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Deterrence, Democracy, and the Pursuit of International Justice

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In recent years efforts to hold the perpetrators of mass atrocities accountable have become increasingly normalized, and building capacity in this area has become central to the strategies of numerous advocacy groups, international organizations, and governments engaged in rebuilding and reconstructing states.[1] The indictment of sitting heads of state and rebel leaders engaged in *ongoing* conflicts, however, has been more exceptional than normal, but is nonetheless radically altering how we think about, debate, and practice justice.[2] Arrest warrants for Sudanese president Omar Hassan Ahmad al-Bashir, Liberian president Charles Taylor, and the leader of the Lord's Resistance Army in Uganda, Joseph Kony, have not only galvanized attention around the role of international justice in conflict but are fundamentally altering the terms of debate. While a principled commitment continues to underpin advocacy for justice, several court documents and high-profile reports by leading advocacy organizations stress the capacity of international justice to deliver peace, the rule of law, and stability to transitional states.[3] Such an approach presents a stark contrast to rationales for prosecution that claim that there is a *moral* obligation or a *legal* duty to prosecute the perpetrators of genocide, crimes against humanity, and war crimes. Instead, recent arguments have emphasized the instrumental purposes of justice, essentially recasting justice as a tool of peacebuilding and encouraging proponents and critics alike to evaluate justice on the basis of its effects.

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The claim that justice can deter atrocities has been inextricably linked to the pursuit of justice during conflict. Since the 1990s two historical "facts"—that war crime trials are held by victors, and that they are only initiated after war's end—have been increasingly challenged. Indicting national leaders and rebels pivotal to ongoing peace talks, notably Slobodan Milošević, Charles Taylor, Omar al-Bashir, and Joseph Kony, turned previously academic conversations about the relationship between peace and justice into pressing policy dilemmas.

When did international justice become a peacemaking tool? Proponents of trials for Nazi war criminals primarily emphasized the appropriateness or moral value of a legal approach, but the belief that war crimes trials could contribute to the prevention of future atrocities was also evident.[4] By the late 1990s this latter argument had become far more central in the advocacy for justice. During the war in Bosnia and Herzegovina, for example, human rights advocates campaigned for the immediate establishment of a war crimes tribunal. Deterrence emerged as a central justification for pursuing investigations during the war in the Balkans. In its 1994 Annual Report, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated, "the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts."[5] Five years later, the speed with which the indictment of Yugoslav president Slobodan Milošević followed the NATO bombing of Serbia significantly contributed to the public perception that justice and peacemaking were part of the same project. This shift has since become entrenched with the International Criminal Court's (ICC) indictments of leaders and rebels in Sudan and Uganda. In February 2006 the language of deterrence was central in the arrest warrant decision issued by the Pre-Trial Chamber of the ICC for Thomas Lubanga, a former rebel leader in the Democratic Republic of the Congo.[6]

Proponents of justice, tribunals seeking to pursue it, and those who are evaluating its contributions have converged on a set of criteria for evaluating the work of international justice that emphasizes deterrence, peace, and the rule of law.[7] The pursuit of international justice in situations where conflict is ongoing has unleashed not only a marked controversy over the effects of justice on peace (through deterrence) and democracy (especially the rule of law) but also an implicit consensus that justice can be legitimately evaluated on the basis of its consequences.[8] In Serbia, Uganda, and Sudan the impact of international justice has been evaluated for its capacity to facilitate peace negotiations, reduce violence, consolidate the peace, and introduce the rule of law. The indictment of the former

Liberian president and warlord Charles Taylor prompted immediate discussion of its impact on peace negotiations and stability in the region. His transfer from exile to Liberia and then to The Hague, and the apparent violation of a promise of sanctuary in Nigeria, spurred a discussion of the "Taylor effect" on future efforts to bargain with leaders fighting wars in Africa.

The underlying assumption for both critics and advocates is that international justice should be evaluated on the basis of whether it contributes causally to a certain set of material and normative outcomes. In both estimations, judicial interventions are conceptualized as a tool that has the capacity to alter fundamentally the prospects for peace by altering the material environment in the short term. Pursued carefully, this type of evaluation promises to deliver research and evidence that will enable policy-makers to base their support on a careful estimation of when and where support for justice is more likely to produce the results they desire and to prevent outcomes they would rather avoid. This is crucial, especially in situations where the sequencing of justice and its relationship to diplomatic negotiations, sanctions, and military force may significantly alter the prospects for peace. In this sense, it may be preferable to a moral absolutist position, which, by stressing the inherent value of justice, also reinforces a tendency to accept justice "as an article of faith" rather than to query its effects on efforts to secure other core values. However, this focus on *immediate* outcomes may both raise the standards by which justice is evaluated too high and deemphasize the long-term goals of justice. It may fail to secure some of the very goals that it seeks to accomplish: the effort to secure liberal values may require a pragmatic approach that delays justice until peace is secured and institutions are stable; it does not require that principles are abandoned altogether.

In the following pages, I discuss the development of international advocacy for justice as it has moved from being *principle- or duty-based* to being *results-based*. I then lay out and evaluate the results-based rationales that have come to define public advocacy for international justice. Finally, I identify the sources of this shift and examine some of the implications.

Arguing for Justice

The most prominent arguments in international policy debates and advocacy campaigns about justice have stressed its effects on two types of outcomes: deterrence and peace, and democracy and the rule of law.[9] First and most

visibly, deterrence has been strategically deployed as a rationale for promoting accountability, and has been crucial to advocacy campaigns surrounding the most highly visible and hotly contested indictments issued by international tribunals. International support for war crimes trials has also been presented as harmonious with strategies of democracy promotion central to U.S. foreign policy in the wake of the cold war. Through their symbolic power, but also through a direct material transfer of legal skills and resources, tribunals have been championed as a mechanism for advancing the rule of law.

Deterrence emerged as an important justification for war crimes trials in Bosnia. The boldest claim made on behalf of criminal law was summed up in the argument most central to international justice in the 1990s: "no peace without justice."[10] This was trumpeted as a core motivation for holding perpetrators of mass atrocities in the Balkans accountable. The argument became, in essence, that justice was crucial for its purported capacity to prevent and deter future crimes.[11] Rather than following victory, justice leads the way toward creating the conditions for sustained peace. The logic of peace through justice gave international tribunals an active role in conflict resolution, and paved the way for efforts to investigate, indict, and prosecute during ongoing conflict.

The liberal-legalist conception of deterrence that underpins advocacy for international criminal tribunals focuses on their role in deterring individual perpetrators from continued atrocities. Since individuals face personal sanction for the crimes they order or commit, the prospect of accountability directly affects their incentive to commit or refrain from committing war crimes.[12] Advocates of deterrence through international tribunals make claims about the capacity of this model to deliver both *specific* deterrence and *general* deterrence.[13] Their broader claim is that deterrence is neither confined to a particular individual or territory nor time-bound, but is a long-term project. Moreover, they argue that even if international tribunals fail to deter further atrocities in a particular conflict, they are a sanction that increases the costs to potential future perpetrators—one that will gradually lead individual would-be perpetrators to comply with human rights and humanitarian norms.[14]

Arguments that stress the specific (or immediate) deterrent effect of justice focus on particular individuals and particular conflicts. Despite a claim that justice is a long-term project, advocates of judicial deterrence have increasingly pointed to the capacity of tribunals to deter ongoing crimes in specific conflicts that may be difficult to end in the absence of effective peace negotiations, economic sanctions,

or the use of military force.[15] The logic rests implicitly on two distinct causal mechanism, and underpinning both of these is the belief that indictments and prosecutions can hasten efforts to secure a peace settlement and thus end war.

The first mechanism relies on inducement. Indictments of particular perpetrators are designed to bring targeted individuals to the negotiating table by removing the prospect that even a successful military campaign will result in anything other than a trial. Indictments may also be intended to deter others from providing covert support to targeted perpetrators, thereby diminishing a target's alternative sources of support. The ICC's indictment of leaders of the Lord's Resistance Army (LRA), a sectarian Christian militant group based in northern Uganda, implicitly follows this logic; and many analysts have argued that the LRA's decision to negotiate with the Ugandan government beginning in July 2006 was a direct consequence of the ICC action.[16]

The second mechanism focuses on marginalization. Proponents have argued that tribunals facilitate peace and deter atrocities by marginalizing their targets.[17] This logic, which underpins the ICC's indictment of Sudanese president Omar Hassan Ahmad al-Bashir, is that indictments trigger a loss of power by delegitimizing their targets, thereby weakening their base of support. In the absence of an international enforcement capacity to make arrests, however, the mechanism through which targets lose power remains unexplained. Absent the voluntary capitulation of targeted individuals, the logic of marginalization depends either on coercion to remove perpetrators or on a stable and effective electoral process through which changes in domestic support can be effectively registered. In the former Yugoslavia, the threat to withhold Western aid in combination with domestic protests and a prior electoral defeat was crucial in securing Milošević's transfer to The Hague. The logic of marginalization, though, wrongly assumes that removal produces peace. Even where indictments do succeed in unseating their targets, deterrence and peace will depend on the ascent of an alternative leader with the capacity to end violence.

In conflicts that are defined along sectarian lines, deterrence through tribunals has an additional logic. Where identity is defined in collective terms rather than on the basis of individual citizenship, international justice has been seen as a tool that can help shift responsibility away from the group and back to the individual.[18] By refocusing polities away from dangerous clan identities and attributions of guilt, the focus on individual accountability seeks to defuse future cycles of violence, and especially revenge killings. Thus, rather than blaming "the Serbs" for atrocities in

Srebrenica, for example, this form of accountability seeks to ensure that blame is placed squarely on the shoulders of key individuals. Because international tribunals do not take the side of any particular warring party and in this sense are neutral, they seek to deter all perpetrators rather than to privilege the values, interests, or rights of a particular party to conflict. Although in practice international tribunals may complicate negotiated settlements, in theory they complement that basket of liberal norms that seeks to reconcile warring parties and promote peace through negotiated settlements and power-sharing arrangements.

Arguments grounded in the logic of deterrence place a premium on using international justice at times and in ways that directly advance peace in the short term. But the effectiveness of these interventions remains highly contested.[19] The ICC's decision to issue an arrest warrant for al-Bashir has so far failed either to marginalize al-Bashir domestically or to alter his participation in the peace process. In the short term, the indictment generated a backlash from the African Union and the Arab League, and prompted al-Bashir to force the exit of many key humanitarian agencies providing relief in Sudan. Where peace processes have been in play and conflict ongoing, ICC indictments have rarely been seen as neutral. Further, one fundamental tenet of the theory of conflict resolution embedded in international justice is that individual attribution can dislocate collective guilt. This is at best a hypothesis. The hardening of group identities that is a natural consequence of sectarian conflict may mean that in many postconflict states premature efforts to bring justice will simply make things worse.

Advocates of deterrence fail to recognize the likely political effects of short-term failures—that is, that support for justice over the long term may be harder to sustain in the face of a series of short-term setbacks. If arrest warrants are perceived to impede peace negotiations, worsen the humanitarian condition, or alienate local and regional support, political support for tribunals may weaken. If the ICC is unable to solicit the cooperation necessary to enforce arrest warrants, this may lead to a downward spiral whereby states are reluctant to lend their support to what they perceive to be a weak institution. Even more problematic, if international justice is found to inspire rather than diminish domestic support for perpetrators of crimes, it may also make long-term goals harder to achieve.

A second rationale advanced to justify international criminal trials underscores the role of international justice in bringing the rule of law to postconflict and transitional states.[20] According to this line of thought, justice contributes to democracy promotion first through a diffusion or demonstration effect. Tribunals

perform a symbolic and social function that spreads the rule of law through example. This logic has been central to campaigns for justice. Its moral appeal rests in part on its use of one morally desirable value (international justice) to advance a second morally desirable value (democracy and the rule of law), but also because it lays down a clear marker that exemplifies how "civilized nations" treat perpetrators of mass atrocities. War crimes trials provide a beacon of hope, a symbol of moral authority for all humanity, and it is the power of this symbol that leads to its broad dissemination and to the widespread embrace of the rule of law. The particular crimes selected for investigation and prosecution, the location of trials, and the characterization of violence all become crucial in demonstrating that part of being a member of the international community, and especially of the community of civilized democratic states, means following a set of international standards and practices for dealing with accountability.

On a more practical level, international tribunals contribute to the promotion of democracy and specifically to the rule of law by providing groups and individuals in civil society a legal resource that facilitates their ability to mobilize and press for the extension of the law to cover crimes that concern them.[21] In some cases linkage has been fostered by international NGOs that have sought out local NGOs and national governments to develop accountability strategies and practices. In Kenya and Liberia, for example, the International Center for Transitional Justice worked extensively with local NGOs to develop practical solutions for increasing accountability in the aftermath of serious crimes.

Democracy promotion through the mechanism of international tribunals also operates through tangible material transfers. Skills and practices associated with the rule of law are transferred through a "spillover" logic that involves the transfer of human and material resources, such as courtrooms and support for reform of the legal sector. The material component of democracy promotion has been formalized through a range of institutional mechanisms, such as the ICC's "complementarity principle" and the ICTY's "Rules of the Road." In effect, complementarity encourages states to develop legal capacity by offering the carrot of national rather than international trials if they are found to be both "willing and able" to investigate the crimes of their own nationals. Similarly, the Rules of the Road sought to inspire legal capacity building by introducing a formal mechanism for transferring expertise and cases from the ICTY to the former Yugoslavia.

The logic of building the rule of law at home through the pursuit of justice from abroad may be compelling in theory. In practice, it raises a series of questions about

the mechanisms through which the rule of law is transported and transplanted. The symbolic power of international justice and its demonstrative appeal are likely to be highest among audiences that are already convinced and do not lack the institutional capacity to pursue justice at home. Where audiences are persuaded but lack local capacity, justice may have less positive effects. International justice may raise the expectations of societies in transitional, weak, or failed states. Meeting these expectations will require more than symbolism. Building local institutional capacity will be crucial for embedding the norms and practices of the rule of law. Ultimately, these efforts to build local institutional capacity are more likely to be successful in the aftermath of a successful peace settlement.

The Triumph of Consequences

Deterrence and democracy promotion as justifications for war crimes trials have formed the basis of advocacy campaigns, inspired criticism, and defined research programs across a broad array of public policy and academic institutions. Perhaps most surprisingly, in shaping the campaigns of advocates they have begun to displace arguments for justice based solely on its inherent moral value. Does this trend signal the absence of a commitment to justice as an absolute moral principle? And if not, how have the goals of deterrence and democracy promotion come to displace moral absolutism and the goal of ending impunity as the most visible and debated public international rationales for international tribunals? Indeed, there is much to suggest that widespread principled support for international justice runs deeper than the rationales designed to promote it may indicate. International human rights advocates undoubtedly share both a belief in the sanctity of international human rights law and a moral commitment to the absolute nonnegotiable nature of certain basic universal rights.

International justice has been widely embraced among international elites and institutions as the appropriate standard by which to hold perpetrators of mass atrocities accountable. Even among those whose interests may run counter to the practice of international justice but who nonetheless wish to remain in the good graces of the international community, overt attacks on the basic tenets of justice have been uncommon. In states such as Kenya, which have failed to punish perpetrators of mass atrocities at home, elites have refrained from critiquing the ICC or the practice of international justice in principle. For democratic states or aspiring democracies, critiquing justice on the grounds that it produces suboptimal

outcomes is politically more feasible than challenging its inherent moral value. When the United States refused to sign the Rome Statute, which created the ICC, and also when it initially pursued a Security Council exemption from the ICC's jurisdiction, it was careful not to reject the inherent value of international justice. Instead, it argued that the United States had a special role internationally and that, as a result, its soldiers could be vulnerable to political uses of international justice. Even leaders indicted by international courts have refrained from challenging the principle of justice, and have argued instead that international tribunals are politically inspired and illegitimate.

But public justifications that stress the fundamental values of "guilt and innocence" have become increasingly rare.[22] Rather, NGOs, international and regional organizations, and public officials working in democratic states in Europe and the Americas have embraced and articulated rationales that stress the *consequences* of justice—for deterrence, for democracy, and for restoring and reconciling local communities. Where efforts have been made to embed accountability in organizational frameworks and practices for peacemaking, state building, or development, the propensity to claim a causal link between justice and certain policy outcomes may be even greater.

How did the basic moral and legal commitment to justice become subordinated by consequentialist logic in the public realm? Those in the business of promoting accountability have decided to hone in on the benefits that international justice can deliver. Engaged practitioners and advocates of transitional justice may in fact be skeptical that justice is an effective deterrent or that it is able to deliver the outcomes claimed on its behalf. Some have argued that although deterrence is a high standard and difficult to achieve, it is used to sell justice to reluctant audiences.[23]

The new focus on the effects of international justice is the natural and possibly even necessary by-product of several closely related developments: the international community's substitution of soft policy instruments, including international justice, for military force when faced with demands for intervention; the pressure by advocates to pursue international justice in ongoing conflict; an inherent organizational tendency, especially in new institutions, to expand and extend; and, finally, the jurisdictional constraints of the International Criminal Court. Each of these factors was facilitated by the renewed possibilities for international intervention and negotiation and the outbreak of wars associated with the end of the cold war.

Advocates have stressed the impact of justice on violence, peace, and democracy in part to galvanize the interests of policy-makers and elicit support for judicial interventions. Relative to military intervention, international justice has the advantage of being cheap both in terms of financial and human resources. By embedding justifications for justice in a logic that stresses its capacity to help deliver peace, advocacy may unintentionally have helped to create the perception among policy-makers that justice can be used as a cheap and morally superior substitute for military intervention.[24]

Justifications for early interventions in ongoing conflicts have almost inevitably centered on the role that indictments would play in shaping progress toward peace. Calls for military intervention in the former Yugoslavia were initially met with great reluctance. Instead, Europe and the United States committed themselves to diplomatic negotiations, UN peacekeepers, and the creation of an ad hoc international war crimes tribunal. This was the first move toward creating a war crimes tribunal during an ongoing conflict; the justifications developed as part of this effort consequently focused on the tribunal's role in deterring atrocities. In Uganda and Sudan, the ICC has similarly intervened during ongoing conflict, and in the absence of any military intervention has become perceived as one of the chief instruments deployed by the international community to shape the peace process. Indeed, considerable debate about the ICC's role has focused on its impact on peace rather than its role in realizing justice.[25]

The urge to evaluate the work of international courts during ongoing atrocities on the basis of its impact has been exacerbated by a third dynamic. Over time, new institutions created to investigate abuses and atrocities have taken on increasingly challenging cases and sought to extend rather than limit their engagement in ongoing conflict. The ICTY's indictments of Radovan Karadžić and Ratko Mladić during the conflict in Bosnia and Herzegovina and its pursuit of Slobodan Milošević during the bombing of Kosovo ensured that the court would be viewed as a player that could not be ignored in any analysis of the peace process. The pursuit of justice prior to a settlement radically altered the terms of the ensuing debate, and international justice became an instrument that was evaluated in terms of its impact on efforts to negotiate a peace with Serbia. Indeed, much of the immediate controversy centered around whether the indictment would impede or facilitate peace negotiations rather than whether it fulfilled a legal duty or satisfied a moral imperative. As one commentator argued, "The tribunal has always said it

wants to stay clear of politics, but charging a current head of state with war crimes will take it right to the center of the diplomatic and political arena."[26]

Pursuing justice "in real time" produces mixed results. Indictments both increase the visibility of the tribunals and generate heightened expectations of what can be accomplished. Further, practitioners often fall into a trap of trying to oversell the tribunal's activities, pursuing an overly ambitious agenda in their efforts to secure the strategic goods of peace, deterrence, and democracy. For example, just a few days after the indictment of Milošević, ICTY Chief Prosecutor Louise Arbour argued, "I have been stressing . . . our commitment to functioning as a real time law enforcement operation."[27] Especially when tribunals are new, the need to consolidate a public role and secure public support may inadvertently bias tribunals against deferring justice until conflicts are resolved. In Uganda proponents have argued that the ICC indictments brought the LRA to the negotiating table, but they neglect to mention other factors that facilitated this, especially the weakened capacity of LRA forces. Similarly, proponents argue that the arrest warrant issued for Sudanese president al-Bashir may bolster moderates and weaken his base of support domestically, thereby paving the way for the selection of a new leader in forthcoming elections. This tendency to oversell criminal law's contribution to stopping ongoing conflict has been intensified by concern that international justice will be marginalized or obstructed by mediators and political leaders with conflicting priorities. The concern is not unwarranted. Historically the formal incorporation of provisions for justice into peace agreements has been exceedingly limited. Even over the past decade there have been several peace agreements that have remained silent on the issue of accountability.[28]

A fourth factor that explains the establishment of criminal trials for ongoing atrocities is the constraint of the ICC's jurisdiction. The court, officially created in July 2002, does not have jurisdiction over crimes committed prior to this date. Further, many of the worst crimes committed since July 2002 are part and parcel of conflicts that have not yet ended. Consequently, the ICC, for better or worse, has become actively engaged in conflict situations.

Four Dilemmas

The streamlining of rationales for justice and the pursuit of international justice during ongoing conflict have produced four dilemmas for the future of accountability in general and international justice in particular.

Displacing the Local

First, indicting alleged perpetrators during conflict threatens to undermine the spirit of the complementarity principle, central to the ICC, that posits that national legal systems are the preferred locus for establishing accountability. Securing international justice, securing peace, and devolving justice to national actors are likely to be incompatible goals, especially in states where institutions are weak and a high degree of instability persists. Under such conditions, securing arrests and convictions is extremely difficult. States in conflict often lack the capacity necessary to pursue investigations and trials. Even where states have sufficient local capacity, the ability of local actors that are party to conflict to pursue a neutral justice, or to be *seen* to pursue a neutral justice, will be heavily compromised and is unlikely to be an immediate priority. The international pursuit of justice in this phase may therefore unintentionally create a situation in which justice is routinely outsourced, thereby disenfranchizing national actors and inhibiting efforts to embed accountability norms locally.

The pursuit of international justice during ongoing conflict may be deleterious for postconflict state building as well. National leaders will be far better placed to make the case for domestic ownership of justice processes once conflict has been resolved. The preemptive pursuit of justice by external actors may restrict and inhibit the transnational and international linkages that can facilitate local autonomy, authority, and ownership of justice in postconflict states. Outsourcing justice and removing options that are deemed to fall short of the gold standard of international justice risk alienation of the *local* from the *international* project of accountability. Over time, this may contribute to a bifurcated system of global justice, with weak states subject to international authority and stronger democratic states answerable only to themselves. Paradoxically, efforts to institutionalize international justice through the International Criminal Court may mean abandoning the goal of decentralized justice. Absent this decentralization, the long-term prospects for the globalization of an accountability norm may suffer.

Sequencing Justice

Second, judicial interventions in ongoing conflict have increased the stakes of debates about sequencing, or the optimal timing for pursuing justice, by bringing real-world significance to an otherwise academic debate. Increased stakes, however, have produced diminished flexibility. By establishing a powerful precedent, recent judicial interventions appear to have restricted the scope for deliberation, analysis,

and choice. They have also recast debates about sequencing. Rather than eliciting an open-ended discussion designed to evaluate the costs and benefits of deferring justice, calls for delaying justice may now be seen as deliberate attempts to protect perpetrators from the ICC. Indictments also raise expectations and mobilize victims, international advocates, and civil society groups to demand swift results. Where states lack the capabilities to meet international standards for delivering justice, these demands are unlikely to be met since the resources of the ICC are necessarily limited.

An outcomes-based approach should evaluate the effects of sequencing on the long-term goals of justice. Often, justice delayed may mean more and better justice. Trials of the major Nazi war criminals were pursued in the aftermath of military victory and facilitated by occupying powers that sought to stabilize and democratize Germany. Recent pursuits of justice in Chile and Argentina are built on a platform of stable democratic institutions, and run little risk of destabilizing the state. Quite the opposite; the arrest of Augusto Pinochet spurred additional efforts to deal with the past, and has helped entrench a culture of democracy and accountability in Chile. Acknowledging past crimes may strengthen prior institutional reforms by setting the historical record straight.

Judicial interventions in ongoing atrocities also present a challenge to the fundamental principle that law should be independent of politics. Advocates of the ICC and of international criminal tribunals generally reject the idea that justice can be coordinated with other international policy instruments, such as negotiations, sanctions, or military force, or that it can be sequenced based on domestic factors. But the assumption that justice can be pursued neutrally during conflict is inconsistent with the claim that justice can independently affect the prospects for peace by marginalizing some actors and empowering others.

History suggests that those judicial interventions with the greatest capacity to contribute to peace have depended for their success on prior political and military efforts. In Bosnia, Kosovo, Sierra Leone, Cambodia, and elsewhere, diplomatic and military interventions have been highly coordinated. The successful creation of international tribunals has depended on the creation or imposition of a stable domestic balance of power. British military intervention in Sierra Leone helped to defeat the Revolutionary United Front (RUF) and thereby paved the way for the creation of the Special Court for Sierra Leone. Similarly, the ICTY only really began to make progress once the Serbs began to lose capacity on the ground and NATO intervention, combined with intensive diplomatic efforts, succeeded in producing

a political settlement. The indictment of Milošević was built on the back of a prior decision by NATO, highlighted by the bombing of Serbia, that Milošević was on the wrong side of politics. In Uganda, the failure to compel the LRA to capitulate despite the ICC indictments suggests that in the absence of superior military force or a stable negotiated settlement, judicial instruments have little effect.

Impairing Neutrality and Undermining Legitimacy

Third, international interventions in ongoing conflict, including international trials, are unlikely to be seen as neutral. Whereas in Uganda the ICC has been criticized for failing to investigate government crimes, the government of Sudan views the ICC as a court that supports rebel action. The tribunal in Iraq has at times been viewed as a means of exercising American power against the Sunnis. Only in Sierra Leone, where the war against the RUF was fought and won prior to the court's creation, were similar allegations avoided.[29]

The broad base of support in many democratic states for the basic value of international justice also contrasts dramatically with the challenges that have been launched against tribunals by heads of state who have become its targets. Among these actors, debate has not converged on *consequences* or *values* but centers on *legitimacy*. Almost without exception, former or sitting heads of state indicted by international courts have challenged the legitimacy and authority of the courts that have indicted them. Milošević argued that the ICTY was both partial and illegitimate. Charles Taylor lodged similar claims against the Special Court for Sierra Leone upon his arrival at The Hague. Saddam Hussein blasted the Iraqi Special Tribunal for being the handmaiden of U.S. imperialism; and al-Bashir and his cohort have accused the ICC of being illegitimate and having no proper authority on which to indict or prosecute them.[30]

The perception that international justice is neither neutral nor legitimate is exacerbated by the ICC's interventions in ongoing conflict. Local alienation from international justice deepens the sense that international courts are illegitimate and intervention is bound to be seen as biased. Indeed, in these conditions justice is also subject to political manipulation. During ongoing hostilities, the temptation for local elites to press for judicial intervention as a mechanism to undermine or discredit their opponents will be difficult to resist.

Raising the Stakes for Justice

Finally, and perhaps most significantly, proponents of international justice have opened themselves up to empirical scrutiny. Emphasizing the capacity of justice

to deter crimes in situations of ongoing conflict sets a very high bar, and may undermine the case for justice. Skeptics will find failed deterrence an easy basis for attack, as scholars have long recognized that successful deterrence is notoriously hard to identify. Further, when justifications stress outcomes, the perception that justice is an independent value is weakened. Rather, international criminal justice becomes one among many interchangeable policy tools used to manage conflict, alongside negotiations, economic sanctions, and military force.[31] If justice cannot bring peace and reduce violence as effectively as these other instruments, then logically it follows that it should be replaced by these other tools.

So far, the new convergence on results-based assessments and effects-based advocacy has not yielded conclusive evidence.[32] A study by Human Rights Watch claims that the potential of justice to contribute to peace has been "sold short," and that in many cases international justice has helped establish the rule of law, deter further atrocities, and prevent future cycles of violence.[33] In contrast, a recent study of the ICTY's effectiveness argues that the evidence "did not provide an adequate basis for even provisional conclusions" to assess the ICTY's deterrent effect.[34] The report instead pointed to the tribunal's role in contributing to the removal of criminals from the former Yugoslavia and its role in promoting local justice. A great deal of recent research also suggests the positive effects of international justice on democracy and deterrence.[35] Nonetheless, contending perspectives suggest justice has little independent effect on peace or democracy. One review of the research on the effects of transitional justice argues that there was little evidence of the positive impact of trials on peace, and no sustained support for the claim that justice is necessary for peace or that it brings about peace faster.[36]

Case study research, taken seriously, may force advocates to qualify their claims and introduce statements that set parameters designating where and when international trials will be successful. The claim that pursuing criminal trials is absolutely necessary for lasting peace is undermined by a number of significant and well-researched cases. Negotiated settlements in Mozambique and El Salvador were built on the back of amnesties.[37] And factors entirely unrelated to international justice appear to be far more significant in explaining the sustainability of peace. For example, some studies of international justice have argued that military factors, especially one-sided victories, are a greater predictor of peace than any effort to bring war criminals to justice.[38]

Similarly, claims that justice can and should be a central component of democracy promotion may need to be moderated. Successful transitions in Spain, Brazil,

and Portugal were built on a buried past. The potential destabilizing effect of recent efforts in Spain to uncover the abuses of the Franco era was cushioned by a consolidated democratic state with robust institutions capable of ensuring respect for rights and the rule of law. Amnesties in Chile and Argentina helped to contain and buy the support of powerful spoilers who might otherwise have obstructed democratic transitions. Challenges to these amnesties in the past decade have been mounted with the support of democratic systems with strong civilian controls over the military. In each of these cases, if justice for the perpetrators of mass atrocities is now being served, it is the handmaiden of peace and not its usher.

Despite the publicity that international justice continues to receive, the uncertainty that surrounds recent indictments is likely to lead to a protracted debate about the effects of ICC arrest warrants in conflict situations. Mediators and local political elites have continued to use amnesties; and as amnesties for certain categories of crimes have been abandoned, those in power have opted for silence on the question of accountability. Writing justice into peace agreements and negotiations continues to be rare.[39] In Zimbabwe the costs and benefits of an amnesty program are debated internally, but the plausibility for international recognition of such a strategy is low. Progress in Uganda has been stalled in part due to the indictment of LRA leaders. Recent efforts to end conflict in Afghanistan have focused on strategies designed to negotiate and reconcile with the Taliban, though any amnesty will necessarily exclude genocide, crimes against humanity, and war crimes. The continued use of amnesty since the end of the cold war, and more broadly between 1970 and 2007, suggests that justice may still be considered a luxury good by those actively engaged in fighting and ending wars.[40] Indeed, the vast majority of unrestricted amnesties adopted in wars since 1990 were granted in conflicts where international actors had a low presence.[41] This underscores a gap between the solutions proffered by the international community and those sought in states emerging from conflict.

What is at stake when the expectations outlined for international justice are set so high that justice is expected not only to spread the rule of law but also to deter crimes and bring peace? Indicting individual leaders or rebels who are crucial to negotiations may increase pressures to use military force to resolve conflict. The potential of a backlash against international justice is great if, as skeptics fear, evidence emerges that ICC indictments undermine humanitarian efforts, inhibit peace talks, and impede successful implementation of peace accords.[42] The push

toward early judicial intervention may weaken the entire project of international justice.

Rewriting Justice

International justice has moved squarely into situations where conflict is ongoing. If it is to remain in this treacherous space, it will be politically impracticable not to investigate the effects it is having on events on the ground. This requires some real sense of the actual impact of pursuing justice in different types of states, and at different stages of conflict and peace building.

Does a lack of systematic evidence for the proclaimed effects of international justice mean that there are no grounds on which to defend its centrality in state building? Clearly not, and much important research is in process, or is only now being released, but it does raise a red flag. Arguments on behalf of justice will benefit from modesty. Grandiose statements that attribute to international justice a single-handed ability to deliver peace stand a high chance of backfiring. Nor can the caution of skeptics be ignored by those engaged in postconflict reconstruction and state building.[43] The lessons of history are often misread, and not without consequence. There is reason for a healthy dose of skepticism, if only to encourage debate and to displace dogmatism, whether it emanates from skeptics or advocates of international justice.

Indeed, the pursuit of justice as an absolute and nonnegotiable value in international politics may sometimes mean that other important goals are jeopardized. Instead, embracing justice but promoting it in places and at times where it is likely to deliver both more peace and more justice offers a more pragmatic and principled way forward. This also places a premium on systematic and rigorous empirical research, experience, and knowledge as the basis for promoting justice strategies, rather than on the basis of faith. A focus on both principle and outcomes will necessarily recognize that international justice is a limited resource that should be deployed both where it can be realized and where it can have the greatest positive effect on other values we hold in great stead, especially saving lives, ending conflicts, and building stable institutions.

As it is, mediators now face increasing pressure to introduce mechanisms for guaranteeing accountability into peace negotiations, and as such their flexibility has been greatly limited.[44] Initiatives designed to bring accountability for mass atrocities have been integrated into the work of foreign aid and development

agencies and those NGOs whose main goal is monitoring human rights violations, negotiating peace, and rebuilding postconflict states.[45] The claim that these initiatives are necessary for sustained peace and can play a critical role in deterring conflict has been widely articulated, and also broadly embedded as a practice in the mandates and operating guidelines of many international organizations.[46] Even if this new research eventually produces a sustained evidence-based consensus, it is likely to generate debate for a considerable time to come. Evaluating the pursuit of justice during ongoing conflict is crucial. What we may discover is that contrary to the mantra that justice delayed is justice denied, the most promising way to promote justice may be to postpone it.

NOTES

[1] Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003), pp. 69–94.

[2] Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009).

[3] Notably, even key advocacy organizations promoting international justice have issued important reports evaluating it on the basis of its contributions to other values. Several recent reports reflect this trend. See, e.g., most notably, Human Rights Watch, "Selling Justice Short: Why Accountability Matters for Peace," July 7, 2009; and Diane F. Orentlicher, "Shrinking the Space for Denial: The Impact of the ICTY in Serbia," Open Society Justice Initiative, May 2008. There are also numerous academic studies evaluating transitional justice, and the 2010 Special Issue of the *International Journal of Transitional Justice*, "Transitional Justice on Trial: Evaluating Its Impact," will be devoted to evaluations of its impact.

[4] The American Jewish Conference argued for the "moral obligation" to prosecute those who had committed crimes, but also suggested this would serve as "a warning against future attempts to instigate or commit similar crimes." "Statement on Punishment of War Criminals," Submitted by the American Jewish Conference to the Secretary of State, Cordell Hull, National Archives, RG 107, August 25, 1944. See also Arieh Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998).

[5] Annual Report of the ICTY, UN Doc. A/49/342, S/1994/1007, August 29, 1994, cited in Orentlicher, "Shrinking the Space for Denial," p. 15.

[6] *Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, February 10, 2006.

[7] Arguments that advance international justice on the basis that it can bring sustained peace, especially those that emphasize its role in building the rule of law, bear some relationship to arguments made by scholars of the "liberal peace." The emphasis, however, is different: whereas liberal peace scholars emphasize peace between liberal states, arguments that advance international justice as a means of developing the rule of law and peace make more general claims about its effects (they are universal, and not simply limited to a community of liberal states).

[8] Most notably, reports such as Human Rights Watch, "Selling Justice Short," emphasize the effects of justice on the peace process and renewed cycles of violence; by contrast, one of the most influential post–cold war statements about accountability stressed the legal duty to prosecute. See Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100 (June 1991), p. 2537ff.; Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism," *Human Rights Quarterly* 31, no. 3 (August 2009); Oskar N. T. Thomas, James Ron, and Roland Paris, "The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners" (working paper, Centre for International Policy Studies, University of Ottawa, 2008); Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effects of Human Rights Trials," available at www.iilj.org/courses/documents/Sikkink-Kim.HC2009Oct21.pdf, p. 2; Leigh Payne, Tricia Olsen, and Andrew Reiter, *Engaging the Past to Safeguard the Future: Transitional Justice in Comparative Perspective* (Washington, D.C.: United States Institute of Peace Press, forthcoming); and Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (Winter 2003/2004), pp. 5–44.

[9] A third category of rationales that stress the effects of justice draws on the notion of restorative justice. Although many theorists of restorative justice are solely concerned with restoring relations between victims and perpetrators, this type of explanation can also be used to suggest the positive effects of justice on state building. Establishing guilt and innocence may be crucial not as a means to punish perpetrators and assuage victims, but instead as a mechanism designed to reintegrate these two communities and thereby lay a foundation for reconciliation and restoration. International justice is a distant cousin of other nonlegal strategies preferred by those who seek to promote restorative justice. Mechanisms designed to bring victims and perpetrators together through truth telling have been at the center of this approach to justice. See Daniel Philpott, "An Ethic of Political Reconciliation," *Ethics & International Affairs*, vol. 23, no. 4 (Winter 2009), pp. 389–409.

[10] An Italian NGO established in 1993 used this name and became a key advocate of international criminal justice. See www.npwj.org.

[11] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95, no. 1 (2001), pp. 7–31.

[12] Mark Drumbl develops a critique of this assumption that international criminal justice can prevent collective violence in Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

[13] See, e.g., Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal," *Human Rights Quarterly* 20, no. 4 (1998), pp. 737–816; and Richard Ned Lebow, *Coercion, Cooperation, and Ethics in International Relations* (New York: CRC Press, 2007), p. 188.

[14] ICTY Judge Wolfgang Schomburg argued strongly on behalf of the long-term deterrent effect of contemporary tribunals. See Orentlicher, "Shrinking the Space for Denial," p. 94n34.

[15] This claim has underpinned much of the logic behind arguments in support of recent ICC indictments. It also guided the logic of those who argued that the International Criminal Tribunal for the former Yugoslavia would reduce violence and contribute to state building within the former Yugoslavia and especially in Kosovo. Indeed, Human Rights Watch argued in its study "Under Orders: War Crimes in Kosovo" (Human Rights Watch, 2001), that the violence in Kosovo was muted because of the work of the Tribunal.

[16] This argument is made, e.g., in Priscilla Hayner, "Negotiating Justice: Guidelines for Mediators," Centre for Humanitarian Dialogue and International Center for Transitional Justice, February 2009, p.17.

[17] See Kenneth Roth, "Why Indictment Matters"; available at www.hrw.org/en/features/why-indictment-matters (accessed March 15, 2010).

[18] For a critical perspective on this and related issues, see Drumbl, *Atrocity, Punishment, and International Law*.

[19] For contrasting perspectives, see, e.g., Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly* 30, no. 3 (August 2008), pp. 529–60; Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America," *Journal of Peace Research* 44, no. 4 (2007), pp. 427–45; and Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions," *International Studies Quarterly* (forthcoming, 2010).

[20] The effort to build institutions is complicated by the pursuit of justice during conflict, making it seem that the logic of this argument is more naturally conducive to the pursuit of international justice in the aftermath of conflict than during ongoing violence. For an example of this type of argument, see Kathryn Sikkink, "Contra Trial Skepticism," SSRC Blogs, "Making Sense of Sudan," posted July 16, 2008; available at www.ssrc.org/blogs/sudan/2008/07/16/contra-trial-skepticism (accessed March 8, 2009).

[21] Similarly, Beth Simmons argues that treaties foster greater compliance with human rights norms because they serve as a resource for civil society that enables citizens to more easily mobilize and pressure their governments to comply. See Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009).

[22] Remarks by Juan Mendez, "Fifteen Years of International Justice: Assessing Accomplishments, Failures and Missed Opportunities—Lessons Learned," Wilton Park, April 14–15, 2008; available at www.ictj.org/en/news/features/1673.html.

[23] For example, Richard Wilson argued that the language of deterrence is simply adopted to sell tribunals as a policy, not because advocates believe that deterrence works. Remarks on Roundtable on Human Rights, International Studies Association, New Orleans, Louisiana, February 2010.

[24] Orentlicher, "Shrinking the Space for Denial."

[25] Many of the debates, e.g., about the ICC and Sudan, focus on the consequences of the ICC's role there. For a summary of some of these debates, see Alex de Waal, "Sudan and the International Criminal Court: A Guide to the Controversy," July 14, 2008; available at www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy. Another example of the type of debate that has surrounded the ICC is contained in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008).

[26] Gillian Sharp, National Public Radio, May 27, 1999, quoted in "Will Indictment Derail Peace Process?" UN Wire, May 27, 1999; available at www.unwire.org/unwire/19990527/2855_story.asp (accessed February 25, 2010). This publication reviews the range of views that surfaced in response to this controversial indictment.

[27] Statement by Justice Louise Arbour, Prosecutor ICTY, The Hague, May 27, 1999, JL/PIU/404-E; available at www.un.org/icty/pressreal/p404-e.htm (accessed March 1, 2009).

[28] See Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (New York: Oxford University Press, 2008).

[29] "Warrant Issued for Sudan's Leader," BBC, March 4, 2009; available at news.bbc.co.uk/1/hi/7923102.stm; Bashir also argued, "You will find in all the world's countries that militants who take up arms against a government are classified as terrorists. Even those who resist occupation in Iraq, Afghanistan and Palestine are classified today as terrorists, except in Sudan. When some people take up arms, it's the government that's guilty"; quoted in "ICC Prosecutor Makes Case Against Sudan's President," PBS NewsHour, September 8, 2009; available at www.pbs.org/newshour/bb/africa/july-dec09/icc_09-08.html; on bias in favor of the government of Uganda, see Tim Raby, "Advocacy, the International Criminal Court, and the Conflict in Northern Uganda," *Humanitarian Exchange Magazine*, Humanitarian Practice Network, Issue 36 (December 2006).

[30] For one example of the types of claims being made in response to the ICC's issuing of an arrest warrant against President Omar al-Bashir of Sudan, see "Bashir Attacks West Over Warrant," Al Jazeera English, March 5, 2009; available at english.aljazeera.net/news/africa/2009/03/2009351781685923.html (accessed March 6, 2009).

[31] Orentlicher, "Shrinking the Space for Denial."

[32] For an excellent review of much of the research that attempts to evaluate the effects of transitional justice, see Thomas, Ron, and Paris, "The Effects of Transitional Justice Mechanisms." For a recent study of the factors associated with transitional justice, see Laurel E. Fletcher, Harvey M. Weinstein, and Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31, no. 1 (2009), pp. 163–220.

[33] Human Rights Watch, "Selling Justice Short."

[34] Orentlicher, "Shrinking the Space for Denial," p. 16.

[35] Sikkink and Walling, "The Impact of Human Rights Trials in Latin America," pp. 427–45; Kim and Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions"; Tricia Olsen, Leigh Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, D.C.: United States Institute of Peace Press, forthcoming); Tricia Olsen, Leigh Payne, and Andrew G. Reiter, "The Justice Balance: When Transitional Justice Improves Human Rights and Democracy," *Human Rights Quarterly* 32, no. 4 (forthcoming); Helga Malmin Binningsbø, Jon Elster & Scott Gates, "Civil War and Transitional Justice, 1946–2003: A Dataset" (paper presented to the workshop "Transitional Justice in the Settlement of Conflicts and Kidnapping," Bogotá, Colombia, October 18–19, 2005); available at www.svt.ntnu.no/iss/helga.binningsbo/card/Binningsbo_Elster_Gates131005.pdf (accessed January 31, 2010); and Tove Grete Lie, Helga Malmin Binningsbø & Scott Gates, "Post-Conflict Justice and Sustainable Peace" (Post-conflict Transitions Working Paper No. 5, World Bank Policy Research Working Paper 4191, 2007).

[36] Thomas, Ron, and Paris, "The Effects of Transitional Justice Mechanisms." Others note that since 1945, wars that have been followed by sustained peace have more often than not achieved these results in the absence of accountability. Leslie Vinjamuri, "Is Accountability Necessary for Sustained Peace?" (presented at the conference "Pursuing Justice in Ongoing Conflict: Examining the Challenges," Wilton Park, December 2008).

[37] Helena Cobban, *Amnesty After Atrocity: Healing Nations after Genocide and War Crimes* (Boulder, Colo.: Paradigm Publishers, 2007). The absence of any reference to accountability has characterized many wars that were followed by sustained periods of peace. Since 1990, international justice has more often been associated with sustained peace when it was pursued at least two years after a war ended. Vinjamuri, "Is Accountability Necessary?"

[38] Thomas, Ron, and Paris, "The Effects of Transitional Justice Mechanisms."

[39] Leslie Vinjamuri and Aaron Boesenecker, *Peace Agreements and Accountability: Mapping Trends from 1980 to 2006* (Geneva: Centre for Humanitarian Dialogue, 2007).

[40] Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, "Transitional Justice in the World, 1970–2007: Insights from a New Dataset," *Journal of Peace Research* 47, no. 6 (forthcoming). On trends in amnesties, see Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Portland, Ore.: Hart Publishing, 2008). See also Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

[41] Vinjamuri, "Is Accountability Necessary?"

[42] For an example of this type of argument by skeptics, see Andrew Natsios, "A Disaster in the Making," SSRC Blogs, "Making Sense of Sudan"; available at www.ssrc.org/blogs/sudan/2008/07/12/a-disaster-in-the-making (accessed March 8, 2009).

[43] Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30, no. 1 (2008), pp. 95–118.
[44] Vinjamuri and Boesenecker, *Peace Agreements and Accountability*.
[45] See Maria Avello, "European Efforts in Transitional Justice," Fundacion Para Las Relaciones Internacionales Y El Dialogo Exterior (FRIDE) 58 (Working Paper, June 2008). For an example of efforts by NGOs to ensure that development agencies embrace transitional justice, see International Center for Transitional Justice, "Donor Strategies for Transitional Justice: Taking Stock and Moving Forward," October 15–16, 2007; available at www.ictj.org/images/content/8/0/808.pdf (accessed March 6, 2009).
[46] On the normalization of accountability, see Teitel, "Transitional Justice Genealogy."