TEST CASE LINKAGE:
CIVIL SOCIETY AND THE DEVELOPMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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ABSTRACT

What impact do civil society-led test cases have on developing courts? I draw upon the international courts, norm diffusion, and transnational advocacy networks literature to develop a theory of test case linkage. I argue that test case advocates can link the fate of the court and the fate of their movement. I hypothesize that courts may be more susceptible to test case linkage when the court is new, has undergone recent changes, or is deciding cases involving a new region, new issue, or controversial issue. My linkage typology suggests strong linkage can lead to a positive stimulus for the court’s growth or a negative backlash, while weak linkages may lead to positive progression or negative disruption. I argue that test case advocates may have an obligation to the court when taking cases before developing courts.

What factors determine whether a test case linkage is positive or negative? Using the overlap of literature on the effectiveness of international court, test cases, and transnational advocacy movements, I provide a framework of factors at least partially under the control of test case advocates that may contribute to test case efficacy: (1) usage, through usage balance and venue loyalty; (2) resources, such as litigation and mobilization costs; (3) expertise, including repeat player status, case selection, and information; (4) compliance, such as persistent, varied international and domestic mobilization. I theorize that if courts do not have sufficient resources or authority, test case advocates may have to fill in the gaps in these categories.

Case studies in the Inter-American system suggest that the system might have been strongly linked to the anti-impunity movement that stimulated the court’s growth as the justice
cascade swept Latin American in the 1990s, while the Trinidad death penalty cases of the late
1990s might have led to a backlash in the Caribbean. The case studies suggest linkage outcomes
may be influenced by pre-existing, well-funded, and mobilized transnational advocacy networks
with domestic connections, as well as by usage imbalances, venue loyalty, and domestic
connections. Lastly, findings suggest that the effects of linkage may linger for years.
The research and writing of this dissertation is dedicated to my mentors, Steve, Neal, and Dr. J., to my very patient committee members, and to my always supportive husband.

Many thanks,

JULIE LANTRIP
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CHAPTER 1
THE ROLE OF CIVIL SOCIETY IN A REGIONAL HUMAN RIGHTS COURT

In the late afternoon of September 21, 1981, a Honduran student named Manfredo Velasquez-Rodriguez was seen being forced into a white Ford by armed men in a parking lot in Tegucigalpa. He was never seen again. His family was unable to find him through habeas corpus and criminal complaints filed with the authorities in Honduras. With the help of a domestic human rights group, Velasquez’s relatives and the families of several disappeared persons filed complaints before the Inter-American Commission on Human Rights (or alternately, the commission), part of the Organization of American States (OAS). Honduras did not cooperate with the commission or its recommendations, despite the fact that Honduras had ratified the American Convention on Human Rights (ACHR) and recognized the jurisdiction of the Inter-American Court of Human Rights (IACHR, or alternately, the court) during the early stages of its struggle to democratize. Even neighboring Costa Rica’s attempts to aid the victims in this and several related cases were unsuccessful (Case of Velasquez-Rodriguez v. Honduras 1988).

The Velasquez-Rodriguez case, represented by a group of Americas Watch human rights lawyers connected to the anti-impunity movement and the Inter-American Commission, became the first individual complaint to be sent to the IACHR in 1986, eight years after the court was formed. The court’s 1988 decision was the first time an international tribunal declared disappearances a violation of human rights and one of the first times that a tribunal had confirmed that states have a duty to investigate and prosecute past violations of human rights.\(^1\)

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\(^1\) The court’s decision noted that kidnapping a person without proper arrest procedures violated the right to liberty; prolonged, isolated detention and torture violated the right to be free of cruel and inhumane treatment; the extrajudicial execution and concealment of the execution was a violation of the right to life; and the fact that the
The Velasquez-Rodriguez family was not alone in seeking to know the fate of a loved one. Disappearances and other gross violations in the 1970s and 1980s in Latin America left many families as victims of disappearances, and other gross violations of human rights occurred without justice.

The outcry for justice, according to recent literature, deeply concerned a transnational advocacy network including activists and the human rights lawyers who became involved in the Velasquez-Rodriguez case, and the network successfully pushed an anti-impunity movement, particularly in Latin America (Lutz and Sikkink 2001; Sikkink and Walling 2007). Though the domestic judiciary in Latin America at first largely ignored the Inter-American Court’s 1988 decision (Skaar 2011), the “Velasquez Rodriguez Law,” as it was sometimes known in Latin America, became synonymous with the growing success of the anti-impunity movement. The movement fought to end, and bring to justice those responsible for, the practice of disappearances that had been widespread among military governments in the Latin American countries like Honduras, Argentina, Peru, Guatemala, and Chile. All of these countries, including Argentina, had disappearance cases filed against them at the Inter-American Commission, and the Guatemalan and Peruvian cases appeared before the Inter-American Court throughout the 1990s. The extensive networks of anti-impunity activists used “test cases,” including Velasquez Rodriguez, foreign trials, arrests such as the well-publicized arrest of former Chilean dictator Augusto Pinochet in London, and the growing call for international criminal tribunals to put pressure on post-conflict countries and to bring to justice those who committed atrocities. Ten years after the Velasquez Rodriguez case, nearly all of Latin America had accepted the jurisdiction of the Inter-American Court, and many countries had held trials to bring state failed to investigate these violations constituted a continuing and ongoing violation of the ACHR (Case of Velasquez-Rodriguez 1988).
to justice those who had perpetrated disappearances in the region. During Peru’s democratic backslide, the Fujimori government attempted to delink the court and the movement’s anti-impunity norms so that it could withdraw the court’s jurisdiction, but its efforts to do so failed likely due to lingering linkage.

Meanwhile in the former British colonies of the Caribbean, the Inter-American human rights system only slowly gained acceptance. Disappearances and military dictatorships had not been of recent concern in most of the Commonwealth Caribbean, so the region did not see the wave of recognitions sweeping throughout Latin America in the justice cascade. The Republic of Trinidad and Tobago ratified the ACHR and the jurisdiction of the Inter-American Court in 1991 and was the first Commonwealth Caribbean to do so. Shortly after the country’s recognition of the court, the Privy Council in London, which still acted as the highest court of appeal for most of the Commonwealth Caribbean, handed down its decision in the 1993 *Pratt and Morgan* case brought by an association of pro bono London lawyers. The Privy Council found that lengthy stays on death row amounted to cruel and inhuman treatment and barred execution of most inmates who had spent more than five years on death row, regardless of the reason for the delay.

Actual executions waned in the Caribbean after this 1993 decision, but due to political and public pressures to deal swiftly and strongly with growing crime rates, government officials in Trinidad and Jamaica again turned to the death penalty. The London lawyers for the death row inmates turned to the United Nations Human Rights Committee (UN HRC) for international appeals of alleged due process violations, inhumane prison conditions, and the injustice of mandatory death sentences. The UN HRC’s decisions requested commutation and even release for convicted murderers based on minor procedural violations and were not well reasoned, and
these decisions further emboldened the government’s countermovement to decertify the cases and the London-led movement. When in 1997 the advocates moved the cases to the Inter-American human rights system in the hopes of higher quality legal reasoning, they linked the IACHR with a movement already saddled with minimal resources, a lack of domestic networks for their movement, and an “outsider” reputation in the Caribbean. With the five-year Pratt and Morgan time clock ticking, Trinidad made the decision to issue death warrants for many of the inmates on death row, even those whose appeals were still pending before international tribunals. In 1998, when the Inter-American Commission refused to expedite the cases and instead requested the Inter-American Court’s preliminary injunction orders in the James et al. cases, which asked Trinidad to delay the executions and rejected the state’s arguments that the complaints were simply delay tactics, Trinidad withdrew from the American Convention and the court’s jurisdiction. Afterward, the English-speaking Caribbean failed to join the court’s jurisdiction, with the exception of Barbados, which tried to delink the court and the anti-death penalty movement. The London lawyers’ movement to stop executions saved many of their individual clients’ lives, but progressed only through individual, case by case litigation in most cases and was not able to connect with transnational or domestic networks to gain broader policy changes. The countries retained many of the contested capital punishment procedures and worked toward forming their own regional tribunal in the Caribbean, which eventually became the Caribbean Court of Justice. Though some broader policy gains occurred years later in some of the region’s courts, the anti-death penalty movement has failed to reach outside the judiciary, and the backlash against the IACHR has lingered. (See Table 1 for the timelines for the expansion and recognition of the court.)
The Puzzle

Why did these two test case stories end so differently? Why did the movement against impunity benefit from the Inter-American Court’s decision in *Velasquez-Rodriguez* and lead to near universal acceptance of the court in Latin America, while the same court’s orders in *James et al.* led to an immediate withdrawal from the Convention and a nearly universal rejection of the court in the English-speaking Caribbean?

*Table 1: OAS Member Ratification of ACHR and Recognition of the Inter-American Court by Subregion*

<table>
<thead>
<tr>
<th>Subregion</th>
<th>Not Ratified or Recognized</th>
<th>Ratification of ACHR</th>
<th>Recognized the Court</th>
</tr>
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<tbody>
<tr>
<td>North America</td>
<td>Canada</td>
<td>1981 Mexico</td>
<td>1998 Mexico</td>
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<tr>
<td></td>
<td>United States</td>
<td></td>
<td></td>
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<tr>
<td>Caribbean</td>
<td>Antigua &amp; Barbuda</td>
<td>1977 Haiti</td>
<td>1987 Suriname</td>
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<tr>
<td></td>
<td>Bahamas</td>
<td>1978 Grenada</td>
<td>1991 Trinidad &amp; Tobago*</td>
</tr>
<tr>
<td></td>
<td>St. Kitts &amp; Nevis</td>
<td>Jamaica</td>
<td>1998 Haiti</td>
</tr>
<tr>
<td></td>
<td>St. Lucia</td>
<td>1981 Barbados</td>
<td>1999 Dominican Republic</td>
</tr>
<tr>
<td></td>
<td>St. Vincent &amp; Grenadines</td>
<td>1987 Suriname</td>
<td>2000 Barbados</td>
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<tr>
<td></td>
<td></td>
<td>1991 Trinidad and Tobago*</td>
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<td></td>
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<td>1993 Dominica</td>
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<td>1977 Honduras</td>
<td>1981 Honduras</td>
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<td>1978 El Salvador</td>
<td>1987 Guatemala</td>
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<td>Panama</td>
<td>1990 Panama</td>
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<td></td>
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<td>1979 Nicaragua</td>
<td>1991 Nicaragua</td>
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<td></td>
<td></td>
<td>1987 Guatemala</td>
<td>1995 El Salvador</td>
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<tr>
<td>Andean</td>
<td>Guyana</td>
<td>1973 Colombia</td>
<td>1977 Venezuela</td>
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<td></td>
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<td>1977 Ecuador</td>
<td>1981 Peru**</td>
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<td></td>
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<td>Venezuela</td>
<td>1984 Ecuador</td>
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<td></td>
<td></td>
<td>1978 Peru</td>
<td>1985 Colombia</td>
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<td></td>
<td></td>
<td>1979 Bolivia</td>
<td>1993 Bolivia</td>
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<tr>
<td>South America</td>
<td></td>
<td>1984 Argentina</td>
<td>1984 Argentina</td>
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<td>1985 Uruguay</td>
<td>1985 Uruguay</td>
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<td></td>
<td></td>
<td>1989 Paraguay</td>
<td>1990 Chile</td>
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<td></td>
<td></td>
<td>1990 Chile</td>
<td>1993 Paraguay</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1992 Brazil</td>
<td>1998 Brazil</td>
</tr>
</tbody>
</table>

*Source. Information on Court recognition and Convention ratification were adapted from http://www.oas.org/juridico/spanish/firmas/b-32.html. *Trinidad withdrew from the ACHR and the court’s jurisdiction in 1998. **Peru attempted to withdraw from the court’s jurisdiction in 1999 but reaffirmed its acceptance of the court’s jurisdiction in 2000 after a return to democracy.*
Though the literature on the justice cascade in Latin America addressed some of the key factors for the anti-impunity movement’s success, it and other literature on transnational social movements did not systematically address how such movements might be intertwined with the development of a growing point of access for legal activists: regional human rights courts. Further, the literature on transnational advocacy networks has remained underdeveloped regarding the study of test cases as a method for transnational activists and has for the most part lacked thorough study of how these test cases impact the development of international human rights tribunals. A few recent studies have explored the potential role of movements using litigation strategies and their role in increasing usage and compliance (Alter 2006; Cichowski 2007; Conant 2002), but they have focused on the more stable European systems. They have yet to address how these actors may impact court development. Further, the human rights literature has been focused more on the positive impact of human rights activism (Hafner-Burton and Ron 2009) and has not fully addressed the possible negative consequences of these human rights test cases on developing systems or the potential obligation that this possibility may impose on movements bringing test cases to newly developing courts.

Thus, the puzzle to be solved, in its broadest sense, was what is the relationship between the development of regional human rights courts and test cases brought by civil society? International human rights organizations, acting as norm entrepreneurs, and legal activists promoting their particular causes (such as anti-impunity or anti-death penalty) file test cases in international courts, which include emerging regional courts, to establish certain human rights as international law. I hypothesize that these test cases link acceptance of the regional court to acceptance of the human rights norms presented in those test cases. Further, when the movement uses the court’s decision to bolster its own legitimacy, this may enable the movement’s resources
to promote the court, which can be especially important for a court with deficiencies in resources, authority, or support. Specifically, I develop a theory of how non-state actors, primarily international nongovernmental organizations (NGO) with legal expertise acting as part of a broader transnational advocacy networks, use international courts to promote their movement, and how that usage may link the fate of the movement and the fate of a developing court. This “test case linkage” theory addresses the impact that use of the court has on the court system and in aiding a movement, or conversely, how it can lead to a backlash against both the movement and the court.

To study test case linkage, I break down the broader puzzle into two sub-questions. First, what factors impact the likelihood and strength of test case linkage? Second, what factors contribute to the likelihood that the outcome of linkage between a test case and the court will be positive or negative?

I argue that test case advocates, whether connected with transnational advocacy networks or not, had a greater impact on developing regional and international courts than previously noted in the literature. Prior literature had addressed why states accept international tribunals and focused on state and court controlled factors. Test case advocates often chose to take test cases to the international courts in part because of lack of access or success for disadvantaged groups in domestic venues, due to repression in the violator country, a lack of responsiveness, or active blockage of the efforts of domestic organizations or lawyers (Tarrow 2005). In some cases, test case advocates suffered from lack of direct access to other aspects of intergovernmental organizations or lack of response from the media and other states with the political or economic leverage to change the violator state’s behavior (Keck and Sikkink 1998). Test cases have been used as an additional method to attempt an end run around these domestic
and international blockages. Studies of interest groups and test cases in domestic courts, particularly in the US, have found that nongovernmental interest groups with legal expertise have an advantage when they bring test cases to promote their agendas before the Supreme Court (Epstein and Rowland 1991; Songer et al. 2000; Yarnold 1995). When successful, these players become repeat players who can coordinate with a broader movement to select and frame appropriate test cases and to mobilize political pressure after the favorable decision is handed down.

The impact of these test case litigation strategies on the development and expansion of the jurisdiction of voluntary international courts has not been studied systematically, and the theory has not been fully expanded to develop an overall framework of factors that aid not only in winning cases at the court, but also in coordinating those cases with a transnational advocacy network’s broader agendas and strategies and filling in gaps in court effectiveness in developing courts. Scholars studying court effectiveness have extensively analyzed the role of the court to write quality decisions that are appropriate for the region (Helfer and Slaughter 1997; Burstein 2006; Cavallaro 2008), and studies have recognized the important role of non-state advocates as court users (Alter 2006; Helfer and Slaughter 1997; Posner and Yoo 2005) who mobilize to promote compliance with the decision after it is written (Conant 2002) or who take advantage of the additional mobilization opportunities created by litigation strategies (Cichowski 2007).

Studies have often focused on either the success of movements, the success of test cases, or the success of the court, but I argue that the literature has yet to develop a complete framework for how test case usage by movements may affect the development of a court’s jurisdiction. Further, given the literature’s emphasis on studying European systems which have more stable membership and in which, as Conant (2002) noted, outright non-compliance has been rare. Test
case linkage allows me to explore the intersection of the literatures on test cases, transnational movement, and international courts, and how they relate to the likelihood, magnitude and direction of linkage between test cases and courts that have not yet fully institutionalized.

International courts in developing regions may face states and intergovernmental organizations that are unwilling or unable to provide resources for a full time court and/or sufficient staff to provide outreach and find potential complainants, offer legal aid or trainings for the legal community, conduct in-country research and other case development, provide adequate time for hearings, or monitor the aftermath of a court decision. As a consequence, I argue that activists using the court may need to fill in the gaps left by the court’s lack of resources and authority if the court is to be effective in the categories that I suggest are most important for test case linkage outcome: usage, expertise, compliance, and resources. Since a growing number of international and regional courts convene through voluntary membership, I propose that that it is important to study the impact test case advocates can have on a new court’s still developing jurisprudence, jurisdiction, and effectiveness.

I argue that movements’ uses of developing courts through test cases can help or hinder the expansion of a court’s jurisdiction in a region through test case linkage. A growing trend in regional human rights and other courts is to allow more standing for NGOs and other members of civil society to bring test cases emblematic of their movement. Test cases offer transnational advocacy networks the legitimacy and imprimur of a formal legal decision on which to base their work in a region, if they can incorporate the decision into a well-framed and organized regional mobilization. Once they receive a favorable decision from the court, these advocates use their movement’s resources and networks to promote the test case decision in the region. As a side effect of this promotion of the court’s decision, transnational advocacy networks can end up
promoting not only their cause but also the court itself. Their promotion may lead to a stimulus effect on the acceptance of the court in the region. On the other end of the spectrum, “one-off” cases, or those brought by movements that do not have adequate resources and mobilization to promote their cases in the region, can backfire and lead to a backlash against the court. In other words, the cases can link acceptance of the court with acceptance of the movement, for better or worse.

My theory of test case linkage suggests the existence of differing levels of linkage, and I argue linkage is more likely to occur at certain “critical junctures” in a court’s development. First, stronger linkage is likely when the court is new and has little previous jurisprudence, or when the court has recently undergone a major change in its system. When a court is new, I argue, it has not yet developed its reputation in the region and will be more likely to be associated with the first major case that it decides. Second, I hypothesize that test case linkage is more likely when a court has few previous cases from a sub-region, for similar reasons as to why a new court would be associated more strongly with its first cases. Third, if the topic of a test case is a new issue or area for the court, it can become associated more strongly with that decision because it can cast a new light on an old court. Lastly, if the case itself involves high profile actors or more controversial areas of the law, that case may be more likely to strongly impact how governments and the public see the court.

I hypothesize that the larger the quantity and magnitude of these critical junctures that are present in a case, the greater the chances of a linkage and the greater the magnitude of the linkage. These critical junctures may contribute to why some cases cause a strong linkage, while others cause only weak linkage or no linkage. When the linkage is strong, I categorize that as “stimulus” linkage since it stimulates acceptance for the court and movement if its outcome is
positive for the court. I categorize a negative, strong linkage as a “backlash,” since the court is likely to face withdrawals or disassociation with the court. When weaker or fewer critical juncture factors are involved, I argue that the weak, positive linkage simply reinforces the “progression” of court acceptance and support, while the weak, negative linkage may cause some “disruption” to court acceptance or support. Table 2 offers a visual depiction of the effects of critical juncture factors on a test case linkage.
Table 2: Test Case Linkage Outcomes by Critical Juncture Intensity and Level of Gaps

<table>
<thead>
<tr>
<th>Critical Juncture Factors</th>
<th>Low Linkage Efficacy</th>
<th>High Linkage Efficacy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Many Unfilled Gaps in Test Case, Movement and Court Effectiveness</td>
<td>Few Unfilled Gaps in Test Case, Movement and Court Effectiveness Factors</td>
</tr>
<tr>
<td>High</td>
<td>Backlash</td>
<td>Stimulus</td>
</tr>
<tr>
<td></td>
<td>strong negative linkage</td>
<td>strong positive linkage</td>
</tr>
<tr>
<td>Low</td>
<td>Disruption</td>
<td>Progression</td>
</tr>
<tr>
<td></td>
<td>weak negative linkage</td>
<td>weak positive linkage</td>
</tr>
</tbody>
</table>

Note. The intensity and quantity of critical juncture factors, such as a court having little or no previous jurisprudence, increases the magnitude of test case linkage. The number of gaps in linkage effectiveness factors that have not been filled by states, the court, or external users, such as test case litigants, contributes to a positive or a negative outcome for test case linkage.

In order to explore which factors may contribute to whether a linkage outcome is positive or negative, I offer a framework from the overlap of factors from the literature regarding what makes international courts effective, what aids test case success, and what strategies and resources contribute to a successful transnational advocacy network. I use the correlating factors from these literatures, because in order for test case linkage to succeed, the movement must be successful both as test case advocates and as a movement. Further, I argue that the movement must be able to fill any gaps for missing factors in the court’s own effectiveness through four important categories: usage, resources, expertise, and compliance. I contend that these factors can be controlled to some extent by private actors using courts. Within these four categories, test case advocates may need to complement any resources not provided by the states or intergovernmental organizations in charge of the court or provided by the court itself. I theorize that while all these categories overlap to some extent, financial resources (the category I call “resources”) can actually interact so much with the other three, that it is subsumed by the other
three categories, particularly in courts with very low financial resources, such as courts in
developing regions like the Inter-American and African human rights systems.

The factors within my framework’s categories that I argue may contribute to test case
linkage efficacy, or a positive rather than negative outcome for linkage, include the following
factors that are typically at least partially controlled by test case advocates:

(1) usage: including whether usage is balanced with the level of resources available to the
court and can be affected by advocates filing cases who can contribute to under usage or over
usage; and the level of venue loyalty that a test case advocate has, which can contribute to their
motives to prioritize their potential obligation to consider the impact of their cases on the court;

(2) financial resources: including the budget and staff available to the court which, as
explained above, affect all three other categories and can be supplemented indirectly through test
case advocates who provide such resources as outreach, information, litigation costs, and
mobilization that the court itself may not be able to afford;

(3) expertise, including the repeat player status of the advocates that includes not only
legal training and experience of the litigants, but in the case of developing court litigation, also
their knowledge of the gaps in the court’s resources and how to fill them; the ability of the
advocates to choose cases that are the most well prepared and easiest to frame sympathetically;
as well as the ability, connections and resources needed to do extensive research, produce
evidence and witnesses, and provide information to the court; and

(4) compliance: such as through coordination of the test case advocates with a broader
movement or campaign that includes regional moral authorities, the media, and international
NGOs who can use publicity campaigns, leverage, shaming and other TNAN strategies; and also
through ties to domestic nongovernmental organizations, media and other domestic elites who
can provide an education function for the public, sell the movement to a domestic audience, and put persistent pressure on a variety of government pressure points, such as through litigation strategies, lobbying the legislative and executive branch, prodding executive agencies for enforcement, and general political mobilization to broaden the effects of the policy changes beyond formal, specific compliance with the test cases.

Using comparisons between the disappearance and death row cases before the Inter-American Court of Human Rights, I explore how test cases may impact court development. The Inter-American Court provides the opportunity to study an underfunded, voluntary, and developing court with standing provided for civil society-led cases. These case studies shed light on the mechanisms that may lead to test case linkage. For example, the studies both highlight the lingering nature of strong linkages that can have effects that wane over many years and that may dampen the magnitude of other linkages during that period, and how attempts to delink the court and movement may be difficult if a strong linkage has occurred, as was the case with Peru’s attempt to delink the court and anti-impunity movement when it tried to withdraw from the court a decade after Velasquez Rodriguez.

The findings suggest that conditions preceding a test case may be important to linkage outcomes. Much of the previous literature on private actors and international courts focused primarily on compliance and the importance of mobilization after a test case. Several pre-existing factors related to the four categories in my linkage efficacy framework appear to contribute to linkage outcomes. These pre-existing factors include pre-existing mobilization structures linked to either the test case advocates or an established countermovement, prior experience with the system and knowledge of its gaps in resources, and leftover frames (good or bad) from previous test cases or campaigns by the movement in the region.
The case studies suggest that test case linkage outcomes are not just a story of formal compliance with specific cases, which has been given a lot of attention in the court effectiveness literature, but rather a story of the broader success of a court and a movement. Domestic mobilization structures, as expected from Tarrow’s (2005) findings on the leading cause of failure among transnational movements, are found to be especially important in my analysis. Further, findings indicate that if the court has become institutionally dependent upon an external source’s resources, expertise, monitoring, or mobilization structures, the court may become more vulnerable to backlash when a test case becomes linked to the court that is outside of the “crutch” organization’s expertise, research and information sources, mobilization networks, etc., upon which the court has become dependent.

Lastly, I find that test cases may impact the long-term success of a developing court and that test case advocates may need to consider the potential impact of their cases on the court when filing those cases. The legal ethics literature on test cases has debated the tension and potential conflicts of interest for lawyers of test cases (Crow 2005). These lawyers must consider not only whether they have a chance of winning for their client at the court but also whether they have a chance of successfully using the decision to promote their cause. I argue that international test case advocates face an even greater dilemma if linkage is likely to occur between the court and their movement. This linkage may create an additional level of obligation to consider: the impact of the test case on the court, if linkage occurs. Courts may also want to consider this potential impact when setting standing and case selection procedures that allow more direct and open access. Courts may need to consider keeping some control of the cases that come before them at critical junctures, such as early in their existence. In some cases, however, the conflicts between the court’s success and its own mission may add to the potential conflict.
for advocates between the third level of obligation to the court and their obligations to their clients, particularly if advocates are representing the poorest, most oppressed, or hated groups. These groups may be the most in need of urgent human rights protections but also may be likely to have the fewest resources behind them. However, understanding the mechanisms that affect linkage and its outcome may help test case advocates and not yet fully institutionalized courts assess which factors may be useful for mitigating the very real possibility of a backlash against the court and the movement.

The research and theory building in this study is divided into two parts. The first part will review the literature on international courts, norm diffusion and transnational movements in Chapter 2, develop a theory of test case linkage and critical junctures for courts in Chapter 3, and then explore whether test case linkage occurred in Latin America after the disappearances cases in Chapter 4 and/or in the Caribbean after the death penalty cases in Chapter 5. Part two reviews the literatures on international court effectiveness, test case success and transnational movement outcomes to create a framework of factors that may contribute to test case linkage efficacy in Chapter 6, and then in Chapter 7 compares the Latin American case study and Caribbean case study using the linkage efficacy framework. Chapter 8 provides some concluding observations and highlights some potential areas for future research.
CHAPTER 2
CIVIL SOCIETY AND REGIONAL HUMAN RIGHTS COURTS

International tribunals and transnational movements have each received a fair amount of attention in the political science and legal literature, but until recently the crossover between the two had not been the focus of the literature. Courts at the international level must be accepted by states, and much of the legal and political science literature in the past has been focused on why states recognize these courts at all. The norm diffusion literature in political science has included theories about how policies spread throughout a region, and the social movement literature has addressed how movements cross national lines in both directions, such as from the international to the domestic and vice versa. I draw from these three literature strands in this chapter to present a theory of how acceptance of a human rights court can become linked to the success or failure of movements that win test cases before newly developing voluntary regional courts. I explain in the next section my rationale for using the Inter-American human rights system for building this theory of test case linkage.

Background on the Inter-American Human Rights System

The Inter-American human rights system offers a unique opportunity to explore the role of civil society and test cases on the development of an international tribunal. The Inter-American system developed after the rise of nongovernmental organizations (NGO) and transnational advocacy networks beginning in the 1970s. Though little known in the United States, the Inter-American system of human rights has been a strong advocate for human rights in the Western Hemisphere for decades. In 1948, the Organization of American States (OAS) passed the American Declaration of the Rights and Duties of Man, and in 1969, the organization opened the American Convention on Human Rights (ACHR) for signature. The OAS established the Inter-American Commission on Human Rights based
in Washington, DC, in 1959. This commission of experts was tasked to perform watchdog duties for human rights in all OAS states, whether or not the state ratified the Convention.

The American Convention established the Inter-American Court of Human Rights (IACHR), when the requisite number of ratifications had been received to put the Convention into effect. This event occurred upon the 13th ratification in 1978. The court’s seat is in San Jose, Costa Rica. After a rocky start, in part due to poor relations with the commission, which at the time was solely responsible for deciding when to send individual contentious cases to the court, the court began hearing cases from individual complainants against States Parties to the Convention in 1986.

The court only hears individual contentious cases against states recognizing its jurisdiction. Unlike the European system, recognition of the court’s jurisdiction remains optional even for states that have ratified the American Convention. As opposed to the European system, ratification of the Convention is not a requirement for OAS membership, and many states including the United States, Canada, and much of the English-speaking Caribbean have not ratified the Convention nor recognized the court’s jurisdiction. By 1998, all Latin American states (sans Cuba) had recognized the court’s contentious jurisdiction, enabling it to hear individual complaints (see Table 1 in Chapter 1). Since many international courts remain voluntary, this case study has relevance to other systems. Further, this study allows for comparing the roles of sophisticated actors in two separate geographic areas (Latin America and the Caribbean) of the same system as well as between successful and unsuccessful norm campaigns.

For states not recognizing the court’s jurisdiction, the court found in its earliest cases that the state itself is responsible for the actions of any regime that existed while it was under the court’s jurisdiction, regardless of regime changes or transitions.\(^2\) Thus, if a state were to become a

\(^2\) The court accepts the international law principle of “continuity of the state” in its first decision, *Velasquez Rodriguez*, in paragraph 181.
dictatorship for a few years after recognition of the court’s jurisdiction and then democratize, the new democratic state would be held responsible for violations by the previous regime. Recognition of the court’s jurisdiction can be withdrawn if a state withdraws from the American Convention. Withdrawal has occurred three times. First, the Republic of Trinidad and Tobago withdrew from both the American Convention and the court. Second, Peru attempted to withdraw in the latter years of the Fujimori regime but re-recognized the court after the country’s redemocratization. Most recently, Venezuela withdrew from the American Convention in 2012 after a series of cases in which it claimed the court was biased.

**Why States Recognize a Voluntary Human Rights Court**

To explore the mechanisms of the potential linkage between courts and movements that bring test cases before it, I have chosen to study a voluntary court, because linkage in a voluntary court can potentially lead to stronger reactions and greater failure for the court. The Inter-American Court is not the only voluntary international tribunal, even for human rights. In fact, the majority of international tribunals for human rights are voluntary for states, including the IACHR, the African Court of Human Rights, the International Criminal Court, and the United Nations Human Rights Committee (UN HRC), which hears complaints from citizens of states that have ratified the Optional Protocol to the International Covenant on Civil and Political Rights. Europe’s less purely voluntary system is in fact the outlier.

Why have states continued to create international tribunals that are meant to hold them accountable for their actions? Studies have argued over which tribunals—human rights or otherwise—should be considered international tribunals, but regardless authors find that states continue to create such tribunals. Estimates from the Project on International Courts and Tribunals include the operation of approximately 20 existing international judicial tribunals and another 20 quasi-judicial

Why would states agree to have an external body scrutinize their human rights record or other policies? Many, often contradictory, arguments may be made to explain this behavior. Earlier studies were primarily state focused, but the more recent norm dynamics literature has explored the role that non-state actors may play in the use of international institutions, though the focus with few exceptions has not been on test case strategies. Studies that have included test cases have tended to be focused on Europe, where the international courts’ memberships and development are more stable. In the following sections I offer a description of realist responses to these central questions along with some liberal rebuttals, and follow up with answers focused on domestic rationales. I then present a brief look at the relevant portions of the diffusion and norm dynamics literature. I will begin by addressing the literature on court recognition, which though focused on state behavior, contributes to the understanding of states’ motives and goals in establishing and recognizing international courts. Understanding state’s motives to recognize courts is necessary to identify why these decisions may later become intertwined with the decision to accept a movement’s preferred norm.

**Realist Theories and Court Recognition**

Realists have long argued that international institutions in general are often created by powerful states to serve their own interests (Morgenthau 1973). They give these institutions little real power over themselves, for example by reserving the power to veto for the five superpowers of the UN Security Council. They argue that powerful states may use these institutions to push their own democracy or human rights agenda and values, but they push these agendas to gain additional control over other states by having those states mirror their own value systems rather than because those values themselves are the objective (Carr 1964). When the institutions become inconvenient, such as
when the UN Security Council seemed unlikely to sponsor the Iraq War for the US, the powerful states maneuver around these institutions and act unilaterally or at least outside the established institution. Thus, the institutions merely offer a façade of multilateralism with no real control over powerful states. I note that many powerful states fail to recognize courts altogether, as has been the case with the Canadian and US governments in the Inter-American system. However, I disagree that institutions cannot carry some weight with states, especially when combined with other powerful forces, whether those forces are state or non-state controlled.

More recent studies have echoed earlier realists’ findings that international institutions and relationships can be used by more powerful states to pressure weaker members to do what is most economically and politically advantageous for the powerful state’s interest. For example, bilateral economic treaties can be used to enforce the desired political goals of democracy and human rights. In a study of European treaties, Hafner-Burton (2005) associates provisions requiring human rights and democracy in order to trade with a nation with a higher rate of compliance with these policies. The same could be argued with respect to other treaties and powerful states, presumably in Latin America: this would be the United States.

Yet one previous study, which specifically looked at whether realism and power politics explained the establishment of the Inter-American human rights system, determined that the US government did not in fact have the most significant impact on the system’s development. Forsythe (1991) explored whether the actions of powerful states explained why some states had supported the system when they did. Instead, Forsythe concludes that key Latin American democracies had acted as moral authorities to promote and influence support of the system. These democracies, ironically, included Venezuela, which in 2007 threatened to withdraw from the Inter-American Court if it found against the state (Chicago Public Radio 2007), and in 2012 carried through with that threat. The key
democratic states were not necessarily powerful in economic or military strength, but Forsythe finds that their moral authority and strong support for human rights made a difference. This idea challenges the realist notion that economic and military strength were the critical factors. Hawkins (2004) suggests that persuasion rather than coercion may be effective with norms that have been taken for granted or believed to be self-evident. Persuasion may be useful for weaker states and non-state actors able to use persuasion to pique the interest of the stronger states (see Keck and Sikkink 1998), and especially where they can leverage those stronger states to intervene.

I argue that another theory may help explain how weaker states that are moral authorities may impact policies in other states’ deals through relationships and shared political and cultural values, rather than just through economic and military power. This theory, called emulation, comes from the diffusion literature. Emulation relates to the premise in the transnational advocacy network (TNAN) literature that networks that have connections to what I call “translators,” such as moral authority states in the region or elites within a country, can help “translate” international norms for a more local audience. The TNAN literature has noted how important domestic connections are (Tarrow 2005), and I propose that they may in fact help explain how moral authority states obtain effective persuasive power, absent true coercive power. When those moral authority states are part of a broader mobilization of intergovernmental organizations and NGOs, I argue, they may have even more force. This will be discussed more later in the chapter.

**Toothlessness and Cheap Talk**

Realists not only argue that coercion causes states to recognize international tribunals, but they also argue that states can sign onto tribunals and treaties when they do not have to make much of a change to comply (Hathaway 2002). In other words, states sign on when the commitments required match the policies the state has already accepted merely for the purpose of symbolically signing on to
the tribunal’s or treaty’s principles (Posner and Yoo 2005). A state that is already a democracy has no problem committing to a tribunal or treaty designed to ensure compliance with democratic principles or policies. According to these theories, those states that might really be impacted by the treaty’s or tribunal’s core mission are not likely to sign on if they fear it has any real “teeth” or ability to compel their compliance. States, in some cases, may be mistaken about how close their policies match the treaty’s policies or the treaty’s interpretation that may evolve over time through decisions by the tribunal, such as those that arguably “overlegalize” the treaty (Helfer 2002) (discussed further below). A further example of this would be the interpretation of equal rights as including gay and lesbian rights in recent years in some jurisdictions. If a state believes it respects human rights and thinks it will not be called to account before a tribunal, it may be surprised when a new policy or controversial interpretation of the underlying treaty lands it before the tribunal.

In other cases, realists might argue, states ratify a treaty knowing full well that they are not willing or able to comply with its terms. The literature calls this practice “cheap talk,” because the state offers “lip service” to a treaty’s principles without actually implementing the policies (Hathaway 2002). Since many treaties with tribunals attached allow ratification of the treaty without recognizing the jurisdiction of the tribunal, cheap talk often occurs with only the treaty ratification and does not necessarily place a state under direct monitoring bodies with real enforcement powers unless the state acknowledges some additional recognition. Or, as Conant (2002) argues, where possible the government may seek to constrain the impact of the decision even if it is not willing to completely fail to comply. The TNAN literature notes, however, that sometimes even purely cheap talk or symbolic ratifications can be utilized by non-state actors who leverage powerful states to call out the disconnect between a state’s commitments and behavior through accountability politics strategies (Keck and Sikkink 1998). Essentially, even cheap talk ratifications may offer some purpose for movements.
Accommodation

Some of the courts’ literature has noted that even when a state recognizes the authority of a tribunal to hear a case, the tribunal may in fact only serve the economic, strategic, or political interests of the states that created it. Posner and Yoo (2005) demonstrate empirically that the more dependent tribunals (i.e., those over which states have more control via ad hoc tribunals for which each state chooses one of the tribunal members) tend to be more effective. Posner and Yoo argue that the more independent tribunals promoted by many activists and idealists tend to be less effective outside of Europe. They define effectiveness as both usage of the court and compliance with its judgments. Independent tribunals are permanent tribunals, have compulsory jurisdiction, do not require a national of the state to be a member, and have fixed terms for judges who are chosen by third parties (Posner and Yoo 2005). These tribunals are less likely to be used by states, and states are less likely to comply with their decisions. The underlying implication is that states show a greater likelihood to prefer the more accommodationist tribunals to the state or states involved. They argue that with more independence given to the court and more access given to non-state actors and individuals, the court’s impact on state behavior decreases.

Several scholars have noted the ways in which courts go too far can undermine compliance and state support, for example, when courts offer overly detailed decisions that ignore domestic political realities (Cavallaro and Brewer 2008) and provide innovative interpretations that ignore regional consent (Neuman 2008). The more recent studies, however, have at least focused more on the role of the court and its agency in writing decisions, something which is important when considering the different but perhaps complementary roles that states, courts, and non-state actors may play in the development of international courts and for my focus on test case linkage which focuses on court and civil society actions that overlap.
**Liberal Theories**

Liberal theorists argue that courts can succeed with more independence but that this independence for international courts is not without limits. In his study of why the Republic of Trinidad and Tobago withdrew from the American Convention on Human Rights, Helfer (2002), after dismissing several alternative theories, concludes that the international and regional human rights systems had “overlegalized” human rights, particularly in relation to the challenges to the death penalty in the Caribbean. Though Helfer does not explicitly argue that the tribunals went too far or should accommodate the state’s interests more, Helfer implies that the courts must consider allowing some discretion to the state in the details of the implementation of the treaty so that the state can make the treaty work within its political situation or within what has been labeled in the European system as a “margin of appreciation” (Burstein 2006). If not, tribunals can scare off states that otherwise would remain in the system. Allowing this discretion, Helfer and Slaughter (1997) argue, is one of many factors that have made the European Court of Human Rights more effective. These authors continue to develop court agency theories, including various factors outside of the overarching rules on the authority and structure of the courts as controlled by the courts themselves and that can allow them to try to grow their jurisdiction and become more effective. These court-controlled factors include knowing the audience, impartiality, quality decisions, and incrementalism.

Using this logic, some scholars promoting independent tribunals have flipped realist perspectives on their ear. Instead of arguing that commitments to such institutions are merely symbolic and do not necessarily show a real commitment, these scholars argue that the commitment allows states to signal credibility and build trust. By putting itself under scrutiny from an outside, independent body, the state actually signals its true commitment to the principles. Further, Helfer and Slaughter (1997) argue that states’ interests may overlap with those of more independent tribunals.
States enter into agreements with other states hoping that the other states will live up to their commitments.

Costs must be borne for monitoring and evaluating other states’ compliance with a treaty. These costs can be shifted to an independent tribunal from the state, recognizing not only the resource costs but also the relational costs of having to criticize a treaty partner directly. Independent tribunals offer a means for maintaining the good will of a broader community outside of the state or states involved in a dispute (Helfer and Slaughter 1997).

States’ acceptance of institutions, including tribunals at the international level, can be intertwined with domestic goals. Perhaps the most well-known domestic theory is liberal republicanism, a theory put forward by Moravscik (2000) in his study of the development of the European Court of Human Rights. Moravscik concludes that in the European context it was not the established democracies that promoted the binding nature of the European Court but rather the newer democracies. He theorizes that the elites within new democracies had hoped to make commitments at the international level that would “lock-in” the democratic reforms that their domestic opponents might have wished to overturn. On the flip side, Moravscik suggests that established democracies in a region should not support creating a tribunal that puts their policies under scrutiny, since they do not need to lock in reforms that are already well established. As reported above, Forsythe (1991) points out that it was in fact Venezuela and some of the other established democracies that supported the development and recognition of the Inter-American system (Forsythe 1991). This theory may not apply directly to voluntary court recognition but does suggest that internal motives may be important and that domestic pressures and reactions to courts and their test cases, in addition to international pressures, are important to consider.
Other similar reasons are proposed by scholars for why domestic concerns may lead states to support the development of international and regional institutions. States that wish to promote democracy (or other policies) can use regional institutions to pressure members to democratize or redemocratize (Pevehouse 2005). As mentioned above, perhaps Venezuela and other established democracies in Latin America wished to use the court as a mechanism to promote human rights and democracy through a regional institution. Further, the institutions can create mechanisms to socialize societal elites (e.g., the military, or in the case of courts, judges) to be more supportive of democracy. Lastly, Helfer and Slaughter (1997) argue that signing on to international tribunals can be used by states to signal their credibility and trustworthiness to other states and can likewise relieve states some of the monitoring costs so that states do not have to monitor treaty compliance by partner nations (Helfer 2005).

Though this part of the literature does not emphasize the use of courts by advocacy groups, the reasoning could be used to argue that institutions like a regional human rights court can be used to legitimize transitional policy and movements as with the push for anti-impunity trials in Latin America. Further, the suggestion that tribunals may wish to put off some of the monitoring costs onto international institutions may apply to developing, underfunded international institutions also wishing to put off some of the monitoring costs onto private litigants or advocacy networks. For a court these shifted costs could include the costs to do outreach to find cases, fund litigation, and monitor its compliance. This part of the literature, however, does not reach a detailed analysis of the potential mechanisms whereby non-state actors may have agency to help make international courts work or to help grow their jurisdiction. Though many theories in this part of the literature have attempted to explain motives for states’ recognition of international tribunals, none of these realist, idealist, or liberal theories have been used to explore whether civil society groups, such as transnational advocacy
networks taking test cases, may play a role in the development of a tribunal or a state’s choice to accept a tribunal’s jurisdiction.

The Development of Norms and International Courts

The literature on why states create and recognize international institutions or regional human rights courts raises many useful questions but does not fully explain the potential pool of mechanisms for how a developing human rights system gains support and recognition from member states. The missing ingredient may be partially found in the study of how a developing human rights system interacts with the legal and political norms developing in the region, especially norms related to the system’s goal of human rights protection and the advocates promoting those norms.

The recent literature has begun to address the variety of interactions between movements promoting norms and the development of international institutions, though only a few studies have so far applied these theories to international courts and even fewer have applied them to developing, voluntary jurisdictions. This literature offers instruction on how non-state actors can be involved in the very creation of the institutions themselves and the reform and expansion of private access to those institutions (Cichowski 2007; Hawkins 2008). Alter (2006) notes that the increased amount of access given to private actors in recent decades may be part of a trend toward the creation of judicial checks and balances within the international system. Further, Alter and Helfer (2010) offer a comparison of ECJ and Andean Court of Justice jurisprudence that judges tend to be more expansive in their interpretations when they are supported by domestic government officials and advocacy networks. This recent literature on non-state actors in international courts has to some extent been based on previous literature outlining the basic notions of how norms are created through an interaction between norm entrepreneurs and developing international tribunals, but demonstrates that these ideas of non-state actor and domestic support for courts may be critical in the development of courts. However, it
still does not reach the idea that test cases themselves may be a more direct way for movement advocates to impact the court’s development of its jurisprudence and, if linkage occurs, its jurisdiction as well.

Nevertheless, the literature on norm development and diffusion does more generally give insight into the broader interaction of courts, norm development, and the use of courts by norm-promoting movements upon which to base a theory of the impact of these norm entrepreneurs on states’ decisions to recognize the court. I will note here, however, that much of the literature on diffusion has not specifically focused on the study of the deliberate use of international tribunals by these movements, something that is critical to understanding how norms may be successfully attached to institutions by entrepreneurs promoting their own movements.

**Diffusion**

Diffusion scholars have studied how norms and policies can take hold and spread like a virus, and have attempted to identify the mechanisms underlying what makes these norms spread. Much of this work has reaffirmed some of the mechanisms identified in the literature addressed above, including some forms of coercion (Simmons et al. 2006) or a desire to be politically accepted in a community of nations (Pevehouse 2005). Yet the literature on diffusion does offer some additional insight into how norms spread that may be applicable to patterns of court recognition that relate more to factors that may be under the control of transnational advocacy networks.

Diffusion is the idea that innovation, such as a policy of democracy, liberalism, or even court recognition, travels across space. Key to diffusion is that the decision of one state to innovate, or to change its policy, impacts its neighbors states’ decisions. “Neighbors” can be geographic or those with which the state has the closest ties. Research related to diffusion has for many years studied the flow of democracy across space (O’Loughlin et al. 1998; Starr 1991), but only recently has this research
begun to address the impact of geography and other mechanisms of diffusion on a country’s human rights practices (Greig et al. 2007; Lantrip et al. 2006; Risse et al. 1999). In these studies, diffusion indeed took place, though how it took place and the mechanisms by which it took place has differed.

Simmons et al. (2006), in an overview piece for a symposium on diffusion in *International Organization*, note the presence of strong evidence for states’ decisions being interdependent on previous decisions by other states. Simmons et al. distinguish between several explanations in the broader literature for why states adopt the same policies. They find four major explanation categories, two of which overlap. The first two are somewhat related to the ideas addressed in the international tribunal literature, while the last two overlap and have not been fully addressed by literature on acceptance of international tribunals.

First, the article addresses theories of diffusion through *coercion* from realist theory’s powerful states, intergovernmental actors, regional bodies (see Pevehouse’s 2005 account above), or other organizations. Second, diffusion occurs through *competition* with other states that can be used to make a country attractive to investors or conceivably to join a bilateral agreement to trade with states wanting to promote democracy or human rights, as has occurred with some European Union trade agreements (Hafner-Burton 2005). Lastly, the authors summarize theories of *learning* from or *emulation* of others, which includes idea-sharing between elites, the impact of epistemic communities, and constructivist ideas of norm diffusion dynamics.

The literature on what makes states recognize an international tribunal has been sparse on how it may be impacted by diffusion of emulation, especially since it has failed to consider one of the most important aspects of emulation theory: the recognition that a policy, such as court recognition, may mean different things at one point in time or in one location than it does at another. I argue that this concept may be important for my linkage theory, especially if a court wants to address different sub-
regions within its potential jurisdiction and understand whether linkage to particular test cases may wax and wane over time. Part of emulation theory is that the meaning of a policy, or innovation, can change over time (Simmons et al. 2006). For example, taking on democracy may mean caving to Western ideology at one point in time, but it may mean something completely different after several other states with a similar background and in the same geographic neighborhood have successfully “translated” democracy into something palatable to a state’s cultural and political past, as well as a demonstration that democracy can be successful in a particular region (O’Loughlin et al. 1998).

I argue that the same may indeed be true for acceptance of a regional court, whose perception and reputation may change over time. So what acceptance of the court might signal to the community of nations at one point in time may change as the court’s jurisprudence develops. It can also be changed depending on how that jurisprudence fits with what moral authorities have accepted as their policies, and which transnational advocacy movements those key states have joined (along with with intergovernmental organizations, NGOs, and epistemic communities). If the court or its jurisprudence fits with what these moral authorities have accepted, emulation of the state’s policy to accept the tribunal may aid in diffusion of acceptance of the court’s jurisdiction by other states in the region. Drawing from this literature then, I will argue that test cases can link a court to a movement now, but that linkage may wane over time or be replaced by future linkages.

Mechanisms for diffusion of acceptance of a tribunal likely include all of the above diffusion theories but, I propose, may include mechanisms that have not been addressed by the diffusion literature directly. The literature on why states accept tribunals offers a baseline for understanding states’ motivations for wanting or needing to be involved in the creation of these international institutions, but unfortunately they cannot explain the full process of diffusion or acceptance of a tribunal, because states do not fully control the trajectory of courts that allow individual complaints. In
many regional human rights courts these complaints must be brought by individuals or by a group of people or private organizations with the resources to support at least the litigation costs, including NGO-sponsored cases. The role of non-state actors, that is, individuals and advocacy groups, and their use of courts as a norm changing tool is an area of literature that is just starting to flourish in the international arena and is addressed in greater detail below.

Legal NGOs bringing test cases, supportive states and intergovernmental institutions, and social movements working together as transnational advocacy networks are one mechanism of diffusion that has not been extensively addressed in the context of the literature on international treaties and tribunal recognitions, but has been addressed more generally in international relations and social movement literature. Without understanding how these advocacy networks may impact a court’s jurisprudence, it is difficult to know what impact their use of the courts may have on the institution’s development and acceptance by states, as well as how and why that impact may vary dramatically at different times or in different locations.

**Transnational Advocacy Networks and International Institutions**

The state-centric focus of the literature on why states accept treaties and international tribunals has often failed to acknowledge the role NGOs and social movements can play in the development of international tribunals including regional human rights courts. The transnational advocacy networks literature is a subfield that has been able to fill that void in the political science literature as it relates to the potential relationship between social movements and international institutions more generally. To a lesser extent, studies have begun to address their role in international courts. However, the relationship between these movements and the expansion of a voluntary court’s jurisdiction has not been systematically analyzed. This section provides an overview of the literature on the role of transnational advocacy networks and other non-state actors in the development of international norms,
their increasing use of international institutions and tribunals, how social movements can function at both the domestic and international level, and the goals of social movements as compared to that of the international tribunals themselves. I will then use this review of the literature to develop a theory for the use of test cases at international courts by transnational advocacy networks, and how their use of courts can affect not only the success of the movement but also the development of the court.

**Courts, Social Movements, and Norm Development**

The political science literature has not extensively explored the role of courts as mechanisms to aid in diffusion or as regional certifiers of norms, nor has most of the literature on norm development fully explored the use of international courts in norm development, though it has pointed out the important role that non-state actors can play in promoting and framing international norms more generally. Only a few scholars have begun to systematically address how movements and advocacy networks can use test cases, or emblematic cases chosen to represent and address larger sets of violations, to enlist international tribunals as a mechanism for diffusion of their preferred policies and norms, and most of them have focused on compliance issues for the court and on stable European courts that have already institutionalized (Alter 2006; Cichowski 2007; Conant 2002). The literature, however, has noted that test case decisions have the potential to become respected mechanisms for certifying and diffusing a norm within the region if advocates can mobilize to promote the decision.

Test cases can fit within the processes described in the political science literature on transnational social movements, even though this method is not specifically indicated in many of these studies. Social movements, Tarrow (2005) notes on page 32 in *The New Transnational Activism*, can go through six different processes to become transnational social movements. Though not addressed by Tarrow specifically, I propose that each of these processes can occur or be impacted by test cases.
First, Tarrow (2005) specifies that at the domestic level a domestic issue becomes framed by international symbols. I apply his logic to test case decisions from the international court, which I argue can be deployed to give a domestic issue an international human rights frame. At the domestic level, Tarrow argues that internalization can occur, whereby the domestic politics respond to the international pressure, derived from a court decision, either favorably or not. Tarrow states that it is important at the domestic level for a diffused policy to be “certified,” or legitimated, or at least not decertified by respected authorities. This is equally true at the international level, where if a policy is to diffuse successfully and take hold, it must be certified or at least not be decertified by the key states in the region. For these reasons, I theorize later in this study that for a successful linkage, movements hoping to succeed in a region would be wise to have connections with some of the states that hold moral sway in the community, with international organizations in the region, and with elites at the regional and domestic levels, so that these players can help certify the movement and decision, or at least do not attempt to mobilize against the movement and decertify any test cases or other gains the movement might make.

At the intersection of domestic and international politics, Tarrow (2005) describes scale shift and diffusion, which mean taking a movement to a different level vertically (e.g., domestic to international) or horizontally from one site to another. Applying this to the present study, when domestic NGOs contact Human Rights Watch or CEJIL, they can cause a scale shift and these international organizations can help the organization file a test case, which means taking the case vertically. Then advocates can use the international court’s decision to spread the movement across countries within the court’s jurisdiction or even beyond it, if the test case receives a favorable decision.

Tarrow’s (2005) last two processes address the international level, and he says that these processes are the two most likely to result in creation of a transnational advocacy network. I will
discuss these two processes as I propose they would apply to the formation of a TNAN around a test case. At the international level, movements filing test cases are externalizing a domestic problem and putting it into an international arena, and the case development and the eventual decision by the court can then bring in other domestic NGOs working in the region, more international NGOs, key states and others to form a transnational advocacy network to mobilize around the decision.

These processes are informative in the understanding of how a movement can become a transnational movement. They begin to help form my theory of linkage by helping understand the mechanisms by which test cases can impact domestic individuals and groups, and how they may be able to aid in the mobilization of additional domestic advocates for the movement, though not yet to how they link the court. This literature sheds light on how test cases at the international level may become tied to domestic change, while not directly addressing test cases or what factors determine test case successfulness. Neither do they flesh out how the success or failure of a test case campaign relates to the success or failure of a court in a region.

The literature on norm dynamics has also shown that NGOs and networks can act as norm entrepreneurs who initiate a movement to promote a specific norm through platforms (e.g., international institutions) that are available to them. For example, NGOs in coordination with sympathetic states and other actors might begin to push for the norm that domestic abuse is wrong. They would advocate using persuasion that states should protect women and children from domestic abuse by lobbying international institutions or in state capitals, they may leverage powerful countries using public opinion garnered through publicity campaigns to leverage those countries to pressure other states to accept the norm or to shame the violator country (Keck and Sikkink 1998). Other mechanisms for diffusion at this stage include socialization, emulation, and institutionalization of the norm (Tarrow 2005).
The norm entrepreneur’s advocacy, if successful, would initiate a diffusion of that norm to other states through the work of networks, states, and international organizations (i.e., the UN). Once about a quarter of states accept the norm, scholars argue, a so-called “tipping point” is reached and initiates what political scientists call a norm cascade, or a sharp spike in the acceptance of the norm by other states. This culminates in the norm literally becoming the “norm” of state behavior which then becomes habit (Finnemore and Sikkink 1998). The role of these norm entrepreneurs, including non-state actors, has not been fully explored in terms of how they may use international courts to promote a norm, especially in emerging courts that may be more readily impacted by new cases, since they have not developed previous jurisprudence, or how test cases may fit in with broader network campaigns.

The legal literature has also discussed norm development in terms that are helpful to understand how NGOs and social movements can impact that development through test cases. The most strongly established norms in international law are considered customary international law. In determining customary law, two aspects show that a law (or norm) is one so ingrained as to become international custom. The first is formal law, or *opinio juris*, to create a sense of obligation for states through codified laws or decisions. Second, the law must be followed by a significant number of states in practice. With more compliance and less non-compliance, the likelihood that the norm becoming customary becomes greater.

Though most norms that movements attempt to create do not become customary as laws, the following are two aspects or factors for determining the forcefulness of a norm: (1) formal legitimation; (2) practice. For more on customary international law and how to break down the components of how a norm reaches this status, see Anthony Clark Arend’s *Legal Rules and International Society* (1999, Oxford University Press).
the concept of formal legitimation, which falls short of *opinio juris* but is a stepping stone toward the general acceptance of a norm.

For the theory of linkage that I develop in this chapter, the importance of these concepts is that the court becomes useful to the movement because of the formal legitimation that its decisions can create. This formal legitimation through the opinions of experts or those with formal authority (e.g., regional courts) recognized by states establishes credibility for the norm to represent the force of law. The movement can then address violations of the preferred norm as a formally recognized violation of international law. Though usually not sufficient to obtain instant compliance in practice by all states, this formal authority by regional court decision, for instance, can be used by both international and domestic advocates to promote their causes.

The African Commission on Human Rights is an example of a regional system where domestic advocates in Nigeria have been able to use the court to promote their cause. The advocates in Nigeria use the commission’s decisions to “justify preferred interpretations of existing constitutional provisions, and to embarrass (and de-legitimize) the military” and thereby turn public opinion against some of the practices of the military (Cavallaro and Brewer 2008, citing Chinedu Okafor, p. 776). The decision can complement the ongoing claims and campaigns by domestic NGOs and activists (Cavallaro and Brewer 2008). Likewise a government can use a case lost by advocates or individuals at the regional court to delegitimize their claims, through cases including *Nogueira de Carvalho v. Brazil*, in which the Inter-American Court found that insufficient evidence had been produced to show that the Brazilian government had failed to investigate the murder of a human rights defender. Government authorities were able to employ this loss at the court to delegitimize the claims of advocates that the state had violated judicial guarantees (Cavallaro and Brewer 2008, p. 807).
I also argue that regional court decisions can be used by sympathetic government officials to convince their colleagues in government to follow a new norm or interpretation of a norm. This idea, similar to Moravscik’s idea of locking in reforms by recognizing an external court’s authority, presumes that often some within the current power structure would like to move toward or retain reforms, and a formal legal decision by a court, whether the state has recognized it or not, may give weight to the norms in question. Tarrow (2005) notes that domestic advocates and insiders can be a critical part of bringing an international norm into a domestic sphere without it being rejected as too foreign, and these domestic elite insiders can be what I call “translators” to help diffuse norms through emulation, especially where they feel they have “cover” because of mobilization of other international and domestic supporters.

Lastly, I reiterate that international advocates may be able to use many of the strategies noted in the TNAN and norm dynamics literature (Finnemore and Sikkink 1998; Keck and Sikkink 1998) when using test cases, though most of the TNAN literature does not focus on test cases. Test case decisions may be able to help in the process to convince a Western state to leverage an abusive state by using its economic or military support to influence the state to follow the norm. Advocates can use the court’s decision to show that they are not a fringe element, and to gain attention to their cause. They may be able to use the decision as part of accountability politics to show the disconnect between the commitment of the state and the state’s behavior, especially those states that have ratified the treaty that the court interprets (and possibly even if the state has not accepted the court’s recognition yet). Further, they might use the case in shaming strategies as further documentation of the violations and to gain publicity.

Though the norm dynamics literature has not always addressed the direct use of regional court decisions by advocates, it has on occasion acknowledged that tribunals may have a role in the norm
acceptance process. One role can be that acceptance of the court itself can signal that a rule has reached prescriptive status. In their chapter on human rights diffusion in Latin America, Ropp and Sikkink (1999) use recognition of the Inter-American Court as the benchmark for entry into prescriptive status. This prescriptive status phase occurs after a country has gone through the first three phases that include initial socialization, denial, and tactical concessions, but before the state has fully achieved the final phase of rule-consistent behavior. In other words, acceptance of the court means they are willing to be obligated by a set of rules, even if they have not yet fully changed their behaviors in practice. Similarly, states may accept a court to further show that they have accepted a particularly movement, such as the anti-impunity movement in Latin America.

The constructivist literature on norm development demonstrates the court’s potential role in diffusion of human rights norms. The justice cascade literature has traced the growth of the anti-impunity movement and trials of perpetrators in Latin American and suggested that the Inter-American Court may have had an impact on the successful diffusion of anti-impunity policies and trials in Latin American. The study specifies, however, that it does not address or analyze this important issue (Lutz and Sikkink 2001). These references to the Inter-American Court do not directly explore the role of NGOs, networks or other non-state actors’ use of the court. They do not explore how use of the courts by advocacy networks may impact the role courts can take in diffusion of a norm or, conversely, the impact the advocacy networks can have as a mechanism to diffuse acceptance of the court’s jurisdiction

This part of the literature also does not reach the issue of whether specific cases or movements’ use of the court can have an impact on states’ perception of the court and whether it means they have accepted human rights in general or whether they are accepting (or rejecting) some specific norm the court has certified in a decision. Ropp and Sikkink (1999) see the acceptance of the court as a static
generic stamp of approval for human rights, and therefore this type of characterization does not reach the issue of whether accepting the court may signal something different depending on the ever growing jurisprudence of the court that may change what that recognition means over both time and space in different eras or sub-regions, as the previously discussed emulation literature might suggest. Though Lutz and Sikkink (2001) suggest the court may have agency in norm development, their study did not reach that issue. The study also did not address the potential agency of TNANs using the court, and the potential interaction between the two.

Further, the literature ignores the idea that, as one might have expected given the previous suggestion in *Power of Human Rights*, a court might receive more acceptance in a region if ideas of accountability take hold in general in the region. As one law review article points out, in Europe the norm of acceptance is something that was cultivated by the court itself, which he argues moved slowly with its judgments in order to avoid a backlash (Burstein 2006). I argue the norm of acceptance is something that can be cultivated by the court as well as by non-state actors using the court strategically, especially if they have strong venue loyalty to the court because they have repeat player status, policy congruence (Hansford 2004) or simply wish to continue to have the court grow and be a venue for them in more countries.

I argue that transnational advocacy movements can use test cases in conjunction with a broader, well-mobilized campaign to promote their issue and, ultimately, impact the development of the court itself. Test cases are cases that have implications for broader public law on the issues raised in the case. Test cases tend to have, or at least attempt to have, a significant impact outside of the individual complainant who filed the case. Lawyers working with NGOs or transnational advocacy networks can, in ideal cases, carefully select the right individual case to represent the movement’s preferred norm and coordinate it with their broader, mobilized campaigns. Whether or not a case was filed as a test case,
any case can become emblematic later if it involves an issue that has not been previously addressed by
the court. A case with bad facts can be turned into an emblematic case if the opposition uses it to
represent the advocates as fringe elements, such as when advocates support known murderers or
terrorists, such as when the ACLU argued due process complaints on behalf of Guantanamo Bay
prisoners. More detailed discussion of why some test cases have a positive impact on court
recognition and others have a negative impact will be presented in later chapters.

Recent literature on international courts has begun to address the role that test cases can play in
the norm promotion process, at least as it relates to broadening compliance with a court’s decision.
Cichowski (2007) explores the use of litigation strategies within the European Court of Justice (ECJ)
and how they have impacted the policies of the ECJ, the EU, and mobilization strategies of movements
in general. In a study of the impact of ECJ decisions, Conant (2002) describes how different types of
private litigants, including movements, use ECJ decisions as bargaining tools when negotiating with
domestic officials. Alter (2006) theorizes that movements are more likely to be litigants in
international tribunals when their interests are narrowly focused test cases and when they are
politically disadvantaged in other arenas.

These studies provide initial exploration of the role of litigation strategies for movements and
the importance of movements’ litigation strategies for compliance and usage of courts. However, these
studies are primarily based on the European courts that are fairly stable and already institutionalized.
The literature does not address how usage of the court by movements may impact a developing court’s
growth, which I address in the next chapter, nor the factors other than mobilization and usage through
which test case advocates may affect the court’s growth in a positive or negative way, which I address
in Chapter 6.
CHAPTER 3

LINKAGE: THE IMPACT OF TEST CASES ON COURT DEVELOPMENT

In this chapter, I develop a theory that recognition of international human rights courts can become linked, for good or for bad, to social movements through test cases. I argue that a court’s opinions can play an important legitimizing role for social movements, much as the first Inter-American Court cases did for the justice cascade’s norms of individual responsibility and justice in Latin America. In the Honduran cases, the Inter-American Court served as a platform not only for states but also for non-state organizations and activists, a relationship noted in Finnemore and Sikkink’s (1998) norm cascade scholarship. The court helped promote the norms by giving the norm legitimacy or “certifying” the movement within the Organization of American States (OAS) and the community of nations with the strongest links to the OAS, the Latin American countries. The opposite is true when test cases lead to a backlash and when states or other domestic or regional actors can decertify or constrain the court’s decision through organized opposition to the movement, and if linkage has occurred, to the court. A strong negative backlash linkage, I argue, may be what happened when the London attorneys tried to use the court to not only save their Trinidadian clients from execution but also to establish norms relating more broadly to the inhumane nature of death row conditions and the injustice of mandatory death sentences.

As a side effect of the role it was called into service to play by activists, the Inter-American Court’s frame and reputation may have become linked with the anti-impunity movement through the disappearance cases and later with the anti-death penalty activists through the Caribbean cases. The linkages, I argue, altered the court’s reputation and development within the two regions. Linking norms to ideas that fit with a cultural norm have been shown to help speed the acceptance of norms as they diffuse. It can, as Tarrow (2005) suggests, aid in the internationalization of the problem and can
link it to cultural cues that might avoid decertification by elites at the domestic or regional level. For example, Busby (2007) notes a distinct connection between linking norms to religious ideas and the success of the norm with respect to the Jubilee 2000 debt relief campaign. This campaign had great success in Judeo-Christian countries, yet it was only accepted in some countries (e.g., Japan) after it had passed the tipping point and become fairly well established (Busby 2007). Another example of this linkage is the evolution of the normative discourse on US nuclear weapon use, which became linked with the idea that democracies do not start wars or fight dirty and helped developed a taboo around nuclear first use (Price and Tannenwald 1996). By linking an issue to something already held as a strong belief, norm entrepreneurs can frame norms to create an obvious good or bad connotation.

By linking a court to a norm that becomes more and more accepted in a region, I argue that this can aid the court’s development, while linkage to a norm that becomes decertified in a region can have a negative impact.

Though the justice cascade literature has not fully acknowledged the potential links between the anti-impunity movement and court recognitions, I argue that as the justice movement’s activists, both nongovernmental and intergovernmental at the Inter-American Commission, reeled the court into the movement through its first three cases (all disappearances), acceptance of the court’s jurisdiction became perceived as part of the acceptance of the anti-impunity ideals of the movement and a way for the state to show its values aligned with justice. It was a signal that the country would never again allow such atrocities to be condoned by the state. In other words, accepting the court’s jurisdiction became part of what Ropp and Sikkink (1999) call the “prescriptive status” phase of norm acceptance. Though the justice movement had its political and legal actors, the activists promoting the campaign against impunity purposefully framed the campaign using the pre-existing ideas of justice in Latin America and the Argentine example.
The court’s development in Latin America during the anti-impunity movement can be contrasted with its development in the Caribbean. The Caribbean came into the OAS at a later date, in the late 1960s, and most of the English-speaking Caribbean nations were established democracies. The Republic of Trinidad and Tobago recognized the court in 1991, 21 years after the Convention opened for ratification, so the Caribbean’s experiences before the court in 1998 did not start until a decade after Latin America’s first cases made their way to the court.

The Republic of Trinidad and Tobago’s first time to appear before the court occurred in 1998 (James et al. Case 1999). The group of cases failed to find the same successes through their use of the court that their anti-impunity predecessors had. The initial Caribbean cases, I argue, led to a backlash linkage in the Caribbean against the Inter-American system of human rights and provided more fuel for a Caribbean-based, alternative court. Unfortunately, neither the previous literature on diffusion nor the literature on why states do or do not accept the oversight of an international tribunal provide a tool for understanding why the development of the Inter-American Court has become so bifurcated. Despite arguments that it was because the courts overlegalized the issue in its decision (Helfer 2002), the same could have been argued about the court’s innovative legal decisions in the Honduran disappearance cases, which had the opposite effect in Latin America. The full story does not seem to have been uncovered in the literature.

This study seeks to explore whether linkage of the court to test cases, and surrounding campaigns by transnational advocacy networks as part of broader social movements, may provide some of the missing pieces to this puzzle. In the next section, I outline how the goals of regional human rights courts and transnational advocacy networks may in some cases have overlap, and that after a test case is won in the court by the network, these goals may become intertwined. I then outline a theory of how the growing use of international tribunals by activists has impacted the development of
international tribunals, specifically human rights courts that developed during and after the exponential growth of transnational activism that started in the late 1970s. To do so, I draw both on literature from the general literature on diffusion and international courts discussed in the previous chapter, but I further develop how transnational advocacy network and American judicial politics literature apply to the use of test cases in international courts. American judicial politics scholars have studied the role of interest groups in courts for decades, and the international courts literature has recently begun to draw on these works in studies of movements’ use of international courts. I draw upon these limited studies of interest groups in international courts, but I address the unique aspects of how these activists’ cases may impact the development of courts that have not yet fully institutionalized.

**Goals of the Movement and the Courts**

As implied above, the end result of a positive linkage between a movement and a court is that both the movement and the court meet key goals, which in some cases overlap. I explore some of the general, underlying goals of both courts and movements that may overlap. I explain why linkage may occur in the context of a regional human rights court to which civil society brings emblematic test cases. Later, when I discuss factors that influence the positive or negative outcome of linkage in Chapter 6, I will also outline how in some cases the goals of courts and the movement’s test case clients may sometimes conflict and lead to ethical dilemma’s for test case advocates.

**Court’s Institutional Goals**

Regional courts have substantive goals or functions often included in their founding documents primarily to interpret and promote compliance with the treaty upon which the system is founded. In the case of regional human rights courts, a regional human rights treaty is enacted as is the case for the American Convention on Human Rights. If a movement is successful in at least some of its arguments before the court, the test case decision becomes the court’s interpretation of the treaty and therefore
part of the court’s goal is to promote compliance with that decision within the region. Compliance bolsters the legitimacy of the court by showing that its decisions hold weight. Legitimacy serves the purposes of the court, which include promoting human rights in the Inter-American system. As the court promotes compliance with its decision, it promotes the movement’s preferred norms (or at least the court’s version of it). The court’s substantive goal then overlaps with the movement, at least on a particular case or issue that the court has opined. (See Table 3.)

**Table 3: Potential Overlap in Goals of International Courts and Transnational Advocacy Networks**

<table>
<thead>
<tr>
<th>Goal Type</th>
<th>Court’s Goals</th>
<th>Overlap</th>
<th>TNAN goals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantive Goals</td>
<td>Interpret treaty</td>
<td>Interpretation in test case to include preferred norm</td>
<td>Legitimize preferred norm as international legal rule</td>
</tr>
<tr>
<td></td>
<td>Promote compliance with treaty</td>
<td>Call out states that are not in compliance with test case</td>
<td>Spread its norm and compliance with norm</td>
</tr>
<tr>
<td></td>
<td>Enforce decisions</td>
<td>Monitor test case compliance</td>
<td>Help a particular victim(s)</td>
</tr>
<tr>
<td>Institutional Goals</td>
<td>Increase size and quality of docket</td>
<td>Increase access for civil society through formal rules &amp; trainings/outreach</td>
<td>Greater access to international institutions</td>
</tr>
<tr>
<td></td>
<td>Expand jurisdiction</td>
<td>Promote acceptance of the court after test case decision</td>
<td>Expand reach of sympathetic institutions</td>
</tr>
<tr>
<td></td>
<td>Impartiality</td>
<td>Careful selection and framing of cases for region</td>
<td>Promote greater respect for sympathetic institution’s decisions</td>
</tr>
<tr>
<td>Individual Goals</td>
<td>Prestige of writing “big” case</td>
<td>Case becomes famous (but can become infamous if it moves too quickly)</td>
<td>Gain attention or funding for the movement to better reach goals</td>
</tr>
<tr>
<td></td>
<td>Activist or accommodationist judges</td>
<td>(Can conflict or overlap depending on individual goals)</td>
<td>Self interest of individual movement members</td>
</tr>
</tbody>
</table>
Secondarily, the court, its staff, judges, and supporters may want to expand the court as an institution in order to promote its function as an interpreter of the law and a treaty compliance body. To make itself more effective, it may seek to hear more cases (Posner and Yoo 2005) or to increase the quality and breadth of cases it hears and reviews. To increase its docket, a court may encourage more cases to be filed by promoting procedures and admissibility decisions that allow broader access to the court, such as by permitting NGOs to file cases or accepting class action lawsuits. The court can promote its use by speaking to conferences of judges and lawyers and working with law schools and universities to create training opportunities. It may find alliances with civil society beneficial for securing funding and may organize conferences, especially in a system as fraught with a lack of fiscal resources as the Inter-American system with its reliance on states and the European Union for its operating budget due to its lack of financial support from the OAS (Cancado Trindade 2000; Cavallaro and Brewer 2008). Through these ties, resources, and professional development, the court’s staff and judges can increase case knowledge, improve procedures, hope to gain more prestige, and enhance the quality of the cases coming before it through a better understanding of the court, its jurisprudence, and its procedures in the region’s legal community.

Another way for a court to promote the underlying human rights treaty and its own institutional growth is to expand its jurisdiction. Linkage to a movement can aid in expansion of the court’s jurisdiction if the movement is successfully diffusing into additional states within the region. On the other hand, as can be seen in the case of the IACHR death penalty cases in the Caribbean, this goal may be hurt by linkage to cases and movements that have not (or at least not at this point) successfully coordinated, framed, and translated their movement within a subregion that has not recognized the court’s jurisdiction. The court may have conflicts between its mission to take cases and interpret the treaty, and its institutional goals for growth that may be harmed by taking certain cases. Where courts
have a choice on which cases to take, it may wish to limit the amount and timing of these potentially
negative cases. If it allows more control over its dockets to individuals or groups filing at the court, it
may have to rely on their discretion more. This potential obligation on petitioners will be discussed
further in Chapter 6.

Individuals working at the court may have differing goals, and some of those goals may be at
odds with institutional goals. Individual judges and staff members may wish to gain prestige for the
court to bolster their own career goals, or they may wish to be involved in or write the decision for a
“big” case to make a name for themselves. Individuals, including judges, may have activist goals,
either as human rights advocates or sovereignty advocates. They may wish to please a member state in
order to seek political or administrative office domestically. Sometimes these goals may align with a
court’s institutional goals, since bringing more prestige and more important cases to a court can build
its reputation and power (Burstein 2006), but that is not necessarily likely. An activist judge may write
a decision that goes too far too fast and alienate member states and potential member states. An
apologetic judge may opine such limited interpretations of a treaty and lead states already in
compliance in the region to become alienated. As a consequence, the court’s legitimacy may be
questioned.

For example, in the case of the *Castro Castro* reparations decision against Peru, the Inter-
American Court ordered Peru to add the names of inmates killed in a military raid of a prison to a
national monument to victims of the country’s tumultuous recent past. However, this decision was met
with distaste by Peruvians and the Peruvian government, since the inmates were members of Shining
Path and considered terrorists. The decision was very specific and not sensitive to the domestic
experience, but it drew attention to the Inter-American Court’s distinctness in that the European Court
established the margin of appreciation principle, allowing domestic governments some latitude to
interpret the specific implementation of a treaty’s provisions. In some cases, the Inter-American Court may be accused of the opposite, such as in the Peruvian case of Loayza Tamayo, in which the court declined to find rape was torture, suggesting the court is not consistently activist or apologetic, perhaps due to changing individuals on the court or the framing and selection of a particular case.

These examples demonstrate the impact individuals working at the court can have on an important institutional goal for most courts: impartiality. If a court wishes to remain neutral, which is often one of the important aspects of an effective judicial body, it may be a drawback to be too heavily linked to a particular campaign, NGO, or movement. In the case of voluntary courts or new courts that want to remain in the good graces of the governments that have accepted their jurisdiction and to attract new members, being seen as impartial may be particularly important. How much a court feels it must remain distant from civil society movements may be partly determined by how judges and staff are appointed. If they are appointed as representatives of particular states (as the judges are appointed in the European system), they may feel a need to remain less attached to movements. If they are independently appointed (as judges are appointed in the Inter-American system), and especially where they are drawn from academia or directly from civil society, the judges may feel less inclined to distance themselves from movements or to favor their states’ interests.

It may be important for the court not to become overly associated with large Western NGOs or Western states, and risk gaining a reputation as biased. In the Southern Hemisphere, this could lead to a reputation as an institutionalized version of the will of Western NGOs and states. Venezuela accused the court of this very weakness in its withdrawal from the ACHR in 2012. This reputation may perhaps be the most detrimental side effect that can result when a system finds itself linked to closely with a movement lacking strong enough ties to the region or a frame for the campaign that can succeed in a particular region.
Goals of Transnational Advocacy Networks

Social movements, including those representing transnational advocacy networks, tend to seek a particular set of public interest goals. In the case of human rights movements the goal could be, for instance, ending female circumcision or discrimination against indigenous populations. To achieve its goals, many transnational human rights movements seek to promote specific norms that can become universal and spread to more places. Legal NGOs or NGOs with strong ties to the legal community may particularly focus on promoting a norm as an international legal rule, perhaps with the hope that it may even become customary international law, as has arguably been the case with the ban on genocide. For some legal groups, the change in international law itself may be the goal, whereas groups with ties to non-legal organizations that work directly with affected populations may be more concerned about actual practices within countries, though arguably the two goals are intertwined and often promoted concurrently.

In addition to the broader norms, some groups or private lawyers may wish to help more individual victims directly. In this way, they may differ from those networks more focused on the change of broad government policies and international norms. Working together though, organizations, such as the mothers of the disappeared, founded around helping individual victims can aid transnational groups by using their members’ stories, cases, and information to promote the broader movement. When the individual concerns of the clients are urgent, such as needing to get a client who is being tortured out of prison, tensions can occur between the movement’s goals and the individual’s goals that must be balanced by the representatives in the case. These conflicts will be addressed in more depth in Chapter 6.

Experienced movements know that getting more leverage from powerful states and organizations is an important ingredient to meeting their public interest goals, so a subset of this goal is often to receive as much attention as possible for their cause. Garnering more publicity, more
celebrities, and visible high-ranking officials as backers can help push a movement forward in a region. Test cases before a court can be the catalyst for gaining the attention of highly visible people.

Once a movement has won a case before a court, part of its goal may be to enforce that case. Enforcement efforts lead to domestic strategic litigation campaigns and the lobbying of various government agencies using the test case decision as additional leverage in negotiations and lawsuits. These efforts lead to monitoring and enforcing the court’s decisions, a clear overlap in goals between the court and the movement. In order to promote their substantive goals, movements may desire more access to the institutions related to the court. Successful use of the court establishes additional ranking and respect from the institution and may allow the movement to mold the court’s agenda and have more say in future changes to the procedural rules of the system (including standing rules or representation rules), which in turn afford the movement more court access in the future. More access can mean more “wins” at the court and additional resources from funders who see the group as successfully expanding the movement’s activities.

Lastly, once a group has selected a venue for its efforts and finds a sympathetic institution, one goal may be to increase the reach of that organization. Here, the overlap between the goals is a little less clear, but if the court expands its jurisdiction, the movement’s winning test case decision becomes more authoritative and becomes better leverage in still more states. As American judicial politics scholars have found, once a civil society group uses a venue successfully, they are very likely to return to that same venue for future campaigns (Hansford 2004), making the growth of that venue’s reach something in the group’s own interests, or venue loyalty. This can be especially true when activists have few other venues for get direct access, such as when fewer domestic courts available or if domestic courts are corrupt or unresponsive. This aspect will become part of the framework for linkage efficacy, which I develop later in Chapter 6.
Even movement-connected test cases can have conflicts between different goals that they must balance. Scholars have noted the potential conflicts between the individual goals of clients and the goals of a movement’s activists. This tension always exists in test cases and can lead to a test case dilemma for the lawyers representing these cases (Crow 2005). I add that conflicts can exist between individual or movement goals and the goals of the court. If a movement is not very well known, it may want to use the court purely for publicity, even if bad publicity erupts in the short run and would be negative for the movement (and linked court) but could help the court in the long run. Movements and activists who are inexperienced may not understand the potential for negative repercussions. When these conflicts happen, I argue, they are likely to contribute to a negative outcome for test case linkage. This dilemma and potential for negative outcomes is discussed in Chapter 6, in which I express a framework for understanding those factors that may contribute to a positive or negative outcome if the court and a movement become linked.

Despite the potential for goals to conflict, the goals of both a regional court and a transnational advocacy network may overlap when brought together by a test case. If this overlap occurs, the movement and the court’s efforts to promote their own interests in effect promote the other’s interests. The movement may or may not succeed, but if it does, it can aid the court’s acceptance in the region. If it does not, the court’s acceptance may be slowed or reversed. Thus, the movement and the court may become linked and succeed or fail together.

**Linkage: How Courts Become Linked to Transnational Activist Movements**

This section will further develop my theory that test case linkage occurs when the growth and success of a voluntary court’s jurisdiction in a region becomes tied through test cases to the growth and success or failure of a particular movement. Theoretically, linkage might conceivably occur through many different mechanisms other than test cases, and to many different types of organizations other
than courts. For example, linkage might occur when norm entrepreneurs, including NGOs, government officials, or the states themselves, link their preferred norm to an organization by formally requiring potential members of a regional body to be democracies in order to join the organization. Democracy and that organization would then be formally linked, and as democracy spreads it might carry along with it membership in this regional body. Activists may use political means to indirectly link a supranational tribunal to their movement. Alter and Helfer (2010) note that activists, scholars, and legal experts who supported regional integration in Europe used their political influence with judges through political ties and professional legal conferences to link the court with more radical ideas of regionalism. For many activist movements, particularly in regions where membership is not contingent upon recognition of a voluntary court, I argue that one potential mechanism for linking courts to a movement is the use of test cases. As has been argued in both domestic court studies and is now being acknowledged at the international and regional court level, when activists cannot satisfy their goals through the usual political channels to change policies directly by having governments change laws, they often turn to the courts to gain direct access to the political agenda (Vose 1959). This theory of political disadvantage sees the courts as a “last resort” initially, but I argue that in many regions where activists find blockage at the domestic or international level, they have turned to international judicial bodies, not necessarily as the last resort, but more as either a substitute for non-functional or non-responsive domestic courts or because some part of the political process is not available to them. As with domestic courts, international courts can allow activists to influence which norms make the agenda more directly, because in other political arenas, such as legislative bodies, activists require support from a government or government official. In a court that gives more direct access to test cases, advocates may be able to influence the agenda more easily. Thus, I focus on the theory of test case linkage specifically.
Test cases are brought by lawyers or legal NGOs, often in conjunction with transnational advocacy networks, in order to establish a principle that applies more broadly than the specific case before the court, even if the specific case is also important. They can be used by movements to overcome domestic or international blockage, frame their cause in a way that is palatable to a region, legitimize and certify their preferred norms in a region, and attract more support from the international and regional community. NGOs and other repeat players before international courts tend to win their cases, and it is these winning cases that set in motion the process of linkage. Since the test case decisions written by the court are used by the movement to promote their cause in the region and the court promotes compliance with its own decisions, the decision becomes the mechanism through which a movement and court become linked. If the activists lose the case at the court, it is unlikely to link the court with that movement since the court is in effect rejecting their preferred norm (or at least dismissing the case without reaching that issue), though it might be possible in some cases for a court to be linked by its rejection of the norm to the countermovement against that norm.

Assuming that the activists receive a favorable decision, several factors are likely to be important, I argue, to determine if linkage will occur and how strong that linkage might be. Not all movements’ test cases brought before a court become linked in a substantial way to a court’s growth, but several factors may influence the likelihood of linkage and its magnitude. Multiple factors impact whether a winning test case links the court’s growth to the movement that brought the case. For example, linkage may have a greater chance to impact the growth of a court’s jurisdiction in a region if the test case is an early case in the court’s jurisprudence, an early case in a new subregion, or involves a controversial topic, or importantly, if the court’s decision includes groundbreaking or controversial elements that directly impact other states within the subregion.
The outcome of the linkage can be either positive or negative. If linked to a movement that is successful in the region, the court may find more acceptance in the subregion and may move into that region as the wave of acceptances of the movement sweep the region, as part of what I term the “package deal.” If the movement is unsuccessful in the region, the court’s expansion in the region may stagnate or shrink along with the movement in the region also as a package deal with the movement, so long as they are still linked. In other words, linkage puts acceptance of the movement and acceptance of the court together in the same package of norms to be accepted or rejected together as long as the linkage continues.

**How Movements End Up Before Courts**

Why go before the court and not use other domestic or international avenues? Movements sometimes turn to the courts when other political avenues are not working or as part of a strategy to put multiple points of influence. At the domestic level, domestic movements and activists can be met with a lack of response from the government, active resistance or blockage against their movement, or even outright repression (Tarrow, 2005). Activists and advocates for the disadvantaged in the 20th century became very adept at using domestic courts, quite visibly the US Supreme Court, to promote their causes. Scholars have argued at the domestic and international levels that when a group is politically disadvantaged to the point that it does not have access to policy making entities in legislative and other institutions, it turns to the courts (Cortner 1968; Schlozman and Tierney 1986).

The political disadvantage theory states that courts give advocates the ability to set the agenda of an institution by allowing them to choose a case that exemplifies the problem they want to address. Such test cases are possible because most courts do not *sua sponte* hear whatever issue or case they like but rather must wait for a case to be brought to them. Even the US Supreme Court, which has wide latitude to accept or reject writs of certiorari, does not go out and find a case to hear, but must
wait until one is filed (though of course the US Supreme Court has more than enough cases from which to choose). In a political or legislative arena, politicians have even greater choice to select the issues they want to debate, making it more difficult for the politically disadvantaged to overcome blockage by politicians.

If the same is true when they try other avenues such as the courts, the domestic advocates may reach out to international venues through externalization methods. One externalization method they may use is to pass along information about abuses to international institutions, states, or NGO allies. Though sometimes these allies can mobilize a powerful government or institution to influence the abusive state into compliance through sanctions, aid, or shaming, movements may still be unable to complete the boomerang process as laid out by Keck and Sikkink (1998) in *Activists Beyond Borders*. (See Graph 1.) Just as domestic NGOs may find that they face lack of response, blockage, or repression at the national level, sometimes international NGOs, institutions, and even coalitions of sympathetic states face at least a lack of responsiveness and/or blockage when trying to mobilize stronger states or institutions to use their power to pressure the abusive state through sanctions. Advocates at the international level may fail at their attempts to get the attention of the strong states that can obliterate the domestic blockage, particularly if political avenues in Western countries or at the international level are unwilling to help or have too many other causes on their plate. Thus, Keck and Sikkink’s (1998) boomerang process can also be blocked at the international level.

In Keck and Sikkink’s (1998) boomerang process, domestic NGOs find blockage when trying to change domestic government policies and turn to external NGOs to persuade their governments to use their influence against the abusive regime. Graph 1 modifies their boomerang to illustrate how NGOs can find added blockage when trying to mobilize external governments (or in some cases, intergovernmental organizations), especially if other issues are higher on these bodies’ agendas. In
some cases they may not be able to gain the attention of key states or allies through merely issuing reports or lobbying. (See Graph 2.)

Even if they can garner action by a state or intergovernmental organization, the abusive state may block action, especially if only a few states are mobilized or if the mobilized states and institutions are not powerful enough in the region to persuade the abusive state. Thus, a movement may find that it needs to draw greater attention to its norms via an international court by bringing a symbolic test case that brings attention to the movement and legitimacy for a rule. This test case can become the leverage needed for gaining the attention of other governments with the ability, through economic or political means, to force compliance by the regime in question.4

Courts can provide legitimation and certification of a norm and can be used to work around blockage in other arenas. Further, whereas the basic rules and procedures of domestic courts have often been long established in domestic courts, even some of the most basic procedural rules affecting access to international courts are still in flux, and many of the newer courts’ founding documents have been or are being written with civil society at the negotiating table (directly or indirectly), giving them an opportunity to expand their own use of the court in the future. Civil society groups, therefore, once they have brought successful tests cases before a court, may have more of an interest for venue loyalty, in promoting the court, as well as in using the court to help promote its own preferred norm.

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4 For more on strategies such as shaming and leveraging, see Keck and Sikkink’s *Activists Beyond Borders*. 
Graph 1: Boomerang Before Test Case: Lack of Attention from Strong States, Intergovernmental Organization (IGO), and Week States Efforts Insufficient

Note. Graph is based on the original boomerang graph found on page 14 of Activists Beyond Borders by Keck and Sikkink (2000). This study’s addition to the graph is the blockage that sometimes can be found by NGOs approaching strong states.

Submitting the case to an international tribunal can have the effect of using all three of the collective action forms that Tarrow (2005) notes domestic actors often use, but all at once: (1) the case itself can convey the information about abuses to the broader human rights community; (2) the case utilizes and activates international institutions in the court itself; and (3) the case can be a tool for gaining media attention and/or a focal point for protests. A domestic group that has successfully allied with other external NGOs as part of a transnational advocacy network may want to take a test case
because resources are scarce, and some external NGOs, most likely a legal advocacy NGO or NGO with access to legal expertise, can create a team of international legal experts to develop a test case (or use and bolster an existing case) and bring it before an international court. This NGO and its team would be acting as what previous literature has termed “transnational epistemic community” (Haas 1989; Lutz and Sikkink 2001) but in the context of direct legal advocacy rather than in the context of lobbying or treaty writing. However, as discussed in later chapters, having a legal team without connections to a broader transnational advocacy network may backfire, even if the cases are successful in the international court, since many international courts lack authority to order sanctions against states for non-compliance and often the petitioners must be able to mobilize support for the test cases and decisions (as noted by Cichowski 2007; Conant 2002; Helfer and Slaughter 1997). In that case, if linkage occurs, I argue the movement may fail to get specific compliance with the decision and/or to be able to successfully use the court’s decision for broader policy change. The linkage of the movement and court in these circumstances may lead to the court being ignored, at best, or discredited if a countermovement exists.

The process used by victims or NGOs representing the victim to externalize an issue through the use of a test case therefore can be visualized as seen in Graph 2, or in linear form it might look like an amended representation of Tarrow’s (2005) Figure 8.2: Domestic NGO/Victim→International NGO/TNAN with legal expertise→win case at international court→use case to get attention of states/IOs/media→pressure abusive state (through such techniques as shaming, leverage, accountability politics, as noted by Keck and Sikkink 1998).
How Test Cases Can Lead to Linkage

In this section, I briefly outline a theory of the linkage between civil society movements and international courts that is created by test cases. I hypothesize that factors including the timing of the case in the court’s development and the novelty of the topic raised by the case impact whether linkage will occur and the strength of that linkage. In a later chapter, I outline the factors that increase a test case’s odds for having a positive impact on the movement that brought it before the court making the linkage of the movement’s norm and the acceptance of the court’s jurisdiction more beneficial for both the court and the movement.

As defined above, linkage is a direct connection between the growth and success of a voluntary court’s jurisdiction in a region with the growth and success of particular movements. Test case linkage occurs when that linkage is generated through the use of test cases before a court brought by activist
movements who use the court to bring test cases that bring to light their causes. Test case linkage occurs after a movement has won a case before the court, so first the case must be presented successfully before the court. A movement that includes international legal expertise, the resources of international NGOs and/or major states or institutions, and access to information from domestic groups has an advantage at winning the case before the court. Because interest groups (or international networks) act strategically and choose their representative test case from among the potential complainants, they tend to choose cases that will be “winners” before the court (Epstein and Rowland 1991). This concept of repeat player advantage has been posited as most likely existing at the international level as well (Alter 2006), though to what extent that changes the affects of repeat player status in any unique way has not been addressed. I discuss unique factors in international repeat players in Chapter 6.

Attempting to take a test case before a regional court can sometimes require overcoming blockage within the court’s system itself. In newer systems, resources to provide legal costs may be lacking or not guaranteed by the system, such was the case with the Inter-American system where awards of attorney’s fees were not guaranteed and the system did not initially have money to provide for legal resources. The Protocol establishing the African Court provides for legal fees, but has jurisdictional issues that limit access, such as the requirement for a state to make a separate declaration to allow direct access by NGO applications to the court. Only four states have done so, and the court’s first such application was denied because Senegal had made no such declaration (Yogogombay v. Senegal). Much like the Inter-American Court’s initial procedures, it appears most African cases have to wait for their commission to file the cases with the court, which has, again like the Inter-American system, been hesitant to do so. In fact, the cases that are filed can be limited by these rules. With disappearances in the Inter-American system, both Uruguay and Argentina had cases pending at the
commission and had recognized the court, but the commission chose Honduras, perhaps for political reasons and because those cases were more developed. Even worse than not getting before the court though, is to lose before the court and give the government credible authority to deny an alleged violation. As noted earlier, the Brazilian case where a human rights defenders murder was allegedly not investigated fully by the government was found to have insufficient evidence, and that loss was used by the government to defend its own actions. Whether because of insufficient time spent on the case by the court (as Cavallaro and Brewer 2008 suggest), or because the case actually could not be proven, it demonstrates that winning a case at the court can lead to linkage to a movement.

Once a movement wins its test case before the court, the court hopefully writes a decision that pronounces their preferred norm, or some relevant piece of it, to be part of their interpretation of the treaty or principles that the court is tasked with promoting. The movement then uses the test case as a tool for its efforts to promote its preferred norm, which is now at least partially represented by the court’s decision. By promoting their own interests represented by the court’s decision, the movement is in effect promoting compliance with the court’s decision. The court promotes compliance with its decision, which in effect establishes the movement’s norm. Thus, the court and the movement are now at least in some part promoting each other’s interests.

Graph 3 demonstrates the linkage of a movement and acceptance of a court. When it wins this case before the court, the court and the movement (or lack thereof) that is connected with the test case then put pressure on the state to comply with the decision and accept the norm. When the movement pressures other states in the region to accept the court’s decision and its norm, the movement puts pressure on those states to accept the jurisdiction of the court, since the court’s decision becomes the certifying or legitimizing authority for the norm.
The court, for its part, may have been accepted by some states that had not yet accepted the movement (including most obviously the one from which the test case arose), but once the court is linked to the movement, those states too should be more willing to accept the movement as part of their commitment to the court, especially if the movement properly coordinates mobilization efforts surrounding the enforcement of the test case on the original complainant’s government, as well as others that have accepted the court as a legitimate part of the rule of law. Through a strategic litigation campaign, similar domestic cases can be brought using the court’s decision as a basis for the claims (among others). This can be done in the state where the test case originated and in other states that have accepted the court’s jurisdiction (R. Cichowski 2007). Lobbying efforts of the campaign can use the court’s decision for more authority, bargaining, publicity, and leverage in states that have accepted the court’s jurisdiction.

In effect, acceptance of the movement’s principles and acceptance of the court become joined into a package deal (or package defeat, if linkage has a negative outcome). As the movement’s ideas gain acceptance in the region, the acceptance of the ideas eventually reaching a tipping point where a cascade of states join the movement. If the movement is linked to a voluntary court, or has used the court’s decision to reach that tipping point, acceptance of the court should be included as part of a package deal of accepting both the movement’s principles and the court’s jurisdiction. Conversely, if the movement is unsuccessful and faces rejection in the region, a linked test case can mean the “package” of the movement and the court are rejected together.
Critical Junctures: Factors that Increase the Likelihood of Linkage

I argue that certain critical junctures faced by a court increase the likelihood that a case will become linked to the court. If the critical juncture is significant, the case can impact the magnitude of the linkage to be either strong or weak. Borrowing from historical analysis scholars and path dependence literature\(^5\), I argue that some points in time or cases are more pivotal for a court’s trajectory than others. These points in time or cases create critical junctures. I draw from a rather simplified version of the concept of critical junctures as “brief phases of institutional flux—referred to as critical junctures—during which more dramatic change is possible” (Capoccia and Kelemen 2007), enabling an institution to attain a trajectory that can last for years. I simplify the concept to adapt it to

\(^5\) For a more in depth discussion of how critical juncture relate to path dependence theories, see Ruth Berins Collier and David Collier, 1991, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America.*
linkage theory, but the heart of the concept applied here is that when the court is faced with a critical juncture, test cases are more likely to link it to their movement and are more likely to have a strong linkage that sets the trajectory of a court’s development for some time after that. For example, while all test cases try to bring to light an issue that has broader implications than the case at hand, some cases have a heavier impact than others and some come at a time when the court’s development is more vulnerable to being linked to cases before it. These factors create what I loosely call a critical juncture in which a test case represents a landmark decision, either because of the court’s newness overall, newness to the region, or newness to the issue, or because of the issue’s significance in general. When a court decides a case that fits one of these criteria, it increases the likelihood of linkage. When it fits multiples of these factors or a very intense version of these factors (such as the first case ever), it increases the strength of the linkage.

First, I argue that if a court is still developing its jurisprudence or the case is in a new region for the court, the test case may become the main concept with which the court is associated in that region, thus it should have a higher likelihood of strong linkage. The cases that initially thrust the court into the spotlight in a region or subregion tend to affect the long-term perception of the court in that region, especially if it is the first or one of the first decisions for the court. If a court is associated with a popular movement with which states want to be associated, the states may accept the court’s jurisdiction because the court’s jurisdiction and a popular norm become intertwined. On the other hand, if the body of jurisprudence of a court is already rather large, a test case may somewhat impact the court’s reputation in the region, but not as greatly, since the court will not be associated in particular to that case as opposed to others.

Test cases early in the court’s development, therefore, are more likely to have a greater impact on their development because it has not yet fully institutionalized. When a voluntary court is first
developing, cases that occur as the court is still moving into the region and developing its reputation are more likely to become linked. Also, once states recognize the court, they become less willing to withdraw that recognition, if they face political consequences (though this is obviously not always true). So if a court gets to a point where acceptance of the court is not fully voluntary or has consequences for withdrawal, those factors may alter the strength of the linkage or at least dampen its outcome. For this reason, regions like Europe where membership is stable, the reactions of states may be more limited, such as Conant’s (2002) finding that full non-compliance with decisions is rare there. However, as states are in the process of evaluating their decision to accept or delay acceptance of a regional court, cases occurring concurrently with that decision making process potentially weigh more heavily, than any future cases could, to sway a state’s decision. Yet the stakes remain high for linkage in voluntary courts, since states can and do withdraw even after they’ve accepted a court’s jurisdiction.

Second, I argue that the court can become more vulnerable to linkage when a significant change occurs in the court’s jurisdiction or procedures. When a court is opened up to a new subregion, it gains a new constituency of states with whom it may not have an established relationship or reputation. In those cases, it may once again be subject to strong linkages with initial test cases before it. The Inter-American Court’s addition of the English-speaking Caribbean was impacted by death penalty cases before the court. In Europe, when the court began hearing cases from Eastern European countries, it began to hear cases of more egregious human rights violations, which may have impacted its reputation with Russia. Although the European court’s jurisdiction is not as voluntary as it is in the Inter-American system, Russia delayed its vote in favor of the European court’s procedural streamlines in Protocol 14 at least partially because of its strained relationship with the court after findings of egregious violations of physical integrity rights in Chechnya. The same could be true for controversies arising after a major procedural shift. Examples include permitting NGOs and individuals direct
application to the court, reconfiguring the structure of the system, or allowing new types of violations to be considered.

Third, if the case stems from an especially controversial, weighty or high profile issue, its result is likely to have more impact on the court’s reputation and growth. The more controversial an issue is because of the controversial makeup of the facts, the high profile nature of the case, or due to the novelty or weight of the issue presented, the more impact it is likely to have. For example, the Castro case in Peru dealt with how to make reparations to Shining Path members who were wrongfully killed. Since the country had been under siege from Shining Path guerillas for many years, the case was highly controversial. Though it resulted in a weak linkage due to lingering positive linkage, such a case in conjunction with other critical juncture factors could lead to a strong linkage. Cases (i.e., head scarves in France or terrorist suspects from Al Qaeda) addressing a politically or culturally controversial topic in the region can offer more of an impact on how states in the region perceive the court and be more likely to impact their thinking than cases regarding small, procedural issues that do not address major regionally recognized issues and may not be foremost in the mind of decision makers. Further, the involvement of a high profile person or group can raise the profile of a case, as in the Pinochet cases in Chile, influencing the case’s impact on the court’s reputation in the region.

Summary of critical junctures that increase the likelihood of linkage and the strength of the linkage:

1. The court is new and has little prior jurisprudence, or has recently undergone a major change in its system.

2. The court is new in a subregion and has little jurisprudence involving the new subregion.

3. The topic of the case is new for the court.

4. The topic of the case is controversial or involves high profile persons or groups.
Outcome of Linkage: Positive or Negative?

The US judicial politics literature cautions that winning a case before the court is not the end for activist movements, and I argue as have those who have studied compliance in international courts that the same is true for international cases. Yarnold (1995) suggests that success for these groups is not based solely on the litigation prowess of groups, but rather on their political clout in the system, such as strong lobbying campaigns, campaign contributions, and contact with the bureaucracy. Independent litigants, who do not coordinate with the larger movement and legal experts, can set the movement back by taking a case to the courts, without regard for the long-term policy implications of setting a bad precedent by bringing a case with “bad” facts (Tolley 1990) or without the proper regional frame and coordination. Larger networks of advocacy groups can coordinate their efforts to have a greater impact on the court’s agenda. The same has been found at the international level, particularly that coordination between advocacy groups with a larger campaign as a goal can be an effective strategy for changing norms in a region (Clark 2001), that taking advantage of the opportunities opened up by litigation success requires mobilization (Cichowski 2007), and that compliance can be contained if test case advocates lack sufficient mobilization resources (Conant 2002).

The legal advocates who are connected to a broader transnational advocacy network must not only bring a carefully selected and skillfully argued test case, but they must also coordinate it with a broader, growing movement. This movement, just like the arguments to the court and hopefully its decisions, should be part of a strategic campaign of litigation, lobbying, and publicity, preferably framed in a way that makes it palatable—if not imperative—for governments within the targeted region to accept the principles of the movement and the court’s authority. These factors, along with the support of key states, intergovernmental organizations and domestic NGOs that form part of the
transnational advocacy network, can create a positive frame for the movement and, as a side effect, a positive frame for the court and a linkage between acceptance of the norm and acceptance of the new court’s jurisdiction.

These issues of whether the linkage has a positive or negative effect on a court’s growth, or what I call “test case efficacy,” are addressed in Chapter 6. In that chapter, I use the overlap between judicial politics literature, transnational advocacy network literature and international court effectiveness literature to develop a framework for factors that may contribute to a positive or negative test case linkage outcome. In this section, I only briefly define the differences between what we should expect to see in a positive versus a negative linkage outcome.

Through a positive linkage, I argue that the success of the movement’s campaign can carry acceptance of the court into new states that otherwise may not have seen acceptance of the court as necessary or desirable. If the court is linked to a particular movement, a government wishing to demonstrate its commitment to the norms promoted by the movement may not be taken seriously without acceptance of the court. Acceptance of the movement without acceptance of the authority and/or jurisdiction of the court may be seen as an incomplete or weak commitment, since this demonstrates a lack of willingness to be legally bound by the principles of the movement. If states have already accepted the court, it should reaffirm their commitment to the court, which might be seen through rhetoric and cooperation with the court.

On the flip side, if the movement fails within a region, I argue that we should see less acceptance of the court by states in the region or, if already signed on, at least some negative feedback to the court. If the case is decertified within the region—as opposed to merely being ignored—it can actually cause the court’s jurisdiction to shrink or stagnate as states express their unwillingness to accept both the test case, and consequently, the newly developing court. Some states could even
withdraw their acceptance, particularly if key states in the region do the same in systems where that is possible. Certainly there could also be negative rhetoric, attempts to decertify the court, attempts to delink the court from the movement through containing the case or limiting jurisdiction, or even a countermovement that attacks both the norms of the movement and the court. These signs of linkage will be discussed more in detail in the Research Design.

In the next chapter, I demonstrate how the Inter-American Court of Human Rights became linked in Latin America to its earliest test cases from the region, the Honduran disappearance cases. I show how after the test case decision, linkage between the acceptance of the court’s jurisdiction and the anti-impunity movement’s goal to have states hold responsible those who commit abuses and disappearances may have led newly democratizing states to accept the court and the anti-impunity movement together as a package deal rather than piece meal as they democratized. Further, I explore how in the Caribbean, the court’s jurisdiction stagnated and temporarily shrank after the anti-death penalty cases from Trinidad and Tobago, and how the movement’s failure in the region may have shrank and stagnated the growth of the court in the region. First, I will explore what different types of linkage may be expected to look like depending on the strength of the critical juncture factors and the positive or negative outcome.

Different Types of Linkage

Above I have developed a theory of how linkage of a court and a movement through a test case may occur, as well as factors influencing its occurrence and strength of occurrence. I have begun to describe how linkage can have either a positive or negative impact (partially determined by factors to be discussed in Chapter 6) on the court’s development. I hypothesize that five different types of linkage, depending on the strength of the linkage and whether it positively or negatively impacts the
court’s development. The typology of these five types of linkage are shown in Table 4 as an expansion of the similar table presented in Chapter 1.

I first argue that strong linkage can occur when the court scores high on the critical juncture factors I noted above, such as that the court is both new and has issued a decision on a controversial issue for the region. The outcome of this linkage may lead either to backlash or stimulus. When a court is strongly linked to a movement, it is likely to have a major impact on the recognitions of the court’s jurisdiction if the voluntary court is new and still gathering recognitions. The stronger the linkage, the more pronounced the result will be, whether positive or negative.

For a strong, positively linked case, I hypothesize that recognitions should continue or even pick after the decision that links the movement and the court in what can be called a *stimulus*. Evidence should demonstrate that there was linkage in time to the state’s acceptance of the movement’s policies and the recognition of the court, so that for example, after the Honduran disappearances cases, Latin American countries that accept the anti-impunity movement should in proximity in time recognize the IACHR if they have not already done so. This is suggested in the case study that follows. The linkage is different than a tipping point from the norm cascade literature in that it links at least two things—the court recognition and movement’s policy—not just a speeding up of acceptances. The same results as predicted for linkage could occur due to coercion or membership requirements in economic or political organizations, among other things, so in the next chapter I also explore some of the potential alternative arguments to determine if the linkage was at least partially based on the test case and not solely on other factors.

Further, even after most states have accepted the court and the movement it was linked to, I propose that linkage can continue to impact the court’s continued relationship with states through a *lingering linkage*. The more strongly a court is linked to the movement in the region, the more the
linkage should have a lingering impact. The prior strong positive linkage can act like a protective buttress that discourages later withdrawals or attacks up on the court caused by later decisions. The continued linkage to a movement means the court remains linked to what has become a well-respected and critical community standard. One example is the community norm in Latin American created against disappearances and impunity. Over time, however, this linkage should wane as more and more distance in time passes by, and other critical junctures arise for the court. It could also be delinked if another critical juncture case occurs, or if a state can separate the court’s jurisdiction from the movement by decertifying the court in a way that can override the linkage. I suggest that this second type of delinkage is likely to be more difficult if it is a strong linkage.
Table 4: Linkage Typology Chart

<table>
<thead>
<tr>
<th>Strength</th>
<th>Negative</th>
<th>Positive</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Strong Linkage</strong></td>
<td><strong>Backlash</strong></td>
<td><strong>Stimulus</strong></td>
</tr>
<tr>
<td>high level of critical</td>
<td><strong>Consequence for Court:</strong></td>
<td><strong>Consequence for Court:</strong></td>
</tr>
<tr>
<td>juncture factors</td>
<td>Withdrawals</td>
<td>Recognitions pick up after case &amp; mobilization</td>
</tr>
<tr>
<td></td>
<td>Change reservations or domestic laws to limit reach of system</td>
<td>Evidence that recognitions become linked to movement’s cascade after cases</td>
</tr>
<tr>
<td></td>
<td>Create alternatives to recognition of the court</td>
<td>Lingering impact in system when court under attack (Hesitant to withdraw or block others’ withdrawal)</td>
</tr>
<tr>
<td></td>
<td>Strong, organized efforts to discredit court by state leaders, regional organizations, etc.</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Example Cases:</strong></td>
<td><strong>Example cases:</strong></td>
</tr>
<tr>
<td></td>
<td>Caribbean after James et al.</td>
<td>Latin America after Honduran cases</td>
</tr>
<tr>
<td></td>
<td>Venezuela terrorist case &amp; 2012 withdrawal (still developing)</td>
<td></td>
</tr>
<tr>
<td><strong>Weak Linkage</strong></td>
<td><strong>Disruption</strong></td>
<td><strong>Progression</strong></td>
</tr>
<tr>
<td>lingering linkage</td>
<td><strong>Consequence for Court:</strong></td>
<td><strong>Consequence for Court:</strong></td>
</tr>
<tr>
<td>from a prior strong</td>
<td>Growth of system stalls</td>
<td>Slow pick up in recognitions</td>
</tr>
<tr>
<td>linkage, impact of</td>
<td>If already formed, compliance weakens, some rhetoric of withdrawal</td>
<td>No strong patterns emerge</td>
</tr>
<tr>
<td>new linkage</td>
<td>Trickle out/no strong patterns</td>
<td>Increased support or rhetorical support</td>
</tr>
<tr>
<td>tempered by</td>
<td></td>
<td></td>
</tr>
<tr>
<td>lingering prior</td>
<td><strong>Example Cases:</strong></td>
<td><strong>Example Cases:</strong></td>
</tr>
<tr>
<td>linkage, low on</td>
<td>Dominican Republic case</td>
<td>Late recognitions in Latin America in countries that did not have</td>
</tr>
<tr>
<td>critical juncture</td>
<td>Death penalty in Latin America</td>
<td>disappearances</td>
</tr>
<tr>
<td>factors, or within</td>
<td>British reaction to Al Qaeda case &amp; prisoner’s voting rights</td>
<td></td>
</tr>
<tr>
<td>more stable system</td>
<td>Venezuela TV channel case 2002</td>
<td></td>
</tr>
<tr>
<td><strong>No Linkage</strong></td>
<td><strong>Apathy</strong></td>
<td></td>
</tr>
<tr>
<td>no critical juncture</td>
<td><strong>What to Expect:</strong></td>
<td></td>
</tr>
<tr>
<td>factors</td>
<td>Recognition will be propelled/restricted only by means other than test case linkage (e.g., power politics, political requirements, economic incentives, etc.)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sign ons, if any, will not have a pattern related to any particular movement</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Example Cases:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Early Caribbean, before linkage</td>
<td></td>
</tr>
<tr>
<td></td>
<td>North America in the Inter-American system</td>
<td></td>
</tr>
</tbody>
</table>

When a strong, but negative linkage occurs, the court’s development will most likely undergo a backlash. A suspected example of backlash linkage occurred with the Republic of Trinidad and
Tobago, and most of the Caribbean’s, reaction to the death penalty-related cases and measures decided by the Inter-American Court. These occurred as the first cases against English-speaking Caribbean countries and of these countries to accept the court’s jurisdiction. Additionally, they involved a controversial issue for the region. The reaction of Trinidad was to withdraw from the American Convention on Human Rights and its recognition of the court, after it was unable to delink the court’s jurisdiction from death penalty cases (which it unsuccessfully attempted at the UN HRC as well). While exceptions could occur (as in the case of Barbados), recognition by other states in the region where backlash has occurred should be slowed or never begin. There should be discussions of weakening the court in question through a change in its rules, challenging it at a regional body (at the OAS or CARICOM minister meetings, as was the case in the Caribbean during the backlash against the anti-death penalty cases), or attempting to discredit the court in the region. In the Trinidad case, the Caribbean discussed alternatives to recognition of the Inter-American Court, including the creation of the Caribbean Court of Justice and its supranational jurisdiction. The backlash should be linked to the case, and rejection of the movement’s policy as well as the court should be seen. Lingering backlash might serve to mitigate any gains made by the movement or court for some time afterward, and then wane in following years as the court hits other critical junctures or begins to lose its association with the failed movement. Their fates, over time, can become delinked through time, or through attempts by states to delink the court’s jurisdiction over the movement in question.

I theorize that weak linkage can occur when only one of the factors for linkage is present or multiple factors are present but weakened, reducing the long-term impact of the case on the court’s development but nonetheless raising tensions between states and the court, in a negative case, or at least somewhat increasing cooperation and compliance in the case of a weak but positive case. In the negative but weak linkage situation, a disruption in the court’s development may occur. A test case...
decision may be very controversial and negatively received even in a region where the lingering buttress of a prior strong, positive linkage makes it difficult to fully withdraw.

This is the case in Latin America where several controversial cases have gone before the court after the likely strong stimulus linkage to the anti-impunity movement. The Peru cases demonstrate a dampened attempt to delink the court and movement and to withdraw, both of which were dampened by the strong linkage lingering in Latin America. Further, a case against the Dominican Republic over citizenship rights for Haitian children born to immigrants that touched on an issue that is hotly debated in DR. Though there was talk within the Dominican Republic’s officials that they should withdraw, they have not done so, are unlikely to do so, but have delayed full compliance with the judgment of the court.

I argue that the weak negative linkage reaction could also happen in more institutionalized systems where strong critical juncture factors are less likely, but tensions can still be sparked by test cases. For example in the UK, where many officials had a negative reaction to the Hirst case regarding the UK’s ban on voting rights for incarcerated persons. Even after several years, the UK had not fully complied with the decision even after requests from the Council of Europe (Hofsommer 2011), and a think tank report that gained wide circulation in Britain suggested negotiating reforms of the ECHR or withdrawing altogether. More recently, many conservatives in the UK spoke out forcefully against the ECHR’s intervention in national affairs and called for withdrawal from the European Convention on Human Rights, because of the ECHR’s decision to deny the UK’s deportation of an Al Qaeda leader to Jordan because of possible torture (Preece 2012; Vale 2012).

I expect given my theory that if the court’s jurisdiction is still growing in the region, disruption like these examples could cause recognitions to stall. This was arguably the case for Mexico, which delayed recognition of the Inter-American Court until they had fixed many of the policies the court had
already declared to be violations in other states (Fix-Zamudio 1999). If recognitions are pre-existing or required for membership, as in Europe, then compliance may be weakened by a disruption, and continued tensions between the state and the court, including a state’s threats to withdraw or calls from parts of a state’s government to withdraw, may occur. States may withdraw their political or monetary support.

When the linkage is weak, but it is positive, I theorize that the effect may be simply to continue the status quo if the court is already developed and stable, or to show a slight increase. This progression should not lead to any strong patterns emerging in recognition, other than a slow and steady pick up in recognitions as the movement moves through the region and rhetoric about the court when discussing or accepting the movement’s preferred policy. Moderate increases in support for the court, or at least rhetoric in support of the court, may be offered by countries that have accepted the policies of the movement and may even influence friendly settlements with the court in similar cases. Such was the case with Ecuador, which reacted to the Suarez Rosero case by changing its internal policies regarding in camera detentions and settled several similar cases that later came before the court.

When no linkage occurs or is so weak that it has neither a positive or negative impact on the court, apathy is the expected result. The development of the court will not be limited by or propelled by the test cases failing to make it to the court, being dismissed due to inadmissibility, or when the court is not otherwise at a critical juncture. This situation also happens when no cases have occurred in a region. An example is the case in the English-speaking Caribbean that happened before the Trinidad case. This circumstance has occurred for many cases in the European Court, at least prior to recent reform efforts, since thousands of cases are decided each year. Many such cases are about small property rights issues, address issues that are redundant (Finn 2006), or successfully are contained the
states involved (Conant 2002). Recognition of the court in these instances may stem from economic incentives or membership requirements, but no clear patterns linking the recognitions to a movement through a test case may be found.

**Research Design**

By engaging courts to gain legal legitimacy for their norms and the frames for their norms, movements that use test cases set the agenda for a developing court’s jurisprudence. I contend that these cases can then impact the development and reputation of a court within a region. I theorize that the court can be linked to the norms it presents in cases at critical junctures, which can then lead to increased acceptance of the court as states accept the movement’s norms. In the event that the states reject the movement’s norms, these same states are likely to reject the court and either reject the court’s jurisdiction, fail to accept it, or otherwise distance themselves from the court. This section lays out the research design for the two case studies that follow in Chapter 4 and Chapter 5. These case studies will explore how the linkage process played out in the Inter-American Court. Chapter 4 outlines and analyzes the impact the earliest cases of disappearances and their likely strong test case stimulus linkage of the court to the anti-impunity movement, and the subsequent acceptance of the court by Latin American states as they democratized and accepted the norms of the anti-impunity movement. Then, Chapter 5 summarizes the likely strong test case backlash linkage that occurred in the Caribbean after the Trinidad anti-death penalty cases went before the court, and the subsequent rejection of the movement and backlash against the court in the English-speaking Caribbean.

I have argued that a court’s initial jurisprudence, or cases at other critical junctures, can establish a “frame” for the court that may be hard to change and may leave lingering linkage for many years, as is the case with both the stimulus, or strong positive linkage, in Latin America and the backlash, or strong negative linkage, in the Caribbean. If a court’s initial cases identify a country with
a specific norm or movement, it may be difficult to overcome that linkage within a region for many years to follow, or to delink the court from the movement.

The two case studies that follow focus on demonstrating the existence of and consequences for a strong linkage of the court to the two movements selected, as well as the consequences for court acceptance patterns regionally, and the factors that created the critical juncture that made the court open for a strong linkage. In later chapters, I flesh out the factors that influence the likelihood for a positive or negative linkage outcome. For purposes of these case studies, I simply focus on demonstrating that strong test case linkage can occur at these critical junctures and that linkage can have a significant impact on the patterns of court recognition in a region, whether it be positive or negative.

**Case Selection**

*Voluntary Recognition*

To test the theory of test case linkage to court development, I use a modified most similar system design and test the development of two subregions within the same system, the Inter-American human rights system. The Inter-American system allows a unique opportunity to explore a regional human rights system that has voluntary recognition, where legally states can choose to come and go from the system without withdrawing membership in an intergovernmental political organization or trade alliance. Some international organizations require acceptance of a court’s jurisdiction in order to maintain full membership. For example, the European Court of Human Rights is associated with Council of Europe membership.

On the other hand, states within the Organization of American States (OAS) are not required to ratify the American Convention on Human Rights (ACHR) to be members of the OAS. Even if members do choose to ratify the ACHR, they are not bound to recognize the jurisdiction of the Inter-
American Court. Members of the OAS may choose to recognize the court’s jurisdiction by submitting a declaration of the recognition of the competence of the court to the Secretary General’s office, and they may withdraw recognition of the court by denouncing the ACHR. Many states have ratified the ACHR without recognizing the court, or have waited to recognize the court until a later date. Two of the largest and most powerful members of the OAS, the US and Canada, have not recognized the court’s jurisdiction. While the new African court has established a similar voluntary procedure to recognize the authority of the court to hear direct applications from individuals and nongovernmental organizations (NGO), as of yet only four states have accepted that jurisdiction, and few cases have been heard through direct applications. Thus, the Inter-American system offers one of the best scenarios to test the theory of test case linkage.

The Inter-American system not only allows states to choose whether to accept the court’s jurisdiction but also to choose whether to remain under the court’s authority. Since membership in political or economic organizations is not contingent upon acceptance of the ACHR or court jurisdiction, states may legally and formally withdraw their previous recognition of the court if they withdraw ratification of the ACHR. This was in fact accomplished by the Republic of Trinidad and Tobago in 1998 when it submitted notice that it would withdraw from both the ACHR and the court’s jurisdiction. This withdrawal went into effect one-year later, as required by law. The withdrawal was in reaction to the system’s request for an injunction to stop the execution of death row inmates in Trinidad whose cases were pending before the Inter-American Commission. Trinidad and Tobago has not re-ratified the ACHR at this time. The court rejected the attempt of Peru a year later in 1999 to rescind its recognition of the court’s jurisdiction, because the state failed to withdraw from the ACHR (from which it wanted to delink the court), which the court deemed necessary to influence a withdrawal from its jurisdiction. Peru re-established normal relations with the court by 2000.
Venezuela most recently withdrew from the ACHR and the Inter-American Court in 2012. These withdrawals demonstrate that both formally and in practice, states may withdraw from the court’s jurisdiction without losing or suspending their membership in the OAS.

**Structural Similarity**

Studying two cases from the same system provides an opportunity to hold constant many of the institutional and structural factors that can vary between court systems, such as standing issues or recognition guidelines, when assessing the potential impact of test cases. Though the Inter-American system underwent significant changes in its procedures and statute in 2007, in the time period of the two case studies analyzed here begins in the mid-1980s and ends in the early 2000s. Therefore, the procedures, standing rules and the statute of the court remained more or less unchanged for both case studies. Moreover, the overall institutional framework, the selection process for judges, the commission’s referral of cases, and many other aspects of the court’s structure were virtually unchanged during the time period studied.

**Early Era for the Court**

The ability to study the earlier years of the court’s jurisprudence offers the opportunity to test hypotheses of linkage over time in a developing court system. The Inter-American court uniquely offers the opportunity to look at a burgeoning court’s development within two separate subregions before its jurisprudence is settled, and before either subregion had fully accepted the court’s jurisdiction. Alter and Helfer (2010) have offered similar reasoning for their choice to study the early years of the Andean Tribunal of Justice and the European Court of Justice. In Latin America, only eight countries had recognized the Inter-American Court when the first of the Honduran disappearances cases was sent to the court. In the English-speaking Caribbean, only Trinidad and Tobago had recognized the court when the first of that subregion’s cases reached the court. The early
era of the Inter-American Court makes the impacts of distinct test cases somewhat easier to trace. Since the court had few cases within each subregion within in the relevant time periods, the impact of one case and campaign versus others can more easily be teased out.

Both of the cases studied below involve the first cases before the court for that subregion, so these were likely to be a critical juncture where the court’s trajectory could be altered. The court had not settled most issues nor established a reputation as being an activist court, a conservative court, or any other type of court. The entities bringing cases before them, both the commission and the private or NGO lawyers assisting and/or filing the cases, have more ability to set the agenda of a court and frame its reputation based on those cases when the court has not heard other cases.

The two cases studied here are old enough that it is possible to report some of the long-term impacts on the court’s development and related developments in the region. Studying the earlier cases of a court permits study of stronger cases of linkage, and whether they have lingering effects when weaker linkages pop up later in the court’s development, since linkage is may be stronger for cases at the beginning of the court. If at least weak linkage is not seen in the initial cases (that have the other characteristics hypothesized to cause test case linkage) within a region that allows and can be impacted by test cases, then the concept of test case linkage fails. In other words, linkage should be strongest and most obvious earlier in the development of the court. Further, I hypothesize that the lingering effects of linkage are only likely if strong linkage has occurred, so the study looks at times when strong linkages are more likely to demonstrate the lingering effects of test case linkage on later test case linkages, attempts to withdraw, and recognitions by late ratifiers.

After the Rise of TNANs

The Inter-American system allows comparison of cases after the rise of global NGO-led activism and transnational advocacy networks. Tarrow (2005) reports that by 1983, there were 348
transnational social movement organizations, up 90% from 10 years before. By 1993, there were over twice as many, and the number continued to rise into the 2000s (Tarrow 2005, Table 3.1, p. 45). In jurisdictions with ratifications and recognitions of regional courts before the rise of transnational advocacy networks, test case linkage is less of an issue in development of the courts. Test case linkage, in this situation, is limited in its ability to impact multiple nations within a region, because the creation of these networks leads to advocacy organizations and legal networks able to globalize their movements. Prior to these advocacy networks, strong region-wide linkage may be possible without state assistance or some other conduit for the movement. This may be the case in Western Europe, which lacks voluntary recognition and is unlikely to show the strongest forms of linkage, since initial recognition and maintained recognition are tempered by the possibility of withdrawing from membership in the intergovernmental organization. The earliest of recognitions in Latin America (i.e., pre-Chavez Venezuela and Costa Rica), occurred before this rise in NGOs, and occurred before any cases had been decided by the court. It should be expected that test case linkage should be far more prevalent and pronounced after the growth in worldwide advocacy within courts, such as in Latin America during democratizations in the 1980s and 1990s and the Caribbean in the 1990s, as well as potentially in the new African Court as more states start to make declarations to accept cases directly filed by individuals and NGOs.

**Positive and Negative Linkage**

Studying the two case studies within the Inter-American system allows the exploration of test case linkage when it has a positive impact on the court’s development and when it has a negative impact. Uniquely, the Inter-American system allows the comparison of two case studies that occur close in time within the same court system but in two distinct subregions, used for test case by two different movements. More importantly, the two sets of test cases evoked equally strong but almost
opposite reactions and consequences for the court. For purposes of this chapter, test case linkage is shown to occur equally strong whether the outcome is positive or negative, and the factors determining the strength of that linkage are similar, even if the outcomes are different.\(^6\)

For these reasons, I have chosen to study two potential cases for linkage within the Inter-American system to demonstrate test case linkage: the Honduran disappearance test cases and the Trinidad and Tobago death penalty test cases. These cases are used in Chapters 4 and 5 to analyze factors under the control of non-state actors that might have contributed to the Trinidad case’s strong, but negative linkage or “backlash,” and the Honduran case’s strong, but positive linkage or “stimulus.”

First, I explore whether linkage—positive or negative—in fact occurs, and which of the critical juncture factors I have hypothesized may increase its likelihood and magnitude.

**Linkage Hypotheses for Test Cases: Critical Juncture Factors**

The overall hypothesis of test case linkage can be stated as follows: Under certain circumstances, test cases can cause the continued development of a court’s jurisdiction to become linked to the movement that brought the test case. In the previous chapter, I hypothesized that both the level of development of the system and the novelty of a particular test case can increase the likelihood that a test case will become linked to the growth of a court’s jurisdiction in a region, and that these factors increase the strength of any linkages that are formed. For each of the two overall factors, the two related hypotheses are presented below.

**Level of Court Development**

1. Linkage is more likely if the court is new or has little prior jurisprudence.

2. Linkage is more likely if the court is new within a subregion or has little prior jurisprudence involving a new subregion.

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\(^6\) The factors that determine whether the linkage will be positive or negative are explored in detail in the chapters following the initial two case studies.
Novel Aspects of the Test Case

1. Linkage is more likely if the topic of the case is new for the court.

2. Linkage is more likely if the topic of the case is controversial or involves high profile persons or groups.

The first case presented addresses the possible linkage of the Inter-American Court to the anti-impunity movement through its first three cases, three Honduran disappearance cases. This case matches the criteria for at least three of the four hypotheses expected to make linkage more likely. The matches include a new court with no pre-existing jurisprudence, a new court for the subregion (and new altogether), and a new topic for this new court. Though not necessarily high profile because of the victims or country involved, the case did actually become high profile since it was the first case before the court (Mendez and Vivanco 1990), but this observation overlaps heavily with Hypothesis 1. Regardless, this case should represent the most likely scenario for ensuring linkage. Since it sustains three out of the four hypotheses, it should be a case of strong linkage. The more of these criteria that are met and the stronger each criteria is met, the more likely and the stronger the linkage should be. I argue that the criteria are cumulative. The more criteria present and the stronger they are, the more likely linkage will occur.

In the second case presented, the same three hypotheses are met though slightly less so in the case of the first one, so it too should be a most likely scenario for strong linkage. If either does not demonstrate linkage, the theory would be challenged and weakened. After exploring whether linkage, and in this case strong linkage, existed, I explore in Part II why some test case linkages result in positive linkage and favorable outcome for court development, and other test case linkages may result in negative linkage. First, I begin by exploring the two cases to determine whether my theory of linkage seems to exist at all, and if so, whether it is strong as predicted by my hypotheses.
CHAPTER 4
CASE 1: STRONG TEST CASE LINKAGE OF THE INTER-AMERICAN COURT AND THE ANTI-IMPURITY MOVEMENT IN LATIN AMERICA

The Inter-American Court of Human Rights (IACHR) has played an important part in the justice cascade and the diffusion of anti-impunity norms in Latin America. The court was actually pushed into service for the movement by some of the same nongovernmental, transnational advocacy network members, in part by the human rights lawyers who would later form CEJIL, an organization whose mission includes bringing cases to the court and promoting the court. This network had support from NGOs and the connections between those NGOs, as well as key states such as Costa Rica. Using favorable decisions by the Inter-American Court, among others, to legitimize some of the main concepts at an early point in the movement’s development, the network pulled along the court’s recognition with the movement once the court and movement were linked by the Velasquez Rodriguez and the other Honduran disappearance cases. The court’s early decisions served as one of many contributing factors that aided the anti-impunity movement by providing the movement a mechanism to call out states for not investigating and prosecuting past crimes. As a result, the court became linked to the justice cascade through a transformation of its reputation and perception in the region. As the justice cascade swept Latin American states, the use of the court caused democratization, justice trials, and the court’s recognition to become linked. Thus, a pattern of recognition and acceptance of the anti-impunity movement became part of a package deal for new democracies in Latin America, particularly in states that had been affected by disappearances. The first step is to identify and confirm how and when the court became linked to the anti-impunity movement.
The IACHR and the Justice Cascade: Push, Pull, and the Package Deal

The IACHR was linked to the anti-impunity movement by test cases that were brought by activists that joined the diffusion of accountability norms with recognition of the court within Latin America. The court was pushed into service for the movement by some of the same nongovernmental human rights lawyers involved in the anti-impunity movement in Latin America. Using favorable decisions by the Inter-American Court, among other institutions, to legitimize some of its main concepts at an early point in the court’s development, these members of the network pulled the court’s recognition along with their movement. The court’s early decisions served as one of many contributing factors that aided the anti-impunity movement by providing a mechanism to call out states for not investigating and prosecuting past crimes, and giving certification and legitimation of their norm, strategies noted by the TNAN literature. In turn, the court became linked to the justice cascade through a linkage of its reputation in the region with the anti-impunity movement, which was gaining popularity among democratizing nations. The justice cascade, as it swept Latin American states, pulled the court’s recognition along as a norm linked to the anti-impunity norms of the movement. Thus, acceptance of the movement and the court became a package deal for new democracies after its first cases, especially the landmark *Velasquez Rodriguez* case from Honduras, which was its first contentious case.

For purposes of studying linkage in the *Velasquez Rodriguez* case, Latin America is defined with delimitations that exclude some members of the Organization of American States (OAS). My theory proposes that diffusion of a movement happens along the usual cultural, political, geographic, and economic mechanisms as is usually seen in policy diffusion. As a result, I exclude from my definition of Latin America both Canada and the United States and all English-speaking Caribbean nations including Belize and Guyana. These countries have a different historical, cultural, and political structure and a different legal system. I include in my definition of Latin America, all former colonies.
of Spain, Portugal, and the Netherlands. I emphasize formerly authoritarian countries that transitioned to democracy during the 1970s through the 1990s and the patterns that their acceptances of the court’s jurisdiction followed before and after my theory would suggest linkage.

I use the first section to examine the two separate but important steps to understanding how the court’s jurisdiction was affected by the justice cascade. Two steps are necessary to demonstrate that a strong test case linkage occurred. First, when and how the court became linked to the justice movement must be identified and confirmed. Second, the outcome of that linkage was that the court and the movement diffused through Latin America as a package deal beginning around the time that the alleged test case linkage occurred must be demonstrated.

**Pushing the Court: Test Cases**

The three initial cases before the court were all Honduran disappearance cases that were connected to a segment of the transnational human rights network in the Western Hemisphere that was actively promoting anti-impunity at the time. I demonstrate the link between these groups and the anti-impunity movements. I consider the link between these groups and the Honduran cases. Then, I review the court’s decision in *Velasquez Rodriguez* and its impact on the anti-impunity movement and on the court’s perception among states in the region. By establishing the link between the movement and the court’s first cases, I demonstrate how this interaction impacted the growth of the court’s jurisdiction, which is analyzed in a later section to determine if the positive, stimulus linkage pattern predicted by my theory of linkage occurred. If it did occur, there should be signs of a package deal that consisted of recognition of the court and acceptance of the anti-impunity movement that becomes more prevalent following the court’s rulings on these test cases.

As justice cascade scholarship has suggested, the Inter-American Court’s decisions in the Honduran disappearance cases promoted the concept of justice at a critical point in the movement
within Latin America—just as domestic trials, foreign trials and international trials were beginning to occur, so in effect, they are arguing that the test cases occurred at a critical juncture for the movement as well. Sikkink and Walling’s research shows that a handful of countries had held domestic anti-impunity trials in the Americas in the early to mid-1980s. Only in the end of the 1980s, does the number of trials go above six trials per year. Sikkink and Walling do not find a spike in trials until the early to mid-1990s. Between 1991 and 1996, they find over 15 countries have trials. This S-curve pattern is the same expected in the diffusion literature with the exception of this extremely sharp spike in the early 1990s. Graph 4 shows the S-curve that shows a similar pattern and timing for increases in democratization, court recognitions, and trials, with truth commissions lagging behind.

The court was thus plugged into the movement at about the time that trials were just beginning. On April 24, 1986, the court finally received a contentious case from the commission, which had the exclusive right at that time to determine which contentious cases would be taken before the court. All contentious cases began as complaints submitted to the commission by individuals or NGOs on their behalf (the system’s standing rules allow such proxy cases; see Chapter 6 for more on access issues). Though the court had come into being in 1979, the commission had not submitted a contentious case to the court by the beginning of 1986. Some have argued that this was because the commission was caught up in its own endeavors and few states had recognized the court’s jurisdiction anyway (Mower 1991), while others have implied mistrust of the court or even lack of political will on the commission’s part had occurred. My findings, as seen in later chapters, suggest that it may have been more due to the commission’s prior focus, which was more on diplomatic efforts and reports than the contentious cases until pressure from NGOs led to a more case-based approach (Grossman 1998). This pressure included the anti-impunity movement who was unable to get satisfaction in a court setting in most domestic courts in the region until the 1990s when judicial independence became more prevalent.
(Skaar 2011). For whichever of these reasons, it was not until April 1986 that the court received the first three Honduran disappearance cases, its first contentious cases.

Graph 4: Expansion of Court Recognition, Democratization, and the Justice Cascade in Latin American Countries*

Notes. *Numbers given as percentage of Latin American countries in South American and Central America. Justice cascade is represented by separate lines for trials and truth commissions, which are shown as percentage of countries that have had at least one year of trials or truth commissions. Sources. Information on Court recognition and Convention ratification are taken from http://www.oas.org/juridico/spanish/firmas/b-32.html, while dates for truth commissions and domestic trials are taken from Sikkink and Walling (2007). Nicaragua truth commission information found at http://www.ictj.org/en/where/region2/592.html

Since the court does not act on its own, and its contentious cases come from individual complaints filed at the commission, the same transnational network promoting anti-impunity trials was
responsible in part for bringing the Velasquez-Rodriguez case before the commission and thus the
court. The court, in effect, became a venue for the anti-impunity movement to have a public hearing
on its preferred norms. Interestingly, the norms of the anti-impunity movement included letting
victims have their day in courts.

The first of the cases to be decided by the court became the most prominent, the Velasquez
Rodriguez case. This case was filed originally with the commission by the family of Manfredo
Velasquez and included the involvement of his sister Zenaida Velasquez. The family filed habeas
corpus petitions within Honduras but was unsuccessful. Zenaida Velasquez was one of the founders of
the Honduran human rights organization called the Committee for the Defense of Human Rights in
Honduras, or CODEH, formed in 1982, and was involved in her brother’s case before the commission.
Other groups representing families of the disappeared formed around this time in Central America, and
both the Honduran group COFADEH and the Costa Rican group Association of Central American
Relatives of the Disappeared (ACAFADE) were involved in the case. Attorneys for the case before
the court have stated that ACAFADE along with the active support of the Costa Rican government
“played a large role” in the disappearance cases before the court, particularly in the Fairen Gaibi case
which involved the disappearance in Honduras of a Costa Rican citizen (Mendez and Vivanco 1990).
In other words, there were pre-existing connections between many of the regional and domestic civil
society groups and a regional moral authority, Costa Rica.

While several prominent US-based and Latin American-based NGOs were involved in these
disappearance cases and more generally in the anti-impunity movement in Latin America and
Honduras, the most direct involvement in the litigation of the cases came from Americas Watch.
Americas Watch was part of the alliance of watch organizations that became Human Rights Watch.
Americas Watch, the US-based NGO that put together the legal team and raised money to finance
travel for witnesses and lawyers for the *Velasquez-Rodriguez* petitioners, notes in its reports from the era that it sought to use the court for individual complaints that amounted to test cases for the new court. In its 1989 report, after the 1988 decision on the merits in the *Velasquez-Rodriguez* case, Human Rights Watch “continued to use international mechanisms as a means to seek redress for individuals, and as a forum.” The organization believed all of their cases were representative of novel and important issues of international law, which in effect describes their purpose to use international courts to bring test cases. The international connections with domestic and regional groups created a transnational advocacy network that was well organized and had access to resources to circumvent, or boomerang around, the domestic government blockage faced by the domestic groups within Honduras.

The agenda of the international NGO involved, Americas Watch, specifically included ending impunity. An entire section of the organization’s annual report was devoted to “seeking accountability for past abuses,” and it was the Americas Watch formal policy to seek an end to amnesties and other impunity measures (Human Rights Watch 1989). In a later report, the organization more strongly argued for ending impunity as a fundamental and necessary step to end human rights abuses in the region (Human Rights Watch 1990). Therefore, in the organization’s own words, it was part of the anti-impunity movement in Latin America and intended to use the Inter-American Court, among others, to bring test cases to aid in its fight against impunity for abuses. The purposes and details of how the cases were framed and, the make-up of the legal team, resources, and connections within the network are addressed in Chapter 7 in order to explore why the anti-impunity movement succeeded in the region.

Having handed the court an egregious disappearance case that left out the politically charged amnesty laws issue, the anti-impunity movement, acting as advisors to the commission, gave the court an opportunity to indirectly link itself to the anti-impunity movement in its first decision on the merits,
Velasquez-Rodriguez. Leaving out the politically charged amnesty issue meant that the court could condemn disappearances and the lack of investigation of the disappearance without angering some of the more powerful countries in the region who supported an end to the practice of disappearances, even if these countries had turned to amnesty out of political expediency as Argentina did even while recognizing the court and having cases pending before the commission.

The Honduran cases were allegedly some of the more developed cases at the commission at the time (Mendez and Vivanco 1990). The Americas Watch legal team for the cases used many of their own resources for investigating and preparing the cases, including discovering witnesses, documents, and other in-country research. Officially, the attorneys served as advisors to the commission’s legal team during the proceedings before the court, since victim’s representatives were not allowed to participate independently in the proceedings.

Because of the court’s first few cases in the late 1980s, which were its only cases with decisions on the merits before 1991, the court and its decisions became a symbol of justice in Latin American which linked it to the anti-impunity movement justice cascade that was on the rise in the early 1990s (Sikkink and Walling 2007). The diffusion remained within Latin America whose early ratifiers were those democratic states in Latin America that wanted to promote human rights and democracy as security in their region and within which the issue of disappearances was so acutely prevalent at the time. The movement then spread to the states just beginning to democratize in the region. The movement spread through the usual diffusion mechanisms, including cultural, political, and economic ties, but the newly sparking flames were fed by the actions of the transnational advocacy networks promoting the movement through the Inter-American Court’s Honduran decisions.

After hearings on the Velasquez Rodriguez case, the court’s decision was released on July 29, 1988, and extensively covered in the media in Latin America and around the world. In its landmark
decision, the court found that states are under an obligation to investigate and prosecute those responsible for past crimes. Despite the lack of explicit prohibition of disappearances in the ACHR, the court found that the practice of disappearances violated the right to liberty, due process, and life. The court found, in a finding that would be far reaching, that disappearance is a continuing crime. The court held in paragraph 166 of the case that “states must prevent, investigate, and punish any violation of rights recognized by the Convention” (Case of Velasquez-Rodriguez v. Honduras 1988). The court then relied on patterns and practices to fill in where explicit evidence in the cases was missing, given the nature of disappearances. Disappearances were rampant in Latin America during the time period, and the use of disappearances rather than open extrajudicial executions or releasing torture victims allowed regimes to deny their complicity in the crime, because no bodies were ever found and no records of incarceration existed. The court’s decision was the first time an international tribunal recognized disappearance and defined exactly which rights under international legal standards were violated by the practice. Reparations were ordered for the victim’s next of kin. A similar decision was rendered in the Godinez Cruz case. The court found that the commission and its advisors failed to meet the burden to show why Honduras would have disappeared the two Costa Ricans in the Fairen Garbi case. The most well-known of the cases, however, remained the Velasquez Rodriguez case.

Given that the Velasquez Rodriguez case was the first of the court’s cases and that it involved a controversial and new topic to require states to pay for violations of disappearances, the case became synonymous with both the court and the anti-impunity movement. As Thomas Buergenthal, one of the judges at the court during the Velasquez Rodriguez case, observes, even a farmer in the back woods of El Salvador referred to the right to justice for past human rights violations as the “Velasquez Rodriguez law” (Buergenthal 2004-2005). Because of the extent of the case’s reach, it would therefore make sense that states democratizing after the court’s early jurisprudence would have viewed the court
differently than those considering recognition before these cases. Before the test case decisions, states in democratic transition (e.g., Honduras) may have, as Moravcsik suggests, seen the court as a way to “lock in” their democratic reforms for the future and as part of the community of growing democratic nations.

After the initial cases and after viewing the experiences of a country like Honduras, states appear to perceive the court as a potential sword for justice to address past or continuing atrocities, or at least as a signal to other states that they were part of the movement toward this goal. This observation would suggest that recognition of the court was part of a package deal that occurred along with accepting the anti-impunity movement’s norms. Some countries, weary of being hauled before a court for its continued problems, may have waited to recognize the court until the country accepted the reforms that go along with the anti-impunity movement’s justice trials.

This circumstance is demonstrated by Mexico, about whom Fix-Zamudio (1999) observes that the government of Mexico delayed recognition of the Inter-American Court until after reforming many of the policies the court had already declared to be violations in other states. Oddly, Mexico’s overall Political Terror Scale score for physical integrity rights during its year of recognition was still a three on a scale of five, with five being the worst possible violations. Mexico still had significant human rights violations at the time of its recognition of the court and probably did not expect to have cases before the court, but another factor had changed. Mexico’s 1998 recognition of the court happened between two sets of justice trials held in 1992 and 2001. This suggests that state understood from the test cases that recognition of the court meant confrontation of past abuses. The Barrios Altos case, in which the court specifically struck down Peru’s amnesty law, did not happen until 2000, so the disappearance test cases (both from Honduras and additional countries) were likely to continue as the impetus for Mexico’s hesitation during the 1990s.
Norm entrepreneurs and anti-impunity activists used the court as a tool to promote the justice cascade by bringing important test cases to the court that identified important contentious legal issues and gave the court the opportunity to find formally that states could not ignore past abuses and the suffering of victims and their families. Once the court’s initial decision on the merits in the Velasquez-Rodriguez case was announced in 1988, the side effect was that the court became linked to the movement, and its decisions could become the basis for proof of and condemnation of impunity by states in the region. The decision served the movement by sending a signal to victims in the region that their rights would be supported by the broader international community and would be recognized before a court of law, thereby certifying the norm of justice.

**Stimulus of the Court’s Development Through Linkage with the Justice Cascade in New Democracies**

The push through the court for the anti-impunity movement was not the court’s only interaction with the anti-impunity movement’s activists. Once linked with the court by the Honduran test cases, the justice cascade pulled the court by helping to expand its jurisdiction. The side effect of the test cases and use of the court by the movement was to link the court to the justice cascade early in its jurisprudence and early in the court’s existence in Latin America. The court influenced the wave of the norm cascade that swept democratizing Latin American countries, among many other factors. The movement was in fact active in other venues and mobilized more broadly, as noted by other scholars, such as through publicity campaigns and working with the UN (Clark 2001) or through foreign trials (Lutz and Sikkink 2001). After expanding its own temporal jurisdiction to cases that began prior to recognition of the court through the continuing duty to investigate and prosecute disappearances from the past, the court’s spatial jurisdiction was expanded as the justice cascade diffused truth commissions and domestic trials of perpetrators throughout Central and South America.
The linkage of the court with the Honduran cases was very strong for many of the reasons hypothesized above. First, the case was the first set of cases for the court, so they met most of the landmark criteria for the court hypotheses. It was the first decision in the court’s jurisprudence of contentious cases. The cases came to the court at a time when the court had only been recognized by 10 of the eligible states, so the court’s jurisdiction still had much room to grow even within Latin America. Second, the topic was a new topic for the region and for international law in general, insofar as it had not been formally legitimized as a violation of defined provisions of pre-existing international law by an international tribunal. Disappearances had not specifically been identified as an abuse of human rights by an official treaty or judicial body at the time of the decision. It had been called out as an abuse of human rights and even as a crime against humanity by the United Nations (UN), which had established a Working Group on the issue within the UN’s Commission on Human Rights (CHR) in 1980.

The Inter-American Commission and the OAS General Assembly had called for the end of the practice within Latin America on various occasions. The Inter-American Court was the first supranational judicial body to call out disappearances as a continuing violation of several key physical integrity rights, including the right to personal liberty, to be free from arbitrary arrest, to be free from torture, to due process rights, and to the right to life, since most disappearance victims are executed and their remains hidden to avoid prosecution of those responsible (Velasquez-Rodriguez case). These aspects of the case qualified as a new topic for the court and as a controversial topic. The law was unsettled at the time, and the practice, or at least the impunity of governments who were not investigating the whereabouts of its victims, was still defended in the region.

Even in the initial cases before the court, Honduras defended itself with preliminary objections based on temporal objections and on the fact that this was not a continuing crime. Though not directly
addressed in the Honduran cases, amnesty laws were still prevalent in the region. Though the court did not directly address amnesty laws, it was only shortly after this decision in the early 90s that Argentina, among others, lodged a request for an advisory opinion with the court to ask if the Inter-American Commission had the authority to call states out on general laws and not just specific instances of violations. It was widely known that the general laws in question were amnesty laws. The fact that Velasquez Rodriguez was the first contentious case for the court and that no other cases were being heard at the time likely contributed to the strength of the linkage. Thus, because of its landmark status on all four of the critical juncture factors hypothesized to increase linkage, the impact of the linkage was both very strong and long-lasting.

Strong linkage to the anti-impunity movement, its growing popularity, and the consequent stimulus of court recognitions, in addition to several other factors, may help explain why court recognition only swept through Latin America and not North America or the English-speaking Caribbean, where recognition has been slow or non-existent. These regions did not have a direct link to the anti-impunity movement insomuch as they were not newly democratizing countries with a history of disappearances. If strong positive linkage occurred, Latin American states democratizing after linkage occurred between the anti-impunity movement and the court should both recognize the court’s jurisdiction and perform domestic justice trials and/or truth commissions. These therefore should be linked and there should be a visible pattern of these being a package deal after linkage of the court to the movement through the court’s initial decisions starting in 1988. They should occur closer in time to each other after this date, and closer to initial democratization and initial attempts to be “accepted” in the community.

The recognition of the court immediately after redemocratization in Peru, after Peru’s attempted withdrawal from the court in 1999, sheds light on the fact that even as late as the 1990s, the
lingering impact of the strong, positive linkage between the court and anti-impunity movement still had a great impact. In order to be accepted back into the fold of Latin American countries, Peru saw the necessity of not only beginning a truth commission and trials after Fujimori’s departure and its redemocratization in 2000 but also the need to reestablish relations with the court, despite its continued tensions with the court’s decisions over later cases, after the court was already linked to anti-impunity regarding the past treatment of Shining Path terrorist suspects. The lingering effects of that strong linkage in Latin America may explain why Peru’s attempt to withdraw failed but why the Republic of Trinidad and Tobago successfully withdrew from the court, to be explored in more detail in the next chapter.

Measurement of Recognitions of the Inter-American Court and the Package Deal

If linkage exists in this best-case scenario of a new court and its first cases, as hypothesized above, then the patterns should be observable in the Linkage Typology Chart (Table 4). The pattern of test case linkage should include the following:

1. evidence that recognition of the voluntary court becomes linked to acceptance of the movement, that is, that the movement acceptance and the court recognition are occurring closer in time than before the test case;

2. recognitions of the court after the test cases should continue steadily or increase, if the movement is increasing steadily or increasing (or conversely should decrease if the linkage is negative and the movement causes a backlash).

The hypotheses suggest no clear pattern of linkage between any movement and the recognitions of the court before the test cases, unless some other form of political or economic linkage was present, which I argue would generally not be very strong unless formally linked by membership requirements or strong coercion from other states or the overarching regional institution, in this case the OAS. Since
this is not suspected in this time period for court recognitions, no clear pattern of linkage to a particular movement before the test cases link the court to a movement should be expected to occur. Alternative theories are explored to determine if they may have caused any linkage patterns that are found either before or after the test cases.

In the Latin American case, if strong linkage occurred there should be a fairly consistently linked pattern between the acceptance of the anti-impunity movement and recognitions of the court after the first three Honduran disappearance cases reach the court and begin to be decided, roughly around 1988 when the first of the decisions on the merits was handed down in the Velasquez Rodriguez case. Court acceptance is measured by the date that the state officially recognized the court by delivering its declaration of recognition of its authority to the OAS’ Secretary General’s office (OAS 2007). Because the anti-impunity movement moved through states that were already democracies or becoming democracies, the date of democratization represents a critical measurement, as do the dates of trials and truth commissions. Measurement of these and other factors are discussed below.

Overall Patterns: Before and After

Democratization, trials, truth commissions, and court recognitions were all on the rise and diffused across Latin America during the 1970s, 1980s, and 1990s. Graph 4 above shows the rise in these events over this time period. Though only trials show the sharp spike in the early 1990s, a more gradual rise occurred in democratization and court recognitions between the late 1970s and early 1980s with which the trials spike seems to be playing “catch up” very quickly in the early 1990s. Truth commissions increase in this era but never spike to reach as many countries as trials (around 60% rather than 80%).
Before Test Case Linkage

Using theories from the court acceptance literature discussed in Chapter 2, I expect that in the beginning of the S-curve shaped acceptance pattern for the court’s jurisdiction, the early innovators should be established Latin American democracies that wanted to promote democracy in Latin America, presumably to give themselves more security. These established democracies were surrounded and outnumbered by many authoritarian governments, which made security and trade issues with Europe and other countries more difficult. The recognition of the court and respect for human rights from these democracies would then serve as an example for other states in the region to emulate. Thus, as in Forsythe’s article, older Latin democracies acted as moral authorities, and in their own self interests, took the additional step to promote the system and accepted its binding authority in an effort to “lock in” and diffuse democratic reforms and norms in the region. The need for lock in for them was regional rather than domestic. Thus, older democracies in Latin America likely recognized the court to promote democracy and human rights, and thus security and economic stability, in the region. For this reason, and because their recognitions in many cases pre-dated the growth of the anti-impunity movement in the region, their recognition is not expected to be linked to the anti-impunity movement, though they may have supported that movement later.

This recognition should support the contention from liberal republicanism that countries moving toward democracy in the region should have wanted to use the court as a symbolic gesture or to “lock in” reforms in the region and domestically. In the early years before the justice cascade took hold, these would include countries that may or may not have been willing or fully able to implement justice and accountability measures, such as broad trials or truth commissions, including countries going through rough or very slow democratic transitions. Since the court was a tribunal for judging state’s behaviors and not a criminal court to investigate past crimes, they may have recognized the court even though they were not fully compliant, especially before it had actually delivered any
decisions. Since the court was not associated with the anti-impunity movement, the reverse could be true. A state that accepted ideas of justice, whether through trials or a truth commission, might not accept the court’s jurisdiction when democratizing in this early period, since they were not linked. Thus, no prediction can be made regarding new democracies at this time, since they may or may not recognize the court depending on many domestic and external factors.

The clearer pattern (or package deal), according to my linkage theory, should develop as the justice cascade begins to take hold and after the court’s decisions in the test cases link it to the movement, establish it as a justice cascade proponent, and show it to be an arbiter of justice for the past and the present. Countries that democratize after the court’s first decisions, beginning in 1988, should only recognize the court if they have already moved toward, or are in the process of beginning, trials or truth commissions and should show signs of the package deal, accepting both the court and the anti-impunity movement. A complete ban of amnesties was not in the court’s jurisprudence until after the last Latin American country recognized its jurisdiction, so amnesties would not be a determining factor before the court’s 2001 Barrios Altos decision. For this reason, amnesty laws need not be addressed directly here, since many countries had partial amnesties even while still conducting domestic trials. There should be evidence of the package deal after 1988. If such a deal exists, Latin American states that democratize after 1988 should accept the court’s recognition and justice trials within close proximity in time.

Once Latin American countries completed the recognition process, the rest of the Hemisphere should only slowly trickle into acceptance of its jurisdiction unless the justice movement and norms can cross into these other areas. Since many of the countries in the Caribbean and North America were long-time democracies without recent legacies of atrocities and impunity, it would be unlikely to occur
unless some other norm is invoked and linked to recognition of the court, as in the case of regionalization in Europe.

**Regional Acceptance Patterns Before and After Velasquez-Rodriguez**

This section provides how the patterns outlined above are demonstrated in the history of democratization, court recognition, and the anti-impunity movement in Latin American states. I explore whether the package deal pattern suggested by the theory of a “stimulus” type linkage for the court existed, and whether it began after the court was linked to the anti-impunity movement in its first cases in the late 1980s.

**Regional Findings**

I have argued above that in the time period before the court’s first decisions (that linked it to ideas of justice and anti-impunity), democratization in a country would not necessarily mean that a state would recognize the court. Rather, it was not until the court became associated with the justice movement that it began to become part and parcel to democratization in general. Thus, court recognition should become closer in time to democratization after *Velasquez Rodriguez* and the court’s other initial cases, if that country is accepting the anti-impunity movement.

The court’s recognition should become more closely associated with anti-impunity events, specifically truth commissions or trials, after its initial cases. This linkage would likely bring to leaders’ minds the earliest example of Argentina, the critical learning point for *justice* in Latin America. In 1983, Argentina democratized after a brutal military regime that disappeared and killed its opponents and perceived opponents. Approximately 8000 people were “disappeared.” Weak from the Falkland Island war with Britain, the military junta did not have enough leverage when the new civilian government took over to avoid prosecutions. The new civilian president repealed the military regimes’ amnesty laws, a truth commission investigated the disappearances, and the commission’s
findings were passed on to the legal system for prosecution (Argentine Truth Commission 1984). At this time, Argentina recognized the IACHR. Argentina accepted the package deal even before the court heard the cases.

As an influential country in the region and because of the widespread publicity of its prosecutions and the Argentine Truth Commission’s (1984) report “Nunca Mas,” Argentina represents an example for other countries in the region to emulate. The pattern of diffusion of the package deal that included court recognition does not really show up until the court actually decided cases that linked the court to the issue of disappearances (a phenomenon widely publicized partly because of the cases in Argentina) and the duty to investigate disappearances, both of which may have linked the court to Argentina’s prior, mostly successful example.

Though Argentina may have been an example for later democratizing states (Walling 2007), its nearby neighbor Brazil is not. Looking at the economic alliance in Argentina’s sub region, Mercosur became the common market trade alliance known as the “Common Market of the South” officially in 1991. Mercosur formed only after the first Inter-American Court cases. However, assuming ties existed before Mercosur officially came into being, the members of the alliance recognized the court over a span of 14 years, and none were “clumped” around Argentina’s recognition. Uruguay recognized the court shortly after Argentina in 1985, failed to hold justice trials until 2002, but did hold a truth commission during that time. Paraguay does not follow with recognition of the court until 1993 at which time it does hold justice trials, and Brazil failed to recognize the court until 1998, and is the last to do so in South America. No clear pattern surrounding recognition, democratization, and justice trials appears to be linked to Argentina’s recognition, even within its trade partners and closest neighbors.
Argentina did not continue to be a perfect shining star for the anti-impunity movement and found itself before the Inter-American Commission in the 1980s due to its amnesty laws. Argentina’s nascent government rather quickly passed the Due Obedience Laws in 1986-1987 to cover the military’s lower and middle ranks (Program on Negotiation at Harvard Law School 2002) and to set a deadline on filing cases against abusers so that the country could “move on.” Several key generals were pardoned by Argentina’s president in this time period. Argentina thus served as an early but somewhat tempered example of the package deal of democracy, justice, and court recognition. Argentina was a setting in which it was easiest to do so, because the past military government was weak and democratization did not come through a negotiated end to a conflict. The commission did not bring Argentina, or its neighbor Uruguay, before the Inter-American court in the 1980s, despite pending cases, because the commission did not want to put a major country before the court on the issue of amnesties, before the court could declare one of the most prevalent abuses in Argentina, disappearances, a violation.

It must be acknowledged that Argentina’s successful transition, including justice for the past with the potential intervention of an external court, demonstrates that this linkage does not necessarily pose a significant threat to a country’s transition to democracy, something feared when amnesties are taken off the table. This is a widely held fear expressed by politicians and some scholars (Snyder and Vinjamuri 2003), who argue that politically expedient reasons may lead to foregoing some justice in order to preserve tenuous stability in a new democracy. Despite the fact that Argentina was only partially successful in maintaining full anti-impunity in the early years, it served as the primary translation of the linkage in the region, demonstrating to states considering accepting the movement and court after they were linked by the test cases that this package deal could work in Latin America.
Patterns in Recognition in Newly Democratizing States

Since no clear pattern emerges in the pattern of recognitions and justice trials over the entire time period, I explore whether a shift in patterns at the time of the test cases happened in order to check for the overall pattern in recognition and justice linkage hypothesized above. Table 5 lists the countries that have recognized the court and the time elapsed between court recognition and key events (either before or after): democratization, onset of trials, and onset of truth commissions. Truth commissions are separated from trials, because questions arise as to whether most truth commissions fulfill the full thrust of the anti-impunity movement, since many are coupled with amnesties or other leniencies including anonymity.

Countries are listed in order of the year they democratized, since democracy is the threshold, necessary condition for most states to recognize the court. In fact, only Honduras, Guatemala, and Suriname have recognized the court before becoming fully democratic, and in the cases of Honduras and Suriname, recognition occurred only one year prior to initial democratization. Guatemala democratized in 1986 then backslid and re-democratized again in 1997, both times holding trials and, in 1997, a truth commission. Running the averages in the tables below with Guatemala in as 1986 or 1996 democratization had very little impact on the overall results, so I have left it in as 1996. Democracy is measured as a state that received a score of 6 or greater on the polity2 scale using Polity IV data (Marshall 2010). This scale is used to avoid counting long transition periods against a country’s elapsed time, and because it does not measure civil liberties and other components of democracy that would simply measure human rights themselves. Graphs 5 and 6 offer pictorial views of the Table 5 data.

The results described in Table 5 and depicted in Graphs 5 and 6 suggest that a pattern developed between democracy, justice trials, and court recognition around 1988. Table 5 shows that the average time elapsed between court recognition and democratization for new democracies in the
region was 4.82 years overall. The average was calculated using absolute values, so that the time elapsed includes time before or time after the event, which becomes more important in justice trials, where the events tend to take place equally before and after court recognition. Before 1988, the average time between democratization and court recognition is 7.11 years, not including the older democracies. The countries of Venezuela and Costa Rica were already democracies when the ACHR opened for signatures in 1969.

The time elapsed between democratization and court recognition in new democracies drops to 2.25 for countries democratizing after 1988. This suggests that at least court recognition did indeed become part of the democratization package after 1988, a way of “locking in” democracy, and a means for demonstrating to the region that the state would remain democratic. It is of course difficult to separate democratization from this process. The findings lend support to the diffusion idea. The more countries in the region that have recognized the court, the more quickly the court gains overarching recognition, the classic S-curve. The linkage in the late 1980s and early 1990s is striking, see Graphs 6 and 7.
Table 5: Time Elapsed between Democratization, Domestic Trials, Truth Commission, and Court Recognition

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<tr>
<th>States</th>
<th>Year of Democratization</th>
<th>Years from Court Recognition to Democratization</th>
<th>Years from Court Recognition to Trials</th>
<th>Years from Court Recognition to Truth Commissions</th>
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<td>Prior to 1969</td>
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<tr>
<td>Dominican Republic</td>
<td>1978</td>
<td>-21</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ecuador</td>
<td>1979</td>
<td>-5</td>
<td>8</td>
<td>12</td>
</tr>
<tr>
<td>Peru</td>
<td>1980</td>
<td>-1</td>
<td>9 (-3)</td>
<td>20*</td>
</tr>
<tr>
<td>Bolivia</td>
<td>1982</td>
<td>-11</td>
<td>-10</td>
<td>-11</td>
</tr>
<tr>
<td>Honduras</td>
<td>1982</td>
<td>1</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Argentina</td>
<td>1983</td>
<td>-1</td>
<td>-1</td>
<td>-1</td>
</tr>
<tr>
<td>El Salvador</td>
<td>1984</td>
<td>-11</td>
<td>-5</td>
<td>-3</td>
</tr>
<tr>
<td>Brazil</td>
<td>1985</td>
<td>-13</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uruguay</td>
<td>1985</td>
<td>0</td>
<td>17*</td>
<td>0, 15*</td>
</tr>
<tr>
<td>Suriname</td>
<td>1988</td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Panama</td>
<td>1989</td>
<td>-1</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>1990</td>
<td>-1</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>Chile</td>
<td>1990</td>
<td>0</td>
<td>1 (-4)</td>
<td>0</td>
</tr>
<tr>
<td>Paraguay</td>
<td>1992</td>
<td>-1</td>
<td>1 (-4)</td>
<td>10</td>
</tr>
<tr>
<td>Haiti</td>
<td>1994</td>
<td>-4</td>
<td>-3 (-15*)</td>
<td>-3</td>
</tr>
<tr>
<td>Guatemala</td>
<td>1997</td>
<td>9</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>Mexico</td>
<td>1997</td>
<td>-1</td>
<td>4 (-5)</td>
<td></td>
</tr>
<tr>
<td>Overall Average for new democracies (using absolute numbers)</td>
<td>4.82</td>
<td>4.36, dropping Uruguay (4.54, dropping Haiti)</td>
<td>7.50, dropping Peru</td>
<td></td>
</tr>
<tr>
<td>Average Before 1988 (using absolute numbers)**</td>
<td>7.11</td>
<td>6.71, dropping Uruguay</td>
<td>6.67, dropping Peru</td>
<td></td>
</tr>
<tr>
<td>Average After 1988 (using absolute numbers)</td>
<td>2.25</td>
<td>1.75</td>
<td>8.33 (2.5, dropping Haiti)</td>
<td></td>
</tr>
</tbody>
</table>

Notes. Year of court recognition is used as \( t = 0 \), so positive numbers indicate how many years after court recognition the event occurred. Negative numbers indicate the number of years prior to court recognition the event occurred. Years between Trials and Court Recognition are given for the number of years since the first trials since a democratic transition. Years since the first trial year whether democratic or not is given in parentheses, if different. *Some countries have had redemocratization periods after the 1990s and the justice cascade, and these periods account for some of what appear to be extremely long delays. **Venezuela, Costa Rica, and Colombia were dropped since they democratized before the treaty opened for ratification and the delay in those countries allowing the treaty to “stew” might skew the numbers. Sources: Information on Court recognition and Convention ratification are from http://www.oas.org/juridico/spanish/firmas/b-32.html, while dates for truth commissions and domestic trials are from the Sikkink and Walling (2007). Nicaragua truth commission information can be found at http://www.ictj.org/en/where/region2/592.html.
Graph 5: Time Elapsed During Linkage of Democratization, Domestic Trials, and Court Recognition in New Latin American Democracies

Notes. The Honduran cases were sent to the court in 1986, while the first decision on the merits was released in 1988. Guatemala is charted as democratizing in 1986*, while Suriname’s democratization occurred in 1988. Thus, linkage is suggested to have occurred around the time these countries were democratizing. These countries and all those to the right of them on the chart democratized post-linkage, indicating that trials and court recognition became part of a package deal for new democracies after the mid to late 1980s. *For the graph, Guatemala has been coded for its first democratization period when it took the leap from -6 to +3 on the Polity IV scale. It later fully democratized to a +6 in 1997.

Before 1988, although all the established democracies in Latin America recognized the court, new democracies in the region fell into one of two extremes: about half recognized the court almost immediately after or just before democratization, the rest tended to wait over 10 years to recognize the court. These extremes are present in all but one case (Ecuador, which waited only five years to recognize the court after democratization). One explanation for this would be that brand new democracies in the process of “locking in” and taking a stand for democracy may be more likely to recognize an external tribunal in the earliest phases. If a state got past the first year or so of democratization without recognition, the need to prove themselves a democracy to other states becomes less urgent, while the pressures of everyday domestic problems such as economics, civil wars
(El Salvador) or terrorist threats (Peru), and possibly realizing the “work” that still needs to be done on the country’s legal and political system before it could withstand the scrutiny (and bad publicity) of an external court. Further, the sense may have been that the country needed to focus on domestic concerns. All of these may have outweighed any benefit from recognizing the court in a democracy’s adolescent stage. Once the pressure of the norm’s diffusion progressed and/or the country’s democratic institutions and laws become more stable, the country might be more likely to revisit recognition and its potential benefits for trade agreements and other external concerns.

**Graph 6: Time Elapsed During Linkage of Democratization, Truth Commissions, and Court Recognition in New Latin American Democracies**

Notes. The Honduran cases were sent to the court in 1986, while the first decision on the merits was released in 1988. Guatemala is charted as democratizing in 1986*, while Suriname’s democratization occurred in 1988. Thus, linkage is suggested to have occurred around the time these countries were democratizing. These countries and all those to the right of them on the chart democratized post-linkage, indicating that trials and court recognition became part of a package deal for new democracies after the mid to late 1980s. *For the graph, Guatemala has been coded for its first democratization period when it took the leap from -6 to +3 on the Polity IV scale. It later fully democratized to a +6 in 1997.

Court recognition and onset of justice trials are closer in time after 1988. Table 5 shows the time between court recognition and the beginning of domestic trials, as measured by Sikkink and
Walling (2007). No clear pattern between the time elapsed in new democracies between domestic trials and court recognition is clear for countries that became democracies before 1988. Some countries have trials many years before recognition (e.g., Bolivia and El Salvador), while others have trials many years after recognition (e.g., Honduras and Ecuador). Overall, the average difference in time between court recognition and onset of domestic trials is 4.36 years, as shown in Table 5, while before 1988 the average is 6.71. After 1988, the difference is only 1.75 years, a dramatic drop. Looking at the time lapses between date of democratization and date of trials shows a similar drop from 6.86 years before 1988, and only two years after 1988. Trials were thus becoming closer to both democratization and recognitions.

This suggests that in states that democratized after 1988, the court’s recognition and domestic trials tended to happen closer together in time and closer to the time of democratization. Since democratization, trials and court recognition follow the same pattern, the three may have been traveling, or diffusing, as a “package” deal as suggested by linkage theory. New democracies saw court recognition as related to or part of the justice and democracy package that signaled their adherence to norms that were becoming community norms at the time. It suggests that something occurred in this late 1980s time period to link the three together, since they were not previously. (See Table 6.) Thus, the court’s early cases, in addition to a continuing pattern of diffusion for democratization, justice trials, and court recognition in the region, may have contributed to the linkage of court recognitions to the anti-impunity movement and democratization.

**Linkage of Court Recognition and Truth Commissions**

Interestingly, the linkage between court recognition and truth commissions does not show the same pattern, and I argue this is because truth commissions were not seen as complete justice by the anti-impunity movement or victims of the disappeared. The timing of truth commissions does not
seem to become closer in time to democratization or court recognition after 1988. Table 5 shows that the average difference (in absolute values) between court recognition and truth commissions is 7.50 years overall, and the time periods before and after 1988 show only a very slight variation from the overall average. The average before 1988 was actually less by almost a year, while the average after 1988 was slightly greater, just over one and a half years increase in the time difference between court recognitions and truth commissions (6.67 years before 1988 and 8.33 years after). The same is true of truth commissions and democratization. Table 5 shows that truth commissions remained at an average of about seven years before or after democratization. Looking at Graphs 5 and 6, the pattern of truth commissions in new democracies does not seem to follow the same pattern as trials and court recognition, and did not become something new democracies were more likely to do during their earliest years as a democracy but rather stayed stable throughout the period.

This suggests that truth commissions were not following the same pattern in new democracies as trials and court recognition in the post-Velasquez Rodriguez period. Court recognition and truth commissions may not have been linked or, to some degree, the court, after its early decisions, may have been less linked to truth commissions. This may simply be because the court’s legal nature associated it more easily with criminal trials than an investigative body, or because the test cases it was presented with by the movement’s activists were decisions that leaned toward (and the court does state specifically in them) the obligation of states to both investigate and punish, while truth commissions were often associated with amnesties (though not always), or at least not entirely associated with prosecutions. This is evident from the fact that truth commissions and trials are only close in time in about half the countries that held them.
Table 6: Comparison of Dates of Recognition with Truth Commissions and Domestic Trials

<table>
<thead>
<tr>
<th>Country</th>
<th>ACHR Ratification</th>
<th>Court Recognition</th>
<th>Truth Commission</th>
<th>Domestic Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>1992</td>
<td>1998</td>
<td>Transition without trials or TC</td>
<td></td>
</tr>
<tr>
<td>Suriname</td>
<td>1987</td>
<td>1987</td>
<td></td>
<td>1989</td>
</tr>
<tr>
<td>Uruguay II</td>
<td></td>
<td></td>
<td>2000</td>
<td>2002</td>
</tr>
</tbody>
</table>


Truth commissions met with varying degrees of success and did not have a consistent reputation for seeking justice, and were in some cases associated with “transitional justice” mechanisms that were used by the political branches to avoid actual prosecutions (Skaar 2011), rather than the judicial trials that the anti-impunity movement was promoting. Problems arose in countries
including Chile and El Salvador where the truth commissions or prosecutions from their reports were hampered by amnesty laws, and in Bolivia where the truth commission found itself without the necessary resources and with a restricted mandate that eventually led to it disbanding without issuing a report (Hayner 2001).

Despite these setbacks for truth commissions as an instrument of justice and their growing disfavor in the 1990s, truth commissions in the 2000s were held in some countries where they had not occurred previous, but were later held, even after trials, in connection with investigations of the remaining cases from past eras, such as in Nicaragua where in 2007 a truth commission was created to investigate abuses during the country’s armed conflict (International Center for Transitional Justice 2008). This new wave of truth commissions occurred around and after the time of the court’s invalidation of the Peruvian amnesty laws in the 2001 Barrios Altos case, a decision that was handed down by the court while a truth commission was underway in Peru.

Some critics of prosecutions have argued that banning amnesties leaves important political options off the negotiation table and may turn some political leaders away from the table altogether (Snyder and Vinjamuri 2003), but the move toward banning amnesties has continued in the international realm with the creation of the International Criminal Court. Despite the lack of clear linkage pattern for truth commissions, the above analysis suggests that there indeed was a linkage of democratization, domestic trials, and court recognition after the late 1980s, sparked in part by the actions of activists who brought test cases before the court. States that democratized after the late 1980s tended to accept the court’s jurisdiction and have domestic trials far closer together in time and much closer to their democratization date than states that democratized before that point. Before 1988, the court was not linked to the anti-impunity movement. It had only offered advisory opinions on regulation issues that included state licensing of journalists.
After the linkage of the court to the justice cascade through its initial contentious case of *Velasquez-Rodriguez*, received in 1986 and decided on in 1988, the three things become a “package” deal and seem to come swiftly one right after the other. However, though the justice cascade literature links truth commissions and trials, there seems to be a disconnect between the timing of truth commissions and the other events. This indicates that truth commissions as a whole may not necessarily be as tightly linked to the “package” of anti-impunity, democracy, and court recognition developing in Latin America in the late 1980s and beyond. The importance of the truth commission in the Argentine example and the lack of linkage to court recognitions cast some doubt on alternative theories that suggest perhaps it was coercion or pressure from Argentina that was actually behind the package deal. The findings on truth commissions suggest that linkage with the Honduran test cases may indeed have had an impact on the patterns of diffusion of these norms.

**Two Country Examples: Pre- and Post-Velasquez Rodriguez**

The previous section’s findings suggest that among new democracies in Latin America, those that democratized after the court was linked to anti-impunity and its status as a symbol of anti-impunity in the region was established tended to accept the court and have trials all within a short period of time. Two countries, Bolivia and Paraguay, are similar in many ways, except that they democratized in different periods, one before and one after 1988. Bolivia took 11 years to recognize the court and 10 years after holding trials, while Paraguay accepted the court’s jurisdiction within one year of democratization and at the same time period that trials were begun. Though both recognized the court within months of each other, the history before doing so demonstrates a different pattern before and after 1988.7

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7 The argument that they may have recognized the court at the same time due to geographic diffusion is addressed in the following section on alternative explanations, which notes that there does not appear to be a pattern of direct geographic spread in Latin America as a whole.
Bolivia and Paraguay share a similar background and recent history. The two countries are neighboring South Central American nations, though Bolivia tends to associate with the Andean nations and Paraguay with Brazil and Argentina. Both countries were Spanish colonies that gained independence in the early 1800s (CIA 2008, 2008). After a variety of governments, Paraguay came under the dictatorial control of General Stroessner in 1954, while Bolivia came under military rule a short time later in 1964. Under these military governments, both countries suffered serious, gross violations of human rights as was typical in the region at the time. Both democratized in the period in question, but Bolivia’s democracy began in 1982 after a transition from military to civilian government, while Paraguay reached the requisite level of institutional democracy in 1993 after a few years of transition that began in 1989 with the ouster of General Stroessner (State Department 2008, 2008).

From 1978 until 1982, Bolivia underwent a tumultuous transition to democracy that included coups and strikes, eventually ending with the last military president calling on the civilian Congress to choose their own president. A civilian truth commission investigated human rights abuses under previous military rule in 1982, and domestic prosecutions occurred in 1983. Partly due to economic woes, the civilian administration found itself at odds with Congress, which threatened a coup and caused the president to resign (State Department 2008). Though human rights were greatly improved during this time period, Bolivia did not recognize the IACHR until 1993 (OAS 2007), 11 years after democratization and about a decade after the first trials and the truth commission.

On the other hand, Paraguay’s similar history had a different outcome for court recognition when it democratized a decade after Bolivia. Paraguay was under the rule of General Stroessner from 1954-1989, during which time grave abuses occurred such as political arrests, torture, and murder. The Inter-American Commission released a report in 1978 and the OAS General Assembly passed a
resolution in 1980 condemning Paraguay’s human rights situation (Library of Congress 2005). By 1989, another general had ousted Stroessner and began the transition to democracy. A new Constitution was drafted in 1992 and free and fair elections were held in 1993 (State Department 2008). The country had begun to hold trials after the initial coup in 1989 and held trials in 1991-1992 (Sikkink and Walling 2007). Though the country did not initially hold truth commissions, it did accept the court’s jurisdiction in 1993 (OAS 2007). Trials continued 1994-1999 and again 2002-2004; a truth commission was begun in 2001 shortly before the last wave of trials.

Paraguay’s quick acceptance of the court occurred after the 1983 example of Argentina as well as after the 1988 Velasquez-Rodriguez case. In his state of the nation address in March 1993, the President of Paraguay stated the importance of accepting the court’s jurisdiction to ensure human rights and Paraguay’s place in the international community. March mentions, in several places in the speech, the importance of moving beyond the past and educating people about their rights and mentions the need to preserve the archives containing information about the repressive previous regimes’ actions and violations so as to give the victims their rights (Asuncion Radios 1993). Preservation of records is in keeping with the fact that the recognition of the court occurred not only right after Paraguay reached the threshold of institutional democracy (6 on the polity2 scale) but also shortly after initial prosecutions for past abuses began. Like many of the countries that democratized later, Paraguay did not use a truth commission during this time period, but rather held trials through its court system. Not until 2003 did the country establish a truth commission. This truth commission was linked to its latest round of trials rather than an amnesty, as was the case with several earlier truth commissions that predated the anti-impunity movement’s successful discrediting of amnesty laws in the region and the court’s anti-amnesty decision in Barrios Altos.
In looking at Bolivia and Paraguay, the package deal pattern associated with linkage through the tests cases in 1988 is present in Paraguay but not in Bolivia. Though the two recognized the court in the same year, Paraguay recognized the court first in January, while Bolivia followed in July (though the legislation authorizing it was passed in February; OAS 2007). Despite otherwise similar violations of human rights, prior regimes and paths to democracy, these two countries took different paths to court recognition. Bolivia joined the justice cascade in the early 1980s by holding trials, but failed to link this action to court recognition, which occurred over a decade later. Other neighbors of Bolivia had recognized the court at the time of Bolivia’s democratization, including powerful Andean neighbors Venezuela and Peru, but Bolivia does not do so. Though this is not a pattern for all countries that democratized between the 1970s and 1988, it is indicative of the lack of linkage and lack of consistent pattern in the timing of these events present before 1988. Paraguay on the other hand follows the pattern of most states democratizing after 1988. It embraced trials and the court’s recognition at the time of its democratization and only later held a truth commission. Bolivia, having waited over a decade to recognize the court, did so only after its neighbor Paraguay did so and, notably, shortly before its second round of trials that occurred in 1995, which may in itself demonstrate the trials become linked to court recognition.

Thus, these two countries illustrate the change in recognitions occurring in newly democratized countries after 1988. Those like Paraguay that democratized later and embraced trials recognized the court at the same time, while those countries like Bolivia that democratized before 1988 did not necessarily link the court’s recognition with democratization or trials before 1988.

**Alternative Explanations for the Pattern of Recognitions in Latin America**

Several other explanations for the dramatically shorter time between Court recognitions and justice mechanisms in new democracies after 1988 must be explored. I address these explanations in
three parts: (1) why states recognize the court at all; (2) how they link if at all to the anti-impunity movement; and (3) why the linkage is so much stronger after 1988. The most obvious explanation, of course, is that they were both on the rise at the same time and were always related. As shown above there was little linkage, at least in proximity in time, before 1988. A variety of alternate explanations likely account for that time period, because even after an alleged test case linkage occurred, they do not consistently account for the patterns demonstrated.

**Recognition: Alternative Theories**

**Coercion**

Coercion is the first alternate theory mentioned in the diffusion literature, and relates to the realist literature. This suggests that some state or international organization used its influence to get states to both recognize the court and have justice trials at or near the same time starting after 1988. Forsythe’s (1991) piece on the development of the system has shown that the US policy toward the system has been inconsistent. Given the US’s lack of recognition and outright animosity toward the system at times (many cases are filed against the US in the commission and more recently an advisory opinion request by Mexico at the court), there is no reason to believe that the Bush I administration nor the Clinton administration involved themselves in lobbying for the court, even if they could arguably have pushed justice mechanisms.

Further, the Latin American powerhouses of Brazil and Mexico were the last to recognize the court and did so long after 1988. Mexico’s domestic trials were held late (starting in 1992), and Brazil had no justice trials or truth commission. Venezuela, certainly an important early proponent of the court, did not have more than moral authority over many of the countries that recognized the court. Though probably an example to others, Venezuela’s trade linkages (shown below) do not recognize the court faster than others in the region. Lastly, while Argentina was a key first example of the linked
package deal in the early 1980s, its own record of justice after the Due Obedience Laws were passed did not give it any reason to increase such influence in or around 1988 instead of 1983 when it first accepted the package deal itself.

The OAS has supported the court’s recognition, but for its part has focused more on democracy and creating further mechanisms to respond to democratic breakdowns than to linking accountability and recognition of the court. OAS Resolution 1080 in support of representative democracy and possible action in cases of coups within member countries did support human rights as well, but was not passed until 1991.

If the OAS was not pushing the court, perhaps UN involvement in some countries would make them more likely to recognize the court? In countries where the UN assisted or aided in negotiations, the pattern is inconsistent: in El Salvador, for instance, a truth commission was convened but the country did not recognize the court until eight years afterward, suggesting that the UN was not interested in or able to coerce Court recognition, while in Haiti justice and recognition did occur within three to four years of each other and initial democratization.

**Competition and Trade Alliances**

Competition and trade alliances are another alternative explanation. Since many of the most powerful trade partners in the region, particularly the US and Canada, have remained outside the system and/or inconsistent with respect to supporting it, their trade agreements have not required recognition. No such mandates exist with treaties that involve European countries, though the Council of Europe supports the work of the court directly through funding for publications, supplies, and staff, and it has encouraged acceptance of human rights and the court (circa its protests when Peru withdrew).
Trade between Latin American countries may be an explanation, but since trade alliances in Latin America are most strongly associated with geographic subregions (with some exceptions), looking at the geographic diffusion of recognition over time helps illustrate the lack of explanation for the pattern found in the findings above. Table 7 demonstrates that court recognitions over time did not appear to move through one subregion faster than others within Latin America, and that each subregion had some states before and after 1988, though North America and the Caribbean are exceptions. No one subregion, including the Andean countries, Mercosur countries, and Central American Common Market countries, seem to follow the pattern any more or less than others, and their dates for creating their subregional market organizations do not match up with dates of acceptances. Looking at the official creation dates of the various subregional trade alliances, no clear patterns, such as swells of recognitions, emerge around their creation dates. Further, if Argentina’s example in 1983 remains an overriding factor, as it does not diffuse along trade lines because trading partner Brazil is one of the last to recognize the court. Argentina did so several years after the start date of Mercosur, of which Brazil is a founding member.

Without the justice cascade in long-time North American and Caribbean democracies, the swift pull of the movement failed to take off in those regions, and so they do not share the post-1988 linked pattern. In the Caribbean those countries with their own justice and accountability issues were more likely to recognize the court, even if a bit later in time. This is the case in Surname and Haiti, where gross abuses had occurred and calls for justice against complacency and compliance by the government would be more apt to fit with their experiences. Barbados may have some competitive reasons for recognizing the court in an era when it would like to do more business with Latin American states. The Commonwealth Caribbean is discussed in detail in its own case study, demonstrating a second pattern of linkage for the Inter-American Court.
Table 7: OAS Member Ratification of ACHR and Recognition of the Inter-American Court by Subregion

<table>
<thead>
<tr>
<th>Subregion</th>
<th>Not Ratified or Recognized</th>
<th>Ratification of ACHR</th>
<th>Recognized the Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>North America</td>
<td>Canada, United States</td>
<td>1981 Mexico</td>
<td>1998 Mexico</td>
</tr>
</tbody>
</table>

Note. Information on court recognition and Convention ratification are from http://www.oas.org/juridico/spanish/firmas/b-32.html

Cheap Talk

Finally, it is important to note by analogy one of the most common theories given for why treaties are ratified by states. An accusation of “cheap talk” might stick in a few cases of recognition of the court by states before they were ready to comply with the Convention, including several states recognizing the court while experiencing very poor human rights conditions (i.e., Honduras in 1981, Guatemala in 1987, Suriname in 1987, and Nicaragua in 1991). Cheap talk countries should only have recognized the court after its cases began in 1988 if they were ready to be at least somewhat compliant,
since the talk was no longer so cheap (after all, two states later withdrew as a consequence of Court actions) at least for a state’s reputation, even if actual compliance was hard for the court to enforce. Looking at the human rights scores of new democracies at the time of recognition points out that most states were what appears to be the magic number, or mode, of 2.5 on the political terror scale, for whom measures violations of physical integrity rights were arbitrary arrest, torture, disappearances, and extrajudicial executions. This 2.5 score sits in the middle of the 5-point scale, meaning that moderate but not widespread or gross violations are occurring at the time of recognition (Gibney and Dalton 1996). Several, including Nicaragua, Haiti, Mexico, and Brazil show at least a 3, while others earn no more than a 2. The range of scores for the states in the year of recognition is from 1 to 4; the variation for states at the time of court recognition is wide given the brevity of the scale. If anything, it could be argued that some recognized the court due to being compliant while others recognized due to the desire for positive public relations. Nonetheless, these two theories do not appear to explain the linkage patterns, with a package deal appearing after 1988 as has been found in this study.

**The Outlier: Peru and Withdrawal After a Strong Positive Linkage**

Despite the evidence for a strong positive linkage, or stimulus, after the Velasquez Rodriguez case in the late 1980s, one country in Latin America did attempt to withdraw its recognition of the court’s jurisdiction. However, the attempted withdrawal of Peru in 1999 after the Castillo Petruzzi decision against it actually has many aspects that support the existence of the lingering effects of a strong positive linkage of the court and the anti-impunity movement in Latin America, which continued to have effect even 10 years later. Peru quickly reversed course in 2000 after a new democratic regime took over after several years of backsliding under the Fujimori regime. Though Peru’s reaction was negative to the court’s decision in 1999, the previous linkage still left a weak linkage behind that Peru could not overcome, though it has since weakened and new, stronger linkages
are emerging (such as the withdrawal of Venezuela in 2012\(^8\)). Even the actions of Peru itself demonstrate that the linkage was not completely gone by 1999, and that Peru attempted but failed to “delink” the court and the movement so that it could decertify the court’s actions against it without seeming to stray from the then entrenched positive outcome for the movement. A brief history of Peru, its initial acceptance of the court’s jurisdiction, its democratic backslide in the 1990s, and its reaction to cases before the court demonstrate the lingering impact of a strong linkage.

Perhaps the strongest evidence of lingering linkage happened almost 20 years after the *Velasquez Rodriguez* case, when some in Peru called for withdrawal from the court. In its 2007 case of *Castro Castro*, the IACHR found Peru responsible for the unlawful killing and torture of imprisoned members of the Shining Path guerilla movement during the Fujimori era in the 1990s. When the court held that Peru must make reparations to the families of the deceased terrorists and add their names to a national monument for those lost in the nation’s civil war, some leading politicians in Peru were so outraged that they called for a second withdrawal of Peru’s voluntary recognition of the court’s jurisdiction. Despite the swell of domestic disapproval of the court’s decision, Peru’s democratically elected regime gave signals that it would not support a move to withdraw its voluntary recognition again, and instead worked within the court’s internal procedures for requesting clarification of the decision and lodged its complaints about the court’s actions with other bodies within the OAS. Peru’s recourse to multilateral channels after the 2007 situation contrasts with the country’s more thorough attempt to withdraw from the court’s jurisdiction during the Fujimori regime in the 1990s. That attempt failed for many reasons, suggesting that the lingering linkage to the anti-impunity movement and its linkage to democratization as a package deal may have greatly impacted the outcome of Peru’s

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\(^8\) Venezuela withdrew from the court’s jurisdiction in September 2012 after a decision in which the IACHR found Venezuela violated a terrorist’s right to humane conditions while imprisoned. At the time of this study, this situation was still developing, but it does show that the strength of the initial linkage is beginning to wane, suggesting a strong negative linkage might be able to pierce the lingering linkage and go beyond a weak negative linkage to a fully developed backlash linkage.
attempted withdrawal and its actions upon rejoining the court officially in 2000, when it held justice trials and a truth commission, as predicted by the package deal that occurred after the court’s linkage. In contrast, Peru’s previous recognition that occurred before the linkage to the justice movement did not bring about the package deal when it recognized the court in 1981.

Peru, much like other Latin American countries, has a checkered history that ranged from authoritarian regimes, military regimes, and failed attempts at democratization. Peru’s early attempt at democratization in 1919 saw its elected president, Augusto Leguia, take power in an *autogolpe* or self-coup (Palmer 1996). In the latter half of the 20th century, military intervention into politics was partially been based on a perception that civilian rule was so inefficient or so unjust that it might lead to revolutionary movements (Einaudi and Stepan 1971). In 1968, the military government became frustrated with the lack of successful reforms by civilian President Fernando Belaunde Terry, whom it had supported in 1963, and staged a successful military coup (Einaudi 1969). After the 1968 coup, the military government of General Juan Velasco Alvarado ruled and began making reforms that have been characterized as a “socialist” revolutionary government (Tudela 1993) by some, while others describe its economic reforms as “nationalistic” and somewhere between communism and capitalism (Mauceri 1996). Velasco was ousted by General Francisco Morales Bermudez in a 1975 *coup d’etat* (Pease Garcia 2003; Tudela 1993) brought about by conflicts within the military and growing labor protests (Mauceri 1996). The new regime became more aligned with business elites, implemented austerity measures, and by June 1977, had sparked a national labor strike (Mauceri 1996). Morales then began talks with the non-Leftist parties in the country that led to the beginning of a transition to civilian government (Mauceri 1996).

On July 27, 1977, Morales’s government signed the ACHR (OAS 2007). The following day, on Peru’s Independence Day, the General announced elections for a Constituent Assembly, which
were held on June 17, 1978 (Tudela 1993). The American Convention was ratified on July 12, 1978 (OAS 2007). Civilian presidential elections were held in 1980, and former President Belaunde won the election. Belaunde’s regime was one of the first newly democratic governments in the region to recognize the jurisdiction of the IACHR by submitting its formal recognition to the OAS on January 21, 1981. Thus, while ratification of the treaty occurred before Peru’s transition to democracy, recognition of the court’s jurisdiction occurred as part of the transition but perhaps aimed more toward ensuring or “locking in” consolidation after the transition. This pattern of ratification has been found for other human rights treaties and treaty bodies (Hathaway 2002).

The new democracy in Peru struggled with economic and internal security issues, and by the 1990s it was clear that attempts to consolidate democracy, including the recognition of the court’s jurisdiction, were to be put to the test. Belaunde’s government in the early 1980s was unable to solve the country’s economic crisis that had begun before the 1980 election. The government failed to squash the small but rising leftist guerilla movement, Shining Path (Palmer 1996). The 1985 elections were won by charismatic opposition party leader, President Alan Garcia, whose populist and mixed populist/austerity economic policies failed to slow the economic deterioration (Mauceri 1996), which eventually resulted in an economic collapse and excessive inflation (Palmer 1996). Further, his administration was plagued by the growing strength and violence of the Shining Path movement, and scandal arose over Garcia’s authorization of the alleged massacre of over 200 detained guerillas (Palmer 1996). Because of these crises and the growing ethnic and economic divide within the country, Peruvians rejected the established parties’ favored candidate, well-known Peruvian writer Mario Vargas Llosa, and elected Alberto Fujimori, who seemed to take on a populist rhetoric; soon after being elected Fujimori adopted neoliberal economic policies as well as a “hardline” against Shining Path (Mauceri 1996).
Even before Fujimori came to office, security concerns raised by the growth of the Shining Path movement had led the government to establish tough anti-terrorist policies that were often in conflict with the state’s obligations under the American Convention on Human Rights, which does not allow many of its core rights (e.g., torture, extrajudicial executions, or “judicial guarantees for the protection of such rights”\(^9\)) to be suspended even during states of emergency. Peru instituted legal procedures with military courts and ill treatments including mock drowning in addition to many even harsher policies. The commission’s 1990-1991 annual report notes that 50 of the 86 cases of noncompliance with commission recommendations that were forwarded for review by the OAS General Assembly were cases against Peru (Inter-American Commission on Human Rights 1991), many involving the state’s anti-terrorism laws. In 1991, the first Peruvian case reached the court, the *Case of Neira Alegria*, in which the court found Peru in violation of the American Convention for the disappearances of three detained terror suspects in 1986 (Neira-Alegría 1991).

Tensions escalated between Peru and the court after a series of cases decided in the late 1990s. These cases included the *Case of Loayza Tamayo*, a professor suspected of being a member of Shining Path, who was held for several years without due process and suffered cruel, inhumane, and degrading treatment. In the reparations decision, Peru was called upon to pay monetary damages to the victim and to investigate and prosecute those responsible for her mistreatment. Further, the court called upon Peru to bring its laws in line with its international obligations (Human Rights Brief 1998). The other case of interest that was brought to the court in this time period was the *Case of Castillo Petruzzi*, which involved four Chileans suspected of terrorist activities who were convicted before “faceless” military judges (Castillo Petruzzi 1998).

Despite having received the reparations decision in *Loayza Tamayo* in late 1998, it was not until after the May 30, 1999 *Castillo Petruzzi* decision on the merits and the June 1, 1999 interpretation

\(^9\) See Article 27, Section 2 of the American Convention on Human Rights.
of Loayza Tamayo that Peru appealed the court’s judgments to its domestic courts, which deemed both cases “inexecutable.” The delay to begin to fight the court on these cases was likely because the Loayza Tamayo case was more sympathetic, since the victim was a woman and professor rather than three foreign terrorists (Cavallaro and Brewer 2008). Regardless, the state of Peru was concerned that the overturning of its anti-terrorism legislation would mean more lawsuits by convicted terrorists both domestically and in the international system based on the court’s wholesale rejection of the legislation as a violation of international obligations. Rather than try to develop a domestic stop-gap procedure that would allow the government to reorganize or retry those convicted under these laws, Fujimori and his Congressional allies passed Legislative Resolution No. 27152, which provided for the withdrawal from the court’s jurisdiction, on June 8, 1999.

Even in the process of this withdrawal, there were signs of lingering positive linkage, and attempts to “delink” the movement and the court before withdrawing from the court’s jurisdiction. Debate in Peru’s Congress demonstrates that there was opposition to the withdrawal on the grounds that it would signal a lack of respect for the rights in the ACHR, something that was clearly against the accepted norms of most of the speakers in the debate (at least rhetorically). Of course, this portion of the debate may imply that there was a fear of external repercussions and reputation costs within the OAS and the region. In fact, proponents of the withdrawal legislation made clear that they were only withdrawing from the competence of the court and not the convention, or basically that they wanted to delink the court from the anti-impunity movement represented now in the convention. They used rhetoric that attempted to decertify the court, stating that the court had gone outside its authority and was acting as a political, rather than a juridical, court. Because of that, they found the withdrawal necessary to ensure that terrorism could be ended and democracy stabilized (Parlamento 1999).

Another speaker in Congress comments on a fear that the court’s order in the Castillo Petruzzi case
might liberate 1800 convicted terrorists (Parlamento 1999). For these reasons, the Congress’ legislation and Fujimori’s decision to withdraw recognition of the Inter-American court’s jurisdiction argued that the withdrawal should be effective immediately, but limited the withdrawal to make sure they did not appear to be withdrawing completely from the ACHR and the Inter-American system (the ACHR could still be enforced through complaints to the commission).

Peru’s attempt to withdraw immediately from the court’s jurisdiction met serious opposition, as would be expected if a strong positive linkage remained in force. Actions by international bodies in the region, which included Peru’s neighbors, made clear that an immediate withdrawal would not be accepted. In September 1999, the court contacted the OAS Secretary General Gaviria Trujillo and requested that the matter be taken to the Permanent Council and made note that it would take the matter to the OAS General Assembly as authorized by Article 65, which permits the court to report to the General Assembly (Human Rights Brief 1998; Inter-American Court of Human Rights Court 1999). Letters of concern and support came in from the court’s European counterpart (Inter-American Court of Human Rights Court 1999), since such an immediate withdrawal could have set a precedence and undermined regional courts’ jurisdiction in other systems as well. The court worked with the OAS General Assembly to combat the attempted withdrawal from its jurisdiction and to maintain its ability to call Peru to task for violating basic human rights. After the court’s annual report on 1999 was presented to the OAS General Assembly (2000), the Assembly noted in its observations that the court’s decisions are final and cannot be appealed (a reference to Peru’s appeal to its own domestic courts). The OAS General Assembly’s observations included that a withdrawal affects the system as a whole, and the Assembly urged those who had withdrawn to reconsider. Peru was never mentioned in the observations, though it was clear to whom the message was directed.
Within Peru, scandals erupted regarding corruption with Fujimori’s close aide Vladimir Montesinos and election fraud in the 2000 elections, including the refusal of the OAS electoral mission to continue working with the regime to certify the runoff between Fujimori and Toledo. By September 2000, Fujimori decided to step down from office and sought asylum in Japan. At that time, the Secretary General of the OAS acknowledged the need for “urgent measures to democratize the country,” including bringing “Peru back into the orbit of the Inter-American Court of Human Rights” (Lefcovich 2000). Peru’s attempts to decertify the court and delink it from human rights and the strong hold of the successful justice movement in Latin America had failed in the end.

The court’s relationship with Peru since annulling its withdrawal from the court’s jurisdiction has not been without tension. For example, some in Peru desire to implement the death penalty, but legal experts have responded that to do so would necessarily require Peru to withdraw from the court’s competence, because of the delay that would occur in death penalty cases taken to the Inter-American system (Tin 2005) and because the court has interpreted the Convention strictly such that a member state may not expand the use of the death penalty (Opinión Consultiva OC-3 1983). Additionally, the court ruled that amnesty laws in Peru were illegal in 2001 in a case in which police were not prosecuted for extrajudicial executions (Barrios Altos 2001). Despite these weak linkages of the court to cases with a potential negative consequence for Peru, the country has not again attempted to withdraw.

The only state to follow through with withdrawal is Venezuela under Chavez, who most recently in September 2012 withdrew from the ACHR and the IACHR, primarily due to a case of an alleged terrorist (BBC 2012) among others that the government claimed demonstrated that the system was not impartial. Chavez’s government had previously similarly attempted to decertify the legitimacy of the court, and had even called the OAS a puppet of the US (Lee 2012), suggesting that
Chavez no longer cared about the approval of the community (others in the OAS) that might otherwise have pressured the country to remain under the court. It remains to be seen what the long-term consequences of the withdrawal are, especially given Chavez’s death. But Venezuela’s withdrawal may mean any lingering linkage from the anti-impunity cases has waned, leaving open the possibility of a strong backlash against the court. Such a backlash would be free of the linkage to the previously popular anti-impunity movement. However, at this point, the regime is likely too undemocratic at this point to meet the minimal threshold of democracy that underlies the assumptions of linkage theory, as demonstrated by its Polity IV scores. Venezuela’s scores have fallen below the threshold democracy score of 6 as of the mid-2000s, and since 2010, this score has fallen to 0 (Marshall 2010), much as Peru did for a short time under Fujimori when it attempted its withdrawal. Though in Peru over 10 years earlier and closer in time to the Velasquez Rodriguez case, the withdrawal was tempered more by domestic, regional, and external calls for reacceptance, while Venezuela as of late has found allies in the support of other leftist regimes like Bolivia.

In the years between Velasquez Rodriguez and the current withdrawal of Venezuela, even cases that had ignited tensions demonstrate that countries in Latin America were unwilling to withdraw from the system or allow a “rogue” country like Peru to do so. Until lately, a more recent weak negative linkage continued to be dampened by the lingering stimulus linkage from the past. For example, in Castro Castro, the court found that Peru, under the Fujimori regime, had violated the right to life of incarcerated terrorist suspects and convicted terrorists when, in 1992, dozens were extrajudicially killed in prison (Case of Castro Castro). Many Peruvian leaders were outraged that the court would ask the country to pay over two million dollars in reparations to the families of the deceased terrorists and to pay tribute to the terrorists on the monument honoring the very victims of the Civil War they held the terrorists responsible for (Paez 2007). While some have even gone so far as to suggest that
Peru withdraw from the court again (Comercio 2007), Peruvian leader and former UN Secretary General Javier Perez de Cuellar, though he expressed concern about the court’s decision, noted that such a withdrawal for any reason “would be proof that Peru does not respect international treaties,” thereby leading to a loss of credibility in the world” (Andina 2007). Unlike in a test case linkage that occurs early in a court’s jurisprudence with a new topic, the court is now well established in the region and associated with combatting egregious violations, which were involved in the Castro Castro case, and democracy in Latin America. Thus the negative linkage created by this case was even weaker than the previous cases in the Fujimori era, which were not as strong as the disappearance cases and that fell closer in time to the strong positive linkage. As time progresses on, the strong positive linkage to Velasquez Rodriguez would be expected to wane slowly, unless bolstered by similarly strong positive linkages. Without the lingering linkage from the anti-impunity movement cases, the court is now open to potential strong linkage once again whenever critical junctures occur, since recognition of the court remains voluntary.
CHAPTER 5

CASE 2: STRONG TEST CASE LINKAGE OF THE INTER-AMERICAN COURT AND THE ANTI-DEATH PENALTY MOVEMENT IN THE CARIBBEAN

The case study of the strong positive, stimulus linkage in Latin America after the first disappearance cases suggested that linkage might be beneficial to a developing court’s jurisdiction. These cases were part of a movement that was on its way up and continued to mobilize once they had the court’s decision in hand, thereby taking the court with them as the norm cascade swept through Latin America in the 1990s. In this chapter, I will explore the first Caribbean cases in the Inter-American Court, which I argue linked the court to a movement through these test cases. Unfortunately for the court, the anti-death penalty’s political and grassroots movement in the Caribbean was already on its way down, and the court’s first contact with the cases, through ordering the petitioners not be executed while their cases were pending in the Inter-American system, only fueled a pre-existing counter-movement in the region. Once linked to the failing movement, the court’s fate was attached to the fate of the movement.

Though less obvious than the wave of acceptances of the court in Latin America, the reaction to the court by domestic and regional officials in the Caribbean after the court became involved in the test cases was similar to its reaction to the movement. Though only Trinidad could withdraw, other governments in the region joined in the rhetoric and supported Trinidad’s withdrawal, while domestically promoting constitutional amendments to protect the capital punishment status quo. Together, they revived support for and the eventual creation of the Caribbean Court of Justice as an alternative to the Inter-American system. This linked fate suggests that strong backlash linkage existed in Trinidad and the Caribbean that meant the court and the movement were both linked in a package deal that was decertified by the domestic and regional countermovement.
Critical Juncture Factors

In the case of the Caribbean, the linkage fits all four criteria to determine if it was at a critical juncture and ripe for a test case linkage. Though it fills all criteria, I argue that this is not quite as solidly a critical juncture for the court as it perhaps was in the first case study. For the first criteria, the court is still relatively new in 1998 when the James et al. Case provisional measures request is submitted to the court. The court did have established jurisprudence on many grave physical integrity cases by that time. In addition to the disappearance cases from Honduras, the court had previous decisions on a mass killing and an illegal detention in Suriname (Aloeboetoe and Ganagaram Panday), deaths in the quelling of a prison riot, illegal detention and disappearances in Peru (Neira Alegria, Loayza Tamayo, and Castillo Paez), disappearances in Colombia (Delgado), disappearances in Guatemala (Blake and Paniagua Morales cases), and a failure to prosecute military personnel for killing a teenager in Nicaragua (Genie-Lacayo). However, the court’s jurisprudence was still relatively lacking on procedural issues and issues involving stable rather than transitional democracies.

The test cases from the Caribbean strongly met the other three critical juncture criteria. In the second criteria, the court’s decisions regarding Trinidad’s cases were the first Commonwealth Caribbean cases before the court. The only other Caribbean cases were violations of personal integrity rights that included mass killings and illegal detentions in Suriname, a state that does not share the history of the Commonwealth Caribbean nations. Much like the disappearance cases before the Inter-American Court, the cases against the Republic of Trinidad and Tobago were the first cases that the court heard from the English-speaking Caribbean countries and fit the third and fourth critical juncture criteria. The death penalty was an issue that the court had only dealt with in an advisory opinion (Opinión Consultiva OC-3 1983) regarding whether states, particularly Guatemala, could expand the crimes given the death sentence, which the court found was not allowed under the ACHR. No contentious cases on death penalty issues had been decided by the court.
Further, the fourth criteria was met because the death penalty was controversial in the Caribbean at the time, especially since the Caribbean countries had held very few executions since the 1980s and there was a contemporaneous surge of political support to overrule the de facto abolition caused by the 1993 Privy Council case limiting the time prisoners could spend on death row. They were controversial and high profile, because the process to hang prisoners had begun in several countries, including Trinidad, which hoped to revive the use of executions due to very high murder rates. The issue was very much on the agenda and minds of political officials in the Commonwealth Caribbean.

For all of these reasons, the critical juncture hypotheses suggest that a strong linkage between the patterns of recognition of the court within the Caribbean and the anti-death penalty movement in the region should be present starting around the time Trinidad cases were filed at the commission in late 1997, and their May 1998 submission to the court for provisional measures to enjoin the execution of petitioners whose appeals were pending before the commission.

**Measurement of Linkage Patterns**

If linkage exists in this case, as hypothesized above, then the patterns noted in the Linkage Typology Chart for a backlash, or strong negative linkage, should be present, since the anti-death penalty movement did not succeed in broad policy changes in the region in the 1998-early 2000s era, despite wins in supranational tribunals like the Inter-American system. The pattern of test case linkage should include the following:

1. evidence that withdrawal or avoidance of the voluntary court (through creating alternatives to the court or trying to bypass the system through constitutional amendments, etc.) becomes linked to rejection of the movement as evidenced by that the rejection of the movement and withdrawal or discrediting of the court occurring at roughly the same time
2. recognitions of the court after the test cases should decline or fail to take off, if the movement is declining in the region

As in the strong positive linkage scenario, the hypotheses would suggest that there should be no clear pattern of linkage of Inter-American Court recognition with any movement before the test cases, unless some other form of political or economic linkage was present. In this case, ratifications of human rights treaties are known to have been coerced by the Carter Administration of the US in the late 1970s (Forsythe 1991). Other than that, no other known coercive forces are observable after the Carter Administration in favor of Inter-American Court recognition, though there does appear to have been a delay in recognitions in Commonwealth Caribbean countries as opposed to Latin American countries. This may have been because of their late entry into the OAS, they were not part of the justice cascade countries since they had no history of disappearances (all but Guyana were democracies already), and they already had the Privy Council as an external court of last appeal.

In the Caribbean case, a fairly consistently linked pattern or a negative package deal is expected between the rejection of the anti-death penalty movement and the lack of recognitions of the court, rejections of other international bodies or pacts, brazen non-compliance with the Inter-American system, attempts to reject the system within domestic law, and movement toward creating alternative tribunals after the test cases by the movement succeed in the court. The tensions between the movement and the states of the Caribbean had begun before the cases actually reach the Inter-American Court due to earlier “domestic” test cases that created Privy Council precedents that required Caribbean governments to commute sentences of inmates on death row for five years or more. Because of this, the commission’s process and delays more immediately linked tensions between the movement and the Caribbean governments to the Inter-American system than they had in the earlier Honduran cases. In other words, the test cases could “win” just by delaying the cases substantially.
through successful filings of a prima facie case at the commission that would take them past the Privy Council’s limits on length of stay on death row. For this reason, I use the dates when the throng of Caribbean and Trinidadian cases represented by London law firms began to be filed at the commission, signaling the intent to use the commission and Inter-American system as a strategic venue for the movement. These filings began in the latter part of 1997, and many of these cases are those for which provisional measures were requested from the court in May 1998.

Because so few Commonwealth Caribbean countries had recognized the court prior to the movement’s test cases, court rejection is measured as both withdrawals and other forms of affirmative rejection of the system. In this case, I use the date of withdrawal as the actual date of delivery to the Secretary General of the OAS as a notice of intent to withdraw from the system, even though the withdrawal does not legally take effect for one year. Since it is the intent to withdraw that is most important, the date of submission of that intent is more relevant to this study. Since Trinidad was the only country that had recognized the court at the time the test cases began in 1997, I look at factors that can demonstrate that other countries rejected the Inter-American system and the court during this time period as well. These include rhetoric regarding non-compliance with the commission’s recommendations or precautionary measures or provisional measures from the system. This can include statements from officials that they will not comply with or official refusal to respond to the commission or courts’ requests or appear at hearings. Further, domestic attempts to override recommendations, procedures, or decisions of the system through legislation, constitutional amendments, or other methods are used to measure rejection of the system. Rejection of other supranational bodies, such as the United Nations Human Rights Committee (UN HRC) for reasons related to death penalty cases related to the same movement as those in the Inter-American system, are
used as indirect evidence that the country had no intent to place itself under the Inter-American system for reasons related to the death penalty-related movement.

While linkage with the UN HRC is not explored in as much detail, it is important to note that the UN HRC became linked to the death penalty movement in the Caribbean through cases shortly before the test cases in the Inter-American system, and though perhaps not as strongly, met the four criteria that can strengthen linkage. It is in fact the failure of the UN HRC decisions to elicit compliance or legitimation of the preferred norms of the movement, arguably because the UN HRC’s decisions lacked significant legal reasoning and tended to ask for reparations that were unjustified by the record, was one of the reasons given by advocates for bringing their movement to the Inter-American system. When they did, they linked the court not only to the specific test cases before them but also to the pre-existing movement in the region, much as the anti-impunity movement had linked the Inter-American Court to the pre-existing movement that had begun in countries like Chile and Argentina and had already been lobbying the United Nations and trying to leverage the US. In this case however, the pre-existing movement was already on a downward trajectory when the Inter-American system was linked, rather than the upward trajectory that the anti-impunity movement was on.

Lastly, I argue that a country’s support for the creation of alternative tribunals, which include the Caribbean Court of Justice, that seem to spike or pick up momentum at about the same time as the rejection of the Inter-American system and death penalty cases add additional evidence to demonstrate a linked rejection of the system. Rejection of the Privy Council, though not an international body, is reviewed since it represents a unique hybrid of domestic and external characteristics. Caribbean nations, while acknowledging its ability to make domestic precedent in interpreting the Constitution, saw it as an external, Europe-centric body. As such, rejection of and/or strong rhetoric about the Privy
Council may denote significant backlash against the movement’s test cases, against external review of national policies and against any other court, such as the Inter-American system, that becomes linked to that movement. Helfer (2002) deals with the Privy Council in a similar way in his review of Trinidad’s withdrawal.

Rejection of the anti-death penalty movement is measured by several factors that demonstrate a willingness to retain or expand the death penalty. Obviously the strongest evidence of retention and support for the death penalty would be executions themselves, which are used as one indicator of retention. However, since many of the Caribbean countries were unable to use the death penalty because of the time limits placed on them by Privy Council precedent, I focus beyond actual execution numbers to demonstrate support for retention of practices such as the mandatory death sentence that was one of the measures being fought by the movement. This way, I am measuring both specific compliance with a domestic test case and the broader movement’s policy goals. These include votes in favor of retention or against moratoriums, issuing death warrants even if they are unable to use them, occupancy on death row, attempts to carry out executions even if thwarted by the Privy Council or the Eastern Caribbean Supreme Court (which hears cases from some of the smaller Eastern Caribbean countries including St. Lucia and St. Vincent), and attempts to preserve the status quo on laws like mandatory death sentences. Further, rejection of the movement is shown through outright statements of retentionist intent in official statements of countries or government networks (meetings of Attorneys Generals) and through votes against the more recent UN Resolutions on establishing a moratorium.

In order to understand the movement and the linkage of the court and the movement against the death penalty in the Caribbean, it is important to understand the history of the region. In the next section, I briefly outline the history of the Commonwealth Caribbean as it relates to relations with the OAS and the history of capital punishment in the region.
Background on the Caribbean and OAS

The Commonwealth Caribbean

For this case study, I include the English-speaking nations within the Caribbean. These nations include those former British colonies that have declared their independence from England and constitute sovereign nations that share a Caribbean connection, including the islands of Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, St. Kitts and Nevis, Santa Lucia, St. Vincent and the Grenadines, and the Republic of Trinidad and Tobago. All of these nations, in addition to Suriname (which was a Dutch colony), formed the modern day CARICOM, the economic alliance of primarily English-speaking Caribbean nations. Most of these countries were members of the original 1958 West Indies Federation that ended in 1962, but later morphed into CARICOM. Two other countries, now members of CARICOM, are commonly associated with the English-speaking Caribbean, including the South American country of Guyana and the Central American country of Belize. Both of these countries were once British colonies, and all are currently democracies. Guyana is unique in that it had an autocratic socialist leader from the time of its independence until his death and a transition to democracy with free elections in 1992 (Helfer 2002, pp. 1861-1863). All are parliamentary democracies (CIA 2012) with constitutions and a bill of rights (Helfer 2002). Several other British colonies remain territories of England and are not included in this study of the Caribbean (CARICOM 2012). Also excluded are territories of other countries and sovereign Caribbean nations sharing political, historical, and cultural ties to Spain, the Netherlands, or other European empires.

The English-speaking Caribbean countries share a unique history but inherited a very different legal system than other parts of the Caribbean. Many of the countries, such as Suriname or the Dominican Republic, formed after independence from Dutch or Spanish settlement have civil law systems (CIA 2012). All of the English-speaking Caribbean countries included in this study inherited the common law legal system from their British colonial pasts, and all except Guyana retained the
Judicial Committee of the Privy Council in London as the court of last resort (Helfer 2002). Due to their common history, similar legal system, and continued ties to the Privy Council, the Commonwealth Caribbean nations’ legal history is intertwined. These connections serve as mechanisms through which movements involving legal issues are likely to move more readily through the region. Thus, this study considers these countries a subregion of the Western Hemisphere.

**Ties to the OAS Before Linkage**

The nations of the Commonwealth Caribbean became independent over a span of two decades from the August 1962 independences of Jamaica and the Republic of Trinidad and Tobago and throughout the 1970s and early 1980s. As countries became independent, most joined the OAS within a few years of independence, except for a few exceptions that took as long as 10 years after independence before joining the organization (OAS 2012).

As shown in the chart of Ratifications of the ACHR Table, several Caribbean countries have ratified the American Convention on Human Rights. Jamaica and Grenada ratified the treaty in 1978, followed shortly thereafter by Barbados who signed the treaty in 1978 and ratified it in 1981. Trinidad and Tobago ratified the ACHR in 1991, as well as accepted the jurisdiction of the court. Dominica ratified the ACHR in 1993. No other countries have ratified the treaty.

The majority of English-speaking Caribbean countries, even those who ratified the ACHR, have failed to recognize the court. The Republic of Trinidad and Tobago’s recognition in 1991 was the first recognition of the court in the Commonwealth Caribbean, and was withdrawn in 1998. Barbados recognized the court in 2000, but no additional recognitions have occurred, nor have any additional ratifications of the ACHR (OAS 2007). In fact, one scholar comments that the ratifications of Grenada, Jamaica, and Barbados in the late 1970s and very early 1980s were likely due to the urging of the US’s Carter Administration (Forsythe 1991). The OAS and Inter-American human rights system
had already begun to develop by the time the majority of Commonwealth Caribbean countries entered the OAS, which may offer at least one reason why they were slow to ratify the ACHR and recognize the court (Helfer 2002). Despite Barbados’ recognition shortly after the Trinidad test cases reached the court, evidence laid out below shows that the negative reaction the Caribbean states had to anti-death penalty test cases in the Inter-American system were linked to the continued and strengthened resistance to recognition of the court in the English-speaking Caribbean as well as to reigniting the call for a Caribbean Court of Justice.

**The Death Penalty in the Caribbean**

The death penalty has a long history in the Caribbean, going back to the British colonial era. However, since independence, a worldwide movement against the death penalty has been successful but not unanimous. While unpopular in super powers like the US and China, the movement has made great strides in Europe and Latin America. Given its ties to Great Britain and proximity to Latin America, the movement has impacted the Caribbean, which Amnesty International declared an “execution free zone” in its 2011 Death Penalty Report, despite the fact that death sentences are still handed down and have been carried out in the Caribbean as recently as 2008. For most of the 1970s and 1980s, partial or de facto moratoriums were in place in most English-speaking Caribbean countries at least partly due to the protests of the small movement in the 1980s. High murder rates in the region, caused in part by the drug trade, led to more public and political support for capital punishment by the 1990s. The contrast between the movement toward abolition in Europe and Latin American stood in stark contrast to the push for executions by many officials and the public in the Caribbean in the 1990s. The increasing population of death row inmates and the increasing likelihood of an end to de facto moratoriums was the impetus for the test cases brought before the Inter-American system and those
that were previously filed at the Privy Council and UN HRC, so it is important to put the test cases in context.

International law by the 1990s had made some strides toward codifying abolition and restrictions on the death penalty, but the movement still had a long way to go. The death penalty in the late 20th century remained a “disputed norm” in international human rights law, and it could not be formally declared an international rule by the OAS General Assembly at the UN due to lack of support, particularly by the United States and other powerful nations that still used capital punishment (Hood 2002, p. 18). The United States has been an obstacle to the completion of the movement to abolish the death penalty in democracies (Badinter 2004). That said, the Middle East, Africa, and China are still primarily pro-death penalty, though those regions are mostly non-democracies.

Support for abolition of the death penalty in international law has made some strides despite opposition. The United Nations Commission on Human Rights (UN HRC), created by the International Covenant on Civil and Political Rights, put forward as a 2003 resolution calling on states to institute moratoriums, which would temporarily halt executions, and move toward complete abolition. The trend has primarily been toward progressively narrowing the death penalty by nicking away at the types of offenses (Hood 2002), and the types of people who could be executed (e.g., exceptions for youths). In the creation of the International Criminal Court statute, the death penalty was not included as a potential sentence for the most heinous crimes (including genocide) on earth (Hood 2002). Though only a few states had abolished capital punishment in the beginning of the 20th century, by the end, over 70 states had abolished the death penalty (Prokosch 2004).

Europe has mostly abolished the death penalty, or at least in practice has not used it. After abolition in many countries throughout the 1960s and 1970s, Protocol 6 was passed by the Council of Europe in 1983 to call for its abolition (Badinter 2004). States accepting membership in the Council of
Europe after 1994 were required to abolish the practice and ratify Protocol 6, and all but Russia did (Badinter 2004, p. 8). Some states, such as the UK, still retain capital punishment for use against treason during a time of war (Hood 2002), though public opinion still tends to side with the use of the death penalty and parliament has tried to reinstate its use many times (Hood 2002). In 2001, the Council of Europe began requiring that new states who wish to have observer status with the organization would have to abolish the death penalty. Exceptions were included so that the US and Japan could remain observers (Badinter 2004, p. 3).

Latin America has a long tradition of abolition and restrictions on the death penalty. Uruguay and Venezuela in the past have been leaders in the movement to abolish the death penalty at the UN (Schabas 2002, p. 311). Though not required for membership, many members of the OAS from Latin America have abolished the practice, not used it in practice, or limited its use to a restricted number of crimes (Hood 2002). A 1983 advisory opinion from the IACHR demonstrates that the American Convention’s Article 4.2 did not allow expansion of the death penalty to crimes not punishable by the death penalty at the time of ratification of the convention, that capital punishment may only be used for the most serious crimes, that it could not be used ex post facto, and that due process must be provided before its imposition. Further, Article 4.3 would not allow re-establishment of the death penalty where it had already been abolished, and Article 4.4 would not allow its use for common or political crimes (Opinión Consultiva OC-3 1983). In 1991, an additional protocol to the ACHR to abolish the death penalty was opened for signatures (Schabas 2002). No Commonwealth Caribbean states have ratified the optional protocol.

Surrounded by Latin American influences to abolish the death penalty and pressure from human rights groups, the Caribbean slowed in its use of the death penalty throughout the 1970s, but the abolition movement did not fully take hold before rising crime rates created a call to reinstitute the use
of the death penalty and spurred an active countermovement. Many English speaking Caribbean
countries had not held executions for more than 10 years in the 1970s or 1980s, but began procedures
to restart executions again during the later 1980s or 1990s. Jamaica, suffering from high crime rates,
returned to the death penalty in the 1980s. Despite limited attempts by Jamaican elites in the 1980s,
including the legal community and part of the political community, the death penalty could not be
abolished. Two government committees of inquiry, called the Fraser and Barnett Committees, even
released findings that were skeptical of the deterrent effect of the death penalty and that recommended
limiting or abolishing capital punishment in Jamaica (Hood 2002; Amnesty International 1989). In
Barbados a government consultant recommended abolition but the findings were not heeded by
Parliament (Hood 2002). In the 1980s, the national Coalition Against the Death Penalty in Trinidad
and Tobago submitted a petition to the government to abolish the death penalty that was supported by
40 organizations, schools, unions, and churches, but after a Commission of Inquiry report in 1988, the
government chose to keep capital punishment. Trinidad and Tobago revived the death penalty after
over 15 years of de facto moratorium in the 1990s (Amnesty International USA [AIUSA] 1989; UN
HRC 1999). The Bahamas revived the death penalty later in the 1990s after a short break with two in
1996, two in 1998, and another in 2000. The level of protest against the death penalty in the late 90s
was far less than the protests against it in the 1980s, signaling that the movement against it had begun
to fizzle. It was reported that there were no “sign-waving protestors” at the site of executions in the
Bahamas in 1998 like the dozens that had protested the last hanging in 1996. Instead, more than 100
countries have ratified the Optional Protocol to the ICCPR against the Death Penalty or the Protocol to
the ACHR to abolish the death penalty (Burgess and Anderson 2007). The movement’s attempts to get
governments to abolish the death penalty officially through political means had failed, and few
remnants of the grassroots mobilization of the movement—small as it was—remained by the late 1990s.

Against a backdrop of increasing crime rates and calls for capital punishment by the public and politicians, the movement saw the small gains of the 1980s drowned out by increasing crime rates and calls for capital punishment by the public and politicians in the Caribbean. Having failed to make long-term inroads in the political system, the abolition movement found itself at a political disadvantage, where they are unable to continue to make gains in the legislative or executive branches. In the judicial politics literature, it is common when a group is politically disadvantaged to enlist legal experts to pursue litigation strategies in the courts (Vose 1959).

As the anti-death penalty political and grassroots movement waned, what was left was a strategic litigation campaign fought primarily by pro bono lawyers from abroad, who took up the cases of death row inmates before the Privy Council in London. Bernard Simons of Simons, Muirhead, and Burton began pro bono representation of Jamaican death row inmates as early as the 1970s, and his work quickly picked up in the 1980s. He sought assistance from his colleagues at other London law firms, and the London Panel was created (Scott-Williams 1995). Working sometimes through the Jamaica Council for Human Rights, a small underfunded NGO, and networking more by word of mouth with individual lawyers and prisoners, the London Panel grew to represent simultaneously as many as 300 death row inmates from Jamaica and Trinidad before the Privy Council in London, since no legal aid was available from the Caribbean governments to cover appeals to the highest court. In the early 1990s, Simons, Muirhead, and Burton hired a full time lawyer, Saul Lehrfreund, to handle the pro bono Caribbean cases, and the London Panel continued a strategy of representing individuals on death row in individual attempts to avoid execution. Each client was valued, but some cases in the broader litigation strategy became particularly important as test cases.
Such was the case for *Pratt and Morgan v. Jamaica*. The *Pratt and Morgan* case would become the primary source of irritation for Caribbean nations facing long appeals before international and regional bodies. In 1979, Earl Pratt and Ivan Morgan were convicted of murder under and sentenced to be hanged under the Jamaican mandatory death sentence. The two death row inmates endured 14 years on death row in St. Catherine’s prison near Kingston, Jamaica. The prison is a remnant of colonial times, built by the British to hold slaves (Mills 1993). Even for average prisoners, the prison conditions are harsh at St. Catherine prison. For the death row inmates, the conditions are even harsher. Pratt and Morgan’s attorney observed that the cells were isolated, their bed was a piece of foam, and they had only a bucket for a toilet (Mills 1993). Even those conditions were not as horrific as the holding cell next to the gallows, where both men had been three times. Reports indicated that they even had their measurements taken by the hangman and heard practice drops of the gallows just outside.

After three last minute reprieves and a four-year delay in response from a Jamaican court of appeals, the two began their appeals to courts outside of Jamaica, including the Inter-American Commission. Their case was appealed to the Privy Council in London, the final court of appeal for Jamaica and, like the prison that housed them, a relic of the colonial era. The council remained, despite criticisms, as the court of last resort for all of the Commonwealth countries including Jamaica, except Guyana. In 1993, after 14 years on death row and their multiple near misses with the gallows, it was the Privy Council case that would establish that the pair’s unduly delayed appeals process in Jamaica violated provisions of international human rights laws. The case of Pratt and Morgan had already been heard in 1987 by the UN HCR (in a petition assisted by lawyers at a British legal NGO, Interrights) and Inter-American Commission, which had communicated to Jamaica that the delay was a violation of the American Convention on Human Rights. However, since Jamaica had not recognized
the Inter-American Court’s jurisdiction, the case went no further, except that it may have deterred Jamaica from any interest in recognizing the court. As such, though, for purposes of studying linkage, I argue that since the court was not a threat and the Commission’s communication was not even included in its published reports for the year, linkage between the movement and the Inter-American system had not yet occurred to any great extent. The case was dealt with in a low key manner, and did not present any of the critical juncture factors that I suspect lead to linkage.

The Privy Council’s decision, on the other hand, had immediate impact for not only Earl Pratt and Ivan Morgan, but for death row in general. Pratt and Morgan’s sentences were commuted, though only Earl Pratt lived to see his sentence completed and his release from prison many years later. Ivan Morgan died in prison of a medical condition and under the suspicion that the prison personnel refused to take him to a hospital for medical treatment (Amnesty International 1996). The case before the Privy Council had impacts far beyond the two individuals. Their case would set off a wave of similar filings that would eventually start at least a rhetorical backlash against the Privy Council, alone at first, by the stable democracies of the Commonwealth Caribbean. The Privy Council found in Pratt and Morgan that the 14-year delay, even the amounts of time delayed by the petitioners’ own actions in filing appeals, amounted to cruel, inhuman, and degrading treatment. The Council referred to the death row phenomenon established in ECHR precedent case of Soering v. UK, in which the ECHR determined that to allow the return of an American to face capital punishment in the US amounted to returning him to inhuman treatment of languishing on death row (Soering v. United Kingdom 1989).

After five years on death row, the Privy Council’s landmark decision stated, there would be a presumption of inhuman and degrading treatment (Hightet et al. 1994). As part of this calculation, the council states that 18 months is sufficient for international and regional human rights appeals, in countries where such appeals are available (Whitaker 2008). The timeline heightened tensions with
the Caribbean countries by virtually assuring that the death penalty could rarely if ever be used, because the Privy Council vastly underestimated the delays of the international tribunals which, if used by a death row inmate, could almost ensure that the five-year time clock for a presumption of inhuman treatment would be run.

Since the Privy Council notes that the presumption applied regardless of whether it was the convicted person’s own continued appeals that were running the clock, it left representatives for death row inmates with an incentive to file international complaints in order to reach the five-year limit. The Privy Council had potentially, through its ruling, opened a door for the linkage between the movement and the international tribunals by opening a door for use of the systems as a mechanism to avoid executions and thereby making the cases that much more of a critical juncture for the Inter-American system by raising the stakes of the cases to be the inability of the state to use the death penalty, instead of considering particular procedural violations (since the ACHR does not abolish the death penalty itself). The test case advocates, a few years later, would walk right through that open door.

Domestically, the *Pratt and Morgan* case was a major blow for Caribbean nations wanting to revive use of the death penalty and led to a wave of unwelcome commutations of death sentences for inmates who had been on death row for more than the five-year limit. Executions were significantly slowed and in many cases completely thwarted. The Privy Council had indirectly led to what amounted to a near-moratorium on the death penalty. The Privy Council could not abolish the death penalty outright, despite its ability to interpret Caribbean constitutions, because of “savings clauses” that preserve laws that were in existence before the constitutions were enacted after independence, including provisions for capital punishment (Whitaker 2008). The *Pratt and Morgan* decision was indeed a landmark decision not only for its content, but because it saw the Privy Council delve deeply into the details of a Caribbean state’s criminal justice system. Helfer (2002) records that the states had
kept the Privy Council appeal in place largely due to the rarity of cases being appealed to the council (due to the expense to the petitioner), the council’s tendency until the 1990s to limit its own appellate review authority, and its status as an appellate court paid for by the British government. Others have noted that foreign investors insist on a British court of appeals, for fear that local courts might be bought off to undo contracts the investors had signed in the Caribbean. Shortly before and subsequently after the *Pratt and Morgan* decision, the Privy Council became a regular stop in death penalty cases, and much more of a thorn in the Caribbean governments’ side. Their distaste for the Privy Council and other courts perceived as meddling was demonstrated by their willingness to put more effort into initiating the long talked about Caribbean Court of Justice, although the impetus for the final push for the court and the true linkage of the movement and the Inter-American system came from the related barrage of test cases against Trinidad filed at the commission in 1997.

**Delaying Death: A Flood of Cases in the Inter-American System**

After the success of London Panel advocates at the Privy Council in *Pratt and Morgan*, Caribbean death penalty case filings before the UN Human Rights Committee and Inter-American Commission spiked, but not at the same time. Helfêr (2002) reports that death row inmates filed appeals before the international tribunals against Caribbean countries such as Jamaica and Trinidad and Tobago at vastly higher rates after the *Pratt and Morgan* decision. While a few of the cases in international tribunals were filed or assisted by an NGO called Interrights or by Caribbean attorneys, the majority of the cases before the international tribunals starting in 1994 were represented by the London Panel lawyers.

A closer look at just the cases before the Inter-American Commission reveals a similar but distinct pattern. Complaints from the Caribbean are sparse in the 1980s, except for six published reports relating to death penalty cases from Jamaica and two unrelated cases from Grenada (relating to
confiscation of a passport and books, respectively). No complaints against Trinidad and Tobago had been filed at the Inter-American Commission prior to 1997, but that year saw 10 Trinidian cases filed before the Inter-American Commission, in addition to a case from the Bahamas and seven from Jamaica (three were found inadmissible due to being dual filed at the UN HRC). Slightly lower but very consistent numbers of Caribbean complaints continued until the later 2000s, when the numbers are closer to about 3 per year, according to the commission’s annual reports. The filing of so many cases close together suggests that these were strategic filings by the London Panel. In fact, the London Panel lawyers, after empty victories at the UN HRC that were largely ignored by the Caribbean states, changed their strategy to go to the Inter-American system. They were looking not just for perhaps higher chance at compliance, but for more in depth decisions to use as potential precedent, since the Inter-American Court’s decisions were better reasoned and fleshed out for a domestic judicial target audience than the very brief UN HRC decisions. UN HRC decisions from the Caribbean had included cases where the UN HRC had issued reparations that were commutation or even release for relatively minor violations (Bannister 2012), and would have only added fuel to the countermovement in the Caribbean.

The sloth like pace of appeals to the Inter-American system and its tendency to write well-reasoned, lengthy opinions was attractive for lawyers hoping to run up the five-year *Pratt and Morgan* clock on each case and have cases that might help as more persuasive to the Caribbean judiciary and Privy Council in order to legitimate the norms against practices such as mandatory death sentences. A large number of Trinidad cases were strategically filed at the commission in succession. Each of the filings requested precautionary measures and substantive claims, and all were represented by London solicitors. Filing so many cases from Trinidad rather than Jamaica or other Caribbean countries with the death penalty at least left open the option to take some of these cases to the Inter-American Court,
which for the Trinidad cases was the only option at that time. Executions were imminent in Trinidad, and precautionary measures were needed to ensure the executions were not carried out. It meant that the court was soon to be linked not to a substantive legally reasoned opinion but to an injunction with little or no legal reasoning that would ask the government to hold off on executions while cases were pending. Unfortunately, the already existing countermovement was able to portray this action as tantamount to the court linking itself not to a substantive norm as much as to the frustrating tactics of clever foreign lawyers bent on saving murderers from justice.

The many filings, however, before they became fodder for the countermovement, first had to present winning cases to the commission. The Inter-American Commission reports clearly that the success rate of the newly filed Trinidad cases was much greater at the commission than previous cases from Jamaica. At the Inter-American Commission, earlier cases had not been successful. Between 1980 and 1996, only eight published reports were issued for Caribbean cases. Most of the cases were death row and due process cases from Jamaica and all but one due process case lost their case before the commission by being found inadmissible or by not establishing enough evidence of a violation (Tittemore 2004). All of the cases but one was listed as filed by the petitioner, without mention of a representative. The one Jamaican case before the commission that lists an attorney was a 1988 case, and it was the only one that succeeded at the commission. Filed initially in 1984 through a letter from the petitioner, Clifton Wright, the complaint was eventually revised in 1987 by Mr. Wright’s attorney for his appeals to the Privy Council, demonstrating that the condemned man had been in police custody at the time of the murder. One of the prior failed cases from Jamaica was the 1981 complaint from Earl Pratt, whose case failed to demonstrate a violation of the ACHR (Helfer 2002). Many of the Jamaican cases were filed at the UN HRC, and *Pratt and Morgan* was no exception. In 1987, the commission asked Jamaica in a communication to spare their lives because of delays in the process that amounted
to cruel and inhumane treatment, but the commission chose not to publicly submit reports on these cases as part of their annual report. The pair was a 1989 win at the UN HRC represented by the NGO Interrights. Interrights is an organization that specializes in legal assistance and strategic litigation in Europe, Africa and Commonwealth nations. The HRC first issued a request to protect Pratt and Morgan while their complaint was processed, which was answered by a death warrant shortly thereafter. The death warrant was stayed at the domestic level for other reasons, but the HRC proceedings continued for another four years, during which time they found the complaint admissible and that the state’s delay in the domestic appellate process was a violation of the ICCPR (Helfer 2002; Interrights 2007). This was all prior to the final Privy Council case in 1993, which was the second time the appeal to the Privy Council had been made. The first, years before, had been rejected by the Council.

After 1996, the condemned men who filed petitions to the Inter-American Commission were actively represented at the commission by the London Panel lawyers, which focused on new issues and improved filings. Many cases related to the issue of the mandatory death sentence laws and other more complex legal issues than the previous due process cases (Tittemore 2004). The increase in Caribbean cases at the commission overwhelmed the limited resources of the commission. Ten percent of the commission’s backlog in the late 1990s was Caribbean cases (Tittemore 2004, footnote 124). Some of the Trinidad cases were even filed on the same date in November 1997. Despite cutting its processing times in half during this period, the commission was unable to satisfy Caribbean nations’ requests for expedited procedures to meet the Pratt and Morgan timelines, which led to friction.

The Attorney General of Trinidad and Tobago attended a hearing at the commission in February of 1998 to lay out the problem of commission delays which constituted inhuman and degrading treatment under domestic law, governed by the Pratt and Morgan decision (Tittemore 2004,
footnote 125). In Spring 1998, the Attorney General and Minister of Foreign Affairs of Trinidad met with the OAS’s Secretary General to attempt to pressure the OAS into giving assurances that the time frames given by the government to try to meet the Privy Council’s limitations. The OAS Secretary General was not able to assure Trinidad that it would meet those time frames. Similarly, the UN HRC was unable to give such guarantees (Attorney General’s Testimony before the Trinidad House of Representatives, May 29 1998).

Most of the cases filed by the London lawyers requested injunctions to delay executions until the Inter-American system appeals were exhausted. In addition to filing multiple cases with the commission, the lawyers immediately requested, within their initial petitions, precautionary measures in many of the cases. The commission is given authority to request that a country take measures to ensure the safety of persons related to the case. In previous cases, these measures were often requested to protect witnesses who faced potential death squads or similar assassinations. In these cases, the request was to the government itself not to execute the petitioners. In late 1997, several cases, including the cases of Anthony Briggs, Anderson Noel, and Haniff Hilaire (James et al. cases) were filed with the commission against Trinidad and Tobago. All requested precautionary measures in their initial complaint, as noted in the commission’s Annual Report for 1997. The commission requested that the government take precautionary measures for a group of the men, but the government of Trinidad did not respond. Instead, according to the Attorney General, on May 21st, the Cabinet in Trinidad voted to have the Attorney General draft a statement to withdraw from the UN HRC and the ACHR, given the potential for these cases to go before the Inter-American Court and the delays that were likely (Attorney General’s Report to Parliament 1998).

The next day, since it appeared clear that these requests would not be complied with in several pending cases against Trinidad and Tobago, the commission utilized its option to request provisional
measures from the Inter-American Court on May 22, 1998 for James, Briggs, Noel, Garcia, Bethel (James et al. Case 1998). Trinidad and Tobago was at the time the only English speaking Caribbean country to have recognized the court’s jurisdiction, and thus the only state that could be taken before the court. The court’s president issued orders for provisional measures on May 27, 1998, and added three more death row inmates with petitions before the commission throughout the June and July 1998. Trinidad’s response, again, was that its domestic law required speedier proceedings than the commission was able to offer, and that due to the delays, it was usurping Trinidad’s legislative prerogative and de facto abolishing the death penalty (James et al. Case 1998). Trinidad failed to appear at the court’s August hearing on the matter at its seat in Costa Rica. The court rejected the state’s arguments and the state’s attempts to prove a reservation to the American Convention negated its previous acceptance of the court.

Going to the Court Under Pain of Death

Trinidad’s reaction to the commission’s precautionary measures and the provisional measures request from the court was swift. On May 28, 1998, the day after the President of the court initially issued provisional measures for the James et al. Case inmates, Trinidad and Tobago officially submitted notice of its denunciation of the ACHR and withdrawal of its recognition of the Inter-American Court’s jurisdiction, to be effective exactly one year later (as required by international law). Two days earlier, Trinidad had renounced and then reaccessed to the ICCPR’s UN HRC with an amendment to block death penalty appeals. Trinidad later reported to the UN HRC under its ICCPR obligations that the delays at the commission and the consequences under the Pratt and Morgan clock had led to the withdrawal (UN HRC 1999). The government was willing to reaccess to the ACHR, but it noted it was not possible to do so with a reservation against hearing death penalty appeals (Attorney
General’s Testimony before the Trinidad House of Representatives May 29, 1998). Trinidad did not send representatives to the August hearing on provisional measures at the court.

The linkage between the death row cases and the withdrawal is ultimately made clear by the government’s own statements:

The Government of Trinidad and Tobago is unable to allow the inability of the Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago. Persons convicted and sentenced to death after due process of law can have the constitutionality of their death sentence determined before the Courts of Trinidad and Tobago. (Trinidad Minister of Foreign Affairs Ralph Maraj, Notice to Denounce the American Convention on Human Rights, May 26, 1998)

The state listed the commission’s delays and the frustration of the death penalty as its reason for withdrawing from the ACHR. The court is not mentioned specifically, but it is clear from the language in the withdrawal that the overall frustration with the lengthy processes in the Inter-American system were now seen as part of the overall obstacles blocking the government from carrying out executions. The Attorney General’s statement to Parliament in May 1998 made clear why the frustration with the commission’s delays was indeed linked to the movement’s barrage of related test cases, which the government considered frivolous:

Mr. Speaker, an examination of the cases which go before the human rights bodies would reveal that most convicted persons raise the same arguments as to the violation of their rights as they raised before the Court of Appeal and the Privy Council, and in some cases the arguments are identical. In many cases the same arguments written for convicted person “A” are written word for word for convicted person “B.” These applications are being used without doubt by
convicted persons to frustrate the state from carrying out the death penalty. (Attorney General’s Testimony before the Trinidad House of Representatives May 29, 1998)

The government appears to have not had much respect for the commission’s acceptance of these cases as admissible, though it does not outright say this in the statement to the House of Representatives. To the Senate, however, the Attorney General notes again that the commission would give no guarantees on time frames, despite his testimony on the statistics of crime rates and explanation of the 5 year time clock. He then notes that subsequent events demonstrated that “the matters were not attended to” in a timely fashion. (Attorney General Testimony before the Trinidad Senate, June 6, 1998). Given this characterization of the petitions, the court’s contemporaneous provisional measures were likely seen as yet another part of the obstacles created by the movement utilizing the system to delay, and Trinidad’s refusal to cooperate and show up for the court’s hearings in the summer of 1998 demonstrated its unwillingness to cooperate with the system as a whole by the time of its withdrawal. The commission and the court were now linked with the movement that the government was attempting, on the record, to decertify as murderers filing frivolous lawsuits.

In regional meetings, Trinidad again signaled its discontent with the Inter-American system as and its role in trying to frustrate the government’s use of the death penalty. Just days after announcing its renunciation of the American Convention and the court’s jurisdiction, Trinidad spoke out at the OAS General Assembly meeting on June 4, 1998, refusing to support approval of the Inter-American Commission’s annual report, which included an order for Trinidad to stay five pending executions (Gutierrez 1998). If the government had merely wished to bow out without making any attempt to decertify the commission, it could have merely ignored the report. It did not, and neither did its neighbors. Jamaica expressed solidarity with Trinidad’s delegation. Trinidad’s foreign minister openly expressed doubts about the legitimacy of claims accepted by and being processed by the
system, stating that condemned prisoners were using the system to delay their cases. The majority of other states representatives present at the OAS General Assembly meeting were concerned that the death penalty cases would result in plentiful renunciations from the Caribbean (Gutierrez 1998), though since many had not accepted the court’s jurisdiction and the commission would hear cases against states like the US that had not ratified the Convention, there would seem to be little motive to renounce, but indeed the informal renunciations of the movement’s use of the system and the system itself were plentiful. Barbados’ foreign minister Billie Miller did not speak out during the GA meeting, interestingly, but had previously announced that the government might denounce the American Convention on Human Rights, which it had already ratified.

Trinidad’s leadership made clear that the intent of withdrawal from the Inter-American system was to remove an obstacle to carrying out the death penalty, demonstrating their awareness of the linkage of the system and the death penalty through the barrage of filings at the commission and the potential for those cases to all go to the court. In June 1998, Trinidad’s Attorney General Ramesh Maharaj stated that the withdrawal from the Inter-American Court and the UN HRC would allow the government to clear death row through executions (Gibbings 1998). The withdrawal received support from Guyana and Barbados who threatened to withdraw their ratifications of the ACHR as well. Trinidad’s foreign minister was not worried about Trinidad’s reputation as a democracy or its reputation on human rights (Gibbings 1998), and considering the support from other Commonwealth Caribbean countries, Trinidad was further emboldened.

Within its own Parliament, the government of Trinidad had some minor opposition, but even the opposition who vigorously questioned the Attorney General on the withdrawal focused primarily on the political issues rather than any seeming support for the anti-death penalty movement. The issues focused upon were the Attorney General’s personal flip-flop on the issue of capital punishment

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(he had a brother on death row in Florida), and on issues of separation of powers and whether Parliament should have been consulted (Attorney General’s Testimony before the Senate June 6, 1998).

The backlash against the Inter-American system and the UN HRC had begun, but it did not end with Trinidad’s renunciation of the ACHR or reservation to avoid death penalty cases at the UN HRC. Just a month later in July 1998, a summit was held in Trinidad by the Caribbean Community (CARICOM), and an agreement was made by Caribbean leaders to house a new Caribbean Court of Justice (CCJ) in Trinidad that would replace the Privy Council (Rohter 1998). Though the idea of the CCJ had existed for over 20 years, the impetus for movement toward it appears to have been the growing discontent with the outcome of the Privy Council’s decisions and their interaction with the UN HRC and Inter-American system (Writer 1999). The government of Trinidad had already discussed removing criminal jurisdiction from the Privy Council in February 1998, but for Trinidad’s Attorney General, even if the CCJ could not be established quickly enough, it could pursue other domestic alternatives (Gibbings 1998). The backlash against external tribunals is further demonstrated by this attempt to set up alternatives to those systems, specifically to demonstrate their independence on death penalty issues, the very issue linked to the systems through the test cases.

If the recognition of the push for the CCJ was not enough of a demonstration of the attempts to reject external tribunals, more direct calls for withdrawals came in January 1999. The meeting of Attorneys Generals from CARICOM nations signed a statement asking their respective governments to withdraw from the ACHR and ICCPR and then reaccept the treaties after adding reservations that would exempt anything related to the death penalty (Fraser 1999). It was signed by all of the attorneys general from Commonwealth Caribbean countries and Suriname.
Domestically, by November 1998, Trinidad had issued death warrants for nine men from the Chadee gang who killed a former gang member and his family. Their hangings were stayed temporarily by domestic appeals. Trinidad moved forward with executions in the summer of 1999, despite the Inter-American Court’s provisional measures, which were still in effect. In June 1999, just a week after Trinidad’s withdrawal from the ACHR became official and days after the structure of the CCJ were agreed upon, it executed the nine members of the Chadee gang. At least one of these men, Joey Ramiah, had provisional measures ordered by the Inter-American Court that enjoined execution of the man while his petition was before the commission. The commission argued that the inmates in the provisional measures had all made a prima facie case even though the commission had not ruled on whether a violation had occurred. Given the previous statements by the Attorney General to Parliament in 1998, the commission’s cases were not well respected or seen as legitimate by the government, which had made efforts publicly to decertify the test cases and the system in general.

In July 1999, Trinidad’s noncompliance with the recommendations of the Inter-American Commission and the court were made even more clear by the execution of Anthony Briggs. Briggs was part of the original May 1998 provisional measures issued by the court, and the commission had found violations of his right to a speedy trial and published the report of their recommendations in their 1998 Annual Report after Trinidad refused to respond to an offer of friendly settlement (Tittemore 2004). Trinidad requested that the court lift its injunction but the court instead reaffirmed the injunction in his case along with ordering injunctions in several more cases, and requested Trinidad to report the status of Mr. Briggs’ case to them. On July 29, 1999, Trinidad executed the man. Before Briggs’ execution, the commission had submitted the singular Hillaire case to the court in May 1999.

The actions of the commission that followed Briggs’ execution suggested that it changed its strategy after realizing that Trinidad would not comply with its recommendations, and ended up
grouping larger amounts of cases together. In 2000, it referred a total of 32 of the cases from Trinidad
to the court in an additional two large groups (one with 23, the other with 7), including one member of
the Chadee gang who had already been executed in 1999. The court later joined these two large
groups with the Haniff Hillaire case that had been submitted in 1999 and decided the case on the merits
in 2002. After its preliminary objection to the court continuing these cases which were filed before its
withdrawal was rejected by the court in 2001, Trinidad and Tobago notified the court that it would not
attend further hearings at the court.

Efforts by the government to restart executions have continued, and its distance from the Inter-
American system remains. Executions in Trinidad since 1999 have been thwarted by delays in appeals
to the UN HRC (Richards 2000), which Trinidad later then renounced completely in 2000, and by
individual case filings before domestic courts. The next section looks at the impact of the likely
backlash caused by linkage between the IACHR and UN HRC systems and the death penalty test
cases.

**Regional Impact of the Test Case Barrage on the Development of the Court: Backlash Linkage
and the Negative Package Deal**

During the late 1990s, the London law firms involved in pro bono cases before the Privy
Council, the UN Human Rights Committee, and the Inter-American Court succeeded in many of their
cases against death penalty practices in the Caribbean. Their successes appear to have led to linkage of
the Inter-American Court, as well as to the UN HRC and Privy Council in which they filed similar test
cases, to the movement against the death penalty. The movement was primarily led by lawyers from
outside of the Caribbean with ties to at least one underfunded legal NGO in Jamaica, the Jamaica
Council for Human Rights, and the fizzled remains of an anti-death penalty movement from the 1980s.
The legal cases had little to no support from a broader activist community, media, or other allies in the
Caribbean, because the movement-oriented political community was by the 1990s nearly non-existent
in the Caribbean. International organizations like Amnesty International that had put out a report on Jamaica in the 1980s could not build much traction domestically, and given the de facto abolition in the region, they had not created much of a structure for mobilization. The lawyers, who were working pro bono, were instead left to run an almost entirely litigation-only strategy with little international or domestic political or grassroots connections. Despite the de facto lack of executions, the region still sentenced many prisoners to death row under deplorable conditions, usually under the mandatory death sentences that did not allow any consideration of mitigating facts in the cases, including a woman who had aided in the murder of her abusive husband who had threatened her life and severely beaten her.

The movement still had battles to fight, and the governments kept attempting to preserve their status quo laws, such as mandatory sentencing, and leave execution as an option they could continually try to carry out.

The strong negative linkage to the test cases can be seen in the development of the jurisdiction of the three judicial bodies, the Inter-American system, the UN HRC and the Privy Council, all of which saw attacks and a decline in their jurisdiction during and shortly after the successful test cases. As expected in a scenario in which states reacted negatively to a court’s decision in a test case, backlash against the tribunals occurred. Though it is hard to show a negative, since many had not recognized the Inter-American system, other behaviors supplement the inability to show withdrawal trends, and the factors that determine whether the states’ reactions will be positive or negative are discussed in Chapter 6.

With backlash linkage, I argue that a strong but negative linkage is made between a court and a movement (whether the movement is weak or strong itself) through a test case. The reactions of states within the Caribbean during the late 1990s demonstrate this pattern or negative package deal, although the linkage appears to be between multiple tribunals and the anti-death penalty movement. The
negative reaction to the movement pre-dates the cases themselves, but the successful test cases in the 1990s link the court to that downward trend and make them targets of the pre-existing countermovement that was further fueled by the delay tactics of the test case advocates after *Pratt and Morgan* and their use of the international tribunals, which the state saw as merely using the courts to further those delays. The courts, once linked, became targets of the countermovement led by the governments of Trinidad (particularly the Attorney General and representatives at the OAS) and some of its CARICOM neighbors.

As Table 8 shows, the first withdrawal to occur was actually Jamaica’s denunciation of the First Optional Protocol to the ICCPR, which Jamaica had previously ratified. That acceptance of the Optional Protocol had permitted the UN HRC to hear individual complaints from Jamaica. The denunciation occurred on October 23, 1997, after two years with a heavy volume of cases against Jamaica at the HRC. In 1996, 10 decisions or “communications” as the HRC calls them were issued in Jamaican cases, and eight such decisions were issued in Jamaican cases in 1997. By 1997, the HRC’s communications note that the Jamaican cases and Trinidad cases are represented mostly by London law firms, with a smaller number represented by a European-based NGO called Interrights. These cases brought the pre-existing countermovement out in force against the UN HRC, much as they did when it became clear the Inter-American Commission was going to find similar appeals admissible in late 1997 and thereby linked the Inter-American system to the death row advocates’ cases and movement to end the death penalty, or at least mandatory death sentences and related practices.

**Backlash: Denouncing the Anti-Death Penalty Movement and Enforcement Mechanisms**

The backlash against the anti-death penalty test cases in the late 1990s and early 2000s was quite extensive for both the movement and for international tribunals. Helfer (2002) argues that the backlash was not extensive, because nine other democracies in the Caribbean did not withdraw from
human rights treaty regimes. However, when it comes to enforcement bodies, extensive withdrawals compared to the numbers who had previously acceded to them were relatively high. Few of the Commonwealth Caribbean democracies had recognized the enforcement mechanisms or human rights treaties in general, even if they had ratified the treaties. There was widespread call for withdrawals, including a January 1999 statement signed in Trinidad by 12 attorneys general from Commonwealth Caribbean nations noting that countries should withdraw from the ACHR and ICCPR and then reaccede to the pacts with reservations to exclude all things relating to capital punishment (Fraser 1999). Their attempts to reaccede without giving access to death penalty cases merely suggests that they wanted to withdraw from only the parts of the international courts that were actually being utilized, or in other words, they did not want to allow the systems access to issues on which they might actually be called out. This type of trying to remain a party to everything but the parts where they would have to change any of their policies fairly strongly suggests that after linkage with the movement and the test cases, at least some of the Caribbean states were interested in having toothless recognition of the tribunals or none at all. Even Barbados recognition of the Inter-American system in 2000 came as the state was also fighting to pass constitutional amendments to assure that death penalty cases would not go to the court (more on Barbados below).

While Bahamas, Barbados, Grenada, Jamaica, St. Vincent, and Trinidad had ratified the ICCPR, only Guyana, Barbados, Jamaica, St. Vincent, and Trinidad had ratified the First Optional Protocol to give the UN HRC the ability to hear complaints from their jurisdictions. Jamaica denounced the Optional Protocol in late 1997, and Trinidad denounced and re-acceded to the protocol with a reservation exempting death penalty appeals on May 26, 1998 (just as the James et al. provisional measures made it to the Inter-American Court). Guyana followed suit in 1999, though in 1998, the country’s attorney general had already argued that Guyana would ignore the UN HRC’s
recommendations (Associated Press [AP] 1998). Trinidad, after the UN HRC found its reservation invalid, denounced the Optional Protocol again in 2000 (*United Nations Treaty Collection* 2012). That left only St. Vincent and Barbados who permitted death penalty cases to appeal to the UN HRC under the Optional Protocol. (See Table 8.)

*Table 8: Backlash Against Tribunals Within Caribbean Countries*

<table>
<thead>
<tr>
<th>Status</th>
<th>IACHR</th>
<th>UN HRC</th>
<th>2001 Agreement to Establish CCJ</th>
<th>Constitutional Amendment*</th>
<th>Executions</th>
</tr>
</thead>
</table>
| **Negative Actions against Court (withdraw or delink) or Movement** | Trinidad and Tobago 1998 | Jamaica 1997      | Antigua & Barbuda Barbados Belize Grenada Guyana Jamaica St. Kitts St. Lucia Trinidad and Tobago | Jamaica Trinidad Barbados Belize | Trinidad 1994 (1) 1999 (10)  
St. Lucia 1995  
St. Vincent 1995 (3)  
Bahamas 1996 1998 (2) 2000  
Guyana 1997 (2)  
| **Remains Under Jurisdiction**      | Barbados 2000       | Barbados 1973     | St. Vincent and the Grenadines 1981 | None have abolished the death penalty by law |
| **Never Recognized**                | Antigua and Barbuda Bahamas Belize Dominica Grenada Guyana Jamaica St. Kitts and Nevis St. Lucia St. Vincent and the Grenadines | Antigua and Barbuda Bahamas Belize Dominica Grenada St. Kitts and Nevis St. Lucia St. Vincent and the Grenadines |

*Notes.* *Constitutional amendments meant to negate the impact of the death penalty cases or attempting to prohibit death penalty issues from being decided by international tribunals. **Denounces and immediately re-accedes with reservation for the death penalty.*
At the Inter-American Commission, Trinidad was not the only country that called for expedited procedures for death penalty cases in 1998. Jamaica imposed a one month limit. If the commission did not respond in one month, Jamaica reserved the right to schedule the petitioner for execution (Wilson 1998). Other countries flat out publicly “accused the commission of deliberately prolonging its decisions in a bid to prevent hangings” (Nash 1998).

The opposition to the movement to limit the death penalty in the Caribbean has continued, even while most of the Caribbean states have remained outside the reach of the UN HRC and Inter-American system. For example, to demonstrate solidarity among the nations of the Caribbean on the death penalty and their opposition to international actions opposing the death penalty, all of the Commonwealth Caribbean states voted against the UN General Assembly Moratorium Resolutions in 2007, 2008 and 2010, with almost unanimous signatures on the Note Verbale of Disassociation with the measure (Death Penalty Worldwide 2012). The Caribbean made up about one-fourth of those voting against the resolutions. Though outside the time frame of the test cases, this near uniform vote against the measure and move to disassociate from it, demonstrates that even in later years, states in the Caribbean continue rejecting the anti-death penalty movement. Despite procedural and judicial barriers that exist to actually fulfilling executions themselves, the states have continued their support for the death penalty as policy and death rows are still occupied in the Caribbean.

Similarly, while Grenada, Barbados, Dominica, Jamaica, and Trinidad had ratified the ACHR, only Trinidad had recognized the Inter-American Court’s jurisdiction at the time of the James et al. cases. Barbados, with its recognition in 2000, is now the only Commonwealth Caribbean country under the Inter-American Court’s jurisdiction (OAS 2007). Barbados had few cases before the commission during the initial backlash period, and it has been argued that they may not have been immediately impacted (Helfer 2002). It was indeed more complex than that (see below). Even so, that
would soon change when the court began issuing decisions that would extend to Barbados and many other Caribbean countries, even those that only had to deal with the commission and not the court.

In 2002, just two months after the *Hilaire et al.* judgment against Trinidad from the Inter-American Court that called out that government on its mandatory death sentences, its due process procedures, and its non-compliance with the court’s injunction against executing inmates with pending claims (Burgess and Anderson 2007; Tittemore 2004), Barbados passed the Constitutional Amendment Act which added provisions to permit time limits for appeals to the Inter-American system and to restrict appeals based on mandatory death sentencing laws, even though it had contradictorily just recognized the court in 2000. Barbados was reportedly pursuing the option of becoming a republic outside the Commonwealth in order to avoid the Privy Council as early as 1998 (Rohter 1998), and the attorney general in 1999 had originally proposed those constitutional amendments passed in 2002. Jamaica, Belize, and Trinidad considered similar constitutional amendments (Tittemore 2004; United Nations Human Rights Committee 1999), though at least in some cases the political opposition opposed constitutional amendments and legislation that would have overturned *Pratt and Morgan* and other test cases (Burgess and Anderson 2007; Independent Jamaican Council for Human Rights 2009). Jamaica passed constitutional amendments to revoke *Pratt* and the appeals to international tribunals to 18 months (Death Penalty Worldwide 2012).

Many governments or at least parts of their governments had proposed stricter laws and more executions in the years following the test cases. Antigua and Barbuda’s government proposed expanding the number of crimes eligible for the death penalty, including all crimes with serious bodily injury (AP 2008), while Guyana proposed adding the death penalty for pirate attacks.

Executions themselves are hit and miss in the Caribbean, which is still mostly considered “de facto abolitionist” due to the lack of executions for many years in most of the Commonwealth.
countries. This is primarily due to the results of *Pratt* and the mandatory death sentence rulings by the Privy Council that have required commutation of sentences for those spending longer than five years on death row or sentenced under mandatory sentencing guidelines. Even still, many of the countries have either expressed their intention to continue executions or, in some cases, actually carried them out. Of the 19 executions held in the Caribbean since 1994, all but five were held from 1998-2000, including one from St. Kitts, 10 from Trinidad and Tobago, and 3 in the Bahamas. Trinidad executed nine convicted murderers in one weekend in 1999 (Reuters 1999). The Bahamas held a double execution in 1998 on the same day (Lofquist 2010), despite the Inter-American Commission’s requests to stop the execution (Nash 1998). An additional execution came in 2000, despite appeals pending before the commission (AP 1999). The 2000 execution would have been a double execution as well, but one of the inmates committed suicide two days before (Lofquist 2010). St. Kitts and Nevis and other countries in the region were reported to have been attempting to speed up the process of executions (Fraser 1999), presumably to beat the *Pratt* clock and satisfy public calls for tougher stand on crime. St. Kitts and Nevis held executions in 1994, 1998, and 2008; Guyana in 1997; St. Vincent and St. Lucia in 1995; and St. Lucia in 1995.

The execution dates demonstrate that there was a strong rejection of the limitations being placed on the governments around the late 1990s. The executions that do happen mostly came right around the post-1993 to 2000 time frame, with the majority in 1998-2000. The limitations these executions rejected were the direct result of the test cases, starting with *Pratt*, that had become successful in large part due to the efforts of the London Panel that would later become the Death Penalty Project. However, the policies to do away with the mandatory death sentences or other procedural issues, such as mercy or pardoning procedures, have not been touched. Because of the lack of actual executions, international organizations had not put a lot of resources into the region except
for Amnesty’s report in the 1980s. As noted by one of the attorneys, they have had to fight each execution one prisoner at a time, even today.

Many more prisoners were held on death row, many pending appeals, during the late 1990s and early 2000s while their governments attempted to follow the lead of Trinidad and the Bahamas to restart executions. One reason their plights are often unknown is because finding accurate data on death row statistics and even on executions in the Caribbean can be difficult, often leaving researchers to rely (as does the current study) more on contemporaneous news sources (Lohnquist 2012; see also Death Penalty Worldwide 2012, whose excellent database often refers to news sources rather than government sources) or on statistics compiled by non-governmental organizations. The Bahamas had about 40 death row inmates in 1998 and was said to have about 24 as of 2011. Jamaica, which has not held an execution since 1988, currently has eight death row inmates, but in 2008 had a conscience vote of the legislature and government that affirmed their desire to retain the death penalty. Jamaica attempted executions but has been thwarted by appeals, including an attempt to execute a man in June 1999. Jamaica had 47 inmates on death row in 1998, but many have had their sentence commuted due to the Pratt case and mandatory sentencing limitations in the interim 10 years, including attempts to execute six prisoners in 2000 (Barnes 2000). Even though unsuccessful then, Jamaica tried to execute at least 7 prisoners in 1999 and 2000.

Some of the lesser known islands have held executions even though they had small populations and therefore very few on death row. St. Kitts executed a convicted murderer in 2008, and their Prime Minister called it a deterrent to crime (AP 2008). St. Lucia’s Prime Minister noted in 1999 that his government at least intended to resume executions (Writer 1999) of its seven prisoners on death row in 1999 (Reuters 1999).
In Trinidad, they had a reported 107 inmates awaiting execution in 1998 (Rohter 1998). 10 men were executed in 1999, though nine of them had been scheduled originally for execution in 1998 and had been delayed by domestic appeals. All nine were executed in a 4-day period from June 4, 1999 through June 7, 1999. The news heavily covered the executions, including coffins being hauled out dripping with blood. Over the course of the June 1999 weekend, according to one activist who was in Tobago at the time, the population’s initial reaction to cheer the executions faded as the grisly images barraged them on television over the weekend (Bannister 2012). Despite that, Trinidad’s government at the time, led by Prime Minister Panday, executed Anthony Briggs, whose case had been reviewed and his execution recommended to be commuted by the commission, on July 28, 1999 (capitalpunishmentuk.org 2012).

The execution surge in Trinidad and the restart of executions in the Caribbean during the late 1990s indicate that a backlash against movement and the court, as part of a package deal in the Caribbean, may have existed. This included non-compliance with court orders by Trinidad, and active steps to thwart the anti-death penalty movement and restart executions in the region. Further, evidence indicates that the governments were rejecting the movement even if the Privy Council had thwarted their ability to carry out many of the executions. The Caribbean Court of Justice was brought into being largely due to a major push after the test cases in 1998 led Trinidad to promote creation of the court and the support of its neighbors, to avoid the international systems altogether and create an alternative. I argue that the test case slinked the international courts to the anti-death penalty movement at critical junctures for those courts, and that after the linkage occurred, the negative reaction to both the movement and those courts pushed the creation of the CCJ. Even as the death penalty advocates have been able to thwart many of the executions in the region through individual judicial litigation strategies, the international courts are not making much progress at gaining new
membership or reaccessions in the region. I argue that it is likely that, even if the Caribbean were at some point in the future to accept outlawing the death penalty, linkage has likely already started to wane, and the paths of the movement and the courts separating. States will not have much motive to rejoin the IACHR, absent another linkage of the Inter-American system to something else (or trade agreements or other non-test case related items). Now that the CCJ exists, as a result of this prior strong negative linkage, I contend that the IACHR may have missed its window in the Commonwealth Caribbean due to its linkage to an unpopular litigation-based movement during a critical juncture in its development in the Caribbean. Thus, though the linkage was perhaps not as obvious or smooth as in the Latin American case study, this linkage did have lasting impact on the IACHR’s development.

**Lingering Linkage**

The backlash against the Inter-American system and the anti-death penalty movement has shown some signs of weakening in the 2000s and early 2010s. The weakening of the backlash and seeming thaw toward to the IACHR has occurred primarily in the judiciary, where the test case advocates have focused their limited but excellent litigation resources. Some courts in the region have been willing to use Inter-American decisions from the cases against Trinidad and Barbados as persuasive, even if not binding precedent, for cases involving issues such as the mandatory death penalty and mercy procedures. The Privy Council began referring to the commission’s early unpublished decision on mercy procedures in 1999 and 2000, the Eastern Caribbean Court of Appeals in a 2001 decision declared mandatory death sentences unconstitutional in St. Vincent and the Grenadines and St. Lucia partially using the commission’s decisions and the Privy Council concurred in a 2002 decision. However, the Privy Council found that it could not strike down mandatory death sentencing in Trinidad or Barbados because of the savings clauses in those countries that preserve laws that predate their constitutions, despite the fact that these were a breach of international treaty
obligations (Tittemore 2004). The Caribbean Court of Justice in its early decisions used the reasoning from decisions of the Inter-American Court, and one of the respected jurists on the CCJ observes that the IACHR system’s decisions are given weight though not full precedential value (Anderson 2010).

The Caribbean has not shown as many signs of the backlash waning in the executive or legislative branches, which would be required before any moves to accept the court are likely to occur (outside of Barbados’ contradictory recognition dealt with below). In fact, as shown above, the contemporary and later actions of the executive and legislative branches to amend constitutions and otherwise thwart implementation of later Inter-American Court decisions in the Trinidad and later Barbados cases. In fact, the commission had to file an advisory opinion eventually with the court questioning whether states can take legislative measures to deny judicial reviews of mandatory death sentences and related violations (Tittemore 2004). The mandatory death sentences are, as of 2013, now gone in all but Trinidad and Barbados, and now in those countries the London Panel, now operating at the Death Penalty Project, has continued to litigate within the domestic courts in the countries that no longer have mandatory death sentences to develop appropriate tests for when death sentences are merited.

According to one of the lawyers, Trinidad has in fact failed to comply with the Hilaire decision at all and the courts have delayed giving decisions to avoid having the lawyers take them back to the Inter-American system for non-compliance proceedings. So linkage has lingered, and even the courts in Trinidad have tried to avoid allowing these cases to go back to the court if at all possible. In the later Barbados cases, such as Cadogan, the lack of sanctions have made enforcement difficult (Lehrfreund 2012). Thus, even judicial compliance in cases in Barbados, and even more so in Trinidad, continue to be a problem.
Ironically, the slow but growing cooperation of the Caribbean judiciary outside of Trinidad and Tobago and contrasting continued backlash from the executive and legislative branches is actually the opposite of compliance findings from a recent study of Latin American compliance with the Inter-American system. That study found that the compliance record in Latin America indicates that the judiciary and prosecutors have been the part of governments least likely to comply with orders by the Inter-American Court to prosecute and investigate past abuses, while Latin American executive and legislative branches have complied more readily (Huneeus 2011). The reasons for the difference in these outcomes likely have to do with the strengths and weaknesses of the movements, and the judiciary in Latin America in the 1980s and 1990s. In Latin America, the judiciary was weak and non-responsive to the IACHR cases and the anti-impunity movement largely due to its lack of dependence until later in the 1990s (Skaar 2011), while civil society had made inroads in political spheres and through the media that gave them greater leverage with politicians. By contrast, in the Caribbean the litigation strategy was the sole focus by the time of the test cases in the late 1990s, and lacked support from civil society, the media and political elites who might have been able to push more reforms through the executive and legislative branches. These and other issues related to the continuing backlash in the Caribbean are discussed in more detail in the later chapters addressing with why the Caribbean cases led to a negative linkage, but it is important to note that linkage has lingered, but it has done so inconsistently in both cases, demonstrating the importance of mobilization effort to which avenues of action will give way to the movement and to the court to which it is linked. Deference in the Caribbean case, therefore, to the Inter-American system has only happened in the judiciary, where the movement has made some inroads now.
Alternative Theory: Caribbean Identity

Despite all of the talk of Caribbean identity and legal culture especially surrounding the creation of the CCJ, the backlash in the Caribbean does still in many ways come down to a backlash against the anti-death penalty movement and its test cases rather than being primarily related to cultural issues. Much of the cultural rhetoric may have been code for “not Europe and Latin America” because of the backlash against the London lawyers and IACHR cases. Many of the nation’s leaders in the months and years following the test cases of the 1990s and early 2000s characterized decisions by the Inter-American system, the UN HRC, and the Privy Council as out of step with the realities of the Caribbean, including its legal culture. Barbados’ Attorney General stated in 1998 that the push against the death penalty was seen as “British and Eurocentric notions” being pushed upon the Caribbean by their former colonizers (Faul 1998), though some at the time claimed the British would be more than happy to get rid of the Caribbean appeals before the Privy Council because of the increasing costs. British officials condemned hangings in the Caribbean in 1999, including Britain’s foreign office minister Tony Lloyd in the House of Commons, and some members of Britain’s Labor Party had called for threats to cut off aid and trade to Caribbean states that carry out recommendations (AP 1999).

One justice on the newly formed Caribbean Court of Justice clearly stated that “the ultimate responsibility for defining and guarding the Caribbean legal persona remains a matter for Caribbean people and jurists” (Anderson 2010, p. 20). While he acknowledges the positive impacts from the Inter-American system, he argues that their decisions can be seen as potential “best practices,” but in the end, they are not the traditions and standards of the Caribbean and lead to an “urgent necessity for self definition by Caribbean law” (Anderson 2010, p. 3). The Caribbean Court of Justice was seen as the solution by Caribbean leaders and attorneys generals, who in 1998 and 1999 established agreements to start the court, which had long been discussed but had never been brought to fruition.
On the court’s own website, its vision is a “justice system built of jurisprudence reflective of our history, values, and traditions” (Caribbean Court of Justice 2010).

For human rights organizations, the resurgence of the push for a Caribbean court was seen as part of the backlash against the test case decisions in death penalty cases and the courts they had used: the Privy Council, the UN HRC and the Inter-American system (Howe 2000). This was not the first mention of a Caribbean Court though. CARICOM had issued a report in 1972 calling for a court to replace the privy council and the leaders called for the drafting of an agreement to create a court at the CARICOM meeting in (Permanand 2011), but the process was slow until the late 1990s after reports by regional bodies had been issued in the 1980s and as late as 1992. In June 1998, a meeting of the Legal Affairs Committee for the CARICOM secretariat, consisting of legal affairs ministers and attorneys general from the region, met in Guyana and scheduled a meeting for Sept. 1998 to finalize the CCJ agreement (Secretariat 1998). In July 1998, just two months after withdrawing from the ACHR, Trinidad’s Prime Minister announced that Barbados, Guyana, Jamaica, and Trinidad had hopes to establish the court in 1999 (Faul 1998). At the same meeting, the Legal Affairs Committee discussed strategies to realize a “harmonized front” on the death penalty issue. Many leaders observed that the Privy Council’s decisions in death penalty cases thwarted the will of the people. Then by February 10, 1999, Attorney General of Trinidad Lawrence Maharaj attempted to dismiss the idea that the move to have criminal appeals moved to a CCJ was linked to the death penalty cases (Reporter 1999). The timing and manner of the CCJ’s creation and moves to get Trinidad’s criminal cases there but not its civil cases (which foreign investors want to have Privy Council jurisdiction) suggests that frustration with the JCPC on death penalty issues has been prominent in the minds of the leaders moving the court forward.
By 2001, an agreement for the CCJ was officially signed by CARICOM members, and the court was inaugurated in 2005 (Lord 2012). The court serves as both a court to resolve original jurisdiction disputes within the CARICOM economic zone and as an appellate court for states that accepted its optional appellate jurisdiction. The appellate jurisdiction would replace the Privy Council. Only Belize, Guyana, and Barbados have accepted the CCJ as their appellate court. Jamaica and St. Vincent expressed intent to accept the appellate jurisdiction but their constitutions require a referendum to be passed, and neither nation has been able to do so (Bowcott and Wolfe-Robinson 2011). Without the potential for delays in international tribunals to run the Pratt clock, some of the pressure has been lifted on these countries. As of 2012, both Jamaica and Trinidad are considering referendums to accept the CCJ for criminal cases only (http://www.economist.com/node/21556277). Moving appeals to the CCJ only for criminal cases suggests that the death penalty and related issues may remain one of the key motives to replace the JCPC, and the lingering strength of the prior linkage of external tribunals with the death penalty. In fact, the complications caused by the Privy Council’s decisions on the death penalty have been acknowledged by the current Trinidad Prime Minister upon calling for the acceptance of the CCJ’s appellate jurisdiction for criminal law only in April 2012 (Lord 2012), while acknowledging that the JCPC was still the court respected and trusted by Trinidad’s foreign investors on domestic business and civil matters. The move toward the CCJ on criminal matters signals that Trinidad may be unlikely to reaccept the UN HRC or sign on to the Inter-American court again, at least in the short term. I argue Trinidad may be less motivated to join the IACHR later because of the CCJ’s existence as an alternative now.

Early decisions by the CCJ, despite the possible push for its inception by death penalty supporters, have led to the acceptance of some limitations on the death penalty similar to what the Privy Council had established, so it may be that countries are waiting to see how the court develops
before joining it. This in and of itself makes it difficult to accept an argument that the court is meant to establish a Caribbean identity so much as it was seen as a way to possibly avoid test case decisions that the states did not like, in other words, its development was egged on at least partially because of the backlash against other courts and the anti-death penalty movement’s use of those courts, rather than merely because they wished to create a Caribbean identity, though the two issues in these former colonies remain intertwined.

**Alternative Theory: Coercion or Trade Alliances**

Could the pattern demonstrated above have been the result of coercion by powerful nations or by trade alliances? Certainly the pattern of recognitions before the test cases indicates that these concerns did have some impact on the development of the Inter-American system in the region. Indeed, Jamaica, Grenada, and Barbados may have been convinced at least in part to ratify the ACHR in the late 1970s by pressure from the US Administration at the time, which was strongly promoting human rights (Forsythe 1991). No other clear patterns of coercion or trade pressures seem to appear until after the linkage with test cases at the court. In the late 1990s, regional meetings of leaders and CARICOM led to statements and calls for withdrawing and reacting to human rights treaties and creation of the CCJ. This organized resistance is successful to some extent at “harmonizing” the approach of governments to international bodies during the backlash period, with the exception of Barbados. Barbados’ foreign minister admits to having tried to convince other Caribbean countries to recognize the court, and the OAS and the commission are still pressuring Caribbean members to recognize the court (Buckley 2008). As for dumping the Privy Council in favor of the CCJ, some states found domestic hurdles, especially in Trinidad where business interests seem to have been winning over death penalty proponents (Lord 2012), for fear that a too sudden move to the CCJ would not be received well by foreign investors who trust the Privy Council as a check on the Trinidadian
court system for their business contracts (Bannister 2012). In other words, these pressures seem to cut both ways. The concerted efforts of CARICOM members and leaders to constrain the impact of the test cases lends proof to the idea that backlash linkage occurred and that the Caribbean governments and government networks (e.g., the Attorneys Generals) were at least somewhat successful in organizing a pro-retentionist counter-movement to constrain the impact of the test cases in the region, delegitimize the test cases and indirectly (and sometimes directly) the courts that were reviewing them, and to limit their obligations to the Inter-American system.

**Alternative Theory: Democracy**

All of the Caribbean countries were democracies at the time of their entry into the OAS. No clear pattern has emerged to indicate that Caribbean countries were recognizing the court or even ratifying the ACHR at the time of entry into the OAS, nor at a set interval thereafter. Long-time democracies have been theorized not to feel the need to garner additional reputation points by giving an external tribunal review over its policies, so perhaps this accounts for some of the lack of recognitions. Since they were at the time all relatively new democracies, or at least newly independent democracies, they might have wanted those reputation points, as depicted by the three countries who presumably at least partially caved into American pressure in the late 1970s. As a whole the pattern of recognitions and ratifications suggests they did not feel the need to lock in reforms or demonstrate their commitment to human rights through ratification of the treaty or recognition of the court. The only country in the region that went through a period of authoritarian rule followed by democracy, a pattern similar to Latin American countries, was Guyana. Guyana has never recognized the court or ratified the ACHR, though it did ratify the ICCPR and the optional protocol. There may be some consistency in the efforts of Trinidad (and Barbados through domestic attempts) to reaccede to agreements but with reservations that make the tribunals toothless on the matters that have most been sent to them: the
death penalty cases. Democracies may only want to recognize their laws as they are, and may have little motive to put themselves under the jurisdiction of a tribunal that contradicts their laws. Overall, however, patterns suggest that democracy does not explain the patterns of ratifications and recognitions, and as discussed in depth above, the backlash may have been somewhat tempered by their status as democracies, but it was still quite extensive.

**The Outlier: Barbados and Accession After a Strong Negative Linkage**

At first glance, Barbados stands out as the outlier in the story of negative linkage outlined above. Barbados recognized the IACHR in 2000, after the test cases before the Inter-American system had begun, and did not denounce the UN HRC. Barbados has at least in large part rejected the anti-death penalty movement, retained the death penalty in its laws, and currently still has an estimated 18 death row inmates, all of which signal that it has not accepted the anti-death penalty movement. If Barbados shared the same historical, political, and legal cultures as other parts of the Commonwealth Caribbean, as well as death penalty policies similar to many of its neighbors, why did Barbados accede to the IACHR’s jurisdiction as the rest of the region was going through an alleged strong negative linkage, or backlash?

Several reasons have been suggested for this deviation in the expected pattern. First, according to Barbados’ Ambassador to the United States, Barbados recognized the court to be consistent with its reputation as a world leader on human rights. Relating to the human rights leadership of Barbados, Ambassador King noted the pride of Barbados in the exceptional service of Barbadan citizen Judge Oliver Jackman, who served on the court from 1995-2006 (King 2007). While this may seem trite, the Foreign Minister of Barbados, Billie Miller, stated in her address to the OAS during the ceremony to recognize the court in 2000 that it would be “invidious” if Barbados did not recognize the court while it had a citizen both on the court’s bench and on the commission ("OAS Court Attains Jurisdiction in
Barbados" 2000). Further, in his appeals to Jamaica to recognize the court’s jurisdiction in 2008, the executive secretary of the commission listed Jamaica’s Margarette Macaulay’s position on the court as an important reason why Jamaica should recognize the court, and a local human rights advocate said it was “shameful” not to recognize a court upon which its own citizen sites (Buckley 2008).

Trade ties might have been a factor. In response to other questions, the Ambassador reported that Barbados intended to increase trade with Latin American countries, and so it may be that acceptance of the Inter-American system was a signal to potential trade partners in Latin America that Barbados considered itself part of the broader Hemisphere (King 2007). CARICOM itself was trying to negotiate trade agreements with Colombia and Venezuela in the early 1990s and increased trade with Latin America in the 1990s, but that suggests that other states should have wanted to similarly signal their ties to Latin America but do not do so through the ACHR. This may explain why Barbados was attempting to get all of CARICOM on board to recognize the court. Before recognizing the court, Barbados had attempted to get CARICOM to take a unanimous position and recognize the IACHR, but Jamaica and Trinidad were unwilling to accept ("OAS Court Attains Jurisdiction in Barbados" 2000). The OAS, according to Amnesty International, in 2000 was on a push to strengthen human rights and to encourage states to ratify human rights treaties, and it had recently had Peru reaccept the IACHR. To recruit Barbados to sign onto the court was one step in that direction (International 2000). In the ceremony to accept the court, Barbados’ foreign minister discussed Canada’s proposal on human security suggesting that Canada may have been pressuring Barbados, although Canada has not recognized the court itself ("OAS Court Attains Jurisdiction in Barbados" 2000). Further, there were threats by Labor Party officials in Britain that trade preferences might be cut off, along with aid, to Caribbean countries continuing to pursue capital punishment (AP 1999), for
which the recognition might have signaled at least some intent to curb the more harsh death penalty procedures.

Barbados’ decision may make more sense when taken in context of Barbados’ other actions during the era after test cases started, though as one interviewee who wanted to remain anonymous noted: Barbados’ policies on the death penalty tend to be “schizophrenic.” Barbados had not executed an inmate since 1984. The government’s coalition in power did not change close to the acceptance, but the Barbados Labor Party, in power since 1994, won the largest victory in Parliament ever with 26 out of 28 members from the BLP in 1999, making their position at least more secure for that time period and passages of their policies that much easier. The executive’s decision to accept the court, thus, might have felt less fear of political challenge. Further, Barbados had far fewer cases before the both the UN HRC and the commission, so it had fewer reasons to object to them (Helfer 2002).

Jamaica, Trinidad, Grenada, and the Bahamas had already had rulings from the commission (and for Trinidad from the court) that held that mandatory death sentences were a violation of the American Declaration and Convention, but Barbados had not had any such cases at the time (Simmons 2002).

The story of Barbados’ actual policies on the death penalty was quite different than its 2000 recognition of the IACHR might suggest. Back in 1998, the government in Barbados announced it might consider denouncing the ACHR (Gutierrez 1998). In 1998, Barbados was not pursuing abolitionist policies but rather attempting to restart the death penalty domestically noting that hangings were “eminent.” However, last minute appeals (Emling 1998) curtailed the execution. Barbados, like Trinidad, pushed strongly for an end to Privy Council appeals after the Pratt and Morgan decision made appeals to international systems like the Inter-American system a method for commuting sentences (Wilson 1998). One Barbadian Senator commented in 1998 that Barbados was rethinking its
relationship with Britain in order to restart hangings in the country (Emling 1998). Barbados has since rejected the Privy Council altogether and now sends appeals to the Caribbean Court of Justice.

It appears that Barbados attempted to delink the anti-death penalty movement from the Inter-American human rights system using several actions to counter its sign on the court’s jurisdiction and render it toothless, as Trinidad had hoped to do officially with reservations, through domestic efforts. Barbados took domestic legal actions to limit some of the impact that the Inter-American court could have on the use of the death penalty, which it had planned since at least 1999, prior to its accession to the court’s jurisdiction. In June 1999, Barbados Attorney General David Simmons reported the intention to amend the Barbados constitution to exclude delays as a form of cruel and inhumane treatment and to override the Pratt ruling (Reuters 1999). In 2001, Barbados began the process to replace the Privy Council altogether with the CCJ (CMC 2011), eventually passing the Caribbean Court of Justice Act (Act 2003-9) that granted the CCJ appellate jurisdiction. The jurisdiction took effect in 2005 (Permanand 2011). In 2002, Barbados changed its constitution to prohibit claims that delays in executions constitute cruel and inhuman treatment, as had been the Privy Council’s decision in Pratt and Morgan. The amendments added a prohibition on delays by international bodies in capital cases. The Privy Council has since held that Trinidad and Tobago and Barbados could retain the mandatory death sentences due to savings clauses in their constitutions and despite finding it a violation for other Caribbean countries, and Barbados has fought to maintain it in appeals taken to the Privy Council and IACHR. Barbados hosted a session of the Inter-American Court on its shores in 2011 (Pile 2011), demonstrating that it seemingly has good relations with the IACHR at this point.

Barbados has been under CCJ jurisdiction and IACHR jurisdiction. The CCJ has not been a hanging court, even if its early reputation led some to believe that it would be. It has upheld parts of the death row phenomenon ideas in Pratt and Morgan, though not the strict time limits. The CCJ
acknowledged Barbados’ constitutional amendment prohibiting enforcement in claims of cruel and inhuman treatment based on delays (Attorney General v. Boyce). The Inter-American Court has ruled against Barbados’ mandatory death sentences in cases in 2007 and 2009 (Boyce v. Barbados and Cadogan v. Barbados). Indications at the time of the 2009 decision were that Barbados would indeed change its Constitution to comply with the decision (Death Penalty Worldwide 2012). This would require rescinding a constitutional provision added in 2002 to exempt mandatory death sentences from findings that they are cruel and inhuman. However, after cases from the Inter-American Court found that mandatory death sentences are a breach of the ACHR, Barbados has said that it has begun to take steps to align its internal laws with those decisions (Barbados Advocate 2011), and the attorney general of Barbados acknowledged that it was doing so because of the Inter-American Court cases (CMC 2011). However, at least one advocate has noted that Barbados is still fighting at the IACHR level to try to retain the ability to use mandatory death sentencing at the same time (hence, the schizophrenic comment from the anonymous interviewee). The UN HRC has similarly ruled that Barbados should abandon the mandatory death sentence.

Despite fighting appeals to try to end mandatory death sentences, Barbados has not executed anyone since 1984. Only Grenada has gone longer without an execution. The state has accepted both the IACHR and retained the UN HRC despite a trickling of death penalty cases before them in the 2000s. The outlier case of Barbados, I argue, suggests that the backlash pattern against the Inter-American Court is not universal and suggests that the advocate who called Barbados’ death penalty related policies “schizophrenic.” Barbados did not withdraw from the UN HRC but did withdraw very quickly from the JCPC to the CCJ. Barbados made attempts to thwart the court and the UN HRC through domestic constitutional amendments shortly after recognizing the IACHR, though those attempts ultimately failed to be recognized by the Inter-American system as valid exceptions. Perhaps
the reputation costs of formal withdrawal made it unattractive, perhaps the government wanted to be respectful of the Barbadian judge and commissioner, or perhaps Barbados’ government is using the sophisticated tactic to allow some outside forces to be an excuse to not use the death penalty in reality while fighting very hard for political purposes to keep up the pretense of being tough on crime (Bannister 2012). Whatever the case, Barbados has not been joined by any of its neighbors, despite its efforts back in 2000 to enlist others to join, and the rest of the Caribbean seems far more consistent in their rejection of the movement and the IACHR’s jurisdiction even while most more recent attempts to execute have been thwarted by the persistent, individual litigation strategy of the test case advocates.

**Conclusion**

Despite the outlying case of Barbados, the preceding case studies have demonstrated that strong test case linkage can be a factor in the development of a voluntary, regional court’s jurisdiction, for better or for worse. In both cases, patterns of acceptance change around the time of the test cases before the regional tribunal, and other tribunals in the case of the Caribbean, where other tribunals were an option. The findings show that in both cases, critical juncture factors were high on the four hypothesized factors: the court was new, the court was new in the subregion, the cases were a new topic for the court, and the cases were controversial topics in the subregion. As I noted, however, the critical juncture factors are somewhat higher in the Latin American case because of the court’s newness overall and the system had some limited death penalty cases before the 1997 filings from Trinidad. Findings suggest that the linkage is more clearly defined in the Latin American cases, partially because patterns of recognitions are easier to trace than patterns of not accepting something not previously accepted. Signals were given though that states were not merely ignoring the IACHR, but rather that they were openly hostile to the system especially shortly after the 1997-1998 filings at the commission. In both cases, a pre-existing upwardly moving or downwardly moving movement
existed and took test cases to the court, though the movement in the Trinidad cases was largely just the test case lawyers by the late 1990s because most of the small political movement in the region had dissipated.

As predicted, the states reacted strongly, either positively or negatively, to the successful test cases before the court and attempted to either align themselves with the movement and court or distance themselves. Either a strong positive linkage occurred that acted as a stimulus for recognitions of the court’s jurisdiction as the states accepted the well-funded, well-mobilized anti-impunity movement, or a strong negative linkage occurred that led to a backlash against the court due to its acceptance of the anti-death penalty movement cases. The countermovement to decertify the movement and its use of the court included some withdrawals, calls for withdrawals, continued resistance to recognize the court, strong rhetoric against the system (especially against delays at the commission), and domestic legal actions and reservations to attempt to avoid the scrutiny of the international tribunals involved, all of which were simultaneous to continued calls for executions, actual executions, and the creation of an alternative, subregional tribunal to avoid the Privy Council and IACHR. Thus, these findings suggest that linkage with movements associated with test cases may have impact on developing courts’ jurisdiction and futures in a region.

Chapters 6 and 7 present a framework for factors that may contribute to states’ positive or negative reactions to test case decisions from regional human rights courts and extensions of the current two case studies to explore those factors in depth.
CHAPTER 6
FILLING THE GAPS IN INTERNATIONAL COURTS

Test Case Linkage Outcomes: Effectiveness and Filling the Gaps

In previous chapters, I outlined a theory of test case linkage that may impact the development of courts by linking the fate of the court and test case advocates through favorable test case decisions. Since the findings in the previous case studies suggest that test case linkage may have a considerable impact on court development, it is important to explore which factors may contribute to a positive or negative outcome for test case linkage, which is the measure of whether a test case linkage has a beneficial or adverse outcome. Understanding these factors can benefit both the movements using the court and for the court itself. In this chapter, I establish a framework for test case linkage efficacy that outlines the factors that may be under the control of states, courts, and court users. This framework draws upon the overlapping criteria that previous literature documents for court effectiveness, test case victories, and transnational advocacy network success and further adapts and augments these criteria to apply to the efficacy of test case linkage in developing courts.

Efficacy for test case linkage, I contend, requires a combination of some of the factors for effective courts, movements, and test cases. I argue for a significant overlap in the control of factors that impact test case linkage outcomes, which are shared between states, courts, and court users. I first categorize the linkage efficacy factors where control overlaps between these parties into four categories that I assert are likely the most important for test case linkage outcome: usage, resources, expertise, and compliance. I then develop some unique criteria for these categories as important for the more general study of test cases and court development. The criteria include the concepts of usage imbalance in courts, an enhanced idea of repeat player status as not only experts at winning cases but also expertise in understanding the gaps in resources at a particular court, the importance of promoting
informal compliance through norm changing strategies (such as TNAN campaigns) in the short run and not just formal compliance in the long run, the interactive effects that resource deficiencies at a court can have on all of the other criteria, and the importance of test case petitioners’ venue loyalty to test case linkage efficacy. I note the existence of a third level of obligation on test case advocates, which may impose a burden on them to consider ways to minimize the likelihood of damage to a court in situations where strong test case linkage may occur. This third level obligation complicates the tensions already noted in previous international law literature between the advocates’ obligations to their individual clients or their movement by adding yet another level of obligation that may have severe consequences if ignored, particularly when developing courts face with critical junctures and considerable gaps that leave them vulnerable to backlash linkage. This third level has implications for policy, given the trend toward allowing more direct, unfiltered access by petitioners.

Because of the potential for strong test case linkage, it is important for a court’s development that linkages with test cases be given every chance possible to support a positive outcome, rather than a negative one. I argue that the emergence of a linkage as positive or negative involves a combination of factors in the control of those bringing the test case to the court and the factors outlined in the international law literature, primarily the debate between Posner and Yoo’s (2005) dependence theories and Helfer and Slaughter’s (1997) checklist of factors aiding the effectiveness of the international tribunals in Europe. Much of the focus of this international law debate is on criteria under the control of states and courts, or in some cases not under the control of anyone or any group. The overarching theme within these debates is that courts need a minimum level of usage and compliance to have a chance to be effective. The important categories for the effectiveness criteria contribute to the positive outcome for effectiveness of a court, and I argue, similar criteria within these
two categories are important, with some adaptation, to the positive outcome of test case linkage as well.

Further, I argue that two additional criteria are important for effective courts: resources and expertise. Both of these criteria are only indirectly addressed in the court effectiveness literature. When states or courts are unwilling or unable to support the court adequately in one or more of these categories, the court is left with gaps in its effectiveness. I argue that, since the effectiveness criteria for courts overlap with some of the test case efficacy criteria explored in the judicial politics literature, some of the factors within these four main categories can be partially in the control of test case litigants. For example, judicial politics literature explains the importance of repeat player status, providing information to courts, and case selection strategies (Galanter 1974; Songer et al. 2000; Yarnold 1995). I argue these strategies for litigants overlap through test case linkage with court effectiveness in both the framing and quality of legal reasoning in opinions, both of which might be provided by a court, if the court has the resources to do its own research and authority to do fact finding, or provided through submissions, evidence, information, and arguments presented by petitioners to the court.

Such examples, and many more, demonstrate that given the potential for test case linkage, the strong need to consider not only factors that states and courts control but also the contributions of test case advocates is present. In another example, political mobilization strategies suggested as important for test case success by judicial politics literature (Vose 1959; Yarnold 1995) and by transnational advocacy network literature (Conant 2002; Keck and Sikkink 1998; Tarrow 2005) overlap, once a favorable test case decision has been handed down, because of the need for the court to have resources to promote compliance or to ensure that decisions are enforced by private litigants or other parties.
My framework suggests that successful test case linkage is impacted by the ability of test case advocates to complement the pre-existing usage, financial resources, expertise, and compliance resources of the court and to fill any gaps in those categories. Further, my framework highlights that it is possible for test case advocates to fulfill at least some of these needs while fulfilling some of the same criteria identified as important for success for clients and movements. Thus, I argue that test case petitioners must not only be able to supply the means to have an effective test case to win at the court and to change norms through transnational advocacy network campaigns but may also find themselves obligated to fill in the gaps that may exist in courts, especially developing courts. If the gaps are too great and the litigants and their networks cannot fill them, the risk of negative test case linkage increases.

This chapter is divided into several sections that lead to my framework for the factors that I argue may lead to either a positive or negative test case linkage outcome. The first section explores the legal debates on effectiveness of international tribunal to glean an overall basis for my test case linkage outcome criteria. Since part of test case linkage is the success of the court, these criteria create a foundation from which to start, since a gap in one of these criteria may be a factor that has to be complemented by those who attempt to take test cases before the court. However, the literature on effective courts has focused primarily on factors in control of states, courts, or no one, so in the next section, I explore literature in which the factors for success that private litigants, NGOs, and TNANs have at least partially under their control are addressed. To do this, I draw from the overlap between court effectiveness criteria from the international courts literature, emerging literature that addresses private actors in international courts more directly, test case victory criteria from the judicial politics literature, and social movement success criteria drawn from the transnational advocacy network literature. I use the overlap of the literature to create a more comprehensive theory of factors under the
control of test case advocates that can contribute to a positive or negative outcome for test case linkage and analyze the potential interaction between court gaps and test case litigant gaps. As part of this discussion, I outline the obligations to the court that these test case advocate-controlled factors potentially place upon those considering taking test cases in developing courts. In the last section of this chapter, I outline in detail each of the four major categories of test case effectiveness criteria: resources as an interaction variable, usage, expertise, and compliance. With these four major categories, I develop a full framework for evaluating the factors that must either be provided by states, the court, or test case advocates in order to lessen the likelihood of negative test case linkage.

Court Effectiveness Criteria: Factors Controlled by States, Courts, or No One

My exploration of factors that contribute to a positive test case linkage begins by drawing from some of the effectiveness debates in the international courts literature, including some of the key factors that define “effectiveness” for international courts. Helfer and Slaughter’s (1997) extensive exploration of the European Court’s success begins by defining effectiveness as “the power to compel a party to a dispute to defend against a plaintiff’s complaint and to comply with the resulting judgment.” This definition focuses on state participation and compliance. They further note the drawbacks to relying so heavily on compliance as an effectiveness factor, including the difficulty with measuring compliance, the flaws in comparing levels of compliance depending on whether a treaty merely codifies the status quo versus a treaty that pushes boundaries, and the court’s purpose of providing insight and interpretation. Posner and Yoo (2005) define effectiveness primarily using usage of a court and compliance with its judgments, but they employ usage of a court more broadly as the overall number of cases before the court, not just the respondent state’s participation. I agree that broader ideas of usage and compliance are both critical components of court effectiveness. Therefore, I combine Helfer and Slaughter’s definitions of court effectiveness as state usage and compliance with
Posner and Yoo’s inclusion of usage by states or court petitioners as well as state compliance, to elicit the first two categories of factors that may be important in test case linkage effectiveness and are controlled in large part by states: usage and compliance. States control many of the usage and compliance factors noted by Helfer and Slaughter (1997), including the authority that treaties and decisions have, the membership of the court, the cases a court has jurisdiction to hear, and its ability to do fact finding (Helfer and Slaughter 1997).

Courts are not just empty filters that hear cases and enforce cases. Between usage initiation and compliance, the court must be able to adequately judge a case and write a decision that can lend itself to effectiveness. Helfer and Slaughter offer a separate term, legitimacy, to denote the ability of a court to gain support from states, and they discuss qualities of decisions and courts that may aid legitimacy. I argue that in a voluntary court, at least a minimal level of legitimacy is a necessary part of effectiveness, since state support—through at least continued recognition of the jurisdiction of the court—is necessary before participation as a respondent and compliance are involved. From Helfer and Slaughter’s (1997) analysis and that of other international court scholars (Alter 2010; Burstein 2006; Cavallaro and Brewer 2008), the legal expertise of the court is important, including such factors as knowledge of the audience, an understanding of the audience within the region and the domestic political situation, impartiality, their decision to be bold or incremental in style and the quality of legal reasoning in their decisions. I argue that these factors are likely relevant to test case linkage as well as court effectiveness. I offer the expertise category as including the factors listed above and suggest its refers to more than just legal expertise. Expertise for court effectiveness and for test case linkage efficacy, I argue, likely requires knowledge of the region and more general expertise in judicial discretion.
In addition to these factors given in the literature, I argue that sufficient financial resources are necessary for a court to be effective, and that a lack of sufficient resources exacerbates all of the other three categories that are likely to be critical for test case linkage success. The court itself must have sufficient funding to function as a court. I argue that resources are likely to be an important component of effectiveness for test case linkage given the likelihood that developing courts are likely to operate without sufficient support or that states that recognize the court may be resource poor and unable to support a court, to see the litigants with a higher likelihood of indigence if they are from a developing region. The courts in developing regions may be more likely to have significant resource gaps that make it more difficult to fill gaps in the factors that I have categorized under usage, expertise, and compliance.

Resources can come from a variety of sources, including individual states, the intergovernmental organization that supports the court, external intergovernmental organizational support, or private support. I argue that financial resources must provide for services of the court and that these may be especially important if the court has few coercive compliance mechanisms such as in voluntary courts. I argue that resources interact with many of the other factors because resources are necessary for just about any activity that a court is expected to discharge. Examples of the activities that require resources include usage activities, such as outreach to potential court users and staff to process cases; expertise activities, such as costs of fact-finding missions, sponsoring, or sending staff/judges to conferences, providing training for potential court users; and conducting compliance activities such as monitoring compliance with judgments. In other words, I argue that resources directly impact a court’s ability to support usage, expertise, and compliance effectively, and that without sufficient resources, gaps are likely to exist in all three of these categories.
Some factors that may influence outcomes are not factors that state or courts can fully control, but I argue that the potential negative impact of these factors may be dampened in cases where they are interacting with other factors. Helfter and Slaughter (1997) note that the nature of violations is not something that states or courts control. However, I argue that violator states do have some control over the nature of violations. More importantly, I argue that courts can take a different tact depending on the nature of violations, which in some part then relies on a court’s discretion, which I categorize as a type of expertise. Where egregious or urgent violations occur, a court may have to act more swiftly and more boldly. Yet the information that the court acts upon can be greater or lesser, its knowledge of the region and potential frames can vary, its knowledge of the situation on the ground (as noted by Cavallaro) may be increased, etc. Predictions that more minor violations will lead to easier effectiveness, however, have proven not always to be the case by the previous case study on the Caribbean violations. Therefore, a court’s expertise and discretion in how to deal with these cases is something that may contribute to the outcome, even on factors that cannot be controlled fully.

Urgency is a potential type of violation that is not easy to control; however, a court that has sufficient resources and procedures to deal with urgent cases is likely to be able to handle them more effectively. The types of domestic institutions can represent factors that a court cannot control, though arguably neighboring states have some influence. Again, predictions as to what types of domestic institutions will aid effectiveness of courts is not necessarily as clear cut as suggested by the literature. Helfer and Slaughter note this uncontrollable factor, but suggest that domestic institutions and rule of law lead to great compliance. This was the opposite of the case in the Latin America and Caribbean case studies, because other factors may interact and change the outcome of this factor, or at least suggest that it is more complicated than initially suggested. Lastly, cultural and political homogeneity represent a factor Helfer and Slaughter identify as not controlled by states or courts, but as noted above, some
expertise in how to frame a decision for various audiences (which Helfer and Slaughter note is in control of the court) may sometimes be able to dampen the impact, but to know the audience may require knowledge, information, and research that requires resources as well.

Table 9 shows the effectiveness factors explored in the international law literature categorized within the four categories that I argue are most likely to be relevant to the efficacy of test case linkage: usage, resources, expertise, and compliance. In each category, I have separated the effectiveness factors into those scholars have noted to be in the control of states (including states as members of intergovernmental organizations or as individual states), the court, and no one.

My framework in Table 9 identifies the four categories minimally needed for an effective court in a test case linkage situation, but it does not yet include the final column, which will add the factors in these categories that may be in control of test case advocates. An effective court is one component of a positive linkage outcome, but when test case linkage occurs, the court effectiveness factors on the chart overlap with, complement, and interact with factors that are important for a test case to be effective and factors that make a movement effective as well. I argue that it is in the overlap and interaction of these three types of factors that the factors needed for test case linkage efficacy can be discovered. Starting in the next section, I will explore the possibility that since these important overlapping case and movement effectiveness factors may in some cases be provided by external sources, including test case advocates, that these advocates contribute to the effectiveness of the court both directly and indirectly through supporting a positive test case linkage outcome. I will explore case and movement effectiveness factors noted in the judicial politics, TNAN, and international courts literature more specifically in later sections, where I will find the overlap between test case and movement factors under control of test case advocates, and then add them to Table 9 to create a more complete framework for understanding how test case linkage outcomes can be impacted by both court
effectiveness and the ability of the test cases and movements linked to the court to complement the
court by filling any gaps in the usage, resources, expertise or compliance effectiveness categories.
First, however, I will explore options for filling gaps at a court, which will lead to a discussion of how
external sources may end up being called upon to fill gaps at courts when test case linkage occurs, and
the benefits and drawbacks for the court (and future test case linkage) of reliance on external sources
such as test case advocates to fill gaps at a court, especially for a long period of time.

Filling the Gaps for Successful Test Case Linkage

When an international tribunal is deficient in one of the four effectiveness categories I outline,
whether in its control or the control of the state or no one, many possible methods may be utilized to
fill those gaps. In some ways, all courts have some inherent gaps, even successful domestic courts. In
the US and in the European Court, test case literature has noted the importance of follow up
mobilization by the petitioners to avoid constrained compliance (Conant 2002; Helfer and Slaughter
1997; Vose 1959). I argue that where the gaps are great and the stakes high, filling each of the gaps
may become more important for linkage success. Stakes are higher when the court is more likely to
have a strong test case linkage, such as when the court is new or moving into new regions or subject
matters. When considering use of the court for a test case, advocates may want to consider the court’s
potential gaps and the likelihood that they can be filled. This section explores different options that
may exist for filling the gap, and explains why in developing courts the answer has sometimes been to
rely heavily on external actors, particularly petitioners before the court, to fill those gaps.

If a court is not yet effective on its own, several options may be considered for filling gaps at
the court in order to increase the likelihood of positive test case linkage outcomes, but only one is in
the control of test case litigants. First, the possibility exists for having states or the parent
 intergovernmental organization of an international court increase the court’s legal authority and/or its
resources. Second, the court itself could defer more to the states it represents or be forced to do so by making the court more dependent as outlined by Posner and Yoo (2005). If these two or other ways are not possible or cannot fully fill the gaps, other external sources such as petitioner-led mobilization, as mentioned above, may be needed to fill the gaps.

*Table 9: International Court Effectiveness Categories Relevant for Test Case Linkage Efficacy: Factors Controlled by States, Courts, No One*

<table>
<thead>
<tr>
<th>Effectiveness Categories</th>
<th>States Parties Control</th>
<th>Court Controls</th>
<th>Not Fully Controlled by States or Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Usage Balance</strong></td>
<td>Formal access rules (jurisdiction &amp; standing)</td>
<td>Admissibility rules, reforms to procedures</td>
<td>Wild card cases (not submitted by Advocacy Networks)</td>
</tr>
<tr>
<td></td>
<td>Participation as respondent state</td>
<td>Outreach to potential court users (dependent on resources or domestic courts)</td>
<td>Urgency of case (violator state has control)</td>
</tr>
<tr>
<td><strong>Financial Resources</strong></td>
<td>Funding for court</td>
<td>How it uses funds</td>
<td>Level of development of region</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Legal aid</td>
<td></td>
</tr>
<tr>
<td><strong>Expertise</strong></td>
<td>Composition of court</td>
<td>Quality of legal reasoning</td>
<td>Nature of violations (procedural, systemic, physical integrity, etc.)</td>
</tr>
<tr>
<td></td>
<td>Expertise as respondent</td>
<td>Type of decision: judicial style, incrementalism, type of reparations</td>
<td>Urgency of violations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Framing and knowledge of domestic situation</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Impartiality</td>
<td></td>
</tr>
<tr>
<td><strong>Compliance</strong></td>
<td>Legal status of treaty and decisions &amp; authority granted to court to compel compliance</td>
<td>Monitor compliance</td>
<td>Domestic institutions for rule of law (democracy, judiciary, etc.)</td>
</tr>
<tr>
<td></td>
<td>Recognition of the court’s jurisdiction</td>
<td>Reports on compliance</td>
<td>Political and cultural homogeneity of region</td>
</tr>
<tr>
<td></td>
<td>Reaction to decision (delegitimize, constrain, ignore, enforce, etc.)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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Each of these solutions has pros and cons, and each lays the majority of the weight of the solution on a particular party. It is likely that some combination of each is likely to be the most effective. For purposes of discussion here, each option is discussed as its own separate solution to identify the potential benefits or drawbacks of each individually as they relate to court effectiveness in general and court effectiveness as it relates to providing a solid foundation for a positive linkage outcome. The likelihood of negative linkage outcome, I argue, increases the larger the gaps in the court’s effectiveness factors that remain unfilled during the court’s hearing of the case and following the test case decision, as would overlapping gaps in test case and movement efficacy factors discussed more below.

**Increase Court Authority and Resources**

One solution for the institution is for states to broaden the authority given to the court under its treaties and within the regional body, and to provide the court with sufficient resources to increase its likelihood of effectiveness. This could include specific changes such as providing for a full time court, enforcement mechanisms, or involuntary membership for members of the regional body. The benefit of these additional powers and resources is that the courts could hear a growing number of cases and, hopefully, garner more compliance and participation by states. The biggest problem with this solution is that it is unlikely to happen in a system where sovereignty is highly valued or where resources are scarce, both of which are the case in the Western Hemisphere and Africa. This solution requires states to be willing to concede more authority to a court and requires that they provide more resources. Therefore, the brunt of the weight in this solution is on the states. These states have a conflict of interest that arises with this solution, in that they are potential defendant states before the court, and that conflict may lead them to avoid granting more authority or resources to a court.
Increase Court’s Friendliness to States

Another potential solution is that courts could seek to make themselves more amenable to states so that more states would be willing to cooperate with the court. For example, courts could be “dependent” in that states choose judges for particular cases and different judges can be selected for future cases if the states do not agree with their handling of cases. Posner and Yoo (2005) promote this model, but it may not be practical for a human rights court, in which only one state is being questioned normally and judges need at least some provision for independence to give the imprimur of legitimacy when grave violations are at stake. Another strategy is to allow states more control to select friendly judges. Founding documents could be written to require that courts follow a margin of appreciation philosophy to give states latitude in how they implement treaty provisions (Burstein 2006) and avoid overlegalizing, or adding too much to the provisions states expected at sign on (Helfer 2002). Further, judges could be asked to consider domestic factors and the domestic political situation of each state in determining reparations.

States will be more likely to work with a court that it sees as friendly toward its concerns, and less likely to withdraw if the court is seen as being cognizant of the states’ interests. If taken too far, particularly in situations where grave violations have occurred, this could lead to allegations of being soft on human rights violations. I suggest that states could argue that even obvious violations of provisions of a treaty are not applicable, that the court did not allow it enough latitude, etc. An example of this is the frequent argument of the U.S. (among others) that treaties cannot require them to violate their own constitutions and that their own constitutions take precedent over treaty obligations. The US, for one, usually includes a reservation to treaties that states this principle. In other words, lawyers are adept at coming up with reasons why the violation is not in fact a violation and states can always balk at any decision as overlegalizing. This is addressed more in the alternative explanations in the case studies to follow, and I argue that overlegalizing may be something that is in the eye of the
beholder. The party hit heaviest in this solution is the court, which must be willing to back off on its decisions and be intentionally less bold.

While incrementalism and accommodation of states may be appropriate in cases that are more procedural, I argue that it may not be appropriate for a court dealing with grave violations, such as torture, disappearances, genocide, etc., to take a lenient stance or to give too much latitude to states committing such violations. Further, in some cases, the court is placed in a position to act in a manner that is simply going to irritate a state, such as is the case of the request for provisional measures not to execute petitioners before the commission serving as the impetus for Trinidad’s withdrawal. The court would have had to twist human rights standards pretty out of shape in order to reject the request.10 The court bearing the weight of the effectiveness of its institutions raises conflicts of interest in that the court may not wish to call out certain countries known to be heavier political weights in the region if it feels this jeopardizes it as an institution.

Increase Court Reliance on External Sources

Where a court is left with large gaps in its authority or resources by its founding organization, member states or it lacks expertise in the broader sense that I outlined previously in this chapter, it may end up relying more heavily upon external sources to fill those gaps. For example, within the Inter-American system, the court has relied directly upon funding from the Council of Europe and donation of its headquarters by Costa Rica, among other external funding sources. In addition to funding, the Inter-American court has informally relied upon NGOs and advocacy networks to a large degree, as is demonstrated by the case studies in the following chapters to fill in gaps in financial resources, expertise (especially trainings, research, experts, and staff time), outreach to potential court users, and monitoring and mobilization to support compliance with its judgments. This allows the court to

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10 Though Trinidad’s representatives did at one point propose to the Commission that Trinidad would be willing to pay reparation to the petitioners who were executed during proceedings but later found to have had their rights violated.
supplement its own resources and authority with the assistance of TNANs, individual NGOs and petitioners representing cases before it, and to maximize its effectiveness where these other sources are available to fill in gaps. However, I argue that this option lays much of the burden for effectiveness on petitioners, who may or may not be well-funded and connected TNANs.

Potential problems exist with heavy reliance on external sources, especially if the reliance outlasts an initial test case linkage and becomes institutionalized. First, if the court relies too heavily on external sources, the court can begin to seem less impartial (which is itself one of the named effectiveness criteria), and can be seen as an “external” body that is not respected within its region or by states. Second, if a court relies heavily on external sources for funding and support, it risks leaving itself vulnerable to not developing independent means to support itself. This can lead to what I label as an “institutional dependence” on an external “crutch” source. When faced with a case outside the subject matter or regional expertise of the external source, or outside the parameters of what that source will support (such as a type of case they do not support), the court’s gaps may be left wide open, leaving it vulnerable to backlash if test case linkage occurs. Third, reliance on petitioners in particular presumes that those whose rights are violated in the region have access to TNANs and NGOs with extensive resources to fill court gaps, including litigation costs, expertise, the ability to select cases carefully, and mobilization resources. Since not all victims will be well liked or well connected, it is hard to say that they can equally access resources. Nevertheless, in the beginning of a court’s existence, it may indeed be NGOs and TNANs doing the outreach to bring in cases if a court has few resources for conducting outreach and is not well known in the region. This may be to the court’s benefit if it means earlier cases will come more from better organized TNANs with connections at the domestic level and using international NGO resources. However, even these NGOs and advocacy networks that bring cases before a court may already have a conflict of interest between their
obligation to their individual clients and their movement’s agenda. Adding another layer of obligation to support and supplement the court is a heavy weight to bear and another level of potential conflict of interest, which I explore in more depth below. Further, in general, this leaves the most indigent and unpopular victims in regions who are likely to have the fewest resources to fend for themselves, which in some ways defeats the purpose of an international human rights court, since violations are sometimes made against the most despised members of society, such as terror suspects who may or may not have NGOs or TNANs willing to support their cases.

Test Case Advocates and the Effectiveness of International Courts, Test Cases, and Transnational Advocacy Networks

Within the political science and legal literature, much debate has taken place about what the respective responsibilities and agency of various actors is and should be in international tribunals, and more recent literature has begun to explore the significant role of NGOs and test cases in international courts. As noted above, much of the earlier literature had looked at the role of states, while studying the role of international institutions themselves. Legal and political science literature bring to light the agency held by international courts for impacting domestic and international policy as well as for affecting their own development. Others have noted that networks of government officials have formed across countries and between domestic and international officials and can exert great influence in policy changes both internationally and domestically (Slaughter 2004). Yet other scholars have begun to emphasize the role that non-state actors such as NGOs and transnational advocacy networks play (Keck and Sikkink 1998; Tarrow 2005), including their increasingly more active roles in the creation and use of international institutions to promote their own agendas (Clark 2001, Joachim 2003). Most recently, the literature has acknowledged the role that actors play in test cases and compliance with test cases (Alter and Helfer 2010; Cichowski 2007; Conant 2002), sometimes drawing
on literature from judicial politics’ studies of interest groups in domestic courts (Alter 2006; Conant 2002).

The role that NGOs and movements bringing test cases can and should have in the development and how much they should be relied upon to aid effectiveness of courts is even more important given the impact that my theory of test case linkage suggests that they may have on the success or failure of course when test case linkage occurs, as addressed in the previous part of this study. This is important because a full understanding of the obligations and implications of civil society within international courts must include an understanding of how their actions impact the courts in addition to their own cases and movements. In this section, I will briefly review some of the most relevant literature that has begun to address the role that civil society has in courts and the effectiveness of courts, which has focused primarily on NGOs’ roles as users of courts and as agents for compliance mobilization. I then draw from other judicial politics literature and non-test case literature about transnational advocacy networks to begin to outline the overlap between the potential skills and resources that civil society can use to succeed with test cases and movements and the court effectiveness factors outlined above. I additionally discuss three potential problems with courts relying, as the third solution suggested above, on test case advocates to bring these skills and resources to fill gaps for the court’s effectiveness in test case linkage situations, including the potential institutional dependence on an external source, the risk of relying on petitioners who may not always have the skills or resources to fill gaps in court effectiveness, and the potential conflicts of interests that test case advocates can face when they are, as I argue, obligated to consider the consequences of their cases not only for their clients and movements but also for the court. Therefore this section explores differing aspects of test cases both before the court and after it has rendered its decision that are under the control of test case advocates, courts, and states, and examine some of the factors under
control of individual petitioners, NGOs or TNANs bringing test cases that may be more likely to lead to the success or failure of the case, the movement, and, once linked, the court itself.

The Reality of Civil Society Agency

Much of the discussion in the literature of court effectiveness, until recently, had not included the potential control that NGOs may have, and more importantly, how much control they may have in regions in which significant gaps in a court’s authority, resources, and enforcement mechanisms may be found. Further, the debate over court effectiveness factors outlined in the previous section emphasized factors that lead to success for the court overall, but do not address how test case linkage may be involved in the determination of effectiveness, and therefore the overlap between factors controlled by states and courts, and those partially controlled by test case petitioners. I argue that these factors can complement those that are controlled by states and courts, especially when gaps in the resources, skills, and authority that the states and courts provide ensue.

Within the court effectiveness debate, much of the emphasis is on the factors controlled by states or courts, but even that literature included acknowledgement that private litigants in general have played a role in usage and compliance. Helfer and Slaughter (1997) recognize the role of private litigants as court users and to lobby states to leverage compliance, and in fact note that the findings from studies of ECHR and ECJ compliance rates “demonstrate[ed] the crucial role played by private parties in securing compliance with supranational court rulings” (p. 297). Despite this acknowledgement, they do not fully develop this finding into the criteria for effectiveness of the court, instead focusing more on state controlled factors, court controlled factors and factors controlled by no one. Within the court controlled factors, they again reference the importance of private litigants, as part of a court’s need to be aware of its audience, noting that the ECJ called to action individual litigants with landmark opinions that gave notice that it would protect individual rights, a practice used
by the ECHR (pp. 309-311). Yet the terminology they use remains that of the court “deploying” the individuals and NGOs to expand and support the reach of the tribunals and court usage (p. 312). This terminology de-emphasizes the prospect of court actions led by private actors and NGOs, and Slaughter (2004) later repeated this type of terminology in her study of government networks, in which she not only downplays the role NGOs have but also the role they should have, noting that she believed private actor-led reforms would lead to less democratic accountability than would be offered by networks of judges (or bureaucrats). Posner and Yoo (2005) acknowledge that interest group litigation may be an important part of increasing usage for courts, which is one of their key effectiveness criteria. Posner and Yoo (2005) point out that Helfer and Slaughter have not developed a theory of how such actors may impact the creation of international tribunals. They do suggest that theories could be posited that interest groups’ use of courts can lead to greater usage overall and more compliance, which are the two components they focus on in their definition of a court’s effectiveness. This debate overall, I argue, fails to recognize the breadth of factors that petitioners, particularly those that are NGO or TNAN-led test cases, can have on other areas of court effectiveness outlined above, including supplying resources and expertise in addition to usage and compliance assistance. Further, in order to tailor the court effectiveness factors to those that more specifically relate to test case linkage efficacy, I seek to explore the overlap between court effectiveness factors and those suggested to be most important for test case and movement success in order to develop my framework of overlapping, complementary and sometimes interactive factors that may contribute to the outcome of test case linkage.

Newer literature on courts has continued to expand upon the theories that suggest private actors can play a substantial role in international courts, although I argue that much of the literature has continued to focus more narrowly on usage and compliance factors that may be under private actor
control rather than expanding fully into other skills and resources they may be able to bring to fill gaps and improve odds of a positive outcome for test cases. Two studies of European movements illustrate this development of the literature. Conant’s (2002) European study focuses primarily on the impact of actors on compliance outcomes, but does note that resources and other factors can impact the ability of private actors to promote full compliance. Conant does address private litigant usage of courts, but notes that the EU does not have much support for organized cases brought by civil society. Because of that, she adds, in Europe government responsiveness has actually had to fill in “enforcement gaps” left by the lack of mobilized civil society organizations to enforce full compliance. These findings support my theory that states, courts, and non-state actors have to complement one another. The functions of usage, resources, expertise, and compliance have to be fulfilled, but different parties can bring those skills or resources to the table.

Mobilization of civil society movements and their resources to push compliance with court cases has been noted in other studies, and domestic mobilization is noted as especially important. In Europe less history of organizations using litigations strategies has been observed, but these strategies can be used to expand rights through test cases in international courts that then give organizations more opportunities for litigation in national courts and potential lobbying success in legislatures (Conant 2002). However, Conant (2002) argues, decisions can have greater impact when test case litigants have access to mobilization resources to take advantage of those newly created judicial and political spaces. This echoes the findings of even the earliest judicial politics studies (Galanter 1974; Vose 1959) and the importance of pursuing not only a litigation strategy but also having a mobilized political network to take up the cause after the court case is won. However, the political disadvantage theory from judicial politics notes that it is often those who have no current chance at legislative or executive action who turn to the judiciary, so those turning to courts can sometimes be those with the
least resources and political capitol, which may create a problem if a movement or court cannot connect with membership or other networks to create pressure after a winning test case (Conant 2002; Vose 1959). Conant’s study and the judicial politics literature find that resources are important in compliance strategies and litigation costs in general (Collins 2004), but they do not address the potential resource deficiencies of a court that may add to the resources needed by advocates to have successful test cases, aid their movement, and in so doing help the courts they may be linked with.

In the transnational advocacy networks literature, mobilization is a common and important theme in the study of positive outcomes for movements. Part of the definition of TNANs is that they are building channels of information and exchange between the domestic and international spheres (Keck and Sikkink 1998). Tarrow (2005, p. 200) notes the importance not only of mobilized networks, but domestic networks, since he finds that most transnational intervention fails because it is heavy handed, not properly framed for the domestic culture, and delegitimizes domestic partners. The TNAN literature has documented the tactics and techniques successfully used by organizations promoting movements, along with some of the obstacles that have caused them to fail, such as the domestic resistance to outsider ideas noted by Tarrow (2005). For test cases, I argue that these networking resources may be able to supplement the test case in the usage, resources, expertise and compliance categories through domestic NGOs or elites (Tarrow 2005) who can increase outreach activities to help find the right case, provide information for fact finding and monitoring (Keck and Sikkink 1998), and lay the groundwork for mobilization of compliance activities as well as for the financial, media and political support to broaden the campaign (Clark 2001). Despite a growing literature on the success of TNANs, most have focused on the positive potential for such movements, and most of the transnational advocacy network literature has not addressed test cases specifically, but rather has only recently been drawn upon by some of the studies mentioned above. This study seeks to further flesh
out the overlap in skills and resources of TNANs and those necessary for test case linkage effectiveness.

Some of the international courts literature has begun to take note of the potential impact that expertise of non-state actors can have on the effectiveness of international courts. A recent study by Alter and Helfer (2010) though focusing on the potential importance of external support from networks of judges, intellectuals and transnational epistemic communities, note that these supporters can be important both because they can mobilize broader support for a court and can lay the intellectual foundation for a court’s bolder decisions and exchange ideas through legal conferences. Although her piece focuses primarily on private litigants as court users, Alter (2006) draws upon domestic judicial politics findings that interest groups can be repeat players whose expertise can help them be effective court users, as does Conant’s (2002) study though it focuses on repeat players as a factor in what makes mobilization for compliance more effective after a court’s decision has been rendered.

Expertise factors, I argue, can draw upon similar skills from the TNAN and the norm development literature. In this literature, norm entrepreneurs use techniques such as framing issues close to well accepted norms to increase the likelihood of a movement’s success (Busby 2007; Finnemore and Sikkink 1998; Joachim 2003). All of these potential expertise skills will add to my framework of factors potentially under control of private litigants that I argue can complement or fill gaps in a court’s expertise. Before any of these factors and those related to usage, resources, and compliance can influence the outcomes of a court or test case’s effectiveness, or their joint effectiveness as a test case, organized interests have to have access to courts in the first place.

**NGO and TNAN Access to Courts**

NGOs and transnational advocacy networks have been active participants in international courts since their increase in existence in the 1980s and 1990s, and their level of access continues to
grow. Charnovitz (2006) mentions that NGOs have “exerted a profound influence on the scope and dictates of international law” (p. 348). He recounts the long history of NGO participation in international law, noting their direct involvement—even as early as the 1910s—in women’s groups at the 1928 Pan-American Conference. Charnovitz describes the recognition of NGOs in a 1905 treaty creating the International Institute of Agriculture, and explains that the Red Cross was specifically mentioned in the 1919 Covenant of the League of Nations. Clark (1998) notes that in the 1980s, the idea that third parties, such as Amnesty International, would change state behavior through international institutions was still a relatively new idea, but the growing number of TNANs focusing on human rights doubled from 1973 to 1982 and continued to grow at that pace in the 1980s (Tarrow 2005, p. 188). These organizations have continued to gain more and more access to international institutions, and the more they gain the more they push to gain even greater access (Cichowski 2007) and the more they are able to permeate organizations as they change their rules (Hawkins 2008).

Given this long history of and growing participation in international institutions, it is unlikely that NGOs will be forced out of international law or relegated to much lesser participation in the near future. Thus, Posner and Yoo (2005) conclude it is important for theories of international courts to address the very real agency that they have in order to examine the pros and cons of this participation and to ensure their role is accurately accounted for when attempting to reform or expand these courts. Further, I argue that advocates themselves need to understand the functions that they play within the court and how they can impact the growth and development of the court, and not just the movement itself. They need to understand how their role is affected not just by access rules, but by varying amounts of resources and skills that they are asked to bring to the table by various courts due to potential gaps in resources The size of these gaps for each court can vary as much as formal access
rules do, and with the growing trend toward greater access, greater reliance on these private actors to bring resources and skills to complement the institutions may grow.

Several scholars have analyzed the access that formal legal rules have allowed for NGOs in various systems. For example, Lindbloom’s extensive book on NGOs in international law gives a comprehensive, almost encyclopedic description of the formal legal access provided for NGOs in various systems (Lindblom 2005). Treves et al.’s (2005) edited volume raises the question of the role of civil society in compliance bodies and the creation of the ICC, and includes a variety of studies presented at a conference on the same topic. Many of these pieces focus on the formal legal avenues available to NGOs and reforms needed to broaden them, though some have addressed informal roles as well. In particular, one study related to the permeability of international institutions offered greater insight into informal avenues that NGOs can even use to continue expanding their roles within the organization (Hawkins 2008). Hawkins explains the permeability of an international organization using three factors: 1) the range of third parties with access; 2) the level of decision making where access is granted; and 3) the transparency of the organization’s information to the third party (Hawkins 2008). I contend that courts are somewhat unique, since non-state actors not only have access to decision makers, but can sometimes act as agenda setters, since they become formally empowered in some cases to set the agenda for the court through their choice of cases and frames through liberal standing rules.

Standing rules are formal rules that determine who may file a claim before a court, and they are usually controlled by states and intergovernmental organizations that write and ratify the basic treaties that create international tribunals. It is somewhat controlled by the interpretation of those rules by the tribunals themselves, and to some degree by the informal influence of NGOs behind the scenes. Standing rules can vary from very restrictive to extremely open. First, they could be limited to
individual victims and their individual representatives. In these cases, the case would only apply to actual victims and their specific cases. A broader range of access might include suits brought by civil society, where the case is brought with a victim but represented by an NGO that may be acting alone or as part of a broader TNAN. Further broadening the actors allowed to participate could include *actio popularis*, class actions, or other suits brought by civil society to represent victims’ claims en masse.

Some courts permit cases brought by a civil society group that has direct ties to a victim and act as that victim’s representatives. This is the case in the Inter-American system, where the Statute of the Commission states that “any person, group of persons or NGO can lodge a petition alleging violations by a state party” (Aceves 2003, p. 380). In the Inter-American system, NGOs are defined as any civil society group recognized by any OAS member state. Even this minor broadening of the rules of standing from individual only to allowing civil society representation allows for test cases to be filed by a movement, so long as the movement has ties to victims, such as through ties through domestic NGOs.

Not all international courts can take every individual case, particularly courts in developing parts of the world where resources are limited for the court itself as well as victims. Even if victims in a developing country can find the means to bring each of their individual cases before an international tribunal, the court must have the resources, even just the time to schedule hearings on a limited budget, in order to process those cases. If the court cannot take every case and not every victim has access to the resources to bring their case, such considerations are inevitable. In a system where perhaps a multitude of similar cases may be able to filter through the system due to increased resources and staff, such focus on the individual case may work, but is likely to lead to very large quantities of cases on a court’s docket, such as the numbers seen in the European Court of Human Rights. This quantity of
cases would shut down or at least be harder to process by courts in regions such as Africa and Latin America or other courts where resources and staff are limited.

Perhaps for these reasons, courts in developing regions have allowed more liberal standing rules. The African system goes even further than the Inter-American system and allows what is fairly close to *actio popularis* and has had cases filed by an American University law school clinic with little or no connection to the actual victims. One legal scholar blames these broad standing rules for what she sees as poorly managed, student-led cases (Crow 2005). Her arguments point out that if anyone can file a case, more poorly developed cases may be filed, and then set a bad precedent, or if precedent is not followed in a particular system, at least discourage similar victims from filing in the future after seeing a loss at the court by other victims. This may especially be true without well developed, regionally based legal NGOs. In recent years in the Inter-American system, the court has drawn a balance between *actio popularis* and shutting out civil society, and has allowed claims of “systematic abuses” and collective rights suits for indigenous groups (Aceves 2003).

Unfortunately, problems have arisen in the Inter-American system when standing rules have been broadened, and I argue that these problems may indicate that the court has gone too far in relying on NGOs to fill a gap in its own ability to do outreach to communities and domestic courts and in allowing large consolidated cases to move through the court, a measure that saves time and resources but may miss out on some important parts of cases. For example, the lack of screening of the NGOs claiming collective rights in Inter-American cases has been criticized after findings of direct financial conflicts of interests for some of the NGOs involved (Crow 2005). Aceves (2003) suggests that screening procedures to avoid these conflicts could be established in international courts in a manner similar to the class action screening done in US courts to ensure commonality among the violations involved and that the representative complainants are typical of the class and adequately represent the
class, including that the representatives are competent and have no conflicts. In the Inter-American cases used in the empirical aspects of this study, the commission still had the authority to determine which cases went to the court. In the Caribbean cases, the backlogs created by the extensive use of individual cases in a system with few resources led to threats of death warrants by Trinidad and to the commission’s mass filing for both provisional measures and later consolidation of large numbers of cases on the merits. These mass filings led to less ability to frame a sympathetic case or highlight a human story within the cases. Similar findings in the domestic judicial politics literature in the United States noted that the broader standing rules in US courts in the 1960s and 1970s led to more interest group access and a great increase in interest group led cases (Scholzman and Tierney 1986).

This study’s findings of test case linkage suggest that courts may want to wait until they are past critical junctures before they broaden access to allow individuals and NGOs to choose when to file cases or allow mass filings, since they are more vulnerable to strong linkages early in the court’s development. They may be less open to a strong negative linkage if they wait until they not only have time to get past some of the early critical junctures (such as going into new regions or having little previous jurisprudence) that can make strong test case linkage more likely, but also until they are sure they can fill the additional resource and expertise burdens that such cases may place on the court if brought by litigants who cannot fill the court’s gaps on resources, expertise or compliance factors or who cannot carry the full weight of their own litigation costs.

**Institutionalized Dependence**

As noted previously in this chapter, I argue that test case linkage effectiveness is affected by the ability of a complement of state, court, and private sources that can fulfill the effectiveness factors that courts need to succeed combined with the factors that test cases and related movements need to succeed, including factors related to usage, resources, expertise, and compliance. If the court or test case
litigants have gaps in their ability to fulfill one of these factors, which will be detailed later in the
chapter, and the gap remains unfilled, a negative outcome for test case linkage becomes more likely.
Over the course of a court’s existence, if strong linkage occurs early on and is negative, this could
mean that the court fails to develop at all. If, however, a court finds a private source such as a TNAN
related to a test case with a positive linkage outcome to provide its own resources and is able to help
fill substantial gaps in resources, expertise, or authority that the new court has, the court may begin to
rely on the movement in future cases. In the case of the Inter-American system, the initial court cases
were backed by the anti-impunity movement, which was connected to a TNAN that desired a venue
where it could continue to seek justice since the courts in Latin America were still underdeveloped.
Over time, however, if a court begins to rely on a particular “crutch” source to fill some of the gaps in
usage, resources, expertise, and compliance mechanisms that are required for its effectiveness and that
of the cases before it, a dependent relationship can develop. I argue that a court that develops such a
relationship may atrophy in its development and be unable to become fully independence from that
organization. This “institutional dependence,” I theorize, might lead the states, intergovernmental
organization, or other superior institution that would otherwise be expected to provide some of those
resources as the court grows, to fail to do so if the court seems to have success without additional
support. The court can grow to have a larger docket than was ever intended, and/or develop in
directions that the original founding states are unhappy with and will not want to further support if
support is withdrawn or diminished from the external crutch organization.

Systemic resource gaps can be a factor that can exacerbate the court’s reliance on a narrow or
centralized group of organizations or a TNAN to provide resources, expertise, usage, and compliance
mobilization for the court. For example, in some cases, resources to bring cases before a court are
already provided by the international institution, the court, or its member states. As more resources are
provided by the system or member states in the beginning of a court’s development, less resources will be needed to be drawn from private sources such as civil society. In a comparative, cross-national study of the UK, it was a government commission that took cases to the European Court of Human Rights (Epp 1998). However, Epp notes that where this type of assistance is unavailable, such as in India, it is civil society rights groups that must provide these resources. The judicial politics literature and international courts studies, such as Conant’s (2006) and Cichowski’s (2007) studies of Europe note that either government or organizations have to be able to provide resources for mobilization and enforcement efforts, and not just for initial litigation costs before the court. Overall, I argue, the analysis implies that where the court or member governments provide more resources for legal costs and enforcement assistance, the court will be less reliant on civil society sources.

Though the gap in resources can be filled in many different ways, after the rise of international NGOs noted earlier in this chapter, this gap is likely to be filled in many cases by activists with NGOs and TNANs seeking to promote their causes. They seek out clients and provide information and expertise to individuals with complaints. Depending on how many NGOs are active in the system and the role of domestic NGOs and domestic private lawyers, the gap may be filled by decentralized groups working in coordination with particular domestic groups or it may be filled by one key NGO. An NGO that begins working in a system with a large resource gap and few domestic NGOs and domestic private lawyers working in the system would be able to centralize resources, expertise, and information necessary to access the court, thereby exercising a gatekeeping function, especially for individuals in the countries with the least resources. After a successful test case, an organization can expect its name to become more widely known in the region and among domestic NGOs, leading to the organization being contacted by more domestic NGOs and victims seeking assistance if alternative domestic and/or private resources are available to them. This notoriety offers the organization even
more ability to pick and choose test cases and to define the court’s agenda further through this informal
gatekeeping function, especially in systems like regional courts where the court cannot seek out its
own cases but rather waits for cases to be filed by victims.

In the IACHR, among cases from the less resource rich Latin American countries, a far more
centralized group of NGOs exists. Particularly the Center for Justice and International Law (CEJIL)
and a few key university clinics provide not only assistance with representation before the IACHR but
coordination of training for lawyers and the distribution of materials related to the IACHR. In order to
fill the gap in resources, CEJIL developed. They have connections to a large number of cases that go
before the Inter-American system. Even within one system, resources may differ depending on the
countries involved. For example, cases coming before the Inter-American Commission from North
America (neither Canada nor the US recognize the jurisdiction of the Inter-American Court) are often
brought by individual lawyers, smaller interest groups, and others. So a system can develop a more
centralized system for certain areas and not others. In the Caribbean, the lawyers who began
representing clients on death row were without government or court aid and had formed a pro bono
referral panel with law firms in London to represent inmates before the Privy Council in London.
They later created Death Penalty Project is still lacking some of the resources of an organization like
CEJIL, has a broader focus than just litigation before the IACHR, and is no longer focused specifically
on the Caribbean (the organization now works extensively in Africa as well).

One positive aspect to a centralized, focused organization that works on a large number of the
cases within the system is not only that it can fill the resource gap to find victims and bring their cases
to the court, but it can also lead to expanded training for other NGOs. Smaller NGOs may lack the
resources to hire trained international lawyers, and many countries may not have the resources to offer
international legal training in domestic law schools. The central NGO can offer direct assistance to
NGOs who wish to bring cases before the court. Indirectly, the central NGO, with assistance from universities, bar associations, and larger NGOs, can host training seminars, sponsor moot court competitions, and even coordinate LLM programs for lawyers. These can be partially sponsored by intergovernmental organizations and the court itself, but in the Inter-American system this has often been provided through CEJIL and American University.

I argue that an extreme institutional dependence upon a crutch organization, whether an NGO or other external source, can lead to inefficiencies in the system and regulatory capture. The concept of regulatory capture is most often discussed in reference to industries that would have the resources to fight a policy or the compliance with a court’s decision. Regulatory capture is defined as a group of interested parties with high stakes who therefore focus their resources on an issue, while most normal members of the public who are not as affected individually will not have enough interest to motivate them to put their resources into the fight (Conant 2002). This lack of action by most but focused action by the industry leads to a capture of staff or commissioners, who are being pressured by the side with focused resources. This tends to lead to this side’s interests being implemented.\[11\]

With respect to regional courts, regulatory capture can mean that the commission and/or court is “captured” by a particular NGO, on which the system relies for a steady stream of cases, legal expertise, trainings, and in some cases as a source for future staff members or commission members, a concept known as the revolving door. Revolving door tends to happen when expertise is limited to a small group, since commissions and agencies, when putting together experts, must turn to those who are current or former members of the industry, in this case regional human rights lawyers. This is a small group of people in a developing system that has a limited amount of its own resources often from the central NGO or within its network.

I argue that if a system in a particular region or subregion has become so institutionally dependent that these types of regulatory captures exist, the system can evolve more toward some interests than others and block out the needs of victims who are not connected to the central NGO or upon whom the central NGO does not focus its efforts (victims with more minor violations or violations of a different nature, etc.). This narrowed interest can lead to a lack of adequate diversity of cases at the court and keep the court from meeting its goal to promote all of the rights in its originating treaty. If a case falls outside the central NGO’s preferred norms, it will be less likely to succeed in a system that never sought the resources to develop its own independent enforcement and monitoring mechanisms, research and fact finding resources, or adequate case selection processes, due to the reliance on the central NGO’s ability to carry out some of the court’s functions. These functions include things like filtering cases, preparing suitable arguments for the region, publicizing the court’s decisions, and coordinating appropriate mobilization within the region.

My theory of institutional dependence suggests at least three potential downsides to the reliance of a court on an external source, such as the supporter of test cases before the court, to fill gaps at the court during the court’s development above and beyond their own case’s expenses and expertise. First, if the court’s relationship with NGOs or TNANs becomes institutionalized, as I argue it can, then its reputation may be impacted by its close association with those who present cases before it, leading to a loss of the appearance of impartiality, which is one of the factors noted to affect court effectiveness positively. Regulatory capture can be a further concern if the relationship persists over a long period of time, which can raise particular concerns if a private organization is the crutch, since some critics argue that private organizations are not as accountable as governments, intergovernmental organizations, and other public institutions. Second, if a court becomes dependent on particular sources of support but the court is faced with cases before it that are not supported by the crutch
organization due to lack of expertise in the subject matter or region involved, because the crutch organization is opposed or apathetic to that type of case, or because the does not have the ability to aid or control the petitioners in the case, the court can be vulnerable to negative outcomes on a case, which can be heightened if the case comes at a time when the court is likely to find itself strongly linked to the test case, such as when the case is the first from a region or on a particular topic. Third, even if the petitioners bringing a particular case that becomes linked to a court have the resources and expertise to bring the case and fill gaps in the court’s effectiveness factors, they may have conflicts of interests that override their ability or desire to help the court avoid a backlash. I will discuss each of these three potential pitfalls for institutionalized dependence and how they relate to test cases before courts that have the potential to lead to linkage.

Impartiality

Although private organizations and civil society have long been participants in international organizations and the development of international laws, some scholars have expressed skepticism about whether they should be relied upon so much by international institutions. Slaughter (2004) is one of the most outspoken skeptics of the idea that private actors should share a role in global governance and observes, quoting conservatives such as former Secretary of State John Bolton,12 the erosion of the line between public and private and between governments and civil society’s interests. Slaughter recognizes the international networks’ move toward having private actors perform more government functions, such as monitoring and regulating, but questions whether this is desirable, since private actors cannot be held accountable. They are not obligated to “uphold the public trust”

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12 Former Sec. Bolton is known for his lack of enthusiasm for international organizations as well as international civil society and has noted his skepticism of the UN and its bureaucracy as. “The United States makes the UN work when it wants it to work and that is exactly the way it should be,” he notes in a speech from February 3, 1994. He went on to say in a discussion of the 50,000+ bureaucrats at the UN that it has been put in the position of “hiring ineffective people who do ineffective things that have no real world impact.” (Excerpt from John Bolton speech, http://www.democracynow.org/2005/3/31/john_bolton_in_his_own_words, accessed Feb. 12, 2012)
(Slaughter 2004, p. 9). Rather, she argues only those with the passion or expertise in an issue area can lead participation in governance. Average citizens, Slaughter argues, are better represented by government networks or linkages between bureaucrats from various governments who specialize in a particular issue. These bureaucrats “must represent their different constituencies, at least in a democracy; corporate and civic actors may be driven by profits and passions, respectively” (Slaughter 2004, p. 10). While this is likely true in an ideal case, I argue that many countries are not democratic, and even in a democracy, the delegates for that state may not provide adequate representation of their minority populations’ concerns. However, Slaughter’s discussion of the potential for lack of accountability when private sources are relied upon is a valid point that must be addressed particularly in the case of these private sources becoming a crutch for a court lacking the resources, expertise, usage, and authority needed for being effective without relying on a private source.

In some cases, private groups may be able to meet their own goals without providing all of the factors necessary for the court to have a positive outcome from linkage to that test case. These do play into Slaughter’s (2004) concerns about placing too much control in private hands. Slaughter’s criticism is backed up by recent reports that NGOs in some cases have become overly partisan, which does portend a possible negative side to granting so much NGO access and control within international institutions and courts, and a lack of one thing that most effective courts purport to have: impartiality. Crow (2005) refers to this problem within human rights NGOs, noting the emergence of more and more partisan NGOs, whose agendas erode the credibility built up by longstanding human rights organizations, many of whom may have spent years cultivating their non-partisan credibility, such as Human Rights Watch and Amnesty International. Through test case linkage and relying on petitioners such a NGOs or TNANs to fill gaps for the court’s effectiveness, the court risks losing its impartiality
if the NGOs it relies upon are not seen as neutral. Even if they are fairly neutral, states deciding to use
the court may not believe that.

I conclude that the merits of arguments against the reliance on a centralized NGO-led source
for cases could cause a court to be seen as biased, or as noted above, possibly even captured by the
NGO to the extent that it is no longer trusted by states, or at least is regarded with some skepticism. If
the NGO brings most of the cases, offers most of the trainings for lawyers in the region, promotes the
court’s cases, etc., it can cause the court’s reputation to be tarnished and lose its goal of impartiality,
which is one of the effectiveness criteria factors. The same could be true if a state were the biggest
supporter or donor to the court. In the Inter-American case, perhaps Costa Rica who gave the court its
seat, though they’ve called themselves before the court, unsuccessfully, so they’re not seen as using
that influence to avoid accountability. Further, support from other regions, such as Europe, may give
the impression that the court is not truly a regional court, but rather one imposed by external sources,
which Tarrow (2005) notes can lead to failed movements and, presumably, negative test case linkage.
The recent discord with Venezuela has called into question whether the Inter-American system is
impartial, for example, though the implication in Venezuela’s statement implying that the US
government is in control rather than US-based NGOs. (See Venezuela’s statement accompanying its
withdrawal from the ACHR.)

Unable to Fill Court’s Gaps

I argue that another problem with institutionalized dependence is that those representing a case
may simply not be able to provide all of the resources or expertise necessary when the system becomes
too reliant upon private actors bringing cases before international courts to fulfill the court’s
effectiveness criteria using their own resources. Taking cases before an international court come with
many costs, and many courts are unable to provide financial resources upfront, even if they do allow
petitioners to ask for litigation costs as part of the reparations phase. Litigants must therefore come up with resources on their own unless the court provides legal aid. These can be extensive and include attorney fees, research costs, witness and attorney travel costs, expert fees, etc. The cost of a case brought before the Inter-American system costs approximately $80,000 in litigation, not including costs for mobilization for compliance, domestic litigation, lobbying to enforce the court’s judgment, or the costs to pursue compliance procedures at the court if the state fails to comply (CEJIL 2012). Many victims in human rights courts are supported by NGOs, either domestic or through TNANs CEJIL (2012). But not all victims have access to that support, particularly if they are outside of the scope, expertise, region, or preferences of the main TNANs or NGOs that have supported the system.

Because of test case linkage though, test case litigants in developing courts may need to fill in resource and other gaps for the court in addition to providing for their own case costs. The extent to which resource interact with other factors, such as usage, expertise and compliance for courts and the success of test case linkage is addressed more extensively below, but the central argument that I make is that when a court relies on external sources to fill gaps, it leaves itself vulnerable to negative outcomes for test case linkage in the future when a case comes before it that is not supported by or fully vetted by the crutch organization.

**Conflicts of Interest for Test Case Advocates Between the Individual Client, Movement, and Court**

Reliance upon NGOs and movements to make up for inadequacies in a system creates a potential conflict of interest for movements, which already face a conflict between their movement and their individual clients. When taking a case before the international system, the movement’s legal advocates represent not only the particular victim(s) of human rights violations named in the case but also the movement itself. The legal literature has outlined how test cases raise an ethical and strategic dilemma for attorneys and representatives of victims of human rights violations who are
representatives of a movement. However, I argue that the dilemma for international legal advocates working on test cases for advocacy networks is even more complex because of linkage, especially in systems where shortages in authority or resources exist. They must achieve a balance between obligations to represent their individual clients and obligations to promote their movement as well as indirectly balance those two obligations with an obligation to the very venue with which they file their case. This obligation exists because cases can impact the development of the human rights systems to which they bring their cases. I will address the dilemmas that advocates face in the next section.

The Test Case Advocate’s Dilemma and the Third Level of Obligation to the Court

I argue that the test case advocate in an international court has an additional level of obligation to consider: obligation to the court if a risk of test case linkage between the test case and the court is present. This obligation makes an already hard job more difficult. As advocates for the individual client, the legal advocates must make every effort to advocate fully and zealously for their client’s interests. In many cases, those interests overlap with the overall objective of the movement. In those cases, tying norms to real cases can make a difference for the victim and the movement at the same time (Clark 2001). A victim whose right to a fair trial was violated wants to be released from prison or given a new trial. The movement for fair trial rights wants the rights of defendants to be legitimized by the court’s decision. These interests overlap and can be advocated for jointly. During the case, advocates must sometimes balance their own objectives as members of a movement with their obligations to their clients. For example, the attorney as activist for the movement may want to refuse a settlement offer (perhaps a release from prison with a monetary award) in order to take the case to trial and to gain a precedent-setting legal decision and wider media coverage. However, the attorney as advocate for the individual client might know that the client is better served with the generous settlement. This reasoning has been questioned based on the idea that representatives of victims have
an ethical obligation to do what is in the best interest of their client rather than in the best interest of a movement. Victims may want damages, reparations, or individual justice for loved ones or other losses, while a movement may be looking to raise awareness, lessen the likelihood of future violations, promote norm development, or broader accountability of the state for similar violations. This conflict is the classic case of the advocate’s dilemma between the obligation to the individual and the obligation to the movement. When broader access is allowed, these conflicts can become more pronounced, and some argue that this draw toward broader movements takes the system further away from the focus on what is best for each individual victim before the court (Crow 2005).

In every test case, lawyers have to weigh their ethical obligations to their particular client and the movement that they are hoping to promote with that client’s case. In international human rights law, as Weissbrodt notes, when a specific victim is included in a test case, human rights can be the real client (as cited in Crow 2005, p. 1127). He argues that movements and NGOs should consider whether they have a realistic chance of winning or if they will merely lose on a case with bad facts, and that they should not take cases that will set a bad precedent. Crow, on the other hand, questions whether it is possible for lawyers to know realistically if they have a chance to win. Further, though not discussed by these scholars, since international court decisions are not enforced by the courts and governments, Weissbrodt’s argument that movements should avoid loser cases should be extended to cases that win at court but have no chance of actually changing the behavior of a state (Crow 2005).

Whether the loss might be in court or in lack of compliance after the court renders a decision, representatives of victims are usually argued to have an ethical obligation to do what is in the best interest of their individual clients rather than in the best interest of a movement. Victims may want damages, reparations, or individual justice for a loved one or other loss, while a movement may have broader goals (Crow 2005). The movement may be looking to raise awareness, for example, and even
bad press, such as losing the case or the client being left to languish in jail, may be better than no attention to the issue at all. An example of this type of conflict is the case of Roe v. Wade, where the case’s appeal to the Supreme Court meant that the named plaintiff had to wait so long she had given birth before the court ruled on her right to an abortion. She could have secured an abortion in another jurisdiction had she not been involved in the appeal. The movement might be in conflict where the suffering of one person might lessen the likelihood of future violations more if they continue their appeals and get a precedent rather than taking a generous settlement offer. Conflict can occur if promoting norm development or broader accountability of the state for similar violations is not the goal of the victim, who may simply want a monetary award or their freedom. Consequently, the balance between client and movement is something that many lawyers and courts have dealt with for test cases and class action lawsuits in domestic jurisdictions for decades. Legal ethical codes have been developed, and could be developed more in depth for international lawyers; informed consent could be secured from victims to ensure that they understand their rights and the risks of conflicts; and even education and training could be given to victims by the court (Crow 2005).

As if the balance between a client’s interests and the interests of a movement were not difficult enough for a legal advocate, I argue that taking test cases before developing international tribunals, especially voluntary ones, raises an even more complicated dilemma because of test case linkage. My theory of test case linkage suggests that where the court may become linked to the fate of the movement and the ability of the test case advocates to fill gaps in the court’s effectiveness criteria, the level of obligation to the court itself is heightened. As shown previously, test case linkage is likely to occur when advocates use the court as a venue for a test case and the court is new or at a critical juncture (as described in Chapter 3). If they win the test case in the court, the case can link the case to the court. If reactions toward the movement’s case are negative from states in the region, a backlash
against the court can result because of its connection to the ill-received case or cases. States reject the case, the movement, and the system as a package. In some cases, like Trinidad and Tobago, this can mean the victim’s interest is rejected. Such was the case with Anthony Briggs, whom the Inter-American Commission found should have a new trial, but Trinidad executed instead. It can mean the movement is rejected, as was the case in the Caribbean where other states continued to retain the death penalty and give out mandatory death sentences (though the mandatory death sentences have been abolished in some jurisdictions over recent years). It can lead to rejection of the system as well, as was the case with Trinidad, which withdrew its recognition of the Inter-American Court and denounced the ACHR. Even if the advocates are able eventually to find resolution using the courts decisions in domestic judicial venues, the initial backlash can linger in the political sphere and preclude the court’s growth in the region for years to come. The implications of test case linkage raises the stakes of the international advocate’s dilemma, both regarding considerations of the needs of individual victims, potential future victims, and the movement and considering the possible consequences for the system as a whole, if they are not able to provide a well prepared, well supported case and fill any substantial gaps in the court’s authority, expertise, and resources.

I argue that some private actors within the system may have a stake in ensuring that they have the international court remain available for their cases. Repeat players within the system, or potentially repeat players, are more likely to benefit by tailoring their cases to achieve their goals without causing backlash on the court, since they are likely to want the sympathetic venue to remain open to them for future cases (Hansford 2004). Discussion of venue loyalty on the part of those bringing test cases and its implications for long term external support for a court with which a case has been linked has not been fully addressed in the international courts literature. However, this consideration by both advocates and the court could lead them to not address or ignore cases that might
need attention the most, such as those by outcast groups, the most indigent in a society, and those who are least able to mobilize. Consideration, however, could be given to whether to take those when a court is at a critical juncture, such as when it is the court’s first cases.

I argue that international advocates need to be conscious of this dilemma, even if no method to satisfy all three conflicting interests can be achieved. The three levels of obligation for a test case add an additional layer of obligation on advocate before an international tribunal, especially a voluntary tribunal. Ethically, legal advocates must consider their individual client’s interests, especially where that involves life or death or the freedom of the victim, as was the case in the Caribbean death penalty cases in which the individual litigants had an incentive to delay their cases (see also Helfer 2002) by using the slow procedures of the Inter-American system (at least until Trinidad started executing the petitioners anyway). Those concerns may very well have to override all other concerns where the urgency of the cases requires it. If the case is not life or death or similarly urgent for the individual victim’s safety, then advocates must employ the best strategy for client and the movement, and clients themselves may become invested in the movement through education about the long-term implications of their case for the behavior of states toward themselves and their communities (Crow 2005). Once those obligations have been met, advocates can then consider the benefits or drawbacks their case may have on the development of the court. Then they can take any steps that they can without jeopardizing their case to mitigate the aftershocks for the tribunal, or to fill the court’s gaps in resources, authority, or expertise that may make their test case dangerous for the court’s future in the region. These considerations are condensed in the following chart showing the pros and cons of focusing more on a particularly level of obligation and some of the potential consequences for the court, the movement or the individual client:
My framework developed more below suggests that many test cases success factors and court effectiveness factors overlap, such as the art of framing a case and finding a case with good facts to fit the frame, which could also help a court’s perception if linked to the case. The idea of framing has been discussed at length in judicial politics literature and has been applied to international movements as well (Busby 2007; Finnemore and Sikkink 1997; Joachim 2003, 2007; Tarrow 2005). For example, test case advocates can tailor a case that is likely to be ill-received by framing it around a cultural or religious concept that is highly regarded in the region, such as the appeal to motherhood and family that was emphasized in the Mothers of the Disappeared movement. Rather than emphasizing that their sons may have been union leaders or activists, they emphasized the pain of their mothers’ losses. Sadly, however, even with bad facts, some movements may need awareness raised about their issue so much that they are willing to risk badly framed publicity, which might be better than no publicity at all. This risks setting in motion, however, a countermovement by giving them a catalyst to mobilize, to use as a frame for their countermovement, and to decertify the norm and potentially any linked courts.

<table>
<thead>
<tr>
<th>Focus</th>
<th>Pros of focusing on that level</th>
<th>Cons of focusing on that level</th>
</tr>
</thead>
</table>
| 1\textsuperscript{st} Level Obligation to Client | Stop abuse or injustice  
Fulfill zealous advocacy and ethical requirements | Urgency can override other levels of obligation  
Wildcard cases with bad facts |
| 2\textsuperscript{nd} Level Obligation to Movement | Promote broader norm  
Publicity for movement/catalyst  
Compliance goals overlap with court | Sacrifice client’s best interests for sake of movement  
Bad publicity for movement may be seen as better than no publicity even if harmful to court |
| 3\textsuperscript{rd} Level Obligation to Court | Promote sympathetic court for future cases | Discourage the hardest cases from being taken to the court; not address the hardest issues |
However, not all factors that may lead to a positive or negative test case linkage outcome overlap so easily. I argue that many other manners for tweaking a case or developing case selection criteria may be more possible for advocates if this obligation is more fully understood before a case is even filed in the court, and so education and training of advocates that may be offered within a system and should include discussion of this potential third tier of obligation. Many advocates already consider the backlash within a community that might occur if they win a case, so this just adds a layer of concern for backlash, not just against the movement, but against the linked court as well. Backlash against the movement at least is often a case selection criteria for advocacy groups, as addressed in Interrights’ (2012) strategic litigation criteria. To enrich that training, this study seeks to offer a more thorough understanding of linkage and the pros and cons of relying upon NGOs and advocacy movements to provide resources, expertise, outreach, and enforcement for the system.

**Sophisticated Players Versus Wild Cards**

This study focuses on the potential positives and negatives of the agency of international legal advocates and the reliance on NGOs or TNANs by international tribunals in developing regions. The emphasis is on organized test cases and how they impact the court. This emphasis seeks to explore and develop theories about how these actors influence the outcomes not only for their clients and their movements but also for the court itself. The cases studied for this case represent an opportunity to understand the three levels of obligation that exist for advocates in international courts. Advocates at least will see the courts as venues for potential future activities. Repeat players have more of an overlapping interest in this than those bringing one-off cases or cases that are so urgent that they must focus on the obligation to the individual client, because they can consider the benefits to the movement of the continued access and the potential to gain more concrete interpretations of human rights treaty obligations. Advocates who are not part of broader movements or who have no long term stake in the
court’s future, perhaps because they have other avenues available to them, are less likely to be concerned about the third level of obligation, the obligation to promote the court’s development, when possible.

Even among organized movements and test cases, a broad spectrum organization and connectedness between the advocates and lawyers to the second and third levels of obligation may be observed. In some cases the movement may simply lack the financial or mobilization resources to take the case to the next level or fill gaps. In other cases, overriding individual concerns may make it impossible to move beyond the individual client obligation, especially when the life of a client or some other irreparable damage must be avoided, such as is the case with the death penalty, the destruction of a rainforest, or the removal of life support.

Cases may be brought by individuals or lawyers with little or no connection to an organized movement, by movements lacking an interest in future litigation in the court, or by movements facing desperate situations. How can courts and more organized NGOs and TNANs who are repeat players mitigate these potentially “wild card” cases? Neither activists nor court and states can completely control these cases, once they allow access to these groups. Where resources or legal avenues exist to do so, courts and states can change institutional rules, hold trainings about the system, provide legal aid, reach out to domestic judges to get better cases referred (Slaughter 2004), and/or strengthen the quality of representation through certification processes for lawyers. Courts can attempt to write their decisions in ways that minimize the negative impact of such wild card cases. However, they cannot fully avoid them. Since courts do not *sua sponte* select their own cases with a few notable exceptions, such as the US Supreme Court, or under the previous rules where another body, the commission (which was not able to avoid the backlash in the Caribbean cases, as discussed more in Chapter 7), chose which cases to send to the Inter-American Court. In systems where resources are more scarce,
or where violations are typically more urgent and grave, it may be impossible to avoid “wild card cases” that may be more likely as the trend moves to more easy access for cases at international courts.

I do not suggest that even the most well-funded and coordinated civil society movements can control wild card cases either. They can push for changes in institutional rules, hold training events, and conferences about the system (Alter and Helfer 2010; Slaughter 2004), provide legal services, and otherwise help improve the quality of cases where those wild card petitioners are willing and able to be helped. Further, they can help frame even the most wild of wild card cases by submitting amicus curiae briefs in jurisdictions where that is possible. The advocacy groups have access to information that can aid the court in its decision writing and can help find language and examples of more sympathetic cases that can help the court write a decision more effectively for the regional audience. Advocacy networks can help frame the media and campaigning that occurs after such a decision is given to try to fend off attacks from states and others who may try to decertify the decision and call for withdrawal from the court. They can back the court and concurrently delegitimize the source of the case, and can possibly use their own credibility to shut down donations to groups who knowingly take cases with bad facts. This of course presumes that they are well funded and have expertise in the types of violations being discussed by the wild card litigants, which is not always the case. This, then, suggests that it is not appropriate for courts to rely exclusively upon civil society to mitigate these wild card cases.

The case studies presented here do not assume that all movements or lawyers are free of overriding concerns for their individual client or movement, or that all test cases will have sufficient resources to support their case and fill the gaps left by the court’s deficiencies in resources, expertise, or authority. In some cases, a movement is still weak within the region, or does not have a grassroots movement or set of elites within the region to plug into once they receive a winning decision from the
court, and some cases are brought by unconnected NGOs or individual lawyers. As discussed previously, the problem with a test case or an individual case that is not coordinated with an active transnational advocacy network (the so-called “wild card” cases mentioned previously) is that it is less likely to be able to fill the gaps within a court that has many gaps, and may not have mobilization resources (Conant 2002) or domestic actors with which to connect (Tarrow 2005). Test cases not fully integrated into the more sophisticated strategies of a transnational movement, for which no sophisticated movement with which integrate is available, or for which advocates wish to move ahead faster out of obligation to their individual client in an urgent case can unintentionally set back a movement by receiving a bad decision from the court. Such a bad decision would be one going against the policies the movement promotes, or even if the case is won, a bad decision could emerge based on the court limiting its decision in ways that make using it less appealing to a movement. Even if the decision of the court is a striking victory for the movement, it can lead to backlash from the defendant government and their allies, if the court lacks the authority, expertise, or resources to support the case effectively and the movement lacks the ability to fill those gaps. This circumstance is especially true for a case that is not a sympathetic one or is a type of abuse requiring expanded expertise or resources to sell the case to the public or elites.

Sometimes the best option for all three obligations that test case advocates face in developing courts overlap, and they can serve their client, the movement, and the court through the same mechanisms. In the earlier discussion of linkage, the movement and the court’s goals were shown to overlap as far as promoting the case once it has been decided favorably. Other times, they can conflict, such as decisions to file cases with the court when it is low on resources; the case is not able to provide its own resources, needs urgent assistance, has bad facts, or suffers from many other limiting factors depending on the circumstances of the case and how the interests and purposes of individuals,
movements, and the courts align in a particular case. Regardless, it is important to develop a framework for understanding how some of the factors that may contribute to effective test case linkage are in the control of the test case advocates themselves and how those relate to the factors that states and the court control.

The Overlap of Effectiveness Factors under the Control of Private Actors in Courts, Test Cases and Movements

From the above discussion of the relevant intersections of the judicial politics literature, transnational advocacy network literature, and international courts literature, several overlapping themes emerge that relate to potential factors that could contribute to test case efficacy. Table 11 lays out some of the most prominent theories in the three categories of literature about what factors can successfully impact whether test cases, movements, and courts. I argue that to increase the likelihood of a positive test case linkage outcome, which is a linkage with high efficacy, several overlapping and complementary factors drawn from the literature may have to be provided for by those bringing the test cases or through their connections with networks. Within the table, I have added a column at the end that lists the merged factors that I theorize could be most important for test case advocates to have, especially when the court itself is weak in that category. For example, if a court has low expertise on the domestic situation in a particular country, those bringing the case would need to be able to bring additional information outside the scope of what they might normally bring in the case to bring the court up to speed on factors in the country that might contribute to a backlash, such as the political situation and how certain types of reparations might be tailored or framed more appropriately. If a court was already expert on the situation within the country, perhaps of its political instability, then the test case advocates might not need to bring quite as much information on that subject.
Table 11: Test Case Linkage Efficacy Factors in Control of Test Case Advocates: Overlap of Judicial Politics, TNAN, and International Court Literature

<table>
<thead>
<tr>
<th>Effectiveness Category</th>
<th>Judicial Politics Test Case Effectiveness Criteria: Successful Test Cases</th>
<th>TNAN Movement Effectiveness Criteria: Successful Social Movements</th>
<th>Private Litigants Role in International Court: Contribution to Effective Courts</th>
<th>Test Case Linkage Outcome Criteria: Positive Linkage Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Usage</td>
<td>Political Disadvantage Theory</td>
<td>Use of international courts not prominent in initial transnational advocacy network literature</td>
<td>Interest groups and narrowly focused interests as most likely litigants</td>
<td>Usage Balance: Quantity of Cases &amp; Outreach</td>
</tr>
<tr>
<td></td>
<td>Case Selection</td>
<td></td>
<td></td>
<td>Venue Loyalty (# of other options available to litigants)</td>
</tr>
<tr>
<td></td>
<td>Venue Selection &amp; Loyalty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Resources</td>
<td>Litigation Costs</td>
<td>Litigation costs</td>
<td>Litigation Costs</td>
<td></td>
</tr>
<tr>
<td>Expertise</td>
<td>Legal Expertise</td>
<td>Framing</td>
<td>Repeat Players</td>
<td>Repeat Players (trainings, prior experience, knowledge of gaps)</td>
</tr>
<tr>
<td></td>
<td>Repeat Player Status</td>
<td></td>
<td></td>
<td>Framing &amp; Case Selection</td>
</tr>
<tr>
<td></td>
<td>Case Selection/Good Facts</td>
<td>Framing</td>
<td></td>
<td>Information &amp; Research</td>
</tr>
<tr>
<td>Compliance</td>
<td>Political mobilization</td>
<td>Domestic &amp; International Mobilization Networks: leverage, shaming, media, key states</td>
<td>Domestic mobilization (Conant, Tarrow, Helfer &amp; Slaughter)</td>
<td>Domestic Mobilization: political, grassroots and litigation strategies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Coordinated Campaigns</td>
<td>Lobbying for international leverage (Helfer &amp; Slaughter)</td>
<td>International Mobilization: campaigns, regional allies, publicity, leverage, shaming, other TNAN strategies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Framing</td>
<td></td>
<td>Media Mobilization: insiders, education function</td>
</tr>
</tbody>
</table>
This requires, as I have noted in the table, that the advocates be aware of the court’s status on expertise in the country and any gaps that it might have. This is more likely if they are repeat players, meaning that they have had experience or connections to those with experience in the system, or perhaps were involved indirectly in the creation of the court (such as the Rome meetings for the ICC where NGOs assisted country representatives). This factor interacts, as I argue all do, with the resources available from the court or litigants to do the research required to bring information. This examination of the expertise category demonstrates that my theoretical framework draws directly from across the categories where factors overlap, asserts that these factors are complementary with the court’s resources in a particular category, and creates adapted factors that account for the unique criteria that test case linkage in developing courts require. Some of the unique factors, however, may have applications in international court usage in general, such as the idea that repeat players in developing courts need to understand its strengths and weaknesses to best adapt their strategy and put their resources toward the most needed factors.

The next section explores each of the factors I derive from the overlaps in the literature and argue to be critical to the success of a test case linkage that can be controlled by NGOs and civil society movements bringing test cases before a court. I theorize that movements must be able to fill gaps in these criteria in order to lead to a positive outcome for both them and the court. In some cases, not all of these gaps may be successfully filled by NGOs without additional assistance from states, the court itself, or the regional body, since I argue the resources provided by states, courts and private litigants act to complement each other. Some cases may start from a greater deficiency, often due to the factors discussed above that lay outside of the control of any of these actors, including the nature of violations and the development level of the region. (However, I previously noted that in some cases these factors may be mitigated.)
Joachim (2007) observes that in norm development, sometimes the international environment and mobilization structures operate beyond the actors and their strategic choices and become important to determine whether a norm will be successful or not. In order to take account of these factors, I utilize a similar approach and take into account the goals of non-state actors and their choices; the conflicts that exist between their obligations to their client, movement, and the system in different kinds of cases that put the activists starting from a deficit that they or the court must be able to supply the resources to overcome. In a system flush with resources on a particular category, that system may be able to prop up an actor whose resources or expertise are weak in that category, such as a court fact finding or issuing subpoenas with funding for witness travel, when the petitioners are unable to provide some of the necessary evidence or witnesses.

More important in developing and not yet fully institutionalized courts, which are the most susceptible to stronger linkage because they tend to be newer or expanding courts, I consider structural weaknesses or “gaps” of the international court system that test case advocates may be able to overcome because of the expertise and resources they are able to mobilize. I argue that those actors, who can overcome the court’s structural weaknesses and any other deficiencies caused by non-controlled factors, are more likely to have a greater impact on new and emerging courts and are more likely to both win at the court and meet their broader goals. They are more likely to have a positive impact on the court’s growth in cases generating linkage of the movement and acceptance of the court’s jurisdiction. Table 12 presents the complementary relationships between the factors in each of the four major categories of test case efficacy. The table shows the factors controlled by states, courts, and test case advocates across factors, along with potential factors that may not be controllable. Table 12 shows what contributions different actors may add to the positive or negative fulfillment of that criteria for test case efficacy.
Table 12: Test Case Linkage Efficacy Factors: Complementary Factors Controlled by States, Courts, No One or Test Case Advocates

<table>
<thead>
<tr>
<th>Efficacy Categories</th>
<th>States Parties Control</th>
<th>Court Controls</th>
<th>Not Fully Controlled by States or Courts</th>
<th>Partially Controlled by Test Case Advocates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Usage Balance</td>
<td>Formal access rules (jurisdiction &amp; standing)</td>
<td>Admissibility rules, reforms to procedures</td>
<td>Wild card cases (not submitted by Advocacy Networks)</td>
<td>Usage Balance: Quantity of Cases &amp; Outreach</td>
</tr>
<tr>
<td></td>
<td>Participation as respondent state</td>
<td>Outreach to potential court users (dependent on resources or domestic courts)</td>
<td>Urgency of case (violator state has control)</td>
<td>Venue Loyalty (# of other options available to litigants)</td>
</tr>
<tr>
<td>Financial Resources</td>
<td>Funding for court</td>
<td>How it uses funds</td>
<td>Level of development of region</td>
<td>Litigation Costs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Legal aid</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expertise</td>
<td>Composition of court</td>
<td>Quality of legal reasoning</td>
<td>Nature of violations (procedural, systemic, physical integrity, etc.)</td>
<td>Repeat Players (trainings, prior experience, knowledge of gaps)</td>
</tr>
<tr>
<td></td>
<td>Expertise as respondent</td>
<td>Type of decision: judicial style, incrementalism, type of reparations</td>
<td>Urgency of violations</td>
<td>Framing &amp; Case Selection</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Framing and knowledge of domestic situation</td>
<td></td>
<td>Information &amp; Research</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Impartiality</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compliance &amp; Acceptance of Norm</td>
<td>Legal status of treaty and decisions &amp; authority granted to court to compel compliance</td>
<td>Monitor compliance</td>
<td>Domestic institutions for rule of law (democracy, judiciary, etc.)</td>
<td>Domestic Mobilization: political, grassroots and litigation strategies</td>
</tr>
<tr>
<td></td>
<td>Recognition of the court’s jurisdiction</td>
<td>Reports on compliance</td>
<td>Political and cultural homogeneity of region</td>
<td>International Mobilization: campaigns, regional allies, publicity, leverage, shaming, other TNAN strategies</td>
</tr>
<tr>
<td></td>
<td>Reaction to decision (delegitimize, constrain, ignore, enforce, etc.)</td>
<td></td>
<td></td>
<td>Media Mobilization: insiders, education function</td>
</tr>
</tbody>
</table>
Why do some test case linkages lead to growth of a court and movement while others lead to backlash? The above framework laid out in Table 12 shows the factors that I argue contribute to test case efficacy. I have previously outlined my theory of test case linkage and suggested courts become linked to a movement through test cases to be linked to the success or failure of that movement. In this section, I outline several key factors and attempt to explain why linkage to a movement may have a positive impact on the expansion of a court’s jurisdiction and why other times linkage may lead to a negative impact on the court’s jurisdiction. Normally when the movement succeeds, the court succeeds, and as the movement fails, the court fails to grow. In cases lacking a perfect alignment between the court and the test case advocates fates, linkage may suggest that their fates and the feelings toward them are to some degree intertwined. My lingering linkage theory, however, notes that over time the positive or negative aspects of linkage may wear off, and eventually the fates of the movement and court will become less intertwined over time, leading to points at which, later in time especially, the fates of the movement and court do not follow the same path. The following discussion is based on the assumption that a case has come before the court that will create a strong linkage between the movement and the court. Where linkage is much weaker or apathy prevails, these factors are likely have less or no impact, respectively, on the court’s development. Each of the four categories of test case efficacy is explored separately in the following sections, but I begin here with resources and the interaction that resources have with factors from all three of the other efficacy categories.

**Category 1: Resources**

When the court does not have access to the resources it needs to perform fact-finding, cover litigation costs, fund a full time bench, provide free legal aid, or even offer sufficient time for hearings, complainants before the court need fill in the gaps in resources in order to be more likely to have a
positive outcome for their cases. The resources term primarily refers to money or access to money, such as through government aid. Resources can refer to connections to major players, such as state officials or celebrities, who can put their weight behind a cause and generate additional resources, such as donations, free publicity that can lead to donations, or government aid. I hypothesize that greater resources leads to greater success in a test case linkage, particularly where the court is otherwise unable to provide certain necessary resources. I argue that resources interact with many of the other factors in usage, expertise, and compliance, since resources can bolster and enhance such factors as outreach, access to expertise and research, and support mobilization strategies such as lobbying or additional litigation.

In the case of using a court system, the relevant resources (or uses of resources) are those that can help find cases of violations, bring and effectively hear those cases before the court, and promote compliance with those cases after a court win. This requires access to information about the court and the resources needed to bring the case, including money to pay for outreach services, to educate individuals in member states about the court and the NGO, for legal representation, travel expenses, filing fees, investigators, and other litigation-related expenses. It includes similar costs if increased litigation is required to promote compliance with the court’s decision in the original country and within other countries in the region along with publicity for the case and any favorable decisions, particularly if the court does not have resources to assist with enforcement and monitoring.

I argue that with international courts, resources have to be fairly high to meet the minimum threshold of resources before a case has a chance of success. American judicial politics studies (Collins 2004; Galanter 1974; Sheehan 1992), as well as scholars studying international courts (Alter 2003; Cichowski 2007; Conant 2002; Posner and Yoo 2005) have confirmed that resources can be critical to the success of a litigation campaign. If there’s no outreach to countries with violations
regarding the availability of the court, no victim is located and no case happens; even initial stages of
the litigation process can utilize a lot of resources, such as exhausting domestic remedies, paying for
victim’s travel to local and national level courts, local representation, filing fees, etc. In developing
countries there can be major domestic resource gaps with no access to legal aid. A wealthy Western
interest group, university, or donor can fund all of these expenses and shape the litigation and
potentially the agenda of the court. They can fund promotion of the decision’s policy in the region
after a win, and give the movement the ability to succeed as one component of its campaigns.

Resources alone are insufficient, but they are a necessary condition to success. They are only
one factor that must be combined with the right other factors to lead to successful compliance with the
test case and to avoid backlash. The need for intensive amounts of litigation costs to bring a test case
is an unfortunate fact. In many cases in the developing world and where systemic resource gaps exist
(as discussed previously), the threshold costs of international litigation may demand that they have the
support of either a government, intergovernmental organization, major donor or the pre-existing
connections to major donors through large, Western NGOs. For example, a case in the Inter-American
Court is estimated to cost $80,000 (CEJIL 2012), and that does not include mobilization after the fact.

Until very recently, no legal aid was available through the system. Although outreach and expertise
are important factors, it is quite true that resources can often buy the thing that is missing and is often
necessary to get a case off the ground. Even if test case advocates have effective outreach and
litigation resources that help them win a favorable decision, without adequate resources for
mobilization, the movement bringing the case may not be able to take advantage of the opportunities
created by the test case decision for further reform and change of policies (Cichowski 2007),
governments may be able to limit their compliance and the reach of the decision unless presented with
organized pressure (Conant 2002), or the decision may be framed as an external intervention by those
wishing to decertify the norm promoted by the decision (Tarrow 2005). This is even more true at the international level since domestic courts may find it difficult to accept an outsider’s opinion and even more so in the international courts, outside of Europe, since these courts have few enforcement mechanisms and often even fewer resources. Resources may affect, therefore, the whole course of test case linkage which starts with proper case selection, and then includes all aspects of the litigation process, winning the case, and promoting the case and court after the fact.

Expertise is often treated in the literature as part of resources. I consider expertise important and distinct enough to treat it as its own separate category below, though I recognize as noted in this section that many aspects of expertise, such as costs of finding and preparing witnesses, doing research in the country where violations occurred, etc., are very much affected by resource availability. I deal with expertise separately because while resources in many cases buy legal and other types of expertise, many of the top international human rights experts and experts within human rights systems are more ideologically than financially driven. The evidence suggests that expertise involves more than just hiring a top gun attorney with litigation prowess who can win a case. Expertise is more about filling in the gaps that the court cannot fill and being savvy enough about the region to know how to fill those gaps appropriately before and after a court victory. Even knowing the court’s gaps and that they need to be filled, I argue, is part of the unique expertise needed for test case linkage efficacy. Even with the interactive effects, my hypothesis for resources is simple: the more, the better. In more formal terms, the resources hypothesis is:

*Resources Hypothesis:* The more resources available to the court and the test case advocates for usage, expertise, and compliance factors, the greater the likelihood that linkage between the court and test cases will be positive.
Category 2. Usage: Usage Balance and Venue Loyalty

Usage Balance

Given the interaction between resources and test case efficacy factors that I outlined in the previous section, I will begin my analysis of usage-related efficacy factors with a theory developed directly from my resources interaction theory: usage balance. Posner and Yoo (2005) defined effectiveness as being partially based on usage, which they define as the quantity of cases before court. Yet usage issues in a system are not just dependent on how many cases it has or does not have. Rather, the usage issues are intertwined with resource and outreach issues. Having no cases, as was the case for the Inter-American Court until the mid-1980s, is certainly a sign that the court is not effective. This analysis of court effectiveness however fails to address the full spectrum of usage to resources ratio. When considering the possible scenarios for usage to resource ratios, perhaps the most troubling is a court so overrun with cases that it cannot process them all or cannot process them efficiently. Ideally, there should be a balance between the number of cases filed and the resources of the court that allow the court and those coming before it to have sufficient time for hearings and deliberations, as well as any fact finding that is necessary, to develop the cases and write quality decisions. Further, even after the case, the court will need to monitor compliance and promote compliance through interactions with the state and the parent intergovernmental organization. These activities require resources such as staff to process cases, including legal and administrative staff, and judges with enough time on the job to adjudicate cases in a reasonable amount of time. For these reasons, I argue, both under usage and over usage of the court are detrimental to its effectiveness.

With regard to international courts, in some cases the court itself can do outreach that leads to an increase in cases before the court. The tribunal has the ability to “drum up business,” so to speak, by doing outreach to other courts or through judicial conferences. Slaughter (2004) observed that networks of judges were able to increase usage of the ECJ. This research emphasizes the role judges
from the tribunal played in the strengthening of the ECJ, where judges educated the region about the court and were able to convince judges at the domestic level to refer cases to the international tribunals (p. 146). Similarly, the African Court of Human and People’s Rights held a “sensitization” seminar in South Africa in October 2011 to raise awareness of the court, because it had only had 10 cases between 2008 and early 2012 (Zambara 2012). Courts can provide outreach services through advertising, networking with domestic officials, and holding conferences or trainings for potential court users. However, these activities all take resources and staff, which may be limited in developing regions, and courts themselves, from which judges might be asked to refer case, may be part of the problem in countries that have an underdeveloped judiciary.

In many developing regions, international courts may not have the resources, nor are legal aid resources available for human rights victims at the domestic level, to function without the assistance of legal NGOs that develop and bring cases to the courts. Further, blockage at the domestic level that they are seeking to get around may very well come from the judiciary or with the complicity of the judiciary, from inside the country as was the circumstance in the Honduran disappearance cases. Scholars have found that private litigants, such as advocacy groups, are likely to be frequent users of international courts, thereby providing the court with cases without having to seek referrals from domestic judges. Alter notes that the most likely private litigants are those who either have resources such as large firms at their disposal, the “haves” as Galantar (1974) would call them, and interest groups. Of interest groups, she specifically remarks that single issue groups with a narrow focus or those who are politically disadvantaged and have less access to other political avenues are the most likely to turn to international litigation (Alter 2006). This is the political disadvantage theory discussed earlier, but applied to the international sphere.
In international human rights courts that allow individual complaints to be heard, transnational advocacy groups can fill the gap of outreach to bring in cases to the court. NGOs within transnational advocacy networks have access to domestic NGOs and lawyers who can refer clients and can serve as a conduit for information about the court and how to file a claim, much like the boomerang process but using courts instead of lobbying or publicity to attempt to leverage, persuade, or shame the country (Keck and Sikkink 1998). NGOs and advocacy networks can help filter cases that are the most likely to be admissible and fit the purpose of the court, as will be discussed more in the expertise section. If they are to be relied upon to fill the outreach gap for the court, test case advocates must be able to make sure that they send a select number of cases to the court so that each can be given its share of the enormous amount of time and resources from both the NGO and the system.

Several drawbacks to relying on NGOs and petitioners to do outreach and determine usage of the court bear discussion. First, not all potential petitioners will be reached equally. Only those that fit the profile that NGOs and advocacy networks want to work on will be included. The court itself cannot tailor outreach to the types of cases it seeks to have if it relies on others. This will give NGOs expanded gatekeeping powers because they are indeed the groups seeking out clients to go before the court. In developing countries, many poorer clients will not have a chance to go before the court unless an advocacy group for their cause exists, though this problem has long been noted in the literature as a widespread problem for courts (Alter 2006; Conant 2002; Galantar 1974). Relying on private NGOs and advocates to seek out cases may then lead to an overload of cases on a certain topic or from a certain region. Further, if private litigants are left to decide which cases are sought, outreach may become overzealous on a few topics, as has been the case at the Inter-American Commission, where lawyers for death penalty cases in the United States started filing a large number of cases before the Commission after word spread among lawyers that they had yet another venue for appeals.
If outreach by NGOs and advocacy networks, usage imbalance can lead to docket growth that exceeds the ability of the court to adequately hear each case. Where decisions are expected to rise to a high standard of legal reasoning, to be well researched and drafted, to provide the proper reparations and balance of boldness for the region, and to provide a proper frame and style for the region (Burstein 2006; Cavallaro 2008; Helfer and Slaughter 1997), constraints on time or staff resources for research, hearings, and deliberations may limit the court’s ability to rise to the challenge if not supported by test case advocates. In the Inter-American system, where many researchers and former commissioners and personnel have noted the court’s extremely limited budget, usage balance has been an issue on both ends of the spectrum. Up until Velasquez Rodriguez was submitted to the court in 1986, the court had not been sent any cases by the commission, which held control over submission of cases to the court at the time. The Honduran cases, however, had the court’s full attention and resources once received, minimal as those resources may have been. Processing a few cases a year was feasible with a part-time court of judges and commission and a handful of legal staff. By the latter half of the late 1990s, the system’s caseload had more than tripled and yet the budget of the commission and court combined was just over 4 million dollars, compared to the European Court’s 47 million, even though the Inter-American system had almost as many cases (Tittemore 2004).

States and courts could contribute to the balance when the ratio tips toward having more cases than the resources of the system can handle by either granting the court the ability to limit the number of cases accepted (as with writ of certiorari in US Supreme Court appellate cases), or providing the court more resources. However, as noted above, many courts are moving in the opposite direction with broader access rules. To some extent, the level of financial support for the tribunal is reliant upon the development level of the states in the region. In the Inter-American system, the two greatest economic powers (Canada and the US) have not recognized the court, and this has contributed to the
lack of funding for the system. Moreover, the budget crises at the OAS have kept the entire regional organization strapped for resources (Cosgrove 2000). The court can control to some extent parts of the usage balance equation, however. The court can pick and choose where to put its resources in order to decide which factors will be most affected. For example, they may have to do less outreach, less training events, fewer hearings, less fact finding, less monitoring of compliance, etc. Whatever the court decides to cut, the deficiency in resources combined with a disproportionate level of usage can have impacts on any or all of the four categories of test case linkage efficacy.

In some cases, external assistance from sources other than states, intergovernmental organizations, or private litigants may be forthcoming. Even when the OAS had limited funds for the Inter-American Court, the court was able to find assistance from the Council of Europe for legal staff and publications. Further, American University’s law school has provided resources to publish and archive decisions of the court, including publishing a small journal on regional human rights courts. In addition, foundations and individual states can provide funding for courts. In the European system, legal assistance is often provided for by government agencies. When a state provides funds that go directly to the court, the court’s impartiality can be jeopardized, just like when institutionalized dependence upon litigants and TNANs occurs

I hypothesize that test case advocates can contribute to usage balance or imbalance through the number of cases that they file and the timing of their cases, as well as by sufficiently supporting the cases they bring and supplementing the court’s gaps with their own resources. Advocates can attempt to mitigate usage imbalance by increasing their own self-initiated outreach activities for the court if it has too few cases and they can be more selective when the court is reaching its usage capacity. Where a court is reaching its capacity, advocates can try to ensure that their cases have adequate financial backing and resources to supplement the court’s gaps in resources before beginning a case. If these
gaps are not met, they may leave a case vulnerable to a negative outcome if linkage occurs, since usage imbalance can increase pre-existing gaps in resources by straining the court’s resources that it uses to provide some of the expertise and compliance factors, such as adequate time to hear cases and adequate staff to monitor compliance. Thus, test case advocates may be able to help avoid usage imbalance by managing their own case submissions and ensuring they have supplemental resources for cases that they do file in order to fill some of the court’s resources gaps. This leads me to hypothesize the following:

*Usage Imbalance Hypothesis:* The more a court’s caseload increases without a proportionate increase in resources, the greater the likelihood that linkage between the court and test cases will be negative.

*Venue Loyalty Usage*

A subsection of usage is the impact of the number of international or external venues to which the advocates have access. The more permeability points or access points that a movement has the less loyalty it may have to any one venue. Having multiple access points can mean that the movement has less stake or obligation to a particular venue, such as a court. This can lead to use of the venue in a way that perhaps best meets the advocate’s obligation to the individual client or movement, with less emphasis on the long term consequences for the tribunal. In other words, the international advocate’s dilemma and obligation to the system may not be as pressing on a movement with multiple venue options, including all potential, fully functioning domestic and international courts.

Advocates who find some pathways blocked, like water, tend to find another opening. Some of the original studies of interest groups in the courts in the United States (Vose 1959; Walker 1983) noticed that politically disadvantaged groups tended to turn to the courts because they could not win in the political arena, particularly when both the resources of the opponents and the will of the majority
are too strong (Cortner 1968; Schlozman and Tierney 1986). Much like Keck and Sikkink’s (1998) boomerang theory and Tarrow’s (2005) externalization theory, the politically disadvantaged theory at the domestic level suggests that when advocates find blockage for whatever reason in one venue, they seek another. In the case of interest groups in the US, some opted and successfully utilized the Supreme Court and other courts. For the international context, this may mean that blockage has occurred at the domestic courts or political arena, and they have decided to make a vertical shift to the international arena.

In most cases, once a strategy or method has been used by an advocacy group, it is much more likely to return to that venue or strategy. This is true in courts and in other venues (Hansford 2004), and this “venue inertia” has been found to be especially true if a new organization finds success in a particular venue. Organizations, at least in US civil society, have been found to choose their venues early in their existence and stick with them (Walker 1983). This is logical, because if the movement is successful in using the courts early on, it is likely to return, become a repeat player, gain the added resources of expertise and experience in the court, and increase its potential to influence the development of further access to the court in the future (through rule changes and pushing things like reparations for attorney’s fees). Such success offers the movement a stronger position to influence policy decisions within the courts (Hawkins 2008). These organizational dynamics are likely to be equally true at the international level.

Another reason given by the judicial politics literature for why groups choose a particular venue is because of policy congruence. If a movement sees potential allies in a venue, such as sympathetic policy makers, they are more likely to take their fight to that venue. In the case of courts, if the court has previously found in favor of a similar interests, litigation before the court becomes a more appealing strategy to an interest group (Hansford 2004). For an emerging or new court, this may
have to be determined by either looking at similar courts around the world, the treaties, and other founding documents that give the court its subject matter, or by looking at the makeup of judges on the court. Whether due to policy congruence, or venue inertia, venue loyalty creates an overlap between the interests of the group that seeks to use that venue repeatedly and the court itself. Groups that know they must use the court in the future, such as the Latin American advocacy groups who knew their domestic avenues (even judicial avenues) were blocked, make sure that the venue remains a viable and effective options.

I hypothesize that when a group has few other options to turn to, venue loyalty is likely to be at its strongest and lead the groups to be the most protective and supportive of the system. It means that their obligation to the court likely weighs heavier than it would on groups with multiple other venues for their claims. Other potential venues could be political avenues or other courts, such as other tribunals recognized by the state involved or domestic courts that are not blocked. For example, in the Caribbean cases, the advocates had successfully argued cases before the Privy Council and UN Human Rights Commission. They had found policy congruence in some cases with these venues. Because of that, their venue loyalty might have been somewhat lower than a country like Honduras in the 1980s, which had not yet recognized the United Nations Human Rights Committee (UN HRC) and did not have a sympathetic, quasi-external court like the Privy Council for making domestic appeals. In contrast, the Honduran cases had few judicial options because there efforts had been blocked by the complicit and to a great extent less functional domestic courts in Honduras at the time. This remained true even after the court’s decision and likely contributed to the findings by one scholar that judicial aspects of the court’s decisions in Latin American countries found less compliance than the political aspects directed at the executive and legislative branches (Honeys 2011). Thus, I argue the more access points an advocacy network has to other potentially sympathetic venues, the lower their venue
loyalty to the system. I hypothesize then that venue loyalty impacts test case linkage efficacy as follows:

*Venue Loyalty Hypothesis:* The less venue options that test case advocates have, the greater the likelihood that linkage between the court and the test case will be positive.

**Category 3: Expertise**

*International Repeat Player Status*

I argue that the repeat player or party capability theory from judicial politics literature and more recent international courts literature provide insight into factors that can make positive test case linkage more likely, but I add that in the case of developing courts, an important part of the repeat player advantage is being aware of the gaps in the court and the resources that will be needed to fill them. One resource that having access to a network of NGOs can provide is potential expertise in the venue. Known as “party capability” theory, the “repeat player” status of groups is alleged to give them the advantage because they gain experience in litigation and, almost in a rational actor-type argument, they learn which methods are successful strategies and which ones are not (Songer et al. 2000; Yarnold 1995). The same benefits of repeat player status are true for international human rights courts, which are likely to be somewhat different than a lawyer’s domestic courts or even their experiences in other international courts, and therefore require specialized expertise and experience. Further, repeat players have more awareness of the potential lack of expertise of the court on particular issues or lack of time or resources to do research on their own, and how best to fill that gap for the particular court. Prior knowledge of a court gained through previous or continuing experience with the system allows the advocates to have a better understanding of the court’s procedures, preferences, and any gaps in other categories that I have identified as crucial for test case linkage efficacy, such as a court’s lack of resources or mobilization mechanisms.
This prior knowledge, I argue, should give the petitioners an advantage, since they either already have previously established mechanisms to fill the court’s gaps, such as pre-existing networks for mobilization, or they at least can set those up before filing the case. Much of the more recent studies of private actors in international courts have addressed the likely importance of pre-existing coalitions and networks for mobilization to promote compliance and policy change after a court has rendered the decision (Alter 2006; Cichowski 2007; and Conant 2002). Alter (2006), for example, notes that when cases are brought by “organized interests or repeat players with the intent of influencing public policy, the resulting decision is more likely to be invoked in bargaining with the government” than in cases brought by private individual litigants. However this study treats the repeat player status advantage primarily as it applies to advantages for mobilization for broader policy change after the court decision, and fails to incorporate fully the party capability theory as it relates to other categories, particularly expertise and filling gaps at the court itself as mentioned above. Conant acknowledges that repeat player status includes mobilization resources and notes that it usually means financial resources as well since organized interests require money (Conant 2002). However, judicial politics literature has found in at least one study some evidence that pre-existing mobilization networks may in fact be the critical repeat player factor, since interest groups in general were found to not be more likely to win cases at courts as had been predicted, but rather those that had broader networks were more likely to succeed at the court (Epstein and Rowland 1991). Thus, this factor may overlap with those in the compliance category discussed below. To avoid this, the hypothesis will only focus on prior experience with the system, and my analysis in the case studies will focus as much on experience-related factors of repeat players as much as it is possible to untangle them, for example the pre-existing nature of mobilization rather than merely its presence at all.
The judicial politics literature in general, however, has noted the breadth of advantages that repeat players, including not only the that repeat players are likely to be able to be able to sustain more persistent pressure over time but many others. The domestic judicial politics literature has noted that repeat player status can mean the organizations have developed more staff or pro bono lawyers who specialize in the subject matter, lined up supportive major donors, made sure they have access to sufficient data and research, gained more experience with publicity and the media who cover the court, published related law review articles that can be seen as at least persuasive for judges considering their cases, garnered experience coordinating campaigns with related networks, and created connections within the government or other groups that they can solicit to submit amicus curiae briefs to the court to bolster their cases before the court (O’Connor 1980, p. 17; see also Epstein and Rowland 1991; Yarnold 1995). These demonstrate the breadth of experience that repeat experience with a system can have. I argue that the same is likely true in the international system where gaps can be extensive, since experience with a developing court with large gaps would mean the advocates would be aware in advance of the resources and skills they would need to line up ahead of taking a case to the court.

Repeat player theories note that those representatives who are “one shotters” or who are without access to repeat player experts are less likely to understand the system. They can waste valuable time and resources, only to have the case rejected, lose the case, cause a bad precedent to be set. In the case of a developing court, the consequence can be even worse for the court when the wildcard case, or one shotter, gets a decision in their favor that is inadequate in some way due to lack of a court’s expertise on the subject, because the petitioners failed to fill those gaps and others for the court. The wildcard petitioners may not have made the court aware of special domestic circumstances, or they might simply lack the ability to mobilize support against domestic countermovements, as Alter
noted. This can contribute to a loss of respect or legitimacy for the court in the region and a backlash if linkage occurs.

Repeat players have been theorized in the literature on domestic and international courts to be more likely to see a positive outcome for their cases and their movements, but I argue in the case of test case linkage that repeat players likely are more likely to contribute to test case efficacy if they have experience with a court and understand the gaps they will face so they can make sure they have the resources, expertise, and networks necessary before taking the cases to the court. Because systems may be new when dealing with test case linkage, I use the term “system” rather than court to include prior experience aiding in the creation of the system or contact with other parts of the system (such as a commission or rapporteurs in the same system). Because gaps and procedures could be very different across systems, experience with other systems is not included in this hypothesis, though I acknowledge that this experience might give them some general insight into international courts.

*International Repeat Player Hypothesis*: The greater the prior experience that test case advocates have had with the system, the greater the likelihood that linkage between the court and the test case will be positive.

*Ability to Properly Frame Cases*

Test cases allow the domestic problem to be reframed for an international or regional audience outside of the government’s delays and excuses that may make it difficult to frame the action as illegal in the domestic context as part of an externalization process that takes the domestic into the international, which might be important for boomerang actions that rely on leveraging through appeal to Western states. This is the same logic Tarrow (2005) uses while discussing non-test case techniques used for externalization but applied to test cases. Framing in the norm dynamics literature is defined as the “strategic packaging of new ideas and interpretations” (Joachim, 2007, p. 16).
Tarrow and other scholars have noted the importance of having the global frame not alienate the domestic actors or become detached from local needs, and I argue that is the most important aspect for test case linkage, since the idea is that the test case has been won, but needs to find acceptance for the norm and court in the domestic and regional sphere. In one study, linkages to religious and moral norms, in this case the Jubilee 2000 debt relief project, has been shown to make a norm and any related policy choice less costly to policy makers than one that does not fit pre-existing and more readily accepted norms, especially in the beginning stages before a norm is widely accepted, in which case even countries that do not have a pre-existing norm might accept it on the back end of a successful and far-reaching norm cascade (Busby 2007). When done correctly, framing can give far-reaching and invaluable assistance to a movement’s cause. The frame must be tailored to the region and countries involved, for it if is too distant a frame, it may not be useful in the domestic context. These persuasion strategies are easier if the norm is closer to taken for granted norms within the society (Hawkins 2004). If the test case can frame the issue as similar to a norm that a respected, moral authority state in the region has accepted, it may be easier to achieve emulation of that moral authority in the violator state and others in the region. Helfer and Slaughter (1997) discuss a similar factor relating to writing decisions with an “awareness of audience” or ability to tailor the decision to the appeal to domestic advocates who will file more cases. I argue that courts can frame cases to help get more domestic political mobilization and positive media coverage as well as additional cases. I add that courts are not the only ones who can help make the connection to an appropriate frame for domestic audiences.

International courts are sometimes portrayed as the primary actor who can improve the likelihood of domestic acceptance of decisions, even while acknowledging that the courts are often not the primary mechanism for enforcement. Helfer and Slaughter (1997) acknowledge that compliance and norm change after case decisions will most likely be pursued by private actors, but do not discuss
the ability of these actors to frame cases within their submissions or by the cases they select to take to the court. Cavallaro and Brewer (2008), in a law review article outlining how the Inter-American Court of Human Rights could write more effective decisions, seem to agree that courts can and should do more to frame norms appropriately. The authors acknowledge that domestic activists could be deployed by the court to monitor and help enforce court decisions. Though the emphasis in the legal literature is with the agency of the court rather than the activists bringing cases before them, at least they acknowledge the importance of framing and the potential use of these better frames by activists. For Cavallaro and Brewer (2008), it is important for the court to have more awareness of the situation domestically, including domestic politics and culture, while writing their decisions, so the activists enforcing those decisions would have an easier time enforcing them. They argue that the court has the ability to make a big impact through the decision writing processes. Courts, for example, have the ability to bring in frames and legal reasoning for their decisions from a variety of sources, including (for more established courts) their own precedents, decisions of other international bodies or domestic courts, international law and treaties, and legal scholarship. However, most of the studies fail to address how a court should deal with bad facts that have been brought to it, especially if the case is legally sound but just not easy to frame such as where a clear violation has occurred but the victim is unsympathetic on the face of the facts and no frame has been presented or suggested by petitioners to aid the court in their decision writing.

The literature on international courts has pointed out the consequences of choosing the wrong frame, the wrong facts, or the wrong strategy: backlash. If a court decides to make an innovative decision that goes too far, especially in a case with unsympathetic victims or facts, the court can be perceived as an outsider’s court by the region, much as Tarrow (2005) warns is often the case with transnational movements. Others legal scholars have further argued that judicial overreach or
overlegalization of human rights can lead to a backlash against the court (Burstein 2006; Helfer 2002). If the case reaches issues that governments and domestic public audiences see as reaching too far into their sovereignty, the court may be perceived as overlegalizing an issue (Helfer 2002), though I argue this can is often a term deployed to mean that the court refused to accommodate the wishes of a state that has enough domestic or regional backing to ignore or even decertify the court’s decision.

Cavallaro and Brewer (2008) similarly chide the Inter-American Court specifically for not taking into account the domestic realities when putting forward highly philosophical decisions that will not be acceptable within a country. Cavallaro and Brewer cite that courts must consider allowing some wiggle room for interpretation. This is what the European Court calls margin of appreciation and through which states to enforce and interpret the treaty even though no clear consensus may be found within a region. Burstein notes that the European Court of Human Rights was able to defer to consensus and the margin of appreciation doctrine in a way that helped it have more success with enforcement. Noting the extreme negative backlash to the Inter-American Court’s reparations decision in Castro Castro (Case of Miguel Castro-Castro Prison v. Peru 2006), which ordered Peru to add the names of slain convicted terrorists to a memorial for terrorism victims, Cavallaro and Brewer (2008) argue that the court must not make itself a distant court by failing to take into account domestic political factors.

I argue that two factors limit the courts’ ability to properly frame and defer to states in test cases, both of which are partially under the control of activists. First, the types of violations presented to the court can make it difficult for the court to be anything short of bold. In the case of the Inter-American system, it is hard to imagine the court deferring to states too much on cases of grave human rights violations, such as torture. The procedural violations found early on in the European Court of Human Rights’ development were much easier to allow for a margin of appreciation than the initial
cases of physical integrity rights violations that drove the Inter-American Court’s early jurisprudence. Some violations are just easier to frame sympathetically than others, so some cases start at a deficit. However, having children as your victims does not guarantee positive reactions if other factors override the appeal of the victims. On the other hand, I argue that the despicable nature of the victims does not automatically render a case hopeless, since activists can choose more or less sympathetic cases and frames even for the most distasteful victims.

For this reason, the second factor can limit the court’s ability to frame a case or conversely aid the court’s ability to frame a case satisfactorily at the assistance of the advocates bringing cases. While I agree that courts can overstep their bounds and become activist courts all on their own, Alter and Helfer (2010) note that external support can make bold decisions more likely to occur. I argue that to a large degree, how a case is framed by the court is predetermined by those bringing the case. Cultural framing, which has been shown to impact the success of other types of campaigns (Busby 2007), should be considered by the judges as they write a decision and by advocates before they file the case in the court. Advocates with the resources and time to do so can attempt to present the right case with sympathetic facts and a sufficiently well-tailored set of arguments and reparations requests that the court can utilize for ensuring best potential for success within domestic context. The judicial politics literature has noted that interest groups can act strategically to pick and choose the right representative case from among the potential victims (Epstein and Rowland 1991) and that these groups can avoid picking cases that have “bad” facts in favor of cases that have “good” facts in order to safeguard the success of the case and movement (Tolley 1990).

Test case activities may be better able to frame the case for several reasons. First, it is the networks of international and domestic groups that often have the expertise in the political, historical, cultural, and legal context within the country rather than the court. Though the government may
present some of this information for the court to balance, the advocacy group has the ability to counter
errors in the government’s presentation of the domestic and regional political reality and offer a frame
that can work for their campaign within that country. This does not guarantee that the court will factor
framing the issue within the domestic reality into account, but it can give them the ammunition they
need to create a decision grounded in facts. Courts, even international ones, only rarely go further than
requested, *sua sponte* add an issue to a case, or go on fact-finding missions (though this has occurred in
some cases). I argue that this means that advocates for test cases before the court must have expertise
and experience in the region’s legal systems, political environment, and culture. These experts can
help locate and select a test case that is appropriate, symbolic, and sympathetic for the region and
countries being targeted by the movement. As an extreme example, choosing a missing abortion
doctor as the complainant to try to promote an end to disappearances may not win over Catholic
countries. Experts in framing a case can make sure the facts of the case and make every attempt to
have the decision written by the court reflect a language and frame of reference that is palatable to a
wider audience in the region.

Unfortunately, neither the political science nor the legal literature seem to have empirically
analyzed the impact of strategically selected cases before regional human rights courts on the growth
of a new voluntary court’s jurisdiction through linkage, which can have for either a positive or
negative impact on court growth. While Cavallaro and Brewer (2008) and Slaughter (2004) both
recognize things that the courts and government networks (of judges, in this case) can do to aid
advocacy movements, their studies did not fully reach the question of what advocacy networks can do
to make their use of the court more effective for both the movement and for the expansion of a
voluntary court and compliance with the court. Even though Conant’s (2002) study of the ECJ
addresses one important aspect of campaigns that utilize test cases, it still focuses more on the role of
emblematic cases after they have had decisions handed down by the courts, rather than tracing the strategy of the campaign or movement from its inception. In the ECJ case, this could be partially due to the difference in standing and use of precedent in the ECJ.

In this study, I seek to add to our understanding of what role and improvements advocacy networks and the attorneys who bring cases for them can do to ensure that cases that are brought before the court are well framed and well chosen if they seek to represent more than just their named client, and how this interacts with the court’s ability to write a well-framed decision. Much as scholars have suggested that judges should consider the external and domestic contexts of the cases before them and the concept of incremental change as being well timed for the region, I argue that so too can these suggestions be made to advocacy networks who use the court and that these can have an impact on the outcome of test case linkage, if it occurs. Advocacy networks must work with domestic and regional experts to strategize how to frame a case, the timing of the case, and in fact the very case that they choose must fit the framing strategy. If a case with bad facts or no potential domestic frame is used, the court may not succeed even if the advocates can fill other gaps in mobilization. As Tarrow notes, most transnational movements fail, and they tend to fail because they are disconnected from the domestic aspects that are important. Framing things properly is one way to avoid that disconnect.

In the end, the court and the movement that files cases within the system must both consider the strategic impact that each case will have beyond the individual case, especially in a system able to hear few cases or offer the ability to use the system to few potential victims due to resource or other restraints. Cavallaro and Brewer agree that this is something the Inter-American system needs to consider more. However, one official from the Inter-American Commission (Cerna 2006) has commented that the Inter-American system has made its decisions broad enough to cover similar cases,
whereas in the European human rights system decisions do not carry precedential value and results in the necessity to decide a multitude of similar cases.

In addition, since I have argued that the first cases on an issue are more likely to garner a strong linkage between the court and test case, it becomes even more important that the first case on an issue in a developing court be one that can be framed strategically. Even without linkage, a court case that occurs early on in the norm development process may have more power in the overall framing of the issue in the earlier stages of agenda setting for a movement (Joachim 2007). Once a frame is set it can be difficult to change it, and I argue that once strong linkage has framed a court in a region, it can be more difficult to change that frame until the linkage (positive or negative) wears off over time.

Instead of wording the hypothesis to take into account directly the inherently more sympathetic nature of some types of cases, I leave this open to weighing not the nature of the violation, the type of victim, and the frame given to it by the activists taking the case as a whole, since they are related—if a case is inherently unsympathetic they may start from a deficiency but their ability to frame it can make up some ground. For example, an alleged terrorist as a victim might be framed more sympathetically if activists can highlight the extreme torture and abuse he suffered at the hands of those he targeted. I do separate out the case selection hypothesis because the ability to frame the case as sympathetic and the opportunity to have some control over case selection do not necessarily have to occur together. A group could have access and the ability to freely choose from among cases, but not be able to frame the case sympathetically once they have it. For case selection, I hypothesize based on the literature that the ability to choose freely among a large number of potential cases increases the opportunity to choose from among cases with a larger variety of facts than if their access to potential cases is very limited by their own lack of networks or other external reasons, such as the nature of the violations,
such as cases where few victims of the type of violation exist or they need urgent protection before a court.

_Framing Hypothesis:_ The more sympathetic the frame of the case, the greater the likelihood that linkage between the court and the test case will be positive.

_Case Selection Hypothesis:_ The more access to potential cases and ability to choose among them freely, the greater the likelihood that linkage between the court and the test case will be positive.

**Information and Research**

I argue that one of the greatest areas of expertise that a test case advocate has vis-à-vis the court is often their ability to do research and fact finding if they have the resources to do so. Courts often do not have the time, resources, domestic expertise, or access to information and victims. Some courts do not even have the legal authority to do their own fact finding, or the country in question is non-cooperative or elusive when asked to provide information to the court. When taking test cases before a court, information can be crucial to building a well-respected case, and it is an area where many developing courts may have gaps that activists will need to fill.

Human rights NGOs have long been acknowledged as sources of information regarding human rights abuses, and the information gathering function of NGOs has a long history. As far back as 1905, the treaty that created the International Institute of Agriculture noted that NGOs were designated as “sources of information for intergovernmental decision making,” according to Charnovitz (2006, p. 357). Today, NGOs are granted consultative status by the United Nations, publish reports on issues such as human rights country reports (Amnesty International’s report annual report, for example), and find and develop cases to be presented to international tribunals. NGO reports from countries abusing
human rights have become staples, including regular annual reports from Amnesty International, Human Rights Watch, and others.

Previous human rights research tends to show that it is the NGOs and private actors who often gather the information needed to advance their causes and mobilize intergovernmental agencies. Keck and Sikkink (1998) argue that it is transnational advocacy networks that provide information to international and foreign officials and create an information conduit for domestic groups that are unable to have success domestically. While Slaughter talks about how it is bureaucrats who cannot gain traction domestically who become the impetus for the creation of cross-government networks of bureaucrats, the boomerang theory notes that it is often private advocates at the domestic level who seek out the assistance of international NGOs when the government, including bureaucrats, have blocked attempts to promote their cause and end violations of human rights at the domestic level. Information is shown to be one of the great tools of transnational advocacy networks (Keck and Sikkink 1998). Information can be used against states who are unwilling to make change, states whose bureaucrats might be unable or unwilling to participate in a government network that might shine light on a practice that would be embarrassing politically or for which domestic elites in the country are weary of promoting until it has been legitimized internationally. Bringing to light facts and information that the government in question, and any of its powerful allies, is often the goal of human rights networks (Clark 2001, p. 32).

My hypothesis maintains that courts often have gaps in their ability to gather information on their own, and that the more evidence and information that those bringing test cases can bring to the court to support their cases, the more successful linkage can be. The must discover, prepare and present information using their staff, networks, and resources for fact finding, particularly where the court lacks the resources to do so and/or the state is unwilling or unable to deliver the information. I
derive this factor from the “information hypothesis” from the judicial politics literature. This hypothesis claims that an important factor for test case success is the ability to provide the court with new information and research that the court does not have access to (Collins 2004), and that judges want interest groups to provide more information on which to base their arguments in order to bolster their decisions overall (Spriggs and Wahlbeck 1997). NGOs with funding and networks can find can have staff members carry out in-country investigations, and their network contacts within the country can help find information that the government is unwilling to provide, that only the victims themselves have, or that can create a pattern of abuse (especially in human rights courts). Since many countries in developing regions have less than stellar information gathering systems or governments that have an incentive to hide or destroy evidence, domestic contacts, and resources within the country are important to ferret out the necessary information. Without adequate information and research, a court is less likely to be able to write a quality decision based on all the adequate and accurate information.

Presenting the information to the court takes time and resources which are often lacking when a court is part-time, has little time for hearings, and has more cases than it has time and staff to fully research. Where a court lacks the staff, resources, or time to do its own fact-finding, NGOs representing victims and filling that gap in research need adequate time to prepare and present their evidence, witnesses and legal arguments to the court. When the court does not have adequate resources, particularly time with a full time court and staff members to support them, presentations of the information may have to be cut short, or presented in a briefer form than desirable. Cavallaro and Brewer ((2008) note such time pressure at hearings before the Inter-American Court in recent years. Further, since the court cannot verify the information due to lack of resources, it is possible for the court to have erroneous information that then harms its credibility. It burns the credibility of the organization presenting it, which would be more important to players who have more of a stake in
continuing to use the venue, but that may not matter to more of a wildcard case. However, more importantly, decisions based on erroneous information can more easily be countered or decertified by domestic opponents, and can contribute to the likelihood of a negative outcome if linkage occurs.

I note that even conveying information and legal reasoning between judges and courts is many times the work of advocacy networks. No doubt judges are involved in this process of sharing innovative decisions, as Slaughter (2004) reports. Advocacy networks are equally important for exchanging information between jurisdictions, both between international and domestic jurisdictions (vertically) and between international jurisdictions or between domestic jurisdictions (horizontally). Slaughter acknowledges that many judicial exchanges and conferences and the development legal databases of court decisions and legal scholarship are often organized by NGOs and foundations (such as the University of Minnesota’s Human Rights database and the Washington College of Law’s Inter-American database at American University). Many of the conferences and networks that judges attend or belong to are organized by NGOs or other private actors, such as Bar Associations or law schools. When a network’s test case before one court is successful, it is not uncommon for advocates to attempt to disperse that information to other courts, demonstrating the breadth of information-related services for which courts rely on civil society and academia to provide even outside of test cases. They publish reports, they publish papers, they hold conferences, they hold trainings or conferences for lawyers and judges, they create databases of case law, and they disseminate information to domestic advocacy groups. In some courts, they can submit amicus curiae briefs using previous decisions that they have won in other jurisdictions to support another case, or they may even support further test cases in other jurisdictions based on the frames and legal reasoning of the previous case. They could provide information to courts when inexperienced or wildcard cases come before a court (Hansford 2004, noting the US Supreme Court asks the Solicitor General for briefs when this is the case). Perhaps in
some courts research and publication of decision can be accomplished by judges and the courts themselves, but in developing courts the financial resources may not be available to do this without substantial assistance from civil society.

In summary, in cases of test case linkage, I argue that information and research are two components of expertise to win cases and write quality decisions that can contribute to the likelihood that the linkage outcome will be positive. I argue that while courts can contribute to information and research, many courts lack the resources, domestic expertise or access, time for hearings, and even the authority to do their own fact finding, and therefore those taking test cases before a court are often required to fill this gap in the court’s information expertise. The ability of test case advocates to find and present information is limited by their fact finding resources, research, travel costs for researchers and witnesses, and the limitations in time that the court has for hearings and deliberations to consider such information. The amount and quality of information presented can be a combination of what information the advocates can produce and what the court has time to allow them to present. Therefore, drawing from the information hypothesis from judicial politics literature, I hypothesize the following:

*Information and research hypothesis*: the greater the information and quality of information presented to the court by test case advocates, the greater the likelihood that linkage between the court and the test case will be positive.

**Category 4: Compliance**

The last category of factors that I argue impacts test case linkage efficacy are compliance-related factors, which are frequently discussed in the literature as a key factor in court effectiveness that can be under the control of civil society and private actors, who can mobilize the post-decision strategies to garner compliance and/or policy change from states. Mobilization is also frequently a
factor that the literature has argued is critical for test case and social movement success. In this section I draw upon overlapping literature between transnational advocacy networks, judicial politics, and international courts to explore how mobilization may be able to fill the gaps that developing courts are likely to have and that may contribute to linkage efficacy. Even Helfer and Slaughter (1997), who otherwise downplay the study of private litigants, note that one way that courts can convince domestic governments to comply with their judgments is to do so indirectly through pressure from litigants (p. 278), though their language reflects an assumption that this is part of the court’s ability to stir this pressure rather than the stirring coming from below. More private actor-focused literature, including Cichowski (2007, p. 6), notes that litigation is precisely the strategy when combined with mobilization for introducing “a dynamic in which institutional change can occur from below” rather than using institutions merely acting through civil society or grassroots movements. My theory encompasses both sides of this discussion, since I argue that it is both institutions and private actors who must complement each other’s resources and skills in order to attain the joint goal of a positive test case outcome that can lead to a positive linkage outcome.

Compliance for a court can mean specific compliance with a case, or general compliance that leads to broader policy change. For a movement, broader policy change is usually the goal, even if they have specific compliance goals for the individual clients. Conflicts, again, can come up when you have tensions between the levels of obligation with compliance, but generally for test case linkage I propose that general compliance is more generally the goal for movements that are trying to use cases as test cases. This is true even if they have strong specific, or individual, compliance goals too. Conant (2002) has noted six different types of compliance options that states have: individual or contained compliance, noncompliance with individual cases, broader application as policy, restrictive application as policy, and legislative overrule. Linkage theory suggests that linkage efficacy will be more linked
to successful general compliance, or the kind of compliance that movements generally promote rather than the individual level compliance that one-off or wildcard cases are more likely to promote. The case studies that follow further find that non-compliance on individual cases may not be as relevant to linkage outcomes, and that linkage efficacy may not be aided by compliance in individual cases, or contained compliance.

The literature has discussed the importance of mobilization to both movements and courts. This overlap leads to my broader look at mobilization. As noted in Table 13 below, I categorize mobilization as domestic or international, with three types of mobilization in each. First domestic mobilization includes strategic judicial mobilization through litigation in the courts; political mobilization that includes lobbying, pressuring bureaucrats, grassroots actions, and sympathetic political insiders (Cichowski 2007; Conant 2002); and media mobilization to serve as watchdogs and help educate the public. International mobilization should also be connected to this domestic mobilization as part of a fully functioning transnational advocacy network (Keck and Sikkink 1998; Tarrow 2005). International mobilization includes judicial mobilization using international courts such as the test cases involved in the linkage; political mobilization of international NGOs through leverage, shaming and accountability politics as well as support from regional moral authorities (Forsythe 1991); and media mobilization through publicity campaigns (Clark 2001) that can raise awareness, externalize a problem, as well as helping promote public opinion to use for shaming and leverage (Keck and Sikkink 1998).
Table 13: Fully Coordinated Transnational Test Case Networks

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<th>Judicial Mobilization</th>
<th>Political Mobilization</th>
<th>Media Mobilization</th>
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<td>Domestic</td>
<td>Strategic litigation</td>
<td>Domestic NGO campaigns: lobbying, pressure on bureaucracy, grassroots actions</td>
<td>Investigative journalists: watchdogs</td>
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<td></td>
<td></td>
<td>Mobilizing sympathetic political elites/insiders</td>
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<tr>
<td>International</td>
<td>International Court</td>
<td>International or major Western NGOs: leverage, shaming, accountability politics</td>
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<td></td>
<td>Decisions: Legitimation</td>
<td>Regional moral authorities</td>
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<td></td>
<td></td>
<td></td>
<td>International Publicity Campaigns: awareness, shaming, leverage</td>
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Mobilization, I argue, may impact test cases by maintaining pressure upon governments through international networks, domestic networks and the media. Test case success in the judicial politics literature has from the early literature noted that mobilization outside of just the test cases themselves was very important to the overall success of the cases and the movement. In his early study of racial discrimination cases in the US, Vose notes the importance of links to the broader civil rights movement of the time (Vose 1959), while other scholars have reported that political clout has been important in pressing change through the courts (Yarnold 1995) and the importance of having test cases coordinated with broader organized interests (Epstein and Rowland 1991) that can provide a support structure and resources to maintain persistent, coordinated pressure on the government (Epp 1998). International scholars have addressed the importance of links to a broader policy reform movement in the context of social movements (Tarrow 2005) and individual ECJ cases (Conant 2002). International research on test cases in regional courts has in many cases corroborated the findings that mobilization and coordination after the test case decision is important for changing policies through
international test cases (Alter 2000; Cavallaro and Brewer 2008; Cichowski 2007; Conant 2002) and
that a courts-only strategy is probably not a good strategy (Conant 2002).

In fact, I argue that though mobilization is important in all courts, it is even more important in
international courts than domestic courts, since most international courts have even weaker
enforcement powers and must often rely on voluntary compliance. One attorney or law firm may find
it difficult to monitor compliance, negotiate policy changes, lobby political officials at the
international, regional, and domestic level, bring additional cases based on the court’s decision in
various countries, and raise awareness throughout the world community to provide further leverage.
Few individuals, short of an expansive industry (which is usually not the case in human rights cases,
with the exception of the press perhaps), can band together enough individuals with enough of a stake
and resources to commit to promote the case in all these venues (Conant 2007). Thus, the likelihood
that a movement’s test case will spread both its cause and promote acceptance of the court’s authority
and jurisdiction, if linked to the court through test case linkage, depends in part on the ability of the
test case representatives to coordinate with broader players both internationally and domestically. This
can include ties to both international and domestic actors who can mobilize transnational advocacy
networks of domestic and international activists and political elites and the international and domestic
media.

I hypothesize that test case advocates who can mobilize international political and media
networks, in addition to domestic judicial, political and media networks are the most likely to
contribute to a positive test case linkage outcome. Table 13 shows the overall mobilization networks
that can coordinate the post-decision campaigns. Some movements will have resources and networks
to provide all aspects of a transnational test case campaign, while some may only have one or a few of
the parts. Since the focus of this study is international test case linkage, the international judicial
mobilization is assumed to be present in the test cases themselves, though follow up compliance reports and/or additional follow up procedures may be required even after a favorable decision, so the factor is still important to the overall network. In cases brought by individual lawyers (so called “wildcard” cases) or by unconnected domestic NGOs, they may only have this category and not much in the other categories.

**Coordinated Strategic Domestic Campaign**

I argue that a successfully coordinated transnational test case campaign needs to have strong domestic mobilization. If a group does not have proper coordination, the backlash from the case and efforts to use it to further a movement’s norms, even if they win before the courts, can prove detrimental to a movement, and I argue, a new, voluntary court that becomes linked to the failed campaign. Tarrow (2005) refers to the importance of domestic allies as being important to creating a transnational movement that is not rejected as foreign, which he notes is the reason most transnational movements fail. Rather it is important that they can be seen as rooted in the domestic sphere and accompanied by “aggressive” domestic mobilization. “In the absence of domestic mobilization,” Tarrow (2005, p. 192) explains, “even powerful foreign groups cannot force the pace of domestic change.”

Mobilization is a critical component in using test cases to affect more than just the particular petitioners in the case. As with mobilization generally, the test case literature from the US litigation campaigns has found that it is not so much the litigation prowess of groups, but rather their political clout, such as strong lobbying campaigns, campaign contributions, and contact with the bureaucracy, that leads to their successful campaigns using test cases (Yarnold 1995). This emphasis on the broader campaign is echoed in the international literature, which notes that changing policy through international test cases does not end with a decision, particularly in courts that have institutional gaps
in their enforcement or compliance mechanisms. In the ECJ, which is considered one of the most effective courts, Conant (2002, p. 215) finds that because of the “permissive environment for governments to evade the policy implications embedded in ECJ case law”, that the system often relies on private, interested parties to mobilize pressure for broader compliance. Cichowski (2007) notes that test cases open up opportunities to make a broader impact, but only if civil society can mobilize to take advantage of them.

I argue that domestic mobilization is more effective when broader coalitions, often including NGOs, are ready to be tapped into or standing at the ready to take advantage of the opportunities created by the test cases, and having experience using them even before the decision is handed down only makes them more likely to be effective because it means they are “repeat players’ at mobilization, especially in test case linkage where the initial reactions can be important. Alter (2006) speculates that compliance is more likely where repeat players, such as NGOs, are involved in the test case, since they are more likely to follow through with mobilization to monitor and enforce compliance at the domestic level. She argues that pre-existing groups are the most likely to be able to mobilize around a test case, presumably because the infrastructure already exists to do so, and that test cases prepared in conjunction with repeat players are likely to have more support than one-off cases. Joachim (2007) also notes that norm change can be aided where activists can take advantage of opportunities using mobilizing structures they already had. Having pre-existing structures is a valuable asset. Tarrow (2005) finds that with that movements with connections to domestic groups that were already effectively mobilizing were the most successful. Attempting to form a coalition after the fact can lose valuable time and can miss the window of opportunities created by the decisions that Cichowski recognized (as noted above).
If a test case can be taken up by domestic networks, many forms of action may occur. I argue a combination of these methods is likely to work more effectively. Many methods for domestic mobilization have been noted by scholars, and most scholars have noted both the need for continued strategic litigation, lobbying, and bureaucratic bargaining. To ensure broader policy change, activists must be able to convince the government that the case will not be isolated and that continued political pressure as well as additional judicial and bureaucratic claims will take place (Alter 2000, p. 507).

Conant (2002) describes the domestic steps after the international court has issued a ruling, such as the filing of copycat cases in domestic courts, of claims with bureaucratic agencies related to the test case decision, and engaging with lobbying officials and legislators for relevant legislative reforms or agency enforcement of the case. Conant’s methods attack through all three branches of government in a democracy: judicial, executive, and legislative. I concur and argue that the more available avenues for redress that can actually be “covered” through mobilized allies or networks, the better.

I argue that mobilization can include more than just direct pressure on branches of government by outsiders. It can include indirect avenues through the media and tapping into political elites indirectly through public opinion or through a few key spokespersons either within government or with clout in society generally. Informal mobilization is part of this domestic process. Tarrow (2005) notes that having some allies who are political elites and able to affect debates from the inside can enable a movement to avoid a backlash. Cichowski (2007) promotes informal strategies as being able to change the frame of policy, preparing special reports, and using the media. Informal grassroots methods can be employed through rallies and protests designed to raise awareness and gain media coverage.

The movement must be able to mobilize around the idea that the court’s decision is a legitimation of the principles of the movement as part of the rule of law. International courts offer movements a means to legitimize their ideas within a formal legal setting and can aid in mobilization
efforts for informal compliance, including overall policy change in the region as well as specific formal compliance with the court order by the state involved in the specific case. Part of the mobilization effort after the court’s test case decision can be the enforcement of the decision itself within the affected countries, which of course means that domestic allies, such as lawyers, NGOs and elites within the country, will be needed. Without elites and the ability to move forward politically within the country, even legal victories may simply backfire and lead to changes in the domestic law to go around the legal victories.

Without the ability to mobilize domestically, an international test case can become a rallying point for the opposition, especially domestically, who may have been disparate before the case, but may begin to see the increased usefulness, after the case, of an alliance and a counter-movement. Test cases may be the catalyst for increased willingness to expend resources to counter or at least dampen the impact of the case, such as through contained compliance (Conant 2002). Without a movement to tie into, legal maneuvers alone may not occur soon enough to avoid decertification by opponents. Tarrow (2005) argues that transnational movements have more difficulty certifying their movement domestically because they can be characterized as foreign or suspect. With judicial actions or other mobilization that occurs slowly, the countermovement can be framing the movement and the court as foreign intrusion. The more politicized branches of government such as the executive and legislative branches are likely to react more to mobilization of political elites and public opinion by broader grassroots campaigns, while the judiciary may react more to steady but often slow litigation campaigns, but wherever the mobilization occurs, I argue, it needs to occur fairly quickly after the international decision is handed down or risk decertification of the test case, and consequently the court.
If domestic mobilization occurs, however, strategic use of a favorable test case decision at the domestic level can be a way to overcome blockage within a violator country and give legitimacy to a cause that has been ignored. For Tarrow (2005), certification is “the validation of actors, their performance, and their claims by authorities” and that certification from an international organization can acknowledge that a problem has international components beyond just an internal problem. If a state is unable to delegitimize the international organization’s authority, this certification can create leverage for a movement to gain political influence or clout within the country. Where the state can delegitimize the court or its decision before a movement can counter that move, a backlash against the court may be more likely.

As noted by other scholars, such as Cichowski (2007), I hypothesize that one key factor for the success of coordination and mobilization is the support of the media. In countries where the network has allies among the press, framing an issue politically can be easier. Further, where the media is willing to go out on a limb, and sees itself as a “watchdog,” the network is more likely to be able to use the case as a prod to get investigative journalists interested in further exposing the violations noted by the court. Further, as with Tarrow’s (2005) warning that domestic elites are critical, insiders within the media can be important for changing the debates among leaders and the public. For not well known or not well understood issues, the ability to tap into elites within the media who can help certify the test case decision to the public and other elites who can, I contend, be an important element of domestic mobilization, and that effort can serve as an “education function” for other elites and the public. The test case decision can become an opportunity for opening up space, similar to those Cichowski (2007, p. 15) argues are opened up by new policy statements such as test cases, allowing new or more open discussions of the issue within the media and the government and discussions that may not have been possible previously.
Overall, I hypothesize that domestic mobilization is likely to be essential to combatting a potential backlash and making positive linkage more likely. Given the literature’s notice of a wide variety of mobilization methods and the importance of persistent pressure across the many opportunities that test cases can open up for targeting pressure, I argue that the greater and more varied the mobilization, the better.

*Domestic Mobilization Hypothesis:* The greater and more varied the domestic support networks mobilized to support a test case, the greater the likelihood that linkage between the court and the test case will be positive.

*International Mobilization*

While domestic mobilization is a critical component of the ability of private actors to influence the compliance category of linkage efficacy, I argue that mobilization through international political networks is important. Connections to transnational networks are more likely to make a test case campaign successful if the networks ties are strong and well mobilized in both the international community and the target region. Transnational advocacy networks (TNANs) are “networks of activists, distinguishable largely by the centrality of principled ideas or values in motivating their formation” (Keck and Sikkink 1998). TNANs offer many methods of mobilization internationally that can supplement a domestic mobilization and support a positive outcome for test case linkage.

The concept of an international human rights “campaign” as a tactic was successfully used starting in the 1970s/1980s by Amnesty International. The organization coordinated with individual members in countries around the world (particularly in Europe and North America) and combined this with publicity campaigns through the media that focused on issues such as torture and combined the issues with stadium concerts and celebrity appearances. Amnesty International conducted strategic releases of reports to increase the issues’ profiles and to leverage developed nations to pressure
violator states to change their policies and save prisoners of conscience (Clark 2001). The court’s
decision, as part of a broader campaign, can be used to garner media attention in key states that have
influence on abusive states in the region and can bolster actions by intergovernmental organizations,
NGOs, and states to shame the abusive state in the international community. Keck and Sikkink (1998)
highlight the importance of media to effective international campaigns, noting that the credibility of
international NGOs “depends in part on their ability to mobilize their own members and affect public
opinion via the media” (1998, p. 23). NGOs in transnational advocacy networks can sway public
opinion in states that are potential allies to the movement, such as in Europe, North America, or major
players in the region. Such public opinion shifts can serve as one route to leveraging material goods
such as economic aid. Applied to test cases, this means that the networks should be able to use media
and public opinion pressure to target regional political bodies, the United Nations, powerful states, and
other intergovernmental institutions to leverage governments to follow the decision as “law.” They
may be able to use the media to shame governments into complying with the decision, both formally
and informally through commitments to the general principles of the decision and not just the one case
(or what Conant 2002 calls a “contained compliance”).

Networks can use the test case for accountability politics. I argue that test case victories fit into
the accountability politics strategy Keck and Sikkink describe because by accepting the court’s
jurisdiction, the state has implied that it agrees to abide by its decisions, thereby making the decision in
effect an indirect commitment on the part of the state. This allows them potentially to embarrass a
state by pointing out the “distance between discourse and practice” (Keck and Sikkink 1998, p. 24) or
in this case the lack of compliance with the decisions of a court that it accepted.

Although campaigns by transnational movements may often focus their campaigns to gain the
support of Western countries, I argue that pressure from within the region and from a country’s
neighbors may be critical as well. As Forsythe (1991) states in his article on the development of the Inter-American system, often regional moral authorities drive developments in a region. These moral authorities can be states that have already accepted the principles of the movement and, ideally, the court’s authority as well. In this way, they can serve as a state to emulate, as reported in the diffusion literature (Simmons and Tierney 2006), since that state has already begun to translate the ideas of the movement into terms that are palatable and well framed for the region in terms of culture, language, religion, historical experiences, etc. (Busby 2007; O'Loughlin et al. 1998). Further, some neighboring states have longstanding relationships that can mean elites from these states have more informal influence over elites within the country as well, in addition to economic and political influence through trade agreements, aid, and other power relationships. Regional moral authorities can use regional international organizations (RIOs) as a venue to utilize their leverage over a country, where they can use their economic and political ties, coupled with the cultural and historic relationships, to have even more influence over the target state than developed country support for the movement. If an RIO supports the movement and the court, it can take action to pressure member states to follow the decision or threaten sanctions or censure, and can be a venue for the moral authority states to help socialize their counterparts through interactions that influence their understandings of the issue (Pevehouse 2005), perhaps framing the issue in a manner that allows the target state to accept the decision and policy change without losing face.

Unfortunately, I must point out, these moral authorities within the region, the regional body, and the international community can be countermobilized. If this is the case, it becomes a showdown between the ability of each side to mobilize for or against the decision. Just as Tarrow noted that it is important to have strong domestic insiders to help certify a movement and avoid decertification by your opponents, it is true at the regional level that international courts can be characterized as “foreign”
to turn support against a transnational movement, so it can be important to make sure that international, regional and domestic mobilization are all strong and, preferably, connected to each other in transnational advocacy networks.

In summary, I hypothesize based on a combination of the TNAN literature and regional international law literature that international and regional mobilization is important for test case linkage efficacy.

*International Mobilization Hypothesis:* The greater and more varied the international support networks mobilized to support a test case, the greater the likelihood that linkage between the court and the test case will be positive.
CHAPTER 7
COMPARING POSITIVE AND NEGATIVE LINKAGE

Research Design

Case Selection

In this part of the study I explore the factors from the previous chapter that may help those bringing test cases before regional human rights courts to contribute to a positive test case linkage outcome. The two cases examined in the previous chapters are utilized to determine which of these factors were present and to what extent in these strongly positive stimulus linkage and a strongly negative backlash linkage. If variation occurs in the four categories of factors under control of test case advocates, this may suggest that those factors are potential contributors to the positive or negative outcome. Each of the three factors of usage, expertise, and compliance, in addition to their interactions with resource gaps in the system, are analyzed separately. First, the relative lack of each factor within the system is explained to determine what gaps, if any, exist in the Inter-American system on that factor. Any differences between the gaps existing at the time of the Honduran cases are compared to the gaps existing at the time of the Republic of Trinidad and Tobago cases, since though using the same system can hold most factors relatively equal, the differences of about a decade in the court’s progression and the system’s variation in experience between the two regions at the time the cases were filed (the Inter-American Commission at least having had extensive prior experience in Latin America), do mean that the gaps existing at the time of the test cases may have made it somewhat harder on the Caribbean test case advocates to fill somewhat larger gaps at the court, since I argue that the court and its users share the burden of fulfilling these factors. This can include exploration of any potential institutionalized dependence that may have been created after the first case, or other cases, and whether that impacted the gaps in the court’s ability to fulfill the four categories at the time of the
Caribbean cases. The relative ability of each movement to fill the gap existing at the time of the cases is then explored for each factor. They are then compared to determine if differences in the size of the gap and related factors along with the ability of the movements to fill the existing gaps shed light on why linkage to the Honduran cases had a positive impact on the court’s growth while linkage to the Trinidad cases have had a negative impact.

The findings suggest that there was a larger gap in resource to usage gap and expertise gap in the system for the Caribbean cases, but that a significant amount of the variation between the two case studies lies in the factors that were under the control of test case advocates. Namely, the comparisons suggest that the Honduran cases had more ability to choose between cases, they had prior experiences with the system and fewer judicial options in Latin America at the time that led them to have more venue loyalty to the system, they were repeat players in that they particularly knew the gaps in resources at the court and were able to fundraise using their larger network connections. This funding allowed them to do more significant in-country research on each particular case and build connections with the pre-existing NGOs and relatives’ networks in Honduras and the region, take advantage of opportunities to use the media to frame the decision, and coordinate their after-decision activities through an already growing transnational advocacy network on disappearances and anti-impunity. Their successes were slower in the courts and formal compliance. The Caribbean cases were not “wildcard” cases, but they were far less connected to transnational movements, and had little or no domestic media, political or NGO networks to tie into, which Tarrow (2005) has found to be a frequent cause of failure for transnational movements. Therefore, they were semi-wildcard cases. The advocates’ legal expertise has allowed them to use the test cases to preserve the lives of most of their death row clients through persistent, individual litigation strategies that have led to what Conant (2002) would call contained compliance at best (they did execute a couple of the clients early in the backlash).
Without a political movement linked to them, they have only years later slowly begun to have some success in the courts that may turn out to be more far-reaching in the region (though not in Trinidad as yet). Their connections to the system were much weaker and they were not repeat players in the system, and came from a region where the judiciary is at least more functional and so may have been counting more on the litigation strategy and, thus, not able or aware of the need to prioritize broader mobilization strategies or the potential benefits of framing individual cases to help neutralize a strong countermovement.

These findings suggest that the overlapping factors from the judicial politics, transnational advocacy movement, and international courts literature that I have compiled and adjusted for my framework may contribute to test case linkage efficacy. Though these case studies are primarily to aid in the development of my framework, they do suggest indicate that test case linkage outcomes are connected to the same factors that influence the outcome for court effectiveness and movements. However, they imply that the third level of obligation may in fact be an important consideration for movements using courts and courts taking test cases, if indeed linkage exists, since the results of these studies suggest that the court and the test case advocates need to complement each other’s resources and skills and fulfill many of the factors that affect both test case or movement success and overall court effectiveness. Even if your clients or movement may succeed in the long run, perhaps partially based on the test cases before the court, despite some negative publicity or outcomes early on, but those early reactions and short-term domestic political mobilizations may be more important for the outcome of the linkage for the court. First impressions, it seems, may count more in test case linkage.

A Note on Timeframes

In this section of the case studies, I will broaden the time frame that I am exploring slightly broader than the moment of linkage studied in the first cases studies. Because of the potential for some
of the factors to impact test case linkage efficacy before the test cases even begin, such as a pre-existing countermovement, or even after the linkage has already begun, such as the potential to be able to reframe the movement and thereby potentially improve the outcome of linkage (or dampen it), I will consider some of the relevant information from both before and after the test cases. For example, I will explore the courts budgets throughout the time span involved, I will explore the pre-existing networks that existed or the lack thereof in each region, and I will consider the actions of the advocates after the linkage occurred both domestically, in the court itself (such as later cases and hearings), and internationally. Another specific example is my exploration of the Hillaire et al. case and consolidation. Though linkage had already begun before these cases made it to the court, they left open the potential to reframe the movement or the court, or to at least dampen the countermovement’s frame of the cases as merely delay tactics, or what may have been achievable if the advocates and court could have presented the substantive issues of the case earlier on in the process. Findings from this broader approach suggest that pre-existing networks and countermovements may be important contributors to linkage outcomes, and suggest that movements and courts may bring their pre-existing “baggage” (good or bad) into the linkage relationship.

**Hypotheses for Positive or Negative Linkage Outcomes**

As laid out in the last chapter, the case studies are used to determine if the following hypotheses, as part of my framework for test case efficacy, may explain to some extent why the Honduran disappearance cases resulted in a positive stimulus linkage for the court, while the Trinidad death penalty cases resulted in a backlash. Measurement will include the starting point for advocates: any existing gaps in the court’s ability to fulfill that category in my framework (usage, resources, expertise, compliance). It will then discuss any differences in the gaps at the court in that category at the time of each case study. Because I argue the court and advocates must complement each other, this
is the starting point for the advocates. Court resources on that category PLUS the resources of the advocates in that category determine the likelihood that the linkage outcome will be positive or negative. The greater the gap, the more the advocate has to be able to fill it.

**Financial Resources Hypothesis**

1. *Resources Hypothesis*: The more resources available to the court and the test case advocates for usage, expertise and compliance factors, the greater the likelihood that linkage between the court and test cases will be positive.

   Measurement: Financial resources are measured based on the amount of funding and staff for the commission and the court, the time available from the judges and commissioners, and costs of outreach, litigation, and enforcement procedures. Resource deficiencies are assumed to interact with the three other categories: usage, expertise, and compliance. For this reason, resources are considered together with each of the following three criteria. How financial resources play into each of the categories is further explained in their respective sections and in the description of the gaps created by the lack of those resources.

**Usage Hypotheses**

1. *Usage Imbalance Hypothesis*: The more a court’s caseload increases without a proportionate increase in resources, the greater the likelihood that linkage between the court and test cases will be negative.

   Measurement: Usage imbalance will be measured by looking at the relationship between the number of cases that a court and system overall has on its docket in proportion to the financial resources available to it. It will then look at the contribution to the docket made by the test cases in question, and whether the quantity and manner of introduction of the cases strained the system’s resources even more. The outreach component underlies the discussion of the quantity of cases
brought to the court, since the advocates must acquire access to the victims. This aspect is examined by examining the relationship between the advocates representing the cases and their ties to the victims in the cases, including to the individual victim and any organizations that have worked with the victims, since many domestic organizations filter the quantity of cases before connecting them to the international advocates.

2. **Venue Loyalty Hypothesis**: The less venue options that test case advocates have, the greater the likelihood that linkage between the court and the test case will be positive.

Measurement: Venue loyalty is measured by the lack of other domestic and international that the advocates can access for their clients, especially judicial venues since those without judicial venues will be most likely to look for a venue that can legitimate and give the weight of “law” in a judicial sense that is missing from their other options. I include any international tribunal that the state has acceded to, regional courts outside of the Inter-American system, and quasi-regional bodies. This considers that in some states the domestic judiciary itself may be more or less functional, may be more corrupt in some states, and in some cases may be complicit in the violations. The more international and domestic options the advocates have, the less intense their venue loyalty is likely to be. Relatedly, venue loyalty can be impacted by previous ties and use of the court, since judicial politics research shows that venue loyalty tends to become stronger as an interest group becomes more entrenched in its use of a sympathetic system (Hansford 2004), if the experiences have shown the system’s policy congruence with the advocates. Therefore I explore whether the advocates have found other judicial venues that are sympathetic, which could mean they have less reason to be loyal to the system in question. I also examine whether their past experience with the system may give them reason to believe the court will be sympathetic.
Expertise Hypotheses

1. International Repeat Player Hypothesis: The greater the prior experience that test case advocates have had with the system, the greater the likelihood that linkage between the court and the test case will be positive.

   Measurement: Repeat player status and training is measured based on the amount of experience the representatives have with the system. Since in both of these cases, it was the advocates’ first times before the Inter-American Court, this variable is measured by how much experience they have overall with the system to gain additional insight into the variation between the two sets of advocates. In addition, I will analyze the experience of the system with the issues and regions involved in the cases, since the less experience the court or commission has with a topic or region, the more the burden is on the petitioners to educate the court about the topic or region. This task is easier if advocates are more familiar with the system, its major players, and its potential deficiencies. Part of the measurement is how much the players would understand the gaps and potential pitfalls within the system and their ability to fill those gaps themselves.

2a. Framing Hypothesis: The more sympathetic the frame of the case, the greater the likelihood that linkage between the court and the test case will be positive.

2b. Case Selection Hypothesis: The more access to potential cases and ability to choose freely among them, the greater the likelihood that linkage between the court and the test case will be positive.

   Measurement: Framing is measured based on the ability of the representatives to convey to the cases a frame that can better fit with the domestic situation and values. This requires advocates and the court to have a properly selected case with facts that are framed in a sympathetic way for the region involved. This can be limited where other factors, including the nature and urgency of the violations, the amount of victims suffering the violations, or jurisdictional limitations. These factors can limit the ability of advocates to select the best case from among similar cases. Where a previous case exists of a
translator state in the region who has made the policy shift already, that can provide assistance to the advocates and court in how to frame the case in a way that can work in the region, such as Argentina’s trials, though short lived. This variable is impacted by the domestic mobilization capabilities (explored in the compliance category), since even the best framing cannot be successful unless the frame itself can be conveyed to the target audience in the region, preferably by domestic actors.

Case selection capabilities are a critical component of framing, since the proper frame often requires finding a case with “good facts” (Tolley 1990) aspects of the case selection hypothesis is measured using the amount of choice the advocates have on which cases they bring. This includes access to a large number of similar cases that could be representative of the problem. It includes the ability of the advocates to choose representative cases, which can be limited if urgent circumstances face the group as a whole or if some other individual level pressure to take particular cases or a large number of cases in lieu of using selection criteria to serve the second and third levels of obligation, namely the cases best for the movement of the court. Without the ability to choose cases with good facts to represent the test cases at least as the lead complainant, the ability to frame the case is severely limited.

3. Information and research hypothesis: The greater the information and quality of information presented to the court by test case advocates, the greater the likelihood that linkage between the court and the test case will be positive.

Measurement: Information and research for each case is measured based on the ability of advocates to fill any gaps in research or information that the court has. In cases where the court or commission has less experience with the issue, petitioners are likely to be expected to bring more information about the violations and the country in question to the system. In most cases, this involves the ability of advocates to investigate the cases in country, locate witnesses or pertinent documents,
and connect with domestic NGOs or other resources that might be able to provide additional evidence for the cases. This factor relates to the ability to monitor the situation after a successful decision and get that information to the court. Information can be affected by the amount of time the commission or court is willing or able to give the advocates to present each case, particularly at public hearings which are often a critical aspect of test cases and allow the petitioners to bring violations to light and educate the domestic and international community about the problem.

**Compliance Hypotheses**

1. *Domestic Mobilization Hypothesis:* The greater and more varied the domestic support networks mobilized to support a test case, the greater the likelihood that linkage between the court and the test case will be positive.

Measurement: Domestic coordination is measured based on the ability of the advocates and movement to mobilize a domestic campaign to pressure compliance. The key components include connections to domestic human rights NGOs or other related grassroots movements, supportive political elites who can act as spokespersons and/or who can bring about judicial, legislative or executive policy changes from the inside, investigative journalists or other media support or at least media that engages the issue in a neutral enough way to educate the public about the alleged violations and decisions, lawyers or NGOs who can bring additional litigation to enforce the decision. I will consider how persistent and varied the activities are, including whether they include strategic litigation, legislative lobbying, pressure on executive agencies, protests, and other activities. I consider whether these networks and ties exist at the time the case is filed, since building them after the fact may be too slow for test case linkage effects.
2. *International Mobilization Hypothesis*: The greater and more varied the international support networks mobilized to support a test case, the greater the likelihood that linkage between the court and the test case will be positive.

Measurement: International coordination is measured based on the ability of the movement to connect to and mobilize international NGOs to provide external support and pressure for compliance through publicity campaigns, shaming, leveraging through lobbying powerful countries or international institutions, and other strategies at the international level. I will consider both pressure for specific compliance in the case and more informal compliance with the broader policies underlying the case. I analyze whether there was support from the international media and focus on the region and cases by large human rights NGOs through reports or public statements. I consider whether pre-existing ties between the international NGOs and domestic NGOs, such as through the boomerang technique outlined by Keck and Sikkink (1998), can more easily be called up quickly than building coalitions after the fact. Lastly, I examine the role, if any that moral authority states within the region played in supporting or countering the cases and the potential support within or by the regional political body, the OAS. The overall comparison of the two cases, the resources of the test case advocates, and the ability to fill the gaps that existed in the Inter-American system at the time they filed their cases is presented in Table 14.
Table 14: Positive or Negative Linkage: Filling the Effectiveness Gaps in the Inter-American System

<table>
<thead>
<tr>
<th>Effectiveness Criteria</th>
<th>Gaps Possibly Filled by TNANs</th>
<th>Disappearance Cases</th>
<th>Death Penalty Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Usage</strong></td>
<td>Outreach &amp; Usage Balance</td>
<td>Increasing case load &amp; stagnant budget leads to overusage, usage imbalance</td>
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<td></td>
<td>Case Selection</td>
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<td></td>
<td>Venue Loyalty</td>
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</tr>
<tr>
<td><strong>Expertise</strong></td>
<td>Training &amp; Legal Aid</td>
<td>Commission and advocates are experts on disappearances</td>
<td>London lawyers are experts on Caribbean death penalty issues, but Commission is not</td>
</tr>
<tr>
<td></td>
<td>Framing &amp; Case Selection</td>
<td>Extensive funding from international NGOs and major donors</td>
<td>Pro bono lawyers and other experts, but limited litigation expenses budget</td>
</tr>
<tr>
<td></td>
<td>Research &amp; Information</td>
<td>Three cases, individuals framed as student, teacher, family members</td>
<td>Cases framed by procedural issues such as provisional measures support state’s counter-frame of delay tactics</td>
</tr>
<tr>
<td></td>
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<td>Commission and advocates select three Honduran cases as most ready, best evidence, and support from Costa Rica</td>
<td>No individual cases publicized or focused on because urgency leads to consolidation</td>
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<td></td>
<td></td>
<td>Commission has extensive prior reports &amp; investigations into disappearance issues in Latin America</td>
<td>Commission lacks experience in death penalty or Caribbean; no previous reports on the region or issue</td>
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<tr>
<td></td>
<td></td>
<td>Extensive research trips to Honduras and assistance from Honduran and regional NGOs and political elites</td>
<td>Less resources to do extensive domestic research or make connections with relevant NGOs (few exist) in Caribbean</td>
</tr>
<tr>
<td><strong>Compliance</strong></td>
<td>International mobilization</td>
<td>Pre-existing connections with Americas Watch, Amnesty International, Lawyers Committee for Human Rights, and many other international organizations with experience in disappearances</td>
<td>CEJIL not connected in Caribbean, few major international NGOs connected to the cause within the Caribbean due to focus on states with higher execution rates (US)</td>
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<td></td>
<td>Domestic Mobilization</td>
<td>Coordinated civil society campaigns against disappearances, and experience using boomerang methods in previous countries like Chile</td>
<td>No civil society campaign connections in the region, no international organizations with extensive experience in Caribbean except limited Amnesty reports in Jamaica</td>
</tr>
<tr>
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<td>Extensive connections with domestic NGOs like CODEH and relatives of the disappeared groups, both domestically and regionally</td>
<td>Lack of domestic grassroots movement, NGOs, political elites, or investigative journalists to connect with or fend off government’s counter-frame</td>
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<td>Lack of formal judicial compliance outweighed by significant political and executive reforms in overall policies toward disappearances and impunity, even if not formal payment to family</td>
<td>Slow judicial victories not translated into political movements that can reach public opinion or political elites who could spur legislative or executive reforms</td>
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<td>Burgeoning investigative journalists in Latin America report on cases and make the “Velasquez Rodriguez” law synonymous with anti-impunity in Latin America</td>
<td>No investigative journalism or similar media campaigns to explain the violations/problems in system, journalists support hangings</td>
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Category 1 Usage: Usage Imbalance and Venue Loyalty

In this section, I will explore what the factors that affect the usage category in my framework of test case efficacy. First, I will lay out the variation in potential usage imbalance and venue loyalty issues that existed for the two different case studies, noting that part of the variation was caused by state-controlled factors, such as variation in the number of court recognitions and venue access for advocates as well as by the budget of the court and commission to handle a growing caseload which contributed to the usage imbalance that likely impacted the level of gaps at the court and the resources that were required for each test case to fill those gaps. Findings suggest that usage imbalance can have a potentially negative impact on the court’s effectiveness, but that over usage is likely more detrimental for test case linkage outcome than under usage, though under usage. The positive test case linkage in fact can help increase usage at the court.

Variation in State Controlled Usage Factors

The context under which the advocates found the court at the time their cases made their way before the court varied considerably on a number of factors controlled by states, rather than test case advocates. The fewer that have, the more likely the state will be emboldened to counter the court’s decisions. At the time of the decisions in the Honduran cases in the late 1980s, 10 states had recognized the court’s jurisdiction to hear contentious cases within Latin America. While during the era of the Caribbean cases, Trinidad was in fact the only Commonwealth Caribbean country that had recognized the court’s jurisdiction. Jamaica, Grenada, and Barbados had ratified the American Convention on Human Rights, but had not recognized the court’s jurisdiction to hear contentious cases.

I argue that the number of different venue options are available to a movement can influence how venue loyal the movement will be to a particular court and how committed and willing to prioritize the third level of obligation, to the system itself, that movement is likely to be. This factor in
many respects is in the control of the state, though the willingness of advocates to use other venues can vary on factors related to them as well (such as whether they believe policy congruence is likely).

Honduras had signed but not ratified the Optional Protocol to the ICCPR to give the UN Human Rights Committee’s (HRC) authority to hear contentious cases at the time of the initial disappearance cases. Honduras did not do so until June 2005. Trinidad had recognized the UN HRC authority and had contentious cases decided by the UN HRC prior to the late 1990s Inter-American cases. Further, Trinidad recognized the authority of the Privy Council in London as a domestic appeal of last resort, and had a judiciary that was more functional at the time of the cases than the Latin American judiciary facing the disappearance advocates in the 1980s. Judicial independence was lacking in the transitional democracies of Latin America until the mid or late 1990s (Skaar 2011), and the advocates for the death row inmates had options outside of Trinidad itself and outside of the Inter-American Court as well. They represented cases from several states (particularly Jamaica) that had not recognized the Inter-American Court, all of which might suggest they were likely to express less venue loyalty to the Inter-American Court.

As far as other mostly state controlled factors in the individual cases, neither state cooperated fully, but Honduras did participate more actively and less confrontationally. The state of Honduras attended hearings with its legal team, but did not fully cooperate with the court. Honduras’ legal team did participate in cross-examining witnesses and presenting legal arguments on the merits at the court, but the state did not produce much evidence to back up its arguments. The court at one point in the *Fairen Garbi* case noted that the Honduran government had bordered on obstructionist in its lack of cooperation to find and exhume the body of a man believed to have been that of Francisco Fairen Garbi (Manuel and Mendez, 1989, p. 75). This may have been due to a lack of resources in the
Honduran government, but does demonstrate that the court did have some resistance from Honduras, and that the state did not merely “roll over.”

Trinidad was even less cooperative. Trinidad’s government failed to show up at hearings on provisional measures before the court in James et al., and had told the commission that it expected resolution of the case within a tight seven-month time frame. Trinidad submitted its withdrawal from the court as soon as provisional measures were initially granted by the court. Further, though Trinidad did present arguments on jurisdiction and other preliminary objections, the state did not respond to the applications or participate in proceedings on the merits in the Hilaire et al., or Benjamin et al. cases, which the court consolidated. During proceedings, the state executed two of the men who were at the time under provisional measures, a complete non-compliance (which Conant 2002 notes is rare in here study of the European courts). Trinidad, needless to say, was not fully utilizing the court.

Usage Imbalance in the Inter-American System

Usage imbalance in the Inter-American system, I argue, shifted from under usage before the Honduran cases to over usage as the Caribbean cases came before the court. In the mid-1980s, the Inter-American system was just beginning its transition to a more contentious case-based system at the time that the Honduran cases were sent to the court. Before the court began hearing cases, the work of the system had been carried out exclusively by the commission. In its previous role, the commission was more of a quasi-diplomatic body that wrote reports of its choosing, with a much more flexible timetable (Cosgrove 2000). Under these circumstances, the commission functioned adequately with its minimal staff, resources, and part-time commissioners. During the era in Latin American when authoritarian regimes persisted, even into the 1980s, the commission had used its powers to do reports on mass violations in order to take a stand against broader human rights violations. It used its ability to do in loco visits to countries after receiving formal invitations from the governments. At least one
former commissioner has argued that these *in loco* visits were preferable for mass, grave breakdowns in democracy and basic human rights, and where urgent mobilization was necessary. Visits had broad visibility and were intended to mobilize public opinion and the media, which often followed the commission on its visits.

When the region shifted to become more democratic in the 1990s, the focus of the commission shifted to processing individual cases. Claudio Grossman, former President of the Inter-American Commission on Human Rights, observed that these individual cases could act as an early warning system to prevent new democracies from backsliding into grave violations, to better define regional human rights standards, and to expand rights even beyond what the domestic protections might be (though some might argue that this could lead to overlegalization; Grossman 1998, p. 187). Grossman argues that these cases have “more limited impact,” which might not always be true. Grossman’s emphasis seems to be on touting the importance of the *in loco* system, which he calls “the most important mechanism of the system” (p. 189). It acted in the region almost like a regional truth commission by publishing reports that pointed out violations even in countries disallowing in loco visits in order to place additional pressure on those governments. The commission had no such past experience, research or networks in the Caribbean nor did the organizations like CEJIL upon which the system had relied heavily in previous cases perhaps to the borderline of becoming institutionally dependent on those previous networks and NGOs to fill gaps in its previous work. My findings suggest this may have impacted its ability to process the glut of death penalty cases that it would receive in the late 1990s, and will be discussed more below. Even if it had wanted to continue in a more diplomatic manner, the commission likely did not have the resources or staff in that time period to carry out the kind of rushed *in loco* visits to the Caribbean would have had to happen to beat Trinidad’s timing objections, though such reporting and media-covered visit might have been useful to
pave the way for future court decisions and mobilization regarding the violations in the justice system, mandatory death sentences and prison conditions in the region.

The transition toward the prioritization of the individual case approach came from a combination of democratization and pressure from human rights groups. This echoes Skaar’s findings that the mid-1990s brought more of a prosecution-based independent judiciary approach rather than the transitional truth commission-based approach to domestic democratic transitions in Latin America, and apparently this was the case at the Inter-American human rights system. This is not entirely surprising given the linkage between the system and the anti-impunity movement. There was, however, intense opposition to this reprioritization even within the commission’s secretariat. Eventually this led to a change of the executive secretary of the commission in 1995. Further, groups of states attempted to stop the commission’s new approach, but were overcome by a combination of democratic states that supported the system and the growing civil society in the region that had put pressure on the commission to move to the case approach (Grossman 1998, p. 191-192).

Early on, the commission had not used the individual case approach, and even after it had begun to use this approach, it sent few cases to the court. In this period, the commission exercised its discretion to send only a handful of cases each year until later in the 1990s when the death row advocates filed large numbers of individual contentious cases simultaneously. The system was faced with far more cases than it had handled during the time period of the Honduran cases. In the late 1980s and early to mid-1990s, the court had five or fewer decisions each year. By the late 1990s and early 2000s, the court was putting out far more decisions and supposed to be monitoring compliance with its previous decisions. In 1998 and 1999, the court issued decisions in 11 cases respectively (including decisions on the merits, preliminary objections, and reparations). In 2001, when the first Trinidad cases had decisions on the merits released, the court produced over 20 decisions (the
consolidated Trinidad cases counted as only three of those decisions). The court’s resources had not significantly increased, nor had the time given to the court to hear cases. The system was faced with overwhelming numbers of cases and minimal resources. This is not to say that the Inter-American system did not rise to the challenge or create ways to deal with the additional usage. Coming at a time when this phenomenon was first hitting the system, the Trinidad cases felt the full brunt of the system’s resource gap and its interaction with spiking numbers of individual cases. The result, in conjunction with the urgency created by the state’s decision to proceed with executions regardless of provisional measures, was the consolidation of cases by the commission when they were sent to the court.

Many scholars who previously worked in the system, and even the OAS itself, have found support for my contention that usage imbalance can affect the system’s ability to hear cases as effectively as needed to contribute to a positive test case linkage outcome. Most have noted that the system was rife with resource deficiency and that the increase in caseload caused a backlog. In the late 1990s, the lack of resources was reported as a significant cause of the backlog of cases within the court and commission, particularly on death penalty cases (Cosgrove 2000). Cosgrove concludes that the part time nature of the commissioners and judges exacerbated the backlog. Brian Tittemore, a former staff attorney for the Inter-American Commission, observes that many judges and commissioners kept other full time employment while serving on the court or commission. Severe budget limitations in the OAS in general had led to resource deficiencies that left the court’s budget at just over one million and the commission at about 3.4 million, compared to the European Court which at the time had a budget of roughly 47 million and served full time (Tittemore 2004), even though by the late 1990s, the commission had almost as many cases as Europe’s system at that time (Grossman 1998). Despite the fact that the caseload of the court had tripled in the latter half of the 1990s, the court’s budget stayed
roughly the same over the last three years of that decade. The same was true for the commission, which had 1000s of cases by the year 2000 (OAS 2000). A former Assistant Secretary of the Court, writing with another scholar, has concluded the system functioned with “extremely small budgets,” leading to time delays in cases after the caseload increase (Rodriguez-Rescia 2000). The OAS’s 2000 report on the system’s financing shows that the budget only provides the court “the minimum resources it needs to function,” and given the increased caseload, the numbers are “alarming” (OAS 2000, p. 6).

Thus, an imbalance existed in the Inter-American system with regard to the interaction between usage and resources which swung from under usage before the Honduran cases to over usage at the time of the Caribbean cases. One major contributing factors was that while the system’s usage increased dramatically from 1986 to 1998, its resources did not. The over usage in the system was not only a result of a failure of the OAS and states to fund the system, though this was a major contributing factor, but also of a shift in the commission to use the case approach more at the same time that advocates from the Caribbean, perhaps partly because of the increased emphasis on the case approach at the commission, shifted many of their cases from the UN HRC to the Inter-American system. These overlapping factors controlled by the states, the commission or the advocates contributed to the Inter-American system’s usage imbalance being a greater problem at the time of the Caribbean cases. While severe under usage can lead to the eventual demise of a court, for test case linkage efficacy, my findings below suggest that over usage imbalances may be more detrimental. However, other usage factors were stacked against the Caribbean cases, since they entered a system that had been heavily dependent on previous connections to a network for much of its docket, and their procedures and approach had been developed with the assumption that cases would be backed by these networks whose resources unfortunately did not extend to the Caribbean or death penalty cases.
Filling in Usage Gaps in the Honduran Cases: Venue Loyalty and Outreach

While the usage gaps were less in the Honduran case, the ability and motive for the anti-impunity movement to fill that gap was greater. Given the blockage that existed in domestic courts in Honduras and the lack of access to other international tribunals, the movement of international NGOs working to end disappearances and impunity in Latin America were very cognizant of the third level of obligation to the system, as well as their obligations to the movement and the victims’ families. Promoting the creation of regional and intergovernmental venues for use by NGOs in the future is important for a movement’s success. For example, Amnesty International USA’s disappearance workbook stated that part of the movement’s work was to support both the creation and functioning of intergovernmental mechanisms (Amnesty International USA 1983, p. 145). Americas Watch was directly involved in the Honduran cases and in 1989, their cases were important not only to the victims, but to the Inter-American system. The credibility of the Inter-American system was in their hands, they acknowledge, and they needed a successful completion of the case against Honduras (Human Rights Watch 1989), including compliance.

Americas Watch worked in conjunction with NGOs throughout Latin America to establish networks that would connect NGOs with legal expertise, through Americas Watch and later CEJIL, to bring their cases before the Inter-American system exclusively, which gave them an even greater stake in the success of the system. Thus, they had a big hand in bringing cases before the system, including at least 230 cases before the Inter-American system between the 1980s and 2012 (CEJIL 2012). Further, because of their focus on providing legal services within the Inter-American system, they had a stake in the success of the system overall. In fact, listed as part of the mission of CEJIL, which was the organization that grew out of the networks for the Honduran cases, is “to increase the effectiveness of the decisions adopted by the Inter-American System and promote equal access to the System’s mechanisms” (CEJIL 2012).
The success of the *Velasquez Rodriguez* case not only caused the court to become more widely known and respected but also raised the profile of Americas Watch as defenders of human rights within the region. Moreover, it in effect linked the fate of the court to the fate of the movement and the movement’s international legal experts to the success of the system. Many of the lawyers involved in the case have gone on to be big names in the human rights community and continue to remain involved at least tangentially with the Inter-American system. Of the lawyers asked by the families to represent them before the court, all three are prominent human rights advocates. Claudio Grossman, now dean of American University’s law school and Chair of the UN Committee Against Torture, served on the Inter-America Commission from 1993 to 2001 (American University Washington College of Law 2012). Juan Mendez later served as Executive Director of the Inter-American Institute for Human Rights and is the UN Special Rapporteur on Torture. Jose Miguel Vivanco went on to found and to direct the new organization CEJIL and is now director of Human Rights Watch’s (2012) Americas division (formerly Americas Watch).

CEJIL has filled the outreach gap for the Inter-American system since its founding shortly after the *Velasquez Rodriguez* and the other Honduran cases went through the court. By 1990, Americas Watch was involved in 40 test cases before the commission (Human Rights Watch 1990), and in its 1989 report it noted that it had been “besieged” by requests for it to assist with litigation of other cases before the system because of the Honduran cases (Human Rights Watch 1989). In 1989, it began enlisting the assistance of law students and pro bono firms to provide legal services to Latin American human rights groups. It now selects cases that are emblematic and can make the most difference, suggesting that they do place limits on the numbers of cases they take to the system and use some criteria for case selection.
Institutional Dependence: Reliance on Anti-Impunity Networks

The growth of civil society’s role in the Inter-American system and the system’s institutional dependence upon the networks that developed as part of the system’s successful work on disappearances in Latin America are in many respects a result of the backing of the Honduran cases and party because of the dearth of resources at the court otherwise (as noted above). International and Latin American civil society had always been active and connected with the human rights system in the OAS, especially given its growth in a time after the boom of human rights NGOs began in the late 1970s. The members of civil society involved in the initial Honduran cases were hoping for even more direct involvement in the system. Americas Watch lawyers Juan Mendez and Jose Miguel Vivanco (1990) detailed in their article on their work on the Honduran cases that they were promoting a more direct and open role for the representatives of the victims during court proceedings. When the commission would not respond to their requests to be allowed to represent victims directly during hearings on the merits and preliminary objections, they worked with the Executive Secretary of the Commission and were appointed as ad hoc advisors. During the reparations phase, with the assistance of the court (especially Judge Antonio Cancado Trindade), the representatives were able to demonstrate that the victims and commission might have conflicting ideas of what constituted appropriate restitution and were given a chance to directly represent the victims in that phase (Mendez and Vivanco 1990). Thus, during the proceedings, the victims’ legal team was able to begin the formal expansion of the role of civil society and victims’ representation before the court.

Not only did advocates involved in the Honduran case promote greater formal access during court proceedings, but their continuing work in the system shows a longer term view toward both increasing the role of civil society in the system and strengthening the system itself using civil society resources. In 1991, Americas Watch and other advocates in the region founded CEJIL to fill a major gap in the region, primarily the lack of expertise and knowledge of the system in the region and
outreach to potential clients. CEJIL aids advocates for human rights and justice in the Western Hemisphere to file cases and takes on as part of its mission to “increase the effectiveness of the decisions adopted by the Inter-American System and promote equal access to the System’s mechanisms” (CEJIL 2012) and increasing implementation of decisions at the domestic level through monitoring, trainings and support for domestic human rights activists (CEJIL 2012). Thus the goals of the organization included outreach, training, and compliance goals in addition to expanding access for civil society. Further, CEJIL attempts to strengthen the system itself through promotion of the human rights system to other political organs of the OAS, publication of reports and a journal on the system, and the monitoring of the selection process for commissioners and judges for the system (CEJIL 2012).

These goals to fill gaps and shore up the system are apparent from early on in the Honduran cases and were made visible to ensure that gaps in usage, resources, expertise, and compliance were filled. Their efforts succeed for themselves and the court in Latin America due to understanding of the gaps in the system, which I argue add to the expertise (described more below). They had the resources to fill those gaps and an underlying commitment and opportunity to fulfill their obligation, both to the individuals and movement they represented and the system as a long-term venue for human rights promotion in the region. Their goals were complementary. Because the system had few resources and a strong positive linkage to the movement, an arguably dependent relationship developed that allowed the system to rely on the resources and networks, and perhaps, as seen in the Caribbean cases below, left it vulnerable to negative linkage when usage shifted to cases brought by those without connections to large-scale networks and resources, and with less ability to give attention to their obligation to the court due to overriding concerns for individual clients.
Filling in Usage Gaps in the Caribbean Case: Venue Loyalty and Outreach

In the Honduran cases, the lawyers faced a system in which the court had no cases and they had the court all to themselves. Bad for the court in the long run, but probably a benefit for the cases and linkage. The Trinidad cases, on the other hand, found themselves facing a system that was already strapped for resources, when the movement was itself trying to fill in the gaps in resources within the Caribbean’s capital punishment system which lacked legal aid for appeals. The movement was funded primarily by European Council short term grants, not fully sure if their funding would be continued, with a large number of clients facing imminent execution, or in the case of two clients, actual execution after filing cases in the system. They reached out to the several venues available to them, including the Privy Council, the UN Human Rights Commission, and the Inter-American system, to contest the violations caused by the mandatory death penalty, prison conditions, and procedural irregularities, and in the end, to delay the threat of execution. Given these circumstances, the movement did quite well for itself and its individual clients. This movement did have long term goals to end executions in the Caribbean, but it was at the time of the cases being filed with the Inter-American system focused far more on the individual level of obligation to their clients and somewhat less so to the movement against practices like the mandatory death sentences. Further, the findings below suggest that they lacked the ability or motive to fill the resource gaps of the Inter-American system or to consider the system’s long-term needs. They were avoiding the noose, and they had multiple venues in which to do it.

The Path to the Inter-American System

The advocates for death row inmates in Trinidad came to the Inter-American system as an overwhelmingly litigation-based group with an individual litigation strategy. Unlike the disappearances cases, much of the outreach in the Caribbean was through word of mouth rather than
through connections with domestic anti-death penalty or general human rights NGOs, as these were weak or non-existent in Caribbean countries. The London lawyers representing the Trinidad death row inmates in Inter-American death penalty cases had found many of their clients through word of mouth. Many of the cases taken by the London Panel and its successor the Death Penalty Project are found through word of mouth from other prisoners. Early on in their advocacy for death row inmates in the Caribbean, the lawyers found themselves with large number of clients, especially given the lack of legal aid available in Jamaica and other Caribbean jurisdictions. Initially, many of the cases were referred to the London Panel by the Jamaica Council for Human Rights, an NGO in Kingston that acted in some cases as the liaison between the prisoners and the lawyers in London. The organization’s mission was to promote human rights and provide legal aid in cases where no aid is available from the government (O'Connor 1991). No legal aid was provided within Jamaica for appeals to the highest court of appeal, the Privy Council in London, so the organization sought the voluntary assistance of the London firm of Simons, Muirhead, and Burton’s partner Bernard Simons, and later, many other law firms in London.

As this London Panel of pro bono lawyers grew, so did the number of cases they could take, and they eventually branched out into death rows outside of Jamaica, including in Trinidad. The firm of Simons, Muirhead, and Burton in the early 1990s hired a staff attorney, Saul Lehrfruend, whose sole duties were to organize, research, and represent Caribbean death row cases. He later went on to co-found the Death Penalty Project, which still represents Caribbean cases before the Privy Council and Inter-American system today. In 1994, the young attorney first travelled to the Caribbean to do outreach for the London Panel. At first, most of the referrals he cultivated were through individual contact with local attorneys, who were skeptical of the commitment of the London lawyers. Over time, after demonstrating that these cases were a priority, local Caribbean attorneys and individual
prisoners began contacting the Panel directly, and word of mouth became the primary outreach mechanism.

After the 1994 *Pratt and Morgan* victory at the Privy Council (Writer 1993), the number of international appeals by London law firms grew dramatically. Representation pre-*Pratt* decision included only a small number represented by the London Panel before the UN HRC and the Inter-American Commission. Many of the cases in these international tribunals failed before the *Pratt* case. After the *Pratt* case, 80% of the cases were represented by London Panel firms (Helfer 2002), p. 1875, and their success rates increased dramatically.

Even more dramatically usage by the London Panel lawyers shifted in 1997 from primarily utilizing the United Nations Human Rights Committee (UN HRC) to primarily using the Inter-American system (Helfer 2002). The filings by the lawyers in London were submitted “contemporaneously,” or basically as a mass group of filings starting in 1997 (Tittemore 2004). They were very similar filings, though they raised a handful of distinct legal issues, and all asked for similar protective measures for the petitioning condemned inmates. An effective means of delaying executions, the cases were a frustration for Caribbean governments dead set on restarting executions, particularly Trinidad and Tobago. The filings made up 10% of the commission’s backlog at the time. Requests from Trinidad that the commission and court process not take longer than seven months were not feasible for the commission or court to meet given their resources and lack of experience with a large number of Caribbean or death penalty cases at the time. The delay further frustrated the government of Trinidad, which was working against the Privy Council’s unrealistic five year *Pratt and Morgan* clock.

Unfortunately for the developing Inter-American system, I argue, the lawyers for the Caribbean death penalty cases did not have the luxury to pick and choose a small number of initial test cases on
the important and unique issues that the Caribbean justice systems raised, such as mandatory death sentences. The Inter-American system was not used to a rapid influx of urgent cases through the contentious case system, and did not have procedures or resources in place initially to process the merits of these cases quickly. Further the sheer numbers of cases before the commission required considerable use of its resources, and though it considered each of the 23 cases that eventually formed the Hilaire case at the court separately while they were at the commission, it chose to send them together to the court (Concepcion 2001, pp. 872-873). In these consolidated cases, ironically, the court found that mandatory death sentences did not consider each individual’s circumstances in the sentencing phase. By the time the cases reached the court for a hearing, one of the petitioners had already been executed.

One organization of lawyers, working together on a group of similar cases, were able to have a huge, direct impact on the usage rates and case types before the system. This suggests, I contend, that advocates for victims hold a great amount of power to determine the make-up of the docket of the system. The commission in the late 1990s still had control over which cases went to the court, but could not ignore the vast amount of cases. These cases were legally admissible and made prima facie cases that violations had occurred. The influx raised questions of whether solutions such as the fast track, urgent action, or streamlined procedures for emergency and death penalty cases that have been suggested by several scholars, including one of the lawyers for the Honduran cases, might have helped curtail the imbalance between resources and usage numbers that occurred during this period (Cosgrove 2000; Mendez and Vivanco 1990). Given the reliance of the system on outreach by NGOs and other advocacy groups that could and often did help filter cases along with the commission’s control at the time, “jumps” in usage may not have been expected. However, perhaps given the focus on the past by the anti-impunity movement with which it had been linked, the system did not fully expect or have a
plan for what to do with a large number of living victims facing an imminent execution date, and the implications for the individual-based priorities and resource deficiencies of their advocates.

**Venue Loyalty**

Given the venue options that the advocates had, my framework’s venue loyalty hypothesis suggests that the advocates did not have as much motivation as the judicially challenged anti-impunity advocates of the 1980s. The sudden upheaval of the Caribbean cases from the UNHRC to the Inter-American system in the late 1990s implies that the lawyers, not surprisingly given the circumstances, were motivated more by individual level obligations than an obligation to any one system or its evolution. With their strategy of procedural delay, the Caribbean lawyers had several options other than the Inter-American system in which to file their cases. Though the Privy Council could limit which cases it chose to take and often failed to hear some of the appeals brought by the London Panel, the lawyers after 1986 had an alternative route for appeals, the UN Human Rights Committee. By 1990, there had been 27 Jamaican death row cases decided by the Committee, including three in which the Committee recommended release of the prisoner (Writer 1990). In 1997, the legal team switched strategies and began filing most of their cases in the Inter-American system.

The lawyers for the Caribbean cases, unlike the Honduran cases’ legal team, did not have the same deep connections and level of commitment to the system itself for many reasons. First, though the Caribbean court systems do not garner praise for their efficiency, largely due to delays, inadequate resources, and some questionable procedures, the level of incompetence and corruption in the Caribbean system at the time of the Trinidad cases at the court was far, far less than the Latin American court systems that existed in countries like Honduras during the disappearance cases (Concepcion 2001). The legal team for the death row inmates wanted to reform certain aspects of the justice system in the Caribbean, but were generally used to having at least a more or less functioning
court system, including the Privy Council appellate system, that was reasonable and responsive to their concerns, at least in large part. Having another appeals level was certainly beneficial for their cases, but it was not likely their primary concern to bolster that option, as it would have been for the Honduran cases’ legal team, who were in many ways primarily looking to provide a route for families of disappeared and other victims of grave human rights violations to find a responsive court that was not trying to cover up its government’s past crimes. They were seeking to create a court that would respond to their concerns, which they could not find domestically, given the state of judicial systems even in democratizing countries in Latin America at that time. The Caribbean lawyers were used to a functioning judicial branch, and so focused more specifically on a litigation strategy, to be further discussed in the compliance sections.

In addition, the Caribbean lawyers likely were less concerned initially with the venue’s well-being because of their overriding concern for the obligation to their individual clients. They simply had more pressing issues. Their hope was to save their clients, and hopefully call out some of the problematic due process and other concerns for their clients, and further move toward a moratorium in the Caribbean. The Caribbean lawyers had less previous sympathetic experience with the system prior to the Trinidad cases. In fact, while the commission had been very active in its opposition to disappearances practices in Latin America, including previous extensive work on the subject, such as in loco visits, published reports, and contentious cases, the commission had mostly rejected prior attempts by Caribbean death row inmates. Of the eight reports on mostly Jamaican death row inmates’ cases that the commission had published between 1980 and 1996, only one was found by the commission to have had any violations (Tittemore 2004). The Caribbean advocates did not have the long-standing, positive interactions with the Inter-American system that the advocates for the disappearances cases had. As noted in the judicial politics literature and my discussion of venue
loyalty in Chapter 6, prior sympathetic experience with a system can lead to a more pronounced loyalty to the system, and that was lacking for the Caribbean cases. This lack of venue loyalty and prior positive experiences meant that they were not concerned about the system when they filed a barrage of death row cases from a country that had already demonstrated its willingness to ignore decisions from cases brought by the same advocates at the UN HRC.

Usage Conclusions

My first usage hypothesis was that when usage expands without proportionate changes in resources, the more likely it will contribute to negative linkage. The literature has noted that under usage can be a problem for court effectiveness. Usage imbalances in the Inter-American system shifted from under usage in the 1980s to over usage by the late 1990s, so my case studies demonstrate both types of potential usage problems. Under usage seemed to give the disappearance cases a bit of an advantage for linkage outcomes, at least in the sense that the court was able to spend more resources and time on the cases. While normally having few cases is a negative for court effectiveness, the findings here seem to suggest that under usage could be less of a problem for linkage efficacy. Over usage, on the other hand, is potentially a major problem, especially if the linked cases come at a time when the court is still struggling to find efficient but not detrimental shortcuts. Combined with the urgency of the death row cases, the over usage led to a strain in the system’s already strapped resources. These problems will be echoed in the discussions of expertise in the next section, given the lack of resources for legal aid, less time to present on each case at hearings, and less ability to highlight individual stories and frames.

My second usage hypothesis was that the less venue options that test advocates had for their cases, the more dedicated or loyal they would be to the system. This venue loyalty, I theorized, might reinforce the third level of obligation to the court, and it might give them incentive to try actively to
promote the court’s interests in addition to their own movement. Though linkage suggests the movement and court’s interests will in many cases overlap, the venue loyalty hypothesis goes further and argues that the movement might actively promote the court. The two case studies suggest that venue loyalty is important to linkage, though it may be more important to note whether a long-standing relationship between the system and a movement exists even outside of the test cases being studied. For the Caribbean case, the lack of venue loyalty and the urgent focus on the first level of obligation appear to have contributed to the inability to overcome or lack of priority for overcoming the gaps at the court or promoting the court. Therefore, lack of venue loyalty may have contributed to the negative outcome for linkage.

The lawyers for the death row inmates faced the imminent executions of their clients and were logically more client-centered than the cold cases presented by the disappearance cases. Further, the legal team in the Trinidad cases was used to having a functioning judiciary and multiple judicial venues for seeking justice through an almost exclusively litigation-based strategy and was willing to forum shop if necessary. They were not as deeply tied to the Inter-American system, did not have as much experience or knowledge of the system’s failings, and were not as focused on creating and expanding the system to overcome a deficiency in domestic or international judicial venues as the Honduran legal team and related advocates had been.

Those disappearance case advocates later founded CEJIL, whose very mission includes promoting the system itself and whose original anti-impunity movement was closely tied and, in fact, grew in conjunction with the Inter-American system, which relied heavily on its usage, filtering, and support for cases at the court. Further, findings suggest that the commission and the anti-impunity movement both moved from a political-based focus, with the commission using in loco visits and diplomacy and the movement using protests and grassroots movements, to a more judicial, case-based
approach in roughly as the 1990s wore on. The relationship suggests, I argue, that the Inter-American system may have developed some institutional dependence on the anti-impunity movement activists that may have left it more vulnerable when faced with a large quantity of very different types of cases not filtered or directly supported by that movement. Both over usage and a lack of independent resources and past experiences on Caribbean and death penalty issues may have also left the court vulnerable to negative linkage on factors in the expertise category as well, which are discussed in the next section.

**Category 2 Expertise: Repeat Players, Framing, and Information**

My framework for test case linkage efficacy categorizes several factors as related to expertise. This includes more than just legal expertise, though of course this is part of the repeat player status that I hypothesize is potentially important for a positive linkage outcome. I hypothesize that repeat player status includes knowledge of the system’s gaps, which will be discussed in the next section. In addition, I argue that case selection and the ability to select a sympathetic frame for the case can contribute to linkage efficacy as well as to prepare the case and present extensive information and research to the court.

In this section, I explore and the level of expertise resources available from to the court, and then compare the expertise factors for each of the two case studies. Findings suggest that the disappearance case advocates had more prior knowledge of the system’s potential gaps on expertise, that the system had more experience and its own information and research on disappearances prior to the cases, that the ability to select among cold cases allowed the advocates to tie into an already existing frame in the region, and that their connections to domestic and regional NGOs, funding for research and witness travel, and more time for hearings at the court allowed build a more fully contextualized and individualized decisions than the Caribbean cases. The death row cases, I discover,
lacked funding, the ability to select among the cases to build a sympathetic frame due to urgency, and the lack of experience of the commission with the Caribbean and the advocates with the system made it more difficult to overcome the gaps and may have contributed to the negative linkage outcome. I observe that these findings suggest that case selection and preparation, prior experience with the system, and pre-existing networks for information, framing and fundraising may all contribute to linkage outcome, and all of these factors relate to mechanisms that predate the cases, suggesting that, at least with linkage outcomes, what happens before a case may be just as important as the international literature’s emphasis on the court’s decision and compliance with that decision.

**Expertise Gaps in the Inter-American System**

The Inter-American system’s own expertise on the Caribbean was not as substantial as its experience and expertise in Latin America. States choose the judges in the Inter-American system, but each state does not get its own judge. All states who are states parties to the American Convention choose the court’s seven judges. Given the very few Caribbean states that have recognized the court and ratified the American Convention, it is not a surprise that very few Caribbean judges have been selected. While the majority of the judges for the Honduran cases were Latin American (with the exception of one North American judge), the judges in the Trinidad cases were all non-Caribbean except Judge Oliver Jackman. Though he was a respected legal scholar, the majority on the court were not experts in Caribbean or common law systems, nor with countries that had large scale imposition of the death penalty. Those arguing before the court in the Caribbean cases need to fill an even greater expertise gap than those arguing the Honduran cases.

Even with brilliant judges, commissioners and staff members, writing learned decisions that draw upon the jurisprudence of other courts, considers all the evidence, and weighs the domestic consequences of how the decision is framed takes time and resources. Judges and commissioners, in
their deliberations, rely upon legal staff to provide legal memoranda on the evidence and arguments submitted, investigative staff to provide reports from on-site visits or evidence they have located, and other assistance for judges and commissioners who are usually only at the seat of the court/commission during the hearings. Even still, judges and commissioners must be given time themselves to hold hearings to hear evidence from witnesses, examine statements and documents, hear oral arguments, and deliberate. In all of these areas, time is a resource.

In the Inter-American system, especially in the late 1990s, resources were scarce, as outlined in the usage section. For Velasquez Rodriguez in the 1980s, resources were not by any means overabundant, but given the court’s light docket at the time, they were at least adequate to hear the cases. Though the court and commission did not have the means to establish an investigative unit even for the Honduran cases, they at least were able to focus what legal research resources they did have on the three initial cases before the court. By the late 1990s, the commission and the court were strapped for both time and money due to the imbalance between usage and resources.

A part time court and commission with inadequate staff can lead to deficiencies in the ability of the system to process all cases efficiently, and can be exacerbated by usage imbalance that further strains all the resources, including those relating to expertise. In the Inter-American system, short cuts were developed to hear cases more efficiently. Time delays in the system grew as the caseload of the commission and court increased in the 1990s, and these created tensions with Trinidad’s government, which was attempting to beat the Pratt and Morgan time clock in death row cases. Ironically, in many cases it had traditionally been the respondent state that used procedural delays to drag out the process (Cosgrove 2000), but in the Caribbean death penalty cases, procedural delays to run out the Pratt and Morgan clock were one of the goals of the petitioners, who sought to spare their clients from execution. In the Velasquez Rodriguez case, the case was filed with the commission on October 7,
1981 and not filed with the court until April 24, 1986, both due to the commission’s delays and the state’s delays. In the case of the Trinidad cases, the petitioners were using the delay to the advantage of their death row clients (Cosgrove 2000). The commission was not able to meet Trinidad’s demands that it complete cases within a six month time frame, but it did improve its processing time by putting more resources on the death penalty cases and developing strategies to cut time, such as hearing admissibility issues and the merits of the case together. The commission’s processing times for death penalty cases went from 24 months in 1997 to 12 months in 1999 (Tittemore 2004). The court’s times were extensive, and averaged approximately 28 months from the receipt of a case to a decision on the merits (OAS 2000). The commission in coordination with the advocates initially chose and filed the Haniff Hillaire case with the court. Perhaps not surprisingly given the urgent pressures of the cases and the similarity of the issues, they eventually decided to consolidate 32 death penalty cases from Trinidad and Tobago into three groups of filings before the court (Tittemore 2004). Especially given Trinidad’s threats to execute petitioners before the cases were complete, urgency was an issue for both the system and the petitioners. By the time the cases went to the court, two of the initial petitioners who had been under provisional measures had been executed (Anthony Briggs and Joey Ramiah).

The combination of a part time court and commission, the urgency of the Caribbean cases, and the lack of resources in the system created a gap in the ability of the court and commission to devote the same amount of time to cases in the late 1990s/early 2000s as had been the case in the 1980s. For the court, sessions were only held two times a year for about two weeks (Tittemore 2004), and the commission similarly only met two to three times per year (Grossman 1998). Judges were not generally at the court except during these two-week sessions, so this was the only time when public hearings and deliberations could be held. While the court’s small but full time staff at the secretariat managed the court’s administrative matters, procedural matters, correspondence, legal research, etc.,
the court’s decisions were made and the opinions released during the sessions. The commission in the late 1990s had only 12 lawyers, compared to 60 for its counterpart in Europe, despite having almost as many cases (800 cases as compared to Europe’s 900; Grossman 1998). In the late 1990s, the court’s deliberations were shortened from approximately four or five days per judgment to only three days per judgment. Time for hearing testimony of witnesses and to hold extensive hearings on each case was severely limited (OAS 2000), leaving, as former Commissioner Grossman has lamented, inadequate time to dedicate to each individual case (Grossman 1998).

Other basic necessities of the court’s legal resources were at least partially covered by external sources. One of the court’s lawyers in the late 1990s was paid for by the Council of Europe. Indeed, even publication of the court’s own documents has at times been minimal because of a lack of resources. Systematization of the jurisprudence of the court has been at least partially done by the American University law school with Dutch funding (Grossman 1998, footnote 16).

The cases were not poorly reasoned from a legal standpoint, but they were not framed with the type of rich, detailed context and individual narratives that the previous cases from Honduras had been. Time constraints, resource deficiencies, and the consolidated cases left much of the details and narratives from coming to light in the hearings or decisions. The lack of appearance by Trinidad and their general lack of cooperation with the court likely contributed to the lack of information. In addition, this was a new area for the commission and the court, and although they had dealt with a handful of death penalty issues in the past, these were the first serious and admissible contentious cases the court had heard on the death penalty and the first from the Caribbean. The commission was slow to respond to some of the initial death penalty cases, had to figure out how to use provisional measures for the petitioners themselves (rather than witnesses, as in the past), and they were less familiar with the circumstances in the Caribbean, since few commissioners were from the Caribbean. It was not
until the government of Trinidad argued that they could execute a person whose case was pending and then provide compensation to the family and Trinidad’s execution of Anthony Briggs despite being under provisional measures that the commission began to take swifter action. Given these gaps in the system’s ability to deliver expertise, staff, research and related resources in each case, it becomes even more imperative that those bringing cases before the commission and court be able to provide well researched, prepared, and selected cases and the resources and time to adequately present and frame them.

**Gaps in Training and Litigation Costs in the Inter-American System**

Much of being able to provide the court with adequately prepared, selected, and researched cases, I argue, is dependent on the training and resources of the advocates who bring cases to the court. However, the lack of legal aid and training resources from within countries in the region and the lack of legal aid training and resources in the system both contribute to the overall gaps that advocates before the system face. The Inter-American system has been criticized for being unable to provide adequate training and compensation for petitioners’ representatives, who bring cases, act as advisors to the commission in cases before the court (and more recently as full representatives for the victims at all stages), and separately represent the interests of the petitioners at the reparations stage. The court has relied heavily on NGOs and academic institutions to provide experts to assist and train petitioners before the commission and the court. Many petitioners before the system need assistance to learn how international tribunals work and the procedures of the Inter-American system specifically (Shelton 1998), p. 204. The court does not offer this assistance, and in recent years has relied heavily on CEJIL and trainings at American University’s law school, among other external sources. Attendance at such training events costs money that may not be affordable for every potential petitioner, nor would petitioners in pressing cases with urgent consequences be able to wait for the next training session.
The court has therefore been dependent on the types of trainings and emphasis that these external sources wish to hold, which may emphasize their own preferences for types of cases and their own expertise limitations (such as having emphasized cases in Latin America and not the Commonwealth Caribbean).

Further, the court did not until more recently begin to offer attorney’s fees for petitioner’s representatives. In fact, as of 1998, the court had “always denied the attorney’s fees and costs necessary to bring a petition to the Inter-American system and see it through to a decision at the Court,” despite the court’s estimation that such costs could be close to $80,000 (Shelton 1998), p. 204. As of 2007, CEJIL who litigate extensively before the court, estimated that the cost of even a very simple case before the system, not including attorney’s fees, was around $55,000 (CEJIL 2009). In fact, it was not until 2008 that the OAS’s General Assembly passed a resolution to allow the establishment of a Legal Assistance Fund for the system, and the rules for the fund at the commission did not go into force until 2011. Even then, it only covered costs for witnesses to attend hearings and to gather documentary evidence (Inter-American Commission on Human Rights 2011). Given these high costs and lack of legal aid, the court and the OAS appear to have assumed, in the earlier years at least, that wealthy, Western NGOs and their donors would foot the bill to bring cases before in the Inter-American system. Ironically, in the region as a whole, domestic legal resources have been woefully inadequate and the court itself has had to order local governments to provide adequate resources to provide access to the full due process right under the Convention (Shelton 1998), though the court could not and did not provide those adequate resources to provide access to the full right to appeal to the Inter-American system.
Filling in Gaps in Expertise in the Honduran Cases

My framework suggests that repeat player status, ability to select and frame cases, and increased information and research will contribute to a positive linkage outcome. In the Honduran cases, all three are presented. The advocates had prior knowledge of the system, and the system had prior knowledge of this type of case. The fact that these were cold cases and that they had many to choose from that had been pending at the commission gave the advocates and the commission the ability to choose the ones that were most prepared already, and that were easier to frame. They drew in Costa Rica by adding a case that had less evidence to back it up (and was eventually found by the court to not have enough evidence to find a violation) but the backing of a regional moral authority (which can help with mobilization discussed later). The Honduran case advocates had ties to international networks that had fundraising capabilities, and connections with domestic networks who could help provide research and information. They had the court to themselves, so hearings (and the decisions themselves) were able to address the details of the Honduran context in general and the individual narratives of the named victims. Overall, the pre-existing connections, expertise, and experience with the system likely contributed to the success of the linkage in these cases.

The Honduran disappearance cases were chosen to be the first cases to go before the court because they were the most advanced in the Inter-American system’s process and had the strongest evidence (Mendez and Vivanco 1990, p. 518), meaning that the selection criteria targeted cases that already had considerable work put into them. They targeted cases that already seemed like they could overcome the lack of resources at the court for investigations and the unknown expertise of the court in its handlings of contentious cases, since these were the first contentious cases expected to go through the court, since the Costa Rican case had been found inadmissible. By the mid-1980’s, the commission, who helped select and prepare the cases, had considerable expertise investigating and reporting on disappearances, having released reports on El Salvador, Argentina, and Chile that were
well respected, and that had even garnered some recognition from the OAS General Assembly. However, they had not been able to muster much state support for a Convention against Disappearances, which is one of the reasons the commission then turned to an option it had previously failed to utilize: submitting a case before the court (Mendez and Vivanco 1990).

The commission had the final choice of which cases to take to the court, and it chose the Honduran cases, because it had already processed the Honduran cases for years. They had considerable expertise and cases with a pattern of violations in Honduras. Given the commission’s extensive background on disappearance issues and its prior interaction with governments in Latin America, it is not surprising that they were able to identify cases that would be most effective on this issue. The Honduran cases were ripe in the sense of being more developed (Mendez and Vivanco 1990). Further, it likely helped that Honduras was not a powerhouse politically, though it did at the time receive support from the United States, since US-backed contras fighting Salvadoran leftists were based in Honduras. Once received, the court held hearings on the cases together, though separate decisions were issued (*Case of Velasquez-Rodriguez v. Honduras* 1988; *Fairen Garbi and Solis Corrales v. Honduras* 1989; *Godinez Cruz v. Honduras* 1989).

**Transnational Advocacy Networks and Repeat Players**

The Honduran cases had been filed by and supported originally by domestic NGOs (such as CODEH) and families of the victims. Once the cases became likely to go to the court, international legal experts were asked by the families of the victims to represent them before the litigation at the court in 1986. These international law experts included Juan Mendez, director of Americas Watch’s Washington Office; Jose Miguel Vivanco, an Americas Watch fellow who was then hired by the commission in 1987; Claudio Grossman, a member of the International Human Rights Law Group and law professor from American University; and Hugo Munoz Quesada, a former Costa Rican minister of
justice (Manuel and Mendez 1989; Mendez and Vivanco 1990, pp. 70-71), since Costa Rica supported the litigation particularly in the Fairen Garbi case that involved the disappearance of two Costa Ricans in Honduras. This case, though it lacked evidence and was eventually denied by the court for that reason, was likely included in the first three as the third case because of the heavy support of a regional ally and supporter of the court as well, the Costa Rican government. The lawyers worked directly with the commission’s head lawyers and Executive Secretary, Edmundo Vargas Carreno. Because of the involvement of Americas Watch and a network of organizations such as the Lawyers Committee and International Human Rights Law Group, the victims had access to full time staff members, at these NGOs, including international lawyers and experts on human rights. In addition to the legal expertise of the direct representatives of the victims, several amicus curiae briefs were filed with the court on legal topics, including by Lawyers Committee for Human Rights, the Association of the Bar of the City of New York, and prominent jurists from around the world (Manuel and Mendez 1989, p. 74).

The legal team for the Honduran cases was able to spend a considerable amount of time preparing, coordinating, and strategizing for the cases. They held meetings with all petitioners and representatives in 1987, where they were able to meet the victims’ families, discuss expectations for the results of the litigation, review evidence, and determine a cohesive litigation strategy. They then sent Jose Miguel Vivanco on an extensive investigative trip to Honduras to review similar cases, the history of the cases in Honduras, and Honduran laws. Vivanco also interviewed human rights activists, politicians, journalists, and other potential witnesses (Mendez and Vivanco 1990). Even within the list of interviewees, it becomes clear that these cases were not about single individuals, but instead were placed in a broader context and within a broader campaign within Honduras. This strategy paid off, and the decisions in the disappearances cases helped accomplish the goals of the movement to publicize and document officially the breadth of the disappearances as well as the modus operandi of
the systematic pattern and government sanction or lack of opposition to disappearances (Mendez and Vivanco 1990, p. 542). Using this strategy to broaden the scope of the decisions, along with making contact with politicians, activists, and journalists early on and even before the hearings began at the court, may have helped develop the human capital and other resources necessary to successfully implement and publicize a victory at the court. In fact, bringing the violations to light and publicizing the cases was one of the main goals of the Honduran cases, and one that along with positive networks with elites and NGOs domestically paid off after the cases were decided.

Of import, the cases from Honduras involved “cold cases” rather than urgent survival-mode cases, which gave them more time to develop, prepare and select the cases in a way that could fill the gaps in the court’s expertise. The named disappeared persons were believed or known to be deceased when the cases were filed. While the families themselves were likely eager to have closure and recognition of the government’s culpability, the cases were not urgent and could be developed fully before going to the hearings at the court. There was no imminent threat of harm to any individual victims, as was the case in the death penalty cases from the Caribbean. The ability to select from among a large number of cases to select the most sympathetic and well-prepared cases, domestic networks for research and information, and financial resources to allow for travel and witness costs allowed the Honduran cases to have considerable preparation, to build a frame for the cases, and to present an extensive record to the court. The time that they were allowed before the court to present their cases represented factor that aided their ability to fill gaps in expertise at the court and to present such an extensive record.

Hearings Before the Court

The ability to present a full record of information, experts, and research gives court users the ability to build the narrative that they need to frame the case, not only to win the case but also to allow
the court to write a complete and well-documented decision. Because of the under usage of the court noted in the previous section on usage, the court was able to spend considerable time on the Honduran cases, especially given its part-time status. The court spent approximately six sessions and three years of hearings on the three Honduran cases before they were all decided (Manuel and Mendez 1989, p. 71). During that time, Honduras presented no witnesses and only some documentary evidence. The commission did not have its staff attorneys do any fact-finding in Honduras. The commission and court provided some documents that could be found by its staff from their headquarters in Washington, but the majority of the documentation from Honduras had to be located and produced by the representatives of the petitioners (Mendez and Vivanco 1990, p. 576). The court did not allow its staff to do any research other than from its headquarters in Costa Rica, though it did request cooperation from Honduras to provide documents and did sua sponte order the appearance of a couple of members of Battalion 316, which was implicated in the disappearances (Mendez and Vivanco 1990, p. 559).

The system did not use its own, admittedly minimal, resources to aid in finding evidence or paying for witnesses to attend. As noted above, the petitioners sent lawyer Jose Miguel Vivanco to Honduras, where he did extensive on-site research and located documents regarding prior habeas corpus suits by the families, autopsy reports, and immigration reports (Mendez and Vivanco 1990, pp. 540-541). This research was aided greatly by the local Honduran human rights activists from organizations such as CODEH. One of the CODEH staff, who later testified before the court, was murdered in Honduras after he returned. Though it is normal for courts to expect petitioners to bring evidence and documents to prove their case, the lack of legal aid funding and lack of in loco visits or other investigative trips by the commission or court staff means that in most cases those costs and expertise must be provided by the petitioners.
Honduras presented very little documentary evidence, while the activists had gathered extensive documentary evidence. The country failed to provide documents as requested by the court, and the court found the government’s behavior to be borderline “obstructionist” (Mendez and Vivanco 1990, footnote 121 quoting the Fairen and Solis judgment from the court). The state did present a brief from the Honduran Bar Association regarding legal procedures available for families of the disappeared. In addition to their own documentary evidence, there were several amicus briefs in support of the petitioner’s, including from Lawyers Committee for Human Rights and Amnesty International.

Despite being its only contentious cases at the time, the court and commission did not have the resources to provide for litigation expenses, but rather relied on the representatives of the victims and the resource of the NGOs supporting the cases to find witnesses, fully vet and prepare them, and pay for their travel and expenses to appear before the court. The system provided no direct funding for representatives for the victim nor their costs. The litigation costs for petitioners strategy to present the full pattern of disappearances in the Honduran cases were very expensive. The representatives had to fundraise for private donations to fund travel to Honduras to collect evidence and for lawyers to appear before the court, which held size hearings in Costa Rica. The representatives had to raise money for the travel of seventeen witnesses, including witnesses from five different countries.

These types of expenses make clear the interplay between resources and the ability to utilize expertise fully. The lawyers were able to bring so many witnesses and provide extensive investigation solely because of additional fundraising through major donors (Manuel and Mendez 1989, p. 71). The names of the major donors were not disclosed. During the late 1980s, Human Rights Watch (1989) was receiving donations from prominent foundations, such as The John and Catherine MacArthur Foundation, the Ford Foundation, and many others. Mendez and Vivanco (1990), two of the lawyers
for the case, concede that one of the reasons they may have been able to raise so much private funding for the Honduran cases was because these were the first cases before the system. It is unlikely every case could hope to raise so much to fund on site research, travel, representation at six hearings in Costa Rica, and other costs such as witnesses’ travel costs.

The Court heard testimony from over 20 witnesses total in the cases; most were paid for by the petitioner’s representatives and their respective NGOs. Witnesses included disappearance victims who survived and even a former member of the infamous Battallion 316 blamed for the disappearances in all three of the Honduran cases before the court. The court relied heavily on these witnesses to determine that disappearances were indeed a pattern and policy, and for its findings of facts in the case (Manuel and Mendez 1989, p. 73). Without the resources to bring witnesses and without Honduras being willing to produce documentary evidence, the court would have had little to base its decision on.

Information provided directly by domestic sources was key to finding evidence and witnesses. Despite all of the witnesses and pro bono legal assistance of the Americas Watch-led legal team, the expertise that the lawyers themselves thought to be most important did not come from the court, the commission, or the legal experts at their disposal. Rather, they observed that the most important support they had was their “direct contact with vital sources of information—the relatives of the victims and grass-roots organizations in the region” (Mendez and Vivanco 1990, p. 532). They did have direct access to the families of the victims of the individual Honduran cases and to families of the disappeared in Honduras and the region more broadly. In addition, they had assistance from Honduran and Central American NGOs with better access on the ground to the evidence and patterns that would be needed to show that Honduras was responsible for the disappearances of the victims in these cases. Connections to domestic NGOs were seen as critical by the anti-impunity movement and were included in Amnesty International’s Disappearance Workbook that acknowledged how international
NGO work often drew from domestic NGOs information to create reports (and presumably cases) as well as to monitor compliance, which is addressed more below (AIUSA 1983, p. 146). In addition, this domestically gathered information was able to put these disappearances into the context of the situation in Honduras at the time, which the court found to be critical for its findings and likely helped support and frame its bold decision condemning the practice of disappearances.

**Decisions**

Presentations of extensive evidence and the legal arguments of the advocates and the commission aided the court’s ability to write a bold decision given its knowledge that a pre-existing network of anti-impunity activists were operating within the system (this network will be addressed more in the section on compliance below). The court’s bold decision in many ways drew from the research and legal reasoning of the commission and representatives of the victims. The court notably took a similar approach to outlining the practice of disappearances as the lawyers for the victims had laid out in proceedings before the court. The decision “described the phenomenon of disappearances in much the same way the nongovernmental community ha[d] described it for years” (Manuel and Mendez 1989, p. 71). The court’s decision was a precedent setting case for international legal standards on disappearances, which were not explicitly included in existing treaties at the time, and the court even (though in dictum) stated that disappearances could be considered crimes against humanity (Manuel and Mendez 1989, p. 74).

While today it may seem a foregone conclusion that disappearances are covered by the rights to life, liberty, and freedom from torture in the American Convention, it was not so clear at the time the decision was written. Honduras’ legal team specifically made the argument that the convention did not include disappearances and thus the case against them should have been thrown out, though the state did not press this issue after its early submissions were not embraced by the court (Manuel and
Mendez 1989, p. 74). The court’s findings confirmed reports already published by NGOs that a pattern of disappearances had occurred in Honduras and in other Latin American countries (Manuel and Mendez 1989). The extensive hearings held on the subject and the many experts and documents presented by the legal advocates for the victims established that pattern and gave the court plenty of evidentiary backing for the decisions, except in the Fairen and Solis case, in which they did not find sufficient evidence of a violation or link to the pattern of disappearances.

The court used its own expertise to create reasoning beyond what was suggested by the commission or advocates for the victims. Most notably the court found violations of Article 1.1, which requires states to do what is necessary to ensure the rights of the Convention are protected. Therefore, though it relied heavily on the petitioner’s and commission’s legal arguments on the merits, it was not without its own expertise and agenda. Further, the court did not fully follow the reasoning of the victims’ representatives at the reparations phase. The court ordered monetary damages, but did not fulfill the wish of the victims to include specific orders for Honduras to investigate or prosecute those involved in these cases (Manuel and Mendez 1989, p. 7). Rather, the court ordered Honduras to investigate the disappearances of the specific victims in the case and report its findings to the victims’ families (Human Rights Watch 1989).

Further the existence of the anti-impunity networks that were aiding the cases and that had developed over several years prior to the cases being brought before the court may have led the court to feel it could be more bold in its decisions. Though these networks will be addressed more in their role as mobilizers in the compliance category sections below, it is important to note here that they were likely known to the court at the time of the hearings and the decisions, given their activities in the region prior to the cases. As Alter and Helfer (2010) have noted in their comparison of the ECJ and Andean Tribunal of Justice, judges are more likely to write bold decisions if they know they have
external support to back them up. These cases involved egregious violations as well, making it more likely that a human rights court would want to write a more bold decision and that its credibility might be lowered if it did not. However, in addition to this concern, in the Honduran cases, I argue that the Inter-American Court was likely bold because of the existence and prior mobilization of these networks. This demonstrates again why it may be important to consider not only their ability to mobilize after a decision has been rendered but also whether their pre-existence at the time of a case may aid the court and advocates. The practice of the Inter-American court to write bold decisions in these egregious and well supported cases became the standard for its jurisprudence. Boldness was still the tradition for the court when faced with the less well-supported cases from Trinidad, and that boldness may have contributed somewhat to the varied reactions to the written decisions, more so than just the potential overlegalization of any decision itself (see the overlegalization section in Alternative Theories later in this chapter for more on this topic).

**Importance of Framing and Case Selection**

The disappearance movement had long utilized the strategy of framing and strategic case selection. Expertise in framing is important for gaining victory both for the petitioners and the movement at the court and for the perception of a new court and linkage outcomes. Well-framed cases can be utilized more easily in the compliance phase, especially in a court that does not have enforcement mechanisms. General resources and manuals for activists campaigning against disappearances were published during the 80s and 90s by international human rights groups such as Amnesty International. Further, Amnesty International as early as 1983 had published the Disappearance Workbook, so the movement had a long history of being thorough about preparing and sharing techniques and strategies for campaigns and litigation. The manual produced by Amnesty International USA (1983) for advocates working on disappearances regarded the importance of giving
intergovernmental organizations (presumably including courts) carefully documented and detailed complaints that establish a pattern of abuse, and offered advice on the types of remedies that would be appropriate (p. 144). It notes explicitly that case selection criteria must be based on both on urgency and remedies available and on the relative chance of succeeding with the case. Those who wished to file cases, the manual urged, should contact groups with experience and specialized knowledge of procedures before international tribunals, which at the time (the workbook was released in 1983) included Interrights and the International Human Rights Law Group (AIUSA 1983). The movement in general, therefore, had expertise and prior experience with framing and case selection.

The lawyers for the Honduran cases and the commission selected cases that could frame the disappearances and impunity issue for both a domestic and world audience. The Velasquez Rodriguez and Godinez Cruz cases were emblematic of the broader pattern of disappearances in Honduras. Those disappeared in Honduras tended to be “leftist activists” including members of unions, people with potential guerilla ties, and students or teachers (Manuel 1993). The pattern established by the court noted that victims of disappearance were seen as a threat to national security by the government, and the court even commented that Velasquez and Godinez specifically were involved in political activities that the government considered dangerous (Mendez and Vivanco 1990), an element of the pattern that allowed the petitioners to establish the government had targeted its opposition. This could have meant the victims would be characterized in the press and by the government as leftists with intent to threaten the government or other negative frame. There was no automatic frame of innocence, but rather that image had been cultivated over years by activists in the region. Saul Godinez and Manfredo Velasquez, like many disappeared persons, were characterized or discussed as family members, and as a teacher and a student, not as leftist activists. NGOs throughout Latin America had framed the issue of disappearances as the disappearance of fathers, husbands, sisters, sons, and not as activists or
guerilla fighters. They had literally put a family face on the issue, including the famous Mothers of the Disappeared, which would appeal to the strong family ties of Latin American cultures. Further, the Honduran human rights groups could offer the wisdom of insiders on how to frame the cases in a way that would be palatable to Honduras, having had such experience in country with a frame that caught the attention of the media in a previous case where a young girl had been disappeared who had no ties to leftist movements.

Not all disappearances were so easily framed. In fact, a later case at the court gives a good example of a less “innocent” seeming victim. The Bamaca Velasquez case, though high profile because of protest by the victim’s American wife Jennifer Harbury, involved a leader of the guerilla movement in Guatemala well known for being a combatant and guerilla leader. Though under human rights law he had equal claim to not being tortured, extrajudicially executed, or disappeared, his case was perhaps not inherently the most sympathetic and more easily countered by Guatemalan officials than those of a student or a teacher as in the original Honduran cases. Even still, activists taking his case to the Inter-American Court, a decade after the Honduran cases, were able to emphasize the pain and anguish of his wife, an articulate American lawyer, and his family instead of just his guerilla status. With media in the courtroom, they were able to bring to question some of the alleged torturers involved in the case in the presence of the victim’s elderly father, whose already stooped frame slowly hunched further and further over in his chair as he listened to the testimony of his son’s alleged torture and extrajudicial execution. The case of the guerilla leader points out the difficulty of framing disappearance cases, and the importance of the petitioners, commission, and movement in general to ensuring that these cases were framed in terms of the loss of a family member.

The state of Honduras attempted to counter the frame created by the legal team for the disappearance cases, but the advocates tie into pre-existing values of family and coverage in the media.
of the hearings made it difficult for the state to decertify the case successfully. Once media attention was starting to make the government of Honduras look bad, the government attempted to make the victims’ families seem to be out for money as they began negotiations on damages in the Velasquez Rodriguez case, while portraying itself as having been cooperative with the court in order to seem like it was committed to human rights, something important in the region during a time of democratic transition. The United States, at least in its State Department Country Reports, seems to have backed up these tactics by the Honduran government, noting that the state was cooperating with the court while at the same time downplaying the court’s findings, especially those that shed light on the US’s questionable assistance to the egregious violations committed by its Central American allies (Manuel and Mendez 1989). The United States attempted directly to frame those bringing the cases as Marxist. The United States State Department Reports of the same era included attacks against the Honduran human rights organization CODEH, which was affiliated with the victims’ families and assisted the legal team for the cases at the Inter-American court. An American Embassy document called CODEH’s president a “Marxist ideologue,” a statement which was condemned in an Americas Watch Report from the era (Manuel and Mendez 1989, p. 83). Despite assistance from the US, and attempts by the country to discredit the victims, they were unable to topple the frames established in the cases and at the hearings.

Selecting the Honduran cases allowed the court to focus on the acknowledgement that disappearances were grave violations of human rights that must be attributed to the governments that suborned them, rather than stirring up the more controversial amnesty issue. By 1989, Uruguay had passed a plebiscite to allow amnesties and Argentina’s president had pardoned some of the major players involved in that country’s atrocities. Americas Watch at that time of the Honduran case had not become involved in litigation before the commission regarding these amnesties, but by 1989, it was
involved in cases before the commission from both Uruguay and Argentina. Though the court’s decision was bold, the selection of the Honduran cases left some incrementalism inherent, since the Honduran cases left off the issue of amnesties. In the first case before the court, the commission did not attack amnesty laws, which might have stirred a harsher reaction from more powerful states in the region.

**Institutional Dependence**

Not surprisingly, given the gap in resources of the commission and the court, the Honduran and subsequent cases led by the later-formed organization CEJIL have led to a system at least partially reliant upon and dominated by NGOs, both in terms of usage and expertise (and mobilization, as will be noted below). With expertise, the court relies heavily upon NGOs to do the “leg work” for finding and investigating cases and collecting the evidence needed to explore the cases fully. This is not unusual in a legal system. In a system where many of those coming before it are likely to be indigent and it has relied heavily on support from the advocacy networks that use it, the court may develop some institutional dependence upon these external actors that has benefits and drawbacks. As I argue, this may have left the system vulnerable when cases came before the system that did not fit the mold for which that organization could provide substantial expertise or mobilization.

After the completion of the Honduran cases, the international law experts and the NGOs that had supported them created CEJIL, an independent NGO with the specific mission to assist and train human rights lawyers to take cases before the Inter-American system. The new organization was an outgrowth of Americas Watch, but was separately headed by Jose Miguel Vivanco, who had been one of the attorneys for the Honduran cases. In 1992, CEJIL was joined with dozens of cases before the commission and two Peruvian cases before the court for which they were helping a Peruvian NGO (Human Rights Watch 1992). The organization continues to provide some of the most extensive legal
trainings, conferences and assistance for Inter-American cases, and focuses exclusively on the Inter-
American system.

Moreover, even the system itself has often been dominated by former NGO experts and this has
given rise to allegations of a lack of impartiality. These allegations arose after the Honduran cases, but
have been fairly common since then (by Peru, for example). Given the court’s specialization in human
rights and the selection of judges and commissioners that do not directly represent a particular state, it
is not a surprise that many of those who find themselves on the court or the commission are experts in
human rights. For example, the former attorney for the Honduran cases Claudio Grossman later served
as a commissioner from 1993-2001 and was president of the commission. The alleged revolving door
that exists in the Inter-American system has led to claims by states that the system is actually an arm of
the human rights movements that use it. Allegations abound that the system is a pawn of the United
States government, particularly by Venezuela. That allegation is ironic given the US government’s
lack of interest in recognizing the court, the US’s disdain for international tribunals in general, and the
fact that it has criticized the court at various opportunities (including the Honduran cases).

When states are confronted by the system that has arguably been institutionally dependent on
some particular external actor, they may attempt to delegitimize it or claim it is not neutral. Arguing
that it is controlled by foreign-based NGOs is an easy target, given the system’s very real reliance upon
NGOs for resources, usage, expertise, and enforcement. Many have suggested that increasing the
resources of the court could help make reliance on particular states’ contributions less crucial to its
operating budget. I argue that increased funding for the system is necessary to dampen the ability of
states to argue against perceptions of NGO control without having to turn away the much needed
assistance of the NGO community. Nonetheless, the impartiality of the court is very important for
court effectiveness and guarding it may mean moving away from resource reliance through NGOs.
The recent move to have funding for legal assistance at the commission may be one step in that direction, as long as it includes safeguards to ensure expert legal assistance, such as a training and certification processes for attorneys and NGOs using the court, which NGOs and the system could work together to develop. In many judicial systems, including the US system, the brunt of litigation costs and investigation of the case to find evidence is at the plaintiff’s expense with some redress of litigation costs by the courts if the plaintiff is successful. A system established to provide redress for human rights abuses in a region of developing countries with indigent litigants, some additional resources are going to be need to be available to avoid missing large areas of violations, often the worst, committed against the poor in society, an issue even more clearly demonstrated in the Caribbean case of death row inmates in a country with little to no appellate legal assistance and no mobilized networks of advocates domestically or internationally to come to their aid, or to support a bold decision by a regional human rights court. Despite having expert legal counsel, the lack of resources within the system itself meant that legal teams had to find their own resources to fund litigation, research, witnesses, and other aspects of the case. Without those resources, the gaps in the court’s expertise resources can be too great to fill even with experienced legal experts, especially in urgent cases where case selection and extensive prep work are not as possible.

**Filling in Gaps in Expertise in the Caribbean Case**

When the death row cases from Trinidad were brought to the Inter-American system, several factors relating to the expertise category were significantly more limited and truncated than the Honduran cases. First, the lawyers for the case were legal experts on Caribbean and international law, but they were not repeat players in the Inter-American system and the system was far less knowledgeable about their region and issues than they had been with the disappearances cases. Second, the cases were a series of individual cases that all faced urgency when Trinidad made clear
that it wished to issue death warrants and execute them, even while their cases were pending before the Inter-American system. This meant that their strategy was not able to be as calculated as the Honduran cases to have a broader impact and to strengthen the system. Without the appeals, they faced execution, since the five year time clock of Pratt and Morgan was pressuring the state to act quickly. So the cases were not “cold cases” that allowed them to choose the most well-prepared or well-framed case to highlight. They also faced a counterframe created by government officials and utilized even before the merits of the cases had a chance to be dealt with in hearings at the commission or court, and even when these hearings did take place the state refused to appear and the hearings were limited. Lastly, the advocates did not have access to pre-existing networks from which to fundraise or rely on for research and information. Their strategy focused on persistent, individual litigation of each client’s case, and they did not have the support of the network of advocates either internationally or domestically that the Honduran cases did. Each of these factors may have increased the likelihood of backlash in this case.

The strategy of the lawyers for Caribbean death row inmates was to defend its many death row clients individually through litigation. This was not a strategy that had strong ties to a well-established campaign or political movement, especially given that many of the larger anti-death penalty organizations had at the time considered the Caribbean de facto abolitionist due to the lack of significant numbers of executions in the 1980s and early 1990s, though numbers of death row were still high even after Pratt and Morgan’s five year limit had effectively commuted many death sentences. The lawyers represented each and every inmate that they could. Lacking resources from the get-go, the London Panel of Lawyers, which sought to defend Caribbean death row inmates, was only able to sustain a litigation strategy because of the pro bono services of innumerable London lawyers and law firms. They were defending large numbers of death row inmates facing possible
execution, rather than giving an emblematic face with which to frame the broader problems of the
death penalty and criminal justice in the region, as the three Honduran cases had done. They were test
cases that raised a series of issues, such as mandatory sentencing, impacting larger numbers of cases
even while not being sold as a single unit with a handful of named plaintiffs around which the case is
framed, as class action lawsuits often are. They were a series of related test cases, plural. The lawyers
involved in the Caribbean cases did save a lot of individual lives in the end, despite the consequences
for the Inter-American system in the Commonwealth Caribbean and potentially for the broader policy
goals to end capital punishment in the Caribbean, at least in the short run.

Lack of Repeat Player Networks for Fundraising

The Caribbean cases had few financial resources behind them, and less access to transnational
advocacy networks that could fundraise as had been the case with the disappearance cases. They were
primarily sustained through the work of pro bono lawyers organized by a few London lawyers at
Simons, Muirhead, and Burton. The London barrister Bernard Simons died in 1994, but his work to
ensure representation for death row inmates in Jamaica and other Caribbean countries has survived his
death (Burton 1994). After serving as counsel in the 1970s for the case of a Caribbean death row
inmate, the London attorney and partner at Simons, Muirhead, and Burton had continued to take pro
bono cases before the Privy Council for Jamaican death row inmates, eventually taking on more cases
than his law firm’s resources could handle. This led him to seek assistance from other London
attorneys, and by 1988, two other firms were on board to try to represent almost 300 death row
prisoners. Knowing they could not sustain representation of such a large number, they solicited even
more firms and the Bar, and the London Panel of Lawyers was created (Scott-Williams 1995). Though
criminal lawyers were sought, no requirement was made that the pro bono Panel members be trained or
experienced in criminal law, primarily due to the large number of cases that needed representatives.
They were supported when needed by expert members of the London criminal law Bar (Writer 1990), and Simons, Muirhead, and Burton “instructed” the pro bono barristers involved in the cases (Lehrfreund 1993). After several firms had signed on to the Panel, it met regularly to coordinate. After the Panel was successfully taking cases in Jamaica, it began taking on cases in Trinidad and Tobago (Scott-Williams 1995).

By the early 1990s, Simons, Muirhead, and Burton had hired a young Saul Lehrfreund, who would years later co-founded the Death Penalty Project, to work full time on pro bono cases from Jamaica at the firm’s expense, including trips to visit clients in Jamaica. The firm could not sustain the expenses and resources were sought in 1993 from the group Justice, which is the UK branch of the International Commission of Jurists. Lehrfreund represented over 70 cases with “overflow” going to the 30 other firms that were members of the London Panel (Writer 1993). After their victory in the well-publicized Privy Council case of Pratt and Morgan, Lehrfreund was approached by other European NGOs with whom he began to create a small network. In conjunction with Penal Reform International, he then successfully applied for a series of temporary project-based grants with the European Union. It was these grants that kept the representation afloat from 1994-2004, though because they had to reapply regularly, the organization that now called itself the Death Penalty Project was always aware that funding was tentative (Lehrfreund interview 2013). Thus, much of the project was premised on finding and receiving free expert legal representation, other pro bono expert testimony, and scholarly research donated for the cases. The Death Penalty Project still depends on and receives these pro bono services today from experts and scholars in the Caribbean and other regions where it has cases. While its access to free legal expertise and other experts has aided its ability to win cases before courts, its otherwise limited resources and access to broader networks has meant that it has had to focus on “putting out fires” in each individual case rather than attack the
problem in coordination with networks that might help to frame the cases for a broader, policy-changing campaign.

**History of the Individual Litigation Strategy**

Armed with minimal resources other than a cadre of pro bono legal assistance in the early 1990s, the London Panel used what it had to overcome some of the systemic resource and legal aid gaps in the Caribbean system, but had not extensively used the Inter-American system when they filed the Trinidad cases in 1997. The history of the attempts at death penalty reform in the region demonstrates that political solutions had failed due to lack of support and a rising crime rate, leaving the lawyers to attempt to make appeals for as many individuals as possible and to fight through the courts. The lawyers stepped in when executions became imminent and some countries had relaunched executions in the late 1980s and early 1990s. Eventually, their litigation strategy led to a breakthrough case, *Pratt and Morgan*, that lent itself to a strategy of individual cases with mass filings in multiple venues in order to delay executions. The strategy worked for the individual level but could not support prioritizing obligation at the court or to the movement more broadly, without risking lives. This meant that the lawyers were focused on overcoming the judicial hurdles for each client and not on developing a case or set of cases that could overcome the political barriers as broader movements do. Without the ability or motivation to focus on broader movement goals, these cases were more akin to “wildcard” or “one-off” cases that have less overlap between their goals and the goals of promoting the court in the region. Because of this, I argue that they were more likely to use strategies that would not necessarily support a positive linkage, such as framing. This section outlines the history of how this individual-focused, “putting out fires” strategy developed out of necessity in the Caribbean, especially after the *Pratt and Morgan* decision’s five year time clock gave Caribbean governments a perverse incentive to speed up executions.
Official legal aid resources within Jamaica and other Caribbean countries during the 1990s were abysmal, so there was little legal aid to be collected domestically or government support for litigation costs before the Privy Council, let alone international courts. In fact, many of the problems in death row trials and appeals was exacerbated by the pitiful amounts paid for legal aid fees, which left little incentive for lawyers to put out much effort in death row cases. No legal fees were available for Privy Council and UNHRC cases (Writer 1990). In many cases, lawyers did not meet with their clients until the day of the trial (Lehrfreund 1993). This left many violations of human rights and fair trial rights unchallenged, or at least under challenged. Legal aid resources were scarce from private sources in the Caribbean as well, and even the Jamaica Council for Human Rights, which was initially one of the sources for case referrals to the Panel, had to ask the Panel to purchase the organization a fax machine, just so they could communicate with the lawyers in London (Scott-Williams 1995).

In addition, long delays in the domestic legal process for death penalty cases had long been a problem, due to the Caribbean governments’ unwillingness or inability to provide adequate resources for the judicial system, and added to the difficulties experienced by death row inmates during their appeals. One scholar noted that though the government was upset at international courts and death row inmates’ representatives for the long delays in appeals, the bulk of the delays in death penalty cases in the Caribbean were not originally caused by the international tribunals or even by the defendants, but rather were caused by the governments (Hodgkinson 1998). The four-year delay in Jamaica’s Supreme Court process upon which the Privy Council based its Pratt and Morgan decision was emblematic of delays in the Caribbean justice systems more generally. The Jamaican system’s sloth like pace included long backlogs just to process requests for a transcript of a trial, a requirement for many appeals (O'Connor 1991), and efforts had to be made to gain assistance of local Jamaican firms to help with document collection.
Similar delays existed in Trinidad in this time period, and it was not until 1996 that the government of Trinidad allocated enough resources to the Supreme Court in Trinidad to establish a way to monitor the progress of capital cases and ensure less delays. These reforms included implementation of a computer transcription unit to end delays in obtaining accurate trial records (UN HRC 1999). These improvements ironically allowed Trinidad to claim it had fixed its internal delays and to blame death penalty case delays on the international bodies, particularly the Inter-American Commission and the UN HRC.

Previous attempts in the Caribbean to reform the death penalty system had failed, and widespread support for the death penalty among the public and elites had defeated the small movement against the death penalty in the 1970s and 1980s. In this era in both Jamaica and Trinidad, official reviews of the death penalty were carried out but failed to make major reforms in the legal system for capital cases in either country. Though the death penalty was reviewed in Jamaica during the 1980s, partially due to the increase in cases before the Privy Council taken by the London Panel and other pro bono attorneys, even the support of the then Minister for Justice, Carl Rattray, and support from the Deputy Prime Minister PJ Patterson for some limitations on the crimes given the death penalty, was not enough to overcome the public opinion and elite support for the death penalty, especially given the rising murder rates at the time (Writer 1990). By 1993, the same Deputy Prime Minister and the new Minister of Justice, KD Knight, were both outspoken in support of the death penalty as “political maneuvering” before a potential important election in Jamaica, again due to calls by the public to restart executions after a five-year gap, which had been caused in large part by the cases filed by London lawyers (Lehrfreund 1993). After becoming Prime Minister, PJ Patterson, made clear his desire to begin executions again. This call for the death penalty by Jamaican politicians as a solution to the growing crime rate, despite the lack of evidence to suggest that the death penalty would actually
make the islands safer, continued well into the 2000s while other avenues to lower crime rates, such as ending corruption in the police force, failed to be adequately pursued.

Similarly in Trinidad, the government sanctioned Prescott Commission reviewed the death penalty procedures and released its findings in a 1990 report. The commission was first suggested in 1980 by the Commission of Inquiry on Prison Conditions, which had begun as early as 1973 and about the time of the Kissoon Ramnanan case. That case had received attention because of his possible innocence and an Archbishop’s presence at his execution in 1973. The Prescott Commission was formed as a three member panel that heard from the public and relevant organizations. In its report, the Prescott Commission recommended that the death penalty be retained, but some changes be made, including the addition of affirmative defenses to murder (self defense and defense of others are examples of common affirmative defense). They recommended that death sentences older than 10 years be commuted, but that executions resume (Amnesty International 1996). As in Jamaica, politicians almost by obligation would take a hard stand on the death penalty and resumption of executions despite personal objections (Hodgkinson 1998), including those like former human rights attorney and Trinidad Attorney General Ramesh Majaraj, whose brother was on death row in Florida.

The groundswell of support in the Caribbean in favor of resumption of the death penalty reached even greater heights by the mid-1990s as crime rates increased largely due to drug trafficking. One of the lawyers involved in the death penalty cases described the situation in the Caribbean during that time as similar to the “Wild West,” where inmates on death row languished for 10-15 years in deplorable conditions, the mandatory death penalty led to populations in the hundreds on death row, and procedures to appeal for clemency lacked transparency and due process (Anonymous 2013). The threat of execution loomed ever greater as politicians moved from pro-death penalty rhetoric to
actually trying to go through with executions, which had mostly stopped during the failed reform attempts of the 1980s.

The lawyers found themselves “putting out fires” as they attempted to avoid executions as the potential for one popped up after another. They were unable to create a more long term, global strategy. The strategy became strategic but was focused on individual litigation, given the limited resources and the urgency of the threat of execution of their clients. The lawyers were experts at litigation and skillfully thwarted most of the executions that the Republic of Trinidad and Tobago wished to carry out. They avoided any Jamaican executions after the 1980s. However, their expertise was not in lobbying, coordinating grassroots campaigns, or launching a media blitz. They were first and foremost litigators with expertise in winning in the courtroom, not in the legislature, not in the executive branch, nor in public opinion.

The lawyers had a breakthrough when the deplorable conditions on Jamaica’s death row and the long delays in their appeals processes eventually led to the victory at the Privy Council in the *Pratt and Morgan* decision, and a way to avoid the death penalty more easily for each client through simply running out the clock. This decision would virtually end the death penalty in Jamaica due to the death row phenomenon, and create hope for curtailing Trinidad’s desire to restart executions. The Privy Council had determined that it was cruel, inhumane, and degrading to let prisoners languish on death row for more than five years, including appeals to international tribunals. The case was represented again by the lawyers at Simons, Muirhead, and Burton and the future Death Penalty Project. The Privy Council’s decision delivered to the attorneys their best weapon: a five-year time clock that the Privy Council estimated was the time needed for all appeals, including international appeals, and that continued to count down even if it was the condemned prisoner himself who was causing the delay.
Findings suggest that after *Pratt and Morgan*, the option potentially to save all of the clients by running out the clock lead advocates to do so by any means necessary for each and every individual client. Ironically, the case gave Trinidad a perverse incentive to try to speed up executions and led to renewed urgency for the state and, therefore, the advocates of death row inmates. Each client had to file a case, and each client must keep their appeals going in whatever venue possible until the time ran out. If the court ruled in favor of the movement’s preferred policies, such as ending mandatory sentencing and making the mercy procedures more transparent, that was an additional and important bonus that might help with future judicial success in the region later on, but the short term goal was saving each client from execution, and *Pratt* meant they could do so by filing a series of appeals for each individual client. In domestic courts, especially in common law countries, where courts can set legal precedence with the force of changing constitutional interpretation and thereby changing the highest law of the land, these types of legal challenges are helpful in the long run. However, with international courts that are still developing and might be impacted by linkage, the findings in this study seem to suggest that broader campaigns or at least connections to broader strategies, as well as the ability to single out a few cases for framing, might have been more helpful for positive linkage outcomes.

**Framing and Case Selection Issues**

Even without the imminent threat of death and the lack of connections to networks that could serve as “translators” to help frame the cause domestically, the death penalty presents a challenge for those hoping to end or limit its use as a policy. Though the nature of the violation and the usual nature of the “victims” puts advocates at a disadvantage in comparison to victims who are inherently more sympathetic, the proper case selection, frame, and a carefully tailored line of reasoning and reparations can at least improve the chances of success for test cases on a broader political stage. Information and
education is needed to change public opinion and give political officials cover to support changes in policies, and civil society campaigns can educate the public and politicians about the flaws of capital punishment in their country, such as the potential to execute an innocent person or the fact that it is given out arbitrarily rather than necessarily to the worst criminals (Hood 2002), something that was certainly a problem in the case of mandatory death sentencing. Education campaigns can draw upon carefully selected test cases to pinpoint these potential problems with the death penalty. Further, the international debate has to be transformed to a national debate, and one way to accomplish this is to draw examples and lessons from other countries (Prokosch 2004, pp. 23-25), particularly those with a similar cultural, historical, or religious background. These “translator” states were unfortunately unavailable for the Caribbean at the time of the Trinidad cases, since the other Commonwealth Caribbean countries had not abolished the death penalty.

Selection of cases is not always an option if a group’s goal is to represent a large group as individuals, but for many strategic litigation groups that work primarily on behalf of broader movements and the second level of obligation with limited resources, case selection is a critical step. One of the groups that helped with a few of the earlier death row cases from Jamaica at the UNHRC (they aided the Pratt and Morgan cases when they were before the UN HRC) has reported that they have careful case selection criteria, including the potential impact of the case and its potential negative effects and likelihood of a public backlash if they do win. With a group like Interrights that takes only a limited number of emblematic cases for strategic litigation purposes, setting a precedent and changing public opinion are part of its goals (Interrights 2012). One of the organizations that referred cases to the London Panel, the Jamaica Council for Human Rights, stated that its legal assistance cases were selected as “special cases which highlight the need for reform or expansion of the law” (O’Connor 1991, p. 331-332) and included criminal appeals to the Privy Council because there were
no legal aid resources available. So some of their cases were specially selected, while others were simply trying to provide a service to fill a domestic gap in legal aid resources.

Similarly the London Panel, and later the Death Penalty Project used an excellently framed case in the 1994 Privy case of *Pratt and Morgan*. The *Pratt and Morgan* case demonstrated the extremes of the Jamaican death row situation and the delays in Jamaican justice systems, unlike previous cases that had attempted to argue the death row phenomenon to the Privy Council but did not have good enough facts related to the severe level of cruelty involved (Whitaker 2008). *Pratt and Morgan* instead laid out the forceful tale of men left on death row in deplorable conditions for 14 years, and laid the blame on the Jamaican government, particularly its Supreme Court’s four-year delay in deciding the men’s cases (Franklyn 2008). Later in the 1990s after gaining the *Pratt and Morgan* five-year time clock, the advocates faced the urgency or imminent executions and pushed more to try to stop potential executions. and that pushed their focus more on increasing the number of individual clients’ appeals to thwart attempts to execute them. They represented not just a handful of cases, but a large number of death row clients from Trinidad and Jamaica, which likely saved an almost equally large number of lives. Their numbers and urgency made it harder to focus on creating a frame and required more focus on representing and saving as many lives as possible. After consolidation at the court due to the urgency and lack of resources at the court to deal with each case individually, the cases took on a class action-type approach to address broad issues like mandatory death sentences and procedural violations rather than creating a sympathetic frame for the movement.

An example of the importance of considering the frame and careful case selection and how the decision on the merits and reparations should be framed, are the decisions of the UNHCR from Jamaica and Trinidad before the *James et al.* cases in the Inter-American system. In those, the UNHRC found relatively minor procedural violations and recommended release of men believed to be
vicious murderers and little or no discussion of the legal reasoning for the judgment given in their brief
decisions. In particular, recommendations to release convicted murderers (rather than other means of
redressing the situation, such as a retrial or commutation) were not well received in the Caribbean.
The decisions caused the Committee to lose credibility with politicians and the public in the Caribbean,
and the government for the most part did not comply with the orders of the UNHRC in these cases
(Bannister 2012). One case in which the UNHRC called for release of Carlton Reid the violation was
based largely on the judge’s omission in his summary of the precise location of the murder, something
that can easily be framed as a technicality (Writer 1990). In another case of prisoner Clifton Wright,
the UNHRC recommended release because he did not receive a fair trial (Lehrfreund 1993). The only
case from Trinidad in between 1987 and 1993 was Daniel Pinto’s case, in which the UN HRC
recommended Trinidad release him because of his poor representation and lack of ability to choose his
own attorney. Trinidad refused (Amnesty International 1996).

Due to these cases, even before the Inter-American cases began, the perception of international
courts on death penalty issues was poor in the Caribbean, where a counter movement had been able to
highlight these “bad facts” and rather boldly written, but completely unsupported decision from the
UN HRC. Unlike the disappearance cases who had networks to connect to, such as relatives of the
disappeared, who had already laid the groundwork for tying the cases into a positive domestic and
regionally acceptable frame, these cases had played into the countermovement’s claims that heinous
murderers were using minor procedural errors to try to get out of prison or at least avoid execution. No
movement existed to try to frame these “bad facts” cases in the media, and the UN HRC decisions
gave little or no reasoning to support their holdings, let alone their calls for release of convicted
murders (rather than retrial or other options). After the victorious but rather inexpert UN HRC
decisions did not receive a good reception in the Caribbean, advocates for the death row inmates
justifiably decided to switch venues and bring cases before the Inter-American system. In doing so, they sought more fully fleshed out decisions with complete legal reasoning and generally a higher quality decision. In addition, they would have another venue to lengthen the appeals process for each individual client (though the commission found inadmissible many of those already filed at the UN HRC). Due the urgency of the situation for their clients, the advocates requested provisional measures in their initial filings with the commission. These provisional measures are requested to request that a state help preserve the lives of witness, or in this case the petitioners themselves, while the cases were pending. The initial decisions on provisional measures are often done swiftly given the urgency of the requests. However, this meant that the advocates once again were getting decisions that did not address the legal reasoning or allow them or the court to develop a frame for the cases. Rather they were merely procedural necessity to keep the petitioners alive until the merits could be heard. The government was able to counterframe this as procedural delay tactics by the death row inmates’ attorneys, before the petitioners could even present their potentially sympathetic substantive issues, such as mandatory death sentencing.

Admittedly it can be a hard job to find a convicted murderer for whom the public has sympathy, but I argue that even cases with facts or victims who are seen as inherently sympathetic do not ensure a positive frame for the cases or the court. Even when the victim is an innocent child, positive linkage and even positive framing alone is not ensured. Take the Dominican case of children born to Haitian immigrants who were denied birth certificates. The Inter-American case on this issue found significant opposition from the public and officials and experienced a weak backlash against the court. What could be more easily framed than abuses against an innocent little girl seeking her birth certificate? Instead they were tied domestically to a frame that they were “illegals,” who were not legitimately in the country. Though it can make the job of advocates and a court harder or easier, the
sympathetic nature inherent in the type of victim is not determinative of the outcome of positive or negative linkage, especially absent the ability to connect to domestic frames or actors who can promote the frame.

In fact, even in the case of the death penalty, I argue that the strategy to frame a particular case as sympathetic can make a difference in opening a broader political space for a campaign to take root, though it might be too slow of a strategy to help linkage if no such space exists at the time of the test cases. Such a strategy to frame cases to open up political space to discuss the merits of the death penalty has found some success, even in staunchly pro-death penalty locations such as Texas and Georgia in the United States. There, the cases of Todd Willingham and Troy Davis, respectively, have brought to light the possibility that these two men were innocent of the crimes for which they were executed, though an actual look at the facts of these cases shows that it is the process and particular evidence whereby they were convicted that has left serious doubts. These should not be mistaken for cases where innocence has been more or less proven, as is the case of convictions overturned with DNA. The arson report that convicted Willingham of triple murder has been shown to be erroneous; while multiple witnesses recanted their testimony that they saw Troy Davis commit murder. Their cases were chosen for particular attention by a grassroots death penalty movement in the US, in conjunction with TNANs, that hoped to frame the inadequacies, biases, and errors in the justice system, rather than focusing on cases where legal technicalities might lead to the release of a person on death row. While the death penalty’s opposition in the US does include lawyers defending death row inmates who appeal on minor procedural errors, these lawyers are not alone. They often work with the broader movement as a whole that can choose to highlight cases of innocence, severe errors, or at least reasonable doubt, to their benefit in the media. These then open a space for discussion in society and, even more importantly, empower elites who were looking for political cover to call for moratoriums.
This strategy has led to moratoriums in some states, and generally a better frame to their political arguments, and created a space for advocates to bring the public to the table, even when the public is largely in favor of the death penalty in general. When lawyers for individuals work alone, they can only do what is best for their own clients. When a full movement and campaign is brought to bear, the lawyers can work with grassroots movements or political leadership to find cases to spotlight and counter or thwart attempts by the government to frame the cases, the movement, and the court’s issuing decisions as pro-criminal.

Though the Caribbean death rows are rife with prisoners who are probably not the first choice for the face of a movement against the death penalty, cases in the past have been chosen for such special attention. It is not without merit to argue that framing might stand a chance in Caribbean death row cases if a few key domestic elites or NGOs could help support the frame. In fact, even in Trinidad and Tobago such a case existed in the 1970s. In 1973, Kissoon Ramnanan was executed, but later two prisoners confessed to the crime for which he had been executed (Amnesty International 1996). Given the inadequacies in the justice system and legal aid in Trinidad and the rest of the Caribbean, the chances of finding potentially innocent or questionably guilty prisoners on death row is perhaps even easier than in the US, where more legal aid and appeals exist. Even the struggle over the execution of prisoners while awaiting appeals in one case could have been more widely used as a frame. The Glen Ashby case provided at least the angle that Trinidad had gone too far, and likely contributed to it taking another five years before another hanging occurred, since he was hanged while his case was still pending at the Privy Council. In a Death Watch (a group out of the UK) report from June 1995, the hanging was characterized as follows:

Glen Ashby who having served 4 years and 360 days was just five days short of the JCPC five year threshold when he was executed in Trinidad in 1994. A fax from the
JCPC ordering a stay of execution was received ten minutes after he was hanged.

(Scott-Williams 1995)

Without a broader civil society movement or political leadership in Trinidad to turn to, though, the Ashby case only had so much of an impact long term. Lawyers for death row inmates, if they had the ability to work with an organized, regional or domestic grassroots network and if they had been able to select and highlight a few cases rather than having to work against urgent potential executions of their clients, might have been able to weave together a sympathetic frame for the struggle against the death penalty, if such a grassroots movement or network of sympathetic elites had existed.

Without that movement and resources to support it, the best the lawyers could do is attempt to save lives, using a more mass strategy of the death row phenomenon and the *Pratt and Morgan* clock, which did not play as well with the public, but rather supported the government’s frame of high crime rates and the need for speedy executions. This unfortunately made the movement look like they were merely attempting to delay justice, rather than seeking justice for a potentially innocent man on death row, or at least a man who deserved some mercy.

I argue that such frames might have found more sympathetic frames if they had focused on a single case or set of cases (such as where the “named plaintiffs” represent a whole class of claims), where mercy or a life sentence might have been more appropriate. I argue these actually existed and were identified by the advocates and the commission, but the urgency and possibly the lack of resources of the advocates and system, forced them to abandon the framing strategy. These potentially easy to frame cases were the Haniff Hilaire, Danny Baptiste and Pamela Ramjattan cases, which were included in the consolidated cases sent to the court. Originally, the Hillaire case was sent alone as the first case to the court. These cases were picked up on in some small part by groups like Equality Now (a women’s rights group), but no major campaign was available to connect to in Trinidad. Pamela
Ramjattan allegedly was the victim of monstrous domestic violence for many years at the hand of her husband, for whose murder she and the two male friends of hers were convicted of murdering. They were all sentenced to die. The jury had only the option to acquit them or execute them due to the mandatory death sentence for murder in Trinidad (Equality Now 1998). Mandatory sentencing leaves room for a campaign surrounding someone who was convicted but with mitigating factors, such as domestic violence. In fact, in a recent public opinion poll, scholars found that a majority of Trinidadians, when confronted with actual scenarios such as this, did not believe in mandatory death sentences. When an actual human story with a sympathetic, mitigating circumstance was presented, the public did not support the government’s policy (Hood and Seemungal 2011). So a frame, I argue, even for convicted murderers in a pro-death penalty region can be found for cases, when time, resources, and support to select, tailor, and promote that frame are available.

Despite the urgency, a framing and selection process was attempted in the cases, but unfortunately it was too late to make a difference in the ensuing backlash. The backlash against the Inter-American Court, began almost immediately after the commission filed for provisional measures at the court in the James et al. cases. These set off the withdrawal from the system by Trinidad, playing right into Trinidad’s counterframe that these cases were merely attempts to delay legal executions. The advocates and commission might have been able to counter this frame, but the provisional measures and the hearings on them did not address any substantive issues or the facts of any particular case. The commission lacked extensive background in the Caribbean or on death penalty cases, dealt individually with each of the cases brought by the London Panel from Trinidad, and perhaps did not comprehend how quickly they needed to reframe the cases. They began to understand that need after their first published recommendations to Trinidad ended with Anthony Briggs’ swift execution.
Commissioners and the commission staff had just prior to Briggs’ execution worked with the lawyers for the Trinidad death row inmates to select a case to send to the court: the Hilaire case, which as noted above had sympathetic facts. The case did not reach the merits before Briggs’ execution, and the commission and advocates decided shortly thereafter to consolidate the cases before the court. Any hope of bringing out the facts of any particular case to reframe the issue in the Caribbean were lost, primarily due to the incredibly short period of time the court could devote to the merits of these cases, as discussed below, which left little time to highlight the narratives or contextual information for each of the cases and led to a decision by the court that did not have these narratives or context to help sell their decisions.

Given the court’s reliance on advocates and the networks with which they are linked (or not, in this case) to aid in the framing of decisions and “selling” the court to domestic audiences, the convergence of a lack of resources, the previous counterframe by pro-death penalty supporters, the urgency of the cases, the lack of frame and focus on particular cases, and the lack of NGO networks and elite support within Trinidad and the Caribbean, led at least in the short term to cases that were not well accepted in the Caribbean context. This unfortunately led to a perception that the court was part of a delay in justice rather than a preserver of justice in the Caribbean.

Consolidation, Court Hearings, and Information

The decision by the advocates and commission to request provisional measures in the James et al. cases, the court’s decision not to get into the merits of the Pratt and Morgan death row phenomenon issues in the case, and the lack of discussion of the individual case facts left the cases open to reframing by Trinidad as procedural delays without any information available to the contrary. It took the court a few weeks after receiving and issuing provisional measures before a hearing was held, since the court is part-time, and the state by then refused to attend the hearing. By the time, years
later, the hearings for the first cases on the merits occurred at the court, the publicity of the cases before the court had waned (given the lack of networks to promote media attention as well as the fact that Trinidad had long since withdrawn from the ACHR), linkage had already occurred and the backlash was already in full swing. Changing the tide would have been an uphill battle after the backlash began, but it was even less likely to happen given the lack of time the system was able to devote to each of the cases. If the advocates would have had the luxury to choose one particular case to file before the commission initially, perhaps the backlash could have been avoided. Yet given Trinidad’s lust for executions at the time, it would likely have meant losing more of their clients to the gallows. This section explores the lack of information about individual cases and contextual research that came out during the cases, and suggests that the commission’s choice of a somewhat weaker facts case to publish first, the Anthony Briggs cases, lead to his death and a subsequent consolidation of the other cases. I argue that this consolidation, combined with the advocates’ lack of resources to present research and the court’s lack of time for the case, even further minimized the ability to highlight information and research about individual cases and violations.

The first of the Trinidad cases that the commission completed with a published report was the Anthony Briggs case, which brought to light the urgency involved in the cases and perhaps a lack of understanding of the situation by the commission. Mr. Briggs case had requested and been granted provisional measures through the Inter-American Court in 1998 that had been continued throughout 1999 as well. After reviewing the case, the commission found a violation of his right to a trial within a reasonable time, but did not find for the petitioner on claims of ineffective counsel or prison conditions. Petitioners had requested that the petitioner be released if violations were found, since he could not be afforded a fair trial after so much time had passed. The commission, based on the finding of a violation of Article 7(5) of the American Convention that the petitioner was not given a trial
within a reasonable time or the opportunity to be released pending trial, recommended that Trinidad provide “compensation and consideration for an early release or commutation of sentence” (Inter-American Commission on Human Rights 1999). Trinidad did not comply with the recommendations, so the commission opted to publish its report and recommendations, rather than send the case to the court. Provisional measures from the court were left in place, but after receiving a green light from the Privy Council, which said the Inter-American system had completed the case (Tittemore 2004), Trinidad executed Mr. Briggs on July 28, 1999, despite the Inter-American Court’s warnings that the execution would violate the court’s binding provisional measures (Caron 1999). Another petitioner named Joey Ramiah, whose case had not been decided and who was under provisional measures, had been executed on June 4, 1999.

The executions of petitioners by Trinidad put the system on notice of the same urgency and individual level obligation focus that the petitioners representatives had been under as well, and resulted in the consolidation of the cases in order to speed the process. The executions presumably sufficiently spooked the commission into deciding that publishing reports would be insufficient to receive compliance and cooperation from Trinidad. Although it heard the cases individually and had previously individually submitted the sympathetic Hilaire case (he was one of the three convicted of killing an allegedly very violent domestic abuser) to the court on May 25, 1999, the commission, working with the petitioners’ representatives as legal advisors, determined that the cases should be sent in large groups to the court. A group of 23 cases that the commission had combined in 1999 were submitted to the court on February 22, 2000 as part of the Hilaire et al. Case. Seven additional cases called the Benjamin et al. Case were submitted to the court on October 4, 2000. After preliminary objections were decided, the court ordered the joinder of the cases into the Hilaire and Benjamin et al. Case on November 30, 2001, since they all involved the same parties (the commission and the state of
Trinidad) and various violations relating to the mandatory death sentence and a handful of other violations. Any attempt to emphasize the particular facts of the Hilaire case or other sympathetic case would be difficult, but without a strong network or campaign to connect to domestically, the petitioners’ lawyers did not have a strong reason to object, especially when considering their own limited financial resources for extended hearings in 32 separate court cases.

The court held hearings on the merits for this large group of cases on February 20 and 21, 2002. Trinidad did not send delegates or witnesses. The commission and its advisors presented three expert witnesses who testified at the hearing regarding problems with procedures in trial and appellate court proceedings in Trinidad, the psychiatric condition of one of the petitioners, and prison conditions on death row. Written expert reports were submitted that outlined the use of mitigating factors in US death penalty cases, prison conditions, and analysis of evidence in one of the petitioner’s specific cases. The commission and petitioners representatives submitted over 200 pieces of documentary evidence. The court did request a follow up on the dates of convictions and arrests of the victims, but other than that, no further proceedings were held (Hilaire and Benjamine et al. 2002). Documentation and witnesses were prepared by the petitioners at their own expense, though all legal and other expert services were donated pro bono. The petitioners had access to a large number of legal experts and several expert witnesses and scholars, despite minimal funding. However, they were not able to present the vast number of witnesses, contextual information, or narrative individual stories as had been the case in the Honduran cases which had far more hearings and far more funding for witness and researcher travel.

Needless to say, even simply hearing the facts of 32 cases in two days of hearings is extraordinarily quick, let alone that the court heard expert testimony, as well as legal arguments on both the merits and reparations. The court had the task of reviewing, deliberating, and writing a full
decision on the merits and reparations in a conglomerate of 32 cases, many of which relied on factual
details specific to each case, such as dates and evidence. The lengthy graphs given by the court in the
decision on the merits demonstrates the complexity of the cases. The court issued its decision on June
21, 2002. Because the state had not appeared and the commission’s evidence was accepted, the court
found violations on all of the submitted issues, and ordered reparations.

The court’s decision was bold in that it asked for extensive reparations including broad policy
changes, but petitioners and the commission wisely avoided requesting anything like the release the
UN HRC cases had requested. On the issue of reparations, the commission requested commutation of
death sentences, legislation to comply with the decision and compensation for the executed prisoner’s
family. The victims similarly asked for commutation of the sentences to 75-year prison terms and
compensation to the executed prisoner’s family. Neither asked for release of the prisoners, as had been
the case in some of the original petitions and as had been ordered by the UN HRC in previous
Caribbean death row cases. The court ordered the state to change its legislation to comply with the
findings of the court. It ordered a retrial and resubmission of the cases for consideration of pardons or
clemency, improved prison conditions and a commutation of the living petitioners. The court ordered
$10,000 for the family of the executed prisoner. Without a domestic or transnational network to
support the decision, the more sweeping parts of the decision were unlikely to go very far, especially in
a country that had already withdrawn from the court’s jurisdiction and the ACHR. However, the court
was accustomed to ordering such reparations, and continued with the tradition in its jurisprudence to
request not only specific reparations, such as commutation, retrial, or monetary damages, but also
request that the state change its laws overall, leaving little room for containing the decision as has been
found in Europe. However, this type of bold decision that calls on multiple branches of government
presumes that the advocates have a network to call upon to do political and judicial follow up on cases.
Without them and considering the other factors in this case, the linkage outcome was a continued backlash. In summary, the petitioners won, but the backlash against the court had already occurred. The backlash lingered as they used this decision over the ensuing years to move forward in domestic courts in the region very slowly, while making almost no progress in the more political executive and legislative branches, or in political circles in general in the Caribbean due to the lack of mobilization, which will be discussed more in the compliance sections that follow.

The Hilaire et al. decision itself (and the other Barbados-based decisions that have come since) was not necessarily framed in a politically sympathetic way, but it was well written in a judicial sense, or at least it seems to have appealed to the judicial audience of the Caribbean who could understand the nuances of the legal arguments. The petitioners won on each violation alleged against the state of Trinidad. The court’s decision included references to the jurisprudence of other common law states to support its reasoning, since Trinidad is a common law state. In the discussion of mandatory death sentences, the court drew upon domestic case law from the United States and South Africa, which have previously dealt with issues of mitigating evidence. This allowed the court to put the decision in the “language” of common law states. The court’s decision was not poorly written, but rather its lack of time and resources, and the lack of cases selected to highlight sympathetic frames, led to a decision that while appealing perhaps to the judiciary in the Caribbean in the long run (which has begun to cite the court in its jurisprudence outside of Trinidad), did not provide an easy frame for a non-judicial Caribbean audience who had little or no domestic actors or networks to explain or promote the cases.

Due to the lack of domestic political movement, political elites or media to support the court or petitioners, the decision made little dent in the pre-existing political backlash against the Inter-American system that had begun with James et al. Unfortunately, broader appeal and not judicial acceptance seems to be a key ingredient in obtaining policy changes in a broader sense and a positive
linkage outcome, at least within the Inter-American system. This requires, as noted previously, some pre-existing networks of NGOs or elites who can be tapped into for help with resources, information, framing, and, as discussed below, mobilization.

**Training and Information for Future Caribbean Cases**

In 2005, the lawyers behind the London Panel of lawyers at Simons, Muirhead, and Burton created a separate NGO housed at the firm to continue and expand their work representing death row prisoners. The organization, called the Death Penalty Project, now provides free legal services for cases in the Caribbean and Africa, and holds meetings for networks of lawyers, NGO representatives, and scholars. They have sponsored publications of a Guide to Sentencing, public opinion surveys in Trinidad and Africa, and other research and training activities for both lawyers and judges.

The Death Penalty Project has continued primarily to serve as legal representatives to individual death row prisoners, and provide information for the court on both new cases as well as helping to monitor former cases. At the Inter-American Court, it was directly involved in the cases against Barbados after the government of Barbados surprisingly accepted the jurisdiction of the court in 2000. Through collaboration with attorneys from both Trinidad and Barbados, they have continued to monitor and provide information to the court regarding compliance with decisions against the two countries (Death Penalty Project 2010). They are now repeat players, and while they likely understand the gaps in the system, they have not had the funding or support from domestic NGOs and elites willing to campaign against or reframe the death penalty in the Caribbean, which remain minimal to this day. The movement believes, as noted by Roger Hood (2002), that the move to abolish the death penalty officially in the Caribbean will come from elites and the courts, not from grassroots movements. However, I argue that the political space for elites and the courts in Trinidad to even discuss a move toward abolition may have been helped by a push from proper framing of the issue that
could more easily have translated the issue domestically, which Tarrow (2005) has noted is crucial for transnational movements. This would have required, however, more resources and networks than exist for these advocates even now. They simply lack the domestic networks or resources to tap into outside of their judicial expertise, and a lack of resources even from international NGOs who focus more on countries with more active executions, which will be discussed more below.

**Expertise Conclusions**

The two case studies highlight issues of expertise that may have contributed to the disparate outcomes of linkage. In the Latin American case, the commission and advocates were both experts on disappearances and had significant experience working on cases involving Latin American governments. They had pre-existing ties and networks in the region that had created some potential frames that could be used for the cases, and domestic NGO connections allowed for more information to be gathered while international NGO connections allowed for more funds to be raised to support research trips and travel by a large number of witnesses in the lengthy hearings before the court. The London lawyers were experts on Caribbean death penalty issues, but the commission was not. They had little or no prior experience in the Inter-American system, and were under urgent time limits that required an individual litigation strategy rather than a framed, coordinated campaign of the most well-prepared and sympathetic cases that led to consolidated, truncated hearings of the cases at the court and a decision with little narrative or contextual information to “sell” the decision in the region. Previous test cases at the UN HRC had led to unsupported, but overly bold decisions that had already sparked the government to create a countermovement and counterframe.

In conclusion, the comparison of factors within the expertise category of my framework has suggested that they may impact linkage efficacy in several of the expected ways in addition to some unexpected related ways. First, the system’s prior experience with an issue and repeat player status of
the advocates at the time of the test cases seems to have aided the Honduran cases. Though part of this was likely the knowledge of disappearances that the commission had, and the knowledge of the gaps in the system as my hypothesis noted, the findings interestingly suggest the importance of pre-existing networks and frames for the broader policy aspects of test cases that connect them to a movement in progress, rather than trying to take a judicial-only approach as was the case in the Caribbean cases. The fact that the judiciary in Latin America had not been fully functioning had led to reliance on more political, grassroots campaigns that only after the Inter-American’s cases began to move toward a more judicial-based movement in the 1990s. The commission had taken a more diplomatic, research-based approach at first in the region before beginning contentious cases at the court, while it was thrown into the Caribbean without that prior foundation from the commission or the advocates. In these cases, the nature of the issues and the approach taken by the advocates and commission made the issues out to be procedural tactics that fed into pre-existing frames from previous bad fact cases from the UN HRC. These findings suggest that the prior baggage, good or bad, of the advocates and the system in the region can impact the outcome of linkage. What happens before test cases at the court may be as important for linkage efficacy as what happens during and afterward, despite the focus of prior literature on the court decision or compliance factors, rather than pre-existing frames, networks, or other factors.

Second, the fact that these cases had more time to be prepared and several cases could be chosen from not surprisingly meant that they were better able to select from a number of cases the most well prepared and easiest to frame. Third, the court’s additional time to hear the cases, and the additional resources of the advocates to research each case and present an extensive record of the facts rather than just the procedural and technical legal issues in the cases meant that they were easier to frame for a non-judicial audience. Fourth, the institutional dependence of the court likely left it
vulnerable to negative linkage in cases where it was dealing with a region or issue area that was outside the expertise base of its crutch organization(s). My findings suggest the court was bold in its decision in the Caribbean, despite having no pre-existing networks to support or frame its decisions in the region, perhaps due in part to its prior experience of having civil society support for bold, broad decisions and the custom that this set in its prior jurisprudence.

**Category 3 Compliance: Domestic and International Mobilization**

My framework identified several important factors that may be relevant for test case efficacy within the compliance category. First, I hypothesize that domestic mobilization of persistent pressure at a wide variety of pressure points is important. This includes trying to enforce the decision’s formal compliance through the courts or other parts of government (depending on the reparation demanded by the court), lobbying the legislature for overall policy change, using public opinion and grassroots movements to place pressure on the executive branch or other officials, publicizing the case locally, and putting the issue on the political agenda through assistance from the media and sympathetic elites who can help educate society about the issue. Further, I hypothesized that international mobilization should increase the likelihood of a positive test case outcome. I also stress that a connection between the international campaign and domestic mobilization is likely important too. Findings in the comparisons that follow of the Caribbean and Honduran cases suggest that these hypotheses are likely true, as they have been in many of the studies in the literature and point to some interesting findings.

First, as in the expertise category, some evidence that pre-existing networks are likely to impact a case positively exists, and the relative organization of the opposition is what matters. Honduras attempted to counter mobilize against the disappearance cases, but failed likely because they were not as organized and did not have the pre-existing and broad mobilization networks that the advocates did. Likewise, in the death row cases, the pre-existing opposition to the cases that had developed around
previous cases such as Pratt and Morgan and the UN HRC cases was unleashed upon the Inter-American system once the advocates linked itself to the court through the test cases from Trinidad. Any baggage that a movement has, it seems, comes with the movement through test case linkage to the court.

Second, the findings begin to suggest that broader movement-level political mobilization may be more important to the efficacy of test case linkage than formal compliance or individual judicial victories. Individual judicial victories may be contained, as the literature has noted, and they can be slow and less well publicized or understood by politicians and the public. Overall, the findings suggest that, for linkage outcomes at least, the success of the movement in the region more generally may be more important than the formal compliance with the specific test case *per se*. This makes sense given that my theory of linkage proposes that the court becomes linked to the movement, not necessarily the fate of the specific victims or the specific reparations ordered in the case.

**Compliance Gaps in the Inter-American System**

When both the Honduran and Caribbean cases came before the Inter-American court, the court itself had little in the way of enforcement mechanisms. Since recognition of the court’s jurisdiction was purely voluntary, even for members who had ratified the American Convention on Human Rights, they could threaten to or withdraw that recognition, as Trinidad did. Further, the court’s recognition was not tied to any “carrots” either. Membership in the OAS or any other body was not contingent on recognition of the court.

When the court held a state in violation of the American Convention, its greatest direct mechanism for compliance was its Annual Report to the OAS General Assembly. Regional political organizations like the OAS’s General Assembly can place community pressure on states who fail to comply with the decisions of the regional human rights bodies like the commission or court. However,
as one scholar concluded, the court had no authority to enforce compliance with its decision other than to request political pressure from the OAS (Deodhar 1988, p. 297). Unfortunately for the court, support for condemnations or reprimands before the political organs of the OAS General Assembly and others within the OAS have been generally lacking. In fact, the OAS General Assembly and other political organs of the OAS have frequently failed to take up the matter when states have failed to comply with court decisions or commission recommendations (Grossman 1998).

The court and commission would not have been able to mobilize state pressure or pressure from the OAS to leverage Honduras or Trinidad. Outright tensions between some states in the OAS General Assembly and the human rights system have not been uncommon in the court’s history. For example, the court and commission failed to garner much support from the OAS General Assembly in the early 1990s, particularly the commission (Americas Watch 1993). In fact, the system was consistently placed “under review,” which Grossman argues led to a persistent lack of legitimacy in the system that made it more difficult for the system to mobilize support within the OAS to take on those states that were non-compliant (Grossman 1998). Perhaps confusing an individual case with the system’s prior role of calling out governments for mass violations, many democratic governments “misinterpreted” the commission and court’s actions in individual cases as hostile or accusatory (Grossman 1998, p. 191). States can pressure one another to comply with judgments of the court, but have not usually been willing to take on other states, and as was discussed in the case studies regarding linkage, states in many cases are supportive of their neighbors, such as Barbados and Jamaica supporting Trinidad at the OAS General Assembly after its withdrawal.

Given the lack of enforcement mechanisms for the court itself, petitioners filing before the court are often relied upon to take on much of the enforcement and monitoring themselves. The court does request compliance reports from countries and the petitioners can report back if reparations have
not been carried out. Overall, the court has had more success with compliance on financial reparations than with requests that a state change its policy or law (Tan 2008), but even those parts of the reparations were not a given in either of the cases studied. Even if the court can write its decisions in a way that give a margin of appreciation to states, as many scholars have suggested they should (though this is harder with cases of more egregious violations), when simple straight financial damages are difficult to enforce in some cases, it demonstrates the weakness of enforcement authority given to the court and the lack of willpower in those cases for the regional political organization to aid in enforcement. When that is the case, as it has been in the Inter-American system, the court needs to rely on external sources, such as NGOs and TNANs, to help mobilize to monitor and ensure compliance, as the literature notes is the case in Europe (Alter 2006, Cichowski 2007, Conant 2002).

Most importantly, as the following comparison of the Caribbean and Honduran cases suggest, it may not be the formal compliance with specific reparations orders that is critical for the positive outcome of a linkage between the court and a test case, though compliance with specific orders has received considerable attention in the literature on court effectiveness and international courts. While the Trinidad government clearly does not fully comply with the judgments at first, the Caribbean lawyers have over time been able to gain compliance (and save most of their clients’ lives) through the slow workings of the courts in Trinidad and the Privy Council, while the Honduran government failed on many levels to live up to formal compliance for many years following the decision, but the persistent, transnationally-connected political and grassroots networks within Honduras and the region were successful in making strides toward acceptance of the norms of the movement and, through linkage, for acceptance of the court as well. Thus it appears that specific compliance for the individual clients from the test cases, especially if only through the one pressure point, seems to be less critical than using the test case victories to bolster more widespread support through the same mobilization
mechanisms that transnational advocacy networks use generally in campaigns for broader change (see Keck and Sikkink 1998; Clark 2001). Even though the test case is the mechanism that links the court’s and a movement’s fates, it seems that the acceptance of the norms of the movement more generally may be more important than compliance with the specific decision.

**Filling in Gaps in Compliance in the Honduran Cases**

Though compliance is one of the most important factors noted in the literature to measure the effectiveness of an international tribunal, specific compliance does not seem to explain clearly why some linked cases lead to failure for the court and others lead to success. In the most formal sense, the *Velasquez Rodriguez* case was not complied with by the Honduran government for six full years (Grossman 1998, footnote 17). Honduras dragged its feet in its payment of the financial reparations to the victim’s family, despite the fact that states generally have followed the court’s reparation decisions, especially the financial reparations (Grossman 1998; Tan 2008). The court in 1990 ordered interest for the delay and accounted for the devaluation of the Honduran currency, and Human Rights Watch’s reported for that year that only partial payments had been made. Not even the partial compliance with the court’s financial reparations could be attributed to overwhelming support from the political organs of the OAS, which in fact was lacking even in the Honduran cases (Grossman 1998). The United States under both Reagan and the first Bush Administration failed to support the Inter-American Court or its decisions in the Honduran cases and, to the contrary, tended to defend Honduras and criticize the court for unfairly singling out Honduras (Human Rights Watch 1989).

At the OAS, support was woefully lacking for the court in general. The OAS General Assembly in the late 1980s and early 1990s refused to support a call for Honduras to comply with the court’s judgments in the Honduran cases. Americas Watch believed this was largely because many governments in the region found the system “threatening” and actually worked to undermine the court
(Americas Watch 1993). The system, in particular the commission, was under constant attack in the early 1990s, including attacks by several democratic governments at a GA meeting in the Bahamas in 1992. The Permanent Council of the OAS even entertained reforms to the Convention, again creating constant “reform” efforts as Grossman writes, though efforts to pack the commission with political appointees more sympathetic to states by increasing the number of commissioners was tabled by its General Assembly in 1993. Much of the animosity may have come from states such as Peru, who would try to withdraw, and Uruguay and Argentina, who were being taken to task by the commission in the early 1990s for their amnesty laws, though the commission did not refer the contentious amnesty cases to the court. Uruguay and Argentina would eventually take the commission to the court through an Advisory Opinion request to review the commission’s authority, but the court would find the commission did have authority to call out the states for their amnesty laws (Advisory Opinion OC-13/93 1993). At least the countries attempted to work out their differences with the commission through mechanisms within the system. Several NGOs submitted amici curiae for the Advisory Opinion.

The positive outcome for linkage in the disappearance cases was not the result of Honduras simply rolling over. On the contrary, Honduras itself attempted to delegitimize the court and the families of the victims, and was not fully cooperative. As noted in the section on expertise, Honduras attempted to characterize the test case victim’s families as gold diggers, while its ally the United States attempted to discredit the domestic NGOs behind the cases as “Marxists.” In addition, one story demonstrates the length to which Honduras was willing to go to try to discredit the cases. Honduran government and military officials gave credence and large sums of money to a man who claimed to have seen the victims in the disappearance cases alive, which of course would discredit the court’s findings that they were part of a pattern of disappearances in Honduras. Even after the man kidnapped
a bishop as well as Honduran and Costa Rican officials, Honduras allowed him to be taken to Mexico and did not attempt to extradite him (Americas Watch 1993) for what became clear were fraudulent statements and kidnapping.

The government did seem to comply with outlawing the practice of disappearances in general, though it had stopped using the practice for the most part by the time the cases were decided. After the court’s decision in the Honduran cases, disappearances still occurred in the country, but not to the extent that they had in the early 1980s, which was the main time when the use of disappearances had spiked. There were a few cases of disappearances allegedly by the Honduran military reported in the Human Rights Watch report of 1989, after the three cases had been decided on the merits and had condemned the practice. But by 1990-1991 the group reported no disappearances in Honduras, even if investigation into past abuses remained illusory in some cases, at least partially due to amnesty laws that were given effect in 1991 (Human Rights Watch 1992). However, this happened before the court had rules specifically on the legality of amnesty laws under the ACHR, which would not happen until the 2001 Barrios Altos case.

The success of the Honduran cases was not so much the reality of Honduras’ formal compliance, but the informal myth created by the political mobilization around the cases that likely contributed to an overall trend more than it specifically aided the families of the specific victims. The case did not quickly change the minds of all of Honduran military and government officials. Rather, some elites were given the legitimacy and authority to act partially based on these decisions and the continued support of the coalition of NGOs and broader transnational networks supporting it, including states like Costa Rica. By 1993, the issue of impunity for disappearances from the early 1980s became an issue in the Honduran presidential campaign. In particular, the two major candidates in the race argued over who had more responsibility for the disappearances and the atrocities committed by
Battallion 3-16, which was the same group found to have been responsible by the court in the Honduran cases. This issue was brought into the campaign by the efforts of the relatives of the disappeared groups and human rights groups (Manuel 1993). This pressure eventually led to Honduras appointing NGO activist Leo Valladares as a human rights ombudsmen and his production of a report on disappearances, though publication and production of the report was made possible by funding from international sources and aided by the extensive research and files produced by Americas Watch and the network of lawyers and NGOs for use in the Honduran cases before the court (Americas Watch 1994).

**Coordination with TNANs**

Much of the progress in Honduras by the early 1990s was due at least in large part to the pressure brought to bear within Honduras and through the use of resources from the transnational advocacy movements that had grown up around disappearance issues throughout Latin America. Before the cases at the court, the movement had made some strides toward recognition of the problem of disappearances, yet the movement had not succeeded in gaining acceptance as a community standard. Findings here suggest that it was the existence of the networks themselves that mattered, even if they had not yet succeeded in gaining sufficient community support for their norm to start a norm cascade in the region yet. From the early 1980s, at about the same time the cases were being filed at the commission, the United Nations and the OAS had both made statements that they were appalled by the practice of disappearances, but they were constrained by internal politics from taking any enforcement actions against countries complicit in disappearances (AIUSA 1983). The movement needed mechanisms to call out individual countries. The Inter-American commission put together general reports for the OAS General Assembly on disappearances, as had some of the international NGOs, that helped define the practice of disappearances. I argue the commission and other reports laid
some of the political foundations for action, but had not yet given the movement an international mechanism with which to deal with individual cases when so many of the governments were unwilling to take domestic action. This is where test cases became a crucial piece of the puzzle for the movement as a way to get the intergovernmental body and the imprimur of a legal decision, but the cases and compliance with the decisions was not something that the OAS or the court could provide, rather it had to be filled in by the new networks that had begun to flourish by the mid to late 1980s.

Transnational advocacy networks were likely a key contributing factor to the positive outcome of the court’s linkage to the disappearance movements. TNANs became a phenomenon in human rights starting in the 1970s and 1980s. One of the areas that early on began to form transnational networks was the disappearance movement in Latin America. Networks for the disappeared had started forming as early as the 1970s, particularly when the coup in Chile occurred in 1973. Because Chile had a pre-existing, internal network of legal experts and legal processes through which they were able to do extensive fact-finding and monitoring of the situation. Chile’s civil society documented disappearances as they happened. They then, through a mechanism described as a boomerang, were able to get this information to Amnesty International and other organizations. Even with this information, before the three Honduran cases were decided, NGOs were still working with the UN to try to move forward on a Convention on Disappearances or at least a declaration on the subject. Activists decided that a test case was needed, but it would need more than just a winning case, it would need mobilization of networks to support the resource-deficient and empowerment-challenged Inter-American system.

The importance of transnational advocacy networks has been addressed in other contexts, but this case demonstrates that in some cases they can make up for at least some of the missing coercive powers for courts. They can be important in a voluntary and poorly funded system like the Inter-
American system, where coercive powers are nearly non-existent. Even in systems with more coercive powers, scholars have concluded that such support is important. For instance, in early ECJ cases, judges were emboldened by the support of scholarship, conventions, activists and advocacy networks who let the court know that they would be supported if they were to write bolder decisions (Alter and Helfer 2010). Where such support is lacking, a court would be wise to be less bold if it wants to gain support for compliance. Some have argued that the Inter-American Court has not always done a good job of leaving a margin of appreciation or “wiggle room” for states to comply, as the European courts have (Burstein 2006). Yet the vast differences in the nature of violations dealt with by the two courts when establishing their jurisprudence may have made this consideration, as wise as it might be, less of a choice at least in the Inter-American system. Regardless of the level of support, it would be hard for a human rights court to be less than bold when facing egregious atrocities like those the Inter-American Court was faced with in its initial Latin American cases; a human rights courts, I could argue, would be equally discredited if it did not boldly condemn practices such as disappearances, torture, and genocide.

Luckily for the court, those bringing the Honduran cases before it had networks of support behind them. Just as external support and networks for mobilization are important for courts to consider, findings suggest that lawyers considering taking cases before such courts may want to consider the same external support and networks if the third level of obligation (to the court) is of concern to them. In the disappearances cases, the cases were directly linked and supported by international NGOs with wealthy donors. Those international NGOs were further emboldened by the information and support they were receiving from domestic NGOs and civil society, while domestic civil society was then emboldened by the actions of international NGOs and the pressure they were able to place directly and indirectly, through leverage and connections to governments with coercive
powers, to advocate more strongly knowing the world’s eyes were upon them. These shaming and leveraging strategies included the Inter-American test cases as one of its components.

The importance of this network rather than merely the type of violation or region in explaining the positive outcome for the court, I argue, becomes clearer when comparing the Honduran cases to what happened in Guatemala. Guatemala actually had more disappearances in the 1970s, but did not have networks of lawyers or activists, nor the internal civil society needed to monitor and document the disappearances. The government’s story could not be refuted with cold, hard facts documented by civil society, as was the case in Chile (Clark 2001, pp. 74-75), which had extensive civil society networks that predated the Pinochet government since Chile had been a successful democracy. The same strategies were put into play in Argentina, and were repeated in many countries after Chile. In countries like Honduras, the civil society was smaller, but still existed and had deep connections to both international and regional NGOs that had been developed to aid with Chile and Argentina. There were very visible organizations that represented the families of the disappeared in Honduras specifically, as well as those that had developed throughout Latin America.

A critical connection to the domestic sphere was present in the disappearances TNANs. In addition to “regular” human rights NGOs, much of the work and persistence to fight impunity for those responsible for disappearances were groups of relatives of the disappeared, many of whom were still looking to find their relatives and bring their abusers to justice. Relatives of the disappeared formed domestic advocacy groups in places like Argentina in the late 1970s. Most famously, the Madres de la Plaza Mayo protested wearing white scarves as they silently walked through Buenos Aires, bringing worldwide attention to the issue (Clark 2001, pp. 76-77). Even in Guatemala, where no strong internal civil society was available in the 1970s to combat disappearances and impunity, groups of relatives had formed by the mid-1980s. Shortly thereafter relatives’ groups that crossed national boundaries began
to form. These groups included the Central American Association of Relatives of the Disappeared in Costa Rica in 1982, one of the organizations that played a major role in the Honduran disappearance cases (Mendez and Vivanco 1990, footnote 1).

The lawyers from Americas Watch in their memoir-type article on the Honduran cases concluded that the most important resource they had was their direct relationship with the victims and the NGOs within the region involved in these issues (Mendez and Vivanco 1990). The Honduran cases were originally filed by the victims’ families with the commission, but they were in conjunction with organizations across Latin America who represented the families of the disappeared, specifically the Honduran organizations of CODEH and COFADEH, with further support from the Costa Rican-based Central American Association of Relatives of the Disappeared (Manuel and Mendez 1989, pp. 70-71). In fact, Zenaida Velasquez, sister of Manfredo Velasquez Rodriguez, was one of the founders of COFADEH in Honduras (Freely 2007). Groups of relatives of the disappeared offered their support and legitimation for the cases. Within Honduras and the region, there were pre-existing mobilization networks to get out the word about the disappearances that included faces of family members trained and ready to speak to the press about the suffering of families who did not know the fate of their

As organizations of relatives of the disappeared grew, they often joined forces with the broader human rights NGOs, including larger international NGOs such as Amnesty International and Americas Watch, who were using many of the TNAN boomerang strategies noted by Keck and Sikkink (1998) such as leveraging and shaming. Domestic human rights NGOs often had direct contact with the relatives of the disappeared and their organizations, who were more likely to trust local advocates, and could hold vigils together, provide support for relatives’ groups, offer local legal expertise to file habeas cases and exhaust domestic remedies, and channel information from the relatives groups to international groups (AIUSA 1983). These connections to international NGOs gave families of the
disappeared access to some of the world’s leading international human rights law experts, the financial
and mobilization resources of larger networks of NGOs already formed for other issues such as torture
and political imprisonment, and the membership and media ties to put persistent and often highly
visible pressure on violator states. On the other hand, relatives of the disappeared, in conjunction with
domestic human rights NGOs, were able to provide international NGOs the detailed information and
internal monitoring that they needed to build successful campaigns. In fact, the international NGOs
saw their role very similar to the boomerang concept later defined by scholars by Keck and Sikkink
(1998). Amnesty International USA’s Disappearance Workbook stated that the function of
international NGOs in these networks was the following: investigate cases, be an outlet for information
from domestic human rights NGOs, provide expertise and research on international law, increase the
visibility of the issue at the international level, bring pressure against the violating country, and
provide international moral, legal and financial support to the movement (AIUSA 1983, p. 157). They
combined their resources and shared their experiences across different countries and venues. Amnesty
International even produced a summary of strategies and campaign techniques that worked entitled
“Disappearances: A Workbook” that was published in 1981 (Mendez and Vivanco 1990). By the time
the cases were decided by the court, the TNAN connections already existed in the region, and they
were quickly gaining experience with shaming, leveraging, and political accountability techniques
using the boomerang approach that took advantage of connections between civil society at the
domestic and international level.

Generally, Americas Watch, which was primarily in charge of taking the test cases to the court,
had already made a priority of working with other Latin American NGOs before it took the test cases
to the court. Americas Watch played the role of “moral pressure” to support domestic NGOs and the
burgeoning civil society in new democracies, and called on other organizations to do the same.
Americas Watch was plugged into transnational advocacy networks throughout Latin America. In fact, in the overview of Americas Watch’s work in the 1990 Human Rights Watch Report, shortly after the final reparations decisions had been issued in the Honduran cases, the organization observed that the most effective situation was to have domestic NGO work reinforced by international attention and support. The organization saw its role as reinforcing the monitoring activities of domestic organizations by providing support and bringing international attention to their findings (Human Rights Watch 1989). The group reported that all of its cases before the commission were in fact cases brought by domestic NGOs as test cases through its agreement with several domestic NGOs across Latin America to which it provided free legal services for victims who wanted to take their cases to the Inter-American system (Human Rights Watch 1990).

Perhaps more importantly for long-term success for both the court and its cases, the international players in the Honduran cases placed a high priority on strengthening civil society more generally in the newly democratizing nations in Latin America, including support for domestic NGOs. They sought to develop the institutions necessary to support NGOs and to create more professional and respected human rights organizations in the region who could work on longer term, institutional problems within their country’s legal systems (Human Rights Watch 1989). They supported those NGOs monitoring internal conflicts such as in Peru, El Salvador, and Colombia in the late 1980s and early 1990s and found domestic NGOs to be important institutions for ensuring compliance with international human rights standards (Human Rights Watch 1990). Growth and sophistication of the domestic civil society networks in Latin America continued into the early 1990s, and Americas Watch (1992) continued to note the credibility and effectiveness of human rights monitoring activities by their domestic counterparts. Americas Watch (1993) lobbied members of Congress and US embassies’ personnel for leveraging purposes and for influencing the use of pressure for injunctive measures
among international bodies to protect human rights monitors who were threatened in the region, which was still a life or death situation in many countries.

Building civil society in Latin America was a way to ensure democracy and human rights would continue while putting an end to impunity, since states had failed to be consistent in their pressure for anti-impunity. Further, it meant that the movement had pre-existing networks to make up for the lack of consistent political will by states in the region. As discussed earlier, the US was inconsistent in its support for human rights in the 1980s and early 1990s due to its own political and security concerns. Even human rights and anti-impunity ally Argentina had failed to remain loyal to the anti-impunity movement, and by 1990 had pardoned its own generals and grown angry with the commission, despite lobbying efforts by Americas Watch (Human Rights Watch 1989). Civil society would have had to take the lead to find more persistent support even when political will ebbed and flowed, and when taking important groundbreaking cases to the underfunded and under empowered Inter-American Court.

Mobilizing Public Opinion for Leverage

Findings in the previous section seemed to support the hypotheses that mobilizing at the domestic and international level is important, but I argue that it is not just mobilization of NGOs that is important. The media coverage and publicity that the networks garnered to support the hearings and decisions in the disappearances cases and were factors in their success. Publicity of the movement is one of the functions of the test cases, and the anti-impunity movement and associations of relatives of the disappeared had a significant impact on public opinion by keeping the issue before intergovernmental bodies and other venues, such as courts, as well as reporting on and monitoring the cases themselves. The cases before the court and the extensive public hearings held by the court brought attention to the cause even before decisions were handed down. There was significant
coverage of the hearings by the worldwide media, and particularly and importantly, the Honduran media (Manuel and Mendez 1989, pp. 71, 557).

The media coverage was apparently extensive enough to put Honduran government officials and parts of its legal team on the defensive. They released statements about how they were cooperating with the court and at least they had attended and participated in the hearings, rather than pulling out altogether (Mendez and Vivanco 1990, p. 541). Given the US support for the Honduran government in that era, blowing off the court’s hearings was not entirely out of the question. With the media watching and pressure from networks at home and abroad, it likely made it harder for Honduras to completely back out. As further evidence of the media’s impact on government action, though it may not have immediately changed its practices, the name of the Battalion being discussed in the court’s hearings had its reputation tarnished so badly that it had to take action to combat that reputation. In fact, Battalion 3-16’s name was changed around the time the cases began at the court due to the “negative publicity” it had received, according to a Colonel in the Honduran military (Preston 1988).

Reports were another way that TNANs were able to mobilize media publicity campaigns for the test cases. In 1989, shortly after the court’s first decisions, Americas Watch published an 83-page report on Honduran human rights, including a section specifically on the Inter-American Court cases and decisions. The report was widely publicized in Honduras. The report noted in its section “seeking accountability for past abuses” that Americas Watch was using domestic documentation obtained with the help of domestic NGOs to continue to pressure governments to prosecute and hold accountable those responsible for disappearances and other egregious human rights violations (Human Rights Watch 1989), so the publication was just one additional part to raise international and domestic awareness. Americas Watch, along with fellow international human rights organization Amnesty
International, continued to aid domestic groups with internal monitoring of human rights abuses in Honduras and used the information sent by those groups to publicize their findings in international reports (Human Rights Watch 1992). The reports helped gain additional publicity, even after the test cases.

Americas Watch used direct publicity from the cases to pressure Honduras through political accountability strategies to comply with the decisions of the court, and to implore the US to use its connections with Honduras as leverage to urge compliance. Attempts to lobby Honduras directly for specific compliance in the cases in the year or so following the decisions were unsuccessful. In the Human Rights Watch report for 1989, the damages ordered by the court in July 1989 had not been addressed by the Honduran Congress in their budget for 1989, despite the court’s October 1989 deadline to pay the damages to the family. It was Americas Watch staff that requested that the commission ask the court to demand payment from Honduras in late 1989 and early 1990. Based in the US, Americas Watch attempted to leverage the United States to use the more than $200 million in military, economic, and humanitarian aid it gave to Honduras at the time to pressure the country to comply fully with the court’s decisions. The State Department was pressured to answer for its ally Honduras’ behavior in its Country Reports on Human Rights and at least once publicly at a meeting of the Bar Association of New York (Manuel and Mendez 1989). Though those attempts were not entirely successful, there was at least persistent pressure on the US to defend its lack of human rights pressure, despite continued close ties to the country. By 1991, the Bush Administration had at least made human rights an issue in bilateral negotiations, even if it still failed to use military aid as leverage (Human Rights Watch 1992). Americas Watch lobbied delegates during the era at the OAS’s General Assembly to pressure Honduras to pay, but Honduras was able to “derail” the debate, even while privately stating that they were studying the possibility of full payment.
The importance of media and the political space to discuss a type of human rights abuse can provide a venue to raise awareness of an issue and educate the public about an issue, sway public opinion about a country’s actions through shaming, and mobilize the domestic and world community to pressure a government through leveraging strategies to comply with international standards. In Latin America after the Honduran cases, the press was pushing the limits in many countries to bring out human rights abuses and government corruption. Some journalists took on a watchdog role, similar to investigative journalists in the United States after Watergate, including in conflict ridden countries like Peru, where their efforts often put them in peril (Americas Watch 1994). Americas Watch observed that these journalists sparked debates that were crucial to gain government interest and approval to change policies (Human Rights Watch 1992). Increased coverage of the human rights reports and other actions, presumably including the test cases, by Americas Watch gave the organization and its domestic colleagues more visibility and, in its own terms, “access to larger segments of the population in most countries” in Latin America (Americas Watch 1994). Given the important role for the media, when investigative journalists who reported on human rights issues were persecuted in the early 1990s, Americas Watch stepped in on their behalf (Human Rights Watch 1992). This new era of watchdog journalism helped Americas Watch get access to the public and through the public to their governments in Latin America, since the journalists were willing and able to educate the public and were willing to report on the government’s flaws. These journalists, among other elites, took advantage of the political cover of the well-mobilized domestic and international networks of NGOs and activists and the test cases that had helped bring the injustices to light.

Working with Elites: Long-Term Success and Political Cover

Even after the victory in two of the Honduran cases at the Inter-American Court, families of the victims and Honduran human rights groups continued to pressure their government persistently and
through a variety of pressure points, which my framework and much of the literature notes is important
to achieve broad policy changes through test cases. They continued to lobby the government to fully
comply with the broader parts of the court’s decisions, though not directly ordered in reparations, that
called on it to investigate and prosecute disappearance cases, even long after the initial publicity of the
cases was waning. They made long lasting connections with government elites who were supportive
of the cases and human rights. They worked with the government’s commissioner for human rights,
Leo Valladares Lanza, who was a human rights activist himself, to help with the investigation of
disappearances that led to the 1993 official report, “The Facts Speak for Themselves.” A month after
the report was released, Honduras inaugurated as its president Roberto Reina, a former Inter-American
Court of Human Rights judge and court president (1979-1985; Freely 2007).

Later, Honduran human rights groups continued to work with special prosecutors and forensics
teams throughout the 1990s as the Honduran government began trying some of the military for
numerous disappearances. Despite the amnesties passed in the late 1980s that often foiled attempts to
punish perpetrators, families and human rights groups continued to pressure the government to find the
truth, succeeding in continued prosecutions, investigations, payment of compensation to some of the
victims’ families, and a 2002 agreement facilitated by the UN Development Program to have
cooperation between the military and the human rights organizations still working to find the truth
about the atrocities of the early 1980s (Freely 2007). Some work was even done outside the domestic
sphere, such as in US courts. As late as 2008, Zenaida Velasquez, sister of Manfredo Velasquez
Rodriguez, along with other families of the disappeared, were still engaged in lawsuits in the US to
hold former high ranking members of the Honduran military and intelligence forces who were in the
US responsible for their family members’ disappearances (Center for Justice and Accountability 2008).
Thus, these pressures were varied, and included not only calls for judicial action but also calls for the
executive and legislative branches to live up to the broader norms of the movement and test cases. These actions likely aided both the movement and pulled the court along too since the two were linked by the test cases.

**Mobilization Resources**

The volume, variety, and size of the networks involved in and supporting the Honduran cases were large and well connected, had access to funding, and were experienced in many of the TNAN techniques to pressure compliance. Researching the background of these landmark cases draws to the forefront not just a landmark decision or litigation strategy, but just how well that litigation was embedded in a much broader campaign that drew together a diverse body of grassroots organizations, media, elites, and many other resources. Domestic families of the disappeared groups were tied in with each other throughout the region. The families groups were tied in with human rights groups in Latin America, such as CODEH in Honduras. These groups were tied in with politicians, lawyers, and journalists in Honduras and other countries. Officials from the government of Costa Rica, given the missing Costa Ricans involved and its status as a respected moral authority in the region, were supporting the cases. These regional advocates were then tied into the broader international movement against disappearances and impunity through Americas Watch, and its connections to many Western NGOs, journalists, lawyers, publishers, elites, and, not unimportantly, major donors.

I argue that major donors or other sources for financial backing are necessary when expecting $80,000 in litigation costs or three years of litigation, but are likely even far more necessary to support the “after-party.” Persistent mobilization requires resources, and persistent mobilization, Conant (2002) notes, is important in order to avoid contained compliance. I suspect resources are even more necessary to avoid outright disobedience toward a court’s decisions, a response which Conant finds to be rare, but I argue it is more likely in a developing court with less coercive powers than courts in
Europe. Resources and networks help support mobilization of continued pressure and monitoring of the state violators, leveraging of governments and political organs of the OAS who can make that pressure have more bite, and publicity for the decisions domestically and internationally to ensure the decisions are not forgotten and that the movement and the court are not marginalized. These are the things that it takes to fill the gaps in authority and enforcement that the court itself has not been able to proffer, not just for specific compliance but for broader acceptance of the movement and, through linkage, the court. Unfortunately, the court relies on potential users to fill in the gap, particularly in key cases where the credibility of the system is most at risk. The Inter-American system had these support networks in most its cases within Latin America, but not when it was later confronted with cases that faced a pre-existing countermovement in the region and few if any domestic or international mobilization resources to combat it.

**Filling in Gaps in Compliance in the Caribbean Case**

Resources were certainly an issue hindering mobilization around the Inter-American death row cases in the Caribbean, but as suggested by my framework, the resources missing were not just financial. As shown above, the wealth or resources available in the Latin America case were not merely financial, but rather included a large, pre-existing network of domestic, regional, and international allies that could be mobilized to publicize, defend, and support the cases, the movement, and the court and to utilize strategies such as shaming, accountability politics and leverage. The Caribbean cases lacked several key factors, one or more of which might have helped avoid a backlash. In the Latin American case, the infrastructure of networks was able to counter Honduras’ attempts to decertify the cases and this helped give the disappearance cases a positive reception in the region. There were several supporters in the region for the notion of justice for families of victims, including regionally organized victims’ families groups, neighbors like Costa Rica, grassroots movements and
NGOs within Honduras, strong support from donors and Western NGOs, the burgeoning watchdog press in Latin America, and even political elites in Honduras, some of whom later became leaders in the government. Without this infrastructure, the message of the legal cases from the Caribbean never connected outside the slow-moving, formal legal victories that were decertified by the organized countermovement against them. This was a coup for the individual men and women saved from execution for sure, but lacked the political capital needed to counter the government’s organized political campaign against the legitimacy of the movement, which unfortunately my findings suggest is critical for test case linkage efficacy, rather than just formal, specific compliance for the individual clients.

**Starting from a Deficit: Pre-Existing Counter-Networks**

The death row cases at the court started from a deficit as far as resources for mobilization not only because they lacked resources but also because their previous cases had mobilized a countermovement that included Trinidad and other Caribbean governments. The pre-existing network supported reinstating and expanding use of the death penalty, and sought to decertify the cases brought by the “foreign” London lawyers through the Privy Council, the UN HRC and then the Inter-American system.

Before the Trinidad cases came to the Inter-American system, the advocates for death row inmates in the Caribbean had already won cases at the UN HRC and the Privy Council. The Privy Council’s *Pratt and Morgan* decision had put the governments of Jamaica, Trinidad and others on the defensive, and they blamed “outsiders” as trying to stop them from protecting their citizens. The pro bono lawyers continued persistent individual litigation strategies, but did not have access to resources domestically who could support, translate or counter the governments’ arguments in the press or other branches of government. Ironically, the *Pratt and Morgan* decision had given leaders incentive to
speed up execution times and an excuse for why they needed to happen swiftly. Rising crime rates and rhetoric from political leaders had led to very strong public support for increasing executions, and the complicated death row phenomenon and other procedural cases were not framed or packaged for the public, nor were they used to leverage other states or intergovernmental organizations by any TNANs.

When the international tribunals became involved, they too fit the rhetoric of the countermovement: outsiders attempting to stop executions based on technicalities. Nowhere else was this more true than the UN HRC. The advocates for death row inmates had succeeded in winning cases at the UN HRC for several years, but had failed to achieve even specific compliance. Lack of compliance was partially due to the gaps in authority and expertise at the UN HRC. The UNHRC’s compliance measures consist of sending a special rapporteur to do follow up and reporting non-compliance to the UN General Assembly. Despite the lack of enforcement mechanism for the international tribunal’s recommendation, the lawyers continued to file numerous cases at the UN HRC, which hears all admissible claims and does not, like the Privy Council, rule on only those cases of public importance. Cases continued to be filed during the early 1990s, despite one of the lawyers’ admission that Jamaica’s lack of compliance (and presumably the lack of compliance by Trinidad in the Pinto case), and outright defiance of the Committee’s rulings was “in itself a serious blow to the strength and credibility of the United Nation’s human rights procedure” (Lehrfreund 1993). The decisions of the UN HRC spurred more opposition than they abated. The HRC ordered, with little legal reasoning or support to back up such a decision, the release of men convicted of heinous murders, despite their cases having found only violations for relatively minor procedural errors. This made it easier for the states to ignore the recommendations and frame them as another outsider intrusion, and the cases were a point governments and supporters of the death penalty could rally around.
While the cases before the Inter-American Court gave far more legal reasoning, the advocates failed to find much more compliance in the short term, largely due to the Inter-American system’s similar gaps in authority to enforce decisions and their own lack of ties to a domestic movement and political elites to counter the already mobilized countermovement. The previous decisions from the Committee, as well as the Pratt and Morgan decision, had already set up a context where the public and elites were more organized to counter the Inter-American test cases than the lawyers were able to find to support the decisions and defend the court. As noted previously, these findings suggest that where the movements start from when they bring cases to the court may be just as important as the quality of the cases or decisions themselves.

**A Lonely Litigation Strategy**

The coordinated strategy of the London lawyers in the Inter-American cases was almost exclusively a litigation strategy rather than a full campaign strategy, largely due to the lack of a complementary domestic political or grassroots movement. They were lawyers, and their expertise and connections were in the courts, which tended to move much slower than the pre-organized political counter-movement supporting executions. They were not part of a pre-existing TNAN, they could not utilize the same level of shaming, accountability politics, or leverage as groups with broader mobilization networks. They did what they were trained to do as lawyers: they kept up pressure through individual litigation.

The lawyers were able to hold off executions through legal maneuvers and challenges, focusing mostly on the individual level of obligation given the urgency of their clients’ cases and their overriding obligations as attorneys for the individuals. Overall, the lawyers were able to coordinate a successful transnational litigation campaign using the domestic courts and combined use of the UN HRC and Inter-American system (Tittemore 2004). They moved between the domestic and
international level as needed to continue their clients’ cases. They used domestic rulings such as the
*Pratt and Morgan* five-year clock to give more power to the use of the international systems, even if
initially the primary focus was simply on delaying executions. They used the cases decided by the
Inter-American system to move jurisprudence forward inch by inch domestically. Some of those
victories are still in progress, as the courts tend to move slowly domestically, just as they did
to internationally. For the most part the long term judicial impact of the Inter-American Court’s
reasoning seems to have been fairly successful, but took years to be taken up by regional courts and
still lacks recognition within Trinidad. Unfortunately, the political blowback had long since led to
rejection of the messenger of that legal reasoning, the Inter-American Court. Despite the backlash
against the court, advocates for the individual death row inmates were able to use the court’s reasoning
as precedent to draw from in their domestic cases throughout the Caribbean.

While the judicial branches have slowly been implementing parts of the court’s decisions in the
Trinidad and Barbados cases, other branches of these Caribbean democracies have not shown signs of
heeding the court’s call for policy or legislative changes and appear unlikely to change their stance in
most cases (Tittemore 2004). Without mobilization networks, the broader movement for policy
change has not succeeded, and in fact has not really been the target of the advocates involved.
Unfortunately for the court, the findings in these case studies suggest that formal, specific compliance
seems to be less important for linkage efficacy than mobilizing persistent political pressure along more
than one pressure point and using techniques such as shaming and leveraging to gain policy changes.

This does not mean that the test cases had no effect for the movement or their specific clients.
In fact, one example of a legal victory from the decisions of the Inter-American system was the
decision that the mandatory death sentence violated the ACHR, for which the Inter-American
Commission’s findings were the first time an international body had ruled on that issue. Though it
does not appear to have helped the standing of the Inter-American Court among the executive branches in the Caribbean that would have to recognize the court, the commission’s decisions were later used by the Privy Council to declare a violation by other bodies, including the UN HRC and the Inter-American Court itself. Further, on the domestic level, the Eastern Caribbean Court of Appeals, which serves as the last court of appeal for Eastern Caribbean countries like St. Vincent that used the mandatory death sentence. The Eastern Caribbean Court of Appeals used the reasoning of the commission to help interpret domestic law in a way that conformed to the obligations under the ACHR. The Privy Council has similarly referred to Inter-American decisions in its determinations that the mandatory death sentence was flawed, though it was unable to abolish it in Trinidad and Barbados due to their savings clauses that preserve pre-constitutional laws (Anderson 2010). Thus, mandatory death sentences in the Caribbean have now been banned by domestic litigation in all but Trinidad and Barbados, and Barbados has made reports to the court on compliance with its decisions that imply that it might not carry out an execution on anyone that was given the mandatory death sentence, though it has fought any move by the courts to strike it down, even in the Privy Council (Death Penalty Project 2010). This contradiction on the death penalty is par for the course. Barbados’ support for Trinidad’s stance on the Inter-American cases contradicted its simultaneous 2000 recognition of the court’s jurisdiction. Yet the movement’s slow success in the courts using the Inter-American system’s decisions has not translated into a counter to the backlash against the court. These litigation-only strategies seem to be too slow or perhaps too isolated from the general public and the branches of government that would have to change policies to join the system or counter the movement’s negative image in the political sphere. The judiciary has not branched out to educate the public, and neither have the test case advocates. No one has taken advantage of any potential broader opportunities,
outside the judiciary, created by this litigation. This, I argue, is largely because of the lack of a domestic movement to seize those opportunities.

**The Missing Domestic Movement**

When the legal victories set up the potential for political backlash against the movement and the courts issuing those decisions, no infrastructure existed to combat the state’s attempts to decertify the movement and the decisions. The potential for political backlash from a solely litigation-based death penalty campaign can be mitigated, argues expert Peter Hodgkinson (1998), through “the presence of an otherwise richly resourced activist infrastructure,” which for the death penalty he argues is really only available in the US. I argue it was available in the disappearance cases. Unfortunately, in the Trinidad cases, they had no broader domestic campaign against the death penalty to connect to and no transnational advocacy network with enough infrastructure in the Caribbean to carry any legal victories over into broader policy changes. Without a complementary infrastructure to connect to, the Caribbean governments (with the exception of the Privy Council decisions from London) fought back and fought back quickly. They passed constitutional amendments, withdrew from treaties, and, according to Hodgkinson et al. (2010), forced the “resource-sapping” individual litigation strategy to continue, as the lawyers tried to save each death row inmate from the noose, one by one. Without parts of a movement to take on the broader concerns, the focus on the obligation to individuals has been criticized as merely “ingenious and creative jurisprudence” meant to save the rights of the few while pushing a backlash that could lead to a withdrawal of rights to the many to seek redress in international tribunals (Hodgkinson 1998).

While perhaps harsh considering the resources of the advocates and the urgency of the cases, these criticisms touched on a key flaw for the Inter-American test cases. In those cases, the court could not rely on domestic civil society to mobilize to defend the court within Trinidad or neighboring
Caribbean countries. There was no one to launch a boomerang-type intervention and put pressure on the government, and the international death penalty coalitions lacked resources within the Caribbean with which to connect for information exchanges (Helfer 2002). Mobilization of domestic campaigns, according to Amnesty International, require delivering a human rights argument with support from domestic religious figures, public figures, grassroots organizations and the media (Prokosch 2004), similar to Tarrow’s warnings about the importance of domestic networks for transnational movement successes. While the Trinidad cases had some limited support for petitions and letters to leaders from religious leaders and international organizations such as Amnesty International, it lacked domestic political figures, grassroots organizations or media support, and further lacked any moral authority or translator states in the region. The infrastructure to pick up and run with any of the test cases (even if just one or two to frame the issue) outside of the judicial branch, just did not exist to coordinate or complement the litigation strategy. Despite its ability to save lives of individuals, litigation was not likely to become on its own a springboard for support from elites for an end to the death penalty or support for the court that was linked to that movement. Even the Privy Council decisions were characterized as “outside” claims by the countermovement, and further mobilized the opposition.

The small Caribbean abolition movements of the 1970s and 1980s succeeded in a temporary de facto moratorium, but governments held commissions that led to few reforms and when the movements fizzled they only seem to have left behind a more mobilized opposition. By the 1980s, protests by human rights groups had led to some officials’ unwillingness to continue hangings. These protests had included in Trinidad a 1984 petition to the Prime Minister to stop the death penalty that was signed by 40 different organizations as part of the National Coalition against the Death Penalty. In 1984, after an execution occurred in Jamaica, Amnesty International released a report on Jamaica and the death penalty, which drew upon information given to it by the Jamaica Council for Human Rights
(O'Connor 1991). The result was that governments set up commissions, including the Prescott Commission in Trinidad. However, the Prescott Commission recommended retention of the death penalty with minor changes. Even support from the Prime Minister in Jamaica never led to any major changes. In the long run, the small movement could not make real reforms or the moratorium on the death penalty a legal reality, and were simply enough to prompt a counter mobilization from pro-death penalty supporters. This small movement, however, never attempted test cases and did not successfully take any cases to the Inter-American system. They did not seem to be well connected to the growing group of lawyers in London, and seem to have lost momentum before the test cases that began later in the 1990s. Regrettably, the test case advocates and the attempted anti-death penalty movement in the Caribbean appear not to have connected, partially due to the lack of overlap in the times that they became active.

By the 1990s, mobilization of those opposed to the death penalty was more than outpaced by a counter mobilization by proponents of the death penalty in Trinidad. Crime rates were rising, and drug trafficking had increased violence in general. Public opinion swayed toward harsher punishment, and officials were quick to jump on the bandwagon of hangings as a means to control crime. Officials in the Caribbean often used the death penalty as rhetoric for being tough on crime because they were not willing or able to offer real solutions to deter crimes, increase the abysmal murder case resolution statistics, or curb the corruption that allowed drug gangs to flourish. The reality of the justice system is not known by the average person in the Caribbean, and only the lawyers understand how the system really works and why the need for reforms to the capital punishment system was so important. For Caribbean politicians, even those who might have personally opposed the death penalty, a message of hanging criminals is easier to sell than educating the public about the details of due process issues (Bannister 2012). The media, which has shirked its role, had not dug into any of the corruption issues
that contribute to the problems in the capital punishment system. The poor quality of journalism and complete lack of a culture of investigative journalism in the Caribbean meant the media did not make a good ally for the small movement against the death penalty (Bannister 2012). The media did not want the task to educate the public on the legal issues, nor were elites in the Caribbean willing to stand up for their own beliefs when the politically easier path was to call for hangings, as was the case for the Attorney General of Trinidad, who was personally opposed to the death penalty, even while announcing the withdrawal from the ACHR after the court issued provisional measures in 1998.

The pro-death penalty advocates were able to capitalize on particular events, such as murders, to frame their side of the story, while the small litigation-focused movement that developed in the 1990s for death row inmates’ rights were unable to find a domestic ally to be a spokesperson to their movement. In the case of the murder of the Commissioner of Prisons in 1993, for example, the media including the Trinidad Guardian newspaper, and the government Minister of National Security, both publicly called for executions. The Minister even called for protests to be held against lawyers for death penalty cases. His report to the press stated that people should “let [their] voices be heard” (Amnesty International 1996). Domestic media and elites were mobilized in support of the death penalty.

International support for the court after the Caribbean cases were brought before the Inter-American system did exist, but it was unable to connect with a domestic movement. In fact, some of the same players from the Honduran cases tried to come to the court’s aid. When Trinidad withdrew from the American Convention in 1998, for example, CEJIL and Human Rights Watch, the organizations responsible for the Honduran cases and many others in the Inter-American system, sent a letter to Trinidad’s Prime Minister asking that the government reconsider its withdrawal, and attempted to shame Trinidad by noting that the withdrawal “detracted from Trinidad and Tobago’s position as a
leading and respected contributor to the International Criminal Court drafting process” in which Human Rights Watch (1998) had worked closely with Trinidad’s delegation.

Some international NGO support occurred at OAS General Assembly meetings, where the court’s reports were being openly opposed by the Caribbean. In June 1998, just after Trinidad’s announcement of its withdrawal, the General Assembly met in Caracas. Human rights groups serving as observers to the OAS criticized Trinidad’s opposition to the commission’s report that year, which contained the first Trinidad reports. Groups such as Caribbean Rights, Amnesty International and others attempted to petition the Trinidad government to convince it not to withdraw from the ACHR, but they were unsuccessful at getting Trinidad to back down or to get any support from the General Assembly (Gibbings 1998; Gutierrez 1998).

Similarly the court itself was unable to get the OAS General Assembly to act on its report of Trinidad’s flagrant violation of provisional measures (Cosgrove 2000). When Trinidad stepped up executions in 1999, Amnesty International attempted to pressure the government using several tactics, but each lacked domestic infrastructure and support. Amnesty International had a petition with 130 politicians, activists, and religious leaders, they requested the OAS General Assembly meeting in the summer of 1999 to call for a moratorium, and the Secretary General of Amnesty International attempted to visit Trinidad’s Attorney General (Writer 1999). All of these actions failed, though they did bring some publicity to the issue, at least enough to spark a response from the governments in question. Caribbean officials from Trinidad and Barbados lashed out at Amnesty International for similar activities in 2000, particularly noting that they were insulted that Amnesty International implied the new Caribbean Court of Justice might be a hanging court (Cana 2000). There was speculation by Caribbean governments that the commission and the Privy Council might have
conspired together to thwart the death penalty, and such speculation gets bandied about by many governments when their policies are scrutinized by the court (Cosgrove 2000).

The work of these international advocates lacked ties to an outspoken or well-funded movement within Trinidad and the Caribbean in general, especially given that the only movement that existed was small and failed to launch in the 1980s, prior to the beginning of the more successful test cases (prior to Pratt and Morgan in 1993, for example). Such organizations, much like the Honduran relatives groups and CODEH, could have helped them monitor the situation on the ground, helped mobilize support for international campaigns, and given them a domestic voice. However, the former leader of the Jamaica Council on Human Rights, which worked on death row cases and was one of the initial domestic connections for the London Panel, concluded that three factors outside the control of the organization had greatly limited its success. These were the government and public’s attitudes about human rights, the Caribbean media’s lack of support on human rights issues, and the unwillingness of other NGOs within the region to take action or even speak out on human rights violations. Human rights are characterized in the Caribbean, O’Connor (1991) argues, as “anti-police,” which made human rights unpopular given the region’s with high crime rates.

Others who have tried to speak out have faced threats and were thus unwilling to continue to speak up. According to one international NGO activist who went on a call in show on Caribbean radio, he received call after call while on air telling him how wrong he was about abolition, but when he spoke individually to the general population, the minority of people who were opposed to the death penalty said they didn’t feel they could speak out given the climate in the country (Bannister 2012). No political space exists for common people, let alone elites, to speak out against the death penalty. What the movement needed most, according to Amnesty International’s lead researcher in the
Caribbean during the 1990s, is “good spokespeople, and more than just the one or two excellent people they have,” who can create a space for a real discussion on the death penalty.

The movement against the death penalty within Trinidad and the Caribbean generally has not made many political strides since the Trinidad cases were at the court, though a very small group continued to call for reforms but could not maintain persistent pressure on the governments. Despite continued, measured legal victories and the thwarting of most executions, support for the death penalty among political elites remains high. The Catholic Church has been opposed consistently, and has participated actively with the National Committee for Abolition of the Death Penalty in calling for abolition and an end to the mandatory death sentence, but the pressure they exert in the Caribbean is small. Other groups, such as Amnesty International, are said by the government of Trinidad to have a “very active chapter” that successfully acts as a “watchdog” (UN HRC 1999), but evidence even from the Amnesty International researcher interviewed for this study appears to point to the contrary. The opposition to the death penalty in the Caribbean appears to remain a hard issue for NGOs to mobilize around, just as the Jamaica Council for Human Rights observed in Jamaica in the 1990s. Even Catholics in Trinidad are not in agreement on the subject (Baldeosingh 2011).

The Caribbean today still needs domestic leaders and mobilized groups like the Murder Victims Families for Human Rights, a group that helped the US movement against the death penalty, to help open dialogue on the death penalty (Bannister 2012). Unfortunately, an attempt to create those types of organizations with external funding that started a few years ago has been unable to continue. From 2006, a joint initiative, funded by the Center for Capital Punishment Studies at the University of Westminster and managed by activists in Trinidad started the Caribbean Centre for Human Rights, attempted to promote ties between human rights activists in order to complement the work of legal advocates, though it was not directly involved in litigation. The group’s work included a victim
support program for murder victim’s families. The Centre and the victim support program have since been suspended due to lack of funding (Hodgkinson et al. 2012; Centre for Capital Punishment Studies 2012). The external resources just did not exist to continue the work, and domestic resources did not exist.

In Trinidad in recent years, despite continued legal victories by the activists using the Inter-American Court’s decisions, those seemingly isolated victories did not provide political cover for elites within the government who might have been able to support them from the inside. There were only two major government officials who were publicly opposed to the death penalty in the current administration in Trinidad, a government which again hopes to reinstate hangings. The two officials include Minister of Trade Stephen Cadiz, who agreed to support the administration’s stance, and the Minister of Gender, Youth and Child Development who was later dismissed in 2012, due to, among other issues, her well-known stance against capital punishment (Seelal 2012). Without further support from the elites in Trinidad and elsewhere, the progress to change the policy continues to move slowly if it only comes from nicking away at the law through judicial decisions that inch closer to formal compliance with the Inter-American’s rulings. Overall, the litigation-only strategy worked well for the individual level obligation in most cases and for formal compliance, since most were not executed. Unfortunately, it has worked extremely slowly for the movement and far too slowly to avoid a backlash against the Inter-American system. A strong transnational advocacy network through which to promote not only formal compliance but to support the movement and court more broadly was missing as a critical element that findings here suggest may be needed for a positive outcome of linkage for the court.
Compliance Conclusions

Comparisons of the compliance records and international and domestic mobilization by the two cases bring to light several interesting conclusions. First two different types of compliance are at issue: formal, specific compliance with the particular orders of the court and informal, broader compliance with the policies and norms promoted by the movements and the court’s decision. In the Latin American case, formal, specific compliance was slow and not necessarily complete. The executive and legislative branches took some time to award monetary damages, but overall the better funded, more persistent, and more varied mobilization of both domestic and international NGOs, relatives’ groups, political elites, a burgeoning watchdog media, and states like Costa Rica helped promote broader compliance and led to acceptance of the norms of the movement in Honduras, including presidential debates on who supported human rights more and a government commission on past abuses. These broad TNANs were able to make both domestic connections to avoid being labeled outsiders, and they had experience using boomerang approaches to leverage, shame or hold accountable the violator states to accept their movement’s broader norms. The Caribbean cases, on the other hand, have slowly begun to see some judicial use of the Inter-American decisions at least outside of Trinidad, and hints that the backlash has perhaps begun to thaw in the judiciary, but the initial reactions were severe and meant to decertify the court and the advocates as “outsiders” much as it had already mobilized to do against Privy Council and UN HRC victories. The advocates still have to fight each and every case individually to thwart executions within Trinidad and the Caribbean more broadly, and only recently have begun to see more far-reaching decisions from regional courts. The litigation strategy has not been connected to a broader movement within the region due to a lack of strength, media support, and funding for NGOs, political elites, or others attempting to bring to light the problems with the capital punishment system, and attempts by small groups to mobilize in the Caribbean against the death penalty have not been well funded or connected and have left them unable
to support strategies such as leveraging, accountability politics, or shaming to any large degree. The lack of elites within the Caribbean and interested investigative journalists able to educate the public has left the political sphere, including the executive and legislative branches, strongly organized against the test case advocates.

My findings in the compliance category suggest that while the general hypothesis that mobilization at the domestic and international level is important, it may be pre-existing mobilization, and mobilization that is focused on broader norm promotion than just specific compliance with the test cases, that may be more important for linkage outcomes.

**Overall Conclusions**

Overall, the two case studies demonstrate several factors from my framework are at least somewhat under the control of NGOs and petitioners in regional human rights courts. These factors may contribute to the likelihood of a negative or positive outcome of linkage as part of the court’s development in a region. When linkage does occur, the gaps existing in resources at the court interact with gaps in the usage, expertise, and compliance categories to create even greater gaps that must be filled by petitioners and supporting transnational advocacy networks. When states and the court’s own institutions are unwilling or unable to fill those gaps themselves, they can either expect the court to fail or to find it necessary to rely upon petitioners, TNANs, or other external forces for those resources, leaving the court vulnerable to institutional dependence that may not always be available to support them in every case. It is important to understand the gaps that exist in regional courts more clearly and how advocates before them can fill those gaps, particularly since regions such as Africa will likely have even greater gaps and even less financially resourceful targets of human rights violations.

In addition to the hypotheses derived directly from my framework, the case studies indicate that additional, indirect factors may be involved and may affect test case linkage in a unique way and
slightly differently than they may affect court effectiveness, TNAN movement success, or test case triumphs. First, from the findings in usage, it appears that as I suspected over usage was worse than the opposite imbalance, under usage, for purposes of having more time to present the case at the court, which allows more time to create a narrative for the cases. Venue loyalty findings supported my original hypothesis that scarcity of venues might lead to more active promotion and overlap between movement and court goals, given the motivation to keep the venue available, and that this would likely contribute to linkage efficacy. The findings seemed to suggest something noted previously in the literature, that repeated use of a venue and having policy congruence makes loyalty stronger (Hanford 2004). The anti-impunity movement grew up with the commission as an ally, and the case advocates were critical in establishing CEJIL, which has at its core a mission to use and promote the Inter-American human rights system.

In the expertise and compliance sections, my findings suggested that repeat player status, framing the case, and the information hypothesis were all potential contributors to test case efficacy. Interestingly though, the findings suggested that the Honduran cases may have benefited from having built pre-existing, political movement foundations in the region both by the TNANs and the commission, and that the TNAN had experience using techniques like framing cases, leveraging public opinion and international connections, and tapping into domestic NGOs for information and to put pressure on a variety of pressure points. The fact that the Caribbean case’s pre-existing baggage was the opposite of this and instead had a well-organized countermovement that had developed from interactions with small, underfunded and inconsistent prior attempts to mobilize in the 1980s and more organized mobilization by governments in the Caribbean against test cases from Privy Council that miscalculated the length of time for international appeals, and the UN HRC decisions that did not support the tribunal’s sweeping requests to release convicted murderers. These findings as a whole
suggest that what happens before a case is decided at a court may be important to consider. It appears that the “baggage” that comes with a movement links to the court through test cases, even though prior literature on test cases and international courts have focused more on the compliance activities that occur after a decision. Prior battle scars on a movement may impact the first reactions of a state, and thus may be relevant for future studies that consider test case linkage.

Lastly, the studies suggest that linkage indeed connects the fate of the court to the fate of the movement in general, and not to the fate of specific victims or reparations ordered by a court. Many studies of compliance and court effectiveness have considered in large part the success of compliance in the specific case (Helfer and Slaughter 1997; Huneeus 2011; Tan 2008), but recent studies that have looked more broadly at the opportunities created for litigants and civil society by litigation strategies (Cichowski 2007) and mobilization to avoid contained compliance (Conant 2002) are perhaps more insightful for linkage outcomes.

**Alternative Theories**

This section will consider several of the more relevant alternative theories suggested by the literature on international court effectiveness, particularly those that are not controlled by anyone. I will start by discussing why overlegalization may not be as relevant to linkage outcomes as previous literature may imply. I then explore why theories on democracy and domestic institutions may not explain the variation in linkage outcomes, and how the nature of the violations and cultural homogeneity may offer less appealing explanations for linkage efficacy than those presented here.

**Alternative Theory: Overlegalization by the Court**

Helfer (2002) suggests that one reason for backlash to occur is overlegalization, and makes a strong case that this occurred in the Caribbean case where the Privy Council’s five year limit raised the level of obligation from what Trinidad had believed it was accepting originally. This section explores
how overlegalization can contribute to a negative linkage, but it may not contribute as much to the positive or negative reaction as the literature has suggested. In fact, my findings suggest that backlash may not always occur if overlegalization happens, since the courts’ actions and decisions in effect led to overlegalization in both cases. The court’s actions and decisions alone are not the only factors involved. Rather, overlegalization accompanied by some of the unfilled gaps outlined above can create more obstacles for advocates to overcome and may contribute to backlash. Alone, overlegalization itself may not help explain a negative linkage, as seen in the positive linkage in the Honduran cases despite what I argue could be categorized as overlegalization. The differences lie more in the state’s characterization and reaction to the perception of the boldness of a decision than to the actual decision alone.

I argue that a few other factors are at work in the overlegalization or not argument. First, a human rights court can discredit itself by being overly permissive, particularly when egregious violations exist. Second, the pre-existing support for the court or the movement in the region seems to have much to do with how its boldness is received. This does not mean that the court or linkage succeeds only when it simply reaffirms the community standard, as some of the literature has suggested. I argue that the Honduran cases imply that the movement’s norms do not have to be accepted as community standards when the test cases are decided, but rather political foundations and network infrastructure needs to be started within the region to diffuse and translate the test case through domestic and international pressure to support the increase in legalization. This increase is discussed more in the next section along with my analysis of the overlegalization that potentially existed in the Honduran cases.
Overlegalization in the Latin American Case Study

The main problem, I contend, with overlegalization arguments is not so much that they are not true, but that they are likely to be true too often. Many states would argue that their understanding of a treaty was whatever their laws were when they signed it, yet those very laws might be called into question later if a court is established. Also, any change in the law might be called into question. In the Honduran cases, the court held the state responsible for the crimes of previous regimes. It is arguable that Honduras would not have signed on to the court’s jurisdiction if it had known it would be responsible for the unsavory policies of the prior regime, since the court’s interpretation to give it temporal jurisdiction was innovative. In many cases, the criticism that international tribunals overlegalize, as opposed to legalizing appropriately, is to say that they have done more than the state wanted. Did the court and/or courts involved in each of these cases go too far in expanding the obligations or scrutiny level of the states involved? If overlegalization is a prime factor in the determination of whether a backlash or negative linkage occurs, the analysis should show overlegalization in the Caribbean case and at least much less of it in the Honduran case. Helfer (2002) provides a strong argument for the existence of overlegalization in the Caribbean case; in this section, I accept his findings for the most part but argue overlegalization in and of itself may not contribute to backlash linkage. Moreover, I will lay out what could be categorized as overlegalization in the history and jurisprudence of the Honduran cases. If overlegalization did occur in the Honduran case, then it demonstrates at minimum that the negative reaction that can occur with overlegalization can be overcome by other factors, and potentially those factors outlined previously in this chapter.

Once given the Honduran cases to decide, the court took a strong stand against impunity with a strong decision that went further than necessary to find Honduras in violation of the ACHR. Under Article 63 of the American Convention, the court is given what one scholar has called the “broadest remedial powers of any international tribunal now in existence” (Shelton 1998). It found that states are
under an obligation to investigate and prosecute those responsible for past crimes. This duty to punish past abuses has been debated in international law, so the court could have argued that, since the Convention does not use this language specifically, it does not require it. The court could have ignored this question and merely found the state in violation for the disappearances, which occurred after Honduras recognized the court. The court interpreted Article 1(1) of the American Convention, which obligates states to ensure the free and full exercise of human rights, to include this obligation, despite the fact that the commission and its NGO advisors had not even argued a violation under Article 1(1).

Specifically, the court held in paragraph 166 of the case that “states must prevent, investigate, and punish any violation of rights recognized by the Convention” (*Case of Velasquez-Rodriguez v. Honduras* 1988). This responsibility, the court further argues, does not dissipate merely because of a regime change, even if that change brings about more respect for human rights. The state continues in international law, even if regimes have changed (*Case of Velasquez-Rodriguez v. Honduras* 1988, paragraph 184), and the duty to investigate a disappearance case persists until the fate of the person is known (*Case of Velasquez-Rodriguez v. Honduras* 1988, paragraph 181). The court stopped shy of requiring Honduras to prosecute in this case, in which those responsible were unknown, but its language made clear that the court would not allow states to forget the victims of past abuses without giving them at least some closure as to the fate of their loved ones.

By adopting these principles within its temporal jurisdiction, the court ensured that its jurisdiction would apply to human rights violations that occurred under previous regimes regardless of political changes such as democratization. This was, in fact, quite common in many of the early court decisions, since several states having rough democratic transitions in the early 1980s had accepted the court’s jurisdiction before a complete transition and full compliance with human rights was guaranteed (such a Peru). Though *ratione temporis* (i.e., the court’s ability to hear cases on matters that occurred
before the state accepted its jurisdiction) was not an issue in the Honduran disappearance cases, the court still addressed the issue and established forced disappearance as a continuing crime. It made clear that part of the violation was the failure to give due diligence to the investigation and prosecution of the crime after the fact, and that it constituted a continuing violation. This became important in later cases where states’ recognitions included limitations on the timeframes for which they accepted the court’s jurisdiction.

States in rough transitions in the early 1980s may not have expected such a turn of events at the court and may not have realized that “locking in” their democratic reforms using the court meant signing on to opening the past. Many states before the Honduran cases may have even perceived the court as weak because the commission failed to send a case to the court between the court’s formation in 1979 and 1986 (Tan 2008). States may not have realized the implications of putting the state’s action under court scrutiny before the state fully complied with the Convention (cheap talk), but they further may not have realized that the court would hold them responsible for any continuing crimes, such as failing to investigate and prosecute disappearances from prior regimes.

The court’s decision was not timid, nor was it a slam-dunk case of innocent lives being taken by a country that was unpopular or fully receptive to the court’s orders. The victims in the case could have been considered controversial, and the court makes this clear by noting that Velasquez, a graduate student activist, and Godinez Cruz, a union leader, and the victim in the second Honduran case, were considered threats to national security (Mendez and Vivanco 1990, p. 544). As noted above, despite the lack of explicit prohibition of disappearances in the ACHR, the court finds the practice violated the right to liberty, due process and life, and goes further to include obligations on the state that the commission and victims’ representatives did not even request. This finding was not a given. In fact,
Honduras’ legal team argued, unsuccessfully, that the convention did not specify disappearance as a human right (Mendez and Vivanco 1990, p. 546).

The court finds, in a finding that would be far reaching, that disappearance is a continuing crime. The court then relied on patterns and practices to fill in where explicit evidence in the cases was missing. The defenses launched by Honduras, and the feet dragging in compliance by Honduras in later years demonstrates that Honduras was not just a country willing to roll over and concede its fault in the matter. This decision could have been described as overlegalization. Overlegalization is defined by Helfer (2002) as making “substantive rules of or review mechanisms too constraining of sovereignty” that can lead to a backlash (p. 1834). Though there was no sustained backlash in this case, this was not due to the court’s lack of innovation or due to deference to the state. It met both types of overlegalization defined by Helfer and expanded the ACHR’s substantive obligations by creating an obligation against the use of disappearances by interpreting and combining several existing obligations. Further, it increased the chance of detection of non-compliance by making disappearance presumable when a pattern is established and by exposing the state to complaints for past disappearances that have not been resolved. The court made clear that states have an affirmative obligation to see that rights are respected using Article 1.1, something which it decided outside the scope of the request of the commission and complainants (Mendez and Vivanco 1990). In addition, the court’s requirement of official obligations of reparation was much more expansive than the traditional handling of reparations within Latin America legal culture (Teitel 2002).

Further, Honduras was not a pushover state ready to give up its sovereignty and accede to anything the court said. The country was still dangerous for human rights defenders, in fact. At least two witnesses for the case were killed in Honduras and two others received death threats (Branigin 1988). Witnesses were “publicly accused of betraying the nation and seeking its humiliation” (Mendez
and Vivanco 1990, p. 557). After the decision, Honduras did not readily comply with the decision, and contemporary press reports stated that Honduran officials were reluctant to accept the decision by the regional court (Mendez and Vivanco 1990, footnote 235), and the government refused to negotiate reparations with the commission. Honduras seemed desperate to discredit the decision. In 1992, a man with a long criminal history claimed to have seen Manfredo Velasquez Rodriguez and Godinez Cruz alive. According to Americas Watch, the man had been paid “substantial sums” of money by the Honduran government. Despite the man’s long criminal history, “the Costa Rican Minister of Government and Security, the head of the Honduran military intelligence, a Honduran bishop and the Mexican ambassador in Costa Rica” agreed to meet with the man, presumably hoping they could use his stories to disprove the court’s findings and clear Honduras’ military (Americas Watch 1993). During the meeting with these four officials in Costa Rica, as his story fell apart, the man took all four of the government officials hostage until they arranged his safe passage to Mexico. Honduras, it seems, was desperately hoping to eliminate the “ding” to its reputation caused by the decision.

In the case of Trinidad and Tobago, the changes that became more strict after its accession to the treaty were not the making of the international community or increased obligations under the treaty. Rather, the increased obligations and more strict readings of the rights of death row inmates were the result of a domestic change in the law that was brought into the international sphere by the active representation of death row inmates by lawyers in London at a time when domestic interest in use of the death penalty was increasing. In 1991, when Trinidad signed on to the court’s jurisdiction and the American Convention, the Convention remarked that the death penalty could not be expanded, that even capital crimes required the full trial rights afforded by the Convention, and that recognition of the court’s jurisdiction meant that cases could be brought before the commission and the court.
Trinidad’s government made clear that its withdrawal was based partially on what it considered overlegalization, but it was overlegalization from domestic courts, not the Inter-American system, as Helfer notes. In its 2000 report to the UN, Trinidad states that its withdrawal was prompted by *Pratt and Morgan*’s clock. The government commented that Pratt and Morgan had not been decided in 1991 when it ratified the American Convention on Human Rights and accepted the jurisdiction of the Inter-American Court (UN HRC 1999). Thus, it was not aware that it would have a limit to the timeframe for death penalty appeals, which could be held up by long delays in the Inter-American system. The obligations that became stricter and that changed after ratification were in fact the obligations of its domestic court of last appeal, the Privy Council, rather than the Inter-American system. While Helfer (2002) notes this is a quasi-external court, it is the court that Trinidad has chosen to keep as its court of last appeal, even though it has had the authority, like Guyana had already done, to do away with appeals to the Privy Council. Thus, it accepted the Privy Council’s decisions as domestic constitutional law.

Overlegalization therefore may not explain the difference between the positive and negative linkage outcomes in these two cases. In both cases, the states were thwarted from carrying out its policies and a court had overlegalized the obligations they had originally accepted. In the Honduran case, the state was unable to continue their policy of impunity and ignoring the past, something at least some in the country were still willing to kill to continue. In the Caribbean cases, the governments were unable to restart their policy to execute some of the death row inmates who appealed their cases, even though the death penalty was a popular policy given rising crime rates. The degree of dissatisfaction with the outcome and frustration of the governments were both high, yet in the case of Trinidad, they withdrew completely while Honduras remained part of the system. Other factors, including those outlined above and some under the control of civil society, thus likely contributed to the differing
outcomes, and overlegalization by the court alone does not seem to explain the difference. Overlegalization explains why a state would be irritated by a decision; the level of overlegalization does not appear to explain why the reaction of an irritated state would be stronger or weaker in different settings.

**Alternative Theory: Democracy and Domestic Institutions (Non-Controllable Factors)**

One of the factors that is not under the control of the court or advocates using courts is the types of regimes in the region. Scholars have theorized that democracy and other domestic institutions can have an impact on whether the state will accede to a treaty or tribunal, as outlined previously in the literature review. There are opposing theories. The theory that democratic states should be more willing to accept an international court would argue that the democratic state already has human rights, so they lose nothing by signing on. Cavallaro and Brewer (2008) and Grossman (1998) theorize that more democracy leads to more compliance, though this seems to defy the two cases studies here which show that a court might be more successful in newer democracies than in more stable democracies like the Caribbean. The Caribbean countries had far less corruption and major institutional issues in their judiciary, despite the procedural issues, than Latin American courts. The ability to go to the courts and successfully use the judiciary without corresponding political or civil society movements may in fact have contributed to the London lawyers’ use of a purely litigation-based strategy, which may then have contributed to the lack of political movement or campaign to support the court after the test cases. This goes back to factors related to mobilization and compliance issues discussed above.

The findings in this study suggest that one democratic institution seems to be vitally important where a court, or any intergovernmental body, lacks the ability to enforce international law: civil society. As Clark (2001) observed in her study of the disappearance movement in Chile, having had pre-existing strong civil society structures was crucial to making sure that the governments version of
events was not able to hide the truth. Chile had long been a democracy before the coup in 1973, so civil society had historical infrastructure in the country. The same was true in the Honduran cases. Though structures may have been somewhat weaker in Honduras than in Chile, civil society support within and outside of Honduras, in many ways based on the initial Chilean model, on behalf of the anti-impunity and disappearance movements was strong throughout Latin America by the mid to late 1980s when the cases needed to be publicized, framed, monitored, etc. External organizations supported and promoted the internal organizations that already existed and were able to grow that into the government. Grossman further suggests that it was a group of democratic governments and the increase in civil society’s voice in Latin America that defended the Inter-American system when it was being attacked as the commission began to place a priority on individual contentious cases in the 1990s (p. 192). This again comes back to the role of civil society.

In Trinidad and Tobago, where democracy had existed for some time, the outcome was different, partially because there was not as strong of an internal, pre-existing support system within civil society for the death penalty cases to plug into. Though the litigation strategies in the Caribbean were making some progress, the lack of resources behind them and lack of broader support in the form of victims’ families groups or related policy advocacy groups based in the Caribbean to support death row inmates’ cases meant that despite the eventual acceptance of some of the court’s decisions by the democratic judicial institutions, this process was slow and not well understood or perceived by the public, the government, or the region. Civil society was not there to translate this and create a space within which to discuss the inadequacies in due process protections for those facing capital punishment in the Caribbean, and without a strong culture of watchdog media or other support mechanisms, even supportive elites in a democracy were unwilling to risk their political necks to save those on death row.
Democratic status, therefore, is not sufficient in and of itself to explain the varied outcomes in these cases. Perhaps the fact that democracy was new in Honduras gave them more need to follow the community’s lead on disappearances, and to follow the court to demonstrate its commitment to democracy, but with US support for Honduras and not the court as well as community moves away from anti-impunity at the time (in the form of amnesties in key countries like Argentina), Honduras falling into line with the court was by no means a given simply due to its new democracy standing.

Alternative Theory: Nature of Violations/Victims (Non-Controllable Factors)

A distinct difference exists between the types of violations in the two test cases, and court effectiveness literature suggests this difference may impact outcomes, so I explore whether this difference impacts linkage outcomes. The disappearance cases sought justice for a past egregious abuse committed by the government, while the Caribbean cases were mostly procedural errors suffered by inmates perceived to be killers. I argue that given the opposing findings from the literature, the nature of the violations themselves are not likely to explain whether a linkage is positive or negative in and of itself. The European Court has been successful hearing procedural violations for decades, while the Inter-American Court was successful in many of the worst types of violations. The systems’ expertise in those types of cases may have helped each of the courts. But is it just a fact that the death penalty is not a popular or sympathetic issue? If so, shouldn’t cases that involve sympathetic victims be popular? Unfortunately, the record does not seem to be that simple.

Public opinion and perception of the victims in each case, while not the only factor, can be a critical factor in how a test case is received by the government. Clearly, Caribbean leaders felt pressure in the 1990s to be tough on crime, and chose an easy rhetorical solution: call for hangings. The perception of the issue and the victims can be modified over time by well-chosen and presented test cases, as described above in the discussion of framing. Truly, death row inmates as a whole are
not as sympathetic as children or genocide victims. They can be portrayed as something other than cold-blooded killers. Take for example the death penalty movement in the United States. Over time, the Innocence Project and other organizations have highlighted cases where guilt was in doubt. These cases include that of Troy Davis, in which many of the original eye witnesses whose testimony put him on death row, had recanted and of Cameron Todd Willingham in Texas, the alleged arsonist of the fire which killed his three children that has now been shown by multiple experts to have likely been an accident, and bring a different picture to the fore. Neither Troy Davis nor Todd Willingham would have been considered examples of ideal citizens, but the movement highlights their innocence on the matter that had them on death row. While some issues start from a deficit, having a more sympathetic issue or victim does not guarantee success. Even though both men in these cases were executed, these types of cases that include the many involving exonerated prisoners and death row inmates based on DNA have led to a new public perception of the death penalty and stronger public support for limiting it or instituting a moratorium. Still a minority in many places, these anti-death penalty voices have created a more mainstream image for those who oppose the death penalty. More than die hard Catholics, criminals, and hippies oppose the death penalty at this time. More political cover is available to politicians to oppose the death penalty and call for moratoriums, as has occurred in several US states.

Even in places in which the death penalty is majority favored, usually strong minority groups oppose some of the practices of the government’s capital punishment machinery. For example, in Trinidad, when given examples of mandatory death sentence cases that included the convicted murderer’s mitigating circumstances, only 26% of the people said that they supported the imposition of a mandatory death sentence regardless of circumstances (Hood and Seemungal 2011). Simply put, the
nature of the violation alone is not determinative on the issue of a positive or negative outcome of linkage for the court.

**Alternative Theory: Coercion, Competition, and Political Clout**

Coercion most likely played a role in both the Honduras and Caribbean cases, but is actually part of the mobilization aspects presented above, just a different source of mobilization. Certainly Trinidad’s lack of opposition and public support from its CARICOM neighbors helped embolden the strength of its reaction to the court, and the countermovement to move to the CCJ. Honduras was likely pressured by neighbor and moral authority Costa Rica, though not enough to reject the meeting with the criminal Honduras put forward who fraudulently claimed to have seen the disappeared victims alive.

Most damaging for a theory that coercion apart from these mobilization aspects noted above is the fact that Honduras did not take advantage of the very large “out” it seemingly had to excuse any lack of cooperate with the court from its ally (and no friend of the Inter-American Court), the United States. The US did purport generally to support Honduras improving its human rights, but they had an interest in not having attention on the Honduran cases. As reported in an Americas Watch report in 1989, the US had not seriously attempted to use its influence on Honduras to pressure it to end human rights violations by the military and rather had acted as an “apologist” for Honduras, had denied abuses despite the growing public evidence of US involvement, and aided the government’s attempts to discredit human rights activists in the country, including CODEH (Manuel and Mendez 1989, p. 79).

There was no love lost between the US government and Americas Watch at the time, and the organization opposed aid to Honduran police forces at the time that they were also representing Honduran victims before the court (Manuel and Mendez 1989, pp. 83-84). At a meeting of the Bar Association of NY, which had submitted amicus curiae to the court in the Honduran cases, US State
Department officials claimed that Honduras was being singled out by the court. The US support for Honduras gave credibility to parts of Honduras’ government that wanted to withdraw from court proceedings (Human Rights Watch 1989), and though those internal factions were not able to get the government to fully withdraw, they may have been part of why Honduras did not fully cooperate with the court either. In the end, this support from (or potentially active pressure from) Washington NOT to participate and reveal any US involvement did not stop Honduras from mostly cooperating with the court. One reason to explain this is the strong networks active in Latin American at the time, which included some of the states such as Costa Rica, who supported Honduras’ participation at the court. In other words, coercion factors alone do not fully explain the divergence in outcomes in the two cases.

**Alternative Theory: Cultural Homogeneity**

One reason outside of the control of states and courts that can impact the effectiveness of a court is cultural homogeneity. This factor, in addition to support for unification of the region, has been cited as one of the factors that helped the European courts succeed (Alter 2010; Helfer and Slaughter 1997). This factor may have aided the Honduran cases, given the similar background of Honduras and many of the other states that had recognized the Inter-American Court at the time the cases were decided. In fact, all of the Latin American countries have indeed now accepted jurisdiction for the court (though it took many years), while the English-speaking Caribbean and North American countries have failed to do so. Tarrow (2005) notes the importance of transnational movements’ domestic connections to counter the suspicions that the movement is “foreign.” As noted in the discussion of lack of domestic mobilization and framing, opponents of the court in the Caribbean were able to brand the court as a frame an “outsider” court trying to thwart Caribbean self-identity and the promotion of a Caribbean Court of Justice both helped delegitimize the court’s decisions and perception in the region.
I argue, however, that these cases studies demonstrate that culture, without other factors tied to it, does not explain the vastly different outcomes of the test cases. Many of the Caribbean countries continue to remain under the jurisdiction of the Privy Council, including Trinidad, despite their insistence of the Privy Council being an outsider or colonial force. This fact seems to belie that the other factors at work, despite the rhetoric of independence and self identity. Further, the recent withdrawal of Venezuela shows that cultural homogeneity clearly does not in and of itself determine success or failure in a region and does not guarantee that negative linkage will not occur. Barbados recognized the court in 2000 and has in some cases complied with the court on specific cases, and in 2011 it hosted a session of the court within its territory, though its support for the court has not been consistent, particularly its support for Trinidad at the OAS and attempts to undercut its own recognition through constitutional amendments shortly before and after recognizing the court.

The cultural heterogeneity of the OAS member states is a variable that cannot be controlled, and as such it has to be accepted and accounted for. It has certainly played a role in the diffusion of the Inter-American Court throughout Latin America but not its English-speaking neighbors, but the homogeneity of Latin America in and of itself does not account fully for that diffusion, nor has it meant that the court cannot develop beyond the borders of Latin states. It just means that, as with other non-controllable factors, some cases start with more of a deficit or “gap” than others, and those taking cases to a developing court that may be at a critical juncture, where linkage is likely, should consider framing and domestic mobilization to be critical components in the presence of less cultural homogeneity.
CHAPTER 8
CONCLUSION

This study started with the question of whether court development is impacted by court users, particularly test case activists. Further, if test cases and court users do impact court development, what are the mechanisms of that impact, and is the impact likely to help or hurt the court in the long run? I have argued that court users, whether transnational advocacy networks, solo NGOs, or individual “wild card” cases, can have an impact on the development of courts through test case linkage. Test case linkage creates a connection between the court’s fate and the fate of the movement as they seek to promote a favorable test case decision. A well-mobilized and experienced movement is likely to aid the court’s development, while a failed movement is likely to contribute to a backlash against the court. I have theorized that there are four types of linkage: strong stimulus linkage, strong backlash linkage, weak progression linkage and weak disruption linkage. I then identified four critical juncture factors that may increase the likelihood and magnitude of linkage at certain times in a court’s development: (1) test cases that occur when the court has limited jurisprudence, (2) when a court is new to a region or has recently undergone a major change (such as in procedures), (3) when a court is faced with a topic for which it has little prior jurisprudence, and (4) when a court is faced with a topic that is controversial or high profile. Strong linkages, I have contended, may lead to lingering linkage for several years following the linkage, and these lingering effects may be able to dampen future reactions, such as the potential for a strong stimulus linkage to dampen potential backlash situations or vice versa. I also observe that an existing strong linkage is likely to be hard for states to “delink,” if they wish to distance themselves from either the court or the movement while maintaining connection with the other.
I drew on judicial politics, transnational advocacy network, and international courts literature to create a framework that identifies several factors under the control of test case advocates that can potentially contribute to outcome of linkage, and that may be especially important for test case petitioners to be able to provide when the court has gaps in the authority and resources available to it. My framework suggests that linkage efficacy factors at least partially under test case advocates’ control include the following: outreach and usage balance, venue loyalty and balancing the test case advocate’s obligations to the client, movement and court; financial resources; litigation expertise, including the ability to select cases with good facts and resources to support in-country research and monitoring; and complete networks that allow mobilization of international and domestic NGO networks, political elites, and the media rather than merely a case by case litigation strategy. My findings caution that relying on test case petitioners to provide all of these resources may leave a court vulnerable to negative linkage outcomes if and when the court’s gaps and the petitioner’s gaps overlap, and that reliance on external sources for great amounts of resources and aid to the court, especially early in its development, can leave it vulnerable to institutional dependence that can aggravate the potential for backlash when the crutch organization is unable or unwilling to assist on a particular test case.

Through two initial case studies examining the early development of the voluntary Inter-American Court of Human Rights, I have found that the court’s first cases, the disappearance cases from Honduras, suggested that a positive stimulus linkage may have resulted from the cases and the support provided by the anti-impunity transnational advocacy network, and findings from the Caribbean death penalty case study suggested that a strong backlash linkage may have occurred as a result of the incomplete networks and resources available to the legal NGOs who brought the cases. In both cases, the critical juncture factors seemed to contribute to the intensity of the linkage between the
cases and the court, and the Caribbean study’s findings suggest that the incomplete nature of the test case lawyer’s transnational networks that led to a lack of political mobilization, the urgency of their cases that precluded framing individual cases or considering usage imbalances at the court, and low venue loyalty to the court, in addition to a low level of resources available for both the advocates and the court, contributed to the negative backlash outcome. Lingering test case linkage, as predicted, appears to have dampened future reactions in both regions, including failed delinkage efforts such as Peru’s failed withdrawal from the court but not the ACHR and Barbados’ contradictory recognition of the court as it continued to undercut the court’s authority in domestic law and at the OAS. Lingering linkage appears to weaken as more time elapses following the initial strong linkage. However, I found that the Inter-American Court’s initial linkage to the anti-impunity movement in Latin America and subsequent reliance on CEJIL and related organizations to provide outreach, training, case filtering, research, and monitoring may have institutionalized a dependent relationship that left the court vulnerable when facing cases outside the crutch organizations’ and courts’ expertise and networks at a critical juncture for the court.

**Test Case Linkage: Theory and Examples**

My primary argument offers a new way to think about the progress of international courts through the direct impact that test case litigants may have on a court’s development through what I term *test case linkage*. Previous literature on international courts has suggested many reasons for why states accept a courts’ jurisdiction, as noted in Chapter 2. More recent literature has noted the potentially important role of transnational advocacy networks as norm entrepreneurs and as likely successful court users, as noted in Chapters 3 and 6. However, neither segment of the literature on international courts has fully outlined the potential overlap the court and test case activists’ goals as they use developing courts to promote their own norms and their goals once they are promoting a pro-
movement decision by the court. Whether successful at promoting the decision or not, test cases have the potential to lead to overlapping perception of a movement and a court. Test case linkage provides a way of thinking about the progression of court development not only from the perspective of states’ internal motivations, but also through the impact on those decisions brought about by the use of the court by individuals, NGOs, and movements.

Drawing loosely on path dependence literature, I argue that there are at least four critical junctures for developing courts which are likely to increase the probability and magnitude of linkage with a test case included (1) a court having limited jurisprudence, (2) a court being new to a region, (3) a court facing a topic for which it has little prior jurisprudence, and (4) a court facing a topic that is controversial or high profile. At these four critical junctures, I have argued that an increased likelihood of linkage between the case and the court occurs, because they are times at which the court’s decision will set it on a trajectory, in this case the trajectory of the movement with which it becomes linked. When several of the critical factors exist within one juncture, they can lead to a strong linkage and stimulate expansion of the court through the favorable acceptance of the case. I drew upon the early Latin American disappearance cases in the Inter-American Court to further develop and demonstrate the patterns present in a positive, or stimulus, test case linkage. Conversely, when the test case at a critical juncture is not favorably received and not successfully promoted in the region, it can cause a backlash that can lead to withdrawals, strong statements against the court, and other negative consequences for the movement and the court. I demonstrated the potential for strong backlash test case linkage when these critical juncture factors are present through an exploration of the Caribbean death penalty cases in the Inter-American system.

To develop my framework of potential test case linkage types further, I argued that weak test case linkage may occur when only some of the critical juncture variables are present or are present to a
lesser degree. When the critical juncture variables laid out previously are not all present together, or some are present but not as strongly, I theorized that test cases can still link the court with a movement, but they should do so with weaker magnitude. A weak test case linkage can lead to a disruption in the court’s status or development in a region if the weak linkage is negative, while a positive weak linkage can lead to a slower, but consistent progression of the court’s development. I hypothesized that weaker linkages can occur after the waning of a stronger linkage and demonstrated this phenomenon through an exploration of its occurrence both in the Latin American case when negative cases like Peru came about, but were dampened by the lingering of the strong stimulus from the disappearance cases, as well as in the Caribbean backlash case, in which despite the lingering backlash against the Inter-American court, some appellate courts have begun to use the Inter-American court’s decisions to support their own decisions. Further, I posited that weak linkage may occur in courts with a longer history of jurisprudence and less intensity within the critical juncture factors. I noted several examples in the European Court of Human Rights including the British prisoner’s voting rights cases where weaker linkage patterns were present. I argued in the case of no existing linkage, apathy will likely prevail, and court development may show no clear pattern or reflect patterns related to factors other than those present for the test cases, as demonstrated by the pattern of court recognitions in the Inter-American system before the Honduran cases arose.

**Filling the Gaps: A Framework for the Role of Test Case Advocates in Court Development**

Using the overlap between legal debates on factors that contribute to court effectiveness, test case success and transnational social movement outcomes, I have created a more comprehensive framework for understanding weaknesses in developing courts that can leave them vulnerable to negative outcomes for test case linkage at critical junctures unless they are filled by external support from court users, such as test case advocates. My framework initially adds to the literature by more
systematically theorizing about systems where intergovernmental organizations or states are unwilling or unable to provide a court with sufficient resources or authority to fulfill its mission without deferring to states in its decisions in order to enlist their cooperation. These situations are likely to continue to exist in more developing regions or in regions where resources are unavailable, or where states are uncooperative, and perhaps interestingly for human rights research, where violations of the relevant treaty are the worst. Where egregious cases are the norm, courts are likely to be less willing to defer to states or grant them a margin of appreciation, which previous literature has been found to have aided court development in Europe (Burstein 2006). Further, the framework I have created based on a court’s effectiveness factors allows refinement of the test case linkage theory through analysis of whether factors that overlap between court effectiveness and successful outcomes for individual test cases, as noted in the judicial politics literature, and for movements, as noted in the transnational advocacy network and norm development literature, are the same factors that affect successful outcomes for test case linkage. The framework allows an overall examination of the complementary roles that test case advocates may be able to play to potentially fill gaps in the court effectiveness factors outlined in international legal literature. The framework provides insight into the mechanisms in control of test case activists that can contribute to whether test case linkage outcomes are positive or negative. Therefore, I have adapted and augmented previously proposed variables to better understand the interaction between a court’s deficiencies, the use of a court by test case advocates, and the potential obligation for test case activists to consider the consequences of their court usage not just on their clients or movement but also on the court itself.

In exploring the gaps that sometimes exist in a court’s resources or authority, I examined the potential pros and cons of a third solution to court effectiveness besides granting courts more resources or authority or requiring courts to be more dependent or deferential to states. This third solution
involves a court’s reliance on external actors, such as the litigants before the court filling the gaps, to
the point where institutional dependence develops. To examine the potential breadth of the ability of
NGO petitioners to provide this solution, I added to theories addressing which actors control the
factors that can influence the effectiveness of a court previously developed in the legal literature. Most
of the literature had referred to successful courts in the European system, so I applied and adapted the
literature to developing courts with deficiencies. I categorized the previously identified factors and
then identified how the non-state actors, such as transnational advocacy networks, using courts can in
some cases control factors to assist court effectiveness in less developed courts where gaps exist.

While previous legal literature has identified many effectiveness factors, these studies have
tended to focus on the control of factors by states, courts, or outside of anyone’s control (Burstein
recent literature has begun to note the role of interest groups and external actors in courts in a more
isolated way, including as likely court users when the interest group’s focus is narrow (Alter 2000,
2006), as part of groups of supporters who can provide cover for a court to write bolder decisions
(Alter and Helfer 2010), and potential users who can attempt to enforce decisions of the court (Conant
2002, Slaughter 2004), but most of the literature has failed to give an overview of the breadth of, and
potentially intensified influence of, NGOs and transnational advocacy network users when a court is at
a critical juncture and has existing weaknesses, or gaps, in its resources or authority. Even studies
addressing court weaknesses in the context of the Inter-American system, such as studies by Cavallaro
and Brewer (2008), Helfer (2006), and Burstein (2006), focused more on factors the court could
change rather than factors under the control of NGOs and petitioners and their potential responsibility.

To begin to construct a more comprehensive framework of potential areas in control of non-
state actors, I first categorized the previously identified factors that impact developing court
effectiveness, or conversely lead to its weakness. The four overall categories are usage, resources, expertise, and compliance. Within each of these effectiveness categories, I then synthesized, tailored, and added to the factors noted in the transnational advocacy network, norm development, American judicial politics, and growing international judicial politics literature to identify ways in which transnational advocacy networks and other test case activists potentially fill gaps or weaknesses that developing courts that have yet to institutionalize or that lack sufficient resources or authority may have in any of these important four categories. States and the regional organizations in charge of voluntarily regional human rights courts control many of these factors, including recognizing the court’s jurisdiction, funding, participation at the court, and enforcement authority given to the court. The court itself contributes to its own effectiveness by encouraging usage of the system, using funding wisely, writing quality decisions, maintaining impartiality, and monitoring and reporting on compliance. However, where a court is significantly underfunded and lacks sufficient authority to complete these tasks, the court is vulnerable to negative outcomes, and its development can be significantly curbed if it cannot overcome these resource and authority gaps. All of the gaps in the Inter-American system are exacerbated by the system’s particularly small budget and the part-time status of the judges and commissioners. I have argued that the combination of state or intergovernmental organization controlled factors, court controlled factors, and test case activist controlled factors as a whole must attain a certain level of resources, expertise, usage, and compliance for test case linkage to be effective and to cancel out any uncontrollable factors that exist in a region or particular case. Conversely, when the combination of deficiencies in the court and petitioner’s resources overlap and leave gaps unfilled, this combination may contribute to a negative linkage outcome.
I then developed an outline of the potential resources test case activists might be able to provide to fill those gaps. These resources have been identified by the judicial politics literature for litigants more generally, and I have combined these resources with those in the transnational advocacy network literature, such as financial resources and mobilization. They include the ability to do strategic outreach to bring carefully selected cases with good facts to the court, legal and regional expertise, information and research capabilities, networks with domestic NGOs to aid in information gathering and monitoring, and the ability to mobilize international and domestic campaigns that use a combination of political, media, and litigation strategies to promote compliance with court decisions. Further, I developed some new variables that augment the existing literature, including the relevance of a commitment to continued use and need for the court based on venue loyalty theories, strategies to focus on either formal or informal compliance, and the interaction of resources and other variables in underfunded courts. In other words, I attempted to identify contexts in which the contributions of test case advocates may have greater impact as an intervening variable to shore up a developing court at a critical juncture through case studies in an outlier case where the values are extreme because of extensive gaps in the Inter-American Court’s minimal budget, part-time status, voluntary jurisdiction, and lack of authority to compel compliance.

In addition to addressing the potential positive outcomes that use and support by transnational advocacy networks can offer a developing court, I outlined the potential pitfalls of a developing court relying too heavily on transnational advocacy networks, NGOs, and other petitioners to provide missing resources for the court. A court lacking its own resources or authority (or state or intergovernmental organizational support) to promote itself or its cases could find itself, for example, with no outreach abilities, hearing fewer well-selected cases, hearing ill-prepared cases with bad facts, unable to fill gaps in research and monitoring activities due to lack of staff, or unable to promote
compliance. I theorized that a court’s reliance on external sources, rather than its own internally generated resources, authority, and state support, could result in a court not fully institutionalizing over time because of being able to survive without requiring the intergovernmental organizations or even supporter states to provide additional resources or authority. The court’s reliance on external sources may even lead in extreme cases to an institutionalized dependence on a crutch organization. For example, if the court receives external aid it could be used as an excuse for states and IGOs not to provide resources and support for the court, or as an argument for violator states that the court is not impartial. The court then may not be able to break easily the codependency it may have developed with external sources, in much the way that the Inter-American Court has relied heavily on support from CEJIL and other NGOs, European financial support, and law schools such as American University to publish its cases, supplement its staff, offer legal training, provide outreach, etc. This can not only raise questions about a court’s impartiality, and the Inter-American system has been subject to characterization as NGO-biased, but it also leaves a court exposed to failure in situations where a withdrawal of support by the external source happens or situations in which the court must decide cases outside the scope of the external “crutch” supporters’ expertise, mission, or resource base and brought by petitioners that are inexperienced or less able or willing to support the court. While all courts rely on litigants to some extent, it is the over-reliance for basic needs especially when some litigants are likely to be indigent or less organized (as noted by Conant 2002), that can create this vulnerable situation. Therefore, I argue that reliance on external support and inability to fill its own gaps can leave the court vulnerable to a negative test case linkage outcome at future critical junctures.

One of the implications of this theory, I argue, is the potential need to add an additional obligation to the legal ethics literature for test case activists in developing courts. The legal literature has recognized the tension for test case activists who represent clients and movements before courts,
but the emphasis in the ethical debate has been primarily between their obligation to their individual clients and the movements that they hope to promote through the test cases (Crow 2005). However, the literature has failed to flesh out what, if any, obligation these activists and other court users might have to the court itself. Many have noted the need for courts to consider carefully their decisions and the implications for compliance that decisions can have domestically for petitioners and their movements, such as Cavallaro’s admonishment of the Inter-American Court’s bold reparations orders (2008). Yet there does not seem to be discussion in the current literature of the obligation of activists to consider carefully the implications of their cases for the court’s development nor to evaluate their ability to fill a court’s gaps in order to prosecute their cases without potentially negative outcomes for the court. My theory of test case linkage suggests that this obligation should be of concern to activists who wish to have the court as a future venue or agree with the general mission of the court, something suggested by studies of interest groups’ use of domestic courts, but that has not been discussed in reference to the different dynamics involved in the use of developing courts. I argue that the level of venue loyalty from court users may impact the willingness of test case activists to be conscious, to the extent possible, of the possibilities of a negative test case linkage for their clients, movements, and a developing court. Further, my argument is that in the legal and political science literature this crossover between the legal ethics and non-state actors as court users research needs to be further fleshed out. The complication of the ethical obligations brought about by test case linkage with developing courts and this third level of obligation must be balanced with possible conflicting obligations to the client or movement. I take a first step toward developing the parameters of the relations between different obligations by arguing that broader movements taking test cases may often find overlapping goals with a court once they both have a common test case to promote in a region, as noted in Chapter 3. Some petitioners, however, may not be fully savvy of the implications of the
potential benefits of promoting the court, and even if they are, they may seek to push a state too far too
quickly with a test case, perhaps even to intentionally egg a state to withdraw from a court in hopes
that others in the international community will then shame the state for the withdrawal or at least
garner attention—even bad attention—for their cause. I argue that this and other disregard for the third
level of obligation may be especially likely where litigants have other venue options than the
developing court, and thus have less venue loyalty to the court. Less venue loyalty, I contend, lowers
the likelihood of attention by test case activists to their obligation to the court.

Further, I discovered and elaborated upon the additional challenges that tensions with the
obligation to individual clients can and do present for test case activists in developing courts, even if
they have not intentionally disregarded their obligation to the court. An example of these additional
challenges is demonstrated by Chapter 7’s discussion of the urgency of the Caribbean death penalty
cases, where a large number of individual clients faced imminent execution if the activists and
commission did not address their cases quickly through requests for provisional measures and filing
cases together rather than highlighting a case or cases with better facts (such as the *Hillaire* case).
Urgency and other first level obligations to individuals create tensions that make it harder for test case
petitioners to focus their concerns and resources upon the court’s well-being, another reason why
reliance on petitioners to fill large gaps in a court’s resources or authority leave it vulnerable to
negative test case linkage outcomes, even when cases are brought by legally savvy litigants (such as
the legal experts in the Caribbean cases).

My theory and supporting case studies suggest an additional variable that interacts with and
exacerbates many of the other potential weaknesses in developing courts: resource deficiencies. While
the literature has frequently taken on issues of lack of authority for courts, dependence on states, and
lack of court expertise or deference to states, there has been less emphasis on the possibility of
resource gaps affecting a variety of areas of effectiveness for a court and leaving it at the mercy of litigants to cover those resource gaps. A court’s lack of sufficient resources can exacerbate all three other categories of effectiveness criteria, and impact the magnitude of gaps in usage, expertise, and compliance. Resource gaps, unfortunately, are likely to be greater and thus even more likely to exacerbate gaps in court effectiveness, in courts that handle regions or countries where many of the most oppressed groups or individual litigants from the region are more likely to have fewer resources, unless the petitioners are independently wealthy or well connected with Western NGOs through TNANs.

I further argue that resources impact usage. The literature has noted resources are important when private litigants can contribute to a court’s effectiveness since under usage can be a serious problem for courts. Yet I find that the literature has failed to address the full problem, which I term *imbalanced usage*. I argue that a mismatch between court resources and the number of cases coming in leads to imbalanced usage, which can occur not only when a court has few or no cases but also when a court has few resources and an overload of cases. Usage imbalance may be controllable using strict rules and safeguards to keep the caseload from growing too quickly, such as through rules and procedures that give the court the ability to turn down cases. Where that authority is lacking, not used because of the urgency of particular cases, or where NGOs and other private litigants have permeated the institution and gained the ability to decide when to bring cases to a court (a phenomenon noted by Hawkins 2004 and that seems to be growing in regional human rights courts), a court can find itself with more cases than it has time, staff, or money to fully accommodate. Shortcuts may have to be taken, and these can lead to problems particularly when this problem has not been anticipated and catches a court off guard, as was the case with the barrage of death penalty cases from the Caribbean.
The Caribbean case studies suggest that resource gaps can potentially exacerbate expertise gaps through a lack of time, staff, and research funds to fully prepare and hear cases. In the Caribbean cases, the commission lacked prior expertise in the Caribbean and on death penalty cases, which were not as common in Latin America. The Commission did not have the vast pre-existing research on these topics and the region as it did in disappearances in Latin America, and the focus on the case approach had led the Commission to expend its resources more on individual cases than developing its broader research base. The petitioners for the Caribbean cases had to help educate the commissioners and staff about these issues, and the commission, overrun with more cases than staff to deal with them and pressure from the state to complete the cases faster, found itself unable to do on site research for general background and information as it had previously done on disappearance cases in previous decades, and after Trinidad had executed two of the petitioners, the Commission sent all of the cases to the court. The court, due to its own restrictions on hearing times and staff, combined a large number of Trinidad death penalty cases into one decision on the merits that did not allow the same level of individual attention to any particular case as had been the case in the disappearance cases, leaving it unable to devote more than three days of public hearings to call attention to the issues and good facts. Since petitioners lacked resources to fly in a large number of witnesses or to present extensive individual research and information on each individual case, the gaps in expertise in the broadest sense including information and framing, as opposed to simply legal expertise, was left lacking and may have contributed to the negative outcome of test case linkage in the Caribbean. These findings suggest that resource gaps, if not filled by the court or an external source, can potentially exacerbate expertise gaps.

Resource gaps exacerbate compliance gaps, I argue, by making the court subject to the assistance of external sources to provide many of the mechanisms noted in the transnational advocacy
network literature as important for the success of the networks but applied to cases—the ability to monitor, promote, lobby, leverage, litigate and publicize the court’s decisions, but that could be alleviated by more resources and authority from the court itself. Research in other courts, including domestic courts in judicial politics literature and the European system’s courts (Cichowski 2007, Conant 2002) in the international courts literature, suggest that litigants are often required to promote compliance using their own resources, but where a court lacks authority to compel compliance, the court lacks resources to monitor compliance fully, and the litigants lack those resources, a court is far more likely to face negative linkage. This overlap in gaps between what the court and petitioners are unable to provide leaves the court open to negative linkage outcomes.

**Backlash or Boost: Comparative Findings from Inter-American Strong Linkage Case Studies**

The findings from the two case studies contrast the importance of the factors under the control of test case advocates in developing courts, particularly in a voluntary court with significant resource gap and other deficiencies. Overall, the findings suggest that a pre-existing, experienced transnational advocacy network including connections to well-funded international organizations and domestic networks, with strong venue loyalty and a focus on broader goals for their movement that the court could aid, as was very strongly present in the disappearance cases, is likely to be able to fill gaps in a developing court better than cases brought by more limited activist groups or individuals. In the Caribbean cases, the petitioners’ advocates were made up of only the legal expertise component of a transnational advocacy network without significant financial or political mobilization resources and with a focus on saving individual clients’ lives rather than on venue loyalty or obligation to the court. In addition, on some of the four effectiveness categories, even within the Inter-American system, gaps in the court have to some degree varied over the course of the court’s existence, further exacerbating the likelihood of a negative outcome for the Caribbean test case linkage. The Caribbean cases
demonstrated the potentially exacerbating impact that usage imbalance can have when the amount of cases strains the system’s time and resources.

In the Latin American disappearance cases, the court’s usage was low, which the literature has noted can be a negative for court effectiveness if it continues, but this lower usage gave the resource-poor, part-time court the ability to spend considerable time and resources on the cases, the commission and advocates were able to choose from a number of cases to find well-prepared, highly researched, and sympathetic cases, the representatives of the victims were able to develop networks with domestic and regional advocates through on site research trips funded by donors and Western NGOs, had the backing of well-funded international organizations with international and regional connections to investigative journalists, and pre-existing links to at least some political elites within Honduras and the region willing to support the movement and the cases. While they lacked the ability to get swift formal compliance for the individual cases, the movement’s experienced political and media mobilization was successful in Honduras and the region. Through the test cases and mobilization around them, the movement was eventually able to gain a commissioner on human rights through the Honduran government and even shift the political dialogue in presidential elections. The advocates in the disappearance cases had a commitment to the Inter-American system because of their previous interactions with the commission, the lack of domestic judicial options for many of their cases, and the fact that Honduras and many other Latin American states did not have access to sympathetic venues at the United Nations Human Rights Committee (UN HRC) or a hybrid domestic court such as the Privy Council, as was the case in the Caribbean cases.

In contrast, the London lawyers for the Trinidad cases not only had other potential venue options, but they were also pressured to spike usage of the court at a time when it was beginning to have an increase in usage and little hope of additional resources. The cases were urgent, and the
pressure of imminent executions led the London lawyers to file quickly rather than choose the best, most sympathetic or well-researched cases, focusing instead on the first level of obligation, to save the lives of their many individual clients. The lawyers’ efforts meant the commission was pressured to request provisional measures and send cases to the court in a consolidated format instead of selecting cases with the best facts. The test case advocates in these cases were more of a solo legal NGO than a complete transnational advocacy network, despite having competent legal experts from London and a handful of lawyers and supporters (such as the very weak Jamaica Council for Human Rights) in the region. They had few financial resources, little or no domestic political movement or investigative journalists with whom they could network for political or media mobilization, and their resources to monitor and enforce compliance primarily involved individual litigation strategies, which required filing appeal after appeal in a slow judicial system with little or no helpful publicity or political elites to help use the Inter-American court’s decisions to leverage political action from the public, media, or legislative or executive branches of government. They also faced a pre-existing countermovement that the court then became linked to. The representatives’ resource and mobilization deficiencies and the urgency that made an ability to concentrate on anything beyond the first level of obligation to their clients, decimated their ability fill the wide effectiveness gaps at the court, already exacerbated by the Inter-American system’s lack of resources, usage imbalance, and lack of information and regional expertise on the Caribbean. The representatives lacked the ability to mobilize political networks to ensure compliance pressure because of the dearth of openly sympathetic domestic political elites, investigative journalists, and related domestic NGOs within the region, and the cases simply fueled the pre-existing countermovement, which meant the court became linked to a political movement on the decline rather than on its way up, as in Latin America. The cases, due to the factors here, were unable
to change the trajectory of the broader movement, but rather simply pulled the court along with it, despite some success with individual level compliance.

The case studies’ findings showed that the court’s resource and expertise gaps were more broadly filled in the disappearance cases. Although the Caribbean cases contained astute and articulate legal reasoning generally, several factors limited the ability of the advocates and commission to fill the expertise gaps. First, unlike the disappearance cases, the Trinidad cases were not highly funded cases. Litigation expenses can be very costly. Although experts and lawyers advocated for the Caribbean cases pro bono, they lacked overall funding to produce witnesses for all of the cases or to conduct intense amounts of domestic research and case development. They were unable to develop each case individually (as demonstrated by the similarity in the case filings at the commission). The ability to ensure appropriate domestic case development and research in the Honduran cases proved beneficial both to educate the court on problem of disappearances in Honduras and to build networks with local NGOs and political elites. Moreover, the commission and the court were not as expert on issues of the death penalty or the Caribbean as they had been on Honduran disappearance cases, for which they had researched and advocated for years before those cases went to the court.

Even if the Caribbean cases had full funding for witnesses, the case studies indicated that the court itself did not have time to hear those cases individually or to do the research itself due to the usage imbalance and the inability of the court to handle a large number of urgent cases. This gap occurred both because the court itself was strapped for time, being part-time with a limited budget for public sessions, and the clients faced imminent threats of executions as the death row petitioners. Therefore, giving the proper attention to the cases to frame each with good facts was not possible. In fact, the first interaction with the court itself was a non-substantive procedural matter and involved the issuance of provisional measures that played exactly into the Trinidadian government and
countermovement’s pre-existing counterframe that the court and petitioners were just using procedural
delay tactics. They linked the court to the decertification they had already begun when the advocates
were before the Privy Council and UN HRC previously. Then, even after the court received the single
*Hilaire* case, which did have sympathetic facts, the commission and advocates were pressured to send
it many additional cases in a consolidated form due to the imminent threats of execution (and the
actual execution of one of the consolidated cases’ petitioners).

One major finding of the case study was the importance of a strong domestic network that can
be mobilized in support of a case, especially one that can plug into pre-existing political and media
campaigns. Formal judicial compliance in the long run might be preferable for an individual client but
findings suggest that it may be less important for a positive linkage outcome for the court than
informal change in policy perception and political action in the short run. Contained compliance, as
Conant would call it, for an individual client only is not what seems to determine linkage efficacy.
Comparisons of the Honduran and Trinidad cases suggest that when the state has a strong domestic
network mobilized to counter the court and when the petitioners have no such advocacy network of
NGOs or media or political elites to support them, the odds of a negative case outcome are greatly
increased, even if slow but steady victories for individual case compliance can be gained in both
domestic and regional courts. Critically, legal advocates in the disappearance cases benefitted greatly
from pre-existing and strong ties to civil society groups like the domestic human rights NGOs,
relatives’ groups, and a supportive burgeoning investigative media, as were present in Honduras and
the region for the disappearance cases. These actors educated the public and political elites about the
importance of the cases, framed and translate the cases to fit with pre-existing frames and continued to
do so even after they were decided, and explained the complexities of the violations of human rights
involved, particularly through pressure and support for a Honduran human rights commissioner.
An additional finding suggested by comparisons of these two cases is the importance of the media as a potential complement or substitute for domestic networks. The education process outlined above could be filled by strong media ties, such as investigative journalists exposing the violations or political elites able to create a space to discuss both sides of the case openly and within political debates in the legislative and executive branches, something that was greatly lacking in the Caribbean cases but present in the Honduran cases. Judicial victories alone, through a litigation campaign, are likely to be too slow and less well understood by the public if media and grassroots campaigns are not available to translate the results for the public or to create a space for discussing the cases’ issues. Even having a handful of sympathetic politicians without a political movement or the media support necessary leave the cases unlikely to succeed, as demonstrated by more recent, unsuccessful attempts by politicians in Trinidad seeking to change the political discourse on the death penalty. The broader campaign is necessary to take advantage of the full opportunities created by litigation strategies, as Cichowski has noted (2007).

The studies’ results suggest that the Inter-American Court suffers from shortages and gaps in its ability to gain compliance, both individual and broader policy change compliance. However, individual compliance appears to be less important in the long run for the court’s outcomes and movements, though it remains very important to individual clients. In the Honduran cases, individual compliance even with monetary awards was slow, but the coordination of domestic NGOs with international NGOs as well as political elites and the burgeoning watchdog media’s coordinated campaigns to end impunity led to both domestic and regional political debates on issues of impunity. Formal judicial compliance in the Honduran cases to prosecute or investigate the cases more was lacking, but the political debates in Honduras led to a pro-human rights president (who was a former
Inter-American Court judge) and the creation of a government-sponsored commissioner on human rights who could document the abuses.

In the Caribbean, the lack of investigative journalism, lack of civil society ties within the domestic sphere, and the relatively weak support from international organizations, many of whom in this era of test cases had been focused on regions, such as the US, with more widespread numbers of executions increased the difficulty for a strictly litigation-based campaign to succeed in changing the political landscape of Trinidad, in which broader policy change compliance were lacking. The strategy did, however, save the lives of most of the individual death row inmates, including all of them who were not executed before the case was decided on the merits. In the time since the cases, the Privy Council, Caribbean Court of Justice, and Eastern Caribbean Court of Justice, have referenced the Inter-American system’s jurisprudence to support their decisions, but overall, lack of political will in the executive and legislative branches to support death penalty policy changes continues to stall the anti-death penalty movement in the region. The government had already coopted and decertified much of the previously existing, small political movement in the Caribbean in the 1980s by having commissions that recommended minor changes, and had pre-existing countermovements fueled by the advocates’ use of other courts before the IACHR. Trinidad and Barbados, the two states that have come before the Inter-American system, at the time of this writing, continue to retain laws allowing for the mandatory death sentences condemned by the court in the first consolidated Trinidad death penalty cases.

**Limitations of the Current Study**

A number of limitations impact the current study and must be noted. This study was first and foremost a theory building exercise. The case studies offered insight into whether and how the proposed hypotheses might matter to test case linkage or to the positive or negative outcome of that
linkage. They only suggested rather than confirmed these theories and could not offer much leverage on the question of how much each variable might explain any apparent linkage or its positive or negative outcome vis-à-vis other variables (George and Bennett 2005). The small number of cases compared and the large number of variables limit the ability to make certain that the findings generalize beyond the examined cases or beyond the Inter-American system’s unique development situation, but rather serve to help explore and expand the theories proposed.

The current version of linkage theory is limited by its focus on test cases to the exclusion of other ways private actors’ use international institutions that could cause linkage between a particular movement or transnational advocacy network and the institution. First, other types of unidentified private actors operating outside of the legal NGOs and full transnational advocacy networks studied in these two cases might have influenced linkage. Such actors could include corporations and business interests in economic community courts able to affect similar or distinct types of linkage. Though test cases are an important tool for some movements, many movements do not choose that method or may lack the resources to bring cases before the court. Those movements may have other ways intentionally or unintentionally to link themselves to institutions that this theory of linkage and the case studies have not fully captured. However, the basic mechanics of linkage, such as the court being stronger when positive linkage occurs early or at other critical junctures in an institution’s development, may apply in other types of linkage.

Time frame limitations, due to the court’s age, limited the ability to determine fully how linkage waxes and wanes throughout a court’s history and before or after certain changes occurred in the system. While the present results showed that exacerbated gaps in resources due to usage imbalance increases the likelihood of a negative outcome, saying with complete certainty whether popular reforms, such as those that allow petitioners more choice in whether their cases are taken from
the commission to the court, may influence linkages in the future cannot occur, but such reforms may
be able to add increased understanding of the usage imbalance theory.

Because the theory of linkage suggests that when petitioners have more control over which
cases go to the court, the need to identify which factors impact a negative or positive outcome is
greater. This need will only grow over time, since the trend in the European, Inter-American, and
African regional human rights courts allows more petitioner participation and control over the cases
presented to the courts. Not all petitioners have the financial resources, expertise, or mobilization
resources to fill the gaps in a court’s effectiveness. The possibilities of linkage, gaps in court resources
or authority, and potentially unfavorable outcomes for movements may require the courts to monitor
the training and certification of those who wish to practice law in front of international courts.
Scholars and policymakers may need to study linkage and courts’ reliance on external sources in order
to educate themselves and litigants about the potential third level of obligation to the court.

The present case studies did not address one of the more common potential deficiencies. This
deficiency exists in many wild card cases: lack of legal expertise before the court. In both the
Honduran and Caribbean cases, the legal counsels were experts in the domestic and international laws
relevant to the cases. Though the Caribbean case study saw a court and commission with less expertise
in the region, its domestic laws, and the topic, the petitioners were experts in Caribbean law. For that
reason, the Caribbean case study was not fully composed of wild card cases, though the processes did
have many of wild card characteristics due to low venue loyalty and the emphasis on individual-level
obligations.

Future studies could address even more one-off type cases and the impact of lack of legal
training on outcomes. Lack of legal training or expertise may be more of an issue as regional human
rights courts gain wider recognition and publicity, as has been the case at the Commission which
receives considerable amounts of cases from US-based lawyers and interest groups able to file cases and represent them fairly inexpensively (since the commission is based in Washington, DC) on such topics as the death penalty and abortion, but in those cases, an appeal to the Inter-American Court is not available because the US has not signed on to the court’s jurisdiction. In other jurisdictions and the Inter-American system, ill-prepared cases with inexperienced counsel may provide more insight into the impact of other aspects of expertise on a positive or negative outcome for linkage.

**Implications for International Courts and Beyond**

The results of this study indicate that the impacts of test cases on policy and court development may be more profound than has been suggested previously in the literature. Test cases may be just as likely to cause the decline of as they are to enhance the court in a region. In general, it seems that courts and other institutions that have not fully taken hold in a region or even within a domestic sphere are more vulnerable to strong linkage in either direction. Advocates using courts need to take note of the burden placed upon them, rightly or wrongly, if the court suffers from a dearth of resources or authority, especially in regions or areas composed of states or intergovernmental organizations unwilling or unable to support compliance with a court’s decisions.

In addition, the evidence suggests that courts relying on civil society to fill the gaps in their resources or authority early on in their development may become dependent on civil society’s assistance. The initial cases in a system can set precedent for procedures and relationships by those using the court. Once established, if these relationships are reinforced by additional cases, as they have been between the Inter-American system and the anti-impunity movement that later formed CEJIL, the court may be ill-prepared to take on cases that fall outside of the purview of the crutch organization’s expertise or networks, as occurred with the Caribbean cases. Despite calls by CEJIL for Trinidad not to withdraw, the organization, and the petitioners themselves did not have the domestic
ties to connect to or to leverage state cooperation. Such dependence does a disservice to petitioners with valid cases, but little resources to fill the gaps, such as the impoverished or oppressed people, who are often more likely to suffer the most severe and well-entrenched violations and prejudices against them in society. Death row inmates are an example, as would be mentally ill and homeless people or drug addicts. On the other hand, activists taking cases before these courts should consider their possible third level of obligation when they use the court. This third level obligation is to promote the cause and protect their clients. Assistance for potential wild card cases needs to be provided, and the steps toward legal aid in the Inter-American system is only the first step, as this study’s findings indicate, since achieving a victory at the court and even individual compliance from the state may not, at least in cases likely to be strongly linked to the court, be the only important outcomes.

**Broadening Linkage and Gap Theories**

Further research may be able to utilize the theories of linkage and the initial framework presented in this study on the potential role that test case advocates may have on court development and filling gaps in developing courts. For example, future researchers could assess whether test case linkage affects courts outside of the Inter-American system. Indeed a cross-system study between the African Court and Inter-American Court might yield some interesting findings, once the African Court has ruled on enough initial cases and existed long enough to establish a timeline in which linkage can be tracked, especially given the new option to allow petitioner’s to file directly with the African Court and forego the commission altogether (though few states have recognized that provision). Other types of international tribunals, such as the UN HRC, the International Criminal Court, and non-human rights courts such as the various regional courts of justice could be tracked to determine the occurrences of linkage from test cases, and whether such linkage fits the typology of weak/strong and positive/negative linkage, as suggested in this study.
This study can help scholars evaluate events that have occurred within the Inter-American system over time, and help policymakers understand events to some degree as they unfold, even if the full story of linkage cannot be tested with certainty. For example, the present study occurred when the events surrounding Venezuela’s withdrawal continued developing, and the full results of that effort remained to be seen. It is likely that the Venezuelan case will present an interesting test case linkage. If so, my framework for understanding the factors leading to negative backlash outcomes may require additional time before full understanding can be achieved. Linkage theories allow evaluation of the petitioner-related mechanisms that may be important, besides just Venezuelan politics or the court’s boldness in its decisions, as previous literature has emphasized.

As noted in Chapter 3, Venezuela’s withdrawal occurs much later and after the effects of the initial strong stimulus test case linkage regarding the Latin American disappearance cases and suggests that the lingering stimulus linkage that likely contributed to Peru’s unsuccessful bid to withdraw has waned and left the court open to a strong backlash, including Venezuela’s notice of complete withdrawal from the Convention in September 2012. As for the linkage efficacy factors under control of the NGO taking the case, the case of alleged terrorist Raul Diaz Pena was the final straw for Venezuela appears to exhibit some of the criteria for a wild card case and would be most likely to fail at providing many of the petitioner-controlled factors, since the case was not supported by CEJIL or other major regional or international NGO or other TNAN-connected group. The case was supported instead by a small domestic NGO that will not likely reappear or become a repeat player before the court. In fact, most of the alleged violations presented by the petitioners to the court were actually found inadmissible, except those related to conditions of confinement (Case of Diaz Pena v. Venezuela). Due to the lack of petitioner success, it is likely the petitioner counsel was not expert in the system and was not tightly connected to such experts through its networks. Unfortunately, the
resource and authority deficiencies in the Inter-American system have not been addressed completely, and without lingering linkage from the disappearance cases, the court may well remain vulnerable to backlashes, such as the Venezuelan withdrawal, when petitioners cannot fill those gaps and have no venue loyalty or dedication to the third level of obligation to the system. The full magnitude of the Venezuelan situation is not yet known, however, especially given the still very recent death of Hugo Chavez, which occurred at the time of this writing, and the potential for regime change or redemocratization. Yet linkage and my linkage efficacy framework allow for discussion of such cases within the context of the ebb and flow of a voluntary court’s usage and the impact of that usage on its jurisdiction.

   Linkage may apply outside of developing voluntary courts. Though linkage reactions may be much more extreme within voluntary courts where strong linkage reactions, such as extra recognitions or swift withdrawals, may occur much more easily than for other courts, the process may be at work in courts in which opting out is more difficult or that are well established rather than developing. Weaker linkage may be more common in those situations with less extreme the critical juncture variables, as suggested by the initial European examples drawn upon to create the typology of test case linkage types, but weak linkage may still continue to impact less voluntary courts’ futures.

   Even at the domestic level, linkage may be relevant. For more established court systems, linkage may be present at critical junctures, such as in the case of the Southern States’ backlash against the US Supreme Court after its controversial decision in the NAACP-sponsored 1954 test case Brown v. Board of Education, which required the National Guard to enforce the decision and protect the beneficiaries of the decision. Additional studies of how test cases impact interactions with a court, even if withdrawal is not an option, may offer scholars more insight into available means for executive, legislative, political, or private actors to react when pleased by or aggravated by test case decisions and
may help domestic interest groups more fully understand how to avoid negative reactions by determining how filling certain gaps, even in established courts, can be important. Previous research already suggested some of the potential reaction mechanisms when governments do not like a court’s decision, such as through constrained compliance and the need for resources to be expended by litigants in order to counter government attempts to constrain decisions (Conant 2002). Previous literature, from which I have drawn to supplement my framework, discussed at least some of the potential factors under the control of petitioners, such as political mobilization and repeat player status. However, my framework may provide a venue to think about potential court weaknesses. Some court weaknesses may seem relatively small and may need to be filled by petitioners, and the concept that deficiencies in factors not in anyone’s control, such as types of violations or victims, may be important to balance when taking test cases before a court.

Linkage can likely be even more relevant in countries where courts are not fully institutionalized, since in those cases both strong and weak test case linkage may become important to the success or failure of the court, and its level of reliance on external forces may bring both benefits and pitfalls in the court’s path to complete the institutionalization process. Studies within courts created during democratic transitions while the country is still developing the rule of law, or in countries making radical changes within their judicial systems, would provide an opportunity to determine if linkage occurs in those courts and to see potentially, as was the case in the Inter-American system, discernible patterns more easily within the consequences of linkage, given the likelihood of greater gaps in effectiveness factors. This investigation could allow for the study of any differences existing between international and domestic linkage outcomes as well as in the critical juncture factors likely to increase the linkage or the differences in the types of resource or authority gaps at the domestic level.
More broadly, future research could benefit from the determination of whether linkage of other types of private actor relationships with international institutions may cause positive or negative outcomes for the institutions, depending on the ability of those actors to fill gaps in the factors that aid effectiveness for that type of institution. If test cases are one vehicle for transnational advocacy networks to link international institutions to their cause in a public and direct way, the same may be true of methods in non-tribunal institutions, if those institutions become more open to direct methods of participation for private, non-state actors. While most intergovernmental institutions do not directly allow private actors to vote or bring issues before their legislative bodies, their strong informal participation may operate parallel to (such as holding conferences at the same time as the United Nations) or behind the scenes of (such as working with states on the drafting of the International Criminal Court statute) intergovernmental bodies, establishing the potential for direct participation with the court to become more prominent in the future. The implications and possibilities of both negative and positive outcomes for participation, especially if the court became reliant on external actors, should be fully identified and addressed as part of any decision to expand private actors’ roles. This study has brought to light some potential pitfalls in an institution relying too heavily on external private actor resources during its early institutionalization that have potentially strong implications if the same pitfalls hold true in other institutions.

The findings of this study suggest the need to determine the best kind of targeted resources, the expertise or authority increases likely to benefit international tribunals, the level of reliance these institutions currently have on external sources, and the existing weaknesses due to any dependence on private actors especially at critical junctures. This information is relevant to many institutions, especially those in which the stakes are often very high and in need of bolder decisions, such as human rights tribunals addressing allegations of grave abuses that do not allow for a wide margin of
appreciation. The Inter-American system is not the only underfunded system with compliance issues. The UN HRC’s Caribbean cases did not fare any better. Given the incentives for states to underfund and to fail to support tribunals that call them out on human rights violations, especially grave violations, it is important to understand the gaps that occur due to lack of resources and to explore ways other than mere reliance on the petitioners to solve those deficiencies. This process is already underway in the Inter-American system, which has added a legal aid system, but as this study indicated, that is only one aspect of the currently existing gaps.

**Conclusions**

As regions around the world continue to define and expand venues in the international arena that may be utilized by transnational advocacy networks and other private actors, it is important that the roles played by private actors in court development through potential test case linkage and in filling gaps in international institutions be fully understood. In impoverished and transitioning areas of the world, in which human rights tribunals and other international institutions are perhaps the most needed, it is especially important not to place too heavy a burden on the petitioners who come before courts to provide the vast resources generally required for their and the court’s success. At the very least, courts and petitioners should be made fully aware of their potentially shared burden, and the consequences if they cannot carry that burden when and if linkage occurs.
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**Chapter 2**


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