# THE JUDICIALIZATION OF REPRESSION:

# ABUSE OF PHYSICAL INTEGRITY AND THE ADMINISTRATION OF JUSTICE

# THROUGH EXCEPTIONAL COURTS, 1990-2005

by

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To my father, Mohammed Albanna. The first human rights activist I have known. I wrote this book for you, but when I began it, I had not realized you would have left this life before I finished it. You will not read it, but the regimes that tortured you will.

To my husband, son, and daughter. Without you, I would have finished this book two years earlier, but would have missed on a life full of joy and love. I love you more than anything.

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by

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Over the last decade, the Human Rights Council in cooperation with the UN Special Procedures has noted the increasing recourse to military courts in trying civilians throughout the world. The Council concludes that trying civilians in military courts is a violation of international human rights because such courts are incompetent to guarantee the fundamental elements of the human right to fair trial--independence and impartiality. The examination of exceptional courts and their relationship with state repressive behavior is missing from existing literature. Utilizing texts of national constitutions and State Department Country Reports, I build a dataset on the constitutional treatment of exceptional courts and the de facto design and behavior of exceptional courts, and examine the relationship between a multitude of constitutional and institutional aspects of exceptional courts around the world and states' coercive behavior. I argue that states use exceptional courts as a cost-lowering instrument of repression, through which they can punish or eliminate their opposition under a guise of legality. I also contend that state leaders are

particularly reluctant to use violence against their people when their national constitutions provide for provisions prohibiting trials of human rights violations in exceptional courts, prohibiting derogation from fair trial rights during emergency situations, and providing for the right to appeal exceptional courts' decisions in ordinary courts. Importantly, though, different regional experiences tend to shape the purposes these courts serve. I conclude with discussion of the implications my dissertation offers for the human rights experts in the Human Rights Council.

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## Introduction

The September 11 terrorist events prompted President George W. Bush and his administration to act quickly to protect the nation from subsequent attacks and to restore and maintain civil and political stability. Shortly after 9/11, the administration proposed plans for responding to the terrorist attacks to Congress for authorization, the majority of which grant the executive an expansion of powers to adopt and implement new security measures. Realizing the urgency of the situation, the congress authorized the proposed plans by passing the Patriot Act, which caused a fundamental shift in the political paradigm within which the executive operated. The Patriot Act purported to give the executive, broadly defined, all the powers of wartime law (Pereira 2008;Davenport 2007; Farrier 2007; Sikkink 2011; Solis 2013; Rona and Wala 2013; Bravin 2013). The seven years following 9/11 were the apogee of extraordinary executive practices that challenge historical assumptions of the executive power. The Bush administration employed what they called the mechanisms of the protection of national security, which included inter alia, the founding of the Guantanamo detention center and the creation of the military commissions for the prosecution of the detainees allegedly involved in acts of terrorism. Within a relatively brief period following the executive order which created the military commission, Americans became targets of searching, arbitrary detention, and seizure of possessions and financial resources under the Patriot Act of 2001 (Rona and Wala 2013; Bravin 2013).

The establishment of military courts for trying Guantanamo suspects of terrorism has drawn critical attention of both domestic and international human rights lawyers and human rights advocates, who claim that such courts suffer legal and ethical deficiencies that undermine the principles of judicial independence necessary for guaranteeing the protection of human rights. The concerns for violations of human rights associated with the military tribunals were echoed in the reports of many of the human rights mechanisms of the United Nations (UN). The reports published by the Office of the High Commissioner of Human Rights, which consist of a range of reports of the Special Rapporteurs of the sub-commissions of the Human Rights Council, underscored the organizational aspects and procedural rules of the US military commission that cannot satisfy the requirements for ensuring the right to fair trial to all persons in times of peace and armed conflict (Special Rapporteur on the independence of judges and lawyers E/CN.4/Sub.2/2004/7 and E/CN.4/2006/120). The reports point to multiple judicial innovations applied by the US military commission violate instruments of international human rights law to which the US is a party. The reports state that the executive branch has direct influence on the judicial procedures of the military courts. Defense lawyers could not secure the right to confidential communication with their clients. Charges were based on evidence obtained through violent means of interrogation. Yet, under the military commission's rule of indefinite detention, many of the prisoners at Guantanamo remain held without facing charges for specific offenses. Indeed, information generated in human rights reports of other various sources, including those of non-governmental organizations and media outlets strongly suggest that the

military courts established by the Bush administration and legislated by Congress in the Military Acts 2006 and 2009 constitute a violation of the right to fair trial guaranteed in Article 14 of the International Covenant on Civil and Political Rights and in the Common Article 3 of the Geneva Conventions, for both which the United States is a member (Weissbrodt and Hansen 2013, Human Rights Watch 2013).

The complex issue of the military commissions has raised concerns among academics, political actors, and public opinion across the liberal-conservative spectrum (Pereira 2008, Davenport 2007). Even the US Supreme Court has taken a stand against adjudicating civilians in military courts in *Hamdan v. Rumsfeld* in 2006 (Chomsky 2013, Glazier 2013). All the concerns have clustered around viewing the conduct of the commission as a threat to human rights. Indeed, it some scholars argue that the Guantanamo detention center and the military commissions, as stated by Davenport, "presented a major reversal in American state repressive power" (6, 2007). Had the unprecedented terrorist attacks of 9/11 not happened, most American citizens could not have conceived the tight airport security measures, the random search and seizures of persons by FBI officials, the data collection of phone calls and Google searches of persons by government agencies, and the creation of secluded prisons managed by a US military bases in foreign lands holding hundreds of detainees.

With all the debate over the implications of the use of US military commissions, one is hard-pressed to consider exploring the question of exceptional courts in other contexts. Exceptional courts are neither new to the United States nor to other countries of the world.

Military courts and other types of courts specializing in adjudicating political crimes have long been part of the judicial systems in a large number of countries, however playing different roles. The use of military courts to try civilians and violations of human rights committed by state officials is a common practice in authoritarian regimes, especially those where military is a dominant political actor. Exceptional courts have been spawned by authoritarian regimes across the Arab world. The military regimes of Egypt have long used exceptional courts for maintaining their strong hold on power. The role played by Egyptian military courts during the long-lived emergency rule has plagued Egypt's records of human rights practices (Reza 2007). The Egyptian constitution of 1971, which was in effect until the Arab Spring revolution in 2011, provided for the establishment of a separate system of military courts and vested the power of referring civilians to those courts in the presidency (Law Library of Congress 2014). A new type of exceptional courts with extensive powers was created under the constitutional amendments of 2007 justified this time by the protection of the society from terrorism (Reza 2007). These justifications seem to reflect on the Special Rapporteurs' argument that the United States is making a model of its military commissions for other regimes to emulate, and moreover to use as a source of legitimation for their own repressive behavior.

Criticism of military courts around the world has been voiced time and time again by actors and organs within the international human rights regime. From the point view of the international law these courts suffer legal and ethical deficiencies that undermine internationally recognized principles of judicial independence necessary for guaranteeing the protection of

fundamental human rights. From year the 2000 through 2006, the United Nations Commission on Human Rights (currently the Human Rights Council) has initiated a global discourse over the issues relevant to the common institutional and operational characteristics of exceptional courts across the world that are considered a clear breach of the internationally recognized principles of independence and impartiality of the judiciary (E/CN.4/2006/58). The discussion on exceptional courts has helped set in motion a significant movement in defining a set of principles concerning the proper administration of justice in exceptional courts, culminating in the promulgation of the "Draft Principles Governing the Administration of Justice Through Military Tribunals". The intent of these soft law principles is to guide states in reforming their military justice systems so that they will conform with the universally acceptable rules of fair trial.

The question of exceptional courts and their relationship with states' human rights behavior is at the core of my dissertation project. I use the terms "exceptional courts" and "military courts" throughout this research interchangeably to refer to the type of courts that are constructed outside the ordinary judicial systems and utilized to hold political trials. While a range of case studies explore the dynamics and the structural and functional features of exceptional courts that make them relevant to states' repressive behavior, the literature is generally lacking theoretical and empirical insights about the reason states establish exceptional courts, and concomitantly, the impact such courts may have on states' repressive behavior. Most of the empirical research examining the role of courts in protecting human rights has focused

only on ordinary court systems. My dissertation project fills this gap in the literature of judicial politics.

My inquiry is particularly timely. A decade ago, the Human Rights Council, motivated by the desire to prevent the violations of fundamental human rights, called upon states to adopt a set of principles intended to reform their military justice systems and restore the protection of judicial independence and impartiality. Today, the formal recognition of these soft law principles lacks universal consensus. While, the human rights literature has the potential to strongly inform this issue, scholars have not yet engaged adequately in the debate about the patterns of constitutional and institutional configurations of exceptional courts that make it permissible for states to manipulate to advance their political interests. My research seeks to feel that gap, advancing both the human rights and law and courts literatures. Through the application of theory and empirical methods, I seek to find answers to the following questions: What is the constitutional significance of exceptional courts? How do states respond to constitutional constraints on the establishment of exceptional courts? What explains the construction of exceptional courts by states with varying forms of governance? In other words, why do democratic states resort to exceptional courts when their ordinary courts are established and functioning? And why do authoritarian regimes resort to exceptional courts when they can influence the judicial process and outcome in ordinary courts? What are the human rights consequences of resorting to exceptional courts? How do we reconcile state security and human security?

## 1.1 Dissertation Overview

My research draws upon the Human Rights Council's legal framework of exceptional courts as documented in the Draft Principles Governing the Administration of Justice Through Military Tribunals. My project draws on the theories of formal law and the protection of human rights in tracing and investigating the constitutional origins and constraints on the establishment of exceptional judicial procedures. It empirically assesses the relationship between formal law and human rights practices. Then it shifts focus to the *de facto* exceptional institutions and examines the institutional, procedural, and jurisdictional features of exceptional courts that may make a difference in states' human rights practices.

The core of the project includes three analytical chapters, followed by a conclusion chapter that draws together those three chapters. Chapter 2, the first analytical chapter, addresses the question of the constitutional protections of the right to fair trial. It builds upon the existing literature in seeking to understand the relationship between formal law and practice in human rights. The constitutional provision for the right to fair trial forms the ground work for protecting the rights of people who fall under the custody of the state. The due process protections of the right to fair trial used to conduct criminal proceedings are intended to provide individuals with safeguards against violations of human rights that take place in the investigative stage of the criminal proceedings. This chapter facilitates the exploration and comparison of due process protections provided for in national constitutions and the extent to which these protections affect state behavior. The constitutional language for the right to fair trial has

important implications regarding derogations that enable states to establish exceptional courts during state of emergency. An empirical understanding of the impact of these provisions on states' practices informs our understanding of the constitutional origins and constitutional design of exceptional courts and paves the way for an in-depth analysis of the relationship between law and practice. The framework of this study is informed by the debate among the dominant theories explaining the relationship between human rights protections and state behavior. It demonstrates that state leaders are rational actors whose choice of tools of repression is related to loopholes in the constitutional protections of human rights that provide a legal justification for their actions. I address theories of constitutionalism and repressive behavior in detail in the subsequent chapters. I then derive hypotheses examining the effect of specific constitutional protections on state coercive behavior.

Chapter 3 examines the significance of the constitutional provisions intended to authorize states to resort to exceptional judicial procedures, particularly the impact of these provisions on states' repressive behavior. The analysis in this chapter focuses on the global variation in the constitutional origins of the institutional design and jurisdiction of exceptional courts. It underlines the aspects of the formal settings of these courts that are most effective in decreasing state repression. As with the existing literature, I find mixed evidence about the relationship between constitutional provisions and coercive repression. I address more thoroughly the conflicting results regarding these provisions in chapter 3.

Chapter 4 brings the concerns of the first two analytical chapters together and examines the political reality of human rights within states where exceptional courts are functioning. This chapter shifts the attention to variations in the design and powers allocated to de facto exceptional courts. I engage in a descriptive analysis that is followed by estimating fully specified models. My findings indicate to a strong and a significant association between the violations of the independence and impartiality principles committed by these courts and states' coercive behavior. Throughout these analytical chapters I control for the measures that constitute the standard model of repression.

Chapter 5 wraps up the dissertation project by reviewing and summarizing the findings, highlighting the important implications of the study. Then it discusses policy prescriptions and future research suggestions, while recognizing the current limitations. This research as a whole should be viewed as a preliminary step towards a better understanding of the design and purposes of exceptional judicial bodies. It ultimately demonstrates that many of the states use constitutional provisions as a resource of legitimation for their actions. The fair trial protections with their derogable status provide these states with the opportunity to bypass the check of ordinary judiciary on their actions by establishing courts that protect their political interests. My contribution in the burgeoning literature on exceptional court systems is grounded in making the first quantitative analysis that provides careful articulation of the de jure and de facto jurisdictional powers, and structural and procedural designs of exceptional courts in the world.

My study also provides empirical evidence linking various aspects of exceptional courts to states' repressive behavior, and showing different regional experiences with such courts.

## Chapter 2

## State Repressive Behavior and the Role of Constitutional Provisions of Fair Trial

The right to fair trial is one of the most prevalent human rights protections enshrined in national constitutions since the ratification of the *International Covenant on Civil and Political Rights (ICCPR)* by the vast majority of states (Ginsburg et al. 2013; Hathaway 2002, 2007). However, national constitutions differ in the extent to which they provide for the specified guarantees of fair trial as measured by the international formal provisions of fair trial enumerated under Article 14 of ICCPR and other regional human rights treaties. This variance engenders concern for the international human rights regime, which deems fair trial provisions as key to protecting life, liberty, and dignity of people under all political circumstances. Scholarly examination of the effect of constitutional law on states' human rights behavior has shown that the relationship between law and practice is a complex one. This study examines states' behavior in light of the law regulating judicial criminal procedures in their constitutions by analyzing the constitutional content of a global set of countries for the 1990-2005 time-period. I seek first to understand the relationship between a selection of constitutional provisions protecting persons' right to fair trial and the actual level of fair trial achieved in states' court, and then to assess the effectiveness of such constitutional guarantees in mitigating states' repressive behavior. My empirical examinations show mixed evidence regarding the relationship between law and state behavior. The mixed evidence about the efficacy of constitutional content, suggests that a single theoretical approach cannot fully explain the relationship between national constitutions and states' behavior. And yet, the results also suggest that constitutions are at least not completely

empty promises, which has important policy implications. On the contrary, constitutional provisions produce an observable direct effect on respect for the overall right to fair trial and physical integrity rights, even when controlling for states' political context. Consequently, this study suggests that constitutions may continue to be a useful channel for promoting human rights.

In December of 2007, a seminar of experts on "the protection of human rights under states of emergency, particularly the right to a fair trial" was held in Geneva under the auspices of the Office of the High Commissioner for Human Rights (UN Doc. A/63/271, 2008). One of the major issues discussed in this seminar was the impact of the declared and undeclared states of emergency on the protection of human rights, especially those non-derogable rights listed in Article 4 of the International Covenant on Civil and Political Rights. The experts noted with concern that during states of emergency states tend to curtail judicial independence and empower military or special tribunals to try civilians, without providing guarantees for the right to a fair trial. In these circumstances, arbitrary detention, enforced disappearances, and torture often become common practices as states disregard the international human rights law and the formal provisions of their own national constitutions under claims that exigencies within the state justified such derogations. The impetus for the UN seminar was fueled by the perceived need to expand the list of non-derogable rights in international human rights law. Of particular concern for the human rights experts is the fact that fair trial provisions are not included in the list of the non-derogable rights under Article No. 4 of ICCPR and the frequent resort of some states to use this absence as a legal justification for suspending some of the fair trial protections, and in sometimes even the whole fair trial provision, during states of emergency. In view of such

problematic developments, the participants of the seminar stressed that the Human Rights Committee has established in its general comment No. 32 on Article 14 of ICCPR that "the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights" (UN Doc. A/63/271, para 39, 2008). This chapter aims to open the door for the examination of the importance of securing the international fair trial protections in the national constitutions without any derogation. This study is of intrinsic value. The fair trial protections are set forth in the Declaration of Human Rights and are promulgated in more details in the ICCPR treaty. With near universal membership, these human rights treaties provide an ideal starting point of understanding the unintended consequences the derogation of human rights protections in the national constitutions on states' abuse of the non-derogable rights.

This chapter serves several purposes. First, it addresses a foundational question of the extent to which constitutions provide for fair trial generally. Second, it offers a glimpse into how international human rights law, with its weak mechanisms of enforcement, shapes states' national law and their commitment to it. Finally, and foremost, it provides an understanding of the effects states may anticipate from incorporating constitutional provisions regulating exceptional courts. To understand how constitutional constraints on the use of exceptional courts would reduce states' use of political repressions, it is important first to understand whether and how constitutional protections of fair trial in ordinary courts affect states' behavior. This knowledge can be used to frame better and more effective international law to face the challenge of due process exceptionalism. This study builds upon the small component of the human rights literature that has sought to understand the role that formal rights protections have on reducing

the likelihood of states violating them. These studies have focused primarily on fundamental freedoms such as speech, religion, press and assembly (Davenport 1995, Keith 2002a, Keith Tate and Poe 2009, Keith 2012). Keith's work has specifically examined fair trial provision but did not examine the specific components or dimensions of fair trial provided for in constitutions, nor does her work examine the direct relationship between *de jure* and *de facto* fair trial. Specifically, I propose to examine three related questions. First, to what extent have countries incorporated into their constitutions the particular protections of fair trial found in international treaties of civil and political rights such as ICCPR? Second, do the various components of the right to fair trial have distinct and direct impact on the performance of trials of individuals on the ground? And third, does the incorporation of fair trial protections make any difference in states' protection of individual's physical integrity—that is, are states' more likely to change their behavior if they have incorporated the various components of fair trial in their national constitutions than would otherwise be expected?

Written constitutions have become an expression of statehood and legitimacy. One of the hallmarks of the modern national constitutions is that nearly all of them contain provisions for human rights (Go 2003, 81, and the citations within). As constructivists such as Go observe, global homogeneity in the form of written national constitutions, even core structural isomorphism, has developed with the spread of global norms of legitimacy (90). Ginsburg et al. report that while some of the national constitutions with human rights provisions similar to those found in ICCPR actually predated the drafting of ICCPR, many more constitutions align with the ICCPR in their human rights provisions following the drafting of ICCPR in 1966 (2013, 85). However, within these similar structures, including bills of rights, we can see a significant degree

of divergence in the content (Go 2003; Davenport 1996; Hathaway 2002 Keith 2012). Davenport reports that while most constitutions have a bill of rights, they differ in the degree to which they explicitly detail those rights (1996, 628). In this paper, I seek to examine the detailed content of the provisions for the right to fair trial, and the potentially varying effect on states' respect for human rights. I believe that beginning with constitutional protections is most appropriate as the right to fair trial is not widely accepted as a norm of customary international law because of its derogable nature (Hathaway 2002, 1934-5). However, international human rights instruments stipulate that serious human rights violations such as enforced disappearance, the extraction of evidence and confessions under torture, the indefinite detentions, and other practices underline the non-derogable nature of due process and the overarching right to fair trial (UN Doc. A/63/271; E/ CN.4/2006/120; Weissbrodt and Hansen 2013; Conte 2013). By analyzing the link between the formal provisions of fair trial and the various abuse of physical integrity (which includes the worst of the human rights violations identified above), then, we may better assess whether there may be a reason for concluding that the right to fair trial should be considered as a non-derogable right. Specifically, this paper undertakes the examination of the impact of the constitutional protections on states' human rights behavior using a database encompassing the global set of independent states across the period of 1990-2005. The data source for the constitutional provisions is the Comparative Constitutions Project (Elkins, Ginsburg, and Melton 2014). First, I address the existing theoretical approaches of constitutionalism and state behavior. Second, I discuss the relationship between constitutional rights and repression in the existing empirical literature. Third, I present an initial descriptive analysis of the extent to which national constitutions include provisions for the subset of

investigative and judicial procedures delineated under the right to fair trial. Fourth, I present my complete dataset and analysis for the research question. Finally, I discuss my conclusions and recommendations for future research.

## 2.1 Theories of Constitutions and Repression

Current scholarship on human rights offers no theoretical consensus regarding the effects of the constitutional documents on human rights practices. While optimistic scholars stress on the role of the formal law in entrenching states' normative values, then transforming them into guidelines for states' conduct. Other scholars' perspective is skeptical of the impact of the formal law on states' behavior, and they note how constitutions make no difference in the behaviors of authoritarian regimes. Constructivists accept that the law sets forth the norms and values that will form a framework for a state-society relationship, in which both parties of the relationship have expectations about the role of the other (Epp 1998; Finnemore and Sikkink 1998; Fox-Decent 2008). They argue that the mechanisms through which the constitutional law influences states and alter their behavior begin with the process of writing the law. In this process, constitutional drafters foster national discourse through which norms emerge. Once these norms gain "broad acceptance," they are promulgated into laws, which state actors begin to internalize and cope with (Finnemore and Sikkink 1998:895; Ginsburg et al. 2009: 206). Finnemore and Sikkink also go so far as to argue that the development of the constitutional limits upon states evolved from states' need for legitimating their exercise of political power. State leaders bind themselves and uphold the rule of the law in order to protect their power. Legitimacy provides states with public consent domestically and acceptance internationally (903). Scholars such as Ginsburg and

Moustafa (2008) suggest that even if states choose to adopt constitutional laws for instrumental or material interests as the case with authoritarian regimes, their veneer of the rule of law grants the opposition and human rights organizations opportunities to gain leverage in questioning their legitimacy (5-6).

From the constructivist perspective of international law, the development of the international human rights regime has increased the attention to the issue of human rights protections globally, and influenced the design of national constitutions through serving as a platform for facilitating the creation and diffusion of human rights norms (Finnemore and Sikkink 1998; Wotipka and Ramirez 2007). Wotipka and Ramirez suggest that the world society approach influences states' commitment to the protection of human rights through the following mechanisms: 1) world conferences in which state leaders learn about the universal human rights and discuss the means of protecting them; 2) the norm cascade which denotes the dissemination of universally acceptable human rights behavior of some states to other states within the regional or global space of socialization; 3) embeddedness in the broader world through the participation in international governmental organizations (IGOs) (314-315). They note, for example, that exogenous factors led to the ratification and incorporation of the principles of Convention on the Elimination of All Forms of Discrimination against Women into the national constitutions of many states, even the most traditional of them. Among these factors are the expansion of human rights regime through international conferences, the activism of human rights experts, and domestic and transnational human rights organizations. (311-314). Nevertheless, some scholars posit unintended ramifications of the world society approach which stem from the lack of strong mechanisms of enforcement for the human rights treaties (Hafner-Burton and Tsutsui 2005).

Hafner-Burton and Tsutsui argue that states are aware of the weakness of the human rights regime's mechanisms of enforcing the law, and thus they may be motivated to ratify human rights treaties they have no intention to comply with. As a result, the dual nature of human rights regime provides states with the benefit of legitimation at no cost of compliance. Thus, this "decoupling effect" of human rights regime is more likely responsible for widening the gap between ratification and compliance and overtime contributing to the negative effect observed in empirical work (1383-1385).

While constructivists posit that constitutional provisions are more than mere "parchment barriers," realists and rationalists maintain a skeptical attitude concerning the effect of human rights law or constitutional protections on state behavior. From the realist perspective, constitutional law's role in polities is no more than a façade of legitimacy for governments. Realists maintain that regimes design this "window dressing" document to advance their political interests domestically or internationally, and even if they comply with the formal law, they do so because the law merely converges with their interests (Waltz 1979; Mearsheimer 1995). For example, the constitution of the Soviet Union had lengthy provisions protecting civil rights, yet the human rights practices of the Soviet governments did not comply with the constitutional law (Cross 1999). Rational choice theorists perceive governments as self-interested actors whose decision making on respecting the law is based on their calculation of the costs and benefits of their decisions. Rational choice theorists use the logic of "uncertainty" about the future of political outcomes to explain why states commit themselves to constitutional provisions that expand the judicial power and limit their own power. Examples of rational choice theories concerning compliance with constitutional law include Ginsburg's political insurance theory

(2003), theory of the judicialization of politics (Moustafa 2008), and judicialization of repression theory (Barros 2002; 2008). In regard to uncertainty, these scholars argue that the institutional settings of the judicial power in the constitutions reveal constitutional drafters' tendency to secure their future political needs, whether those were staying in power, promoting economic investments, or legitimating repressive behavior, and thus, provide an insight to their willingness to respect the law in post-constitutional context. Below, I discuss each of these perspectives in more details.

In the framework of the literature on democratization, Ginsburg (2003) argues that the constitutional design of new democracies, where power is diffused, is more likely to reflect the desires of all the political parties. He suggests that the party in power is more inclined to be committed to enforce the law if it foresees itself losing election in the future. Thus, enforcing the law in present time insures that its rights will be protected under the same law if they lose election and become a minority in the future (Ginsburg 2003). The political insurance (Ginsburg 2003) approach of rational choice is typically associated with providing for the power of judicial review and independent judiciary in the constitutions. Moustafa (2008) argues also that authoritarian regimes use constitutions to promote a veneer of the rule of law because it provides political and economic benefits both on the domestic and international levels. As it becomes clear that they failed to achieve their goals due to persistence of the gap between rhetoric and actions, committing themselves to the law becomes the only strategy in resolving the problem, especially when a regime's continuity is contingent upon achieving its material goals of economic development or international alliances. Thus, he concludes that authoritarian regimes'

commitment to the constitutional law could only come about when there are strings of benefits such as economic liberalization attached to it.

In the context of costs and benefits of employing repression, the rationalist approach argues that constitutions are relevant to the way in which states intend to respond to threat, because they state regimes' commitment to protect certain rights within different circumstances (Davenport 1996; Barros 2002 & 2008; Pereira 1998; Shambayati 2008). Davenport argues that the components of constitutional provisions most relevant to human rights abuse reflect whether and under what conditions governments allow themselves the option of applying repressive behavior (631). He proposes a useful model for understanding how constitutions influence repressive behavior, in which he examines the information about citizens' rights and emergency powers. The manner in which he investigates these provisions concerns explicit mention of specific rights, limitations placed on these rights, clauses of states of emergency, and restrictions placed on states of emergency. The results of his analysis demonstrate that constitutions do provide indication of regimes' willingness to "follow guiding principles across time, space, and context" (648). Following with Davenport's proposition, I seek to investigate constitutional provisions concerned with the right to fair trial during times of peace and crisis and their influence on states' repressive behavior. I explain in detail about how I model the information about provisions in interest in the data and analysis section.

### 2.2 Empirical Literature on the Law and Repression

The mixed evidence of the empirical studies of the law's effect on state repression stress the need for further empirical investigation. In part, existing body of literature points to a

widening gap between law and practice, as evident in studies of constitutional provisions (Blasi and Cingranelli 1996; Davenport 1996; Cross 1999; Keith 2002; Keith, Poe, and Tate 2009) and human rights treaties (Keith 1999; Hathaway 2002; Hafner-Burton and Tsutsui 2005). However, most of these studies also provide evidence to the beneficial impact of law in terms of constitutions (Davenport 1996; Keith 2002; Poe, Tate, and Keith 2009; Keith 2012) and treaties (Landman 2005; Simmons 2009; Keith 2012). However, some of these studies demonstrate an evidence of a decoupling effect of law on state practices. Certain constitutional clauses not only fail to produce the intended effect on repression, but also are associated with increased repression, as was found in early studies of the provisions for habeas corpus and ban against torture in Keith (2002) and Keith, Poe and Tate (2009) and in regard to states of emergency provisions of limited duration and non-derogable rights (Keith and Poe 200; Keith 2012). One of the earliest studies, Davenport's (1995) study of the effect of constitutional provisions of civil liberties and emergency powers on negative sanctions (censorship and restrictions on civil liberties) in 39 constitutions for the time period (1948-1982) finds that providing for constitutional provisions for the freedom of press and the declaration of the states of emergency reduce the likelihood of censorship and civil restrictions (1996). Interestingly, he also finds that the provisions for freedom of press and states of emergency reduce censorship and restrictions even in times of political conflict, when states usually resort to states of emergency powers and dismiss some of the rights.

Subsequent studies have investigated further the effects of constitutional provisions. For example, Keith (2002) examines the effect of ten constitutional rights on abuse of physical integrity for the global set of countries across a 20 years period (1976-1996). She finds that while

the inclusion of the right to fair and public trial improve the protection of persons' physical integrity, the inclusion of the provisions of habeas corpus (the right to challenge the legality of one's detention before a court) and the right to prohibition against torture, contrary to the theoretical expectation, significantly increase repression of physical integrity, suggesting a strong decoupling effect. Keith, Poe, and Tate's (2009) subsequent analysis demonstrates that out of ten individual rights the constitutional protection of the right to fair and public trial significantly reduces states' coercive behavior. They also find that from the provisions for judicial independence the finality of judges' decision and the ban against exceptional courts effectively reduce repression of physical integrity. In contrast, all four provisions of state of emergency significantly affect states' repressive behavior. While requiring legislative declaration of states of emergency and the ban against the dissolution of the legislature during emergencies significantly reduce repressive behavior, articulating conditions for extending the duration of states of emergency and specifying the non-derogable rights significantly encourage states to abuse physical integrity rights. Their empirical analysis also demonstrates that all the tested constitutional provisions have the potential to curb repression in the long run. In other words, constitutional provisions, among other factors (mainly contained in the standard model) has an incremental effect on repression.

More recently, Keith's (2012) exhaustive examination produces mixed evidence about the effect of constitutional provisions for rights and states of emergency on both types of political repression in constitutions of the global set of countries and for the period (1980-2005). She finds that provisions for civil liberties and due process guarantees reduce repression of civil liberties more than repression of physical integrity. More importantly, she finds that the effect of

due process provisions on repression of physical integrity is conditioned by the presence of independent judiciary. Interestingly, when she examines due process provisions individually, the provision for fair trial reduces repression, regardless of the presence of judicial independence. In this study the provision of fair trial is not delineated by its specific components, thus it is not clear which or how many elements of the fair trial provision produce significant effects on state repression without the independence of the judiciary. Moreover, the effect of public trial and habeas corpus provisions operated as a double-edged sword. They significantly decrease repression when the judiciary is independent, but they also significantly increase repressive behavior when judiciary is not independent. As for the provisions for the states of emergency, unlike Davenport's positive findings, Keith continues to find that restrictions on states of emergency represented by clauses for limited duration and to a lesser extent defining the non-derogable rights increase state abuse of physical integrity, except when states face the threat of civil war.

Equally important, Ginsburg et al.'s (2013) investigation of the role of constitutions in influencing states' behavior demonstrates first, that constitutions and international human rights treaties may have a reciprocal relationship, in which the adoption of human rights in one leads to the adoption of the same rights in the other. Second, constitutions exert both a mediating and independent significant effect on states' respect for civil liberties. Their constitutional measures of civil liberties directly correspond to the *de facto* components of Freedom House civil liberties index, including some measures for provisions of judicial independence and due process. Unfortunately, their constitutional measures do not specifically examine the effect of the judicial criminal proceedings specified in the fair trial provision of ICCPR. Instead, they are measured to

parallel the broad range measures of the rule of law category of the Freedom House index. Nonetheless, their analysis indicates the importance of constitutions as an effective mechanism for enforcing international law (2013, 85-90), and certainly, support the UN's Human Rights Council vision about the potential improvement in the performance of fair trial rights after upgrading their status in the international treaties and subsequently in national constitutions.

In general, the analysis in previous studies seem to face a measurement problem with regard to fair trial rights. Often violations of the fair trial provisions are hidden in the broader measurements of states' repressive behavior used in the previous studies, and so in many cases they are inherently conflated with repression of physical integrity. Thus, the effect of fair trial provisions becomes open to imprecise interpretations. In this study I aim to provide a deeper understanding of the role of the fair trial protections in shaping state behavior by utilizing measures that allow me to examine separately the impact of the core fair trial provisions on fair trial violation and repression of physical integrity rights. Violations of fair trial rights are inextricably linked to repression of physical integrity rights. Most acts of fair trial violations involve two dimensions of behavior: an initial or concomitant abuse of physical integrity, such as the use of torture to extract evidence; and a violation in trial procedures leading up to the court decisions, such as not providing poor defendants with a counsel. But the two dimensions of state behavior are not necessarily sequential acts. Fortunately, separate constitutional measures of fair trial provisions are now available through the Comparative Constitution Project(http://constituteproject.org). In measuring states' behavior I am able to utilize a *de facto* fair trial measurement that captures the degree to which judicial criminal proceedings in the legal institutions of a state violate the internationally recognized fair trial protections. This de facto

fair trial index was originally created and maintained by Oona Hathaway (Hathaway 2002, 2007). The index is based on the fair trial information published in the State Department country reports, in which an entire section addresses the status of countries' judicial criminal procedures.

### 2.3 Constitutional Provisions for Fair Trial and Repression

The beneficial effect of the constitutional provision for fair trial on repression is supported in nearly all studies (Keith 2002; Keith, Poe, and Tate 2009; Keith 2012; and Ginsburg et al. 2013). However, none of these studies expand the scope of the examination to look into the due process procedures guaranteed in this provision. I take on Keith's suggestion to expand the scope of the investigation of the effect of fair trial provision beyond the explicit mentioning of the right by delineating the provision into its sub-provisions, which provide important judicial protections directly related to states' behavior. The right to fair trial is provided for under Article 10 of the Universal Declaration of Human Rights, Article 14 the International Covenant on Civil and Political Rights, common Article 3 of the Geneva Conventions, in addition to other regional treaties. The International Covenant on Civil and Political Rights is broadly accepted as the international law of human rights. Under ICCPR, the right to fair trial provides for the following protections: 1) persons are entitled to a fair and public hearing by a competent, independent and impartial court established by law; 2) the presumption of innocence until proven guilty; 3) the protection from arbitrary detention (habeas corpus), 4) the right to communicate with counsel of person's own choosing; 5) the right to be tried with undue delay; 6) the right to be tried in one's own presence; 7) the right to examine witnesses or evidence, 8) the right to have a free interpreter; 9) the right not to be compelled to testify against himself or to confess of guilt, and

10) the right to appeal conviction at a higher court. Moreover, Article 15 stresses that no person shall be tried and punished for a criminal offense that did not constitute as such when it was committed. This Article provides a protection against ex post facto law, which the special rapporteurs referenced in the aforementioned seminar on "the protection of human rights under states of emergency, particularly the right to fair trial" (UN Doc. A/63/271, 2008). I include this provision as my eleventh element of constitutional fair trial. These protections, which are typically enumerated under the formal provisions for criminal and judicial procedures in national constitutions are internationally recognized as standards for fair trial. Persons who become subjected to the control of the state are entitled to these rights whether in times of peace or war. The Human Rights Committee has clarified that "a state party must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state party" (UN Doc. E/CN.4/2006/120, 2006).

Figures 2.1 and 2.2 below provide the distribution of the mean value of the constitutional variables across 1990-2005 time-period. We can see that the majority of the eleven provisions become more prevalent but with varying degrees in the time-period following the disintegration of the Soviet Union, when former Soviet states adopted new constitutions. After 1996 the trend is moderated, and becomes almost unnoticeable. As the figures demonstrate, some fair trial rights are incorporated in many more constitutions than other rights. For example, the right to *habeas corpus*, the protection from *ex post facto* law, the right to public trial, the right to counsel, and the right to be presumed innocent until proved guilty are among the most adopted rights of all thirteen fair trial rights for the entire time period. By 2005, the mean value for these provisions falls between the categories of explicitly mentioned and mentioned with qualifications. Of the set

of eleven provisions, the right to habeas corpus has the highest mean level, achieving approximately 1.6 by 2003, which suggests that some rights spread across countries and maintain popularity more than other rights. However, we see little variance in the number of rights adopted over time (at least in the aggregate, not within countries). More than half of the fair trial provisions appear to be unpopular over 16-years period, achieving a mean level of no more than 0.9. The right to examine witnesses and/or evidence continues to be the least popular provision during the entire time-period in interest. The lack in protecting this right may be a major reason for the concerns the UN actors have expressed in the seminars promoting for the enshrinement of the full provisions of the fair trial right without attaching any constraints or derogations to them.

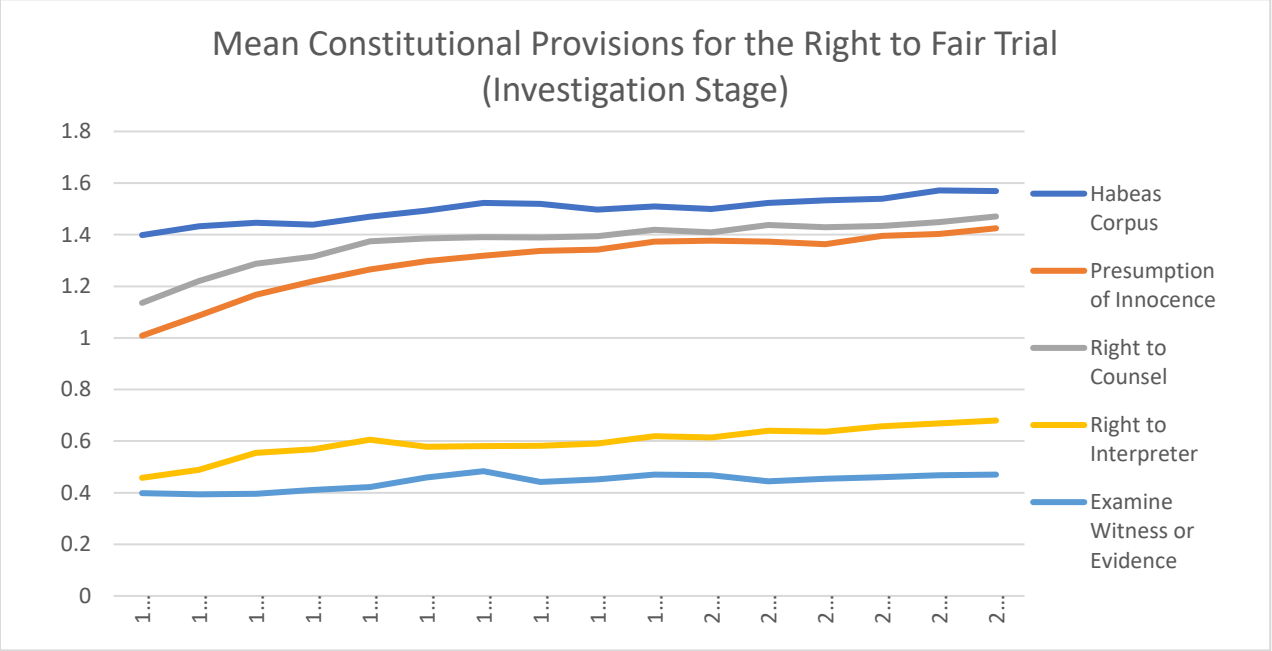


Figure 2.1. Mean Level of Fair Trial Provisions Mostly Related to the Investigation Stage (1990-2005)

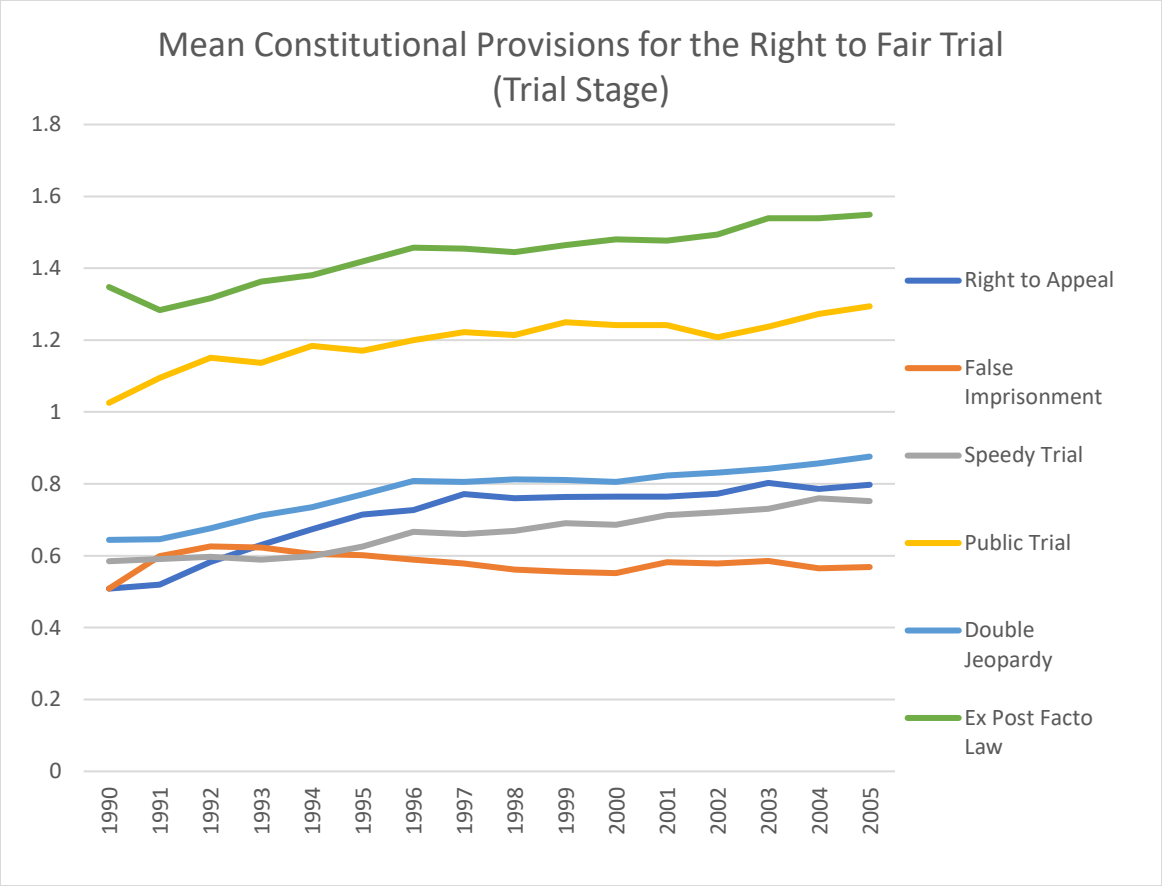


Figure 2.2. Mean Level of Fair Trial Provisions Mostly Related to the Trial Stage (1990-2005)

Figure 2.3 shows that the distribution of constitutional rights varies across levels of democracy, however, not in large degree. Democratizing states appear to be more likely to adopt more fair trial guarantees in their constitutions than autocracies or consolidated democracies. This result is consistent with Ginsburg et al.'s (2013) description of the development of the UDHR document, which hardly resembled the Bill of Rights of any of the prominent democracies that made up the UN Security Council at the time of its drafting. The three levels of democracy in this figure correspond to Davenport and Armstrong's operationalization of political democracy, in which no or low level of democracy (values of 0-7 on the Polity Index) is

category (1), intermediate level of democracy (values of 8-9 on the Polity Index) is category (2), and high level of democracy (value of 10 on the Polity Index) is category (3). As Davenport and Armstrong (2004) argue, I take into consideration that until the level of political democracy hits a critical point, where constraints are severe enough to make repression costly, states will not be deterred from abusing human rights. I use this trichotomized measure of levels of democracy in all of my analysis below.

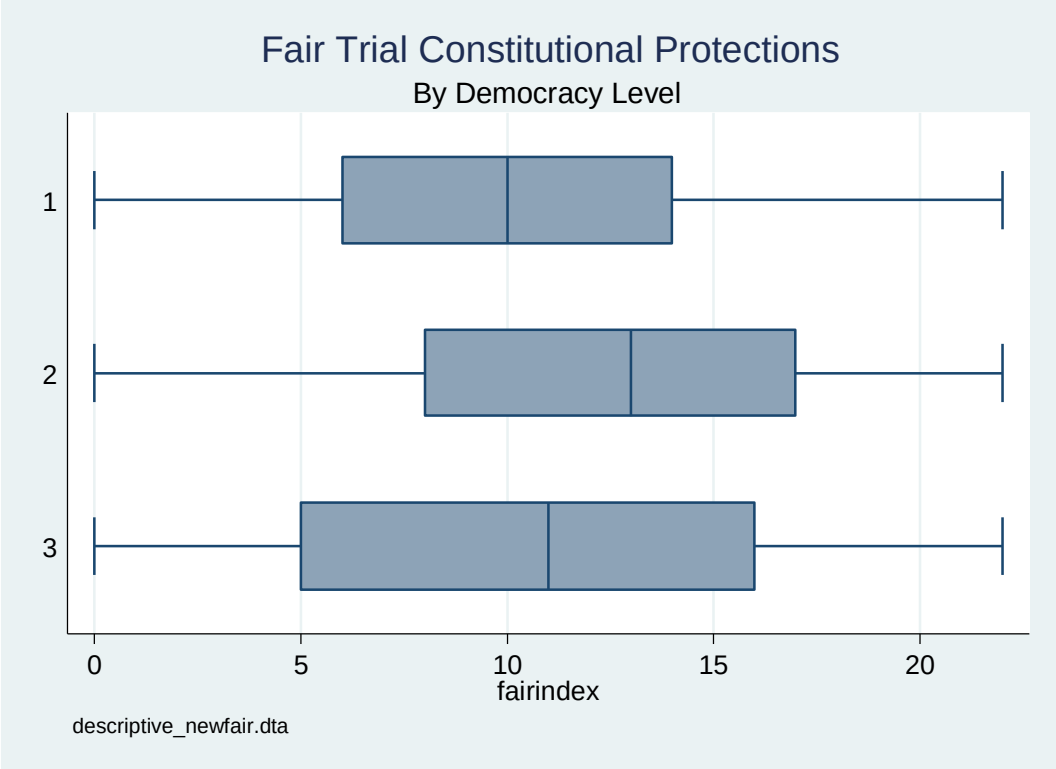


Figure 2.3. Mean Score on a 24-Point Index of De Jure Fair Trial by Democracy Level

The fair trial protections are internationally recognized as the standards for judicial procedures essential for delivering justice. The legal justification for these protections is that they

ensure that everyone who is subjected to the control of the state is afforded the opportunity to challenge their imprisonment and examine the charges against them using such legal procedures that guarantee a fair trial. Member states to international treaties like ICCPR or similar regional treaties are expected to provide individuals with the judicial procedures guaranteed in international humanitarian and human rights law through their constitutions. In this sense, I believe that states' failure to implement the judicial procedures guaranteed by international law results in violations of human rights, namely the right to fair trial, which is intimately linked to the protection of various rights related to personal integrity abuse.

Fair trial protections shape the way in which states can utilize judicial procedures to contend with individuals under their control, which is of fundamental relevance to how states treat those individuals until a final judicial decision is made. To the extent that these protections prevent states from utilizing pretrial practices as indefinite imprisonment, torture and unlawful killing in the course of criminal investigation and judicial procedures. These practices are thus of equal relevance for the right to fair trial as the violations of fair trial. I emphasize that the relationship between violations of fair trial rights and violations of physical integrity rights is not sequential, but rather contemporaneous, and sometimes indivisible. In fact, international human rights regime and its instruments consider the very mission of fair trial rights is to protect the integrity and dignity of individuals in the administration of justice. This perspective is reflected in several Office of High Commissioner of Human Rights (currently Human Rights Council) documents concerning the interpretation and the application of human rights law, such as the *Compilation of General Comments* (updated regularly) and the *Manual on Human Rights for Judges, Prosecutors, and Lawyers* (2003). The right to fair trial, with its principal elements, is

the core subject of at least two chapters in the *Manual on Human Rights for Judges, Prosecutors, and Lawyers* (the Manual), which was published by the UN-OHCHR in cooperation with the International Bar Association as a resource tool for training states' agents and those in the legal profession. The Manual serves as a reference material for the interpretation and application of the human rights law. Chapters Six and Seven focus on the elements of fair trial right outlined in article 14 of ICCPR. The interpretations for these protections in this document emphasize the fundamental importance of the right to fair trial to the effective protection of all human rights. The right to fair trial in these chapters is explained with reference to other United Nations instruments which mainly provide guarantees for the protection of all persons' integrity and dignity under any form of detention or imprisonment. The Convention against Torture, the Universal Declaration of Human Rights, and the Code of Conduct for Law Enforcement Officials are among those instruments often times invoked to highlight states' recourse to torture and ill-treatment of persons in the course of criminal investigation and judicial proceedings.

To give a more precise picture of the relationship between the constitutional protections of fair trial and states' repressive behavior, I discuss below how each of the provisions of fair trial under study matters for certain forms of coercive behaviors. After discussing each of these provisions individually, I address the challenge of articulating separate hypotheses for each provision.

1- **The guarantees of habeas corpus** and the rights to be tried with undue delay (the right to speedy trial) will make it difficult for states to detain persons arbitrarily and indefinitely without presenting charges. Detaining individuals for long periods without presenting charges against them or bringing them to court constitutes a

violation of not only fair trial rights but also physical integrity rights, namely the right to liberty.

2- **The right to be protected from *ex post facto* laws** prohibits states from penalizing individuals retroactively. This right has been made non-derogable in ICCPR and other regional treaties such as the American Convention and the European Convention to ensure legal predictability at all times, even in emergency situations, when states tend to create new laws. The Human Rights Committee notes that the right is mostly violated in times of national crisis, when threatened states tend to imprison individuals and punish them with harsh sentences for political offenses that did not constitute as so when they were first committed. Hence, an adoption of the right to be protected from ex post facto laws would be more likely associated with fewer events of long term imprisonment and extrajudicial killings.

3- **The right to compensation in the event of false imprisonment** insures that arbitrary and indefinite detentions are going to cost states. This right is directly related to the abuse of physical integrity right of liberty. Therefore, the adoption of this right in constitutions is expected to reduce repressive behavior of arbitrary detention.

4- **The right to speedy trial** specifically protects against indefinite imprisonment. It insures that trials for individuals under state's authority will proceed without delay and within a reasonable time. States tend to punish or mold the behavior of individuals they perceive as threat to their rule by imprisoning them for long periods before they are set for trial. Delay of trials is not only a violation of the principle of fair trial but also a violation of physical integrity, namely the right to liberty.

5- **The right to public trial** is one of the fair trial protections that provide safeguards against all repressive practices in concern. It guarantees that inconsistencies with the fair trial obligations and states' ill treatment of persons under their custody will be scrutinized by the public and the media. Publicity of trials generally matters for all types of repressive behavior given that it becomes difficult for states to hold secret summary trials or unlawfully punish individuals without feeling the weight of public opinion. The adoption of the right to public trial in constitutions is expected to reduce all forms of repression.

6- **The prohibition of double jeopardy** protects individuals from being tried again by the same state for the same offense they have already been acquitted or convicted in accordance with the law. The right can be open to multiple interpretations as to what constitutes a double jeopardy. As the Human Rights Committee notes in chapter seven of its *Manual on Human Rights for Judges, Prosecutors, and Lawyers* (2003, 298), the protection of double jeopardy can be complicated by state practices, which prosecute individuals again for the same action by referring to the action with different offense names. Hence, states that violate the prohibition of double jeopardy seek to penalize individuals with harsher sentences than they would have received in the first trial. Therefore, this right is more likely to reduce harsh sentences such as long term imprisonment or execution.

7- **The right to interpreter** applies to aliens as well as to nationals who do not understand the language use by court and state authorities. The service of an interpreter free of charge during investigation and court proceedings provides the

accused with the means to enjoy the rest of his fair trial rights, beginning with understanding the charges against him and ending with the decision of the court of appeals. Therefore, it is expected that a provision providing for the right to interpreter protects those who need this right from arbitrary imprisonment, torture, extrajudicial killing and disappearance as well.

8- **The presumption of innocence**, as noted by the Human Rights Committee in General Comment No. 13, implies that "states should refrain from prejudging the outcome of a trial" (UN Compilation of General Comments, 124, para. 7). This right will be violated if accused individuals were killed by state authorities before they were brought to justice, or if judicial decisions confirming their guilt were not based on evidence collected through legal methods. The presumption of innocence particularly protects persons against the practice extrajudicial killing.

9- **The right to counsel** provides individuals with the means to enjoy all of their human rights, including physical integrity rights. Communication with a legal counsel throughout the course of investigation and trial guarantees that individuals understand their rights and that they are represented in an efficient defense. Furthermore, it is the legal counsel's duty to be alert for any signs of breaches to their agents' rights, and to report them to the court.

10- **The right to examine evidence or confront witnesses** provides the accused person and his legal counsel the adequate time to discuss the case and prepare an examination of the evidence or witnesses whose testimony was the basis of the charges against him. Denying the accused person this right implies, inter alia, that

evidence may be produced by confessions extracted through cruel treatment or intimidation, which constitutes a grave violation of not only fair trial rights but also physical integrity rights, namely the right to freedom from torture.

11- **The right to appeal judicial decisions** protects persons from summary trials and wrong convictions by providing the accused person a second judicial opportunity to review conviction or sentence. Summary trials and wrong convictions may result in harsh sentences that could reach up to execution. The right to appeal is expected to specifically reduce state practices of indefinite imprisonment and unlawful killing.

Table 2.1 below provides a summary of the expectations about the types of states' coercive practices most affected by fair trial constitutional provisions.

Table 2.1. Summary of Expected Types of Personal Integrity Abuse Affected by Certain Fair Trial Provisions

| Imprisonment | Torture | Extrajudicial Killing | Disappearance |
|---|---|---|---|
| Right to habeas corpus | Freedom from ex post | Freedom from ex post | Right to speedy trial |
| Right to speedy trial | facto laws | facto laws | Freedom from ex post |
| Freedom from ex post | Right to public trial | Right to public trial | facto laws |
| facto laws | Right to interpreter | Freedom from double | Right to public trial |
| False imprisonment | Right to counsel | jeopardy | Right to interpreter |
| Right to public trial | Right to examine | Right to interpreter | Right to counsel |
| Freedom from double | evidence or confront | Presumption of | |
| jeopardy | witnesses | innocence | |
| Right to interpreter | | Right to counsel | |
| Right to counsel | | Right to appeal | |

Right to appeal

In seeking to evaluate relation between individual fair trial provisions and states' coercive practices I face a difficult problem in narrowing causation links to distinctive practices. Within the content of the individual provisions, it is clear that the fair trial obligations require states not to coerce persons or inflict pain or suffering on them in the process in order to give effect to the rights guaranteed. Because the protections of physical integrity rights are not part of the formal structure of the fair trial provisions, these effects are often difficult to specify in testable hypotheses. I choose in this study to address these subtle effects by examining the effect of fair trial provisions on the core state coercive behaviors separately. I draw the measures of states coercive practices from Cingranelli and Richards individual measures of physical integrity abuse, which includes imprisonment, torture, extrajudicial killing, and disappearance. I therefore outline general predictions about the effect of fair trial provisions on states' behavior in my hypotheses, and examine the causal relationship in more details in my quantitative analysis. While my hypotheses are shaped in regard to the right to fair trial generally, I examine the aforementioned delineations of the right to fair trial to underline the components that are most associated with lower levels of repression or whether some combination of provisions are most effective in certain areas of states' human rights practices than the others.

The constitutional treatment of these protections is particularly important in times of threat, when states tend to suspend some rights. This study is not only important for our understanding of constitutional law, but also for the normative impact of international law. If the fair trial provisions providing for judicial protections were found to curb states' repressive

behavior, it would provide encouraging evidence for international lawyers' view that international fair trial protections should be entrenched in the international customary law. The section on "Denial of Fair and Public Trial" in the *State Department Country Reports* often times cautions against states' activity that are relevant to and concomitant with the virtual violations of certain elements of the fair trial provision. To give an example, a paragraph under the "Denial of Fair and Public Trial" section in the 2004 State Department report on Nigeria reads like this:

> According to the Constitution, persons charged with offenses have the right to an expeditious trial. Criminal justice procedures call for trial within 3 months of arraignment for most categories of crimes; however, there were considerable delays, often stretching to several years, in bringing suspects to trial…. Most detainees were poor and could not afford to pay the costs associated with moving their trials forward, and as a result they remained in prison.

Note that when a state agent (court) keeps individuals in prison without trial for years, they not violate individuals' right to a speedy trial, but also violate individuals' right to liberty, which is why I believe specifying the relationship between formal law and states behavior should explore two facets of repression; the violation of the actual judicial procedures outlined in the fair trial provision and the change in states' repressive behavior. I believe the exploration of the effect of these specific procedures on both dimensions of repression makes a substantial contribution to the literature of human rights in that it allows us to further understand the mechanisms through which states attempt to achieve their goal of deterring activities that challenge their power without incurring costly consequences on both the domestic and international level.

## 2.4 Hypotheses

According to the constructivist perspective on constitutions and human rights, we would expect that formal fair trial provisions will reduce political repression because: 1) as a part of the constitution they are binding contracts between the state and its citizens, and 2) the constitutional protections indicate to the state's willingness to respect those protections and provide for them. Therefore, I expect that providing for fair trial provisions will reduce states' use of repression.

> Hypothesis One: Providing for explicit constitutional provisions for the right to fair trial will decrease the odds of states engaging in repression of human rights.

However, as discussed above, the realist perspective dismisses these assumptions and deems the constitution as a mere window dressing document for states' legitimacy. Therefore, justifying a null hypothesis that fair trial provisions may be empty promises.

> Null Hypothesis One: Providing for explicit constitutional provisions for the right to fair trial will have no effect on states' repression of human rights.

Furthermore, the decoupling world society approach suggests that states' incentive adopt formal institutions that are considered a part of the "script of modernity" and thus necessary for a state to be considered a legitimate nation state. Thus states may have become more likely to adopt rights provisions, without either the willingness or the capacity to deliver on the promises, creating not only a gap between promise and practice, but also the negative association between law and behavior that has been empirically demonstrated in previous studies. Thus I purpose an alternative hypothesis as well.

> Alternative Hypothesis One: Providing for explicit constitutional provisions for the right to fair trial will increase the odds of states engaging in repression of human rights.

Scholars have argued that an independent judiciary is “the ultimate guarantor of constitutionalism” (Ackerman 1991) or an “essential guardian of the rule of law” (Steiner and Alston 1996, 711) and as “powerful barriers against the tyranny of political assemblies" (de Tocqueville 1966, 261). Keith found significant evidence of a strong conditional effect for judicial independence on the effectiveness of constitutional provisions. Thus, I propose a conditional hypothesis as well.

> Conditional Hypothesis One: The more independent the judiciary, the less likely it will be that states will engage in repression of human rights.

## 2.5 The Standard Model of Repression

Over time a standard model of repression has evolved in the empirical repression literature (see Poe, Tate, and Keith 1999; Davenport and Armstrong 2004). The model includes eight theoretically important variables (democracy, civil war, international war, military regimes, leftist regimes, economic development, economic growth, and population size). Democracy has been one of the most consistently demonstrated factors affecting the level of repression. Opportunity to use repression is constrained in democracies because the structure and limited nature of democratic governments make extensive use of repression more difficult and costly to arrange. Willingness is dampened because democracy “provides citizens (at least those with political resources) the tools to oust potentially abusive leaders from office before they are able to become a serious threat” (Poe and Tate 1994, 855), thus the cost of repression is increased (Davenport 1999). Civil war has consistently produced the largest effect on repression. Civil war is the most violent of domestic threats, seeking nothing less than the removal of the current

government by extra-constitutional means. Presumably, then it will be perceived by regimes to be the most serious of the domestic threats. Regimes often use the cover of this severe threat to legitimize repression of its opposition, and engage in excessive use of force and target civilian populations on thin excuses of collaboration with insurgents.

Civil war has received the most empirical attention of the various forms of threats, and its presence has been demonstrated to be the strongest of any predictor, in terms of impact, statistical robustness, and consistency across a variety of measures of repression and other human rights behavior (Apodaca 2001; Abouharb and Cingranelli 2006; Bueno de Mesquita et al. 2005; Cingranelli and Richards 1999a; Davenport 1995c; Davenport and Armstrong 2004; Keith 1999, 2002, 2004; Keith and Poe 2004; Poe and Tate 1994; Poe, Tate, and Keith 1999; Regan and Henderson 2002; Richards 1999). In addition, interstate wars also pose a potential threat to a state that varies according to level of the state's participation in the hostilities and the proximity of the war zone to the state's territory. Political leaders may use the potential threat from an international war as opportunity to repress its political opposition with the cloak of legitimacy that national security claims may provide.

Two additional regime types are a part of the standard model as well. First, military regimes are expected to be more willing and able to use the tools of repression than other regimes have been well-established, extending back to the work of McKinley and Cohen (1975) who found that military regimes were more likely than civilian ones to suspend constitutions and to ban assemblies and political parties. As Poe and Tate (1994) note, this increased willingness of a military regime to employ coercive means against its civilian population is not surprising as "military juntas are based on force, and force is the key to coercion" (858). Second, Marxist or

Marxist-Leninist regimes have been controlled for, but have produced results that run counter to initial expectations of increased likelihood of repression. Ultimately, the literature has suggested that under these regimes "control of society and personal freedoms have often been so complete that the regime might be less likely to need to engage in these more severe abuses of personal integrity rights to maintain order than would be its non-leftist counterparts" (Keith 2012). Also, both economic development and economic growth are included in the model. But as Poe and Tate (1994) note, the expected effects of economic growth are more mixed. Since economic growth "expands the resource base", it should reduce the economic and social stresses that lead governments to use repression as a policy tool. But "there has also been a strong argument that rapid economic growth is most likely to be a destabilizing force that will, in fact, increase instability and a regime's temptation to resort to coercive means to maintain control" (858). Gurr (1970, 1986) cautions that rapid economic growth may be destabilizing because it cannot keep up with simultaneously rising expectations and because it inevitably occurs unevenly, often harming the poorer segment of the population. As Henderson notes the sharpening class differences within the population may cause the elite to employ tools of repression to quell the protest of the disadvantaged classes (Henderson 1991). Finally, population size is the last factor in the model. As with the domestic economic environment, state population size and level of growth are also seen as conditions are associated with popular unrest stemming from scarcity within the state. Henderson (1993) argues that "growth in numbers of people can create scarcity-a short-fall between what people need and want and what they have. Under this pressure, governments may be pushed in an authoritarian direction. What is worse, government may resort to repression as a coping mechanism" (8). Thus, Poe and Tate (1994) assert that a large

population may increase the occurrence of repression in at least two ways: 1) as a simple matter of probability a large number of people increases the number of occasions on which such coercive acts can occur, and 2) by placing stress on national resources and threatening environmental deterioration, further reducing available resources (857). In all three papers with their focus on political repression, I employ the standard model of repression, considering these factors as control variables.

## 2.6 Data and Analysis

I analyze a sample of 2358 constitutional events between 1990 and 2005 from the Comparative Constitutions Project database (Ginsburg et al. 2013). The database builders conceptualize the constitutional system as the promulgation of whole new constitutions. Whereas, constitutional events take into account the minor revisions and amendments occurring within the same system. Constitutional events excluded from the analysis for certain country-year units are largely those whose texts were missing in the original data and are hard to find. The range of the missing constitutional events for the constitutional variables in interest is between 24-40 events.

**Dependent Variable**: My key dependent variable is political repression in its two dimensions; violation of the right to fair trial and political repression of personal integrity rights. The de facto fair trial index is created by coding from the section covering fair trial in *State Department Country Reports*. The components of fair trial referenced in the ICCPR treaty along with other regional treaties mentioned above include an independent and impartial judiciary, the right to counsel, the right to present a defense, a presumption of innocence, the right to appeal,

the right to an interpreter, protection from ex post facto laws, a public trial, habeas corpus, and a speedy trial. Each element is coded for compliance, partial compliance, or noncompliance. The final index is obtained by aggregating the measures of all these ten elements then rescaling down the additive measure to a four-point scale, ranging from 0 (strongest fair trial protections) to 3 (weakest fair trial protections). This measure of state fair trial practices captures the violation of nine out of the eleven rights coded in my constitutional fair trial measures. The constitutional fair trial components that are missing in the de facto fair trial index are the right to examine evidence or witnesses and the protection against double jeopardy. Although the measure does not fit with the constitutional measures perfectly, I believe it is the only currently available measure for fair trial practices that is almost synonymous with fair trial protections. Moreover, my conclusions of the empirical analysis are based on observations drawn from multiple tests of state behavior, including states' repression of physical integrity rights, those rights that are intimately related to fair trial practices, which allows for cross-validation of results as previous studies of repression stated (Keith 1999, Hathaway 2002, Neumayer 2005).

As the UN Human Rights Council points out in its key legal texts and General Comments, such as its *Manual on Human Rights for Judges, Prosecutors, and Lawyers* that it is an obligation of the state's executive to guarantee that all of its agents are protecting the persons' rights to fair trial starting from the criminal investigation stage that precede the trial to the trial proceedings until the final judgement (2003). Therefore, my study focuses attention on states' breaches of its constitutional promises regardless of the state agents involved in the practice. Note that violations of fair trial provisions are associated with state practices that harm persons' physical integrity during the criminal investigation period. This approach of drawing on multiple

measures of state behavior has been relied on for the purpose of cross-validation in several previous studies of comparative state human rights behavior (The de facto fair trial measure, however, is made available only through year 2000 (Hathaway 2007). therefore, the time frame for the de facto fair trial models will be restricted to (1990-2000) time-period.

Following Keith 2012, I examine multiple measures of personal integrity. I use the measures of Political Terror Scale (PTS), which were used by previous research cited above (Gibney et al. 1988). The measure rates human abuse conditions across the world, ranging from (1) the lowest level of abuse to (5) the highest level of abuse. I also use the CIRI index for physical integrity abuse so that I can also disaggregate the four components of the index (extrajudicial killing, disappearance, torture, and imprisonment) and examine the effect of constitutional fair trial on all four components separately (Cingranelli and Richards 1999). However, I depend more on the PTS coefficients for my analysis of the results, because the indicator has an advantage over CIRI indices in that it takes into account states' coercive actions against not just citizens but also foreign nationals within and outside the jurisdictional territories of the state, such as U.S. action at Guantanamo Bay. Thus, PTS scale is more useful in interpreting repression related to the global war on terrorism (Goderis and Versteeg 2012, 9).

The Political Terror Scale was originally developed by Stohl and others (Stohl and Carleton 1985; Gibney and Stohl 1988; Poe 1992; Gibney and Dalton 1996) and is maintained by Mark Gibney (http://www.unca.edu/~mgibney/). The two "standards-based" PTS measures are based on assessments contained in the yearly human rights country reports published by Amnesty International and the U.S. State Department in regard to the occurrence of political

imprisonment, execution, disappearances, and torture yields. The ordered indices range from one to five. The coding categories and their criteria are:

> (1) Countries [are] under a secure rule of law, people are not imprisoned for their views, and torture is rare or exceptional. Political murders are extremely rare.
> (2) There is a limited amount of imprisonment for nonviolent activity However, few persons are affected. Torture and beating are exceptional. Political murder is rare.
> (3) There is extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without trial, for political views 1s accepted.
> (4) The practices of [level 31 are expanded to larger numbers. Murders, disappearances are a common part of life. In spite of its generality, on this level terror affects primarily those who interest themselves in politics or ideas.
> (5) The terrors of [level 41 have been expanded to the whole population. The leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals (Gastil 1980, quoted in Stohl and Carleton 1985).

While the two measures are highly correlated (.81 in the dataset here), the country coverage varies. The country coverage in the State Department-based measure reflects the universal set of independent states, except in a couple of the early years under study here. Whereas, the measure based on Amnesty International reports is less complete because as a human rights NGO its mission has been to respond to human rights abuse, and thus it has tended to focus on states with problematic human rights records (Poe and Tate 1994, 869; Poe, Carey and Vazquez 2001, 655-6). Specifically, the State Department-based measure tends to cover between 20 to 40 more states than the one based on the Amnesty International reports. I will conduct parallel analyses with each of the political terror scales.

Cingranelli and Richards' (1999) measures are also useful in capturing the level of state repression. Their physical integrity rights measures are somewhat similar to Gibney and Stohl's Political Terror Scale, but four components of repression (imprisonment, torture, disappearances, and killings) are measured separately on a three-point scale that captures the frequency of

violations: frequent violations (0), some violations (1), and no violations (2). The authors note that their categories rest on events-based criteria whenever possible: countries with 50 of more confirmed violations are scored zero; countries with less than 50 violations but than zero confirmed violations are scored one; and countries with no violations are scored two. A brief description of the variables follows (for the fuller description see: http://ciri.binghamton.edu/documentation.asp). The scores are based on the combined reports of human rights practices in the State Department and Amnesty International country reports, with the Amnesty reports controlling in the case of any conflicts. The measures are frequently used as an additive index. Cingranelli and Richards (1999) demonstrate that the index behaves as a unidimensional scale. As Keith (2012) notes, The CIRI scores have the advantage of being disaggregated when theoretical or empirical inquiry justifies it; for example, to examine the effect on the Convention against Torture specifically on state torture practices. The events-based nature of scales can be potentially problematic as 50 instances of torture or killing in China would not be of the same magnitude as 50 instances in Jamaica, given the great disparity in population size. Events-based measures, while less subjective than standards-based measures, assume a higher degree of accuracy in reporting than is likely achieved in these reports. The categorical nature of the scores also require somewhat arbitrary numerical cut-offs in which a state that kills 49 people receives a lower score than one that kills 50. The additive index then compounds these problems, and also suffers from an inherent limitation of additive indices in that countries receiving the same score may engage in very different human rights practices. For example, a country with no political imprisonment and no torture but the high levels of killing and disappearances will receive a cumulative score of 4, as will a country with no killings or

disappearances but high levels of imprisonment and torture. Similarly, a country that has one incident each of imprisonment, torture, killing and disappearance will also receive a score of 4. Clearly, the state of repression in these states differs substantively in magnitude and lethality (64) . Despite the differences in the operationalization of the measures and the different use of the sources on which they are based, the PTS and CIRI measures are highly correlated. Cingranelli and Richards (1999) report an overall correlation of .79 between their index and the PTS scales (408). In the dataset here, the CIRI index in correlated with the State Department-based PTS measures at .83 and with the Amnesty-based PTS measures at .76. The CIRI data are not available for two of the years under study here since their data begin at 1981.

**Key Exploratory Variables**: My key explanatory variables are the constitutional protections that provide for the standards of fair trial guaranteed in international law. The fair trial standards provided under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) represent the most internationally recognized protections of the right to fair trial, given the large-scale state membership of the treaty (166 independent state). I use the variables for these constitutional protections that are a part the dataset of the "Characteristics of National Constitutions" created and developed by Elkins, Ginsburg and Melton (2014) within the larger database of the Comparative Constitutions Project, which encompasses recorded national constitutional texts written since 1789. More information on the dataset can be found at: http://www.comparativeconstitutionsproject.org

The dataset includes a survey of all constitutional variables related to the protections of the right to fair trial. The variables are coded (1) if they were explicitly provided for in the constitution, (2) if not mentioned, and (96) if they were mentioned but either with qualifications or with

ambiguous language. I recoded these variables to capture the variation in constitutional language providing for these rights with the highest score representing the explicitly provided for provisions. Hence, the variables are coded (2) if they were explicitly mentioned, (1) if they were mentioned but with either qualification (like exceptions or derogations) or with unspecific language, and (0) if they were not mentioned at all. Only one variable is coded to range from -1 (constitutional provision denied) to 2 (explicitly mentioned). The following are the survey questions targeting the protections for fair trial as described in the codebook for Constitute Project data set:

1- Does the constitution provide for the right to protection from unjustified restraint (habeas corpus)?
2- Does the defendant have the right to appeal judicial decisions?
3- Does the constitution prohibit punishment by laws enacted ex post facto?
4- Does the constitution provide for the right to examine evidence or witnesses?
5- Does the constitution provide for the right for some redress in case of fault imprisonment, arrest, judicial error?
6- Does the constitution provide for the right to speedy trial?
7- Does the constitution require public trial?
8- Is there a presumption of innocence in trials?
9- Does the constitution provide that the trial has to be in a language the accused understands or the right to an interpreter?
10- Does the constitution provide for the right to communicate with a counsel?
11- Does the constitution provide for the prohibition of double jeopardy (being tried for same crime twice)?

**Control Variables**

The eight control measures are a part of the standard model of political repression (Poe, Tate, and Keith 1999) and are operationalized as follows. ***Civil war*** is measured, following Small and Singer's guidelines for identifying instances of civil war: (1) "the government, as the central authority in a country, must be involved as a direct participant in the war" and (2) "there must be

effective resistance, that is, either both sides must be 'organized for violent conflict" or "the weaker side, although initially unprepared [must be] able to inflict upon the stronger opponents at least five percent of the number of fatalities is sustains" (Small and Singer 1982: 215). ***International war*** is measured following Small and Singer's guidelines for identifying instances of international war: a nation experiences an international war when it is a participant in a conflict in which more than one national government is directly involved and in which "1) there was a total of a thousand or more battle deaths suffered by all of the participants in the conflict, [and] 2) the particular country suffered at least a hundred fatalities or had a thousand or more personnel taking part in the hostilities" (Small and Singer 1982, 50 and 55). ***Political Democracy*** is measured with the Polity measure (Marshall and Jaggers 2007) has the advantage of allowing researchers to disaggregate its components. Polity's institutional democracy indicator is an 11-point additive index coded along four dimensions using the following rules:

> Competitiveness of Political Participation: competitive (3), transitional (2), and factional (1);
> Competitiveness of Executive Recruitment: elective (2) and transitional (1);
> Openness of Executive Recruitment: open election (1) or dual (hereditary and election) (1); and
> Constraint on Chief Executive: executive parity or subordination to legislative or judicial branches (4), intermediate constraints (constraints that fall between parity/subordination and substantial limitations) (3), substantial limitations (2) and intermediate constraints (constraints that fall between substantial limitations and slight to moderate limitations). (Marshall and Jaggers 2007, 14)

***Trichotomous Democracy*** is also a democracy measure derived from the Polity measure, but it is structured to capture the theoretical perspective of Davenport and Armstrong (2004), which argues that there's a threshold of the democratic institutional structure and constraints, above which it becomes hard for states to abuse human rights. The measure is coded (1) for Polity values of 0-7, (2) for Polity values of 8-9, and (3) for the highest Polity value of 10. I alternated

between the Polity measure and the trichotomous measure of democracy in my regression models. Here I report only the models for the trichotomous democracy measure because both measures yielded almost the same results in my models, with one exception, the Polity measure lost its significance in the model of PTS measure based on Amnesty International reports. ***Military Regimes*** is operationalized following Poe, Tate and Keith (1999) and Keith, Tate and Poe (2009) and others which have used Madani's (1992) classification which builds upon McKinlay and Cohen (1975) where military regimes are defined as those which had come to power "as a consequence of a successful *coup d'état*, led by the army, navy or air force, that remained in power with a military person as the chief executive, for at least six months in a given year" (61; see McKinlay and Cohen 1975). ***Marxist or Marxist-Leninist regime*** is operationalized as "those governed by a socialist party or coalition that does not allow effective electoral competition with non-socialist opposition" (Poe and Tate 1994: 858). This measure is a dichotomous variable where Marxist or Marxist-Leninist regimes are coded (1) and all other regimes are coded (0). ***Economic development*** is operationalized as the natural logarithm of per capita GDP and ***economic growth*** is operationalized as percentage growth in GDP per capita, which is consistent with most Large-*N* cross-national studies of political repression, regardless of category of repression (e.g., Poe and Tate 1994; Poe, Tate, and Keith 1999). ***Population size*** is operationalized as the natural logarithm of the total national population and ***population growth*** the average percent increase in national population from one year to the next.

## 2.7 Results

I estimate four sets of models: In Table 2.2 one set that examines the effects of the constitutional variables of interest individually and in bundle (fair trial index) on fair trial violation. In the second set of models presented in Table 2.3, I examine the effect of the constitutional variables individually on repression of physical integrity rights while alternating between repression measures of State Department Political Terror Scale (PTSSD), Amnesty International Political Terror Scale (PTSAI), and Cingranelli and Richards aggregate measure of repression (CIRI Index). The third set of models presented in Table 2.4 estimates the effect of the individual constitutional variables on the four categories of repression of physical integrity using the individual CIRI measures of disappearance, unlawful killing, imprisonment, and torture. I inverted the individual CIRI measures so that the higher score means more repression. In the fourth set of models presented in Tables 2.5 and 2.6, I estimated the abuse of physical integrity models with interaction terms for the constitutional measures and judicial independence. I divided the eleven constitutional measures under study into two sets of fair trial measures with their interaction terms in order not to overwhelm the estimation of regression. The division is based on the relevance of the constitutional provision to either the procedures in the course of the criminal investigation stage or the course of the trial stage. Although overlapping in the criminal investigation and trial procedures is unavoidable, I draw this division from the Manual (described above).

The first set of models reports the results for the *de facto fair trial* variable in Table 2.2. Since all the measures of my dependent variable (repression) are ordered categorical measures, I used ordered probit technique in testing my hypotheses. The initial results as reported in Table

2.2 demonstrate that the fair trial index produces a negative and significant coefficient, however, the coefficient is pretty small (-0.01). So the general picture reveals slightly optimistic results, supporting the hypothesis that states providing with constitutional provisions protecting fair trial will be less likely to engage in repression. At least four out of eleven constitutional provisions of the right to fair trial are associated with greater odds of less violations of fair trial. The provisions that significantly affect the rating of fair trial violation are the right to protection from unrestrained detention (habeas corpus), the right to a speedy trial, the right to an interpreter, and the right to appeal. These protections seem to be crucial for the states' conduct of fair trial, because they influence the violation of fair trial ratings regardless of the political context in the state. A one standard deviation increase in the protection of a speedy trial, for example, decreases the odds of violating fair trial rights by (.25). The negative coefficients signifies a harmful effect for these variables. The same is true for the other three protections but with less degrees than the protection of a speedy trial. Although the general picture supports optimistic views about the effect of law, the nuanced picture tells another story. While some constitutional variables appeared to influence fair trial violation in the right direction, other constitutional variables seem to strongly pull de facto fair trial to the opposite direction, where not only do those protections seem ineffective, but also they increase the likelihood of the violation of fair trial rights significantly. Provisions like the right to counsel, the right to be presumed innocent, and the protection against double jeopardy appear to be associated with greater odds of unfair trials. A one standard deviation increase in the right to counsel, for example, increase the odds of fair trial violation by (.33). The results in this set of models provide a preliminary picture that suggests that states may incorporate some provisions without the willingness to respect them, and that

these provisions may constitute what Davenport calls "the constitutional threat" to states (1996). In other words, states are more sensitive about and feel threatened by these provisions. All variables of the standard model are included in my analysis of the first set of models and they appear to produce the expected effect, with few exceptions: The indicators for international war and military regime are not significant in both models of de facto fair trial. The civil war, the greatest source of threat to regimes, is not significant in its effect on de facto fair trial rates when the individual constitutional variables of fair trial are included in the model (see model 2). Since four constitutional measures of fair trial achieve significance in reducing fair trial violations in that model, we can accept that the adoption of certain constitutional provisions is associated with less violations of fair trial even in times of civil war. I do find, however, that civil wars are likely to increase the odds of violations of fair trial in the first model, where the additive index of the constitutional variables is included. Additive indices are known for their drawbacks in that it is hard to interpret their effect precisely. With additive indices like the fair trial index, we cannot tell whether a score of 10, for example, means that five constitutional variables were incorporated explicitly in a constitution or that almost all of the measures were incorporated but with qualified restrictions.

Table 2.2. The Effect of Constitutional Provisions of Fair Trial on Fair Trial Violation 1990-2000

| VARIABLES | (1)<br>Fair Trial Index | (2)<br>Individual Provisions |
|---|---|---|
| Fair Trial Index | -0.0126*** | |
| | (0.00488) | |
| Ex Post Facto Law | | -0.0434 |
| | | (0.0429) |
| False Imprisonment | | -0.0229 |
| | | (0.0374) |
| Speedy Trial | | -0.255*** |
| | | (0.0453) |

| | | |
|---|---|---|
| Public Trial | | -0.0509 |
| | | (0.0361) |
| Double Jeopardy | | 0.164*** |
| | | (0.0400) |
| Right to Interpreter | | -0.169*** |
| | | (0.0444) |
| Presumption of Innocence | | 0.105** |
| | | (0.0411) |
| Right to Counsel | | 0.333*** |
| | | (0.0412) |
| Examine Witness or Evidence | | 0.0174 |
| | | (0.0496) |
| Right to Appeal | | -0.121*** |
| | | (0.0368) |
| Trichotomized Democracy | -0.795*** | -0.675*** |
| | (0.0520) | (0.0541) |
| International War | 0.0775 | 0.100 |
| | (0.0634) | (0.0646) |
| Civil War | 0.201** | 0.157 |
| | (0.101) | (0.104) |
| Military Regime | -0.0498 | 0.0633 |
| | (0.0837) | (0.0868) |
| Marxist-Leninist Regime | 0.598*** | 0.615*** |
| | (0.156) | (0.163) |
| Logged Economic Development | -0.146*** | -0.137*** |
| | (0.0264) | (0.0272) |
| Logged Population | 0.382*** | 0.403*** |
| | (0.0335) | (0.0346) |
| Economic Growth | 0.00586 | 0.00357 |
| | (0.00446) | (0.00449) |
| Observations | 1,387 | 1,387 |
| r2_p | 0.136 | 0.163 |

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

I turn now to the effect of the constitutional provisions on the more severe repressive behavior of states—repression of physical integrity rights. Table 2.3 reports the coefficients for the eleven constitutional variables along with the control variables of the standard model of repression. I employ the three different measures of repression of physical integrity described in the previous section. Each model in the table represents one of the measures of my dependent

variable, repression of physical integrity rights. To begin with, all variables that achieved significant levels of impact actually were significant in at least two of the three models of physical repression, which is why I believe the results are robust. If incorporation of constitutional provisions protecting the right to fair trial is associated with greater level of states repressive practices (more severe and further spread repression) than otherwise expected, the coefficients for the constitutional variables should be positive and statistically significant. As a whole, the constitutional provisions of fair trial perform better in the *de facto fair trial* model than they do in the coercive repression model, which is expected given that the constitutional measures are more closely matched with the measure of de facto fair trial. The results show that only four out of eleven of the constitutional variables produce statistically significant effects on the likelihood of states using coercive repression. Fewer statistically significant constitutional variables are found in the de facto fair trial model. Two out of the four variable show consistency in the statistical significance and direction of their effect on both de facto fair trial and coercive repression: the right to interpreter and the right to be presumed innocent until proven guilty. While the incorporation of the right to an interpreter in national constitutions is associated with lower violation of fair trial rights and physical integrity rights, the incorporation of the right to be presumed innocent until proven guilty is associated with worse violations of fair trial and physical integrity rights. The constitutional variable of the protection against double jeopardy is significant in both models of de facto fair trial and physical repression. However, the result is not consistent. The provision for double jeopardy is associated with worse fair trial protections. Yet, it reduces the odds of states' use of physical repression significantly. The right to examine evidence or witnesses is consistent but only significant in the physical repression models. The

results for the remaining constitutional variables show no statistically significant relationship between constitutional protections of fair trial and state repression of physical integrity rights.

Table 2.3. The Effect of Constitutional Provisions of Fair Trial on Political Repression 1990-2005

| VARIABLES | (1) Personal Integrity Abuse PTS-SD | (2) Personal Integrity Abuse PTS-AI | (3) Personal Integrity Abuse CIRI |
|---|---|---|---|
| Habeas Corpus | 0.0591 | -0.0655 | -0.0402 |
| | (0.0409) | (0.0402) | (0.0384) |
| Ex Post Facto Law | -0.0395 | 0.0581 | -0.00539 |
| | (0.0416) | (0.0409) | (0.0387) |
| False Imprisonment | -0.0125 | 0.0106 | -0.00871 |
| | (0.0359) | (0.0352) | (0.0331) |
| Speedy Trial | 0.0144 | -0.00160 | -0.0684* |
| | (0.0444) | (0.0434) | (0.0414) |
| Public Trial | -0.0132 | 0.0334 | -0.00181 |
| | (0.0357) | (0.0348) | (0.0331) |
| Double Jeopardy | -0.0829** | -0.123*** | -0.104*** |
| | (0.0389) | (0.0384) | (0.0362) |
| Right to Interpreter | -0.241*** | -0.243*** | -0.142*** |
| | (0.0434) | (0.0428) | (0.0406) |
| Presumption of Innocence | 0.152*** | 0.0940** | 0.00771 |
| | (0.0401) | (0.0395) | (0.0372) |
| Right to Counsel | 0.0497 | -0.0271 | 0.0341 |
| | (0.0391) | (0.0385) | (0.0369) |
| Examine Witness or Evidence | 0.164*** | 0.214*** | 0.200*** |
| | (0.0492) | (0.0484) | (0.0453) |
| Right to Appeal | 0.0522 | 0.00241 | 0.00286 |
| | (0.0361) | (0.0356) | (0.0332) |
| Trichotomized Democracy | -0.828*** | -0.755*** | -0.693*** |
| | (0.0565) | (0.0549) | (0.0500) |
| International War | 0.177*** | 0.252*** | 0.212*** |
| | (0.0624) | (0.0612) | (0.0582) |
| Civil War | 1.504*** | 1.447*** | 1.247*** |
| | (0.108) | (0.107) | (0.104) |
| Military Regime | 0.230*** | 0.171** | 0.237*** |
| | (0.0849) | (0.0844) | (0.0824) |
| Marxist-Leninist Regime | -0.369** | -0.530*** | -0.451*** |
| | (0.144) | (0.143) | (0.135) |
| Logged Economic Development | -0.223*** | -0.162*** | -0.200*** |
| | (0.0269) | (0.0264) | (0.0253) |
| Logged Population | 0.550*** | 0.473*** | 0.529*** |
| | (0.0345) | (0.0334) | (0.0325) |
| Economic Growth | -0.00685 | -0.00341 | 0.00639 |
| | (0.00438) | (0.00434) | (0.00436) |
| Observations | 1,583 | 1,583 | 1,561 |

| | | | |
|---|---|---|---|
| r2_p | 0.289 | 0.246 | 0.181 |

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

As with the assessment of *de facto fair trial*, I report the results of the control variables in the physical repression models in Table 2.3. The results for the control variables in the physical repression models perform consistently with the findings in the literature on repression. In comparing the results with the *de facto fair trial* model, I find that, unlike the de facto fair trial model, the civil war and the international war variables significantly worsen states' abuse of physical integrity rights regardless of the constitutional treatment of fair trial protections. Similarly, the coefficient for the military regime variable, which was not significant in the de facto fair trial model, is significant and positive in the physical repression models. The coefficients for trichotomous democracy and economic development measures are similar to those in the fair trial model—statistically significant and negative. The population size measure, similar to previous studies, performs consistently across all models of de facto fair trial and coercive repression. an increase in the population size is associated with unfair trials and more repression. The Marxist regime measure, which did not achieve significance in the de facto fair trial model, produced negative and significant coefficients across all three models of coercive repression. this particular finding is consistent with the previous studies which found that leftist regimes use restrictions more on civil rights rather than physical integrity rights (Keith 2002, 2012).

It is unfortunate that I am unable to separate out the categories of the de facto fair trial measure to verify the specific effects of the constitutional provisions on their corresponding fair trial practices. However, given that the CIRI data of coercive repression has the advantage of

recording individual measures for all forms of repression of physical integrity, I am allowed to explore the effects of the individual fair trial provisions on all types of states' coercive repressive behavior separately. Several benefits adhere to examining the impact of constitutional protections of fair trial using the disaggregated CIRI physical integrity measure, First, the coding criteria for CIRI measures focus on the coercive practices perpetrated by the state and its agents and excludes the coercive practices of nongovernmental groups such as terrorists or gangsters who are not bound by the constitutional law. This distinction means that any association empirically established between fair trial provisions and any of the four types of coercive repression would capture more accurately states' willingness to respect such provisions. Second, many of the fair trial provisions aim theoretically to protect individuals from states' abuse of certain physical integrity rights; the CIRI individual measures enables me to recognize the specific practices that result from the violation of such provisions. Consider the right to habeas corpus, for example. An increase in the number of political imprisonments would be expected to result from the violation of this right. While the CIRI individual measures allow me to explore specific types or combinations of types of states' repressive behavior in relationship to the provisions of concern, I would be somewhat cautious in interpreting the results given that the CIRI measures are based on the count of events in which states' choice of repressive behavior involved each of the four types of repressive behavior regardless of the population size. Thus, both Bahrain and China, for example, would receive the same score on the index of extra-judicial killing for killing 100 persons in a protest. The act in both countries can be described as a violation of a physical integrity right, but the magnitude of this violation may have different ramifications considering both states' population size. I inverted the disaggregate CIRI measures

to reflect repression rather than respect of human rights. So the higher score in my measures means more repression.

Table 2.4 reports the results with all four CIRI measures of coercive repression. The model illustrates variations of state practices in response to constitutional provisions that may be difficult to interpret. To start with, in comparing the expectations of the effects of fair trial provisions on categories of coercive repression in summary table with the corresponding results, I find several provisions have a beneficial effect on all types of repression, with the exception of torture. Out of nine provisions expected to reduce indefinite imprisonment, four provisions achieved statistical significance, and their coefficients are signed in the right direction. However, the provision for public trial is associated with worsening practices of indefinite imprisonment. Only one provision (right to interpreter) meets my predictions for the practice of extrajudicial killing. While the right to interpreter reduces the number of events of disappearance and extrajudicial killing, the right to examine evidence or witnesses has a harmful effect on both types of coercive practices. Counterintuitively, I find the provisions for the right to counsel and right to examine evidence or witnesses produce harmful effects on torture, opposite to the corresponding expectations. In fact, not only are none of the provisions beneficial for torture, but at least three provisions worsen the practice, which reflect the possibility that states are habituated to using torture in their investigational procedures that they feel less concerned about the practice's relevance to the achievement of fair trial. In regard to the provisions that were significant in the models of the aggregate measures of coercive repression: double jeopardy, the right to an interpreter, the presumption of innocence, and the right to examine evidence or witnesses. The protection against double jeopardy significantly decreases the odds of states' use

of disappearance and imprisonment. The coefficients for the right to an interpreter are negative and significant for disappearance and extrajudicial killing. While the provision for the presumption of innocence produces positive and significant coefficients in the models of aggregate measures of coercive repression, it produced mixed coefficients for the disaggregated measures. The coefficients for disappearance and political imprisonment are negative but only statistically significant for political imprisonment. Whereas, the coefficients for the other types of repression are positive but not statistically significant. The right to examine evidence or witnesses performs consistently across all models; it continues to achieve a significant harmful effect on three types of coercive repressive behavior: disappearance, extrajudicial killing, and torture. In fact, the statistically significant coefficients for this provision achieve the highest value of all other coefficients. For example, a one standard deviation increase in providing for the provision increases the propensity of states use of extrajudicial killing by 0.29.

Table 2.4. The Effect of Constitutional Provisions of Fair Trial on The Individual Measures of Political Repression 1990-2005

| VARIABLES | (1) Disappearance | (2) Extrajudicial Killing | (3) Political Imprisonment | (4) Torture |
|---|---|---|---|---|
| Habeas Corpus | 0.0488 | 0.0759* | -0.167*** | -0.0181 |
| | (0.0536) | (0.0454) | (0.0459) | (0.0445) |
| Ex Post Facto Law | 0.0356 | 0.00346 | 0.0596 | -0.0534 |
| | (0.0553) | (0.0466) | (0.0471) | (0.0449) |
| False Imprisonment | -0.0372 | -0.0658* | -0.00875 | 0.0651* |
| | (0.0483) | (0.0398) | (0.0411) | (0.0379) |
| Speedy Trial | 0.0351 | -0.0555 | 0.0148 | -0.107** |
| | (0.0598) | (0.0496) | (0.0500) | (0.0475) |
| Public Trial | 0.0112 | -0.0449 | 0.118*** | -0.0628* |
| | (0.0474) | (0.0396) | (0.0394) | (0.0380) |
| Double Jeopardy | -0.121** | -0.0431 | -0.136*** | -0.102** |
| | (0.0528) | (0.0432) | (0.0437) | (0.0413) |
| Right to Interpreter | -0.206*** | -0.133*** | -0.0803 | -0.0518 |
| | (0.0585) | (0.0486) | (0.0502) | (0.0472) |
| Presumption of Innocence | -0.0153 | 0.0231 | -0.127*** | 0.0650 |

| | | | | |
|---|---|---|---|---|
| | (0.0530) | (0.0444) | (0.0442) | (0.0433) |
| Right to Counsel | 0.0136 | 0.0231 | -0.111** | 0.123*** |
| | (0.0503) | (0.0432) | (0.0441) | (0.0425) |
| Examine Witness or Evidence | 0.229*** | 0.258*** | -0.0569 | 0.181*** |
| | (0.0650) | (0.0543) | (0.0572) | (0.0516) |
| Right to Appeal | -0.113** | 0.0269 | -0.0525 | 0.0818** |
| | (0.0488) | (0.0394) | (0.0400) | (0.0386) |
| Trichotomized Democracy | -0.404*** | -0.373*** | -0.939*** | -0.530*** |
| | (0.0788) | (0.0605) | (0.0644) | (0.0553) |
| International War | 0.245*** | 0.0852 | 0.288*** | 0.114* |
| | (0.0792) | (0.0691) | (0.0703) | (0.0684) |
| Civil War | 1.331*** | 1.114*** | 0.691*** | 0.509*** |
| | (0.114) | (0.120) | (0.117) | (0.130) |
| Military Regime | 0.130 | 0.237** | 0.188** | 0.111 |
| | (0.101) | (0.0929) | (0.0958) | (0.100) |
| Marxist-Leninist Regime | -0.387** | -0.647*** | 0.431** | -0.760*** |
| | (0.180) | (0.155) | (0.169) | (0.160) |
| Logged Economic Development | -0.147*** | -0.216*** | -0.0851*** | -0.142*** |
| | (0.0358) | (0.0302) | (0.0292) | (0.0291) |
| Logged Population | 0.367*** | 0.503*** | 0.361*** | 0.443*** |
| | (0.0448) | (0.0385) | (0.0371) | (0.0374) |
| Economic Growth | -0.00681 | -0.000766 | 0.00650 | 0.0178*** |
| | (0.00534) | (0.00503) | (0.00498) | (0.00538) |
| Observations | 1,562 | 1,562 | 1,561 | 1,562 |
| r2_p | 0.213 | 0.214 | 0.256 | 0.204 |

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

While the right to habeas corpus, double jeopardy, the presumption of innocence, and the right to counsel, all produce negative and significant coefficients on political imprisonment, the right to public trial appear to significantly increase the likelihood of states use of political imprisonment as a tool of repression. Similarly, the right to counsel and the right to appeal appear to have a significant harmful effect on states' use of torture, when these same rights produce negative and significant effects on other types of repression. These mixed results confirm the evidence of a decoupling effect of the world society approach I found in the previous models. Of the eleven fair trial provisions, three provisions (ex post facto law, false imprisonment, and public trial) show no statistically significant relationship with state behavior

in both of its forms, the violation of fair trial or abuse of physical integrity. The provision for public trial show significant harmful effect on political imprisonment in the disaggregated CIRI model. The findings demonstrate that six provisions do have the effects that are intended at least on one type of the repression of physical integrity rights. But these provisions are far from achieving statistically significant coefficients across the rest of the types of repression and sometimes are even significantly harmful. I suspect that this inconsistency across the provisions could be related to the derogable nature of these rights. In other words, while the rights produce effective results in curbing state coercive behavior during times of peace, they may become associated with greater levels of coercive repression if they are subject to derogations in various times of threat. Perhaps it is not the adoption of the provisions for the right to fair trial that leads to further abuse of the physical integrity rights, but instead the derogations of these provisions do so. Since I did not examine the conditional effect of various levels of threat on the effectiveness of the derogable constitutional provisions, I cannot make general conclusions about the mixed results I found here. The results, however, provide an initial nuanced picture about the relationship of the constitutional provisions of fair trial and states' repressive behavior that merits further studying. Control variables are also included in the model. I was hesitant to discard the consistently insignificant control variables like economic growth because I wanted to be able to compare my results with the previous models.

In order to test my hypothesis about the expectation that constitutional provisions of fair trial are likely to have greater effect on states' repression of fair trial and physical integrity rights when the judiciary is independent, I estimated a set of models with interaction terms for the constitutional measures and judicial independence. The analysis with the interaction measures

are reported in Tables 2.5 and 2.6. As I mentioned above, in order to avoid overcrowding the model with too many variables, I decided to approach conditionality with two models: one model examines some of the constitutional rights that belong to the stage of criminal investigation, the other model examines the constitutional rights that belong to the trial stage. The division of the constitutional rights under study is only made from a practical point of view, bearing in mind that some of these rights are essential for both stages. Again, even with the interaction terms constitutional provisions did not affect state behavior uniformly. The interactions of judicial independence were only significant and in the intended direction for the right to speedy trial in all three models, and for the right to habeas corpus, albeit only in the model of the CIRI measure. The interaction of judicial independence and the right to be presumed innocent until proved guilty produced significant and positive coefficients in all models; a consistent result for this provision across all models. Surprisingly, the presumption of innocence provision significantly reduces coercive repression in states where there's no judicial independence. The interaction with the constitutional provisions for false imprisonment and the right to appeal is also statistically significant and positive in the coercive repression models; whereas, these same provisions perform in the predicted direction in states whose judiciaries lack independence.

Table 2.5. Regression of Political Repression on Interaction of Investigation Constitutional Rights and Judicial Independence 1990-2005

| VARIABLES | (1)<br>Personal Integrity Abuse PTS-SD | (2)<br>Personal Integrity Abuse PTS-AI | (3)<br>Personal Integrity Abuse CIRI |
|---|---|---|---|
| Habeas Corpus | 0.107* | -0.0523 | 0.0592 |
| | (0.0561) | (0.0555) | (0.0550) |
| Presumption of Innocence | 0.0118 | -0.0309 | -0.181*** |
| | (0.0533) | (0.0529) | (0.0515) |
| Right to Counsel | -0.0247 | -0.107** | -0.119** |

| | | | |
|---|---|---|---|
| | (0.0526) | (0.0524) | (0.0510) |
| Right to Interpreter | -0.285*** | -0.327*** | -0.172*** |
| | (0.0567) | (0.0565) | (0.0545) |
| Examine Witness or Evidence | 0.247*** | 0.300*** | 0.165*** |
| | (0.0652) | (0.0646) | (0.0633) |
| Habeas Corpus* Judicial Independence | -0.0875* | -0.00950 | -0.142*** |
| | (0.0487) | (0.0467) | (0.0442) |
| Interaction Presumption of Innocence an Judicial Independence | 0.150*** | 0.159*** | 0.188*** |
| | (0.0468) | (0.0458) | (0.0439) |
| Right to Counsel* Judicial Independence | 0.0623 | 0.0646 | 0.104** |
| | (0.0464) | (0.0452) | (0.0433) |
| Trial Language* Judicial Independence | 0.0306 | 0.0654 | -0.0124 |
| | (0.0517) | (0.0505) | (0.0472) |
| Examine Witness or Evidence*Judicial Independence | -0.0666 | -0.0901* | 0.00104 |
| | (0.0534) | (0.0523) | (0.0493) |
| Trichotomized Democracy | -0.660*** | -0.609*** | -0.522*** |
| | (0.0585) | (0.0570) | (0.0520) |
| Judicial Independence | -0.425*** | -0.509*** | -0.488*** |
| | (0.0910) | (0.0884) | (0.0827) |
| International War | 0.195*** | 0.273*** | 0.212*** |
| | (0.0629) | (0.0615) | (0.0584) |
| Civil War | 1.505*** | 1.481*** | 1.318*** |
| | (0.108) | (0.108) | (0.104) |
| Military Regime | 0.250*** | 0.199** | 0.263*** |
| | (0.0838) | (0.0832) | (0.0812) |
| Marxist-Leninist Regime | -0.389*** | -0.521*** | -0.485*** |
| | (0.144) | (0.144) | (0.136) |
| Logged Economic Development | -0.185*** | -0.117*** | -0.153*** |
| | (0.0274) | (0.0268) | (0.0256) |
| Logged Population | 0.523*** | 0.453*** | 0.495*** |
| | (0.0353) | (0.0343) | (0.0332) |
| Economic Growth | -0.00825* | -0.00520 | 0.00554 |
| | (0.00440) | (0.00435) | (0.00437) |
| Observations | 1,570 | 1,570 | 1,548 |
| r2_p | 0.301 | 0.257 | 0.193 |

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

The interactive terms produced harmful effects even for some constitutional provisions that were associated with less repression without the independent judiciary in the coercive repression models. The interaction of judicial independence and the presumption of innocence, false imprisonment, and the right to appeal provisions suggest that when the judiciary is independent, these provisions have a rather harmful effect on coercive repression than when the judiciary is not independent. In contrast, the interaction with the right to habeas corpus and the right to speedy trial suggests that these provisions are more likely to decrease the odds of states using coercive repression when the judiciary is independent. What is more strikingly surprising is the number of provisions that their interaction with judiciary produces no significant coefficients. Nine out of eleven interaction terms have no statistically significant effect on de facto fair trial rating. And five out of eleven interactions have no statistically significant effect on states' coercive repression. In fact, more provisions increase rather than decrease coercive repression in states with independent judiciaries. Although judicial independence in itself significantly reduces the likelihood of both dimensions of repression regardless of the constitutional provisions or the political context, its interaction with the fair trial provisions does not produce the hypothesized results in the general sense. This finding is consistent with Keith's finding that the constitutional provision for fair trial has an independent significant effect on reducing repression regardless of the status of the judiciary (Keith 2012, 217). The findings may also imply that it is possible that the theoretical explanations of constitutionalism and human rights overestimate the role of judicial independence in entrenching constitutional law. Or there might be a reciprocal causation in that states with lower levels of repression are more likely to

establish independent judiciary and the rule of law. Furthermore, independence does not necessarily translate into rights-protectiveness, particularly in times of threat.

Table 2.6 Regression of Political Repression on Interaction of Trial Constitutional Variables and Judicial Independence

| VARIABLES | (1) Personal Integrity Abuse PTS-SD | (2) Personal Integrity Abuse PTS-AI | (3) Personal Integrity Abuse CIRI |
|---|---|---|---|
| Ex Post Facto Law | 0.0198 | 0.0502 | -0.0318 |
| | (0.0523) | (0.0519) | (0.0510) |
| False Imprisonment | -0.186*** | -0.177*** | -0.219*** |
| | (0.0544) | (0.0539) | (0.0524) |
| Speedy Trial | 0.298*** | 0.311*** | 0.256*** |
| | (0.0626) | (0.0618) | (0.0618) |
| Public Trial | -0.0332 | -0.0403 | -0.0268 |
| | (0.0470) | (0.0467) | (0.0451) |
| Double Jeopardy | -0.0373 | -0.142*** | -0.152*** |
| | (0.0524) | (0.0520) | (0.0505) |
| Right to Appeal | -0.0764 | -0.179*** | -0.140*** |
| | (0.0524) | (0.0522) | (0.0502) |
| Ex post Facto Law*Judicial Independence | 0.0610 | 0.0561 | 0.0322 |
| | (0.0486) | (0.0470) | (0.0443) |
| False Imprisonment*Judicial Independence | 0.149*** | 0.114*** | 0.156*** |
| | (0.0438) | (0.0429) | (0.0406) |
| Speedy Trial* Judicial Independence | -0.185*** | -0.217*** | -0.205*** |
| | (0.0490) | (0.0478) | (0.0462) |
| Public Trial* Judicial Independence | 0.0447 | 0.0652 | 0.0279 |
| | (0.0429) | (0.0413) | (0.0384) |
| Double Jeopardy* Judicial Independence | -0.0446 | 0.0263 | 0.0899** |
| | (0.0434) | (0.0423) | (0.0401) |
| Right to Appeal*Judicial Independence | 0.124*** | 0.153*** | 0.124*** |
| | (0.0426) | (0.0418) | (0.0385) |
| Trichotomized Democracy | -0.729*** | -0.673*** | -0.579*** |
| | (0.0578) | (0.0560) | (0.0511) |
| Judicial Independence | -0.472*** | -0.442*** | -0.510*** |
| | (0.0860) | (0.0837) | (0.0789) |
| International War | 0.182*** | 0.270*** | 0.211*** |
| | (0.0624) | (0.0611) | (0.0582) |
| Civil War | 1.531*** | 1.460*** | 1.249*** |
| | (0.108) | (0.107) | (0.104) |
| Military Regime | 0.257*** | 0.195** | 0.223*** |
| | (0.0853) | (0.0847) | (0.0827) |
| Marxist-Leninist Regime | -0.431*** | -0.594*** | -0.497*** |
| | (0.146) | (0.145) | (0.138) |
| Logged Economic Development | -0.179*** | -0.108*** | -0.144*** |

| | | | |
|---|---|---|---|
| | (0.0273) | (0.0268) | (0.0255) |
| Logged Population | 0.506*** | 0.430*** | 0.498*** |
| | (0.0353) | (0.0343) | (0.0332) |
| Economic Growth | -0.00530 | -0.00214 | 0.00681 |
| | (0.00437) | (0.00432) | (0.00435) |
| Observations | 1,571 | 1,571 | 1,549 |
| r2_p | 0.295 | 0.250 | 0.190 |

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

## 2.8 Conclusion

This study, to my knowledge, offers the first systematic empirical analyses of the effect of the constitutional provisions of the right to fair trial on states' repression of fair trial rights and physical integrity rights. I have examined whether providing for explicit fair trial rights in national constitutions would reduce states' repressive behavior. The core constructivist theory of the effect of law on state behavior is straightforward. When national constitutions contain explicit provisions providing individuals with the right to fair trial, states are less likely to use repression because they are committed to the formal law enshrined in their constitutions which are the sources of the legitimacy of their rule. Overall, the empirical evidence regarding the effect of formal law on state behavior appears largely inconsistent with the optimistic constructivist theory of human rights. Although few fair trial rights have achieved a level of statistical significance in curbing states' repressive behavior, more rights were either insignificant or unexpectedly harmful in their effects on repression. I begin with the rights that were effective in lessening the probability of repression. I found that explicit mentioning of the right to an interpreter decreases the likelihood that states will engage in repressive behavior of

violating the right to fair trial or abusing physical integrity rights, while controlling for the political context of the states. The right to an interpreter is expected to affect persons who are either foreigners or minorities of ethnically diverse countries, who cannot speak or fully understand the formal language used by state authorities. As emphasized in the *Manual on Human Rights for Judges, Prosecutors, and Lawyers,* this right ensures that states will assign interpreters, free of charge, for such individuals throughout the criminal investigation and the trial periods to guarantee that they can enjoy all the other relevant fair trial rights (OHCHR, 2003). Clearly, this consistent performance of the provision of the right to an interpreter across de facto fair trial and coercive repression models provides support for the optimistic hypothesis that constitutional protections of fair trial improve states' human rights behavior. However, it is possible that this result is also largely due to states' rationalization with regard to the costs they will incur either internationally if they repress citizens of other states or domestically if the state is ethnically fractionalized and power is diffused among multiple ethnicities. I also found that the right to habeas corpus, the right to speedy trial, the right to appeal have a significant and negative effect on the violation of fair trial, but no significant effect on repression of physical integrity rights. I found mixed evidence with regard to the provision for the protection against double jeopardy. I found that this provision is more likely to reduce the odds of coercive repression. But I found evidence that it is more likely to increase the odds of violation of fair trial.

On the other hand, I find that the right to be presumed innocent is likely to increase the probability of repression of both fair trial rights and physical integrity rights. The harmful effect maintained by the right to be presumed innocent across fair trial practices and coercive repression can be interpreted to mean that states who incorporate this right in their constitutions

are not willing to respect human rights. The right to be presumed innocent is a negative right. As noted in the General Comment No. 13 of the Human Rights Committee, this right ensures that states would "refrain from prejudging the outcome of the trial," and hence, protect individuals from being treated as guilty throughout the period of criminal investigation and trial proceedings until the decision of the final appeal in their case is made (HRI/GEN/1/Rev.9 (Vol. I), 2003). It incurs the burden of proof of charges on the state authorities. The presumption of innocence is violated when the state authorities refer to the accused person as a criminal in press conferences before they have presented a proof to the court, or when court judges find the person guilty in absence of an overwhelming evidence. As a result, a violation of the right to presumption of innocence provides states with control over outcomes by means of which the state authorities can induce the court to do what they want it to do. The violation of this right would lead to quick court decisions and executions of the decisions before the accused person can exercise the right to defense. Clearly this right may be considered threatening to states that adopt it. Moreover, I find an overwhelming evidence that the provision for the right to examine evidence or witnesses has a consistent and harmful effect across all sets of models, except that it didn't achieve significant levels in the de facto fair trial model. The insignificant result with regard to fair trial is more likely due to not accounting for the corresponding practice to this right in the de facto fair trial measure. The right to examine witnesses or evidence consistently produced damaging effects on physical integrity rights regardless of regime type, economic development, or political conflict. However, the interaction of judicial independence with the right produced insignificant results.

Overall, I found that the provisions for fair trial play a rather better role in protecting individuals from the violation of fair trial than the violation of physical integrity rights. While four constitutional variables appeared to be effective in reducing the propensity of unfair trials, only two constitutional variables had a pacifying effect on states' use of coercive repression. Thus, I argued that constitutional law concerning human rights does matter in that it provides an indication to the type of rights that shape state behavior. While some provisions clearly improve state behavior, other rights pose a threat to the state. Hence, states become more likely to violate them. There are two possible explanations for the conflicting results I found in my models. the first possibility, which is always borne in minds of researchers, is that some measurement errors in data account for inconsistent results. While that might still be a possibility, there are good reasons to believe it is minimum in size. Written constitutions usually take long to be replaced or modified. Even when modified, the language used in constitutions is rarely confusing. I coded about 20% of the data on constitutional provisions I obtained from the Comparative Constitutions Project to make up for the missing data. I followed the coding guidelines provided in the project's codebook. Several times I reread the constitutional texts of country-year constitutional events that were already coded by Ginsburg et al. and compared my scores with the existing scores. They were comparably congruent most of the times. Although human rights information might be the hardest to verify, but most of the studies in the literature on human rights have used the same human rights measures I used, and they all agreed that human rights reporting began improving after the 1980s. My analysis is focused on the (1990-2005) time-period.

The second possibility for the conflicting results fares well with the argument of the international human rights regime in that the derogations from the fair trial rights may have encouraged states adoption of the provisions for fair trial without the willingness to respect them. The derogations were meant to allow states to suspend certain human rights during serious times of emergency without being held accountable for infringing human rights. However, it is possible that states faced with any type of threat ranging from nonviolent protests to civil war opt to suspend some of the derogable rights of concern more frequently than others, claiming to be protecting national security. Thus, political conflict may provide states with a convenient excuse for states to suspend rights they were not willing to respect in order to repress their challengers.

Taken as a whole, this study has several implications for future research on constitutionalism and state behavior. First, it provides information about the types and the patterns of the incorporation of provisions for the right to fair trial. Second, it provides a novel evidence about the form and extent to which states' behavior corresponds to the constitutional rights of fair trial. Third, some of the associations of rights with state behavior I found in this study demonstrate that some of the fair trial rights function as a mechanism of signaling domestic or international interests. In particular, I show that the right to an interpreter significantly reduces the likelihood of state repression in all circumstances. States adopt this right to reassure minorities domestically and signify good intentions to the international community. These findings merit further investigation into whether adopting rights with qualifications can be more harmful than not adopting the rights at all. Future studies should also examine the relationship between the effectiveness of the provisions for fair trial and the levels of political conflict that pose a threat to states' power. Finally, my study maybe useful to the international

human rights regime and constitution drafters as it underlines the important issues related to constitution drafting and treaty design.

# Chapter 3

## The Constitutional Context of Exceptional Courts

Over the last decade, the Human Rights Council (formerly the United Nations Commission on Human Rights) in cooperation with the UN Special Procedures has noted the increasing recourse to exceptional courts in trying civilians throughout the world. The Council has concluded that trying civilians in military courts is a violation of international human rights because such courts are incompetent to guarantee the fundamental elements of the human right to fair trial--independence and impartiality. Previous studies have advanced the empirical analysis of the role of independent judiciary in promoting and protecting human rights, casually relating exceptional courts to political repression. None, though, have recognized that different types of exceptional courts exist within a constitutional framework that establishes the scope of their jurisdiction and codes of operation. Using new data on constitutional treatment of exceptional courts, I offer a systematic analysis of state leaders' responses to constitutional provisions establishing exceptional courts. I contend that state leaders are particularly reluctant to use violence against their people when their national constitutions provide for provisions prohibiting trials of human rights violations in exceptional courts, prohibiting derogation from fair trial rights during emergency situations, and providing for the right to appeal exceptional courts' decisions in ordinary courts. Importantly, though, when state leaders are constitutionally constrained in their utilization of exceptional legal procedures to handle their challengers, they become more abusive. Exceptional courts provisions tend to affect state repressive behavior in the same manner across regions when examined in empirical models specifically accounting for regional observations.

Further, as in Chapter Two, I explore the question of whether adopting constitutional provisions governing the administration of justice in exceptional courts have impact on states' repressive behavior. The Special Rapporteur on the Independence of Judges and Lawyers and the Special Rapporteur on the Promotion and Protection of Human Rights have identified the human rights violations under international law that are related to the administration of justice in the military courts and special tribunals in their annual reports to the Commission on Human Rights. In its sixty-second session (UN Doc. E/CN.4/2006/58), the Commission promulgated a set of "Draft Principles Governing the Administration of Justice through the Military Tribunals" that was submitted by its Sub-Commission to the Protection of Human Rights in response to the concurrent concerns, and suggested a potential incorporation of these principles formally into the international human rights regime. While currently the promoted draft principles lack formal recognition, the Commission continues to call on states to enshrine them in their constitutions. I take these principles to represent the strongest consensus on the due process obligations for special courts mandated under international law.

This study addresses whether incorporating these principles in state constitutions will have a positive impact on the protection of human rights. Scholars in various human rights related fields have been examining for decades the constitutional significance for the protection of human rights (Pritchard 1986, Blasi and Cingranelli 1995, Davenport 1996, Keith 2002, Barros 2002, Ginsburg 2003, Keith et al. 2009, Keith 2012, Go 2003). In recent years, scholars have delineated and investigated categories of formal provisions that are related to how governments should protect human rights. Earlier research focused on the effect of the provisions protecting citizen's rights (Pritchard 1986). Subsequent research looked at institutional

provisions promoting for judicial independence and regulating states of emergency (see for example Blasi and Cingranelli 1996, Davenport 1996, Keith 2002, Go 2003, Keith et al. 2009, Keith 2012). To date, no empirical work has examined the significance of provisions intended to allow governments to establish exceptional judicial procedures outside the ordinary judicial system. This research is important because it allows us to investigate and understand the degree to which states legally constrain and/or facilitate the use of these extraordinary courts which have been the subject of much concern within the international human rights regime who are concerned with violations of international law, especially regarding the human right to fair trial, including the right to an independent and impartial judiciary (Weissbrodt and Hansen 2013, Conte 2013). Furthermore, I analyze the content of the constitutional text and empirically examine their ability to facilitate or constrain the likelihood of the state to engage in political repression. Some scholars argue that the law can be both limiting and enabling governments to use political repression (Ní Aoláin et al.2013, Davenport 1996). The law can simultaneously limit the power of the state to restrict freedom of speech while empowering it with specific circumstances under which it may be justified to legitimately restrict the freedom. A small body of literature, which I discuss more thoroughly below, has addressed empirically this question of whether constitutional provisions matter. While civilians' right to a fair trial in an ordinary court as stipulated in the UN principles for judicial independence is among the constitutional provisions for judicial independence examined by Keith 2012 and Keith et al. 2009, she did not examine the right in the context of exceptional courts beyond examining whether the constitution banned or allow such courts. In this study, I examine whether the national constitutions across the world provide for the necessary structural and procedural arrangements of extraordinary

courts that will be sufficient to meet the fair trial rights. The Commission on Human Rights has long argued that the creation of military courts and special criminal tribunals to circumvent ordinary courts hinders the realization of the fair trial rights (UN Doc. E/CN.4/2004/60, UN Doc. E/CN.4/2006/58). It is for this reason the Commission on Human Rights initiated the discussion of the proposed Draft Principles Governing the Administration of Justice through Military Tribunals in its annual sessions and expressed its hope for the adoption of these principles by the states (UN Doc. E/CN.4/2005/135). The Sub-Commission to the Protection of Human Rights represents a significant movement in defining the principles under international human rights law that should be applied in these courts. Based on their investigation of the judicial practices of exceptional courts across countries, the Sub-Commission presents a two-fold framework for the principles: first, the principles declare that military courts or special tribunals should be an integral part of the ordinary judicial system of the state. Second, the principles declare that the structure and judicial procedures of these courts must comply with 1) the principles of the independence and impartiality of the judicial system and 2) the due process principles of the right to fair trial. Interestingly, the draft principles pragmatically seek to reform and normalize the structure and practices of such courts, rather than going as far to ban the use of these institutions. The drafters seem to call for the promulgation of these principles in the state constitutions, with the expectation that the constitutional provisions will provide an appropriate barrier to human rights violations.

Empirically, we know that currently (2014) only sixty-one states make reference to exceptional courts in their constitutions (Comparative Constitutions Project 2014). More specifically, Keith (2012) found that in 2005 41 constitutions fully banned exceptional courts

while 17 placed some limitation on exceptional courts short of ban, and two constitutions explicitly allowed exceptional courts. While the presence of these provisions has been documented, scholars have yet to examine whether the development of exceptional courts is in conformity with the general principles for the proper administration of justice in terms of the vital standards of independence and impartiality for the realization of the fair trial right. In my dissertation research, I am interested in ascertaining 1) the extent to which constitutions provide for exceptional courts, and 2) the extent to which these provisions reflect the norms embedded in the Draft Principles. Ultimately, I seek to understand the effect of these constitutional provisions on the actual state human rights behavior. I am particularly interested in the constitutional provisions related to what Ni Aoláin and Gross refer to as due process exceptionalism (2013).

Due process exceptionalism refers to state modifications of internationally recognized judicial rules and processes, which states may make in order to create an alternative venue, one which is more amenable to their control, and in which they may prosecute their opposition or challengers (Ni Aoláin and Gross 2013, 3). The types of modifications states make deviate from the structural (separation of powers, judge selection, terms of office, authority) or procedural rules (range of offenses within their competence, right to appeal, pre-trial detention legal access) that apply to ordinary court systems (Ni Aoláin et al. 2013: 7-9). According to the UN's Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism (UN Doc. A/63/223: 2008), several structural and procedural features distinguish exceptional courts from ordinary courts. The following structural or procedural aspects as articulated by Ni Aoláin and Gross (2013, 7-8) can be attributed to exceptional courts:

1- They are authorized or established by the discretionary powers of the executive body;

2- The mechanisms of appointment and dismissal of judges differ from those applied in ordinary courts;
3- They have jurisdictional focus on certain offenses;
4- They impose limitations on due process and fair trial rights to those under their authority;
5- They are perceived as lacking legal guarantees of independence and impartiality.

Courts within the ordinary judicial system which have jurisdictional specialty such as family or commercial courts for instance, may meet some of the above criteria. However, international human rights regime and legal scholars use the terms exceptional or special courts more narrowly to describe those courts that try political cases (UN Doc. A/63/223, UN Doc. E/CN.4/Sub.2/2004/7). Weissbrodt and Hansen (2013) use "the terms extraordinary and special courts more narrowly to describe domestic courts specifically created to try offenses related to state security (broadly conceived), the use of military courts to try civilians, or where governments themselves categorize the procedures as special" (306). Barros (2002), in his description of the different forms of military courts that were established under the military rules of Brazil, Chile, and Argentine, notes their common jurisdictional specialization in what he calls "political offenses" (118). My work most closely follows Weissbrodt and Hansen's conceptualization. In the following section, I examine the literature on constitutional provisions and their effect on political repression.

## 3.1 Constitutional Protections of Human Rights

### 3.1a Theoretical Perspectives

Current scholarship on human rights offers no theoretical consensus regarding the effects of the constitutional documents on human rights practices. While optimistic scholars stress on the role of the formal law in entrenching states' normative values, then transforming them into

guidelines for states' conduct, other scholars, whose perspective is skeptical of the impact of the formal law on states' behavior, note how constitutions make no difference in the behaviors of authoritarian regimes. Constructivists accept that the law sets forth the norms and values that will form a framework for a state-society relationship, in which both parties of the relationship have expectations about the role of the other (Epp 1998; Finnemore and Sikkink 1998; Fox-Decent 2008). They argue that the mechanisms through which the constitutional law influences states and alter their behavior begin with the process of writing the law. In this process, constitutional drafters foster national discourse through which norms emerge. Once these norms gain "broad acceptance", states promulgate them into laws, which state actors begin to internalize and cope with (Finnemore and Sikkink 1998:895; Ginsburg et al. 2009: 206). Finnemore and Sikkink also go so far as to argue that the development of the constitutional limits upon states evolved from states' need for legitimating their exercise of political power. State leaders bind themselves and uphold the rule of the law in order to protect their power. Legitimacy provides states with public consent domestically and acceptance internationally (903). Scholars such as Ginsburg and Moustafa (2008) suggest that even if states choose to adopt constitutional laws for instrumental or material interests as the case with authoritarian regimes, their veneer of the rule of law grants the opposition and human rights organizations opportunities to gain leverage in questioning their legitimacy (5-6).

From the perspective of international law, the development of the international human rights regime has increased the attention to the issue of human rights protections globally, and influenced the design of national constitutions through serving as a platform for facilitating the creation and diffusion of human rights norms (Finnemore and Sikkink 1998; Wotipka and

Ramirez 2007). Wotipka and Ramirez suggest that the world society pressure influences states' commitment to the protection of human rights through the following mechanisms: 1) world conferences in which state leaders learn about the universal human rights and discuss the means of protecting them; 2) the norm cascade which denotes the dissemination of universally acceptable human rights behavior of some states to other states within the regional or global space of socialization; 3) embeddedness in the broader world through the participation in international governmental organizations (IGOs). They note, for example, that the expansion of human rights regime through international conferences, the activism of human rights experts, and domestic and transnational human rights organizations accounts for the exogenous factors that led to the ratification and incorporation of the principles of Convention on the Elimination of All Forms of Discrimination against Women into the national constitutions of many states, even the most traditional of them (311-314).

Nevertheless, scholars address the potential unintended consequences of world society pressure which may stem from the lack of strong mechanisms of enforcement for the human rights treaties (Hafner-Burton and Tsutsui 2005). Hafner-Burton and Tsutsui argue that states are aware of the weakness of the human rights regime's mechanisms of enforcing the law, and so they are motivated to ratify human rights treaties they have no intention to comply with. As a result, the dual nature of human rights regime provides states with the benefit of legitimation at no cost of compliance. Thus, this "decoupling effect" of human rights regime is more likely responsible for widening the gap between ratification and compliance (1383-1385).

While constructivists posit that constitutional provisions are more than mere "parchment barriers," realists and rationalists would maintain a skeptical attitude concerning the effect of

human rights law or constitutional protections on state behavior. From the perspective of the realists the constitutional law's role in polities is no more than a façade of legitimacy for governments. Realists maintain that regimes design this "window dressing" document to advance their political interests domestically or internationally, and even if they comply with the formal law, they do so because the law merely converges with their interests (Waltz 1979; Mearsheimer 1995). To use an example, the constitution of the Soviet Union had lengthy provisions protecting civil rights, yet human rights practices of the Soviet governments were not complying with the constitutional law (Cross 1999).

Rational choice theorists on the other hand, perceive governments as self-interested actors whose decision making on respecting the law is based on their calculation of the costs and benefits of their decisions. Rational choice theorists use the logic of "uncertainty" about the future political outcomes to explain why states commit themselves to constitutional provisions that expand the judicial power and limit their own power: Ginsburg's political insurance theory (2003), the judicialization of politics (Moustafa 2008), and judicialization of repression theory (Barros 2002; 2008). In regard to uncertainty, these scholars argue that the institutional settings of the judicial power in the constitutions reveal constitutional drafters' tendency to secure their future political needs, whether those were staying in power, promoting economic investments, or legitimating repressive behavior, and thus, provide an insight to their willingness to respect the law in post-constitutional context. Below, I discuss each of these perspectives in more details.

In the framework of the literature on democratization, Ginsburg argues that the constitutional design of new democracies, where power is diffused, is more likely to reflect the desires of all the political parties. He suggests that the party in power is more inclined to be

committed to enforce the law if it foresees itself losing election in the future. Thus, enforcing the law in present time insures that its rights will be protected under the same law if they lose election and become a minority (Ginsburg 2003). The political insurance approach of rational choice is typically associated with providing for the power of judicial review and independent judiciary in the constitutions. While Ginsburg's political insurance theory establishes the power of judicial review as the ultimate guarantor of human rights, I believe that establishing exceptional courts and delineating their roles and limits in constitutions also provides political insurance, especially for transitioning states that experienced egregious forms of human rights abuse facilitated by exceptional courts in the past. Such states will constitutionalize future exceptional judicial systems out of fear of the past experiences. The abolishing of military courts in the constitutions of several of the transitioning Latin American states provides a supportive example of my argument.

Moustafa argues also that authoritarian regimes use constitutions to promote a veneer of the rule of law because it provides political and economic benefits both on the domestic and international levels. As it becomes clear that they failed to achieve their goals due to persistence of the gap between rhetoric and actions, committing themselves to the law becomes the only strategy in resolving the problem, especially when a regime's continuity is contingent upon achieving its material goals of economic development or international alliances. Thus, he concludes that authoritarian regimes' commitment to the constitutional law could only come about when there are strings of benefits such as economic liberalization attached to it (2008).

In the context of costs and benefits of employing repression, the rationalist approach provides that constitutions are relevant to the way in which states intend to respond to threat,

because they state regimes' commitment to protect certain rights within different circumstances (Davenport 1996; Barros 2002 & 2008; Pereira 1998; Shambayati 2008). Davenport argues that the components of constitutional provisions most relevant to human rights abuse reflect whether and under what conditions governments allow themselves the option of applying repressive behavior (631). He proposes a useful model for understanding how constitutions influence repressive behavior, in which he examines the information about citizens' rights and emergency powers. The manner in which he investigates these provisions concerns explicit mentioning of specific rights, limitations placed on these rights, clauses of states of emergency, and restrictions placed on states of emergency. The results of his analysis demonstrate that constitutions do provide indication of regimes' willingness to "follow guiding principles across time, space, and context" (648). Following with Davenport's proposition, I seek to investigate constitutional provisions concerned with extraordinary judicial proceedings during times of peace and crisis and their influence on states' repressive behavior. I explain in detail about how I plan to model the information about provisions in interest in the data and methods section.

While not empirically examined, comparative case studies do suggest that a relationship exists between constitutional law and the role exceptional courts play in regimes' response to threat. Barros (2002) and Shambayati (2008) argue that powerful parties influence the institutional design in their national constitutions. They establish provisions that enable them to facilitate extraordinary judicial instruments to use in dealing with their challengers. Barros notes, for example, that both of the Chilean and Argentine military regimes' activation of exceptional courts to try their challengers stemmed from the provisions of the state-of-siege in both the Chilean 1925 constitution and the Argentine 1853 constitution (166). Similarly, Shambayati

highlights the constitutional victories the Turkish military scored in the aftermath of both of its1960 and 1980 military coups. After each coup, a new constitution was drafted granting the military mechanisms of intervention in the civilian politics. For example, one of the most blatant constitutional innovations of the 1982 constitution was the revival of the State Security Courts, which were deemed unconstitutional by the Constitutional Court seven years earlier. Through these courts, the military was able to repress political challengers to the long-established principles of Kimalism of the Turkish political system without having to use excessive force. The State Security Courts continued to be an important aspect of Turkey's human rights records until they were abolished in 2004 due to economic and political exigencies. According to the European Court of Human Rights, both the structure and procedures of these courts violated several provisions of the European Convention on Human Rights. Keeping the courts open did not suit the state's needs because they seemed to form an impediment to the process of integration with the EU—a primary objective for Turkey today. Both of Barros and Shambayati's case studies illustrate how states' rational-choice based decision to use exceptional courts as a tool of repression is shaped by their calculations of costs (political legitimacy, integration to EU) and benefits (molding or elimination of dissent behavior) . From a rational choice perspective, the content of the constitutional law provides us with an understanding of policy options available for states to choose from based on their calculation of costs and benefits of the available options.

Previous theoretical and empirical research on state repression has established that regime/system type is a strong determinant of states' repressive behavior (Poe and Tate 1994; Keith, Poe and Tate 1999; Davenport and Armstrong 2004; Davenport 2007a &2007b; Vreeland

2008). Democracy, through its various aspects, constitutes perhaps the most effective institutional structure that prevents despotism and protects the rights of all citizens. Through their assessment of the advantages of democracy, scholars have addressed the importance of the issue of accountability for constraining state's behavior. They argue that accountability to citizens creates high costs for state leaders who use repression reaching up to losing power (Blasi and Cingranelli 1995; Epp 1998; Davenport and Armstrong 2004; Davenport 2007a & 2007b; Keith 2002 & 2012). In fact, Davenport (2007b) contends that when cost of repression is high, the benefits would be low, and the likelihood of success in reaching the objectives of repression is low (38). In democracies, citizens have the institutional resources needed for punishing repressive political leaders represented in the electoral process of the democratic system (Davenport 2007b). However, scholarship on the effect of democracy on curbing repression has produced mixed results about the correlation. Early work suggested a linear relationship, in which greater democratic practices bring about greater human rights practices (Poe and Tate 1994). Later, Davenport and Armstrong (2004) argue that not all democracies are immune to repressive behavior. They suggest that only when a combination of democratic institutions and practices strengthen beyond a critical point we begin to note the significance of democracy in reducing repressive behavior (542). I follow with Poe and Tate model of testing the effect of democracy on repression given the consistent empirical support it received in the literature of political repression (Keith 1999; Keith, Tate, and Poe 2009; Keith 2012).

Other proponents of the effect of domestic institutions theory argue that even authoritarian regimes vary in their respect for law and they ascribe this variation to nuances in the characteristics and types of autocratic systems, which produce varied costs and benefits for

engaging in repressive behavior (Davenport 2007a; Vreeland 2008; Silverstein 2008). Military regimes, for example, have been consistently associated with higher levels of repression of physical integrity. This relationship understandably relates to the orientation of the institution of the military, which makes it more inclined to use coercive power for control (Poe and Tate 1994; Poe, Tate, and Keith 1999; Davenport 2007a; Keith 2012). On the other hand, Vreeland's analysis of state torture practice and the ratification of the Convention against Torture, concludes that institutionalized dictatorships face higher levels of threat of dissent than the more insolated single-party dictatorships, and thus they use torture as a tool to deter dissent more. Therefore, entering CAT becomes a relatively cheap move to mitigate dissidents' anger given the weak mechanisms of enforcement of CAT (78). Davenport (2007a) notes that empirical studies have shown that single-party regimes are the least repressive of physical integrity rights of all autocratic regimes. He suggests that single-party regimes should be more able to democratize than other types of autocratic regimes (500). Some qualitative research supports Davenport's "tyrannical peace" proposition. Silverstein's case study of Singapore (2008) demonstrates how Singapore, a single-party authoritarian regime, incorporates certain aspects of the democratic institutions in its system that allows it to reduce repressive behavior. The Singapore case highlights certain aspects of political institutions that can exist in both democracies and non-democracies and help providing "social control" over citizens without exerting repressive behavior. With their strict compliance with the constitutional law in their actions and their efforts for building an independent judiciary as enshrined in the constitution, the leaders of Singapore are able to limit the reach of the judicial power without breaching the constitution. Singapore's executives found in constitutional amendments the legal mechanism that allowed them to over

write several of the judicial decisions while preserving the international image of Singapore as the success story of the rule of law. In his contrast between Singapore's "constitutional amendment" mechanism for over-ruling courts' decisions and the mechanisms used by constitutional democracies, he cautions that states along the democracy spectrum utilize different techniques in an effort to achieve the same goal, and that is curbing the judicial power while preserving the image of respecting the rule of law. It is striking that Singapore's constitutional amendments have similar purpose to the constitutional amendments passed by the U.S. Congress—reversing the court's ruling. I believe this contrast illustrates the ways in which states, regardless of their institutional design, utilize the constitutional texts to advance their political interests. Of course the elasticity of constitutions varies from one country to another, but the concern here is in the growth and changing roles of the constitution that may suggest as Epp posits, that "the constitution is less an ironclad framework for government than a set of resources to be used by political actors as best they can" (1998: 30). My addresses this significant issue. I hypothesize that constitutional texts have important information that can lead us to trace states' behavior, especially in times of challenge to their rule. The constitutional text, including provisions for rights protection contains a set of available legal responses to threat. I seek to assess empirically whether, as Pereira suggests, democratic and authoritarian regimes are "converging" in the ways they deal with threat of terrorism (2008:47).

As discussed in the first analytical chapter, the standard model of repression takes into account the environmental conditions that prompt a regime's repressive activities. The explanatory variable most consistently associated with repression is political conflict. Whether it is protest, political strikes, terrorism, or civil war, this variable represents the degree of the

domestic threat to the "political control" of the regime. The logic of the impact of political conflict on repression is straightforward. Dissent signals to the state leaders that people are not satisfied with their regime or their regime's policies. State leaders feel their interest represented in (power, economic gains, international acceptance, etc.) is threatened. Threat provokes regime's coercive action in order to retain political control. The repressive tools applied differ from one state to another depending on a host of factors, including the degree of threat and regime type. This is where judicial responses to threat blur the line between repression and alternative adequate means to deal with threat. Scholars such as Davenport (2007b) argue that threat can provoke even democratic regimes to use repression to eliminate or modify the behavior of individuals who are causing the threat (27). Davenport, drawing upon the United States' strategies in confronting terrorism following 9/11 events, specifically argues that

> While most scholars, activists, and policymakers focus on the problem of "illegitimate" or "arbitrary" exercise of coercive power, they tend to ignore those applications that are deemed "legitimate" and "systematic". The influence of political conflict on domestic democratic peace is important for two reasons: (1) it reveals that there are circumstances when repression is supported by at least part of the citizenry and (2) it reveals circumstances under which the assumed uniformity underlying domestic democratic peace will be weakened, if not significantly undermined (27)

Civil wars are the most domestic events that most strongly threaten state leaders. Empirically, the civil war has been consistently proved to produce the strongest effect on the use of repression (Poe and Tate 1994; Blasi and Cingranelli 1995; Davenport and Armstrong 2004; Davenport 2007a & 2007b; Keith, Tate, and Poe 1999; Keith 2012). Other legal scholars such as Ni Aoláin and Gross (2013) suggest that acute acts of violence such as terrorism are equally important to examine the ways in which democratic states respond to threat. They perceive exceptional judicial processes as crucial indications to what Davenport calls "legitimate and

systematic" application of repression. The arguments here suggest that the scale of political conflict should include violent acts of terrorism. Next I examine the empirical findings in this body of research, particularly those related to constitutional effects on states' behavior.

### 3.1b Empirical Literature on Repression

Most of the studies in the literature on political repression have defined the subject as regime's application of coercive actions against the people within their territorial jurisdiction to achieve two goals: maintaining political and social order and diminishing the rise of opposition (Keith 2012; Davenport 2007c; and the citations therein). While studies of repression have focused on two forms of repression; the coercive type of repression addressing the abuse of persons' physical integrity, and the less egregious type of repression addressing restrictions of civil liberties, I intend to focus in my dissertation research only on repression of physical integrity, given its more direct link to due process exceptionalism. The earliest repression literature focused more on the impact of domestic political and economic conditions than on the influence of international factors. Some scholars focused on the political conditions that form a destabilizing and threatening situation to the rule of the state (Poe and Tate 1994; Poe, Tate and Keith 1999; Go 2003, Carey and Poe 2004). The literature consistently demonstrates that conditions such as civil and interstate wars, protests, and economic underdevelopment were associated with states' use of repression (for example, Poe and Tate 1994; Poe, Tate, and Keith 1999; and Cingranelli and Richards 1999). Other studies demonstrate the role of institutional arrangements of polities (particularly regime type) they play in exacerbating or pacifying repressive behavior (Poe and Tate 1994; Poe, Tate and Keith 1999; Davenport and Armstrong

2004; Davenport 2007a and 2007b). For example, Davenport's (2007b) study of the institutional characteristics of democracy found evidence that the decrease in certain characteristics of democracy triggers particular strategies of repression. Most studies of constitutional provisions have focused the attention on the constitutional promises of individual rights and freedoms, judicial independence, and provisions for regulating the state of emergency (Blasi and Cingranelli 1995, Davenport 1996, Keith 2002, Keith Tate and Poe 2009, Keith 2012).

Blasi and Cingranelli (1995) were the first to construct systematic measures of federalism and judicial independence, doing so for 20 constitutions but only for a single year. In their human rights sequence model, they conceived that formally enshrining judicial independence and federalism provisions as the first step in the process of protecting human rights, with the actual building of the institutions following this formal provision, and with the protection of human rights ensured by judicial independence. Their empirical analysis supports their assumption about the role of constitutional provisions in forming the behavioral guidelines for governments' actions. Davenport (1996) subsequently has argued that the content of national constitutions matter in the sense that they reflect governments' willingness to use political repression (629). He takes into account the provisions that provide governments the legal opportunity to restrict rights. He notes that constitutional provisions vary in the degree to which they provide explicit details for the civil rights that governments are committed to respect. His measurement of constitutional structure is derived from the provisions that provide explicit rights, provisions that provide restrictions on these rights, provisions on state of emergency, and provisions that provide limitations on the state of emergency. He finds that only two variables are statistically significant-- freedom of press and state of emergency provisions—suggesting

that when explicitly delineated in the constitution, states are less willing to use repression against their citizens, even in times of political unrest. However, his study is limited to a non-representative sample of 39 countries.

Keith (2002a) builds upon Davenport, examining the global set of countries over two-decades period and testing the effect of ten constitutional provisions associated with internationally recognized fundamental freedoms and due process rights. She finds some evidence to support the beneficial effect of constitutional provisions of rights; while the traditional freedoms such as speech, religion, assembly, association and press were not found to improve state protection against personal integrity abuse, provisions for public and fair trials did significantly improve states' behavior in fully controlled models; however, neither the provision for the right to writ of habeas corpus nor a provision banning state torture influenced state human rights behavior. Keith (2002b) moved us further with examining the role of the provisions that provide for judicial independence on the protection of human rights. Using the UN's principles of judicial independence, she constructed a systematic measure for nine of the constitutional provisions that establish independent judiciary for the global set of countries over a twenty-years period. She finds that four of the components are associated with reduced repression; related to my study, one of the measures that she finds to decrease political repression is the constitutional ban of exceptional courts.

Keith, Poe, and Tate's (2009) subsequent analysis demonstrates that out of nine individual rights the constitutional protection of the right to fair and public trial significantly reduces states' coercive behavior. They also find that from the provisions for judicial independence the finality of judges' decision and the ban against exceptional courts effectively

reduce repression of physical integrity. In contrast, all four provisions of state of emergency significantly affect states' repressive behavior. While requiring legislative declaration of states of emergency and the ban against the dissolution of the legislature during emergencies significantly reduce repressive behavior, articulating conditions for extending the duration of states of emergency and specifying the non-derogable rights significantly encourage states to abuse physical integrity rights. Their empirical analysis also demonstrates that the constitutional effect on curbing repression becomes stronger when effective constitutional provisions are all adopted within a national constitution for a long period of time. In other words, the constitutional law among other factors (mainly contained in the standard model) has an incremental effect on repression. Ultimately, states' repressive behavior could be abated over time, which could lead to the entrenchment of the rule of law.

Keith's (2012) comprehensive study of political repression (1980-2005) examines the effect of *de jure* and *de facto* judicial independence and other constitutional promises of freedoms and due process protections on both forms of political repression—physical integrity abuse and civil liberties restrictions. While the lack of judicial independence appears directly related to the courts inability to prevent states' abusive behavior that includes imprisonment, torture, disappearance, and extrajudicial killing, it also creates an environment in which citizens are deterred from exercising and enjoying the types of civil liberties that they see punishable by their unchecked governments. She finds generally that states with an independent judiciary are less likely to engage in either form of repression. She also observes that *de facto* judicial independence is negatively affected by high levels of threat produced by political conflict (civil and international wars). This result suggests that high degrees of threat may motivate

governments to either dismiss the formal law in responding to threat and take measures that could include curtailing judicial power, or take advantage of the formal clauses that allow them to expand their powers during certain circumstances. The recourse to exceptional courts may be a beneficial option for the executive to expand their power if the formal law allows it. Furthermore, she finds that constitutional protections of civil liberties and due process guarantees are translated into effect in the presence of *de facto* judicial independence. The influence of the formal commitments, however, is more likely to decrease the restrictions of civil liberties than the abuse of physical integrity. Interestingly, when the effect of due process protections was tested individually, the formal commitment to fair trials appeared to significantly decrease political repression independent of judicial independence. While in this study the general provision of fair trial is examined, she does not delineate or examine which many elements of the fair trial provision affect state repression without the independence of the judiciary. The effect of public trial and habeas corpus provisions operated as a double-edged sword. They significantly decrease repression when judiciary is independent, but they also significantly increase repressive behavior when judiciary is not independent. Obviously, these due process rights are directly related to states' interest in protecting their own security. States that are relatively sensitive about secretive information related to their management of threat will be more likely dismissive of public trials and legal detentions in which they have to present evidence for charges against persons.

More recently, Ginsburg et al. use data from the Comparative Constitutional Project, which is a database they have developed for the content of the national constitutional systems for the global set of countries since 1789, to examine whether the incorporation of international

human rights into national constitutions has a mediating effect on state respect for these rights (Ginsburg et al. 2013). That is, whether constitutions work as an effective mechanism for channeling international norms. They find that while international law of human rights represented by treaties has an independent effect on state behavior, portions of its effect are mediated through constitutional protections of the same law (2013, 90). These findings implicate an optimistic picture for the Human Rights Council and international human rights lawyers, who call on states to adopt the core principles of military justice set forth in the Draft Principles.

### 3.2 Theoretical Expectations for Constitutional Principles for Exceptional Courts and Political Repression

The legal justification for the Draft Principles for exceptional courts is derived from the international standards enshrined in the human rights law that guides the administration of justice. The Draft Principles for exceptional courts endorsed by the Human Rights Council (former Commission on Human Rights), best represent international law's attempt to situate the exceptional courts within the proper administration of justice system and normalize their procedures. This set of principles underlines the UN's rejection of the two extreme positions that see exceptional justice, to borrow from their expression, as "a form of justice, outside the scope of ordinary law, whether it's sanctified and placed above the basic principles of the rule of law, or demonized on the basis of the historical experiences of an all too recent past on many continents" (E/CN.4/2006/58). The Draft Principles, as asserted by legal scholars, reflect the UN's consistent approach to the international law constituted in international and regional treaties concerning human rights (Ní Aoláin and Gross 2013; Weissbrodt and Hansen 2013;

Conte 2013). These principles are modeled upon the legal protections provided in international law; inter alia, the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (ICCPR) (1976), and the Geneva Conventions (1949). Member states are expected to provide individuals with the judicial procedures guaranteed in international humanitarian and human rights law. In this sense, I believe that states' failure to apply the principles in military justice and exceptional tribunals results in violations of human rights, namely the right to fair trial, which is linked to the protection of various rights related to personal integrity abuse. Adding provisions for regulating exceptional judiciaries to national constitutions is intended to make it difficult for states to use exceptional courts to conceal their coercive behavior or to hold persons accountable for political offenses without presenting sufficient evidence, and will allow the press and the public to examine and assess the processing of cases transferred to these courts, which will diminish states' opportunities to restrict individual freedoms.

According to constructivists, the potential value for incorporating the draft principles for exceptional courts into national constitutions would be expected by international lawyers to provide legal remedies for persons under the control of governments from arbitrary coercive treatment. The human rights regime believes that by incorporating the judicial procedures of the Draft Principles for exceptional courts in states' national constitutions, the Draft Principles would become part of the binding contract between states and their citizens, which indicates to states' willingness to provide for legal protections in exceptional courts and allow these courts to converge with ordinary courts, and become as the Commission on Human Rights puts it "an integral part of the general judicial system" (E/CN.4/RES/2004/32). Thus, states will be less

likely to use repression. I expect generally that to the extent that constitutions provide for these international principles states will be less likely to engage in political repression.

Draft Principle No. 1, as applied to all extraordinary or exceptional courts, would hold that these courts are to be established only by the constitution or the law, respecting the principle of separation of powers. More specifically, according to the draft principles they must be an "integral part of the judicial system." This principle overlaps somewhat with Principle Number 5 of the 1985 U.N. Principle of Judicial Independence, that stipulates that "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures." which stipulates that everyone has the right to be tried at a court that is established by constitutional or statutory law. Establishing exceptional courts in the constitution as an integral part of the judiciary will protect the exceptional courts from the interference by the executive or the military. Thus, state agents will be more constrained from using exceptional courts as a tool of repression, which leads me to expect that constitutionalizing exceptional courts and placing them within the hierarchy of a separate judicial system, decreases the odds of states using exceptional courts as a tool of repression, and thereby, states will be less likely to engage in repression. Thus, I derive my first hypothesis.

> Hypothesis One: States in which exceptional courts are 1) explicitly established under the constitution and 2) are established as a part of the ordinary judiciary will be less likely to engage in political repression.

Principle No.2 states that exceptional courts must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law. This principle also overlaps with Principle No. 5 above which as

noted above requires the use "established legal procedures" and further holds that "Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals." While some disagreement exists over whether the right to a fair trial is a non-derogable right under the ICCPR, this draft principle takes a pragmatic approach. It draws linkages between the minimum guarantees of fair trial articulated in Article 14 of the ICCPR and the protection of the non-derogable rights, insisting that derogations of the fair trial right must not take place in order to circumvent other protections contained in the covenant. In fact, the Human Rights Committee notes in paragraph 4 of its General Comment No.13 that

> Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.

Legal scholars such as Weissbrodt and Hansen (2013) and Conte (2013) argue that there is no justification for states to consider that the application of derogations from the right to fair trial is acceptable by international law when this right is simultaneously protected in times of peace (article 14 of ICCPR) and times of war (Common Article 3 of Geneva Conventions). Weissbrodt and Hansen contend that this dual protection leads us to think that ensuring the right to fair trial is necessary for the protection of non-derogable rights of life, liberty, and physical integrity (307). Thus, I derive my second hypothesis.

> Hypothesis Two: States with constitutional provisions that more explicitly ensure the protection of the right to fair trial in exceptional or extraordinary courts will be less likely to engage in repression.

Principle No.3 stipulates that the application of martial law during crises should not compromise the guarantees of a fair trial. The Human Rights Council clearly argues that the fundamental guarantees of a fair trial should not fall under the derogations made when states of emergency is declared because deviating from the proper administration of justice may affect the protection of non-derogable rights. The theoretical justifications for the provisions that state the exceptions under which certain rights can be derogated drive the results to two opposite directions. As argued by Davenport 1996 and Keith et al. 2009, provisions placing limits on certain rights during crises may increase repression if they were intended to be exploited by states to apply repression, or may decrease repression if states were concerned by legitimating themselves in times of emergency. Although, it should be noted that Keith et al. posited an alternative hypothesis and found evidence that some provisions for states of emergencies, such as lists on non-derogable rights, had unintended consequences. I do not believe that this particular provision would be subject to the same unintended consequences. I believe that states that emphasize the protection of the right to fair trial under states of emergency indicate to their willingness to respect the right to fair trial in all situations. Thus, I derive my third hypothesis.

> Hypothesis Three: States with constitutions which more explicitly protect the right to fair trial during states of emergency will be less likely to use repression.

Principle No.4 states that military courts should have no jurisdiction over civilians in all times, and civilians accused of a criminal offense of any nature are to be tried by civilian courts. This principle also overlaps with principle # 5 of the UN's Principles on the Independence of the Judiciary. The concern for the trial of civilians in military courts arose from the Human Rights Commission's observations of the exceptional judicial and due process practices of the U.S military commissions and the extraordinary courts in other countries created for countering

terrorism. Legal scholars note that states' manipulation and blurring of the boundaries between "belligerent" and "nonbelligerent" acts of individuals accused of terrorism provided them with the opportunity of trying civilians in military courts that often lack the essential standards of independence and impartiality of the fair trial (Cole 2013; Solis 2013; Conte 2013). Although under the principles of the third Geneva Convention a prisoner of war shall be tried only by a military court, the status of "prisoner of war" is determined based on whether the act of the prisoner was a violation of the law of war (Solis 2013, 75). In his 2006 report on the questions of independence of the judiciary, administration of justice, and impunity, the former Special Rapporteur Leandro Despouy contends that "since civilians cannot commit offenses of a military nature, gross human rights violations and offenses committed by civilians must automatically be transferred to ordinary criminal courts" (UN Doc. A/61/384, para 26). I believe that including a provision for prohibiting exceptional courts from trying civilians will diminish opportunities for states to use exceptional courts as a tool of repression. Thus, I derive my fourth hypothesis.

> Hypothesis Four: States with a constitutional provision that bans trying civilians in military courts will be less likely to use repression.

Principle No.9 states that in all circumstances, the jurisdiction of military courts should be set aside in favor of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes. This principle is set in order to combat impunity, which contributes to the violations of physical integrity rights mentioned in the principle. The Special Rapporteur on the promotion and protection of human rights notes in the comment concomitant to this principle that since violations of human rights is not in the nature of the military conduct, the trial of offenses related to human rights violations must be out of the

scope of the military jurisdiction. The theoretical justification for opposing the trial of human rights violations in military courts is that military courts will have the interest to conceal the acts of their fellow officers, which presents a serious concern for the victims' ability to perceive the decisions of such courts as impartial (Conte 2013, 331). The provision is intended to ensure that civilians trust the rule of law in their quest of justice against the abusive behavior of state officials. Including a provision that prohibits exceptional courts from trying human rights violations will ensure that state agents will be held accountable for their violations of human rights in ordinary courts that uphold the rule of law. Allowing human rights violations to be tried exclusively by ordinary courts will deter state age from engaging in repressive actions. Thus, I derive my fifth hypothesis.

> Hypothesis Five: States with constitutional provision that prohibits the trial of human rights violations in military courts or special tribunals be less likely to use repression.

Principle No.17, it states that in all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. Incorporating this principle in the constitutional provisions is intended to bring the exceptional courts under the hierarchy of the general judicial system and make it an integral part of it. Furthermore, in compliance with persons' right to appeal under the right to fair trial, it provides remedies for the contested legality of decisions made by exceptional courts. The provision should protect persons from arbitrary decisions of speedy trials, the procedures for which may not comply with the judicial guarantees of the right to fair trial, including the right to be provided legal assistance, the right to examine witnesses, and the right not to be tortured for the purpose of extracting evidence for conviction This provision will prevent exceptional courts from establishing a parallel system outside the

control of the ordinary judicial system. Thus, it provides legal checks on punitive actions of torture and arbitrary executions. Thus, I expect, under this provision that states will be less likely to engage in abuse of physical integrity and posit my sixth hypothesis.

> Hypothesis Six: States with a constitutional provision that guarantees the right to appeal from an exceptional court to at a civil court will be less likely to use repression.

Empirical work based on a logical extension of the world society approach leads me to offer alternative hypotheses to the above hypothesis. This perspective finds that the diffusion of international norms over time played a role in legitimating states that adopted these norms into their constitutions. An extension of this logic part of the expectations of this approach is that overtime we would expect that states would incorporate international norms into their constitutions as means to assure legitimacy as a proper a nation-state, without necessarily having the intention or resources to implement them, thus leading to a decoupling effect in which formal rights commitment is associated with rights abuse (Hafner-Burton and Tsutsui 2005). This perspective found some empirical support in the treaties literature (Keith 1999; Hafner-Burton and Tsutsui 2005) and as noted above in some constitutional studies (Keith 2002a; Keith et al. 2009). Thus, I posit an overarching alternative hypothesis.

> Overarching Alternative Hypothesis: States with the above constitutional provisions will be more likely to use repression

Contextual factors play a vital role in defining the conditions under which "constitutional promises" are kept, as Davenport suggests (1996, 646). The domestic institutions approach suggests a key context, which has been demonstrated to lessen the likelihood and level of repression—judicial independence (Keith 2012). Independent ordinary courts constrain states'

opportunities to use repression, because 1) they are in charge of checking the constitutionality of states' actions, and 2) they provide citizens the legal tools to hold their regimes accountable for their arbitrary actions. In states with independent judiciaries, citizens are able to bring their grievances to courts. Human rights litigation will incur reputational costs on regimes, which will affect their calculations of costs and benefits of using repression (Keith 2012, 169). Thus, I would expect that provisions for regulating the judicial procedures of exceptional courts will be more likely respected by regimes in states where the ordinary courts are independent. This point has been examined in Keith's study of the impact of the constitutional provisions of the core freedoms, the key due process protections, and the states of emergency clauses on states' repressive behavior in the context of the presence of an independent judiciary (2012). She finds that such constitutional provisions produce lower levels of repression when the judiciary is independent (216, 269). I believe this expectation also holds in regard to constitutional provisions for exceptional courts, which leads me to hypothesize that provisions for the administration of justice in exceptional courts are more likely to decrease states' use of repression in the presence of an independent judiciary, which constitutes my eighth hypothesis.

> Hypothesis Eight: The effect of the above constitutional provisions may be conditioned upon the level of judicial independence in the state, with more judicial independence increasing the effect of the constitutional provisions.

Returning to Davenport's study of constitutional promises and repression, he finds that the explicitly mentioned provisions for states of emergency, which are the most related to states' derogation of human rights, produce lower levels of repression even in times of political conflict (1996, 648). In fact, political conflict with its delineations of protest, violent dissent, civil or interstate war, has received substantial empirical evidence to its impact on states' willingness to

use repression since it is responsible for generating serious threats to the rule of state leaders (for example, Poe and Tate 1994; Poe, Tate and Keith 1999; Keith et al. 2009; Davenport 2007; Keith 2012). However, the effect of constitutional law on states' repressive behavior during times of threat performed inconsistently across the literature. For example, while Davenport finds that provisions for the freedom of press and the states of emergency lower the level of restrictions placed on press and individual freedoms regardless of the level of threat generated by political conflict (1996, 648), Keith finds no significant effect of the states of emergency clauses on civil liberties regardless of the type or level of threat existing (2012, 282). The Human Rights Committee's opinion in this regard is stated in its general comment No. 13 on article 14 of ICCPR, in which the Committee notes that "quite often the reason for the establishment of such courts (exceptional courts) is to enable exceptional procedures to be applied which do not comply with the normal standards of justice." Legal scholars such as Ní Aoláin et al. focus their attention on the use of exceptional courts in constitutional democracies and note that exceptional courts are "particularly relevant to the way in which democracies have responded to threats and crises (2013, 2). This leads me to believe that constitutional provisions regulating exceptional courts may not withstand threats. Thus, I derive the following hypothesis.

> Hypothesis Nine: The more threat within the state, the less likely the constitutional provisions will be to reduce the use of repression.

### 3.3 Building the Data

Although information about the jurisdiction and codes of operation of exceptional courts is included within the text of many constitutional systems that establish exceptional courts, such information has not been previously coded. This study is the first attempt to gather and code data

on the establishment, jurisdiction and operational codes of exceptional courts. I developed measures for the six major provisions targeting exceptional courts, using constitutional texts of about 140 countries for the time-period of 1990-2005. I relied on the Comparative Constitutional Project as the primary source for the texts of the national constitutions effective in a country-year. However, CCP did not have the texts of some of the constitutional systems included in my dataset. For these cases, I obtained image-based format of the texts either from *HeinOnline*, which is a subscription-based online library for law and law related documents (www.heinonline.org), or from my Chair/mentor—Dr. Linda Keith, who gathered images of many constitutional texts during her research work on formal law and human rights. I coded every provision related to the Draft Principles included in this study, whether that provision was an amendment or an original text that was part of the constitution since its adoption. Below, I discuss the dependent and independent variables I include in my empirical models. I first address the measure I use for my dependent variable—political repression. Then I explain the coding guidelines and the structure of the measures of the constitutional exceptional courts variables. In addition, I present a brief explanation of the control variables that account for the standard model of repression.

**Dependent Variable**: My key dependent variable is political repression, or more specifically political repression of personal integrity rights. Prior studies of repression of physical integrity rights used multiple measures of state respect for personal integrity rights drawn from State Department and Amnesty International country-year reports, such as the measure of Political Terror Scale (PTS) and the Cingranelli and Richards measures (CIRI). However, I take advantage of the new latent measure of political repression that was constructed

by Christopher Fariss (Fariss 2014). The latent measure provides a more valid estimate of the theoretical concept of repression of physical integrity, because it takes into account such unobservable factors as the improvement in the reporting mechanisms of the human rights reports published by the two major sources of information on human rights—State Department and Amnesty International. The latent human rights variable is generated by using what Fariss calls "computational tools capable of linking diverse sources of data in theoretically meaningful ways," and incorporating the quantified increase in the information included in the reports (2014, 301). The scores of the latent human rights variable are produced by this model using information from multiple indicators of physical integrity abuse commonly used in the literature of human rights (Fariss 2014). The latent variable has interval-level measures, which makes data analysis for human rights scholars easier (Schnakenberg and Fariss 2014). The latent measure's values run from approximately -3 as the minimum value of respect for human rights up to 5 as the maximum value of respect for human rights. I have inverted the measure so that the higher values indicate more abuse of physical integrity rights, which reflects my theoretical conception of repression as discussed earlier.

**Key Explanatory Variables**: My key explanatory variables are constitutional delineation of principles governing the administration of justice through special or exceptional tribunals. I have created a code sheet for each of the principles I described earlier, which serve as the basis for my constitutional variables for exceptional courts. Since constitutional language may vary in the extent of specification and flexibility in addressing the principles, I have coded the variables to consider this variation. I have defined my codes as follow:

Provision not mentioned or no constitution (0)

Provision is provided with either unspecific language or some limitations such as derogations to be applied in emergency (1)
Provision mentioned explicitly and provided under all circumstances (2)

In addition, for four out of the six variables I applied a code of (-1) for constitutional provisions that explicitly denied the principles governing the administration of justice in exceptional courts.

Below I present the questionnaire I have constructed to use in coding my variables. This questionnaire format is similar to that employed by Ginsburg et al. in coding the constitutional data of the Comparative Constitutional Project (2014).

1) Exceptional or extraordinary courts are to be established by the constitution or the law and established as a part of the ordinary judiciary.
    a. Does the constitution specifically allow for or set up exceptional, extraordinary, military or special courts by name?
        i. If so, is the court explicitly a part of the ordinary judicial system?
    b. Does the constitution implicitly allow for, or set up exceptional, extraordinary or special courts in terms of process/ procedure identified by the special rapporteur as constituting a special court?
    c. Does the constitution explicitly ban special or exceptional courts?
    d. Does the constitution explicitly ban special or exceptional courts with some qualifications?

2) Guarantee of a fair trial in exceptional or extraordinary courts
    a. Does the constitution explicitly protect the right to fair trial in exceptional or extraordinary courts?
    b. Does the constitution explicitly protect the right to fair trial in exceptional or extraordinary courts with some exceptions? List
    c. Does the constitution explicitly derogate from the right to fair trial in exceptional or special courts? List

3) The application of martial law during crisis does not compromise the right to fair trial
    a. Does the constitution explicitly protect the right to fair trial during a state of emergency or state of exception?
    b. Does the constitution explicitly set up exceptions to the right of fair trial during a state of emergency or state of exception?
    c. What qualifications does the constitution make?

4) Military courts shall not try civilians in all times

a. Does the constitution explicitly forbid trying civilians in military courts?
b. Does the constitution explicitly forbid trying civilians in special courts with military judges?
c. Does the constitution specifically allow trying civilians in military courts under some circumstances?
d. What circumstances? List

5) Military courts shall not try cases of human rights violations
    a. Does the constitution explicitly allow trying human rights violations in military courts?
    b. Does the constitution explicitly allow trying human rights violations in military or special tribunals in some circumstances? List
    c. Does the constitution explicitly forbid transferring case of human rights violations to military courts?

6) Extraordinary court decisions shall have the right of appeal to ordinary courts
    a. Does the constitution explicitly provide for the right to appeal to an ordinary court from military, exceptional or special courts?
    b. Does the constitution explicitly deny the right to appeal to an ordinary court from military, exceptional or special courts?
    c. Does the constitution delineate other bodies to which the cases may be appealed?

**Conditional Variables**

**Judicial independence:** Scholars argue that an independent judiciary is "the ultimate guarantor of constitutionalism" (Ackerman 1991) or an "essential guardian of the rule of law" (Steiner and Alston 1996, 711) and as "powerful barriers against the tyranny of political assemblies" (de Tocqueville 1966, 261). Keith (2012) finds significant evidence of a strong conditional effect for judicial independence on the effectiveness of constitutional provisions. The role of the judiciary empowered by judicial review has been proved consistently to be effective in placing checks on the coercive actions of the state agents, which increases the potential costs of repression, leading to the protection of human rights (Keith 2012; Keith et al. 2009).

**Civil War:** I test civil wars' mediating effect on repression because they represent the most violent forms of domestic dissent and the most serious threat states face. In civil wars,

states are faced by armed resistance, for which the benefit of selecting the most coercive means of repression might trump its costs. The repression literature consistently demonstrated the significant influence of civil wars on states' repressive behavior (Poe and Tate 1994, Keith 1999; Davenport and Armstrong 2004; Abouharb and Cingranelli 2006; Keith 2012). However, given that the variable 'civil war' was given the value of (0) for the majority of country-year observations within my regional models, only one of the conditional models of civil has produced significant effects on repression, and that is the model for Latin America. I discuss the results for that model more thoroughly in the analysis section.

**Control Variables**

I include a series of control variables that have been consistently proven to be associated with states' repressive behavior and constitute the standard model of repression (Poe and Tate 1994; Poe, Tate and Keith 2012; Davenport and Armstrong 2004; Landman 2005; Keith 2012). I operationalize and discuss these variables thoroughly in Chapter Two. These variables include democracy, civil war, international war, military regime, Marxist regime, membership in ICCPR treaty, presence of office of human rights organization in country, economic development, economic growth and population size. Table 3.1 below presents the summary statistics of my dependent, independent, and control variables.

Table 3.1. Summary Statistics of all Variables

| Variable | Observations | Mean | Std. Dev. | Minimum | Maximum |
|---|---|---|---|---|---|
| Latent Repression | 3045 | 1.357731 | 1.414765 | -2.737812 | 4.599651 |

| | | | | | |
|---|---|---|---|---|---|
| Established EC | 2542 | .6176239 | .8796824 | 0 | 2 |
| Fair Trial in EC | 2542 | .0318647 | .1907121 | 0 | 2 |
| No Trial of Civilians in EC | 2542 | .1412274 | .5316801 | -1 | 2 |
| No Human Rights Trial in EC | 2542 | .0759245 | .5419609 | -1 | 2 |
| Appeal EC Decision | 2542 | .1652242 | .5826448 | -1 | 2 |
| No Derogation from Fair Trial during Emergency | 2541 | .162928 | .6811719 | -1 | 2 |
| Trichotomized Democracy | 2341 | 1.566852 | .8024502 | 1 | 3 |
| Judicial Independence | 2359 | .8872404 | .8460871 | 0 | 2 |
| Inter-state War | 2439 | .2804428 | .4493077 | 0 | 1 |
| Civil War | 2382 | .0961377 | .2948419 | 0 | 1 |
| Military Regime | 2382 | .1418976 | .3490183 | 0 | 1 |
| Leftist/ Marxist Regime | 2382 | .059194 | .2360369 | 0 | 1 |
| Logged Economic Development | 2250 | 23.58676 | 2.187365 | 18.6113 | 30.02892 |
| Economic Growth | 2248 | 1.677696 | 6.405633 | -50.48988 | 90.06702 |
| Logged Population Size | 2331 | 16.14878 | 1.468819 | 13.12955 | 20.99329 |
| Logged Number of HROs | 2180 | .9877651 | .6366184 | .6931472 | 4.276666 |
| Membership in ICCPR | 2381 | 1.610668 | .7767875 | 0 | 2 |
| Trade Openness | 2382 | 6.614502 | 1.379181 | 0 | 7.754053 |

### 3.4 Trends over Time

Figure 3.1 illustrates the worldwide adoption of new constitutions each year from 1789 to 2005 for the global set of countries. All of the constitutional systems included in the data illustrated here were effective either in all or certain years of the time-period of my study (1990-2005). On the face of it, it appears that the majority of the constitutional systems in my data were adopted in the last two decades. Of course, many factors may have played a role in causing the trend of constitutional writing in that period. Among those would be the democratization wave that swept through Latin America and parts of Africa, the end of the Cold War and the disintegration of the Soviet Union, or the worldwide spread of the international norms following the rise in international treaty ratification that caused many states to draft wholesale constitutions that converge with the international norms.

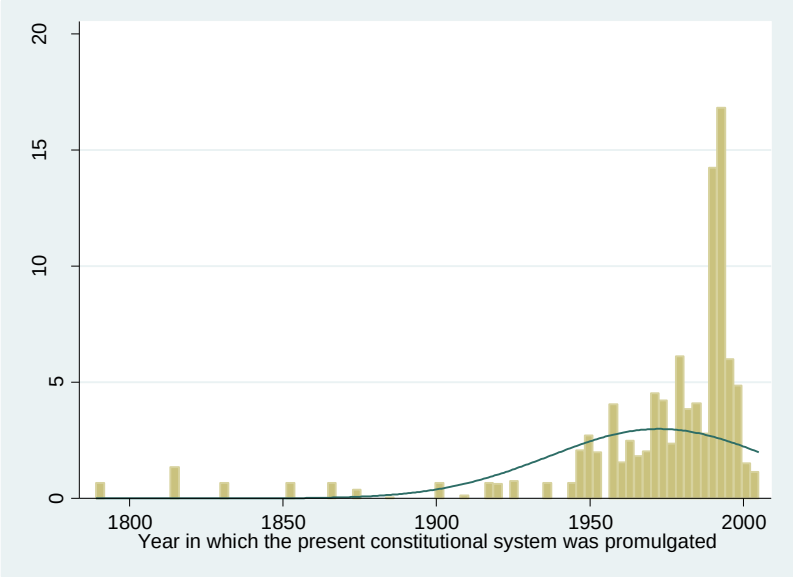


Figure 3.1. The Trending Adoption of New Constitutional Systems

The data of the constitutional variables addressing exceptional courts provide valuable insight into the trends in state adoption of these provisions. The constitutional provisions grouped in a 12-point additive index are shown in Figure 3.2. Here I demonstrate the degree to which these provisions are prevalent in the global set of constitutions. As the figure shows, these provisions were barely present in the constitutional systems before the 1980s. Only a handful of constitutions scored 7 points on the additive index in the 1960s. However, the number of constitutions scoring 7 points increases dramatically after year 1980. The trend spikes upward in the 1990s. Still, only a handful of constitutions score above 10 points. The figure suggests that the provisions became more prevalent around the same time-period of the boost in new constitutional writing, although these provisions might have been added to old constitutions by the process of constitutional amendments. Of course, the historical experiences of many countries around the world in the pre-Cold War era ushered in an era of human rights prosecutions aimed at state officials, particularly in Eastern Europe and Latin America (Sikkink 2011, Dancy and Michel 2015). I argue that constructing regression models that control for the regional differences may reveal possible behavioral change is a function of regional collective experiences rather than constitutional law.

In Figure 3.3 I present the mean constitutional level for all six principles governing the administration of justice in exceptional courts each year from 1990 to 2005. The provisions maintain steady presence across the sixteen-years' time-period. The provision establishing exceptional courts appears to be the provision with the greatest prevalence among all six provisions, with a mean level reaching to 0.7 in 2005, which means that more constitutions do not contain the provision establishing exceptional courts than there are constitutions that do.

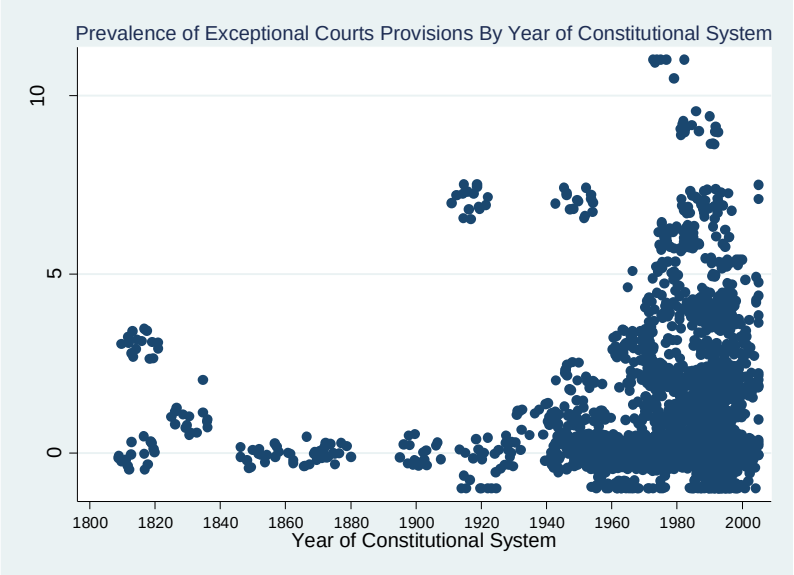


Figure 3.2. Prevalence of Exceptional Courts Provisions by Year of Constitutional System

Even among those constitutions that establish exceptional courts very few go so far as defining their jurisdiction or codes of operation. Four out of five provisions maintain the same mean level across time. Only one provision appears to increase in presence, and that is the provision that prohibits derogation from fair trial rights during emergency. The mean level for this provision shifts upward from nearly 0 in 1990 to 0.2 in 1996, then consistently maintains the mean level of 0.2 until year 2005. I note here that the mean for the measures of the provisions prohibiting the trial of civilians, the human rights trials, fair trial derogation, and the provision protecting the right to appeal exceptional courts' decisions is driven down by the codes of (-1) that were applied to cases where the provisions were explicitly denied. For example, the provision for the protection of fair trial from derogation during emergency was explicitly denied, and therefore coded -1 in 247 cases.

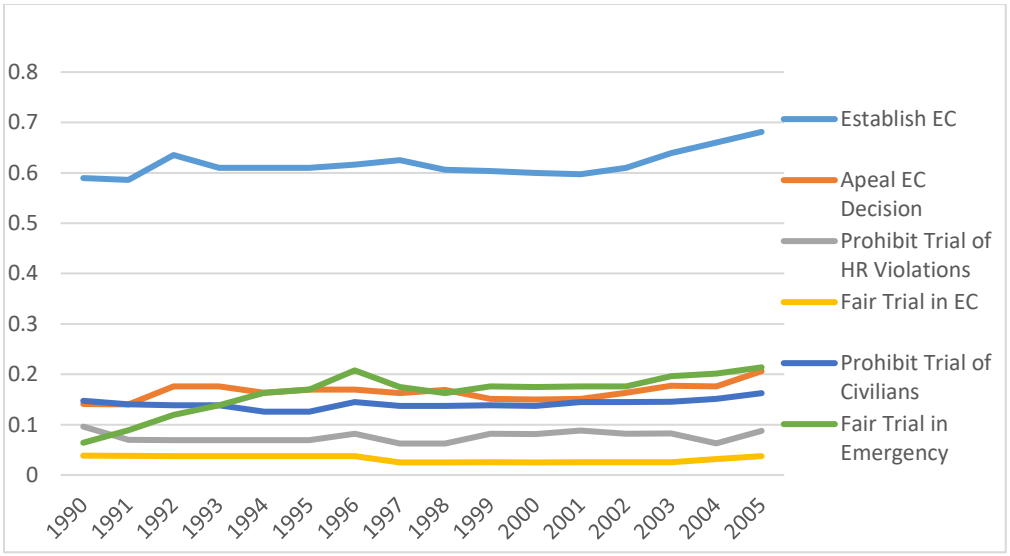


Figure 3.3. Mean level of Individual Measures of Exceptional Courts 1990-2005

### 3.5 Analysis

In order to answer the question of the effect of constitutional law of exceptional courts on state repressive behavior with confidence that unobserved characteristics of countries or the occurrence of external shocks in certain years do not bias the results, it is important to construct a model that accounts for such unobserved factors. Although using ordinary least squares model with robust standard errors and country and time fixed-effects included are the common model specifications employed in prior studies using panel data, such model specifications did not produce a fit model for my observations given the lack of over time variation in the within-country values of my predictors. Given the time-invariant data for the provisions of exceptional courts, I believe estimating region-specific models is the most appropriate approach to control for the constant unobserved characteristics of countries. Regional culture is an important substantive source of information about normative political behavior (Goodliffe and Hawkins

2006, Simmons 2009, Keith 2012). State repressive behavior triggers a response not only from domestic opposition but also from external actors such as the neighboring states, who may respond by seeking precautionary measures like increasing military presence at the borders. For this reason, state leaders tend to keep their level of repression similar to that of their neighboring governments (Davenport 2007, 87). I also include year fixed effects in my general and region-specific models to control for shocks or external events in certain years. The incorporation of these controls into my regression models would satisfactorily allow me to interpret the results under the assumption that we controlled for country and time fixed effects.

I ran a parallel analysis of two models: one with the independent variable of logged number of the human rights organizations within a country (HRO), and one without this variable. As Table 3.1 above shows, the logged HRO variable is not available for many country-year observations. Table 3.2 reports the results of the core measures of the first set of estimated models. I call these models the general models because they are estimated using all the countries in my dataset. Model 1 includes the variable (HRO permanent office). Model 2 is estimated without (HRO permanent office). The analysis supports my hypotheses regarding 1) the constitutional prohibition of human rights trials in exceptional courts, 2) fair trial derogations in emergency, and 3) the constitutional protection of the right to appeal exceptional courts' decisions in ordinary courts. An explicit provision of these provisions significantly lowers state's abuse of physical integrity rights. The provision prohibiting human rights trials in exceptional courts produces one of the most significant and most substantial coefficients in both models. A one-unit increase in the protection against holding human rights trials in exceptional courts reduces repression by 0.30. Thus, a maximum increase in the 4-point provision reduces

repression by .90. While the findings for the hypotheses of human rights trials (hypothesis five) and the right to appeal (hypothesis six) hold in both models, the finding for the hypothesis of fair trial in emergency (hypothesis three) is only significant in Model 2. These are not the only provisions that significantly influence state repressive behavior. Some of the most important provisions influencing state behavior are those showing evidence supporting the world society approach. The provisions prohibiting the trial of civilians in EC and protecting the right to fair trial in EC are strongly and positively associated with repression. A one-unit increase in the provision protecting the right to fair trial in EC produces a significant increase of 0.39 (Model 1) and 0.46 (Model 2) in repression. This provision produces the largest influence among the constitutional provisions regulating exceptional courts, strongly suggesting that states resort to coercive repression as a tool to eliminate the threat of opposition when constrained by constitutional rules that prevent them from using exceptional courts as an alternative venue to legally punish their challengers.

Table 3.2. The Effect of Constitutional Provisions for Exceptional Courts on Political Repression 1990-2005

| VARIABLES | (1)<br>1990-2005 with HRO | (2)<br>1990-2005 without HRO |
|---|---|---|
| Established Exceptional Courts | -0.0357* | -0.0156 |
| | (0.0206) | (0.0187) |
| Fair Trial Rights in Exceptional Courts | 0.392*** | 0.457*** |
| | (0.0750) | (0.0708) |
| Prohibit Trial of Civilians in Exceptional Courts | 0.328*** | 0.308*** |
| | (0.0313) | (0.0284) |
| Prohibit Human Rights Trials in Exceptional Courts | -0.294*** | -0.304*** |
| | (0.0430) | (0.0388) |
| Appeal Decision of Exceptional Courts | -0.0930*** | -0.0687*** |

| | | |
|---|---|---|
| | (0.0284) | (0.0230) |
| Protect Fair Trial in Emergency | 0.0166 | -0.0433** |
| | (0.0239) | (0.0191) |
| Observations | 1,710 | 2,151 |
| R-squared | 0.709 | 0.687 |
| Pseudo R-squared | | 0.683 |

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

With the exception of trade openness, all the control variables prove to be statistically significant in affecting state behavior in the expected direction. By far, the most influential of all variables is civil war.

A closer look at the geographic regions shows that with some exceptions, the provisions of exceptional courts performed virtually the same way as they did in the general model, but in varying degrees. Despite the apparent consistency in the effect of most of the provisions, I do, however, find some discrepancies in the regional models. For the set of the regional models without the variable HRO included, Table 3.3 shows the coefficients of the constitutional variables in five geographic regions: South and East Asia; North Africa, Near and Middle East; Sub-Saharan Africa; Latin America, Europe and the European Settled Countries. Not surprisingly, governments of the European countries along with the European-settled countries appear to be the most affected by the provisions of exceptional courts. Four out of the six provisions are statistically significant. They are strongly and negatively associated with coercive repression. In addition to the three provisions that consistently appear to be associated with decreased repression, the model for Europe shows support for the established exceptional courts hypothesis. Constitutionally established exceptional courts are strongly associated with less

coercive behavior in the European region, but the impact is quite small. A one-unit increase in the provision establishing exceptional courts reduces repression by 0.06. The coefficient for the provision for fair trial rights in exceptional courts shows significant harmful effects on repression. The effect appears to be great because it is produced only by Spain, which is the only country in the region whose constitution includes a qualified provision for fair trial in EC. Although Spain appears to be an outlier in this respect, I chose not to delete the case in order to keep it as reference for a future case-study. The provisions for the trial of civilians in EC and the protection of fair trial in EC, again, show harmful and substantive effects on repression. A result suggesting that old and stable democracies are no less impervious to utilizing repression of physical integrity rights in order to deal with threat when constitutional constraints on the use of exceptional courts to circumvent ordinary judicial procedures are in place.

The most important influences on coercive practices in Latin America are the provisions related to fair trial rights. The provisions for the right to appeal EC decisions, the protection of fair trial in emergency, and the protection of fair trial in EC lead to improvement in repressive practices. These results suggest is that the constitutional protection of fair judicial procedures in all types of courts and under all circumstances is key to preventing states from using legal covers for their coercive behavior. The results are encouraging news to the international human rights regime, whose goal is to allow EC to converge with ordinary courts and become an "integral part of the general judicial system" by applying the same legal protections guaranteed in ordinary courts.

The results for some of the provisions of exceptional courts in the rest of the geographic regions are also statistically significant, but in the opposite direction. While the provision

establishing exceptional courts is moderately associated with better human rights practices in Europe, it is more strongly associated with worse practices elsewhere. For each of the three regions, more provisions lead to worse coercive practices than lead to improvement. While only one provision is associated with better human rights practices for South and East Asia in the HRO model (reported in the Appendix), no provision leads to better practices when the controls for HRO are removed from the model for that region. Moreover, the provision for human rights trials has statistically significant effects on reducing coercive practices only in one model for the region of North Africa, Near and Middle East. However, none of the EC provisions appear to matter for state coercive practices in the North Africa, Near and Middle East region in the HRO model. Taken together, it appears that the effect of constitutional provisions of EC has a very limited significance, and that their impact is mediated by regional differences.

Table 3.3. The Effect of Constitutional Provisions for Exceptional Courts on Political Repression for All Five Regions 1990-2005

| VARIABLES | Europe and European Settle Countries/ without HRO | Latin America/ without HRO | Sub-Saharan Africa/ without HRO | North Africa, Near & Middle East/ without HRO | South & East Asia/ without HRO |
|---|---|---|---|---|---|
| Established Exceptional Courts | -0.0570** | -0.0188 | 0.0892*** | 0.0847** | 0.155*** |
| | (0.0290) | (0.0419) | (0.0317) | (0.0375) | (0.0489) |
| Fair Trial Rights in Exceptional Courts | 2.473*** | -0.656*** | 0.709*** | 0.710*** | -- |
| | (0.206) | (0.151) | (0.0976) | (0.106) | |
| Prohibit Trying Civilians in Exceptional Courts | 0.615*** | 0.235*** | 0.0550 | 0.0870* | -0.209 |
| | (0.0492) | (0.0338) | (0.0695) | (0.0504) | (0.129) |
| Prohibit Human Rights Trials in Exceptional Courts | -1.124*** | 0.0612 | -0.312*** | -0.449*** | 0.253** |
| | (0.0962) | (0.0520) | (0.0589) | (0.0693) | (0.118) |
| Exceptional Court's Decision Appealed | -0.190*** | -0.201*** | -0.315*** | -0.0771 | 0.0614 |

| | | | | | |
|---|---|---|---|---|---|
| | (0.0656) | (0.0326) | (0.0460) | (0.0496) | (0.0701) |
| Fair Trial Protected in Emergency | -0.0620* | -0.156*** | 0.0714** | -- | 0.0754 |
| | (0.0337) | (0.0418) | (0.0346) | -- | (0.157) |
| R-squared | 0.764 | 0.786 | 0.644 | 0.825 | 0.833 |
| Pseudo_R-squared | 0.751 | 0.766 | 0.625 | . | . |
| Observations | 582 | 336 | 636 | 289 | 308 |

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

I estimate two sets of regression models with interaction terms for the five regions: one set for the constitutional provisions and judicial independence, and one set for the constitutional provisions and civil war. Most of the interactions with civil war were omitted from the regional models given the high number of cases where neither the provisions were mentioned, nor there was a civil war. Therefore, I do not report the results for these models here. Table 3.4 reports the results for the models with interactions with judicial independence. The interactions with judicial independence reveal a regional pattern that is similar to the pattern produced by the effect of the individual provisions on repression, but greater in magnitude, specifically in Europe and Latin America. In the set of models for Europe and the European-settled countries the interactive terms suggest that constitutional provisions establishing the jurisdiction and codes of operation of exceptional courts are not effective in curbing the repressive behavior of states without having independent judiciary in those states. Some of the provisions switch from being strongly associated with less repression to producing even more harmful effects when the interactive terms are entered in the models of that region. For example, the provision prohibiting the trial of human rights violations in exceptional courts produces negative and significant effects on repression in the set of models without interaction terms. However, in the models with judicial independence interactive terms the provision not only loses its statistical significance,

but also increases repression by 0.90 and 0.83 with every unit increase in the provision. The interaction of the same provision with judicial independence significantly decreases coercive repression by 1.15 and 1.13. A result suggesting that an independent judiciary is crucial for the enforcement of these provisions in the European and European-settled countries.

A common theme running across all the regional models without the variable of HROs is that the provision prohibiting the trial of civilians in exceptional courts produces either insignificant or significant harmful effects on coercive repression, even when interacted with judicial independence. These results are somewhat contrary to the results in the models controlling for HRO, where we see that the provision produces negative and statistically significant effects in countries that do not have independent judiciary in the regions of South and East Asia and Sub-Saharan Africa, and in countries that do have independent judiciary in the region of North Africa, Near and Middle East. A result indicating to a role that human rights organizations play in those countries with regard to the trial of civilians in exceptional courts. Further research is needed to explore the distinct effect of this provision and its relationship with HROs. Judicial independence continues to produce negative and statistically significant coefficients across all regional models except in Latin America.

Table 3.4. Coefficients for the Provisions of Exceptional Courts with Judicial Independence Estimated in a Standard Model of Political Repression for the Five R 1990-2005

| VARIABLES | Europe and European Settle Countries/ without HRO | Latin America/ without HRO | Sub-Saharan Africa/ without HRO | Near and Middle East, North Africa/ without HRO | South & East Asia/ without HRO |
|---|---|---|---|---|---|
| Established Exceptional Courts | -0.0131 | 0.0610 | 0.0814** | 0.0728* | 0.165*** |

| | | | | | |
|---|---|---|---|---|---|
| | (0.0292) | (0.0526) | (0.0317) | (0.0392) | (0.0515) |
| Fair Trial Rights in Exceptional Courts | 3.054*** | -0.444*** | 0.514*** | 0.797*** | - |
| | (0.221) | (0.168) | (0.130) | (0.114) | |
| Prohibit Trying Civilians in Exceptional Courts | 0.245 | 0.184*** | 0.0561 | -0.0443 | -0.0657 |
| | (0.154) | (0.0578) | (0.119) | (0.0758) | (0.215) |
| Prohibit Human Rights Trials in Exceptional Courts | 0.829** | 0.0338 | -0.240** | -0.391*** | 0.0741 |
| | (0.334) | (0.0643) | (0.0945) | (0.0930) | (0.208) |
| Exceptional Court's Decision Appealed | 0.0981 | -0.167*** | -0.138 | -0.0596 | 0.0233 |
| | (0.124) | (0.0514) | (0.0909) | (0.0544) | (0.0955) |
| Fair Trial Protected in Emergency | -0.0520 | -0.0243 | 0.0406 | | 0.0126 |
| | (0.0577) | (0.0577) | (0.0527) | | (0.307) |
| Interaction of Civilians and Judicial Independence | 0.159* | 0.0951 | 0.000194 | 0.191** | -0.205 |
| | (0.0897) | (0.0708) | (0.134) | (0.0754) | (0.129) |
| Interaction of Human Rights Trials and Judicial Independence | -1.135*** | 0.106 | -0.0849 | -0.145 | 0.188 |
| | (0.192) | (0.113) | (0.0989) | (0.0957) | (0.140) |
| Interaction of Appeal and Judicial Independence | -0.215** | -0.143*** | -0.124** | -0.140 | -0.0391 |
| | (0.0904) | (0.0549) | (0.0511) | (0.112) | (0.0735) |
| Interaction of Fair Trial in EC and Judicial Independence | - | -0.935*** | - | - | - |
| | | (0.278) | | | |
| Interaction of Emergency and Judicial Independence | -0.0123 | -0.202*** | 0.0286 | | 0.0220 |
| | (0.0376) | (0.0560) | (0.0369) | | (0.184) |
| Trichotomized Democracy | -0.374*** | -0.196*** | -0.300*** | 1.031*** | -0.430*** |
| | (0.0499) | (0.0554) | (0.0510) | (0.0799) | (0.0549) |
| Judicial Independence | -0.114** | 0.0111 | -0.204*** | -0.119** | -0.0114 |
| | (0.0552) | (0.0554) | (0.0361) | (0.0597) | (0.0568) |
| Observations | 582 | 336 | 636 | 289 | 308 |
| R-squared | 0.775 | 0.801 | 0.646 | 0.831 | 0.835 |
| Pseudo_R-squared | 0.760 | 0.777 | 0.625 | . | . |

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

### 3.6 Conclusion

This study has been motivated by the Human Rights Council's concerns for the relationship between the utilization of exceptional tribunals and state coercive repressive behavior, and therefore, its calls on states to situate "military justice" within the general judicial system. In approaching these concerns, I have conducted an empirical analysis, drawing on competing theories of international law of human rights and comparative state behavior. Using

six provisions establishing exceptional courts, their jurisdiction, and codes of operation, I examined the trends and spacial patterns of the constitutional adoption of the provisions that parallel the Human Rights Council's Draft Principles Governing the Administration of Justice Through Military Tribunals. The descriptive analysis of the provisions shows that there is a time-series variation in their adoption that is likely linked to the end of the Cold War and the third wave of democratization, when many constitutions of countries of Latin America, Europe, and Africa were replaced with new constitutions. Although provisions regulating exceptional courts became more prevalent in the constitutions during the 1990s, the mean level of their adoption is quite small indicating that such provisions were never mentioned in many currently effective constitutions. Thus, little doubt remains that the incorporation of such provisions is related to the spread and convergence of constitutional rights. I do not claim that I empirically demonstrate that the international human rights regime is unlikely to have played a role in the increased regulatory acts of exceptional courts. Nor do I claim that the presence of provisions constraining the use of exceptional courts indicates a genuine embrace of fairer justice systems by states. I take advantage of the non-prevalence of these protections at this point of history of human rights to try to empirically understand how such provisions affect state behaviors if they do at all.

My analysis has focused on the effect of the individual provisions regulating exceptional courts on state coercive repressive behavior. On the surface of it, the findings in the general models show mixed evidence of the effect of the provisions on state behavior. However, consistency in the performance of most provisions across regional regressions and in regional models with judicial independence interactions confirm that states do respond to provisions regulating judicial procedures of exceptional courts. Comparing the provisions' impact across

issue area in ways relevant to states' calculations of cost and benefit of using repression, the provisions prohibiting the trial of human rights violations in exceptional courts, protecting the right to appeal exceptional courts' decisions, prohibiting fair trial derogations during emergency are more likely to increase the cost of repression. These are the provisions that when activated, hold statesmen accountable for their violations of human rights in judicial venues that are less amenable to their control. Whereas provisions establishing exceptional courts, prohibiting the trial of civilians in exceptional courts , and protecting fair trial in exceptional courts are likely to increase repressive behavior because they provoke states to respond in a way that is difficult to be observed by the public. Removing their challengers from the public and eliminating their threat using coercive tools like prolonged imprisonment, torture, unlawful killing, or even disappearance can be less costly than trying them in courts, where judicial procedures can be observed by civil society groups, HROs, and the media.

The results in general challenge both realists and constructivists to accept that the work of human rights practitioners has achieved some of their goals but not without hurdles. Overall, the findings suggest that states are much likely to comply with constitutional provisions establishing exceptional courts, their jurisdiction, and codes of operation. However, compliance does not mean improvement in human rights practices when it comes to exceptional courts. It means that states make conscious reference to the constitutional treatment of exceptional courts in their calculations of the cost and benefit of utilizing exceptional courts for punishing people under their custody. Latin America represents a distinct case-region in this regard. It is the only region with only one provision that produces unintended effects, and that is the provision prohibiting the trial of civilians in exceptional courts. The provisions protecting fair trial in exceptional

courts and during state emergency, the provision protecting the right to appeal exceptional courts decisions, and the provision prohibiting human rights trial in EC are all associated with improved human rights behavior in the region. Possible explanation for this phenomenon is the collective historical experiences of the countries of this region, where what Pereira calls a "military-judicial collaboration" was the norm in South American military dictatorships (2008, 24), and where a proliferation of human rights prosecutions has marked the period after the fall of the military dictatorships (Sikkink 2011, Dancy and Michel 2015). This relationship merits further examination as it would benefit the debate over the integration of military courts into the ordinary judicial system. Beyond the statistical analysis, the results suggest that international human rights lawyers should promote the Draft Principles through success stories of models on the ground to further the process of internalizing the norms. Given the short time-period of my study, it seems equally important to extend the data to include the past decade. This extension would help in examining whether there is a persistence in the performance of provisions that constrain states' use of exceptional courts and hold them accountable for their crimes.

## Chapter 4

## How Do Exceptional Courts Facilitate Political Repression?

In 2006 five mandate holders of the special procedures of the Commission on Human Rights submitted a joint report Bay to the Office of the High Commissioner of Human Rights on the situation of the detainees held at the United States Naval Base at Guantanamo. In the report they discussed issues pertinent to the US violations of international human rights law, raising concerns for the measures undertaken by the U.S government to combat terrorism (UN doc. E/CN.4/2006/120). The Special Rapporteurs criticize the United States for not implementing its obligations under international law in providing detainees at Guantanamo Bay their right to fair trial. They argue that although the right to fair trial is not enumerated under the non-derogable rights provided for in article 4(2) of the International Covenant on Civil and Political Rights (ICCPR), which the U.S is a state party to, any derogation from this right during states of emergency should not be incompatible with the Convention. Their report raises a number of important issues pertinent to the structure and operational procedures of the U.S military commissions at Guantanamo Bay that constitute blatant violations of human rights. The Special Rapporteurs note, *inter alia*, that the structure of the judicial body of the military commission does not meet the fundamental requirements of independence and impartiality for fair trials. The appointment and removal procedures of judges and defense council of the commission are under full control of the executive, leaving the commission outside the supervision of the ordinary court system. Military judges are incompetent to make impartial decisions due to the lack of independence from the command chain and the lack of sufficient legal training. The rapporteurs identify several other dimensions that do not comply with non-derogable due process guarantees

provided for in international human rights and humanitarian law: pre-trial practices which include interrogation techniques involving torture, arbitrary detentions without enabling detainees to challenge the legality of their detention and also denying them the right to be tried within a reasonable time period. In this paper, I shift my focus to states which have constituted exceptional courts, and examine the *de facto* structural and procedural features of the courts. I use the term exceptional courts throughout my dissertation research to describe "domestic courts specifically created to try offenses related to state security (broadly conceived), the use of military courts to try civilians, or where governments themselves categorize the procedures as special" (Weissbrodt and Hansen 2013, 306). I seek to investigate whether and how would the utilization of the exceptional tribunals affect state repression of international human rights. Primarily, I'm interested in examining the rational-actor approach of the judicialization of repression as a cost-effective state practice to respond to threat to national security or the security of the ruling government. Also, I would like to explore whether and the extent to which democratic regimes may be converging with authoritarian regimes by making use of such courts in response to high levels of threat such as terrorism. Unlike their authoritarian counterparts, democratic regimes have institutional limitations that constrain the range of actions the executive can take to respond to threat, and exceptional courts may be one of the few ways in which democratic regimes can respond with less constraint and still maintain some degree of legitimacy. Thus, the study of actual exceptional and extraordinary courts in use in states is particularly relevant to the way democracies manage threat while balancing rights obligations. An in-depth examination of the structural and operational features of such courts allow us to discern the degree to which institutions comply with international standards of fair trials, and to

discern patterns across various regions of the globe. And subsequently this exploration will allow me to examine the ways in which the variation in structural and procedural features may facilitate or constrain state abuse of human rights. The comparative assessment of exceptional courts in democratic and nondemocratic regimes will provide us with an insight regarding the patterns, similarities, and differences that reflect on state practices in managing crisis.

Legal scholars such as Ní Aoláin and Gross (2013), and their contributors present a collection of case studies focusing on an array of exceptional courts and military tribunals, in which they analyze the types of structural and procedural modifications that distinguish these courts, and in which they critically assess the extent these courts deviate from the standard guarantees of the right to fair trial. For example, Jackson traces the evolution of the Diplock Courts that were established by the British government in 1972 to try cases of terrorism during the Northern Ireland conflict. He focuses on the structural and judicial procedures that kept moving away from the initial non-jury single judge mode of trial towards a normalized and acceptable mode of trial in terms of human rights (2013, 225-44). The case studies in Ní Aoláin and Gross's edited volume provide a foundation for my empirical analysis, upon which interface of exceptional courts and the judicial standards of international law will illustrate the ways in which exceptional courts influence repression. Comparative analysis of the case studies in this collection suggests that various forms of exceptional courts have been used historically, and regardless of whether they were deemed legitimate or not, they were preferred by state actors in order to bypass the standard rules of justice provided by ordinary courts (Ní Aoláin et al. 2013, 10).

While exceptional courts are not a new phenomenon, they have been overlooked in the literature of justice and political repression. Most of the empirical literature studying the role of judicial independence in protecting human rights focuses only on ordinary court systems. My research project will fill this gap in the literature. Two central concerns emerge in the literature about exceptional courts: 1) the structural and functional modifications applied to those courts violate the fundamental rights to fair trail, especially in post 9/11 security-conscious climate, and 2) that they potentially enable state executives to use these courts to punish their challengers or to dampen opposition. From the point view of the international law these courts suffer legal and ethical deficiencies that undermine internationally recognized principles of judicial independence necessary for guaranteeing the protection of fundamental human rights. Specifically, the structural and procedural features states adopt for these courts fail to provide the guarantee of an independent and impartial tribunal under the right to fair trial, which is provided for in numerous international human rights treaties: Article 14 of the International Covenant on Civil and Political Rights ICCPR; Article 8 of the American Convention on Human Rights; article 6 of the European Convention of Human Rights (ECHR); and Articles 7 and 26 of the African Charter on Human and People's Rights. For example, the reports of the special procedures for the Office of the High Commissioner of Human Rights underscore the organizational aspects and procedural rules of the U.S military commission that do not satisfy the requirements for ensuring the right to fair trial to all persons in times of peace and armed conflict (UN doc. E/CN.4/Sub.2/2004/7; E/CN.4/2006/120). The reports point out to multiple judicial innovations applied by the U.S military commission that violate instruments of international human rights law to which the U.S is a state party. The reports state that the executive branch has direct influence on the judicial

procedures of the military courts. It is the appointing and removing power of all of the commission's members. Defense lawyers could not secure the right to confidential communication with their clients. Charges were based on evidence obtained through violent means of interrogation. Under the military commission's rule of indefinite detention, most of the prisoners at Guantanamo remain held without facing charges for specific offenses. In fact, information generated in human rights reports of other various sources, including those of non-governmental organizations and media outlets strongly suggest that the military courts established by the Bush administration and legislated by congress in Military Act 2001, and the subsequent Military Acts of 2006 and 2009 constitute a violation of the right to fair trial guaranteed in peace time (article 14 of ICCPR) and war times (Common Article 3 of the Geneva Conventions) (Weissbrodt and Hansen 2013, 318; Human Rights Watch 2013).

The established literature on political repression suggests that the selection of repressive techniques is likely based on states' calculations of the cost and benefit of repression. The purpose of my dissertation research is to explore the institutional and procedural characteristics of exceptional courts that may make such courts an effective tool of repression that avoids some costs to state legitimacy that resort to repression typically entails.

In the next section I review the theoretical and empirical literature on the use of exceptional courts and repression. Then I set out a theoretical framework for the causal linkages between exceptional courts and political repression. In the subsequent section, I generate hypotheses for the conditions under which exceptional courts influence states' repressive behavior. Before discussing my empirical findings and conclusions about the impact of exceptional courts on state behavior, I explain my method for collecting and analyzing data.

## 4.1 Exceptional Courts and Political Repression in Research

Some scholars and international human rights lawyers have been especially critical of the increasing use of exceptional courts. Although the establishment of exceptional courts has been a common practice in various polities since long ago, empirical cross-national research addressing the question of the relationship between such courts and state behavior is lacking in the literature. My research addresses this gap in the literature of judicial politics by empirically analyzing the interplay between the judicial modifications applied in exceptional courts and the internationally recognized principles of fair trial to draw inferences about the impact of exceptional courts on the use of repression. The vast majority of the studies related to the role of exceptional courts in state repression are excellent comparative case studies, delineating patterns of exceptional judicial processes and functions that are correlated with violations of fundamental human rights. The following case studies of exceptional courts underscore a variety of structural and procedural features of exceptional courts in different political contexts, and assess the functions of these courts and the goals they serve in different political environments. Valuable information in these case studies provides me with the foundation upon which I build my cross-national empirical analysis of exceptional courts and repression and wish to paint a bigger picture.

Fuller (1982) is one of the earliest examinations of military tribunals. He examines one of the earliest military justice systems of Europe, the military courts under the Russian Tsarist regime, and provides the underpinnings of regime's choice to rather try civilians in the military courts than allowing for their trial in the special adjudicating body, the so-called Special Office

of the Governing Senate (OPPS), which was under the direct influence of the Emperor and the state senators. He contends that the regime's choice stems out of its desperate desire to demolish the revolutionary members of the People's Will before they gain momentum in the early 1880s. Here the threat of dissent was very high, and any adjudicative body may have been softer on the defendants than the military courts would have been. Moreover, given the exigencies of the political situation, a host of factors related to the structural and procedural features of the military court that made it more cost-effective for the regime to transfer these cases to it: the speedy procedures of the military courts seemed more attractive in time of crisis, the simple requirements for presenting evidence, the chain of command aspect attached to the identity of the military personnel filling the positions of the judge, prosecutor, and defense attorney, all served in the application of the empire's repressive policies (300-301). Fuller concludes that despite the professional education of the military jurists in the Alexander Academy of military law, which resembles the civilian law schools, and despite the congruence of the codes of the criminal justice of the civilian and the military justice systems, the Emperor was able to extend his influence on the military court and extract the indictments needed to crush the revolutionaries.

Pereira (1998) examines the power relationship between the Brazilian military regime and the civilian judiciary and their effect on Brazil's repressive behavior. He argues that the institutional merging of the military courts with the civilian judicial system allowed for both: legitimation of state's use of repression against their challengers, and the gradual upholding of human rights through the legal contestation of repression (44). The peculiarity of the Brazilian military courts as somewhat independent from the regime and embedded in the long established ordinary court system gave these courts a façade of legitimacy that allowed it to play multiple

and contradictory roles; aiding the regime's repressive behavior sometimes, and providing legal remedies for those accused of political offenses in other times. However, Periera fails to provide a theoretical explanation about the implications of the institutional arrangements of the Brazilian military courts for the type or level of political repression practiced by the regime.

Pereira's research is based on descriptive analysis of approximately 259 political cases (37% of all cases) representative of a broad range of defendants that were brought to Brazil's appellate court of the military justice under the military regime (1964-1979). The data is gathered from the "Nunca Mas" archive, which is considered a rich source of information on Brazil's national security policies under the military regime. A primary distinctive feature of Brazil's military courts was that both the district military courts and the Superior Tribunal Militar were hybrid military and civil institutions. Each district court consisted of four military judges and one civil judge. The Superior Tribunal Militar, which appealed most of the political cases, consisted of ten military judges and five civil judges. Pereira contends that on one level the political trials in the military courts shaped the regime's national security policies, and on the other level they helped prolong the regime's survival period. The structural and operational features of the military courts facilitated the political environment in which these political trials became a platform for civil rights debates, and the civil defense lawyers were able to maneuver and push for less radical interpretations of the national security law (53). Pereira also finds that while torture was systemically used against political prisoners, nearly 54% of the cases achieved acquittal in the appellate court. In this sense, he concludes that prisoners received their punishment for engaging in any act of dissent in the short period of torture that preceded their

trial. Such repressive tactics may have served as a deterring effect on opposition, and spared the government the cost of engagement in wider and more aggressive repressive actions.

Exceptional courts were spawned by authoritarian regimes across the Arab world. Reza (2007) presents the case of Egypt to highlight the roles and consequences of using exceptional courts in trying political offenses against the backdrop of permanent states of emergency. The military regimes of Egypt have long used exceptional courts for maintaining their strong hold on power. The role played by Egyptian military courts during the long lived emergency rule has plagued Egypt's records of human rights practices. The Egyptian constitution of 1971, which was in effect until the Arab Spring revolution in 2011, provided for the establishment of a separate system of military courts and vested the power of referring civilians to those courts in the presidency (Law Library of Congress 2014, Reza 2007). Reza's case study illustrates the role the exceptional and military courts of Egypt played in enabling the ordinary judiciary to push for a liberal agenda (534). In a historical narrative of Egypt's permanent emergency rule enforced by the military regime's apparatus, which include exceptional judicial institutions, Reza notes the excessive powers assumed by the president under the 1958 Emergency Law. States of emergency under that law can be declared "whenever public security or order is threatened" (537). One can infer from the loose language of the Emergency Law that the regime can easily manufacture situations in which the declaration of the states of emergency is legitimate, and it is exactly what the Egyptian military regime represented by its three subsequent presidencies did . Among the powers granted to the president during emergency is that "president may restrict people's freedom of assembly, movement, residence, or passage in specific times and places; arrest suspects and order (and) detain them; allow searches of persons and places without being

restricted by the Criminal Procedure Code, and assign anyone to perform any of these tasks". Continuous acts of mass arrests and indefinite detentions, and the creation of exceptional courts prevailed in Egypt as a result of this provision (538-539).

Reza emphasizes through his demonstration of the Egyptian judiciary arrangements that Egypt has created an array of exceptional courts for different political purposes, some of which were abolished, like the state security court, which was a form of courts-martial institution—utilized for disciplinary purposes of the public officials. However, even this military justice system has been used for trying civilians in terrorism cases. He does not explicate the similarities and differences between these types of exceptional courts, nor does he provide an account of whether one type of the Egyptian exceptional courts is more likely to be associated with states' coercive behavior than the others.

The exceptional courts of Egypt resemble the military courts of Brazil in that they consist of military and civilian judges. Reza contends that because the Egyptian ordinary judicial system was well established since the colonial period that preceded the Free-Officers' revolution in 1952, the judicial innovations that spawned the long military rule's period were essentially a reflection of the regime's distrust of the ordinary judiciary's, which has tried to challenge the regime on few occasions (540). He notes how the state's emergency courts in times tried salient cases of nonpolitical nature that could have been tried in ordinary courts, only because they served to enhance the image of the regime and perhaps elevate the legitimate image of the exceptional courts to compete with that of the ordinary courts. The case of the 50 homosexuals tried in the emergency-court in 2001, for example, illustrates regime's tactics to bolster public support for the exceptional courts, given the general public feeling of disengagement with

homosexuals (547). Yet, the distrust experience between the civilian-military judicial institutions did not lead to the state's moderation of repressive behavior. On the contrary, a new type of exceptional courts with extensive powers was created under the constitutional amendments of 2007 justified this time by the protection of the society from terrorism. The passing of this constitutional amendment meant that these new exceptional courts were not subject to the power of judicial review (541). Reza notes the continuation of Egypt's exceptional judiciary power alongside an increasingly independent ordinary judiciary using the strategic approach of judiciary's behavior. He concludes that Egypt's ordinary judiciary was aware that the state was capable of curbing its judicial powers if it keeps pushing against the state's political interests. Therefore, the judiciary sacrificed its role of defending individual rights to be able to chip away liberal political reforms related to electoral laws and freedom of press (549). The key issue that remerges in every case study of exceptional courts is the interplay between the ordinary and the exceptional courts of the state. Where the ordinary judiciary is able to engage and pursue outcomes protecting human rights, the exceptional courts are more likely to decrease states' repressive behavior (as in the case of Brazil). And where the ordinary judiciary chooses to be apolitical in a sense, exceptional courts encourage more aggressive and widespread repressive behavior (as in the cases of Chile and Egypt).

In terms of the international concerns of the human rights situation under the continuous emergency rule of the Egyptian regime, Reza notes that the military regime of Egypt exploited the international rhetoric about fighting terrorism to justify its own endless emergency policies. He cites an Egyptian government's response to a UN's Commission on Human Rights inquiry about the "semi-permanent state of emergency" in 2004:

> "In the circumstances that faced the country following the assassination of President Mohammed Anwar al-Sadat (in1981), Egypt was forced to declare a state of emergency, which was subsequently extended in order to deal with the phenomenon of terrorism and to protect the security and stability of society (544)".

These justifications seem to reflect on the UN Human Rights Special Procedures' repeated assessments regarding the U.S making a model of its military commissions for other regimes to emulate and use as a justification for their own repressive behavior. Thus, in the context of the war on terror, exceptional justice will potentially present us with a serious threat to international human rights (Conte 2013, 327).

To my knowledge, Kyle and Reiter's study of the military judicial reforms in Latin America is the only empirical research in existing literature that attempts to understand under what conditions military justice reforms can preclude impunity. The authors note that within the democratic systems of Latin America, military courts in some of these states have jurisdiction over cases of military personnel who committed violations of human rights. They seek to explain this variation in the jurisdiction of military courts over human rights violations committed by military personnel in the democratized states of Latin America drawing on two factors: the strength of autonomy of the military institutions and the strength of civilian reformers to remove human rights cases from the jurisdiction of the military courts. Theoretical expectations of reform emphasize the roles of the human rights advocates and the military institution in determining the magnitude of reforms of the military justice. Human rights advocates push for providing justice for victims of human rights violations at civil courts. And military institutions wish to continue to extend direct influence over their personnel through their courts. This

contentious relationship between the two groups impedes complete reforms to preclude impunity.

They identify two sources for the variation in reforms of military justice: 1) the strength of civilian reformers, represented by the density of nongovernmental human rights organizations, competitiveness of political participation (Polity IV), and quality of the rule of law; and 2) the strength of resistance to reform by the military institution represented by military budget, military size, and military prerogatives. They build a model to estimate the degree of military justice reform for seventeen Latin American states over a time period of five years. They code for the degree of military justice reform from the State Department annual reports along with other NGO reports such as that of Amnesty International. The degree of reform constitutes the ability of the civilian jurisdiction to decide cases of human rights violations in order to prevent military's arbitrary exercise of coercive power in combating domestic threats, such as drug trafficking and civil wars. They find that four states experienced complete reform of the military justice system to preclude impunity. The common factors between those states are that they either have no formal military forces (Costa Rica and Panama) or their military is subordinated to the civilian power (Nicaragua and Argentina). In addition, all four states experienced strong civilian reforms. The findings of this study provide the perfect recipe for precluding impunity. The study suggests that a high level of democratization in which the civilian judiciary is independent and human rights advocates actively push for justice to be achieved for the victims of human rights violations will produce greater degrees of reform of the military courts.

While the findings of their model are robust, the study has some limitations. I believe Kyle and Reiter's model is weak because it does not control for contextual conditions that allow

for the reform of the military courts. The military courts become major players specifically in times of threat. They note for example, that the outliers for strong military justice reforms are Mexico and Brazil. These states were unable to reform their military justice system despite the strength of their civilian reformers and the weakness of their military autonomy, and they attribute this result to the high level of internal threats they experience from organized crime and drug dealers, but they don't include threat in their model. As I discussed above, the level of threat plays a major role in instigating exceptional repressive measures, which may include invoking exceptional judicial procedures as means to manage threats. Military forces in countries of Latin America have a long history of playing a primary role of enforcing order in times of exceptional threat. Such conditions allow the military to become stronger. Expanding the power of the military may create opportunities for its members to overstep their boundaries and commit violations of human rights if they know that they could get away with. As a result, the state may experience a potential of reversal to gross violations of human rights. Furthermore, the authors claim that the issue of military justice reform is "still vital for the protection of human rights in the region today" (30), but they do not test this hypothesis. Their study lacks empirical implications for the level of political repression associated with the degree of reform these states are experiencing. My research addresses this relationship between repression and various forms of military courts, as a component for exceptional courts, to provide a better understanding of the types of judicial reforms that will more likely reduce repression. In the next section I outline the theoretical perspectives of exceptional courts and repression, and subsequently, derive specific testable hypotheses regarding structural and procedural features of exceptional courts and states' repressive behavior.

## 4.2 Theoretical Expectations of Exceptional Courts and Political Repression

International lawyers, human rights advocates, and legal scholars have established that the judiciary plays an essential role in protecting human rights by ensuring state agents' compliance with their international and constitutional obligations towards citizens (Office of the Higher Commissioner for Human Rights 1985, 1994; Epp 1998; Keith 2012). They consider courts as the cornerstone for safeguarding the rule of law, under which all persons are treated equally. The domestic institutions and democratic peace literatures argue that state institutions and structures can both facilitate and constrain state use of repression. Keith (2012) applies this rational actor perspective that recognizes the role of numerous domestic actors and institutions within the state, arguing that they likely either affect the regime's menu of acceptable policy options or they influence the regime's calculation of the costs and benefits of engaging in repressive action. In regard to the judiciary the perspective argues that courts can potentially provide the public the tools and or a venue through which they can hold the state accountable should engage in repression (Keith 2002a,b; Keith, Poe and Tate 2009; Powell and Staton 2009; Keith 2012). Moreover, Powell and Staton (2009) argue that in states with an effective judiciary, state repression may result in rights claims through which the regime may incur a loss of resources as punishment for violating its obligations (154). Furthermore, as Keith (2012) notes, "not only may the regime incur losses of resources, such litigation also introduces potential cost of repression may affect the regime's cost-benefit calculation in its decision whether to employ coercive force against its citizens." A small body of empirical research has then emerged that examines the institutional structures and procedures of the judiciary that guarantee its

independence from the executive and legislative powers and ensure its ability to protect individuals' right to fair trial and various other related human rights (Howard and Carey 2004; Keith 2002b; Keith 2012). Keith (2002b) and subsequently Keith, Poe and Tate (2009) identify and examine the effect of the basic components of internationally recognized standards that enhance judicial independence and allow courts to effectively curb state repression. Keith finds the protected terms, fiscal autonomy, and a separation of powers system were associated with a lower probability of repression of civil liberties, and Keith et al. find that provisions for the exclusive judicial authority and finality of decisions lessened the odds of repression of personal integrity rights. The one common UN principle found to be significant in the study of both types of political repression was the ban against exceptional courts. Principle #5 of the basic principles for Judicial Independence promulgated by the UN in 1985 prescribes the use of exceptional courts:

> Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

This principle establishes that in all circumstances persons who are subject to trial shall be tried by ordinary courts. It suggests that military courts and other special tribunals are incapable of providing the legal process that is essential to the effective administration of justice. Subsequently Keith (2012) finds that having a functioning independent judiciary that satisfies the internationally recognized requirements of judicial independence and an impartial tribunal

lessens the probability of multiple forms of repression (188). Such legal procedures are reflected in the fundamental human right to fair trial as established in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other regional treaties. The basic components of this right provide persons who are subject to trial:

> A fair and public hearing by a competent, independent, and impartial tribunal established by law; the right to be presumed innocent; the right to be informed promptly with the charges against him; the right to be tried without unduly delay; the right to have legal assistance and the ability to communicate with counsel; the right to be tried without undue delay; the right to be tried in one's presence; the right to examine witnesses; and the right to appeal conviction to a higher tribunal (UN doc. Treaty series, vol. 999, 171).

While the development of theories to explain the association between independent judiciaries and rights protection would seem to be a vital undertaking to understand variation in human rights practices, to date only the empirical studies above and qualitative studies have attempted to provide theoretical explanations about exceptional courts and human rights practices, which is perplexing, given the burgeoning documentation of human rights violations coming from reports of the international human rights instruments that highlight the rise of role of exceptional courts in such practices. Most of the discussion advanced in the qualitative literature that seeks to understand the consequences of states' utilization of exceptional courts support the proposition that state leaders create exceptional courts to pursue illegal strategies of punishing persons that may have been involved in challenging the state under the cover of judiciary (Ginsburg and Moustafa 2008; Moustafa 2008; Pereira 2008; Barros 2008; Kyle and Reiter 2011; Ní Aoláin and Gross. 2013). However, such scholars acknowledge that exceptional

courts serve different functions in different polities and under different political conditions. Therefore, exceptional courts' role and functions in states' repressive policies should be examined within the political context of these states.

The majority of the qualitative research on the relationship between the judicial institutions and repression argues that state leaders use exceptional courts for two main reasons: 1) legitimizing repression, which is achieved by providing a veneer of legality for state agents' unlawful actions and 2) impunity, by which state actors who are tried in such courts for committing gross violations of human right will not be punished for their actions. Overall, the literature supports the conclusion that military courts and special tribunals overstep their designated powers and they do so with the assistance or under the control of the state actors.

In synthesizing the literature, I notice that the focus to date has been on the question of why states use exceptional courts when ordinary courts are established. The range of case studies that explore various types of exceptional courts and the political consequences that result from resorting to them raises some issues related to the structural, procedural, and power arrangements of these courts and their relation to human rights, but fails to examine their political implications. In fact, exceptional court's structural and procedural features and the powers allocated to them are the core issues examined by the international human rights instruments. While the qualitative literature I synthesize here stands at the margins of the question of the relationship between exceptional courts and the international oversight, I fill this gap in the literature and seek to determine whether the presence of operating exceptional courts, the structural and procedural features of those courts, and the powers allocated to them facilitate political repression. This question matters in light of the international human rights reports that exhibit an increasingly

prominent role of exceptional courts in states' violation of internationally recognized human rights. The focus of my own study is to address the lack of systemic analysis of the judicialization of repression and to add to the scholarly understanding of how particular functions ascribed to exceptional courts produce negative effects on human rights and under what political contexts. In the following section, I address these issues framed by the approaches of the international human rights law on the appropriate judicial procedures that guarantee the protection of fundamental human rights. Then I provide an overview of responses of the international human rights instruments to the use of exceptional courts, which highlight the violations of human rights committed in the context of trials in exceptional courts. The hypotheses I ultimately generate are related to the major issues discussed by the international human rights instruments about exceptional courts.

There is no international law that prohibits the establishment of exceptional courts per se, however significant consensus emerged that asserts that the fundamental guarantees of the right to fair trial apply to all types of judiciaries, including exceptional courts (see for example, International Commission of Jurists 2004; UN Doc. A/63/223; UN doc. E/CN.4/2006/58; Weissbrodt and Hansen 2013; Conte 2013). This international consensus, I argue, sets out the frame of reference in examining the connection between exceptional courts and repression. The basic text in article 14 of the International Covenant on Civil and Political Rights (ICCPR), which lays down the standard requirements of fair trial, has been the subject of the discussions of the human rights instruments in addressing the frequent violations of human rights caused by resorting to exceptional courts. For example, in the words of the Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism, "the Special

Rapporteur is equally concerned about lower fair trial guarantees that often characterize military and special courts in practice due to prolonged periods of pre-charge and pre-trial detention, with inadequate access to counsel, intrusion into the attorney-client confidentiality and strict limitations on the right to appeal and bail. Moreover, the Special Rapporteur is concerned that lower procedural and evidential standards in these courts often encourage systematic resort to extralegal practices such as torture to extract confessions of alleged terrorist suspects" (UN Doc. A/63/223 2008). The right to fair trial is required to be protected across times of peace and war as evident in the principles of the broadly ratified humanitarian (Geneva Convention) and human rights (ICCPR) treaties, in addition to several other regional agreements (Weissbrodt and Hansen 2013, 306-7). Thus, the human rights instruments would caution that reliance on exceptional courts provides greater opportunities for states to use repression. These expectations suggest the following hypothesis:

- Hypothesis One: The presence of operating exceptional courts in states will lead to higher levels of repression.

While military courts or special tribunals are not specifically referenced in article 14 of ICCPR human rights treaty, which provides human rights protections in peace time, it should be noted that under the third Geneva Convention the applicability of the standards of an independent and impartial tribunal set forth in regard to military courts. In the perspective of the Commission on Human Rights the independence and impartiality requirements of fair trial should be applicable in times of crises but not in times of peace (UN. Doc. CCPR General

Comment No. 13: Article 14; UN. Doc. E/CN.4/2006/58, Principle No.4). Independence refers to the structural arrangements of the separation of powers and asserts the judiciary's independence from the influence of the executive or the legislative on its decisions. Impartiality, on the other hand, refers to the bias of the judges on the bench derived from their professional identity (such as military officers) and the external conditions that conditions that influence their decisions (such as bribes or threat to their lives) (Weissbrodt and Hansen 2013, 310-311). Thus, the structural features of exceptional courts that do not support the principles of independence and impartiality of a tribunal are more likely to be associated with violations of the right to fair trial, which is intimately linked to other fundamental non-derogable rights enlisted under article 4 of ICCPR, such as the right to life and the right to be protected from torture. Thus, I expect that states that create courts with lower levels of independence and impartiality will be more likely to use repression. Therefore, I derive the following two hypotheses:

- Hypothesis Two: States that construct exceptional courts with features that lower the level of the court's independence will be more likely to use political repression.
- Hypothesis Three: States that construct exceptional courts with features that lower the level of the court's impartiality will be more likely to use political repression.

Beyond the guarantees of independent and impartiality, exceptional courts are expected to comply with the procedural guarantees of the right to fair trial. During states of emergencies, states are most likely to adopt exceptional measures by which some of the derogable rights get

suspended. While the right to fair trial is not explicitly included in the list of the non-derogable rights under article 4(2) of ICCPR, the Human Rights Committee has reaffirmed that any derogation from the right to fair trial must be 1) necessary for the exigencies of the situation; 2) temporary; and most importantly 3) the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights (UN Doc. CCPR/GN 32, supra note 6). With regard to derogating from fundamental human rights, the report of the International Commission of Jurists on military jurisdiction and international law reaffirms that "the international human rights law places two types of obligation on the state: firstly, the duty to refrain from violating human rights and, secondly, the duty to guarantee that those same rights are respected" (Federico Andreu-Guzman 2004, 21). Thus, the expectation attached to the international human rights instruments is broader than providing or protecting individual rights, but it also extends to investigating violations and bringing justice to affected persons. Derogating from the procedures of the right to fair trial is expected to inhibit delivering justice to persons under state control, by encouraging coercive behaviors of arbitrary detention, torture in order to extract confession, summary executions, and of course disappearances. Thus, I derive my fourth hypothesis.

- Hypothesis Four: States that construct exceptional courts that include derogation from any of the components of the right to fair trial are more likely to use repression.

Another significant violation of the international law that is claimed regarding the use of exceptional courts is the trial of civilians of in military courts or tribunals. The Human Rights

Committee contends constituted military courts should be strictly used for trying offenses related to military misdemeanors (UN Doc. A/63/223, p 28). This position is reiterated in the Draft Principles Governing the Administration of Justice through Military Tribunals, which are designed to regulate military tribunals. In Draft Principle No.3, the Human Rights Committee upholds its position with regard to the resort to military courts during emergencies, emphasizing that military courts should not replace ordinary courts except in situations where ordinary courts are unable to try civilians, such as in occupation (UN Doc. E/CN.4/2006/58). The justification for international law's position lies in: 1) the distinctive nature of the military code of law; 2) the procedural deficits of exceptional courts to guarantee civilians a fair trial. Special Rapporteur on the independence of judges and lawyers holds that the orientation of military courts is to try offenses of a military nature. In his words, "since military functions do not include the commission of gross human rights violations, and since civilians cannot commit offenses of a military nature, gross human rights violations and offenses committed by civilians must automatically be transferred to ordinary criminal courts" (UN Doc. A/61/384, p 26). Also, Special Rapporteurs have repeatedly expressed their concerns with regard to exceptional courts' ability to respect the right to fair trial. For example, the Special Rapporteur on the promotion and protection of human rights notes that "in Egypt, under the law on counter terrorism, military courts are competent to try civilians accused of terrorism…military courts do not offer guarantees as to their independence and that their decisions are not subject to appeal before a higher court" (UN Doc. A/61/384). In the context of exceptional courts that are directly influenced by the executive power, like those exceptional courts of Egypt, where the president has the ultimate power of appointing and removing judges, transferring cases, and reviewing the

court's decisions (Reza 2007), exceptional procedures that do not comply with standards of fair trial states are more likely to be enabled, providing state agents the means to punish state challengers by applying repressive actions against them. Thus, I derive my fifth hypothesis.

- Hypothesis Five: States that allow military courts or special tribunals to try civilians are more likely to use repression.

Another potential problematic dimension of exceptional courts focuses not upon the defendant's rights but rather upon the issue of impunity of the human rights violations. Cole's argument about states' use of exceptional courts for providing a legal cover, their punitive actions resonates with international human rights law's concerns for impunity, which were echoed in several human rights mechanisms' reports on exceptional courts. International human rights law asserts that exceptional courts act as a judicial protective shield for state actors from being held accountable for their violations of the international law. Impunity denotes to states' failure to investigate, prosecute, or punish government perpetrators of human rights violations (UN Doc. E/CN.4/2005/102/Add.1; UN Doc. E/CN.4/2006/58). The institutional hierarchy of exceptional courts, which permits the executive or legislative branch to have direct influence on the court allows for impunity for state actors, and thereby encourages those who are afforded impunity to engage in further violations of human rights. Framed by the international human rights regime's desire to preclude impunity and against the backdrop of the historically notorious military courts of Latin America and other parts of the world, principle No.9 of the Draft Principles for military justice attempts to set the law for precluding impunity. It constitutes that

gross violations of human rights committed by government officials cannot be tried in military tribunals. The international law's aspiration for ending impunity problem is also evident in the creation of the Rome Statute of the International Criminal Court. In her study of transitional justice, Kathryn Sikkink finds a growing trend of human rights prosecutions across the world but more specifically concentrated in the transitional (democratizing) states of Latin America, the very continent that suffered the most from human rights violations committed under the cover of military courts (2011, 138-141). One could argue that the recourse to exceptional judicial procedures in democracies in the wake of the war on terrorism might be a side effect of this "justice cascade" phenomenon. In other words, government officials observe the growing trend of domestic and international human rights tribunals, and thereby preempt potential prosecutions against them by seeking a judicial veneer for their actions through exceptional courts. Rona and Wala note how the congress removed the "act of subjecting individuals to unfair trials" from the federal War Crimes Act at the same time it passed the Military Commissions Act of 2006 in response to the Supreme Court's decision of striking down the military commissions of 2001 in *Hamdan v. Rumsfeld* (2013, 161). Conte concludes that the military "will not find their own to be violators of human rights" (2013,331), when allegations are brought to military courts against state agents involved in the use of torture, summary executions, and enforced appearances. Ultimately, impunity is encouraged because state agents know they will be protected by their peers. Thus, I drive my sixth hypothesis.

- Hypothesis Six: States that try state actors accused of human rights violations in exceptional courts rather than ordinary courts are more likely to use repression.

In addition to my core hypotheses, I wanted to use the data I collected to figure out whether authoritarian regimes and democratic regimes vary in the features of the judicial procedures their exceptional courts adhere to, and whether these features vary in their effect on regime's repressive behavior. Because exceptional courts vary in the level of their secrecy, the information about judicial procedures I could collect is not comprehensive, which hindered me from reaching a conclusive understanding of the procedural differences across regime type.

### 4.3 Building the Dataset

Despite the emerging movement to place exceptional courts under international human rights laws to ensure greater protection of fundamental human rights under all circumstances, the research on long-held judicial practices outside ordinary judicial systems suffers from data deficiencies. To understand how these exceptional institutions function at the global level, and the extent to which their impact on the protection of human rights warrants moving international human rights treaties forward to regulate military and extraordinary courts, quantitative analysis is needed. Statistics is a powerful method to assess the scope and magnitude of a global phenomenon. Statistics allows determining the patterns and trends of the use of exceptional courts, their structural and procedural features, and their jurisdiction—who is being tried in those courts. Statistics also helps in discerning unmeasurable regional or cultural aspects of political activities. Departing from my conviction in the power of quantitative analysis, I decided to collect and code for comprehensive data on the subject. After spending months reading through human rights reports of multiple sources like Amnesty International, Human Rights Watch, the

reports of the UN Special Rapporteurs, and the State Department Reports, I decided to build my data set by coding information included in the State Department reports for the following reasons: First, the reports provide an annual source for states' human rights practices that designates a full section for the "denial of fair public trial", in which information about exceptional courts (where they exist) consistently appear. Second, when I started reading country reports for evidence about the structural and operational features of exceptional courts, I found that the State Department reports frequently cite reports of several UN human rights mechanisms in their own reporting on countries, which enhances the level of reliability of the information in State Department reports. In many examples, I found information in both reports of the Special Rapporteur and State Department is consistent with each other. Both reports, for example, stated the constitutional amendments in Venezuela in 2004 which limited the powers of the military tribunals for trying civilians. Third, other annual reports, specifically those of the UN Special Procedures lack the consistency feature of the State Department reports. In other words reports like those produced by the Special Rapporteur on the Independence of Judges and Lawyers are thematic in nature. The Special Rapporteur selects salient issues to survey and report in one period that he may not report in another period. Finally, The State Department reports have been used by scholars of human rights and tested against other reports, like the reports of Amnesty International, and the information in both reports was found to be highly correlated.

Although a comprehensive and longitudinal data set would be the ultimate choice to make, coding for a time-period that is as long as the time-period of the data sets I used in previous chapters would consume a great amount of time that I could not afford for this dissertation project. Therefore, the decision I made with the consultation of my respected

committee Chair and members was to select three time points to code for. This coding decision implies that the time points I choose would correspond to the data I have collected about the constitutional measures of exceptional courts. Moreover, I wanted to detect behavioral changes, if any, that may have occurred post September Eleventh events. Thus, my time points were every three years from 1999 to 2005. Coding for data proved to be a long complex procedure that required iterative reading, categorizing of information, and sometimes self-debating on the substantial meaning and appropriate operationalization of certain information.

How to quantify the information I collected was a decision made after an attempt to assess the amount of information about exceptional courts that would be feasible to gather from the State Department reports. I have created an initial questionnaire style code-sheet for all the measures relevant to the theoretical question of exceptional courts and human rights and examined the extent my source can reveal about exceptional courts in the global set of countries at a single point of time. Below, I explain more about the information I captured in the variables I created. My unit of analysis is the country-year. My dataset includes observations for about145 countries at three points of time in my empirical models. After verifying states where exceptional courts where established in 1999, I coded for the structural and procedural features of exceptional courts in those states for all three points of time.. Given that the State Department does not report on human rights practices of the United States, I have coded for the structural and procedural features of the U.S military commissions from Amnesty International country reports only for descriptive analysis purposes. I do not include the United States in the empirical analysis due to missing data on some of the important control variables. Exceptional courts include those state courts specifically created to try offenses related to state security (broadly conceived),

military courts used to try civilians or human rights violations, or where the governments themselves describe the procedures as special.

**Dependent Variable**: My key dependent variable is political repression, or more specifically political repression of personal integrity rights. Prior studies of repression of physical integrity rights used multiple measures of state respect for personal integrity rights drawn from State Department and Amnesty International country-year reports, such as the measure of Political Terror Scale (PTS) and the Cingranelli and Richards measures (CIRI). However, I take advantage of the new latent measure of political repression that was constructed by Christopher Fariss (2014). The latent measure provides a more valid estimate of the theoretical concept of repression of physical integrity, because it takes into account such unobservable factors as the improvement in the reporting mechanisms of the human rights reports published by the two major sources of information on human rights—State Department and Amnesty International. The latent human rights variable is generated by using what Fariss calls "computational tools capable of linking diverse sources of data in theoretically meaningful ways", and incorporating the quantified increase in the information included in the reports (2014, 301). The scores of the latent human rights variable are produced by this model using information from multiple indicators of physical integrity abuse commonly used in the literature of human rights (Fariss 2014). The latent variable has interval-level measures, which makes data analysis for human rights scholars easier (Schnakenberg and Fariss 2014). The latent measure's values run from approximately -3 as the minimum value of respect for human rights up to 5 as the maximum value of respect for human rights. I have inverted the measure so that the great

values indicate to more abuse of physical integrity rights, which reflects my theoretical conception of repression as discussed earlier.

**Exceptional Courts Measures**: Prior to the UN-Human Rights Council's attempt to propose a formal international treaty that mandates the principles and rules governing the conduct of military courts, there had not been systemic replicable measures for the structural, procedural, and jurisdictional features of exceptional courts. Therefore, I take the Principles Governing the Administration of Justice through Military Tribunals as the best resource to use as the conceptual framework for defining my core exceptional courts variables. In addition, I consider the detailed information about the features of exceptional courts existed in my collection of case studies as my navigating map throughout the coding process of the U.S Department of State Country Reports on Human Rights. The observations contained in these case studies described the behavioral and structural patterns that were relevant to my core variables. Ultimately, they facilitated the creation of my codebook. Using my codebook, I identified, classified, and quantified the relevant information found in the "Denial of Fair Public Trial" section in the SD reports.

I have constructed six dichotomous measures that reflect the structural and procedural patterns of exceptional courts which constitute the violations of independence and impartiality of court. The first step in coding my data was to identify the countries where operating exceptional courts existed in year 1999, and assess whether these exceptional courts carried jurisdictional functions beyond trying offenses of limited scope nature like military infractions. I called this identifying variable "Presence of Exceptional Courts". I created three distinctive criteria for this variable. The first criterion includes the countries where no exceptional courts existed. I gave this

criterion a score of (0). The second criterion includes countries where exceptional courts existed but strictly tried offenses of military misdemeanors. I gave those countries a score of (1). The final criterion includes countries where exceptional courts exist and either their jurisdiction was not specified or there was evidence that they tried offenses beyond the limited scope of military misdemeanors. These countries received a score of (2). The countries that scored (2) on the variable of the "Presence of Exceptional Courts" were coded for the measures of violations of independence and impartiality of the court in all three points of time. For my hypotheses about the impact of exceptionalism on repression, I have created an index for the six indicators of violations of independence and impartiality of court.

In constructing my measure of **exceptional courts-independence**, I identified the elements of the structural features of these courts that constitute a violation of the independence of the judiciary. In my coding process, the following questions provided me with a guideline for classifying and quantifying information about exceptional-court independence. An answer of (yes) to any of the following questions indicates to a violation of independence, and thereby received a code of (1)

- Do any external actors influence the judicial processes of the exceptional court?
- Does the executive appoint or remove judges, prosecutors, and defense counsels of exceptional courts?
- Does the executive transfer cases of political offenses into exceptional courts?
- Does the exceptional court fall under the hierarchical structure of the executive branch?

Similarly, I have created a measure of **exceptional courts-impartiality,** which is composed of two indicators. An answer of (yes) to the following questions indicates to a violation of impartiality of the court. Each question represents a dichotomous indicator. Thus, an answer of (yes) received a score of (1).

- Is the exceptional court's judge a military officer who is linked to a command chain?
- Does the judge of the exceptional courts lack legal training in civilian code of law?

I also created dichotomous measures for the following jurisdictional variables:

- Exceptional courts try civilians
- Exceptional courts try violations of human rights committed by state officials

The information available about the cases of civilians or state officials that were tried in exceptional courts was not sufficient to allow me to create variables that count the actual number of such trials. Hence, my decision to create dichotomous measures that capture the jurisdictional behavior of these courts rested upon the level of precision of the reports regarding these elements. The measures were coded (1) if information of State Department Reports indicate to any cases where an exceptional court of a country tried civilians or tried violations of human

rights perpetrated by a government official, and (0) if no there is no mention of such cases in the report.

I also created an additive index for **due process exceptionalism**. For this measure, I coded information about the violations of due process procedures conducted in the trials of exceptional courts. Following with the due process procedures enumerated under article #14 of ICCPR, I created a checklist to determine the degree to which the judicial procedures of an exceptional court derogate from the protections of the right to fair trial. It is important to note here that SD reports indicate to the lack of detailed information about the judicial procedures in these courts given the high secrecy nature of the trials conducted in such courts. Bellow I briefly list the components of the index of due process exceptionalism. I created a dichotomous measure for each component. The measure is coded (1) if a violation of the component was mentioned in the report:

- Exceptional courts providing for a public trial
- Exceptional courts providing for habeas corpus
- Exceptional courts providing for defense counsel to defendants
- Exceptional courts providing for trials in the presence of defendants
- Exceptional courts providing for trials within reasonable time
- Exceptional courts providing for interpreters when needed
- Exceptional courts providing for defendants to examine witnesses and evidence
- Exceptional courts providing for appeal at an ordinary court
- Exceptional courts providing for a protection against double jeopardy

- Exceptional courts providing for some redress in case of a fault detention

While precise information about the judicial procedures in exceptional courts is only available for a handful of countries, this due process exceptionalism index allows me to distinguish those fair trial components most vulnerable to derogation.

**Control Variables**

I also used the standard model of repression that I set out in the previous papers. The variables of the standard model of repression are democracy; military regime; leftist regime; civil war; interstate war; economic development; economic growth; economic openness; membership in ICCPR treaty, and population size. Detailed information about these variables are set out in Chapter 2.

**4.4 Describing Data**

The data shows that the majority of functioning exceptional courts in the three time-points of my study are located in Africa and Near and Middle East. Country-year observations from these regions make up about 55% of all country-year observations. The pie chart in Figure 4.1 also shows that the features of exceptional courts of those same regions constitute the most violations of independence and impartiality of the judiciary. Sixty percent of the reported violations of independence and impartiality are concentrated in Africa and the Middle East. The data reveals that Eritrea has the highest number of violations of independence and impartiality of any special

court in the world This parallel special court system that established by the executive power in 1997 receives a score of (1) on every indicator of violations was. A bench of military judges with little to no legal experience preside over the court, which has vast powers that include trying civilians for all types of crimes and reviewing cases adjudicated by the civilian High Court.

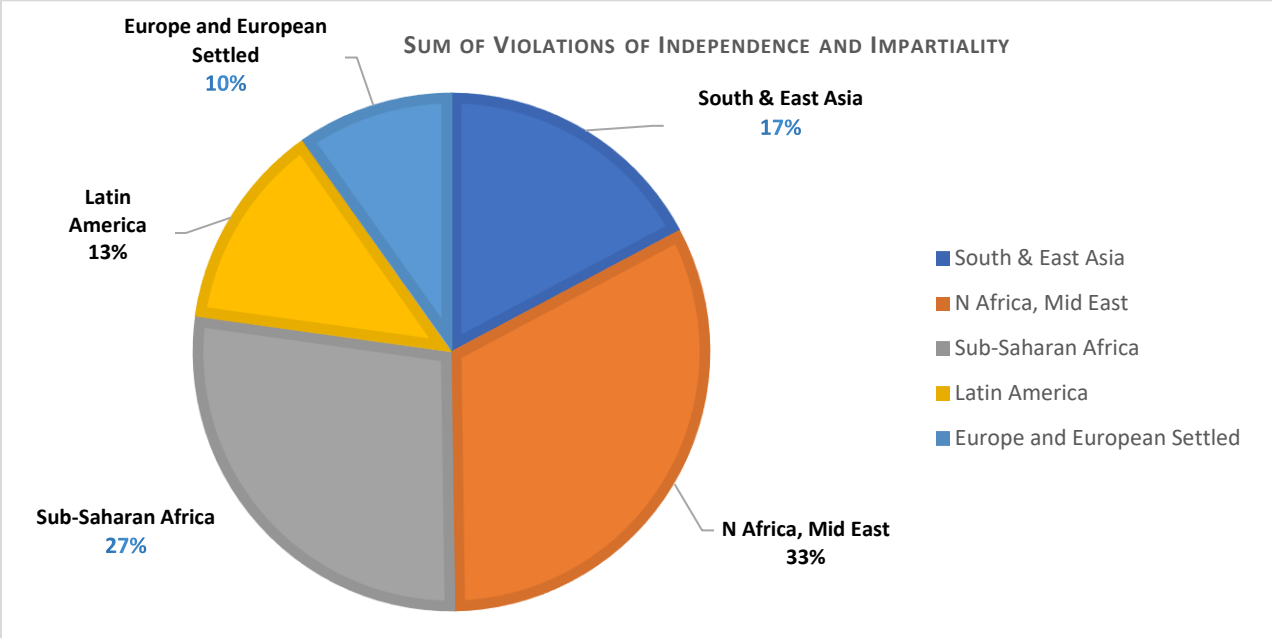


Figure 4.1. Percentage of Total Exceptional Courts' Violations of Independence and Impartiality by Region

Figure 4.2 presents all six indicators of the violation of independence and impartiality of the court and shows the change in the number of observed violations across all three time points. As illustrated, external influence is the type of violation of court's independence that is most frequently reported. All structural and procedural features representing violation of independence and impartiality of exceptional courts appear to have decreased in 2005 after reaching a slight peak in 2002. These patterns suggest that while exceptional courts violations were heightened during the first year of the "War on Terror" following 9/11 terrorist events, pressure exerted by

the Human Rights Council has led some states to relinquish the use of exceptional courts. Libya and Venezuela are among the states that abolished exceptional courts after 2002.

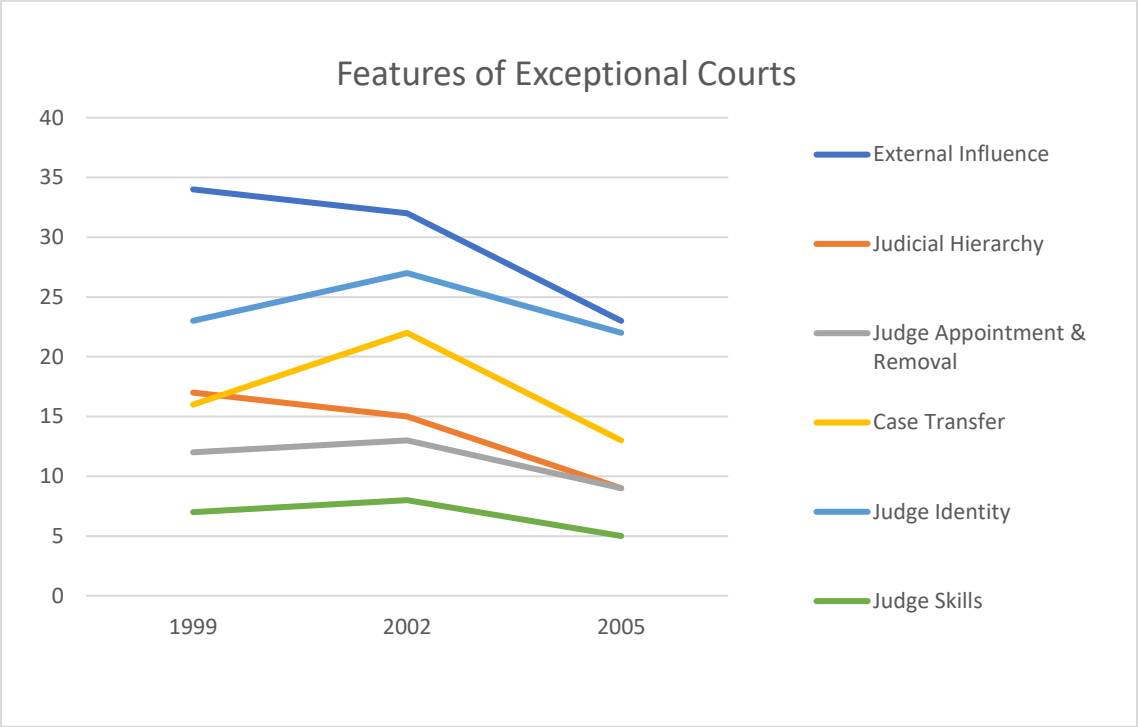


Figure 4.2. Count of Reported violations of Exceptional Courts

In Figure 4.3. I present the regional patterns of utilizing exceptional courts for trying civilians. The graph shows a stark regional difference between the Middle East and North Africa region (MENA) and the rest of the regions. Most of the exceptional courts that try civilians are concentrated in the MENA region. Although we can see a noticeable decrease over time, the number of countries that try civilians in exceptional courts remains the highest within that region. For Sub-Saharan Africa, the practice of trying civilians in exceptional courts is less popular in 2002 than in 1999, but then more countries return to allowing exceptional courts to try

civilians in 2005. After 9/11 a slight increase in Europe and the European settled countries in regard to trying civilians in exceptional courts. As I mentioned above, I have coded for features of the U.S military commissions from Amnesty International country reports for descriptive analysis purposes. Hence the slight increase of observations within that region. Since the reports of the special procedures to the Human Rights Council established their concern that the U.S military commissions could motivate other countries to utilize exceptional courts for trying their dissenters under the banner of "War on Terrorism," I felt that including the United States in the exceptional courts dataset will help me understand the trends better. Contrary to human rights regime's expectations, the number of states that utilize exceptional courts to try civilians was slightly reduced from 39 state in 1999 to 36 states in 2002 and 2005.

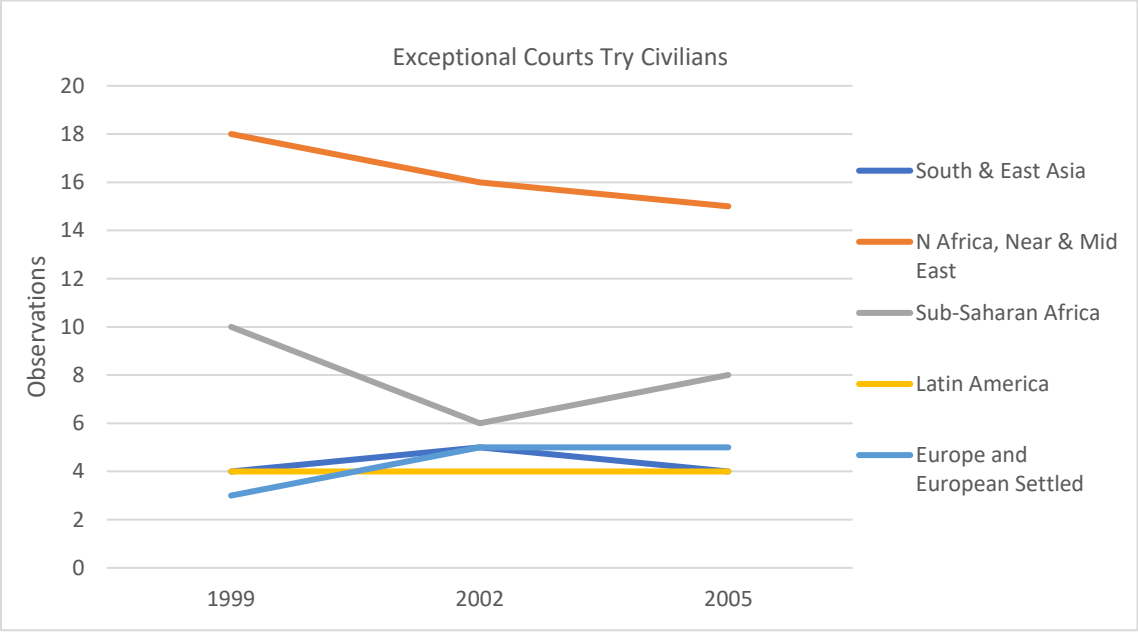


Figure 4.3. The Number of States with Exceptional Courts Trying Civilians by Region

I next explore the patterns and trends in the number of states that utilize exceptional courts to try cases of human rights violations. Figure 4.4 reflects an increasing trend in the use of exceptional courts for trying state officials at least in three regions. The number of states that used exceptional courts for this purpose has increased from 48 in 1999 to 50 in 2002 to 59 in 2005. Not only are more states using exceptional courts for trying government officials over time, but also the number of these states is much higher in comparison with the number of states that try civilians in these courts. Evidently, states are moving away from using exceptional courts for trying civilians, but rather they are using such courts more frequently for trying their own agents. With the increasing entrenchment of the transitional justice norm and international commitment to military intervention in the name of human rights, state actors seek to use exceptional courts to provide them with a legal façade as a means of reducing their probability being targeted in the future by international judicial bodies for their human rights abuses.

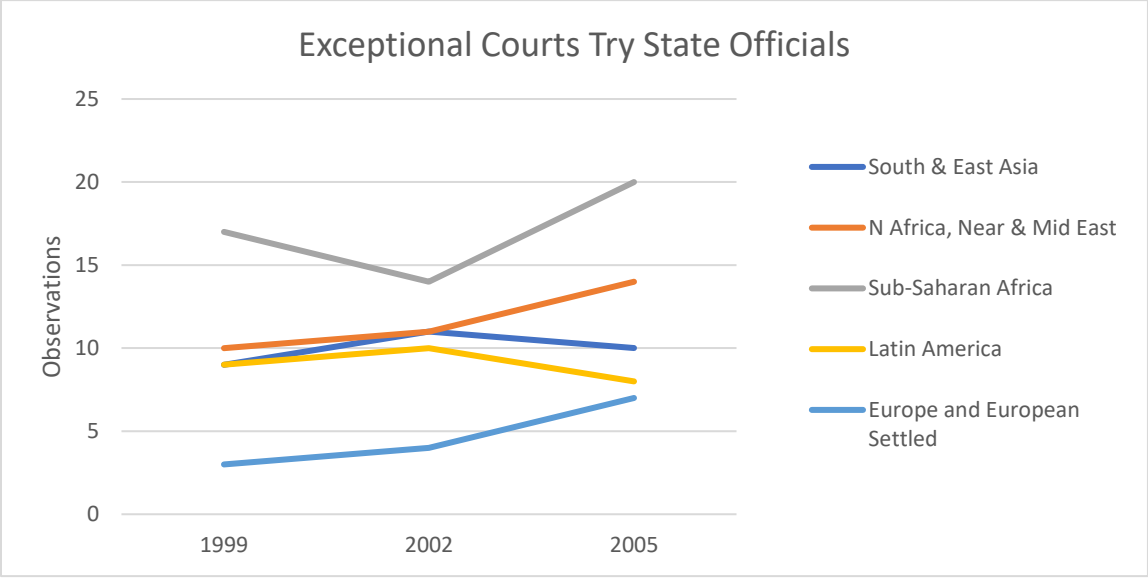


Figure 4.4. The Number of States with Exceptional Courts Trying Human Rights Violations by Region

Despite the lack of sufficient data to support a statistical analysis for the violations of due process rights in exceptional courts, I use the information I gathered on due process exceptionalism in my dataset to explore the core set of violations of judicial procedures that are mostly mentioned in the SD reports. Figure 4.5 shows that most of the reported procedural behaviors of exceptional courts are the closed and secretive trials and the lack of the defendants' right to appeal decisions of exceptional courts in ordinary courts. Judicial procedural behaviors mainly address the protections of fair trial enlisted under Article 14 of ICCPR. Such protections are vulnerable to derogations during state of emergencies. We can see a slight drop over time in the violations of fair trial rights in exceptional courts. However, it is important to note here that this may be an indication of the increased secrecy of such tribunals rather than decreased violations. Figures 4.6 and 4.7 provide us with an illustration of the correlation between de jure and de facto judicial exceptionalism. They show that the establishment and utilization of exceptional courts for trying civilians and human rights violations is a commonplace among states whose constitutions have no provisions protecting these institutions or explicating their jurisdiction. In other words, exceptional courts exist outside the realm of the constitutional law of states. Figure 4.6, which is based on the large sample of all 145 countries in three time-points, demonstrates that the vast majority of country-year observations of states with functioning exceptional courts are those countries whose constitutions have no provisions that establishing or allow these courts. A good number of the cases in this sample have constitutional provisions explicitly establishing exceptional courts; whereas, a small number of the cases have qualified constitutional provisions.

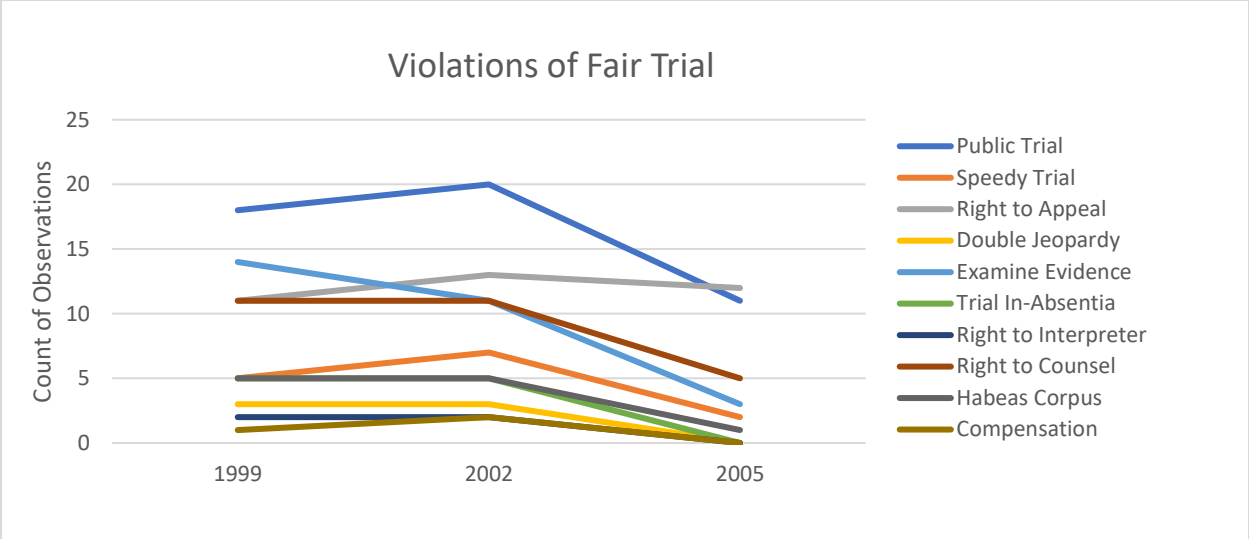


Figure 4.5. The Number of States for the Violations of Judicial Procedures in Exceptional Courts

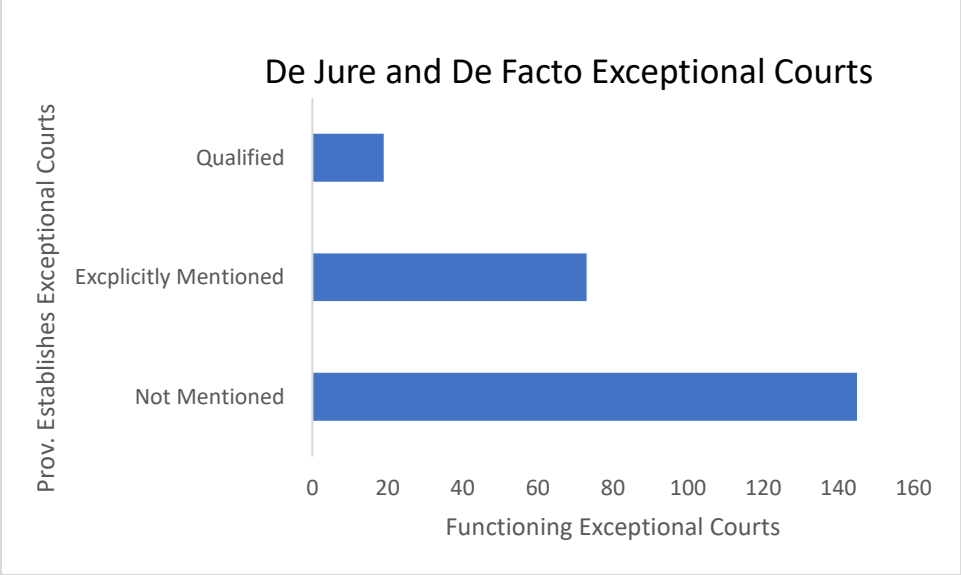


Figure 4.6. Comparison of Number of States with Exceptional Courts Against their Constitutional Design of Exceptional Courts

Figure 4.7. is based on a sub-set of the large sample and includes only the set of countries which have functioning exceptional courts in the time-points of my study. It presents the number of

states that fall into each of the categories of the provisions prohibiting the trial of civilians or human rights violations in exceptional courts. Obviously, this bar chart shows that constitutional provisions explicitly prohibiting the use of exceptional courts for trying civilians and human rights violations are respected by state governments. We know from this graph that states with strong provisions prohibiting the trial of civilians in exceptional courts have not tried civilians in exceptional courts. Only few states with strong provisions prohibiting the trial of human rights violations in exceptional courts have actually violated their constitutional law.

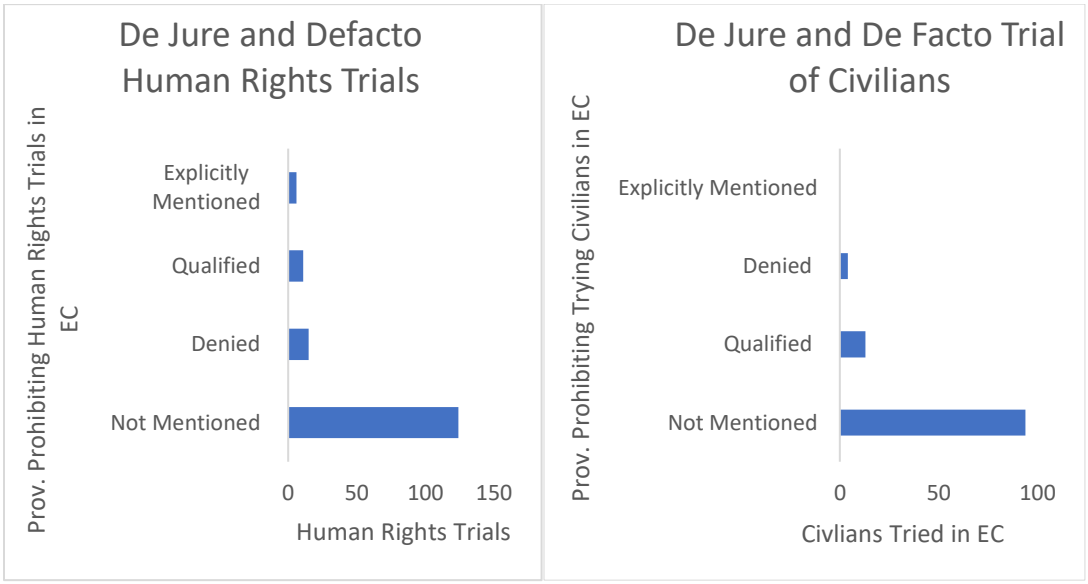


Figure 4.7. Comparison of De Jure and De Facto Jurisdiction of Exceptional Courts

### 4.5 Analysis

In Figure 4.8 I present the means of repression for the states that fall within the three categories of de facto exceptional courts: states that do not have functioning exceptional courts, states that have functioning exceptional courts, and states that have functioning exceptional

courts but with jurisdiction limited to military misdemeanors. All the country-year observations are included in the sample for this graph. The vertical axis represents the mean level of repression, which is a continuous latent measure that ranges from -4 to 3. The higher the number the more repressive are the states. The three groups of states vary substantially in their repressive behavior. The variation is more pronounced between the states with no exceptional courts on one side and the states with either restricted or not restricted exceptional courts on the other. While states with functioning exceptional courts have a nearly stable level of repression across the three time-points, states with limited-jurisdiction exceptional courts show a trend of increasing repression. They start at a lower level of repression in 1999, then that level increases in 2002 to intersect with the repression level of the states with functioning exceptional courts and then slightly surpass it in 2005. This graph of averages of repression only begins to tell the story of the relationship between exceptional courts and states' repressive behavior. The regression tables below reveal the more rigorous examination of the relationship.

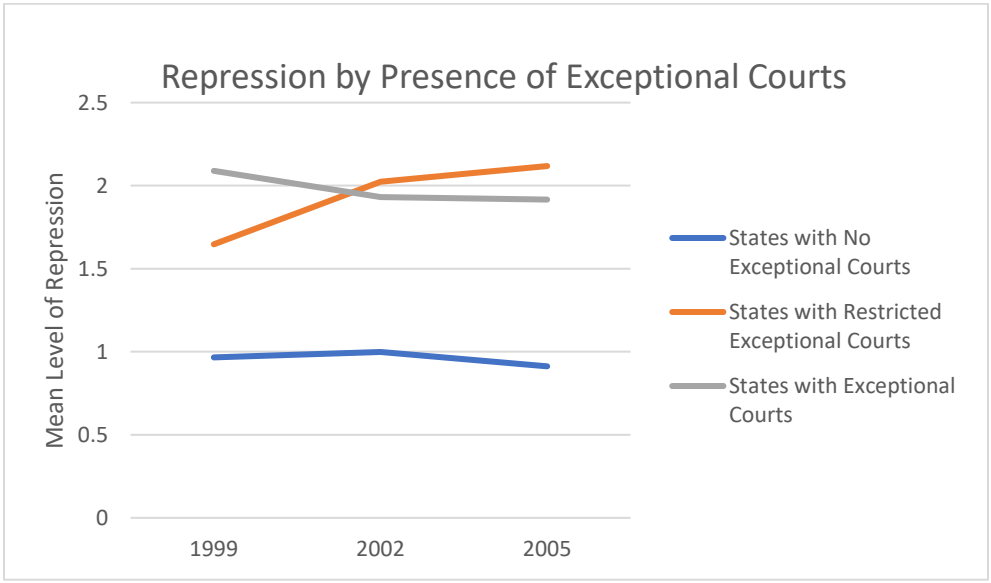


Figure 4.8. Level of Repression by Presence of Exceptional Courts

The empirical analysis examines the relationship between exceptional courts and states' repressive behavior. In particular, the regression models estimate the effect of the presence of exceptional courts, the type of their jurisdiction, and their structural and procedural features that constitute a violation of independence and impartiality of the judiciary, while controlling for the regional differences. The analysis begins with the relationship between the presence of exceptional courts and repression, using cross-sectional data collected on three points of time—1999; 2002; and 2005. Since repression, my dependent variable, is a continuous measure, and since my core independent variables have little variation across my time-points, I use Ordinary Least Square techniques to estimate my models. These models also incorporate the control variables that are consistently associated with repression (see previous chapter for details about my control variables in the standard model of repression). To mitigate the estimation problems that could arise from a small size of data and a high number of independent variables, I use a couple of estimation techniques. First: I use the Lasso algorithm model to select the most important factors from the standard model of repression that efficiently predict repression (see, Efron et al. 2004). After conducting this computational series, five control variables were omitted from the standard model of repression—year, interstate war, economic growth, trade openness, and South and East Asia region. Second, I construct separate models for my core variables of exceptional courts.

The first set of models in Table 4.1 are multivariate models estimating the effect of the presence of exceptional courts and the control variables on repression. The regression in Model 1 does not control for regional differences. Both models show positive and significant effect of the presence of functioning exceptional courts. Countries with functioning exceptional courts are

more likely to use repression. With every unit increase in the variable of the presence of exceptional courts, repression level increases by 0.14. When controlling for regional differences, the coefficient for this variable becomes slightly smaller 0.09, but remains highly significant. This statistically significant association lends support to my first hypothesis, which states that countries that construct exceptional courts are more likely to use repression.

Table 4.1. The Effect of the Presence of Exceptional Courts on Political Repression (1999; 2002; 2005)

| VARIABLES | (1)<br>Without Region | (2)<br>With Region |
|---|---|---|
| Exceptional Courts Present | 0.143*** | 0.0913*** |
| | (0.0386) | (0.0328) |
| Trichotomized Democracy | -0.458*** | -0.326*** |
| | (0.0644) | (0.0789) |
| De Facto Judicial Independence | -0.166*** | -0.128** |
| | (0.0490) | (0.0510) |
| Civil War | 0.913*** | 0.947*** |
| | (0.102) | (0.103) |
| Military Regime | 0.313*** | 0.338*** |
| | (0.111) | (0.105) |
| Marxist-Leftist Regime | -0.240 | -0.316** |
| | (0.157) | (0.145) |
| Economic Development | -0.161*** | -0.198*** |
| | (0.0247) | (0.0287) |
| Logged Population Size | 0.469*** | 0.493*** |
| | (0.0353) | (0.0377) |
| Membership to ICCPR | 0.115*** | 0.152*** |
| | (0.0440) | (0.0532) |
| North Africa, Near and Middle East | | 0.255* |
| | | (0.130) |
| Sub-Saharan Africa | | -0.210** |
| | | (0.103) |
| Latin America | | 0.144 |
| | | (0.118) |
| Europe and European Settled Countries | | -0.459*** |
| | | (0.132) |
| Constant | -1.866*** | -1.518*** |

| | | |
|---|---|---|
| | (0.346) | (0.375) |
| Observations | 427 | 427 |
| R-squared | 0.698 | 0.731 |
| Adjusted R-Squared | 0.692 | 0.722 |
| F/Chi$^2$ | 101.29 | 81.87 |
| Prob>F/Prob>Chi$^2$ | .0001 | .0001 |

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

The control variables of democracy, judicial independence, civil war, military regime, leftist regime, economic development, membership to ICCPR, and population size, all have significant effect on repression in the expected direction. Leftist regimes have significant negative effect only in the regional model. Not surprisingly, the countries of the Middle East show higher level of repression than any other countries. After all, not only did the region of MENA account for more than quarter of the country-years of functioning exceptional courts in my dataset, but none of the exceptional courts in the countries of that region are restricted to try only military misdemeanors. The overall fit of the model is good. The models explain around 70 to 73% of variation in state repression.

The next model examines the effect of the trial of civilians in exceptional courts on states' repressive behavior. Table 4.2 reports the multivariate regression of the trial of civilians in exceptional courts on repression. Again, the first model includes the main independent variable along with the control variables without controlling for the regional dummies. In this Table, we see that the coefficients for the trial of civilians in exceptional courts are positive and significant in both models. The trial of civilians in exceptional courts significantly increases the level of repression, with the larger predictor in the model without regional differentiation. In the model without regional dummies, the coefficient can be interpreted to mean that countries with

exceptional courts that try civilians would be associated with 0.38 increase in the repression scale. A result that is rather substantive when we consider that the minimum score of repression in my dataset is -2.7 and the maximum score is 4.4. The results support the human rights regime's proposition that exceptional courts enable states to bypass the standard rules of justice and punish their dissenters. The control variables and the regional dummies performed virtually the same as in the first set of regressions. Civil war has the largest effect on repressive behavior. The onset of civil war increases the level of repression by 0.93 to 0.96. on the repression scale. Europe and the European settled countries continue to be the least repressive.

Table 4.2. The Effect of the Trial of Civilians in Exceptional Courts on Political Repression (1999; 2002; 2005)

| VARIABLES | (1)<br>Without Region | (2)<br>With Region |
|---|---|---|
| EC Try Civilians | 0.376*** | 0.237*** |
| | (0.0951) | (0.0790) |
| Trichotomized Democracy | -0.451*** | -0.334*** |
| | (0.0653) | (0.0791) |
| De Facto Judicial Independence | -0.191*** | -0.148*** |
| | (0.0487) | (0.0506) |
| Civil War | 0.933*** | 0.956*** |
| | (0.104) | (0.102) |
| Military Regime | 0.240** | 0.296*** |
| | (0.107) | (0.105) |
| Marxist-Leftist Regime | -0.197 | -0.275** |
| | (0.141) | (0.138) |
| Economic Development | -0.174*** | -0.201*** |
| | (0.0245) | (0.0282) |
| Logged Population Size | 0.492*** | 0.504*** |
| | (0.0335) | (0.0368) |
| Membership to ICCPR | 0.0916** | 0.131** |
| | (0.0428) | (0.0519) |
| North Africa, Near and Middle East | | 0.211* |
| | | (0.126) |
| Sub-Saharan Africa | | -0.195* |

| | | |
|---|---|---|
| | | (0.102) |
| Latin America | | 0.171 |
| | | (0.121) |
| Europe and European Settled Countries | | -0.438*** |
| | | (0.131) |
| Constant | -1.797*** | -1.514*** |
| | (0.357) | (0.377) |
| Observations | 427 | 427 |
| R-squared | 0.703 | 0.731 |
| Adjusted R_squared | 0.696 | 0.723 |
| F/Chi$^2$ | 107.59 | 83.27 |
| Prob>F/Prob>Chi$^2$ | .0001 | .0001 |

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 4.3 presents the results for the regression models testing for the effect of the trial of human rights violations committed by state officials in exceptional courts. Unlike the trial of civilians in exceptional courts, the trial of state officials for human rights violations in exceptional courts produced mixed results. The coefficient is positive and significant only in the model without regional differentiation. Once regional dummies are introduced, the coefficient remains positive but loses significance. This finding calls into question the assumption that trying state officials by their own peers provides a legal veneer for their actions and guarantees a satisfactory outcome for the defendants, which leads them back to committing more human rights violations. Thus, creating a culture of impunity. The assumption is maybe not generalizable. It is possible that the culture of impunity can be partially attributed to the absence of the trial of state agents altogether. My analysis suggests that we need to pay more attention to whether and how governments hold their agents accountable across regions. The Latin American experience with impunity is important because states in that region vary in the way they handled trials of human

rights violations. Even those countries with functioning exceptional courts trying state officials have had different experiences given the differences in the context of their political reality. Colombia for example, is one of the states where the military court had full authority over the trial of their own military personnel. Since the constitutional court directed a decision in 1997 against the trial of active military personnel involved in human rights crimes in the military court, the military court has transferred cases of military personnel accused of human rights violations to the civilian courts. However, the cases selected to be sent to the civilian court usually involved lower rank personnel (State Department country report 1997). This is an indication to a changed political context that allowed for some systemic but weak transformations in the jurisdictional competence of military courts of Colombia. Similarly, the military court of the Dominican Republic has jurisdiction to try military personnel for any crime. Yet, the State Department reports of 1999 and 2002 indicate to an increasing public pressure that led to the transfer of some cases related to security force officers involved in gross crimes to the civilian courts. While the military courts of Colombia and the Dominican Republic continue to act as a protective shield for their high rank personnel, their partial compliance with the judicial and public demands indicates that the change in political context slowly chips away from the culture of impunity.

Table 4.3. The Effect of the Trial of Human Rights Violations in Exceptional Courts on Political Repression (1999; 2002; 2005)

| VARIABLES | (1)<br>Without Region | (2)<br>With Region |
|---|---|---|
| EC Try State Officials | 0.129** | 0.0468 |
| | (0.0653) | (0.0668) |
| Trichotomized Democracy | -0.475*** | -0.323*** |

| | | |
|---|---|---|
| | (0.0643) | (0.0812) |
| De Facto Judicial Independence | -0.192*** | -0.143*** |
| | (0.0508) | (0.0520) |
| Civil War | 0.937*** | 0.966*** |
| | (0.102) | (0.102) |
| Military Regime | 0.310*** | 0.334*** |
| | (0.114) | (0.105) |
| Marxist-Leftist Regime | -0.183 | -0.283** |
| | (0.158) | (0.143) |
| Economic Development | -0.156*** | -0.202*** |
| | (0.0250) | (0.0294) |
| Logged Population Size | 0.477*** | 0.509*** |
| | (0.0341) | (0.0374) |
| Membership to ICCPR | 0.104** | 0.140*** |
| | (0.0433) | (0.0524) |
| North Africa, Near and Middle East | | 0.321** |
| | | (0.137) |
| Sub-Saharan Africa | | -0.201* |
| | | (0.104) |
| Latin America | | 0.157 |
| | | (0.119) |
| Europe and European Settled Countries | | -0.460*** |
| | | (0.137) |
| Constant | -1.932*** | -1.577*** |
| | (0.349) | (0.378) |
| Observations | 427 | 427 |
| R-squared | 0.689 | 0.727 |
| Adjusted R_squared | 0.683 | 0.718 |
| $F/Chi^2$ | 92.27 | 81.36 |
| $Prob>F/Prob>Chi^2$ | .0001 | .0001 |

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

In Table 4.4 I tested the effect of the additive index of the structural and procedural measures that lower the exceptional court's independence and impartiality. These measures are the external influence, the power of the executive or military to appoint and remove judges of these courts, the power of the executive or military to transfer cases to these courts, the placement of these courts and the executive hierarchical system, the judge belonging to the military chain of

command, and the legal skills of the judge. I first tested the disaggregated components of the index separately (see Table A4.1 in the Appendix). Although five of the six components are positive and significant in the model without controlling for regional differences, their coefficients lose statistical significance in the model with regional dummies (except for judge skills). For ease of interpretation, I do not report these coefficients. As we can see in Table 4.4 the additive index of these measures is positive and statistically significant in both models. However, the coefficient in model 2 diminishes to (0.04) but keeps an acceptable level of significance. While controlling for region, for each one point increase in the additive index the repression level increases by 0.04. A maximum increase in the index of the violations of independence and impartiality would be associated with a 0.24 increase in repression regardless of the regional location of the exceptional court. Hence, the structural and procedural features of exceptional courts as a whole affect repression moderately when controlling for regional differences. These results suggest that when exceptional courts are constructed with the structural and procedural features that allow state executive or military to influence their decisions, they are likely to be utilized to punish and repress government opponents.

Table 4.4. The Effect of Additive Index of Violations of Independence and Impartiality on Political Repression (1999; 2002; 2005)

| VARIABLES | (1)<br>Without Region | (2)<br>With Region |
|---|---|---|
| Additive Index of Violations of Independence & Impartiality | 0.0781*** | 0.0419* |
| | (0.0233) | (0.0243) |
| Trichotomized Democracy | -0.441*** | -0.308*** |
| | (0.0636) | (0.0793) |
| De Facto Judicial Independence | -0.206*** | -0.151*** |
| | (0.0489) | (0.0503) |

| | | |
|---|---|---|
| Civil War | 0.929*** | 0.960*** |
| | (0.0999) | (0.101) |
| Military Regime | 0.313*** | 0.333*** |
| | (0.113) | (0.105) |
| Marxist-Leftist Regime | -0.211 | -0.290** |
| | (0.158) | (0.147) |
| Economic Development | -0.160*** | -0.200*** |
| | (0.0246) | (0.0294) |
| Logged Population Size | 0.479*** | 0.504*** |
| | (0.0342) | (0.0379) |
| Membership to ICCPR | 0.0760* | 0.126** |
| | (0.0434) | (0.0523) |
| North Africa, Near and Middle East | | 0.301** |
| | | (0.138) |
| Sub-Saharan Africa | | -0.187* |
| | | (0.102) |
| Latin America | | 0.160 |
| | | (0.119) |
| Europe and European Settled Countries | | -0.457*** |
| | | (0.135) |
| Constant | -1.874*** | -1.569*** |
| | (0.350) | (0.378) |
| Observations | 427 | 427 |
| R-squared | 0.693 | 0.728 |
| Adjusted R_squared | 0.686 | 0.719 |
| $F/Chi^2$ | 96.65 | 82.32 |
| $Prob>F/Prob>Chi^2$ | .0001 | .0001 |

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

I now turn to the judicial procedures of the exceptional courts. I tested for the effect of the violations of fair trial rights in exceptional courts on states' repressive behavior. These rights include Exceptional courts providing for public trial, habeas corpus, defense counsel to defendants, trial in the presence of defendants, trial within reasonable time, interpreters when needed, defendant's right to examine witnesses and evidence, right to appeal at an ordinary court, protection against double jeopardy, some redress in case of a fault detention. Given that

the reports on the disaggregated measures in exceptional courts are thin, as with the violations of independence and impartiality I created an additive index for violations of fair trial. I ran the models for the additive index and in neither one was the impact significant. Therefore, I did not report the results here. On multiple occasions, the State Department reports indicated that it was difficult to obtain detailed information about the judicial procedures of exceptional courts because they were usually held behind closed doors. Of all the 80 observations of a derogation from fair trial rights in my dataset, 49 observations reported the violation of the right to public trial. Exceptional courts typically lack transparency in their judicial procedures. So it is unsurprising that the number of violations coded in my dataset is not sufficient to achieve statistically significant levels of effect on repression.

### 4.6 Conclusion

This chapter has focused on the relationship between exceptional courts and states' repressive behavior. I have asked two major questions regarding the relationship between exceptional courts and repression: Does the presence of functioning exceptional courts facilitate states' repressive behavior? What structural and jurisdictional features of these institutions, if any, contribute to repression? My core argument, which stems from the investigation of the United Nations' human rights mechanisms, states that exceptional courts have inherent structural and procedural deficiencies that violate the fundamental requirements of independence and impartiality of the judiciary, which allows state actors to use them as a tool of repression that effectively lowers the cost of their repressive behavior by providing them with a veneer of legality. I contend that by channeling political cases into exceptional courts, states are able to

physically punish their opponents while maintaining the legitimacy of their rule. I have created a unique data set on for the global set of countries across three years (1999; 2002; and 2005). I find significant evidence that the presence of functioning exceptional courts in states contributes to the increased repressive behavior of state actors. A further examination of the characteristics of exceptional courts reveals that those exceptional courts with jurisdiction to try civilians strongly influence repression, regardless of where in the world these courts are established. These findings support the human rights mechanism's theory. I find mixed evidence about the effect of exceptional courts with jurisdiction to try state officials for human rights violations. While disregarding regional differences, the trial of human rights violations significantly increases repression. However, I find no evidence that the trial of human rights violations increases repressions when I controlled for regional differences, which indicates to regional variation in the powers allocated to these courts within different political contexts. This finding calls into question the human rights mechanism's linkages between exceptional courts trying state officials and impunity, which potentially feeds into more repression. While the trials of violations of human rights in exceptional courts may encourage state officials to commit further human rights crimes in some regions, these trials can constitute a form of justice in other regions of the world. For example, until recently in the Middle East and North Africa region, the trial of state officials for violations of human rights has been almost unheard of. The trial of Saddam Hussein and some of his government officials in 2006 was the first and foremost trial of government officials in the modern history of the region that it sent shock waves to the public opinion throughout the region. The special tribunal of Hussein may be a distinctive typology of exceptional courts. It was seen as a tribunal that was established and heavily influenced by the United States (Lutz and

Reiger 2009). Yet, the Iraqi people, especially those who were affected by the crimes of the Hussein regime, considered justice achieved through these tribunals. Arguably, some state leaders in the region may have recalled the implications of the trial of Hussein at the onset of the Arab Spring and entrenched themselves through making small concessions, like relaxing some freedoms, to avoid the potential fate of Hussein. In this light, the trial of state officials by any judicial body in the MENA region may have a rather deterrent effect on state's repressive behavior.

I also examine the assumption that exceptional courts' structural and procedural features that do not meet with the standards of independence and impartiality of the judiciary would affect repression. I find evidence that the aggregated modifications applied on the structure and procedures of exceptional courts do increase states' coercive behavior regardless of the regional differences. While the individual indicators for the features of exceptional courts were only significant without controls for regional differences, I do find judge's lack of legal skills the one feature that is significant whether including regional controls or not. I find no evidence supporting the proposition that violations of the right to fair trial in exceptional courts lead to more repression. Nonetheless, this question merits further investigation given that my data on the judicial procedures in exceptional courts is not sufficient for conducting empirical examination of this question.

My findings as a whole lend support to the arguments made by the UN human rights mechanisms that exceptional courts, because of their distinctive structural and procedural features, may be preferred to be used by states to bypass the judicial standards in ordinary courts in order to punish their opponents under the disguise of the legal façade. Finally, my findings

may be useful to international human rights lawyers who design treaties and state lawyers who write constitutional laws. My results suggest that exceptional courts, their institutional features, and their jurisdiction should be established explicitly in the constitutional law. Particularly, these courts should not be able to try civilians under any circumstances. This finding underlines also the value of redesigning emergency clauses in national constitutions, which typically provide a legal leeway for state leaders to apply modifications on the law to face the threat. Such modifications may include the establishment of exceptional courts for the trial of civilians. I am unable to test the links between constitutional due process derogations and the establishment of exceptional courts in statutory law, but I believe that the evidence I present here provides an indication that the majority of constitutions either have no due process protections or allow derogating from these protections during times of emergency. Exceptional courts are likely to be established during times of emergency. Efforts to prevent states from resorting to these courts in times of emergency should start with emergency clauses. Future research should look into the clauses that set out the conditions under which states are able to use statutory law to facilitate the use of exceptional courts.

# Chapter 5

## Conclusion

Over the last half century, states have gradually entrenched the major components of the international law of human rights in their constitutions, which represents a significant advance in the institutional design of governments. This period saw a global movement toward endorsing the principles of judicial independence in many countries, which spent much time and resources attempting to reform their judiciaries and provide for the full guarantees of fair trial. Previous studies have advanced the empirical analysis of the role of independent judiciary in promoting and protecting human rights, leading states to reduce their repressive actions. None, though, have recognized that the existence of exceptional judicial bodies outside the ordinary judicial systems present a great hurdle to reducing state coercive repression. Different types of existing exceptional courts are established within a constitutional framework that delineates the scope of their jurisdiction and codes of operation. Recent years have seen the emergence of the controversy of the role these exceptional courts play in lower the cost of states' coercive behavior. This dissertation project has been concerned with exceptional courts, their constitutional origins, their composition and functions, and the ways in which they serve state responses to threat and national security crises. Specifically, this research finds that the presence of functioning exceptional courts and the trial of civilians in such courts increases state coercive repression. After employing a variety of data on the formal law and the de facto behavior of exceptional courts in my empirical analysis, several findings inform us about the ways in which exceptional courts become instruments for lowering the cost of coercive behavior. First, in

support of the HRC proposition of the need to expand the list of non-derogable rights, I find that one way in which constitutions prevent states from empowering exceptional courts is through explicit prohibition of derogating from fair trial rights during time of emergency. This provision significantly reduces repression. Second, while provisions regarding exceptional courts have mixed effects on repression, it appears to be that states don't actually use exceptional courts for trying civilians when their constitutions provide for explicit provisions prohibiting the trial of civilians in exceptional courts.

The controversy over the use of exceptional courts to try individuals for offenses related to terrorist acts has been the epicenter of scholarly debate since the U.S military commissions were established two months after 9/11 terrorist events. Against this political backdrop, the question that motivated this study has been whether exceptional courts offer legal façade for coercive actions of states across the spectrum of polity type. I have taken on the Human Rights Council's calls on states to situate "military justice" within the general judicial system to determine the *de jure* and *de facto* aspects of exceptional courts across the global set of countries and the relationship between those aspects and states' coercive behavior. In this study, I have offered a systemic analysis, employing a variety of approaches and methods of analysis reflected in the literature of comparative state behavior. My analysis has not only shown the constitutional variation in the adoption of provisions protecting the fundamental rights of fair trial and guarding against the use of exceptional courts in trying civilians and human rights violations, but it has also shown the actual level of variation in the structural, procedural, and jurisdictional features of established exceptional courts. Such courts serve different purposes across the states. Regardless of the purposes they serve, my analysis has shown clearly that the existence of functioning

exceptional courts in any polity exacerbates states' repressive behavior. This finding establishes a minimum threshold for the effect of exceptional courts that confirms the arguments of the skeptics about these courts. Below I briefly review the results of my analytical chapters. Following the review, I present my policy prescriptions. Finally, I offer my recommendations for future research.

### 5.1 Do Constitutions Matter?

National constitutions differ in the extent to which they provide for the specified guarantees of fair trial as measured by the international formal provisions of fair trial enumerated under Article 14 of ICCPR and other regional human rights treaties. This variance triggers concern among scholars and policy makers of the international human rights regime, which deems fair trial provisions as key to protecting life, liberty, and dignity of people under all political circumstances. Scholarly examination of the effect of constitutional law on states' human rights behavior has shown that the relationship between law and practice is a complex one. I have assessed the effectiveness of such constitutional guarantees in providing for actual fair trials and mitigating states' repressive behavior. The results show mixed evidence about the efficacy of constitutional content, not a single theoretical approach can fully explain the relationship between national constitutions and states' behavior. The analysis suggests an important implication, that is constitutions are at least not empty promises. On the contrary, constitutional provisions produce observable direct effect on respect for the overall right to fair trial and physical integrity rights even when controlling for states' political context. Consequently, this analysis suggests that constitutions may continue to be a useful channel for

promoting human rights. Then there's the question of the effect of the less popular provisions—exceptional courts provisions. The next section provides an overview of the analysis of those provisions.

## 5.2 Do states whose Constitutions Include Provisions Governing Exceptional Court Respect Physical Integrity Rights?

This study is the first attempt to gather and code data on the establishment, jurisdiction and operational codes of exceptional courts. I developed measures for the six major provisions targeting exceptional courts, using constitutional texts of about 140 countries for the time-period of 1990-2005. I examined the trends and spacial patterns of the constitutional adoption of the provisions that parallel the Human Rights Council's Draft Principles Governing the Administration of Justice Through Military Tribunals. Although provisions regulating exceptional courts were adopted more by the constitutions written during the 1990s than the older constitutions, such provisions are not mentioned in many currently effective constitutions. I have taken advantage of the relative lack of these protections at this point of history of human rights to try to empirically understand how such provisions affect state behaviors if they do at all. I find that state leaders are particularly reluctant to use violence against their people when their national constitutions provide for provisions prohibiting trials of human rights violations in exceptional courts, prohibiting derogation from fair trial rights during emergency situations, and providing for the right to appeal exceptional courts' decisions in ordinary courts. Importantly, though, when state leaders are constitutionally constrained in their utilization of exceptional legal procedures to handle their challengers, they become more abusive. Exceptional Courts

provisions tend to affect state repressive behavior in the same manner across regions. After discussing the effects of the formal law regarding exceptional courts, I now turn to the effects of de facto exceptional courts.

### 5.3 How do exceptional courts facilitate political repression?

I find a significant evidence that the presence of functioning exceptional courts in states contributes to the increased repressive behavior of state actors. A further examination of the characteristics of exceptional courts reveals that those exceptional courts with jurisdiction to try civilians strongly influence repression regardless of where in the world these courts are established. I find mixed evidence in regard to the effect of exceptional courts with jurisdiction to try state officials for human rights violations. When disregarding regional differences, the trial of human rights violations significantly increases repression; however, the evidence diminishes after controlling for regional differences. This finding calls into question the international human rights IGOs' linkage between exceptional courts trying state officials and impunity, which potentially feeds into more repression. I also examine the assumption that repression will be associated with exceptional courts' structural and procedural features that do not meet with the standards of independence and impartiality of the judiciary. I find evidence that the aggregated modifications applied on the structure and procedures of exceptional courts are indeed associated with an increase states' coercive behavior regardless of the regional differences. I find no evidence supporting the proposition that violations of the right to fair trial in exceptional courts lead to more repression. Nonetheless, this question merits further investigation given that my data on the judicial procedures in exceptional courts is not sufficient for conducting empirical

examination of this question. My findings as a whole lend support to the arguments made by the UN human rights mechanisms. Exceptional courts, regardless of their structural and procedural features, may be preferred to be used by states to bypass the judicial standards in ordinary courts in order to punish their opponents under the disguise of the legal façade. With the empirical findings from my statistical analysis, I discuss the policy implications of these findings in effort to make useful recommendations for the human rights experts in HRC.

### 5.4 Implications for Policy

The analysis and findings of this study can be useful for the international human rights lawyers who design treaties and state lawyers who write constitutional laws. My overall results undeniably show that established exceptional courts across the world suffer from legitimacy deficit. The problem is in their absence from the texts of the national constitutions. When exceptional courts are not even mentioned in constitutions, we cannot assume they are prohibited. Thus, the states are left to decide whether and under what conditions to invoke them. States especially have this leeway when they could suspend air trial guarantees under a derogation clause within the emergency provisions. In this respect, constitutional designers should make specific language guarding against derogations that could result in empowering the executive or the military to establish exceptional courts. If states wish to establish exceptional courts for specific juridical purposes like trying military fractions, I would urge these states to explicitly enshrine exceptional courts, their institutional features, and their jurisdiction. Such courts may not try civilians under any circumstances. Although my research has not conclusively delineated the specific structural or procedural features of exceptional courts that

are linked to repressive actions, it has at least established that judges with experience in legal practice are significant for decreasing states' repression. My research also could not establish the degree to which established exceptional courts provide for or violated the judicial procedures of the right to fair trial. However, the preliminary analysis of the limited data I was able to gather on exceptional courts' violations of fair trial rights indicates that the most common grave violations of fair trial have involved secret trials and denial or strict limitations on the right to appeal. As expressed by the HRC practitioners in the draft principles, it is important to situate exceptional courts within the hierarchy of the ordinary judicial systems to ensure that such courts provide for the full protections of the right to fair trial.

### 5.5 Recommendations for Future Research

The theoretical foundation of exceptional courts is thin but promising. The continuing academic and political debate about the judicial and political justifications of exceptional courts will inform further empirical questions concerning terrorist suspects and the need to establish such courts as an alternative to the ordinary courts. In the wake of recent wave of wars on terrorism and the strengthening advocacy for interventionist wars for humanitarian purposes, it is vital for the research on exceptional courts to move forward and provide empirical answers about the necessity of such courts given the threat terrorist organizations may pose on ordinary courts. Reflecting on the unexpectedly mitigating effects of the trial of human rights violations in exceptional courts, it would be beneficial to further examine the sources of impunity. It is possible that amnesty laws would be a greater source of impunity than the trial of human rights violations in exceptional courts. Unfortunately, my analysis necessarily ignores executive actions

that were not manifested in the procedures of exceptional courts. One of the primary challenges I faced in conducting this study was data availability on the constitutional and institutional aspects of exceptional courts. The lack of data on exceptional courts presents serious obstacles to the study of states' coercive behavior. We need to develop a database that captures not only the behavioral aspects of exceptional courts but also the intensity of the activity of these courts to enhance our understanding of the behavioral differences across the states. Through my coding process I noticed that the State Department reports indicated to the difficulty of discerning the exact number of political prisoners or the count of the events of political trials held in exceptional courts. Such problems may be remedied in future work by creating of a database that would capture and measure information about political trials from all sources of media outlets, including social media like Twitter. While I would like to say with confidence that less exceptional courts are now trying civilians than in year 2002, I would speculate strongly that a the presence of a new wave of trends underway in the development of exceptional courts. Syria has established new counterterrorism courts in 2012 in addition to its long-lived military courts (Human Rights Watch 2013). The British military courts have been criticized by mass media for dropping prosecutions against army officers involved in crimes in Iraq in 2003 (Arne Willy Dahl 2011). Clearly exceptional courts are not rapidly fading away. I hope that my contributions in this research and future concerted academic efforts would lead to the systemic collection of data on exceptional courts to foster the growth of this burgeoning literature.

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## Biographical Sketch

Razan Albanna was born in Damascus, Syria in 1975. She graduated from high school in 1993 and then completed an associate degree in Dental Technician in Amman, Jordan in 1995. After moving to the United States in 1997, she completed her bachelor degree in broadcast management from The University of Texas at Arlington in 2008.

Razan Began her pursuit of a doctoral degree in political science in fall of 2009 at The University of Texas at Dallas, where she served as a teaching assistant for various professors, and as an instructor of the Middle East Conflict for two semesters.

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**PROFESSIONAL CONFERENCE PRESENTATIONS**

- "The Constitutional Context of Exceptional Courts", will be presented to the American Political Science Association, San Francisco, California—August 2017
- "State Repressive Behavior and the Role of Constitutional Provisions of Fair Trial", presented to the Midwest Political Science Association, Chicago, Illinois – April 2016
- ""Women's Rights, Islam, and State Repression: Cultural or Political Links?", presented to the Southwestern Social Science Association, New Orleans, Louisiana - March 2012.

**RESEARCH INTERESTS**

My research focuses on states' behavior in terms of their respect for fundamental human rights. My dissertation project investigates extraordinary courts and the role they play in providing a legal cover for states' repressive behavior. Further research interests include Political Repression and International Law, Comparative Regime Behavior, Comparative Constitutions, Women's Rights, Judicial Politics, and the Middle East Politics.

**WORKS IN PROGRESS**

- "Physical Integrity Abuse and the Role of Constitutional Provisions of Fair Trial"
- "The Constitutional Context of Exceptional Courts: How Constitutional Constraints on the Use of Exceptional Courts Affect Repression"

- "The Judicialization of Repression: The Role of Exceptional Courts in State Repression"
- "Women's Rights, Islam, and State Repression: Cultural or Political Links?"

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