

# Trials and Errors

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## Principle and Pragmatism in Strategies of International Justice

Advocacy groups such as Human Rights Watch and Amnesty International have made a historic contribution to the cause of international human rights by publicizing the need to prevent mass atrocities such as war crimes, genocide, and widespread political killings and torture.<sup>1</sup> However, a strategy that many such groups favor for achieving this goal—the prosecution of perpetrators of atrocities according to universal standards—risks causing more atrocities than it would prevent, because it pays insufficient attention to political realities.<sup>2</sup> Recent international criminal tribunals have utterly failed to deter subsequent abuses in the former Yugoslavia and Central Africa. Because tribunals, including the International Criminal Court (ICC), have often been unable to gain the active cooperation of powerful actors in the United States and in countries where abuses occur, it is questionable whether this strategy will succeed in the long run unless it is implemented in a more pragmatic way.

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We thank Gary Bass, Lars-Erik Cederman, John Harbeson, Robert Jervis, Peter Katzenstein, Robert Keohane, Stephen Krasner, Neil Kritz, Jamie Mayerfeld, Jonathan Mercer, Andrew Moravcsik, Thomas Risse, Michelle Sieff, Chandra Sriram, Ruti Teitel, Monica Toft, participants at seminars at the Browne Center at the University of Pennsylvania, Columbia Law School, the University of Chicago, Harvard University, New York Law School, the University of Washington, and the reviewers of *International Security* for valuable suggestions, as well as Adriana Lins de Albuquerque, Susan Suh, and Ashley Thomas for research assistance. Vinjamuri thanks Harvard University's John M. Olin Institute for Strategic Studies, the Centre for International Studies at the London School of Economics and Political Science, the Eisenhower Institute, and the Institute for the Study of World Politics for fellowship and logistical support.

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1. Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton, N.J.: Princeton University Press, 2001). We address violations of both international human rights law, which applies to all people at all times, and international humanitarian law, which concerns the actions of combatants during military conflict. For details, see Geoffrey Best, *War and Law since 1945* (Oxford: Clarendon, 1994); and Roy Gutman and David Rieff, eds., *Crimes against War: What the Public Should Know* (New York: W.W. Norton, 1999).

2. On proposals for international tribunals, see Neil J. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights," *Law and Contemporary Problems* (Duke University School of Law), Vol. 59, No. 4 (Autumn 1996), pp. 127–152; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon, 1998), pp. 24–51; as well as the numerous publications by Human Rights Watch, Amnesty International, and the Coalition for International Justice. See also the sources cited in the balanced critical commentary by Gary Jonathan Bass, *Staying the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, N.J.: Princeton University Press, 2000), pp. 284–310.

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*International Security*, Vol. 28, No. 3 (Winter 2003/04), pp. 5–44

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Amnesties, in contrast, have been highly effective in curbing abuses when implemented in a credible way, even in such hard cases as El Salvador and Mozambique. Truth commissions, another strategy favored by some advocacy groups, have been useful mainly when linked to amnesties, as in South Africa. Simply ignoring the question of punishing perpetrators—in effect, a de facto amnesty—has also succeeded in ending atrocities when combined with astute political strategies to advance political reforms, as in Namibia.

The shortcomings of strategies preferred by most advocacy groups stem from their fundamentally flawed understanding of the role of norms and law in establishing a just and stable political order. Like some scholars who write about the transformative impact of such groups, these advocates believe that rules of appropriate behavior constitute political order and consequently that the first step in establishing a peaceful political order is to lobby for the universal adoption of just rules.<sup>3</sup> We argue that this reverses the sequence necessary for the strengthening of norms and laws that will help prevent atrocities.

Justice does not lead; it follows. We argue that a norm-governed political order must be based on a political bargain among contending groups and on the creation of robust administrative institutions that can predictably enforce the law. Preventing atrocities and enhancing respect for the law will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses (or so-called spoilers).<sup>4</sup> Amnesty—or simply ignoring past abuses—may be a necessary tool in this bargaining. Once such deals are struck, institutions based on the rule of law become more feasible.<sup>5</sup> Attempting to implement universal standards of criminal justice in the absence of these political and institutional preconditions risks weakening norms of justice by revealing their ineffectiveness and hindering necessary political bargaining. Although we agree that the ultimate goal is to prevent atrocities by effectively institutionalizing appropriate standards of

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3. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization*, Vol. 52, No. 4 (Autumn 1998), pp. 887–917, especially p. 898, Table 1; and Kenneth Roth, "The Case for Universal Jurisdiction," *Foreign Affairs*, Vol. 80, No. 5 (September 2001), pp. 150–154. Roth is director of Human Rights Watch.

4. Stephen John Stedman, "Spoiler Problems in Peace Processes," *International Security*, Vol. 22, No. 2 (Fall 1997), pp. 5–53.

5. On institutionalization of the rule of law as a precondition for successful human rights promotion, see Tonya Putnam, "Human Rights and Sustainable Peace," in Stephen John Stedman, Donald Rothchild, and Elizabeth Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (New York: Lynne Rienner, 2002), pp. 237–271; and Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton, N.J.: Princeton University Press, 2001), pp. 25, 40.

criminal justice, the initial steps toward that goal must usually travel down the path of political expediency.

We begin by discussing the arguments of constructivist theorists of international relations who highlight the role of human rights groups in promoting normative change in international relations. They contend that norms define a “logic of appropriateness” that plays a central role in shaping the choices and actions that constitute a political order.<sup>6</sup> In contrast, we argue that the point of departure for strategies of justice must be the “logic of consequences,” in which choices and actions are shaped by pragmatic bargaining rather than by rule following. We also briefly discuss a third approach based on the “logic of emotions,” which captures the implicit assumptions underlying arguments in favor of supposedly cathartic truth commissions.

We then discuss the predictions that each of the three logics makes about the consequences of international tribunals, domestic trials, truth commissions, amnesties, and inaction (de facto amnesty) in the aftermath of atrocities. These include predictions both about the short-run consequences for further atrocities and about longer-run implications for strengthening the norms and institutions of justice. We show that policies based on the logic of consequences were more likely to prevent a recurrence of war crimes and crimes against humanity than were policies based on the other approaches. We then assess the long-term effects of the different strategies on strengthening norms and institutions of justice. We conclude that activists and legalists who follow the logic of appropriateness too strictly may undermine the institutionalization of justice rather than advance it.

### *Three Logics of Action*

The social psychologist Tory Higgins posits three different logics whereby a person may decide on the rightness of a choice of action: whether it follows right principles, whether it leads to the right outcome, and whether it feels right given the person’s current emotional state.<sup>7</sup> These correspond to the

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6. James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989), chap. 2; and Finnemore and Sikkink, “International Norm Dynamics and Political Change,” pp. 909–915.

7. E. Tory Higgins, “Making a Good Decision: Value from Fit,” *American Psychologist*, Vol. 55, No. 11 (November 2000), pp. 1217–1230; and Christopher Camacho, E. Tory Higgins, and Lindsay Luger, “Moral Value Transfer from Regulatory Fit: ‘What Feels Right Is Right’ and ‘What Feels Wrong Is Wrong,’” *Journal of Personality and Social Psychology*, Vol. 84, No. 3 (March 2003), pp. 498–510.

logics of appropriateness, consequences, and emotions that we argue reflect the prevailing range of views on justice for perpetrators of atrocities.

These logics are ideal types. The strategies adopted by real political actors inevitably include a mix of these elements, as do those advocated by scholars. For example, human rights “norms entrepreneurs” argue not only that following their prescriptions is morally right; they also claim that these principles are grounded in a correct empirical theory of the causes of behavior and will therefore lead to desirable outcomes.<sup>8</sup> Thus, even arguments based on the logic of appropriateness usually also make claims about consequences.<sup>9</sup> Conversely, proponents of the logic of consequences might argue that bargains based on the expediency of power and interest are often a necessary precondition for creating coalitions and institutions that will strengthen norms in the long run. For example, in September 2002, the United Nations administrator for Afghanistan, Lakhdar Brahimi, resisted calls from outgoing Human Rights Commissioner Mary Robinson to investigate war crimes by key figures in the UN-backed government of Afghanistan’s Hamid Karzai on the grounds that such investigations would undercut progress toward peace and stability.<sup>10</sup> In short, all three logics are concerned with reducing the chance of future atrocities, and consequently it is justifiable to compare the validity of their empirical claims.<sup>11</sup>

#### THE LOGIC OF APPROPRIATENESS

Martha Finnemore and Kathryn Sikkink, leading social scientific scholars studying human rights, adopt a social constructivist definition of a norm as “a standard of appropriate behavior for actors with a given identity.”<sup>12</sup> Norms, for them, imply a moral obligation that distinguishes them from other kinds of rules. In this constructivist view, norms do more than regulate behavior; they mold the identities of actors, define social roles, shape actors’ understanding of their interests, confer power on authoritative interpreters of norms, and infuse institutions with guiding principles.<sup>13</sup> In this sense, norms—and discourse

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8. Finnemore and Sikkink, “International Norm Dynamics and Political Change,” pp. 896–899.

9. See William F. Schulz, *In Our Own Best Interest: How Defending Human Rights Benefits Us All* (Boston: Beacon, 2001). Schultz is the executive director of Amnesty International USA. On a philosophical plane, see Thomas Nagel, “War and Massacre,” in Samuel Scheffer, ed., *Consequentialism and Its Critics* (Oxford: Oxford University Press, 1988), p. 60.

10. John F. Burns, “Political Realities Impeding Full Inquiry into Afghan Atrocity,” *New York Times*, August 29, 2002.

11. Finnemore and Sikkink, “International Norm Dynamics and Political Change,” pp. 910–914.

12. *Ibid.*, p. 881.

13. *Ibid.*, p. 913; more generally, see Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

about what norms ought to be—help to constitute social reality. Powerful states and social networks matter, too, but principled ideas and arguments often animate their actions. In that sense, world society is what its norms make of it.

According to this perspective, norms entrepreneurs attempt to persuade others to accept and adhere to new norms; targets of persuasion respond with arguments and strategies of their own.<sup>14</sup> Persuasion may work through any of several channels, including logical arguments about consistency with other norms and beliefs that the target already adheres to, arguments from legal precedent, and emotional appeals.<sup>15</sup> Once persuasion has succeeded in establishing a norm within a social group, norms entrepreneurs seek to promote conformity with the norm by “naming and shaming” violators, to use the terminology of constructivist theorists and human rights activists.<sup>16</sup>

Thomas Risse and Sikkink note that the early stages of convincing a recalcitrant actor to adopt certain norms may include “instrumental adaptation” and “strategic bargaining.”<sup>17</sup> In this scenario, a powerful community of states and nongovernmental organizations (NGOs) seeks to persuade the rights-abusing state to change its ways by arguing on the merits, but they may also take coercive measures, such as threatening to cut off aid.<sup>18</sup> In response, the state may begin to pay lip service to the norm, but do nothing to change its behavior. Nonetheless, Risse and Sikkink argue, this is a key first step: It traps the state into allowing rights monitors to verify the behavior of the rights-abusing state, and it forces the state to justify its actions in terms of the norm.<sup>19</sup> The logic of appropriateness, though stretched in this usage, retains a central position even in this rather coercive mechanism of normative change.

Finnemore and Sikkink conceive of the process of normative change as a three-stage “cascade.” First, norms entrepreneurs use their organizational platforms to call attention to issues by naming, interpreting, and dramatizing them. Second, once these entrepreneurs achieve widespread success in their campaign of persuasion, a tipping process pushes the norm toward universal

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14. Finnemore and Sikkink, “International Norm Dynamics and Political Change,” p. 914.

15. *Ibid.*, pp. 912–913.

16. Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998), pp. 16–25.

17. Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practice,” in Risse, Stephen C. Ropp, and Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), pp. 5, 11–12.

18. Keck and Sikkink, *Activists beyond Borders*, pp. 23–24.

19. Risse and Sikkink, “The Socialization of International Human Rights Norms into Domestic Practice,” pp. 25–28, 34–35.

acceptance as international organizations, states, and transnational networks jump on the bandwagon. This occurs in part because of these actors' concern to safeguard their reputation and legitimacy, and in part because processes of socialization, institutionalization, and demonstration effects convince people that the rising norm is a proper one. In the third stage, the logic of appropriateness is so deeply imbued in law, bureaucratic rules, and professional standards that people and states conform unquestioningly out of conviction and habit.<sup>20</sup>

Constructivist social scientists have written little that directly applies the logic of appropriateness to the study of judicial accountability for war crimes or genocide.<sup>21</sup> Nonetheless, NGOs and legalists advocating war crimes tribunals implicitly hold to the constructivist theory. These activists assume that efforts to change the prevailing pattern of social behavior should begin with forceful advocacy for generalized rules embodied in principled institutions, such as courts.

Proponents of war crimes prosecutions have long been prone to exaggerate the centrality of rule following in ordering world politics. Judith Shklar, for example, in discussing the post-World War II Nuremberg and Japanese war crimes trials charged some of their proponents with excessive, apolitical legalism, which she defined as "the ethical attitude that holds that moral conduct is to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."<sup>22</sup> Contemporary activists argue that handing down indictments and holding trials strengthen legal norms even when perpetrators are hard to arrest and convict. Many of them favor generalizing norms through such measures as universal jurisdiction for prosecuting war crimes and crimes against humanity.<sup>23</sup> They also encourage setting up judicial institutions that embody the norm of accountability, such as the ICC, even when its short-term effect is to reduce the chance that a powerful, skeptical actor such as the United States will cooperate with the implementation of the norm.<sup>24</sup>

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20. Finnemore and Sikkink, "International Norm Dynamics and Political Change," pp. 904–905.

21. Ellen Lutz and Kathryn Sikkink, "International Human Rights Law and Practice," *International Organization*, Vol. 54, No. 3 (Summer 2000), pp. 633–651, especially p. 644.

22. Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964), p. 1; see also Ruti Teitel, "Bringing the Messiah through the Law," in Carla Hesse and Robert Post, eds., *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999).

23. Roth, "The Case for Universal Jurisdiction."

24. For historical background, see Lawrence Weschler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC," pp. 85–111, and David J. Scheffer, "The U.S. Perspective on the ICC," pp. 115–118, both in Sarah B. Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court* (New York: Rowman and Littlefield, 2000).

In the realm of international criminal justice, the logic of appropriateness generates several predictions. First, as norms of criminal accountability for war crimes and other violations of international humanitarian and human rights law begin to cascade, the notion of individual responsibility should gain international momentum. Local actors, not just proponents in the advanced liberal democracies, should increasingly blame atrocities on individuals (e.g., specific Serbian leaders), not collectivities (e.g., the Serbian ethnic group as a whole).

Second, if the vast majority of individuals worldwide accept the basic principles of the laws of war and prohibitions against genocide and torture, then prevailing practices will tip in favor of a universal system of international criminal justice. In this view, changes in behavior follow the adoption of new beliefs about appropriate standards of behavior. We argue, in contrast, that the prevailing pattern of political power and institutions shapes behavior in ways that are difficult to change simply through normative persuasion. For example, an extensive survey commissioned by the International Committee of the Red Cross (ICRC) shows that large majorities of people in powerful democracies and in conflict-ridden developing countries agree that it is wrong to target civilians for attack or to engage in indiscriminate military practices that result in widespread civilian slaughter.<sup>25</sup> The vast majority of those polled, however, were not participating as fighters in the conflicts. Respondents who said they were participants or who identified with one side expressed significant reservations about the laws of war. The ICRC report finds that “the more conflicts engage and mobilize the population,” as in Israel and Palestine, “and the more committed the public is to a side and its goals, the greater the hatred of the enemy and the greater the willingness to breach whatever limits there exist in war.”<sup>26</sup> Moreover, “weak defenders feel they can suspend the limits in war in order to do what is necessary to save or protect their communities.”<sup>27</sup> Despite the convergence on abstract principles, these data imply that one person’s terrorist is often another’s freedom fighter.

Third, as the norm is embodied in legal institutions such as the war crimes tribunals for Yugoslavia and Rwanda and the ICC, it should begin to have some deterrent effect.<sup>28</sup> We argue, however, that deterrence depends on the

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25. Greenberg Research, *The People on War Report: ICRC Worldwide Consultation on the Rules of War* (Geneva: International Committee of the Red Cross, October 1999), <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/B1C2D1622A51A9F4C1256C550043C232>.

26. *Ibid.*, p. 32.

27. *Ibid.*, p. 33.

28. Neil J. Kritz, “War Crime Trials: Who Should Conduct Them—and How?” in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), pp. 168–182.

predictable ability to enforce the law coercively, which often falls short in countries where abuses take place. When enforcement power is weak, pragmatic bargaining may be an indispensable tool in getting perpetrators to relinquish power and desist from their abuses. Moreover, perpetrators of mass crimes can sometimes be indispensable allies in efforts to bring peace to war-torn states. For example, the 2001–02 U.S. war against the terrorist-harboring Taliban would have been infeasible without the self-interested participation of the Afghan Northern Alliance, whose own leadership was earlier responsible for horrendous crimes in the Afghan civil war in the 1990s.

In such circumstances, legalists need to exercise prosecutorial discretion: A crime is a crime, but not all crimes must be prosecuted.<sup>29</sup> Such choices, however, risk putting judges and lawyers in charge of decisions that political leaders are better suited to make. For example, the investigations of the International Criminal Tribunal for Yugoslavia (ICTY) have complicated a peace settlement between the Macedonian government and ethnic Albanian former guerrillas accused of committing atrocities.<sup>30</sup> The settlement granted these rebels an amnesty except for crimes indictable by the international tribunal. The ICTY's decision to investigate rebel atrocities led the guerrillas to destroy evidence of mass graves, creating a pretext for hard-line Slavic Macedonian nationalists to renew fighting in late November 2001 and to occupy Albanian-held terrain.<sup>31</sup>

In sum, the logic of appropriateness and the theory of norms cascades capture the mind-set and strategies of advocates of international criminal accountability. This social constructivist theory of normative change, however, fundamentally misunderstands how norms gain social force. As a result, legalist tactics for strengthening human rights norms can backfire when institutional and social preconditions for the rule of law are lacking. In an institutional desert, legalism is likely to be either counterproductive or simply irrelevant.

#### THE LOGIC OF CONSEQUENCES

Drawing on the work of James March and Johan Olsen, Finnemore and Sikkink distinguish between the logic of appropriateness and the logic of con-

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29. Roth, "The Case for Universal Jurisdiction," p. 153.

30. "Macedonia Bolsters Albanian Rights: After Constitutional Change, Amnesty Is Declared for Former Rebels," *International Herald Tribune*, November 17–18, 2001.

31. Timothy Garton Ash, "Is There a Good Terrorist?" *New York Review of Books*, November 29, 2001, pp. 30–33; and "Macedonia Is Seeking Control of Land Harboring Ex-Rebels," *New York Times*, November 26, 2001, p. A11.

sequences.<sup>32</sup> Whereas Finnemore and Sikkink place the former at the center of their analysis, our approach emphasizes the latter. The logic of consequences assumes that actors try to achieve their objectives using the full panoply of material, institutional, and persuasive resources at their disposal. Norms may facilitate or coordinate actors' strategies, but actors will follow rules and promote new norms only insofar as they are likely to be effective in achieving substantive ends, such as a reduction in the incidence of atrocities.

If norms are to shape behavior and outcomes, they must gain the support of a dominant political coalition in the social milieu in which they are to be applied. The coalition must establish and sustain the institutions that will monitor and sanction compliance with the norms. Strategies that underrate the logic of consequences—and thus hinder the creation of effective coalitions and institutions—undermine normative change.

This perspective has important implications for rethinking strategies of international criminal justice. Sporadic efforts by international actors to punish violations in turbulent societies are unlikely to prevent further abuses. Deterrence requires neutralizing potential spoilers, strengthening a coalition that supports norms of justice in the society, and improving the domestic administrative and legal institutions that are needed to implement justice predictably over the long run. Meeting these requirements must take precedence over the objective of retroactive punishment when those goals are in conflict. Where human rights violators are too weak to derail the strengthening of the rule of law, they can be put on trial. But where they have the ability to lash out in renewed violations to try to reinforce their power, the international community faces a hard choice: either commit the resources to contain the backlash or offer the potential spoilers a deal that will leave them weak but secure. Efforts to prosecute individuals for crimes must also be sensitive to the impact of these efforts on relations between dominant groups in a future governing coalition. Where trials threaten to create or perpetuate intracoalition antagonisms in a new government, they should be avoided.

To serve as a bridge between lawlessness and norm-governed social relations, pragmatic bargaining needs to have a consistent rationale.<sup>33</sup> It must be part of an integrated normative vision, not an arbitrary departure from the rules. Toward that end, international norms should stipulate that decisions to prosecute past abuses must consider the consequences for the strengthening of

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32. March and Olsen, *Rediscovering Institutions*, chap. 2.

33. For a different solution to this same problem, see Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

the rule of law. When a decision to prosecute cannot pass that test, a simple decision not to prosecute may sometimes suffice. When the bargaining situation demands it, however, granting a formal amnesty may sometimes be necessary. Amnesty should therefore be recognized as a legitimate tool when it serves the broader interest in establishing the rule of law.

Legal efforts to override domestic amnesties, however, have eroded their credibility. For example, despite President Carlos Menem's pardon of military officers convicted of crimes committed during Argentina's "dirty war" of 1976–83, both houses of Argentina's Congress voted in August 2003 to annul the laws that had barred the prosecution of military officers for human rights violations.<sup>34</sup> Other efforts to override amnesties come from international sources. For example, the Chilean military's self-amnesty did not protect former President Augusto Pinochet from legal action in a British court initiated by a Spanish judge under the doctrine of universal jurisdiction for crimes against humanity. The statute of the ICC fails to guarantee that amnesties will be respected.<sup>35</sup>

According to the logic of consequences, decisions about prosecution should be weighed in light of their effects on the strengthening of impartial, law-abiding state institutions. In the immediate aftermath of a state's transition to democracy, such institutions may already be capable of bringing rights abusers to trial, as for example, in Greece following the collapse of the junta in 1974. However, in transitional countries that are rich in potential spoilers and poor in institutions, such as contemporary Indonesia, the government may need to gain spoilers' acquiescence to institutional reforms, especially the professionalization of police and military bureaucracies and the development of an impartial legal system. In these cases, decisions to try members of the former regime should be weighed against the possibly adverse effects on the strengthening of

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34. "Argentina Faces Its Past," Human Rights Watch, Monthly Update, August 2003, <http://hrw.org/update/2003/08/#1>.

35. If the ICC decided to prosecute despite a domestic amnesty, the UN Security Council could defer the indictment for one-year renewable periods if it determined that hearings would threaten peace and security. Regarding the prosecution of current officeholders, a 2003 ruling by the International Court of Justice invoked the doctrine of sovereign immunity in holding that a Belgian court could not try the Congolese foreign minister, Yerodia Ndombasi, for the 1998 killings of ethnic Tutsis because representatives of foreign governments are entitled to diplomatic immunity. More generally, Putnam, "Human Rights and Sustainable Peace," notes that, according to Yoram Dinstein and Mala Tabory, the permissibility of a recommendation for amnesty in a civil war "follows from Article 6(5) of the Additional Protocol to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II)." Dinstein and Tabory, eds., *War Crimes in International Law* (The Hague: Martinus Nijhoff, 1996), p. 319.

institutions. Trials may be advantageous if they can be conducted efficiently, strengthen public understanding of the rule of law, add to the institutional capacities of domestic courts, assist in discrediting rights abusers, help to defuse tensions between powerful groups in society, and produce no backlash from spoilers. Where these conditions are absent, punishment for the abuses of the former regime may be a dangerous misstep and should be a low priority.

In short, the logic of consequences generates the following empirical predictions: When a country's political institutions are weak, when forces of reform there have not won a decisive victory, and when potential spoilers are strong, attempts to put perpetrators of atrocities on trial are likely to increase the risk of violent conflict and further abuses, and therefore hinder the institutionalization of the rule of law.

#### THE LOGIC OF EMOTIONS

A third approach to dealing with past atrocities and preventing their recurrence reflects the logic of emotions. Scholars and advocates suggest that eliminating the conditions that breed atrocities depends on achieving an emotional catharsis in the community of victims and an acceptance of blame by the perpetrators. Without an effort to establish a consensus on the truth about past abuses, national reconciliation will be impossible, as resentful groups will continue to use violence to express their emotions. For these reasons, proponents of truth commissions stress the importance of encouraging perpetrators to admit responsibility for their crimes, sometimes in exchange for amnesty.<sup>36</sup>

Some proponents of the logic of emotions speak in the language of psychotherapy.<sup>37</sup> Others ground their arguments in evolutionary biology, claiming that the emotional aspects of reconciliation are central to social cohesion. For example, an important study by William Long and Peter Brecke contends that successful civil war settlements tend to go through a trajectory that starts with truth telling and limited justice, culminates in an emotionally salient call for a new relationship between former enemies, and sometimes accomplishes a redefinition of social identities.<sup>38</sup> One problem with their research design, how-

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36. Elizabeth Kiss, "Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice," pp. 216–230, and Martha Minow, "The Hope for Healing: What Can Truth Commissions Do?" pp. 235–260, in Robert I. Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton, N.J.: Princeton University Press, 2000).

37. Vanessa Pupavac, "Therapeutic Governance: Psycho-Social Intervention and Trauma Risk Management," *Disasters*, Vol. 25, No. 4 (December 2001), pp. 358–372.

38. William J. Long and Peter Brecke, *War and Reconciliation: Reason and Emotion in Conflict Resolution* (Cambridge, Mass.: MIT Press, 2003), especially p. 31.

ever, is the difficulty of knowing whether the emotional theater of reconciliation is causally central to establishing peace or whether it is mainly window dressing that makes political bargaining and amnesties more palatable to the public.

An alternative conceptual basis for strategies based on the logic of emotions might be found in the burgeoning literature on the role of emotion, resentment, and status reversal in sparking ethnic violence.<sup>39</sup> Arguably, institutionally structured truth telling or punishment might serve as a release valve for resentments that might otherwise be expressed as riots, pogroms, or exclusionary ethnonational political movements. Such arguments might be located more broadly in recent theoretical developments that demonstrate the intimate connection between cognition and emotion in appraising political situations and deciding how to act.<sup>40</sup>

All of these approaches based on the logic of emotions locate the solution to human rights abuses at the popular level. Reconciliation, in this view, resolves conflict because it reduces tensions between peoples, not between elites. Elites, however, not the masses, have instigated many recent ethnic conflicts with high levels of civilian atrocities. Solutions that mitigate tensions at the mass level need to be combined with strategies that effectively neutralize elite spoilers and manipulators.<sup>41</sup>

No one contends that emotion should be entirely removed from an analysis of the politics of punishing atrocities. Emotion plays some role in both the logic of appropriateness and the logic of consequences. Finnemore and Sikkink, for example, discuss the importance of emotional appeals in proselytizing for new norms. Likewise, in the logic of consequences, the goals of political action are valued in part for emotional reasons.<sup>42</sup> Many people worldwide, including those who have experienced atrocities firsthand, feel that judicial punishment is intrinsically satisfying, even apart from any effect that trials may have in deterring future abuses.<sup>43</sup> Nonetheless, few would want to base a global strategy

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39. Roger Petersen, *Understanding Ethnic Violence: Fear, Hatred, and Resentment in Twentieth-Century Eastern Europe* (Cambridge: Cambridge University Press, 2002); and Donald L. Horowitz, *The Deadly Ethnic Riot* (Berkeley: University of California Press, 2001).

40. Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* (Cambridge: Cambridge University Press, 1999); and Jeff Goodwin, *Passionate Politics: Emotions and Social Movements* (Chicago: University of Chicago Press, 2001), intro. and chaps. 1, 2.

41. For a balanced view, see Stuart J. Kaufman, *Modern Hatreds: The Symbolic Politics of Ethnic War* (Ithaca, N.Y.: Cornell University Press, 2001).

42. For elaboration, see Elster, *Alchemies of the Mind*.

43. Peter Liberman, "Crime, Punishment, and War," paper presented at the annual meeting of the American Political Science Association, Philadelphia, Pennsylvania, August 28–31, 2003.

of justice simply on the emotional satisfactions of retribution. The logic of emotions is useful to the extent that it can be integrated into a broader approach that has as its principal aim the prevention of future abuses.

### *Short-Term Effects of Trials, Truth Commissions, and Amnesties*

In this section, we review the empirical claims of different approaches to international justice and evaluate them in light of recent evidence. We examine the short-term outcomes of cases in which activists called for trials or in which amnesties were granted. In a subsequent section, we comment on the likely long-term impact of calls for trials on the strength of norms and institutions of justice.

#### TRIALS

Advocates of legal accountability make three claims regarding the effectiveness of trials. First, trials send a strong signal to would-be perpetrators of atrocities that they will be held individually accountable for their actions. Human Rights Watch claims, for example, that “justice for yesterday’s crimes supplies the legal foundation needed to deter atrocities tomorrow.”<sup>44</sup> Second, trials strengthen the rule of law by teaching both elites and masses that the appropriate means of resolving conflict is through impartial justice. This helps to consolidate democracy in postconflict and postauthoritarian states.<sup>45</sup> Third, trials emphasize the guilt of particular individuals and thereby defuse the potential for future cycles of violence between ethnic groups.

Proponents contend that both domestic and international trials can promote these positive ends if domestic legal systems are sound. International trials underscore that atrocities violate universal standards of justice and engage public opinion worldwide. Some observers argue, however, that domestic trials are likely to have a greater impact on attitudes in the country where the abuses took place.<sup>46</sup> Mixed tribunals under the joint aegis of international and local judges, held in the country where the crimes occurred, aim to accomplish both goals, dispensing justice locally while maintaining international standards and

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44. See the Human Rights Watch website on international criminal justice, October 2003, <http://www.hrw.org/justice/about.php>.

45. Kritz, “War Crime Trials”; and Teitel, *Transitional Justice*, pp. 28–30.

46. José E. Alvarez, “Crimes of States/Crimes of Hate: Lessons from Rwanda,” *Yale Journal of International Law*, Vol. 24, No. 2 (Summer 1999), pp. 365–483.

oversight. Mixed tribunals are intended to help build the institutional capacity of local judiciaries and thereby strengthen the rule of law.

#### TRUTH COMMISSIONS

We also evaluate the claim that truth telling about past abuses, especially through a truth commission, makes a significant contribution to reconciling former enemies, promoting social reintegration in a newly democratic state, and reducing the likelihood of further atrocities.<sup>47</sup>

#### AMNESTIES

According to the logic of consequences, trials may provoke a violent backlash from still-powerful criminals, making norms seem ineffectual and thus undermining respect for human rights norms.<sup>48</sup> The stronger the indicted parties, the greater the risk of backlash. Only a decisive military victory over the criminal parties can remove this danger. In the absence of a decisive victory, a formal amnesty is likely to be a necessary first step in the process of consolidating peace, the rule of law, and democracy. Sometimes a de facto amnesty—that is, doing nothing about whether to hold trials—may serve the same purpose. This is especially true of divided societies where prosecutions not only risk backlash from spoilers but also threaten to further cleavages between groups whose cooperation is critical to future governance. In addition, an effective institutional apparatus—above all, a strong, competent state—is needed to enforce norms of justice in a predictable manner that carries deterrent force.

#### TESTING THE STRATEGIES OF JUSTICE

To assess the effects of these three strategies of justice, we examined thirty-two cases of civil wars between 1989 and 2003. We chose this period because calls for postconflict justice became more common and more politically efficacious after the Cold War. We used Freedom House and Polity rankings of democracy and civil liberties to establish a rough measure of democracy, the rule of law, and human rights standards in our cases and to assess how trends in these indicators correlate with the strategy of justice used in each case.<sup>49</sup>

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47. Kritz, "Coming to Terms with Atrocities"; and Minow, *Between Vengeance and Forgiveness*.

48. For a normative discussion of amnesties and some historical examples, see W. James Booth, "The Unforgotten: Memories of Justice," *American Political Science Review*, Vol. 95, No. 4 (December 2001), pp. 783–785.

49. Using standard databases, we reviewed the following cases: Afghanistan, Angola, Bangladesh, Bosnia, Burundi, Cambodia, Chad, Colombia, Congo/Zaire, Croatia, East Timor, El Salvador, Ethi-

We find that various strategies of justice have been used in cases in which human rights abuses were reduced, peace was secured, and the degree of democracy was substantially improved. Successful cases, as measured in this broad way, include three cases of trials and truth commissions that do not include amnesty (East Timor, the former Yugoslavia except Macedonia, and Peru); one case of amnesty only (Mozambique, though Macedonia might yet prove to be in this category); one case of de facto amnesty (Namibia), two cases of amnesty plus a truth commission (El Salvador and South Africa), one case of de facto amnesty plus a truth commission (Guatemala), and one case of a truth commission only (Sri Lanka, but for part of the conflict only).

This metric, however, is a blunt instrument that has three significant shortcomings. First, it does not credit the short-term successes of amnesties in stopping the fighting (e.g., Macedonia, Angola, and the Chittagong Hills conflict in Bangladesh). Second, it does not get at the counterfactual of what would have happened if trials had been pursued (e.g., Afghanistan). Third, it fails to address whether the consolidation of peace happened despite the complicating effects of trials or because of them (e.g., the former Yugoslavia).

We assess these more subtle issues of causality in reviewing a number of the post-1989 civil wars below. We also comment in passing on some international wars and some problems of domestic strife from the pre-1989 period. Our analysis yields three findings. First, trials tend to contribute to the ending of abuses only when spoiler groups are weak and the domestic infrastructure of justice is

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opia, Guatemala, Haiti, Indonesia, Iraq, Israel/Palestine, Ivory Coast, Kosovo, Liberia, Macedonia, Namibia, Northern Ireland, Peru, Russia/Chechnya, Rwanda, Sierra Leone, South Africa, Sri Lanka (Tamils and Janatha Vimukthi Peramuna [People's Liberation Front]), and Turkey/Kurds. For a table listing the justice strategies and outcomes of these cases, see Jack Snyder and Leslie Vinjamuri, "Principle and Pragmatism in Strategies of International Justice," paper delivered at the annual meeting of the American Political Science Association, Philadelphia, Pennsylvania, August 28–31, 2003. Data are drawn from MIT Cascon System for Analyzing International Conflict Database, July 2003, <http://mit.edu/cascon>; State Failure: Internal Wars and Failures of Governance, 1955–2001 Database (University of Maryland), July 2003, <http://www.cidcm.umd.edu/inscr/stfail/sftable.htm>; Project Ploughshares' Armed Conflicts Report 2002 Database, July 2003, <http://www.ploughshares.ca/CONTENT/ACR/ACR00/ACR00.html>; Dan Smith, "Counting Wars: The Research Implications of Definitional Decisions," paper presented at the annual meeting of the Uppsala Conflict Data Conference, Uppsala, Norway, June 8–9, 2001; R. Williams Ayres, VINC Project (Violent, Intrastate Nationalist Conflicts), July 2003, <http://facstaff.uindy.edu/~bayres/vinc.htm>; Freedom House, *Freedom in the World 2003: The Annual Survey of Political Rights and Civil Liberties*, August 2003, <http://www.freedomhouse.org/research/index.htm>; and Michael W. Doyle and Nicholas Sambanis, "Cases of Internal War and Peacebuilding Outcomes since 1944," in "International Peacebuilding: A Theoretical and Quantitative Analysis," August 22, 2000, American Political Science Association, p. 49, Table 1, [http://www.worldbank.org/research/conflict/papers/peacebuilding/pbapsr\\_finalv4.pdf](http://www.worldbank.org/research/conflict/papers/peacebuilding/pbapsr_finalv4.pdf).

already reasonably well established before trials begin. In other words, trials work best when they are needed least.

Second, the capacity of truth commissions to promote reconciliation is far more limited than their proponents suggest. Truth commissions contribute to democratic consolidation only when a prodemocracy coalition holds power in a fairly well institutionalized state. Absent those conditions, truth commissions can have perverse effects, sometimes exacerbating tensions and at other times providing public relations smoke screens for regimes that continue to abuse rights. Apparent successes of truth commissions are better attributed to the effects of the amnesties that accompany them.

Third, amnesties, whether formal or de facto, can help to pave the way for peace. Like tribunals, however, amnesties require effective political backing and strong institutions to enforce their terms. Indeed, the point of granting an amnesty should be to create the political preconditions for the strengthening of law-abiding state institutions.

#### TRIALS HELD BY INTERNATIONAL TRIBUNALS

Evidence from recent cases casts doubt on the claims that international trials deter future atrocities, contribute to consolidating the rule of law or democracy, or pave the way for peace. Since 1989, two international criminal tribunals have convened: the ICTY (Yugoslavia) and the ICTR (Rwanda). In neither case did their trials deter subsequent atrocities or contribute to bringing peace in the region. Indeed, in the former case, the democratization and pacification of the Yugoslav successor states likely occurred despite the tensions provoked by the tribunal and not because of it. More generally, neither the Yugoslavia nor the Rwanda tribunals has had a demonstrable effect on reducing atrocities globally or on altering the calculations of combatants in conflicts in East Timor, Chechnya, Sierra Leone, or other war sites.

**YUGOSLAVIA.** Two years after the 1993 UN resolution creating the ICTY, Bosnian Serb forces massacred thousands of civilians in Srebrenica, Bosnia. Even after the tribunal began to convict war criminals in May 1997, paramilitaries under the direction of Serbian President Slobodan Milosevic committed mass war crimes in Kosovo in 1999. The tribunal's case against Milosevic notes that he ignored Western diplomats' face-to-face warnings that he would be prosecuted if he failed to stop Serbian abuses in Kosovo.<sup>50</sup>

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50. On the testimony of former British Member of Parliament Paddy Ashdown, see Marlise Simons, "Briton Gives Testimony on Warning to Milosevic," *New York Times*, March 17, 2002, p. 7.

Some proponents of trials argue that the ICTY discouraged anti-Serb violence in Kosovo and forced war criminals to abandon the use of tactics that received particular scrutiny from prosecutors, including mass detentions or concentration camps.<sup>51</sup> Critics, however, contend that the ICTY merely induced the perpetrators to hide evidence of their crimes—for example, removing bodies from mass graves and avoiding the use of written documents to distribute orders.

Rather than individualizing guilt, the ICTY seems to have reinforced ethnic cleavages.<sup>52</sup> For example, many Serbs have complained that the tribunal unfairly targets Serbs, while many Croats have argued that their group has been unfairly singled out. Once ethnic groups are polarized by intergroup violence, it generally takes a decisive change in strategic circumstances and political institutions, not just the invocation of legal norms, to convince people to think in terms of individual rather than group responsibility.<sup>53</sup>

Survey results suggest that there has been a public relations backlash against the ICTY in Serbian areas. In a survey conducted by the National Democratic Institute for International Affairs in February 2002, only 22 percent of respondents in Republika Srpska approved its adoption of a law on cooperation with The Hague.<sup>54</sup> For Serbia, the same survey revealed that virtually every “significant leader and party in the governing coalition” had suffered a drop in image with the exception of Milosevic and his Socialist Party. Milosevic had gained modest support because of the local perception that his trial in The Hague was unjust.<sup>55</sup> A November 2002 survey revealed that 40 percent of Serbs felt that the next president of Serbia should not hand over indicted Serbs to the ICTY; 18 percent thought that all cooperation with the ICTY should be suspended; 22 percent favored continued cooperation; and 13 percent sought additional cooperation.<sup>56</sup> Moreover, 47 percent of Serbs preferred a Serbian

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51. Comments made by Aryeh Neier at a conference at Bard College, “Accounting for Atrocities,” Annandale-on-Hudson, New York, October 5–6, 1998.

52. For a more positive view, see José E. Alvarez, “Rush to Closure: Lessons of the Tadic Judgment,” *Michigan Law Review*, Vol. 96, No. 7 (June 1998), pp. 2031–2113; and Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *American Journal of International Law*, Vol. 95, No. 1 (January 2001), p. 16.

53. Chaim Kaufmann, “Possible and Impossible Solutions to Ethnic Civil Wars,” *International Security*, Vol. 20, No. 4 (Spring 1996), pp. 136–175.

54. “A Survey of Voter Attitudes in B&H, Summary Report,” National Democratic Institute for International Affairs, Bosnia and Herzegovina, May 31, 2002, p. 21.

55. “Serbia: Reform Constituency Shrinks,” Results of the Nationwide Survey Conducted by Greenberg Quinlan Rosner Research, NDI, June 2002, p. 1.

56. International Republican Institute, November 2002 Serbian National Survey, Rob Autry and Gene Ulm, Public Opinion Strategies, slide 48.

president who would try suspected war criminals only in Yugoslav courts. Serbs under thirty years of age were no more likely to favor cooperating with the ICTY (40 percent) than pursuing investigations in Yugoslav courts only (40 percent).<sup>57</sup>

The Serbian public's acquiescence to the ICTY has been based on expediency, not conviction. For example, in an April 2002 survey, 44 percent of Serbs said they thought cooperating with the ICTY would help obtain European Union membership for Serbia, while another 22 percent doubted this; 36 percent felt that cooperation with the ICTY would help obtain U.S. aid, while 22 percent were skeptical. In contrast, only 20 percent were convinced that cooperation with the ICTY was "morally right," and only 10 percent saw the ICTY as the best way to serve justice.<sup>58</sup>

Nor did the tribunal contribute to strengthening the legal institutions of the post-Yugoslav successor states. Because the ICTY has primary jurisdiction over war crimes prosecutions, the Bosnian legal system has in many instances been bypassed or given a secondary role. A survey conducted during the summer of 1999 revealed that Bosnian judges and prosecutors felt marginalized by the ICTY because of its location in The Hague, the lack of communication between Bosnian and tribunal legal professionals, criticisms of the Bosnian legal system made by the international legal community, and the perceived political nature of the tribunal. Judges and prosecutors in Bosnia also felt that they had little understanding of the ICTY's procedures, which draw partly on customary law and partly on civil law traditions. According to the study reporting the survey results, these attitudes reflected the absence of information about the tribunal that "fuelled suspicion and hostility."<sup>59</sup> Bosnia's legal community felt that criticism of the Bosnian legal system was "an attack on their professional identity."<sup>60</sup> The study concluded that "in pursuing their own predetermined agendas, without meaningful input from Bosnian legal professionals, international organizations run the risk of undermining the very goals they are trying to achieve."<sup>61</sup>

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57. *Ibid.*, slide 50.

58. "Serbia: Reform Constituency Shrinks," p. 2.

59. *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors* (Berkeley and Sarajevo: Human Rights Center, International Human Rights Law Clinic, University of California, and Centre for Human Rights, University of Sarajevo, May 2000), p. 43. For similar views among Bosnian NGOs, see Kristin Cibelli and Tamy Guberek, "Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak about the International Criminal Tribunal for the Former Yugoslavia" (Medford, Mass.: Tufts University Project of Education and Public Inquiry and International Citizenship, 2000), <http://www.epiic.com/class/justicereport.pdf>, pp. 14–16.

60. *Justice, Accountability, and Social Reconstruction*, pp. 39, 41.

61. *Ibid.*, p. 42.

The backlash against the ICTY has complicated progress toward peace and democracy in Serbia. In March 2003, Serbian Prime Minister Zoran Djindjic was assassinated by organized crime figures whose bureaucratic protectors were threatened by his efforts to turn war criminals over to The Hague.<sup>62</sup> In response, the government cracked down on criminal networks of this kind. More recently, Serbia-Montenegro's president, Svetozar Marovic, has received death threats in response to his calls for enhanced cooperation with The Hague.<sup>63</sup>

In this and other episodes, however, the worst backlash fears of skeptics appear to have been exaggerated. Earlier, for example, Milosevic continued to negotiate the Serbian withdrawal from Kosovo under relentless NATO air attacks despite his simultaneous indictment by The Hague tribunal.<sup>64</sup> In part, such backlash effects have been limited because prudent politicians have not pushed trials past the point that might have provoked violent opposition. Where trials do threaten to undermine public order, authorities typically proceed with extreme caution. After the signing of the 1995 Dayton peace accords on Bosnia, for example, the ICTY's activities alienated both the Croats and the Serbs and diminished their inclination to proceed with the process of implementing peace. When the tribunal sought to arrest prominent Bosnian Serb war criminals such as former Bosnian Serb President Radovan Karadzic and Gen. Ratko Mladic, Bosnian Serb President Biljana Plavsic threatened to withdraw support for the peace accords and warned that "massive civil and military unrest would result in the Republika Srpska which might well prove uncontrollable by the civil authorities."<sup>65</sup> The states providing UN peacekeeping forces took the danger of a Serb backlash seriously, and as a result, Karadzic and Mladic remained at large while lesser criminals were tried at The Hague.

Similarly, the fear of retaliation against NATO's KFOR peacekeeping mission in Kosovo led the ICTY to keep secret the indictment of Albanians suspected of killing Serb civilians in 1999.<sup>66</sup> Despite the indictment of Milosevic, significant

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62. Misha Glenny, "The Death of Zoran Djindjic," *New York Review of Books*, July 17, 2003, pp. 32–34. For evidence that this killing was mainly about organized crime rather than international justice, see R. Jeffrey Smith, "Behind Murder of Serbian PM," *Washington Post*, November 6, 2003.

63. "Serbia-Montenegro's President Threatened over War Crimes Court: Death Threats from Nationalist Serb Group in the U.S.," Agence France-Presse, October 1, 2003.

64. For other Yugoslav examples, see Akhavan, "Beyond Impunity," p. 14.

65. Plavsic letter to Secretary-General Kofi Annan, January 2, 1997, Appendix B, in Human Rights Watch, *Bosnia and Hercegovina: The Unindicted—Reaping the Rewards of "Ethnic Cleansing,"* Vol. 9, No. 1 (D) (January 1997), p. 71.

66. Misha Glenny, "Trials' Political and Financial Costs Questioned," *Times* (London), February 14, 2002, p. 15; see also "Special Report: Balkan War Crimes," *Economist*, February 9, 2002, p. 25.

Western pressure to have him extradited to The Hague was delayed until after he had ceased to be a serious force in local politics. This kind of anticipatory self-restraint masks potential evidence for the backlash hypothesis. Where this self-restraint has abated, it has followed, not led, events on the ground.

In general, improvements in Croat and Serb democracy and human rights have preceded and facilitated improved relations with the ICTY; they were not caused by it. Proponents of trials argue that cooperation with The Hague helped to undermine antidemocratic nationalist elements in Croatia and that the indictment of Milosevic paved the way for democratic reforms in Serbia.<sup>67</sup> The causal relationship, however, seems to have been the reverse: The death of President Franjo Tudjman of Croatia in December 1999 removed a key supporter of extremist elements.<sup>68</sup> This produced a dramatic shift in Croatia's domestic politics and facilitated democratic reforms and cooperation with The Hague. Similarly, the unpopular ICTY hardly contributed to the collapse of Milosevic's legitimacy in Serbia. Rather, the democratic post-Milosevic regime grudgingly extradited him to curry favor with the West despite its domestic political costs. In sum, the ICTY did not deter subsequent war crimes in the former Yugoslavia; nor did it prevent the emergence of peace. On balance, it may have hindered efforts to defuse ethnic tensions.

**RWANDA.** The deterrent effect of the ICTR has likewise been unimpressive. Proponents claim that the tribunal may have helped to neutralize the Hutu Power movement's agenda of Tutsi extermination following the massacre of some 800,000 Tutsis and Hutu moderates in 1994.<sup>69</sup> However, this was mainly accomplished by the military victory of the Tutsi-led Rwanda Patriotic Front (RPF) armed forces, not by later trials. In fact, the work of the tribunal, which meets in Arusha, Tanzania, has been largely invisible to the Rwandan population. Critics claim that the tribunal, which was tasked only with collecting information pertaining to the year in which the genocide occurred, has been ill suited to presenting a coherent account of the events leading to the genocide.<sup>70</sup>

Evaluated on a regional basis, claims that the Arusha tribunal has deterred further crimes are unsustainable. Some perpetrators of the genocide rearmed

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67. Akhavan, "Beyond Impunity," pp. 7–31.

68. Even after Tudjman's death, nationalists hindered the government's ability to cooperate with the ICTY. See Victor Peskin and Mieczyslaw P. Boduszynski, "International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia," *Europe-Asia Studies*, Vol. 55, No. 7 (November 2003), pp. 1118–1142.

69. International Crisis Group, "International Criminal Tribunal for Rwanda: Justice Delayed," *Africa Report*, June 7, 2001, pp. 7–8.

70. *Ibid.*, pp. 8, 27; and Alvarez, "Crimes of States/Crimes of Hate," pp. 365–483.

in the refugee camps of eastern Congo, leading to military intervention on Congolese territory by the RPF in 1996 and again in 1998. These and other battles in Congo's civil war have led to deaths numbering in the millions, involving widespread atrocities against civilians.<sup>71</sup> Meanwhile in nearby Burundi, fighting between the Tutsi military and Hutu rebels, including atrocities against civilians, has continued sporadically since 1993.

The ICTR has done little to strengthen domestic institutions or to enhance the protection of political and civil liberties in Rwanda. Holding the tribunal in Tanzania created little opportunity for spillover effects for Rwanda's weak judicial institutions. The new government of Rwanda decided to hold domestic trials of those individuals who were not turned over to the international tribunal. Disputes over the tribunal's lack of a death penalty and its limits on pre-trial detention derailed its cooperation with these domestic forums. The government of Rwanda felt that the ICTR was more concerned with due process and the rights of the accused than it was with holding leaders of the genocide accountable.

#### DOMESTIC TRIALS

We find that domestic trials have only a marginal effect on the deterrence of subsequent abuses and the peaceful consolidation of democracy, and sometimes they may even be counterproductive. Where legal institutions are weak, domestic trials typically lack independence from political authorities, fail to dispense justice, and sometimes even fail to protect the security of trial participants. In states where the postatrocities regime retains autocratic features, rulers have sometimes used trials to legitimate their power over domestic opponents or gain international legitimacy through the veneer of legality (as in Cambodia and Indonesia). In other states with weak judicial institutions, trials have largely languished amid a lack of political will or sheer bureaucratic incapacity (as in Ethiopia and Rwanda). In contrast, trials are most effective in cases where legal institutions are already fairly well established, and therefore where the demonstration effect of trials is least needed. In a number of cases, for example, domestic trials have taken place well after rights-respecting democratic regimes were firmly installed (as in Germany and Poland in the 1990s, or in Greece after the fall of the junta in 1974).

These problems are especially acute when the new regime is the result of a

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71. Sarah Kenyon Lischer, "Collateral Damage: Humanitarian Assistance as a Cause of Conflict," *International Security*, Vol. 28, No. 1 (Summer 2003), pp. 79–109.

negotiated settlement with still-powerful perpetrators of atrocities, but such problems confound trials even in cases where reformers have won military or political victories. We begin with a discussion of several cases where reformers were victorious, yet holding trials remained fraught with political complications.

ARGENTINA. Following the collapse of the military junta that led Argentina to defeat in the 1982 Falklands War, five of the junta's leaders were convicted during the 1980s for their crimes in the regime's "dirty war" against domestic political opponents between 1976 and 1983. Activists pressed for more extensive prosecutions. Arguably, these trials were unnecessary to deter future crimes, because the junta's methods were already thoroughly discredited by their defeat in the Falklands War, their disastrous stewardship of the economy, and the widespread publicity about "disappearances" and rights abuses. Nonetheless, pressure for these trials from human rights advocates and victims' families risked provoking disturbances or even a coup attempt by unreconciled elements of the officer corps. Even sympathetic analysts agree that demands to expand the scope of the trials played into the military's hand and created a backlash among moderate opinion in favor of curtailing the trials.<sup>72</sup> Ultimately, President Menem pardoned even the five convicted generals in 1989, but in 2003 Argentine President Nestor Kirchner pushed for the cases to be reopened. In August 2003, the Argentine Congress overturned the laws that had granted amnesty for human rights abuses.<sup>73</sup>

ETHIOPIA. After the 1991 defeat of Ethiopia's brutal Dergue regime in a civil war, the new government sought to put perpetrators of atrocities on trial. Over time, however, new political cleavages and economic dilemmas came to preoccupy the semidemocratic regime. Ethiopia's poorly institutionalized court system became bogged down in the vast task of collecting evidence against thousands of potential defendants.<sup>74</sup> The government's interest in prosecutions waned. In 2001, after some convictions and much fruitless activity, the court began releasing defendants for lack of evidence.<sup>75</sup>

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72. Carlos Nino, *Radical Evil on Trial* (New Haven, Conn.: Yale University Press, 1996), p. 116.

73. For a critique of Kirchner's proposal, see Jackson Diehl, "Revisionist Justice in Argentina," *Washington Post*, September 1, 2003, p. A25.

74. By 1998, Freedom House had raised Ethiopia's rating on political rights and on civil rights to level 4 ("partly free"), on par with such countries as Armenia, Russia, and Senegal. Freedom House, *Freedom in the World, 1998-99* (New York: Freedom House, 1998), pp. 182-184; and John Harbeson, "Elections and Democratization in Post-Mengistu Ethiopia," in Krishna Kumar, ed., *Postconflict Elections, Democratization, and International Assistance* (Boulder, Colo.: Lynne Rienner, 1998), pp. 111-132.

75. Yacob Haile-Mariam, "The Quest for Justice and Reconciliation: The International Criminal

RWANDA. Despite the military victory of the RPF, the new Tutsi-dominated regime in Rwanda was too weak at the local level to protect those who would participate in prosecutions of perpetrators of genocide. “Especially outside the Rwandan capital city of Kigali, magistrates, prosecutors, court clerks, and witnesses worried that their lives would be endangered if they took part in genocide prosecutions in national courts,” says Jennifer Widner. “Over three hundred survivors, scheduled to testify as witnesses, were murdered between 1994 and 1997, and paralysis set in. Without security,” she notes, “officials and citizens feared to take the steps required to build the rule of law.”<sup>76</sup>

Thousands of detainees swamped Rwanda’s justice system. Trained legal personnel for the local trials were lacking. Formal domestic trials eventually gave way to a process based on a traditional form of local community justice, the *gacaca*. International human rights groups have contested the legality and prudence of this traditional model, arguing that it does not provide adequate protection for witnesses. Instead of spending millions on an international tribunal, some observers have argued that a better strategy for strengthening the rule of law would have been to provide much greater international support for institutionalizing a better judicial process within Rwanda.<sup>77</sup>

KOSOVO. After NATO’s 1999 military defeat of the Serbs in Kosovo, ethnic tensions between Kosovar Albanians and Kosovar Serbs remained high, making Kosovo an important test case to evaluate the claim that war crimes trials can defuse tensions between groups by individualizing guilt. In this tense setting, the United Nations Mission in Kosovo (UNMIK) mounted local trials, while the ICTY tried higher-level suspects in The Hague. The trials in Kosovo, however, exacerbated ethnic tensions. Local Albanian judicial officials were heavily biased in their prosecution of several Serb suspects apprehended by KFOR in the summer and fall of 1999.<sup>78</sup> Amid continuing ethnic unrest, Kosovo Serbs detained for war crimes in Mitrovica went on hunger strikes in early 2000. An October 2001 National Democratic Institute poll revealed that

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Tribunal for Rwanda and the Ethiopian High Court,” *Hastings International and Comparative Law Review*, Vol. 22, No. 4 (Summer 1999), pp. 667–745; and Todd Howland, “Learning to Make Proactive Human Rights Interventions Effective: The Carter Center and Ethiopia’s Office of the Special Prosecutor,” *Wisconsin International Law Journal*, Vol. 18, No. 2 (Spring 2000), p. 407.

76. Jennifer Widner, “Courts and Democracy in Postconflict Transitions: A Social Scientist’s Perspective on the African Case,” *American Journal of International Law*, Vol. 95, No. 1 (January 2001), Symposium: State Reconstruction after Civil Conflict, pp. 67–68.

77. Alvarez, “Crimes of States/Crimes of Hate,” pp. 365–483.

78. International Crisis Group, “Finding the Balance: The Scales of Justice in Kosovo,” ICG Balkans Report No. 134, September 12, 2002, p. 20.

89 percent of Kosovo Serbs felt that local courts would not resolve disputes with members of another ethnicity fairly.<sup>79</sup>

To improve procedural standards and address Serbian criticisms, UNMIK gave international judges and prosecutors a majority voice in these trials. The reconstituted courts reversed eight of eleven prior convictions.<sup>80</sup> This internationalization of local trials may have bolstered legal standards, but it revealed the incapacity of trials to socialize local elites into accepting the rule of law. Rather than eliciting local support, retrials outraged local judges.<sup>81</sup>

War crimes trials in Kosovo have had little deterrent value, as interethnic violence has continued since NATO's victory. Local judicial officials failed to adequately prosecute those responsible for two notorious attacks against Kosovo Serbs. In 1999, fourteen Serb farmers were gunned down south of Pristina, and in 2001, eleven Serbs riding civilian buses were killed and forty others injured.<sup>82</sup> Between January and May of 2000, there were ninety-five murders in Kosovo, twenty-six of them among the tiny Serb population. The violence decreased by 2002, primarily because much of the Serb population had fled. The trial and conviction in July 2003 of four former members of the Kosovo Liberation Army, however, sparked a new wave of violence against the international police and judiciary amid claims that the UNMIK trials were biased against Kosovar Albanians.<sup>83</sup>

**EAST TIMOR AND INDONESIA.** In retribution for the 1999 referendum establishing East Timor's independence from Indonesia, Timorese militias that had been collaborating with the Indonesian military perpetrated widespread atrocities. After order was restored with the help of UN peacekeepers, a UN-sponsored local court in Timor indicted more than 200 war criminals. More than 100 of them, including the Indonesian army commander, General Wiranto, and many senior officials, are living freely in Indonesia.<sup>84</sup> The Indonesian government has been unwilling to extradite them. East Timor's President, Xanana Gusmao, has been reluctant to pursue trials that would strain relations

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79. National Democratic Institute, "Public Opinion Poll," by PRISM Market, Media, and Social Research, November 2001, cited in ICG, "Finding the Balance," p. 25.

80. Organization for Security and Co-operation in Europe, Mission in Kosovo, *Kosovo's War Crimes Trials: A Review*, September 2002, pp. 10–11, 48.

81. "Decision to Acquit Serb for Kosovan War Crimes Absurd," Agence France-Presse, January 30, 2001, cited in International Crisis Group, "Finding the Balance," p. 21.

82. *Ibid.*, p. 24.

83. Arben Qirezi, "Kosovo: KLA Trial Backlash," Institute for War and Peace Reporting, Pristina, Kosovo, August 1, 2003.

84. Amnesty International, *Indonesia/Timor—Leste International Responsibility for Justice*, AI Index: ASA 21/013/2003, April 14, 2003.

with this powerful neighbor.<sup>85</sup> Likewise, the UN Security Council spurned activists' demands to create a powerful tribunal with jurisdiction over both Timor and Indonesia similar to the ICTY and ICTR. Instead it decided to hold local trials in East Timor under the authority of the United Nations Transitional Administration in East Timor, while urging Indonesia to hold its own trials.

In Indonesia, the transition to a democratic, rule-of-law state, which began with elections in 1999, has been slow. Military elites with blood on their hands retain a veto over government policies. President Megawati Sukarnoputri's government came to power with military backing in 2001 following the impeachment of the erratic elected president, Abdurrahman Wahid. Moreover, security threats from terrorism, Islamic fundamentalism, and separatism have increased the government's dependence on the military. As a result, civilian leaders cannot risk a military backlash against an attempt to prosecute senior officers for crimes in East Timor.

Meanwhile, Indonesia's armed forces and police continued to perpetrate new human rights abuses in their campaigns against separatists in the provinces of Aceh and West Papua. One reason for the continuing human rights abuses is that military units receive only 30 percent of their funding from the governmental budget. The rest they must extract from business activities, often involving extortion and corruption, in the region where they are based. As a result, for example, there have been gun battles pitting army units against police contending for the privilege of shaking down refugees fleeing from ethnic conflicts.<sup>86</sup>

Calls by human rights advocates for prosecution of suspected Indonesian war criminals have led to a few trials in Indonesian courts, primarily of minor figures, and sentences have been light.<sup>87</sup> Of the eighteen verdicts rendered by January 2003 by Indonesia's Ad Hoc Human Rights Court on East Timor, located in the Indonesian capital of Jakarta, eleven were acquittals. These trials have provided the Indonesian government and army with an opportunity to impart an aura of justice to its version of the truth.<sup>88</sup> Those convicted include

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85. Human Rights Watch, "East Timor Amnesty Bill Flawed," July 18, 2002.

86. International Crisis Group, "Communal Violence in Indonesia: Lessons from Kalimantan," ICG Asia Report No. 18, June 17, 2001, p. 19; International Crisis Group, "Indonesia: Keeping the Military under Control," ICG Asia Report No. 9, September 5, 2000; and International Crisis Group, "Indonesia: Impunity versus Accountability for Gross Human Rights Violations," ICG Asia Report No. 12, February 2, 2001.

87. In August 2003 the Indonesian court found a top army general guilty of crimes against humanity, but the sentence was limited to only three years.

88. Human Rights Watch, "Justice Denied for East Timor," December 20, 2002.

the former militia leader Eurico Guterres and Timor's former governor, Abilio Soares, both East Timorese.<sup>89</sup> These convictions allow the government to portray the violence as a local matter between East Timorese pro- and anti-independence militias, not supported by Indonesian forces.<sup>90</sup>

In short, because of Indonesia's weak system of justice and powerful spoilers in the military, trials neither serve the interest of justice nor help to consolidate peace and democracy. As in the other cases we have examined, trials are shaped by the political and institutional reality in which they occur, not vice versa.

**SIERRA LEONE.** The 1999 Lomé agreement temporarily ended Sierra Leone's civil war by offering Foday Sankoh's rapacious Revolutionary United Front (RUF) an amnesty and a power-sharing deal that left these rebels in key positions in the country's diamond mining industry. After renewed fighting over control of the mines in 2000, British intervention decisively defeated the rebels. UN officials worked with the Sierra Leone government to create a special court that includes both international and local officials and draws on both international and domestic law to prosecute perpetrators of mass atrocities. The decisive military victory and the mixed international/domestic format of the court increase the likelihood that the trials might help to strengthen Sierra Leone's judicial institutions. The court, however, complicated peace talks in neighboring Liberia by indicting Liberian President Charles Taylor as a war criminal for his involvement in RUF atrocities and hindered efforts to induce Taylor to leave office and accept asylum in Nigeria.<sup>91</sup>

**CAMBODIA.** Although the worst perpetrators of Cambodia's mass atrocities of the 1970s, the Khmer Rouge, eventually suffered military defeat, the Hun Sen government shows little enthusiasm for trials, because a number of its officials were at one time associated with the Khmer Rouge. The Cambodian government therefore initially rejected a UN commission's call for trials, contending that they might create national panic and lead to renewed guerrilla warfare. After several rounds of failed negotiations, the UN General Assembly and the government of Cambodia approved draft plans, pending legislative

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89. Jane Perlez, "Indonesia Begins Trials of Military in East Timor Abuses," *New York Times*, March 20, 2002, p. 8; and Amnesty International, *Indonesia/Timor—Leste International Responsibility for Justice*.

90. Marianne Kearney, "Trials Show How Little Has Changed in Indonesia's Military," *South China Morning Post*, November 28, 2002.

91. Jess Bravin, "A Prosecutor Vows No Deals for Thugs in Sierra Leone War: American's Zeal Complicates Diplomats' Ideas to Deal with the Crisis Present in West Africa," *Wall Street Journal*, July 28, 2003, p. 1.

ratification, for a mixed tribunal that would include a preponderance of domestic judges and prosecutors, as well as significant international participation. Human Rights Watch opposes this plan, which it says fails to guarantee that international standards of justice will be upheld.<sup>92</sup>

#### TRUTH COMMISSIONS

Truth commissions have most often been the choice of states whose stability depends on the cooperation of still-powerful potential spoilers. We find that truth commissions are most likely to be useful when they provide political cover for amnesties, and when they help a strong, reformist coalition to undertake the strengthening of legal institutions as part of a strategy based on the logic of consequences.

Eleven of the thirteen states that convened truth commissions terminated their civil wars through negotiated settlements.<sup>93</sup> Only in Ethiopia and Peru did the new government pursue a truth commission following a decisive victory. In Ethiopia, however, the objective of the commission was to produce information that the state would use in subsequent trials. In the remaining eleven cases, no one group had enough power to impose war crimes trials on its competitors. International truth commissions have likewise served to manage rather than alter the existing balance of power. In El Salvador and East Timor, the United Nations preferred truth commissions to a more confrontational strategy of international war crimes trials.

EL SALVADOR, GUATEMALA, AND HAITI. Often states keep truth commissions on a short leash because of the anticipated backlash from potential spoilers. Following the release of the truth commission's report in El Salvador in 1993, for example, the government issued an amnesty that proved critical in securing support for the peace process from key actors. In Guatemala, where the primary purpose of the truth commission was to confer a degree of legitimacy on the government and to minimize the potential for a backlash, the truth commission's report in 1999 did not name names. Despite this compromise, the commission's project director, Bishop Juan Gerardi Conedera, was murdered two days after the release of the report.<sup>94</sup>

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92. Human Rights Watch, "Cambodia: Khmer Rouge Tribunal Must Meet International Standards," New York, December 19, 2002.

93. Note that plans to pursue a truth commission in Sierra Leone followed the 1999 negotiated settlement but not the 2000 British intervention that led to the defeat of the RUF.

94. Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001), p. 244.

Even in the face of threats from spoilers, truth commissions have sometimes produced good results, but only when a reformist political coalition fosters improvements in institutional underpinnings of democracy. In El Salvador, for example, the truth commission contributed to democratic consolidation by investigating the role of the judiciary in past abuses and recommending reforms intended to bring the judicial branch into conformity with international standards. Its report charged that the judiciary had covered up evidence of atrocities and failed to cooperate with the commission's investigations. The report recommended extensive reforms, including the reduction in power of the supreme court and the creation of laws protecting the rights of defendants. While the government rejected the commission's call for the resignation of a long list of members of the judiciary, a reformist ruling coalition implemented some of its recommendations.<sup>95</sup> In contrast, Haiti lacked political support for its truth commission's recommendations for judicial reform, which failed to bear fruit.

SOUTH AFRICA. As in El Salvador, the presence of a reformist political coalition in South Africa made possible the successes of the truth commission that heard testimony on political crimes of the apartheid era. Despite the very different circumstances that surrounded the granting of amnesty in South Africa and El Salvador, in each of these cases, a truth commission provided political cover for this controversial policy. Although amnesty minimizes the backlash from past perpetrators, truth commissions also need to worry about backlash from those who are demanding sterner justice. In South Africa, the truth-telling aspect of the Truth and Reconciliation Commission provoked the anger of some relatives who watched revealed perpetrators walk free.<sup>96</sup> Truth commission staff in Haiti refrained from making the names of perpetrators public for fear that this would lead to random acts of retaliation.<sup>97</sup> However, well-designed truth commissions in the future might be able to minimize such resentments. James Gibson's survey research shows that South Africans consider amnesty to be necessary, but unfair. This perceived unfairness could be mitigated, according to the survey's findings, if victims' families had a voice in truth commission proceedings, if perpetrators' apologies were perceived to be sincere, and if victims were financially compensated.<sup>98</sup>

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95. *Ibid.*, pp. 101–105.

96. James L. Gibson and Amanda Gouws, "Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid," *American Political Science Review*, Vol. 93, No. 3 (September 1999), pp. 501–518.

97. Hayner, *Unspeakable Truths*, pp. 123.

98. James L. Gibson, "Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa," *American Journal of Political Science*, Vol. 46, No. 3 (July 2002), pp. 540–556.

SRI LANKA AND BURUNDI. Hostage to political necessities, truth commissions often lack autonomy and clout. In Sri Lanka, a new president, Chandrika Kumaratunga, came to power in 1994 with the intention of investigating crimes by the armed forces. Renewed fighting against Tamil separatists three months later vastly increased the new president's dependence on the military and dampened any enthusiasm for investigations, hence weakening the impact of the commission.<sup>99</sup>

In Burundi, the Tutsi minority government has been highly dependent on potential spoilers, the Tutsi military that kept the regime in power. Nevertheless, the UN Security Council and international human rights organizations such as Amnesty International supported a truth commission as "a vital step in breaking the cycle of impunity and violence in Burundi."<sup>100</sup> On the day the report was due to be released, however, the government was overthrown by a coup, and the violence continues.

CHAD. Truth commissions have sometimes provided a veneer of legitimacy for governments that actually shun democratization and the rule of law. In Chad, President Idriss Déby, previously a leading deputy in the former regime of Hisssein Habré, convened a truth commission in 1992 aimed at exposing Habré's brutality and burnishing the image of the new government. Meanwhile, Déby relied on similar tactics—killings and torture—to secure his rule. Déby also recruited many individuals from Habré's regime into his security police.<sup>101</sup> In the absence of an effective reformist coalition, truth commissions are at best an empty gesture and at worst a fig leaf covering up continued abuses.

#### AMNESTIES

Amnesties were negotiated following eleven of the civil wars that have ended since 1989. Some were combined with truth commissions, as in South Africa, El Salvador, and the original plan for Sierra Leone in 1999. In other cases, such as Namibia and Afghanistan, the new government did not grant an official amnesty, but the demand for war crimes trials either did not surface or was effectively deferred. Many of these amnesties or de facto amnesties helped to shore up peace and an improved human rights situation. The evidence suggests, however, that amnesties, like tribunals, require effective political backing and

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99. Hayner, *Unspeakable Truths*, pp. 65–66.

100. Amnesty International, "Rwanda and Burundi: A Call for Action by the International Community" (London: Amnesty International, September 1995), pp. 23, 26. Also cited in Hayner, *Unspeakable Truths*, p. 68.

101. Long and Brecke, *War and Reconciliation*, p. 42; and Hayner, *Unspeakable Truths*, pp. 58–59.

strong institutions to enforce their terms. Indeed, the point of giving an amnesty should be to create the political preconditions for the strengthening of law-abiding state institutions. Amnesties are likely to succeed only if they are accompanied by political reforms that curtail the power of rights abusers, and if they can be effectively enforced.

NAMIBIA. In some cases, doing nothing has been a viable strategy for consolidating peace. For example, Namibia's durable peace settlement was not disturbed by the failure to prosecute crimes that had been committed by both sides in the war. Indeed, the terms of the postconflict transition were negotiated before the international human rights movement began to emphasize war crimes trials. As result, the question of accountability for atrocities was left off the agenda, with no apparent ill effects.

MOZAMBIQUE. In Mozambique, peace has been sustained since the signing of a 1992 accord, which provided that neither party had to take public responsibility for crimes committed during the country's civil war. At the outset of the peace talks, each side insisted that the other be held accountable for its misdeeds. A negotiating stalemate resulted. To break the logjam, mediators from the St. Egidio Catholic Church organization suggested that the sides grant each other an amnesty. The Mozambican parliament followed up with a grant of amnesty for "crimes against the state" to speed reconciliation.<sup>102</sup>

EL SALVADOR. An amnesty helped to gain the cooperation of key actors in implementing Salvador's successful peace accord. To end the civil war, moderate conservatives in the business community eagerly supported the provisions of a UN-brokered agreement to completely reconstruct the country's army, police, and other governmental institutions. These economic elites had realized during the course of the war that they could no longer make money through coffee production with repressive control of labor, and instead sought to take advantage of the trend toward economic globalization by expanding *maquiladora* light manufacturing exports. This meant turning their back on their former allies in the right-wing death squads and making peace with the leftist rebels.<sup>103</sup>

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102. *Ibid.*, p. 187.

103. William Stanley, *The Protection Racket State: Elite Politics, Military Extortion, and Civil War in El Salvador* (Philadelphia: Temple University Press, 1996), pp. 218–255; and Elisabeth Wood, *Forging Democracy from Below: Insurgent Transitions in South Africa and El Salvador* (Cambridge: Cambridge University Press, 2000). For a similar point regarding the Guatemala settlement, see Mark Peceny and William Stanley, "Liberal Social Reconstruction and the Resolution of Civil Wars in Central America," *International Organization*, Vol. 55, No. 1 (Winter 2001), pp. 171–175.

An amnesty for crimes committed during the war helped to seal this deal for institutional transformation, which was grounded in an ironclad political and economic logic, whatever its shortcomings from the standpoint of backward-looking justice. The conservative government granted the amnesty as a defensive move following the release of reports by a truth commission and an ad hoc commission on crimes committed during the civil war, which called for the discharge of several military officers and the resignation of a number of judges. Contrary to proponents' claim that truth commissions shore up peace by reconciling former enemies, the Salvadoran government viewed the release of these reports as a dangerous provocation. The military, the defense minister, and the supreme court all denounced the reports as biased. Three days after the truth commission report was released, the president proclaimed the amnesty, and two officers convicted of murdering Jesuit priests were freed. Although 55 percent of the public opposed the amnesty and 77 percent favored punishing those who had committed crimes, the decision for amnesty was crucial in gaining the cooperation of the military, the judiciary and, more generally, the government in subsequent stages of the peace process. ARENA, the governing party, argued for the amnesty on the grounds that forgetting was critical to reconciliation.<sup>104</sup>

**SIERRA LEONE AND IVORY COAST.** In both Sierra Leone and Ivory Coast, rebels were offered amnesty and key posts in the new government. Neither situation proved to be stable. In Sierra Leone, the Lomé accords gave an amnesty to the still powerful RUF leader, Foday Sankoh, and put him in charge of diamond mining in the new government. Far from being reconciled to peace and the rule of law, the RUF saw the accord as a step toward entrenching their practices of domination and plunder. When this view of the settlement was challenged, Sankoh's rebels renewed their violence against the government and civilians.

In Ivory Coast, when France attempted to settle the civil war by proposing that rebels be given key government posts, protesters thronged the streets and sporadic fighting continued. Despite this result, in July 2003 the government of Ivory Coast announced plans for a new amnesty. These cases underscore the importance of removing perpetrators from positions of arbitrary power as the price of gaining amnesty.

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104. Margaret Popkin, "El Salvador: A Negotiated End to Impunity?" in Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), pp. 198–217.

MACEDONIA. In Macedonia, an amnesty covering certain crimes committed by ethnic Albanian rebels was an essential component of the 2001 peace settlement that dampened conflict after the post-Kosovo fighting. This amnesty did not, however, cover crimes under the purview of the ICTY. The tribunal's subsequent investigations in Macedonia created a pretext for Slavic Macedonian nationalists to resume fighting ethnic Albanian former guerrillas accused of committing atrocities, which nearly caused the settlement to unravel.<sup>105</sup>

CAMBODIA. In 1996, Prime Minister Hun Sen extended an offer of amnesty to Khmer Rouge leader Ieng Sary in exchange for mass defections from the Khmer Rouge. The UN General Assembly's plan for a mixed tribunal has deferred judgment on honoring this amnesty. If the Cambodian parliament passes the proposal for the tribunal, the judgment about the amnesty will be left to the Extraordinary Chambers of this tribunal, much to the dismay of human rights activists who oppose honoring the amnesty.<sup>106</sup>

AFGHANISTAN. Afghanistan stands out as a case where de facto amnesty has been the dominant strategy of justice in an international environment that is hostile to such a policy. Despite the political utility of amnesty, recent international legal developments call the credibility of offers of amnesty or de facto amnesty into question. The ICC lacks provisions that explicitly guarantee the sanctity of domestic amnesties. Advocates continue to suggest overturning amnesties. To date, however, efforts to move forward with war crimes trials for Afghanistan have been rebuffed. UN Human Rights Commissioner Mary Robinson pressed Afghanistan's interim government to set up a truth commission with no amnesty powers to investigate crimes not only of the Taliban, but also of the earlier regimes whose members once again secured high positions in Hamid Karzai's interim government. Lakhdar Brahimi, UN special representative for Afghanistan, was successful in persuading the international community that pressing for war crimes investigations would undermine his efforts to institute peace.

IRAQ. The rights activists' assault on the granting of amnesty and exile has coincided with a number of prominent attempts to use such measures to induce rights-abusing leaders to step down from power. After the 1991 Gulf War, activists demanded that Iraq's leader, Saddam Hussein, be prosecuted for

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105. "Macedonia Bolsters Albanian Rights, After Constitutional Change, Amnesty Is Declared for Former Rebels," *International Herald Tribune*, November 17–18, 2001.

106. Human Rights Watch Briefing Paper, *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement*, April 2003.

genocide and other atrocities. The State Department's War Crimes Office, assisted by NGOs, collected information about the crimes committed by the Iraqi regime. In the spring of 2003, just days before the United States began its military campaign in Iraq, President George W. Bush suggested that Saddam Hussein could avert war by leaving Iraq. Bush also indicated that the treatment of Iraqi army officers would be contingent on their behavior during the war, emphasizing that the use of chemical or biological weapons would make them subject to war crimes trials.<sup>107</sup> At the same time, Arab leaders spoke out in favor of amnesty for Saddam Hussein as a means to forestall U.S. military action. A credible and public offer of amnesty, however, was never offered to Saddam or to members of the Iraqi army. Unlike other cases, where formal grants of amnesty have been written into peace treaties, the terms of exile remained ambiguous.

Even though much of the Iraqi army did not fight, one of the first moves by the U.S. authorities in Baghdad was to disband both the army and the police. Individual soldiers and police officers were vetted as part of a broader process of de-Ba'athification of several Iraqi government ministries. Some of those members of Saddam's army and police forces were recruited to assist in the effort to build a new Iraqi army. Plans for local war crimes trials under the authority of the Iraqi Governing Council were also discussed. Ongoing instability in Iraq, however, created ambivalence within the Coalition Provisional Authority about the pursuit of widespread trials. The desire to secure information about weapons of mass destruction created an additional incentive to bargain. In September 2003, the former Iraqi defense minister, Gen. Sultan Hashim Ahmed, number twenty-seven on the U.S. government's list of most wanted Iraqi officials, turned himself in and was granted freedom from prosecution.<sup>108</sup>

Our findings suggest that a strategy of justice focused on war crimes trials in postwar Iraq should be highly restricted. Attempts to conduct widespread prosecutions in the midst of ongoing instability and powerful potential spoilers, as well as in the face of efforts to rebuild the basic institutions of the state, are unlikely to strengthen Iraq's transition. Moreover, cases such as Kosovo and the former Yugoslavia suggest that the pursuit of war crimes trials in ethnically or religiously divided societies can be problematic. Trials risk alienating

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107. George W. Bush speech, "President Says Saddam Hussein Must Leave Iraq within 48 Hours," remarks by the president in address to the nation, The Cross Hall, March 18, 2003, <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>.

108. "Saddam Minister Granted Immunity," *BBC News World Edition*, September 25, 2003, [http://news.bbc.co.uk/2/hi/middle\\_east/3137732.stm](http://news.bbc.co.uk/2/hi/middle_east/3137732.stm).

Iraq's diverse religious groups from each other and thereby undermining efforts to devise institutions for local governance that rely on power sharing among these groups. Because Saddam's regime rested on support from the Sunni minority, Sunni moderates have felt unfairly singled out as targets of suspicion. If trials proceeded beyond a small core of former regime officials, they might be viewed as anti-Sunni and might alienate Sunni moderates who have practical skills critical to rebuilding the state.<sup>109</sup> War crimes trials, if pursued, should take care to ensure that prosecutions are balanced in their consideration of crimes against different groups in Iraqi society.<sup>110</sup>

Immediately after the capture of Saddam Hussein in December 2003, Bush administration statements emphasized that Iraqis should play a leading role in any trial, but some international observers worried that Iraqi domestic justice would fail to meet international standards.<sup>111</sup> Our analysis points to the danger that an exclusively international trial might provoke the anger of the Sunni population, be seen as a patronizing humiliation by Iraqis more generally, and increase attacks on occupation forces. At the same time, the Iraqi Governing Council lacks the legitimacy and capabilities necessary to prevent potential backlash from a domestic trial. While any option presents difficulties, we think that a trial of Saddam would probably be least likely to spur significant backlash if it were held under the auspices of an Iraqi court, but with security and legal oversight provided by the occupying allies (i.e., the Coalitional Authority).

**LIBERIA.** In Liberia, the promise of amnesty and asylum to encourage dictators to step down have competed with calls for prosecutions. The pro-democracy advocacy community was itself split on whether President Charles Taylor, indicted as a war criminal by the Sierra Leone tribunal, should be granted amnesty and given asylum in Nigeria. For example, Festus Okoye of the Transition Monitoring Group argued that if giving Taylor an exit passage would save ordinary Liberians from further abuses, then it would be worthwhile. In contrast, John Prendergast of the International Crisis Group contended that "the precedent of removing an indictment against Taylor would be disastrous for years to come in encouraging impunity and making a mockery

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109. For a more detailed discussion of the implications of alternative strategies of justice in Iraq, see Leslie Vinjamuri, "Order and Justice in Iraq," *Survival*, Vol. 45, No. 4 (Winter 2003), pp. 135–172.

110. Interview by Leslie Vinjamuri with Neil J. Kritz, director, Rule of Law Program, U.S. Institute of Peace, October 3, 2003.

111. Editorial, "Trying Saddam Hussein," *New York Times*, December 17, 2003, p. A38.

of attempts at establishing accountability for crimes against humanity throughout the world. Every tin-pot dictator who is responsible for war crimes will be emboldened in the knowledge that he can sue for peace in this manner.”<sup>112</sup>

On the one hand, our findings suggest that arguments such as Prendergast’s lack strong empirical foundations. On the other hand, Taylor characterized exile in Nigeria as a mere “cooling off period,” which recalls the disastrous amnesty that failed to curtail Foday Sankoh’s power sufficiently in Sierra Leone. Any amnesty for brutal leaders such as Taylor must include credible guarantees that abdication from power will be permanent. Moreover, in Taylor’s case, it seems possible that a decisive victory leading to his arrest might have been achieved at little risk of a backlash, and if so, revoking the indictment would not have been necessary.

In short, these cases show that amnesty can be an indispensable tool in reaching peace settlements when perpetrators remain strong. Moreover, amnesty per se does not appear to be incompatible with the subsequent consolidation of peace. In implementing an amnesty, however, it is important to make sure that perpetrators are removed from office or that the institutional setting of politics is so fundamentally altered that a return to the ways of the past is unfeasible.

### *Effects on Longer-Term Evolution of Global Norms and Institutions*

Even if the short-term benefits of war crimes trials are dubious, advocates of strict, legal accountability argue that bringing suspected war criminals to trial strengthens global norms and institutions of justice over the long term. The demonstration effect of the first post-Nuremberg international war crimes trials and those for the former Yugoslavia did indeed seem to set off a chain reaction in Rwanda, East Timor, Sierra Leone, and Cambodia. At the same time, activists and jurists pursued innovations in domestic courts, most notably Belgium’s, designed to try individuals under the principle of universal jurisdiction. This wave of activity also included the ratification of the multilateral treaty creating a permanent International Criminal Court, which came into force in July 2002.

Despite what might seem like an increasingly institutionalized “norms cas-

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112. Quoted in Somini Sengupta, “Besieged Liberian: Should Taylor Face War Crimes Trial? The Question ‘Has Divided Everybody,’” *New York Times*, July 11, 2003, p. A7.

cade” in the area of international criminal justice, we are skeptical of these claims. Dismayed by the constraints that these legalistic developments place on pragmatic bargaining, states have engaged in an effective, ongoing effort to rein in this trend toward supranational justice. Rather than supplanting the norm of sovereignty and bolstering the norm of human rights and individual accountability, the norm of justice has mutated in directions that recognize the right of states, especially powerful states, to exert control over the terms of justice. One reason for the strength of this countertrend is that states are often correct in acting on a prudent logic of consequences rather than a narrow logic of legal appropriateness.

Following the creation of the ad hoc tribunal for Rwanda, the Security Council began to resist any further demands for the creation of similar tribunals to prosecute war criminals in other countries. Calls for equivalent institutions for Indonesia, Sierra Leone, and Cambodia were rebuffed in favor of courts with weaker powers and greater local autonomy. A new model was devised for trials in Sierra Leone, designed to increase local participation and minimize the burden imposed on the United Nations. Even the Rwanda tribunal itself is under assault. The Rwandan government, fearing indictments of its own leaders, has refused to cooperate with the international tribunal and thereby convinced UN Secretary-General Kofi Annan to recommend the replacement of prosecutor Carla Del Ponte. Inside Rwanda, local community justice procedures, which represent the antithesis of universalized justice, have replaced trials. During the 1991 Gulf War, activists called for an international tribunal to investigate suspected Iraqi war crimes committed in Kuwait, but these proposals were continually dismissed. In the aftermath of the 2003 war in Iraq, the focus of plans to investigate past Iraqi war crimes has shifted to proceedings led by the Iraqi Governing Council rather than an international tribunal.

At the same time as ad hoc international tribunals were being de-emphasized, U.S. resistance to the International Criminal Court has grown. The Bush administration decided to “unsign” the statute of the court and insist that the Security Council grant Americans an annually renewable exemption from its jurisdiction. Moreover, the ICC statute is much weaker than either the ICTY or ICTR. One of the ICC’s grounding features, the principle of complementarity, delegates authority over investigations and judicial proceedings to states except in cases where they are unable or unwilling to assume this burden. In cases of weak or failed states, justice can be deferred for the sake of peace if the Security Council chooses.

Belgian authorities appeared for a short while to be the last renegades in the drive to promote universal jurisdiction. By July 2003, however, even the Belgians realized that their standing in international politics was threatened by the pitfalls associated with universal jurisdiction, and they quickly limited their own capacity to pursue government officials to those cases where Belgian citizens or long-term residents of Belgium have been directly involved in international crimes. Overall it appears that state sovereignty, exercised according to the dictates of the logic of consequences, is playing a central role in the employment of international justice mechanisms.

Proponents argue that the positive effects of international criminal trials on transitional states are often deferred to future decades, when the younger generations become supporters of global norms.<sup>113</sup> Citing Nuremberg, Gary Bass notes that it was the post-Nazi generation that held war crimes trials in 1963–65 for the people who ran the Auschwitz concentration camp and in 1975–81 for those who ran the Majdanek camp. This, he argues, parallels experience in Serbia where the younger generation of Serbians offers the strongest support for full cooperation with The Hague.<sup>114</sup> As a November 2002 survey of Serbians noted, however, the issue of cooperation with The Hague “is dividing the younger electorate as well.” Among Serbians aged 18–30, 30 percent support cooperation with The Hague tribunal, but 33 percent support changing the policy to protect indicted Serbs.<sup>115</sup>

As with post-Nuremberg justice in Germany, the trend in Serbian opinion is away from universal forums and toward local control of justice. Even in Germany, popular protests led in 1958 to the premature release of the vast majority of war criminals convicted at international tribunals at Nuremberg and subsequently at Dachau.<sup>116</sup> Unlike the trials in Germany, however, local efforts will probably accord with international legal standards.

Advocates of accountability also claim that a cascade effect occurs when international norms for enforcing criminal justice are promoted.<sup>117</sup> In this view, holding international trials generates further organization and mobilization of

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113. Gary J. Bass, “Milosevic in The Hague,” *Foreign Affairs*, Vol. 82, No. 3 (May/June 2003), p. 95.

114. *Ibid.*

115. International Republican Institute, November 2002 Serbian National Survey, slide 47.

116. Peter Maguire, “Nuremberg: A Cold War Conflict of Interest,” in Cooper, *War Crimes*, pp. 67–86; and Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2000).

117. Finnemore and Sikkink, “International Norm Dynamics and Political Change.”

international civil society, especially transnational networks of nongovernmental actors who join an ever-growing network of actors to press for stronger measures of justice. Indeed, the growing ranks of NGO advocates at the various preparatory commissions for the ICC confirm these claims. The early calls by Human Rights Watch for a war crimes tribunal in the former Yugoslavia undoubtedly mobilized other NGOs to adopt a similar language of accountability and prosecutions. New organizations such as the Coalition for International Justice were created solely to serve as an advocate for international criminal justice. News organizations and internet groups such as JustWatch also help maintain networks of individuals committed to the principles of international justice. Many of these NGOs have played significant roles both in pressing for trials and also in assisting in the operations of tribunals. Evidence gathered by NGOs on specific crimes has formed the basis for legal hearings and for lobbying governments to provide the financial and intelligence sources necessary for effective prosecutions. In certain cases, NGOs have put up the funds to ensure that investigations go forward in the absence of state support. NGOs have been the sole sponsors of efforts to establish a Women's International War Crimes Tribunal on Japan's Military Sexual Slavery.

The interaction of the strategies of states and advocates of universal justice, however, sometimes creates unintended consequences. Pressed by principled activists and vocal public opinion, democratic leaders often pay lip service to human rights principles and accountability for crimes. These leaders overpromise but underdeliver because they suspect that their publics' underlying preferences are similar to their own: that is, they do not really want to bear the costs and risks that a policy of forceful, unbending application of universal principles would produce. As a result, policies and institutions of humanitarian justice are "designed to fail."<sup>118</sup> Skeptical pragmatists who are required to carry out the policies mandated by legalistic advocates constrain implementing institutions with inadequate resources, support, and authority. Thus, NATO refused to arrest known war criminals for the ICTY.<sup>119</sup> The International Criminal Court may be headed for a similar fate.

Yet sometimes the ill-equipped institutions of international justice can serve as platforms for advocates to try to expand their authority and force states to

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118. On the concept of institutions designed to fail, see Terry Moe, "The Politics of Bureaucratic Structure," in John E. Chubb and Paul E. Peterson, eds., *Can the Government Govern?* (Washington, D.C.: Brookings, 1989), pp. 267–329, especially p. 326.

119. Richard Holbrooke, *To End a War* (New York: Random House, 1998), p. 339.

honor their earlier promises to pursue humanitarian justice. For example, international brokers were able, on the one hand, to negotiate a partial amnesty for Albanian fighters to secure a peace agreement in Macedonia, but on the other hand, were unable to prevent the Yugoslav tribunal from pursuing the same individuals under their UN mandate. Pressure from principled advocates, however, may sometimes be a useful corrective to ill designed, “pragmatic” bargaining strategies. For example, human rights groups were probably right to challenge Colombian President Alvaro Uribe’s proposed amnesty to the United Self-Defense Forces, a rightist paramilitary group, simply for beginning, rather than successfully concluding, a peace process. Uribe has responded by promising to consult with advocates on how to make the terms of the amnesty more palatable.<sup>120</sup>

The long-term trends of international justice will be heavily influenced by the logic of consequences, as assessed by powerful actors, especially states. This is inevitable, because the prevailing pattern of justice necessarily follows the logic of political coalitions and interests more than it leads them. Proponents of strengthened norms of international justice will be more likely to achieve their goals if they accommodate to this pragmatic trend rather than try to undermine it.

### *Conclusion*

In recent years the world has witnessed rampant human rights abuses. Preventing such disasters is one of the most important issues on the international agenda. Legalism, focusing on the universal enforcement of international humanitarian law and persuasion campaigns to spread benign human rights norms, offers one strategy for accomplishing this. We find, however, that evidence from recent experience offers little support for the central empirical assumptions that underpin this approach. Trials do little to deter further violence and are not highly correlated with the consolidation of peaceful democracy.

In contrast, the empirical hypotheses underpinning pragmatism and the logic of consequences fare better. Amnesties or other minimal efforts to address the problem of past abuses have often been the basis for durable peaceful settlements. The main positive effect of truth commissions has probably been to give political cover to amnesties in transitional countries with strong reform

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120. “Colombia’s Peace Bargain,” *Washington Post*, October 3, 2003, p. A22.

coalitions. The international criminal justice regime should permit the use of amnesties when spoilers are strong and when the new regime can use an amnesty to decisively remove them from power. Deciding what approach to adopt in a particular case requires political judgment. Consequently, decisions to prosecute should be taken by political authorities, such as the UN Security Council or the governments of affected states, not by judges who remain politically unaccountable.

Nonetheless, purely pragmatic approaches are inadequate if they do not address the long-term goal of institutionalizing the rule of law in conflict-prone societies. Opportunistic “deals with the devil” are at best a first step toward removing spoilers from positions of power so that institutional transformation can move forward. Institution building must begin with the strengthening of general state capacity and then move on to regularize the rule of law more deeply. Both amnesties and trials require effective state institutions and political coalitions to enforce them. Without those conditions, neither approach is likely to succeed. Above all, external pressure and assistance should be targeted on future-oriented tasks such as human rights training of police and military personnel, improved human rights monitoring of field operations, reform of military finances and military justice, and punishment of new abuses once the reforms are in place.

In cases where legal accountability is not barred by the danger of backlash from spoilers, trials should be carried out through local justice institutions in ways that strengthen their capacity, credibility, and legitimacy. When international jurists must get involved, we favor mixed international-domestic tribunals, such as the one in Sierra Leone. Above all, choices about punishment of past abuses must be made through the application of resolutely forward-looking criteria designed to avert atrocities and secure human rights, not backward-looking strategies based on rigid rule following or on what “feels right.”