Law and Politics in Transitional Justice

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Abstract

The tension between law and politics places transitional justice under cross-pressures. The impetus to hold perpetrators legally accountable for atrocities and major rights violations has emerged in part from the expectation that subjecting political behavior to the apolitical judgment of law will exert a civilizing effect. As demands for accountability have risen, politics has played a central role at every step. The past decade has seen a flourishing of research in empirical political science on the relationship between law and politics in postconflict and postauthoritarian justice. This research has tried to explain the turn to individual legal accountability and the development of norms and institutions for accountability. Research has stressed the role of politics in shaping the implementation of trials and other modes of accountability. It has also examined the consequences of these modes of accountability. We address research on each of these topics.

INTRODUCTION

The tension between law and politics places transitional justice under cross-pressures. On one hand, the impetus to hold perpetrators legally accountable for atrocities and major rights violations has emerged in part from the expectation that subjecting political behavior to the apolitical judgment of law will exert a civilizing effect. On the other hand, as demands for accountability have risen, politics has played a central role at every step: in proselytizing for the norm of individual accountability, in stipulating the acts to be defined as criminal, in creating the menu of institutions to administer justice, in deciding whether and how to prosecute any particular case, in weighing considerations of peace and justice in decisions about amnesty or asylum, and in deciding how tightly prosecutors would be controlled by political authorities.

Superficially, this might seem to constitute a debate over the primacy to be accorded to legal principle or to political consequences. Advocacy by activist international lawyers and nongovernmental organizations (NGOs) asserts that individual criminal accountability for atrocities is a moral and legal imperative. Similarly, some social scientists studying the dynamics of norms change in the areas of human rights and postauthoritarian justice have emphasized the logic of appropriateness (Finnemore & Sikkink 1998). In contrast, states have routinely prioritized considerations of power, self-interest, and feasibility in deciding whether to advocate, block, or ignore accountability. Samuel Huntington explained as early as 1991 how the residual power of the remnants of the old regime shapes decisions about legal accountability for authoritarian crimes, reflecting the logic of consequences (Huntington 1991).

Examined more closely, however, those who carry the banner of law and those who tout political expediency are both taking legal principle and political consequences into account. For example, legal advocates and even the International Criminal Court (ICC) itself make claims about the deterrent consequences of accountability.[1] Likewise, seemingly legalistic proponents of strict criminal accountability are often astutely pragmatic in their attempts to increase the autonomous scope for law in the politics of transition. The memoirs of David Scheffer, the head of the US delegation to the Rome Treaty negotiations that created the ICC, recount the expediency of his efforts to neutralize opposition to independent international courts by acceding to the concerns of powerful, recalcitrant actors seeking protection from prosecution for US troops abroad or for Rwandan Tutsi perpetrators (Scheffer 2012). Conversely, seemingly "realistic" advocates for amnesties argue that rights-abusing spoilers must sometimes be neutralized by inducements in order to strengthen the hand of proponents of the rule of law (Snyder & Vinjamuri 2003). In their different ways, both legalistic and political approaches reflect Max Weber's concern to integrate law and politics in carrying out an ethic of responsibility (Gerth & Mills 1946, pp. 78–79, 94–95, 120–21).

RESEARCH IN POLITICAL SCIENCE ON TRANSITIONAL JUSTICE

The past decade has seen a flourishing of research in empirical political science on the relationship between law and politics in postconflict and postauthoritarian justice. This research has tried to explain the turn to individual legal accountability and the development of norms and institutions for accountability. Research has stressed the role of politics in shaping the implementation of trials and other modes of accountability. It has also examined the consequences of these modes of

[1]The 1994 annual report of the International Criminal Tribunal for the former Yugoslavia (ICTY) states that the ICTY is "intended to act as a powerful deterrent to all parties against continued participation in inhuman acts." The Preamble to the Rome Statute states that the ICC would be established "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

accountability for deterring subsequent atrocities, strengthening the rule of law, and promoting democracy in the countries where abuses occurred, as well as strengthening global norms and institutions of accountability in the long term. We address research on each of these topics in turn below.

Work on transitional justice has made a strong start in asking good questions about law and politics, in carrying out detailed case studies based on in-depth field research, and in collecting data in comparable form across cases. This parallels a similar but somewhat more advanced empirical research program in the broader field of human rights, which provides a yardstick with which to measure the transitional justice literature. We find that the results of these efforts remain limited by problems of theory building, stipulation of scope conditions, measurement, and causal inference. To set the stage for our review of this literature, we offer some definitions and make some general observations about theory and methods.

DEFINITIONS, THEORY, AND METHODS

Transitional justice is the set of institutions, policies, and practices designed to deal with atrocities and major politically motivated human rights violations in the process, anticipation, or aftermath of regime change or violent conflict (Teitel 2000, Nettelfield 2010, De Greiff 2012). In this review, we address the empirical literature on transitional justice, mainly in political science. We set aside the literature that is mainly normative or idealist in the deontological sense (Philpott 2012, Transitional Justice Institute 2013).

In distinguishing between law and politics, we characterize law in terms of binding and authoritative rule-making, rule-following, and rule-enforcing behavior. We characterize politics in terms of bargaining behavior based on power (though not only material coercive power) and interest (though not necessarily self-interest). We assume that persuasion and morality may play a role in shaping both legal and political processes, but in its ideal forms, persuasion works differently in each of these realms. Legal and more generally normative persuasion proceeds within the logic of a system of rules. Normative argument in a legal context hinges on the rightness of ground principles, the duly constituted nature of authority, and conformity with due process. Political persuasion proceeds from premises about power, interest, prudence, and strategic interaction in light of expected outcomes. Ethical argument in a political context hinges on the rightness of objectives and proceeds from assumptions about the efficacy of means.

In practice, however, law and politics are not mutually exclusive universes in transitional justice or in any other social sphere; they interact. The question is how. Some voices in debates about transitional justice seem to assume that discourse about norms, including law, constitutes social and political reality by shaping actors, power, interests, institutions, rules of conduct, and outcomes. Explicitly or implicitly, they share the assumptions of social constructivist ontology. This perspective, pushed to its logical limits, implies that justice leads and politics follows (Finnemore & Sikkink 1998, Sikkink 2011). Other authors assume the reverse: that powerful, interest-based coalitions act effectively to get the legal rules and institutions that they want. Explicitly or implicitly, these scholars share the assumptions of realist, Progressive, and Marxist ontologies. In this view, politics leads and justice follows (Huntington 1991, Zalaquett 1995, Snyder & Vinjamuri 2003, Nalepa 2010).

Many scholars of transitional justice, however, assume that both legal and political mechanisms shape its processes and outcomes (Kerr 2004, Simmons 2009, Howse & Teitel 2010, Nettelfield 2010, Ainley 2011). Political strategy tries to develop and deploy law as a tool to achieve its political objectives, which may include the creation of a favorable legal order. Conversely, legal strategy may take into account political feasibility in its effort to strengthen the rule of law and direct its

development. Thus, politics and law may interact simultaneously or sequentially in ways that take different forms and exert different relative primacy under different scope conditions. Developing and testing hypotheses about those interactions and conditions is increasingly the mission of the research program on transitional justice and the related field of human rights.

This research program faces all the usual methodological dilemmas of social science, examples of which we discuss below. Three merit special attention.

First, transitional justice is a field in which legal and moral norms do triple duty as (*a*) normative claims about how people ought to behave, (*b*) discursive elements that may constitute and empower social actors and give meaning to social action, and (*c*) variables in falsifiable empirical hypotheses. It is conceptually challenging for theorists and researchers to avoid slippage across these different roles that norms play (Sikkink 2008, Snyder & Vinjamuri 2012).

Second, the transitional justice field has been slow to grapple with the question of the scope conditions that govern empirical hypotheses, perhaps because of the universalistic claims that are made for norms of accountability, especially for the worst international crimes. This is beginning to change. The broader human rights field faced the same problem for the same reasons, for example, initially holding that the causal mechanisms of the spiral model (such as treaty signing, shaming, and international sanctions) would eventually work in all cases (Risse et al. 1999). More recently, however, advocates of the spiral model and other law-based approaches have focused their rigorous, multi-method research precisely on specifying the conditions under which such mechanisms do and do not work (Simmons 2009, Risse et al. 2013). Transitional justice work on scope conditions is less developed.

Third, most empirical research on transitional justice has been lax in dealing with problems of selection bias and endogeneity in causal inference about the effects of different justice mechanisms. For example, if Huntington's (1991) theory is even partly true, meaningful trials are likely to occur disproportionately in easy cases where spoilers are weak and where peaceful, law-abiding, democratic outcomes are more likely whether there are trials or not. As we review key contributions to the literature, we point out areas where such inference problems need to be addressed.

A JUSTICE CASCADE? THE POLITICS OF NORM CHANGE

Between the Nuremberg trials and the end of the Cold War, attempts to hold individuals legally accountable before international courts for war crimes and other major human rights violations were few and far between. Despite the rise of human rights advocacy in the late 1970s, trials of major political and military figures remained scarce. Although domestic human rights trials increased in the 1980s (Lutz & Sikkink 2001, Sikkink 2011), many of those most responsible for the abuses of authoritarianism managed to avoid justice. Aryeh Neier, a founder of Human Rights Watch, notes that lessons drawn from military pushback in the 1980s against trials of Argentine officers responsible for "disappearances" led to amnesties in Uruguay and South Africa and chilled thoughts of legal action against President Pinochet in Chile (Neier 2012, pp. 260–62). Moreover, at that time, the Geneva Conventions on war crimes were still generally considered relevant only to international wars (Neier 2012, p. 265).

The first post–Cold War calls for trials came in response to Iraqi president Saddam Hussein's invasion of Kuwait and taking of Western hostages (Sikkink 2011, p. 110). But it was the war crimes and "ethnic cleansing" in the states of the former Yugoslavia that horrified elites in Europe and the United States and generated sustained and effective mobilization around the idea of trials, leading to the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague in 1993. Within 18 months, the United Nations Security Council authorized a second ad hoc tribunal, this time for Rwanda. This marked a trend toward the creation of international

institutions that would establish the expectation of individual criminal accountability for war crimes and crimes against humanity (Sikkink 2011).

International relations scholars have produced a small but interesting literature that tries to explain the emergence and diffusion of individual criminal accountability for atrocities and other wrongdoings. Scholars debate the role of possibly complementary factors, including civil society in the global North and South, liberal state identity, and shifts in local and global balances of power, as sources of the new transitional justice strategies.

The earliest accounts stressed the decisive role of domestic power configurations and implicitly rejected the idea of a "justice cascade" (Sikkink 2011). Huntington's (1991) analysis stressed the power of spoilers in shaping the prospects for trials or amnesty in the transitional state. This school of thought has been extended by some subsequent accounts of transitional justice as a strategic bargain that reflects the balance of power in transitions and peace settlements (Snyder & Vinjamuri 2003).

More normative approaches have challenged Huntington's basic insight. Bass (2000) and Sikkink (2011) suggest that national policies on transitional justice reflected an international normative trend toward more individual criminal accountability. Simmons & Danner (2010) argue that governments, especially in transitional states, joined the ICC in order to strengthen this commitment to liberalism, by credibly committing to limit their resort to illegal tactics against enemies. These scholars differ, though, on the extent to which power and self-interest continue to constrain the prospects for individual criminal justice. Bass, for example, argues that even liberal states have been reluctant to support trials until they can secure protection for their own prisoners of war.

Liberal international relations scholars, most notably Ikenberry (2011), have argued that the concept of human rights has played a role in the broader system of liberal multilateralism, which both reflects the hegemonic unipolar power of the United States and its powerful democratic allies and serves to legitimate and sustain it (Ikenberry 2011, pp. 246–48). One might have expected, therefore, that liberal as well as realist international relations scholars would argue that the transitional justice cascade reflected the unipolar moment. The collapse of the Soviet Union accelerated the Third Wave of democratization and arguably gave liberal attitudes and legalistic professional constituencies free rein to revive the dormant individual accountability norms of Nuremberg. Scholarly accounts of the creation of the ad hoc tribunals and the ICC identify the end of the Cold War as creating a window of opportunity for advocates of international justice, initially backed by the United States, to revive the idea of a permanent court (Bass 2000; Schiff 2008; Sikkink 2011, p. 110). But American ambivalence toward the ICC moderated scholarly emphasis on the unipolar power of the United States as the significant factor.

Within the empirical political science literature, debates have revolved around the origins of the accountability norm in the North versus the South, the relative importance of civil society versus international actors, the importance of actors' agency relative to the embedded normative structures in which they act, the residual role of state power and self-interest, and the failure to distinguish hard versus easy cases. The resolution of these debates is impeded by two methodological problems: undertheorized causal mechanisms and inattention to selection problems in causal inference. We describe these problems here and recommend some solutions in the conclusion.

North Versus South

Bass (2000, p. 8) argues that an underlying legalistic rights culture in powerful liberal democracies loaded the dice in favor of mechanisms of individual legal accountability. His story begins with liberal elites in Britain during World War I and finishes with liberal elites in the United States during the war in Bosnia. In contrast, Sikkink (2011) begins with the trials in Greece that followed

the end of military rule. But her explanation for the cascading of domestic human rights trials really begins in Argentina as a response to torture, disappearances, and other atrocities committed by the military junta. Like other prominent accounts of transitional justice (Nino 1998, Teitel 2000, Orentlicher 1991), Sikkink's stresses the Latin American origins of transitional justice. For Sikkink, what matters is that Argentina's innovations with trials and truth commissions spread globally. In Portugal and even Greece, trials had little impact beyond professional circles. Sikkink attributes the difference both to Argentina's position in a regional context dominated by transitions and to civil society activists who were embedded in the consolidating international human rights movement. These activists pressed for accountability in Argentina, but then took their ideas not only to Washington and New York but also to other sites in the Global South in what might be referred to as a South–South norms transfer (Sikkink 2011, pp. 87–88). For example, individual "norms entrepreneurs" from Argentina traveled to South Africa to participate in discussions to devise a transitional justice strategy appropriate to that context (Sikkink 2011, pp. 90–94).

Civil Society Versus International Actors

At a first cut, the transitional justice books of both Bass and Sikkink could be seen as emphasizing the role of domestic civil society and domestic norms in the origins of trials, though in different countries. Civil society, and the public more generally, though, have also not always advocated for progressive change or, more specifically, for individual criminal accountability. Peskin (2008, p. 23) demonstrates not only that civil society was of limited significance in pressing for accountability in Croatia and Serbia but also that domestic opinion supported the government's war effort in each of these places. In the contemporary international environment, the public has come out in favor of amnesty if it creates the prospect for peace. US State Department polls in October 2014 suggested that 66% of Afghans supported amnesty for Taliban insurgents if it created the prospect for peace (New York Times 2015).

Both Bass and Sikkink also see important international mechanisms at work. Bass (2000) emphasizes the role of liberal elites and civil society in powerful liberal states in promoting accountability worldwide. Sikkink's (2011) account of the justice cascade emphasizes the significance of international networks and the norms entrepreneurship of domestic activists in global civil society, starting in Latin America, while also crediting lawyer activists and "likeminded governments," including small as well as large ones (ch. 4, especially p. 98).

Indeed, international institutions and international activism have become increasingly salient and in many cases may have displaced domestic civil society activism as a key source of expectations for accountability. Critics of the legalistic approach to rights and justice use media statistics to substantiate a critique that the Latin American origins of the global rights movement contributed to the diffusion of a counterproductive one-size-fits-all activism concept (Hafner-Burton & Ron 2013). The confluence of international human rights advocacy and the need for a diplomatic solution to the atrocities in Bosnia was essential in the creation of the seminal Yugoslav tribunal (Sieff & Vinjamuri 1999, Bass 2000). States in Africa have come under external pressure from the ICC to deliver accountability. In Libya and Sudan, a Security Council Resolution, not civil society, acted as the catalyst that shaped justice politics (Nouwen 2013). In Kenya, the ICC was arguably as essential as civil society in sustaining pressure for accountability.

Agency, Structure, and Causal Mechanisms

Scholarship that stresses normative change also fails to be clear about causal mechanisms. For Bass (2000), change seems to be a function of the gradual deepening of liberal norms regarding

justice and accountability. Sikkink (2011) argues that the human rights trials that began in the early 1980s in Latin America were a fundamental departure from the trials that took place across Europe in the aftermath of World War II, where only defeated leaders were tried. Even if one accepts this basic claim, the mechanism for this change is unclear.[2] Sikkink's reference to agentic constructivism implicitly draws on her broader theories of norm diffusion, which begin with normative persuasion by principled norms entrepreneurs and proceed through the subsequent stages of institutionalization and widespread internalization of norms (Finnemore & Sikkink 1998). Compelling persuasion by principled agents cannot be the whole story, however, since the justice cascade they promote has not swept the globe unopposed. Kim & Sharman (2014) argue that agency-centered explanations need to be supplemented with adequate consideration of the liberal normative structures in which justice activism is embedded and which make that agency possible. Using very different terminology, Bass (2000) makes a similar point.

Sikkink also plays down the role of liberal global hegemony in *The Justice Cascade*, but in her earlier work on the spiral model of human rights promotion, she and her collaborators emphasized the importance of supplementing persuasion and civil society activism with coercive sanctions by liberal great powers against states that violate rights norms (Risse et al. 1999). Indeed, the desire to leverage coercive power has been a central component of the strategy of international human rights advocates (Hopgood 2013). Notwithstanding Sikkink's useful insights about the role of normatively motivated activists, including those in the Global South, justice processes and outcomes have been heavily shaped by considerations of power politics at the domestic and the international levels (Snyder & Vinjamuri 2003, Bosco 2014).

The Role of Power in Normative Accounts

Liberal ideational accounts of transitional justice strategies make an important contribution to our understanding of the sources of transitional justice norms. That said, it would be a mistake to overcorrect and forget the crucial role of power implicit in these accounts. It seems hard to imagine the shift toward individual legal accountability gaining traction in a counterfactual world in which the Soviet Union remained a powerful peer competitor of the United States. In that sense, Bass's (2000) interpretation implies that the trajectory of the trend toward individualized criminal justice reflected a mix of law and politics: geopolitical power trends, legal and moral attitudes embedded in liberal democracies and mobilized by the human rights NGOs based there, and tactical maneuvering by states to adapt this trend to their needs of the moment. In the latter vein, many scholars and commentators have argued that the ICTY, far from being a tool to impose unipolar hegemony, was more a fig leaf designed to cover the lack of will for a more effective form of preventive intervention and that it provided a diplomatic solution to the problem of how to respond to atrocities in the former Yugoslavia (Bass 2000, p. 207). American support for the Yugoslav tribunal and especially its investigations of official Serb war crimes only really increased once the balance of power in the former Yugoslavia shifted and Serbs began to lose ground on the battlefield. Moreover, the decision of the George W. Bush administration to "unsign" the Rome Treaty establishing the ICC and to negotiate Article 98 agreements to insure that US leaders and soldiers would not be in its dock demonstrated the ability of powerful states to set limits on international institutions. Bosco (2014) argues that the ICC has continued to accommodate American power throughout its decade or so of activity.

[2] In fact, as was true at Nuremberg, individual accountability in South America consisted primarily of trials of elites who had lost power to new regimes. Trials in South America drew primarily on domestic rather than international law.

Hard Versus Easy Cases

Transitional justice scholarship has made little effort to differentiate hard from easy cases, an underappreciated distinction that is essential to account for variation in the type of transitional justice strategies adopted or in the success of these strategies. Some might think that the justice cascade succeeds mainly in easy cases, where democracy has begun to take root, where independent legal institutions are fairly well developed, where civil society operates rather freely, where sectarian identities are weak, and where the political, legal, and institutional reach of advanced liberal democracies supports the cascade. Even when tribunals have been created prior to these conditions, their success has often been delayed until states begin to liberalize (Peskin 2008) or contingent on a coercive strategy of international intervention to shore up international justice (Vinjamuri 2010, Rodman 2014). Indeed, the broader research on the scope conditions for the successful promotion of human rights suggests that many of these factors are often decisive (Simmons 2009, Risse et al. 2013). As Huntington argued in 1991, the balance of power between perpetrators and reformers shaped and constrained transitional justice in the 1980s. Trials in Argentina were made possible by the collapse of the military regime, and they were curtailed in the face of a military backlash against criminal accountability (Nino 1998). No trials were held in Brazil, and none were held in Chile until decades after the transition. In both cases, the military remained powerful and effectively checked the enthusiasm of human rights activists for stronger punitive measures. Even in Sikkink's poster cases, politics has regulated the flow of the justice cascade.

Against this view, *The Justice Cascade* (Sikkink 2011) rejects any notion of scope conditions that limit the prevalence (or impact) of human rights trials today, although the data on human rights trials suggest that there are strong regional patterns. Sikkink (2011, p. 83) argues that ruptured transitions were an important factor in paving the way for trials in the 1980s, but by the 1990s, this was no longer a precondition. Kim & Sikkink (2010) offer statistical evidence that the justice cascade is not just a mop-up operation coming well after democratization has succeeded and violence has subsided, although a number of their centerpiece Latin American cases, such as Argentina, do have those characteristics.

CREATING A MENU OF INSTITUTIONS OF ACCOUNTABILITY

Over the past quarter century, the array of accountability options for states undergoing transitions out of civil war or autocracy has expanded, evolved, and become institutionalized. Before the 1990s, states relied on a strategy of domestic trials, summary "justice," amnesties, or doing nothing. Over the course of the 1990s, the range of options expanded to include ad hoc international tribunals, mixed international-domestic courts, universal jurisdiction of any state's domestic courts over atrocity crimes, various forms of truth commission, and finally a permanent international atrocities court, the ICC.

On its surface, this looks like a trend toward the judicialization of accountability, and in some respects it is. As demands for accountability for atrocities and major human rights abuses have gathered momentum, international organizations and NGOs have promoted the legalization and bureaucratization of transitional justice, issuing guidelines and creating standards that outline best practices (Teitel 2014). South Africa's unique formulation explicitly linked accountability to the possibility of amnesty. Truth commissions have gradually abandoned formal practices, such as the South African amnesty, that contravene international legal standards. However, this trend toward formal justice proceedings involved politics at every step. The decision to create new institutional strategies for accountability has reflected political choices by states and concerted advocacy by activists.

New judicial options have often spurred political resistance that created countertrends toward dejudicialization. Powerful actors have sought protection from prosecution, and states have sought to retain their sovereign prerogatives, increasing the prevalence of amnesties, discrediting universal jurisdiction, and circumscribing the latitude of the ICC. In this section, we look at the interplay of politics and law in the creation and evolution of this menu of options, and in the following section we discuss the selections that states and other actors make from the menu at a given time.

Rough Justice

Informal accountability measures, such as "rough" or summary justice, have a well-established pedigree in international relations. Goemans's (2000) research on war termination shows that dictators who are overthrown after losing wars are often summarily executed, giving them an incentive to fight to the bitter end. Churchill thought it would be best simply to shoot Nazi leaders without due process (Bass 2000). The fallen Romanian Communist dictator Nicolae Ceauescu was afforded a very brief kangaroo trial before his execution. Such solutions retain some popular appeal. When Egyptian dictator Hosni Mubarak was convicted of corruption but acquitted of murder after a scandalously shoddy trial on both counts, masses congregated in Tahrir Square to denounce the light sentence rather than the travesty of due process.

Domestic Trials

In Huntington's (1991) seminal analysis, the main alternative to rough justice or doing nothing was domestic trials. In his account, trials could be either effective or politically destabilizing depending on the residual power of the defendants. The well-conducted, politically successful trials that immediately followed the utter collapse of the Greek military junta stand in contrast to the politically divisive trials that followed the withdrawal from power of the still contentious Argentine military.

Domestic trials have continued to be a source of great controversy because they can both polarize politically and disappoint legally. Domestic trials in Bangladesh provoked a backlash by opposition party supporters who saw trials as an attempt by the government to smear the Islamist party by indicting several of its top leaders. Rwanda's *gacaca* trials were criticized by international human rights NGOs for failing to meet international standards of fairness and by researchers who claimed the trials were a "state-imposed veneer of reconciliation" (Thomson & Nagy 2010, p. 13).

International Trials

The precedent of international trials based on a military victory, as at Nuremberg and Tokyo, fell into abeyance as a strategy for dealing with mass atrocities until the wars in the former Yugoslavia. In the summer of 1992, in the midst of an ongoing war, journalists and human rights advocates revealed the gruesome details of abuse at detention camps in Bosnia. A transnational campaign quickly mobilized to press for an international tribunal. The rationale of advocates was that a lasting peace was not possible without justice. The ad hoc tribunal created by the UN Security Council represented a pragmatic compromise for legal advocates who insisted that justice should have autonomy from the politics of the Security Council and preferred a treaty-based tribunal. The following year, the government of Rwanda asked that the Security Council authorize a similar tribunal to investigate the crimes of the Rwandan genocide. The Security Council passed a Resolution authorizing this, but the government of Rwanda voted against the Resolution as a nonpermanent member of the Security Council, in part because of a disagreement over the

temporal jurisdiction of the tribunal. The French insisted that a jurisdiction limited to a few months in 1994 was sufficient, but the postgenocide government in Rwanda had lobbied for the tribunal's jurisdiction to begin in 1990 so that responsibility for the planning of the genocide could be given sufficient consideration.

Mixed Tribunals

A second style of ad hoc tribunal followed, the "mixed" tribunals that integrated both international and domestic judges and legal rules. Unlike earlier international tribunals, these were located in the country where the abuses occurred (Sriram 2005). Mixed tribunals were the product of bilateral agreements negotiated between the government where atrocities occurred and the UN Secretary-General. These tribunals were innovated for Sierra Leone and for Cambodia in response to political and practical constraints (Frulli 2000). In Cambodia's case, Hun Sen's government insisted on limiting the scope of the trials and inserting a majority of domestic judges and lawyers into the three tiers—the Trial Court, the Appeal Court, and the Supreme Court—that together formed the Extraordinary Chambers (Linton 2001). Purely international tribunals were criticized for imposing alien justice that was poorly understood by the citizens of the country where the abuses had taken place and contributed little to the strengthening of the rule of law (Alvarez 1998). The experimentation with mixed ad hoc tribunals was short-lived, however, in part because this format was overtaken by pressure to create a standing court. The Sierra Leone court was also disappointing as a vehicle for inculcating a rule-of-law consciousness while the Cambodian court was seen as politicized by the government's aim of limiting the scope of accountability.

International Criminal Court

The creation of a standing international criminal court in 2002 was a game-changer for international justice (Schiff 2008, Busby 2010). First, the ICC's existence enabled many international lawyers to claim that formal amnesties for international crimes were illegal, although some international lawyers have challenged this argument (Freeman 2009, Freeman & Pensky 2012). Second, the ICC's complementarity clause also signaled a game-changing aspiration to undo the primacy that had been granted to ad hoc tribunals and strengthen the sovereignty of states and their national courts (Struett 2008, Nouwen 2013). The ICC effectively sidelined any serious potential for future ad hoc tribunals. The Rome Statute created a set of centralized rules and a template that would structure further discussions of any rules that were still undefined. All states that were members of the Court were subject to these rules as was any situation that the Security Council referred to the Court. This referral authority, together with the power to defer investigations or trials for 12 months in situations where pursuing justice might put peace and security at risk, strengthened the link between the interests of the five veto-wielding permanent members of the Security Council and international criminal justice, as did the Court's lack of any independent capacity to enforce its mandate.

In principle, the ICC's complementarity clause, prioritizing action by states that are willing and able to hold their own trials, strengthened the position of national courts on the menu of justice options. However, Nouwen (2013) argues that in practice the ICC has itself acted to undermine the complementarity principle by discouraging domestic proceedings in cases where states have been willing to cooperate with the ICC, in part to insure an adequate flow of cases to the ICC in its early years. The ICC has likewise raised the bar for evading international justice through sham trials, at least for states that come under the Court's jurisdiction. By 2015, the ICC had approved only one challenge to the admissibility of a case before the ICC, thereby permitting

the possibility for a domestic trial to proceed. This was for Abdullah al-Senussi, Libya's former intelligence chief. Perhaps unwittingly, complementarity at the ICC may have served to recreate a North–South divide reminiscent of earlier power struggles in international politics by loading the dice in favor of a court that would investigate crimes only in failed or weak states (Krasner 1985, Vinjamuri 2010).

Quasi-Compliance

In the absence of a referral, and when trials of any kind seem inexpedient, the informal counterpart to rough justice has simply been to do nothing. But doing nothing, a historical norm, has become more contentious and taken on new forms in recent decades. As a result, states now have developed a range of options between doing nothing and full-blown trials. These provide varying degrees of compliance with international expectations for accountability, including options that are law-governed but do not include trials. The ICC's complementarity rule calls for deference to credible domestic accountability processes, which has had the unintended effect of encouraging "quasi-compliance" (Lamont 2010, Cronin-Furman 2015) through domestic processes that do just enough to hold international critics at bay while keeping down the domestic political and administrative costs of justice. Administrative procedures such as lustration, which is designed to remove officials who participated in abusive practices of the former regime, and informal justice procedures based in part on traditional local justice practices, such as *gacaca* in Rwanda, may also be motivated by a desire to appease domestic demand for accountability. The motives for these measures are complex and include the desire to politically neutralize opponents of the new regime, to administratively manage the cases of large numbers of minor perpetrations, and to exert more political control than might be possible in a full-fledged judicial setting (Waldorf 2006). Some scholars have argued that although some transitional justice institutions may be the product of suspect motives, like the Rwandan *gacaca* trials, these can still have positive effects on reconciliation (Clark 2010a).

Truth Commissions

Even less trial-like is the truth commission. The many variations of this model are tailored to specific circumstances, but its basic features are as follows: It is an officially organized commission that gathers evidence about broad historical patterns of rights violations, not just a single event; often receives testimony from victims and sometimes from perpetrators; and publishes a report with recommendations for measures to promote reform, restitution, or reconciliation (Chapman & Ball 2001, Freeman 2006, Hayner 2010, Wiebelhaus-Brahm 2010). In Argentina, a truth commission was a prelude to trials. In Sierra Leone, a truth commission initially was created alongside an amnesty as part of a peace agreement. Later, after a successive round of peacemaking, a mixed tribunal was added. The coexistence of two distinct accountability mechanisms has been the source of ongoing negotiation. Elsewhere, truth commissions have sometimes been adopted as an alternative to criminal justice. Most prominent among these has been the South African Truth and Reconciliation Commission (TRC), which was a site for contestation among competing visions of reconciliation but not justice. Originally the TRC was intended to provide an arena for contestation over the past, but eventually this gave way to a more narrow focus on catharsis and forgiveness (Leebaw 2011). Even where truth commissions have not formally offered a bargain that evades trials, they have sometimes simply failed to generate support for criminal accountability, as was the case in Liberia. The fact that numerous truth commissions have not led to trials raises a red flag about the compatibility of truth and justice, and challenges the claim in *The Justice Cascade* of convergence on a universal norm of individual criminal accountability.

Amnesty

A final alternative to trials is the granting of amnesty for crimes. The popularity of this approach was sustained through the past four decades, even increasing in the 1990s, but it also came under intense international pressure. In 2009, the UN issued formal guidelines on the use of amnesties (OHCHR 2009, Mallinder 2012), but some leading international legal scholars contested the dominant assumption that amnesties were illegal for international crimes (Freeman 2009). The Belfast Guidelines attempted to delineate ideal practices for the use of conditional amnesty. Scholars likewise delineated the types of possible amnesties, noting that amnesties may be unconditional or conditional on stepping down from office, surrendering weapons, demobilizing a fighting force, stopping abusive practices, or testifying before a truth commission (Mallinder 2008, Freeman 2009, Transitional Justice Institute 2013).

This broad menu of transitional justice options arose in response to a set of nearly universal legal and political motives, the intensity of which might vary by circumstances. These include meting out vengeance, eliminating or discrediting a dangerous political opponent, minimizing gratuitous frictions once the issue of power is settled, recruiting former foes into a new support coalition, providing a vivid model of how to settle disputes and assign accountability through lawful processes, and creating a historical narrative to learn from and to legitimate new directions.

Some options have gained prominence in resistance to the increasing prevalence of international criminal justice. For example, demands for individual legal accountability have generated insistence on formal amnesty, not just informal inaction, in places such as Afghanistan and Yemen. Likewise, criticism of imposed international justice spurred the development of mixed tribunals and guidelines for complementarity. Some options, such as truth commissions that prominently featured opportunities for victims to tell their story in public, arose to appease pressure groups in ways that did not threaten vested interests too severely. Finally, various options—truth commissions, lustration, quasi-compliant domestic or mixed tribunals—proved attractive in part because they could be tailored to situations of political stalemate where some powerful actors demanded a form of accountability but other powerful actors sought to limit its consequences.

In short, the menu as a whole reflects the dialectic between the attractions of law and the necessities of politics.

CHOOSING FROM THE MENU

Just as the evolving menu of transitional justice options reflects the interplay of law and politics, choices from that menu in any given case reflect the cross-pressures of legal expectations and political incentives.

Teitel (2014) identifies two trends that have circumscribed the pragmatism of earlier efforts at transitional justice. The first is toward legalization, especially a reliance on international law. The second trend is toward bureaucratization, which is an effort to spread "best practices" engineered by stakeholders who are invested in transitional justice solutions in general, but do not have a direct political stake in the specific conflicts they are addressing. Despite the normative and institutional shifts that Sikkink, Teitel, and other transitional justice scholars have identified, transitional states continue to adopt a wide range of strategies for dealing with accountability for past atrocities. The strategies they adopt have been adapted and implemented to reflect dominant political interests, often masquerading as legal norm or best practice.

Recent scholarship has begun to develop an array of theoretical propositions of the conditions under which some strategies are selected and others cast aside. States' choices of truth commissions,

trials, lustration, amnesty, and variations on these themes have been driven by competing agendas, reflecting a different balance of political interest and legal aspiration.

Many scholars continue to stress the dominant influence of political power and political interest in determining selections from the justice menu. Peskin (2008) argues that a state's role in armed conflict is a better predictor of state support for tribunals than whether it is liberal or not. The postgenocide Tutsi government sought international trials with the expectation that high-level Hutu perpetrators who had left Rwanda after the genocide would be prosecuted.

Building on Huntington's analysis of the role of power and transition, Nalepa (2010) provides a strategic account of the use of amnesty laws in post-Communist Eastern Europe. She argues that leaders in Eastern Europe with skeletons in their own closets are more likely to opt for lustration, whereas leaders without secrets to hide have supported full-blown trials. The credibility of the opposition's commitment to amnesty once they take office depends on whether they acted as informants under the Communist regime. In those cases where opposition parties are voted into office and fear exposure for their prior role as informants, a strategy of amnesty will be most secure.

Recent studies demonstrate that states continue to enact amnesty laws. In the 1990s, before the legality of amnesties had been challenged, their use increased, as did the incidence of civil wars, many of which were resolved through negotiated settlements. Between 1980 and 2006, amnesties were more common than either trials or truth commissions in peace agreements (Vinjamuri & Boesenecker 2007, Mallinder 2012). After 2007 the enactment of amnesty laws declined in terms of absolute numbers (Mallinder 2012), but this may reflect a corresponding decline in that period of postconflict and postauthoritarian transitions creating occasions for amnesties.

Earlier studies suggested that amnesties would be more common in cases where spoilers are strong and power more evenly distributed. In these cases, negotiated settlements often depend on the use of amnesty as a necessary first step to marginalize spoilers and deliver a peace settlement (Snyder & Vinjamuri 2003). Amnesties continue to be adopted, especially in conflict cases. Over the past 30 years, almost half of all amnesty laws were related to conflicts, many of them ongoing (Mallinder 2012).

The heightened scrutiny of amnesties, along with the intense demand for accountability, has meant that states where perpetrators remain powerful have incentives to shift to other methods to protect their autonomy and escape full compliance, or at a minimum to limit amnesties to non-international crimes. In 2012, Libya adopted an amnesty. Later it responded to international pressure by adopting legislation to qualify that this amnesty did not apply to international crimes but without any credible plans to hold trials for these crimes.

For very powerful states such as Russia, or states on which outsiders have little useable leverage, doing nothing is a likely choice. States that can construct some partially exculpatory story based on self-defense or political legitimation based on democracy, such as Sri Lanka, Israel, or the United States, can tough out a strategy of quasi-compliance based on ineffectual truth commissions or inquests. States that lack legal capacity, such as Libya or Iraq, have often been able to fend off pressures for rigorous accountability with bureaucratically slow, kangaroo, or traditional justice measures, as needed to fit the political circumstances.

IMPLEMENTING JUSTICE

If the 1990s were the heyday of optimism among advocates of creating transitional justice institutions, this exuberance may have peaked not long after the creation of the ICC in 2002. The past decade has witnessed a backlash against the laws and institutions established to embed an accountability norm. Reflecting this change, an empirical literature has developed to assess the implementation of transitional justice, especially the successes and setbacks of the newly

established courts. Two related concerns have been especially prominent. First, scholars and practitioners have acknowledged the inherent institutional weakness of international tribunals and evaluated the strategies that the tribunals use to overcome these limitations and solicit state cooperation. Second, transitional justice scholarship has investigated how politics shapes the implementation of transitional justice strategies, highlighting the lack of autonomy of both the law and its institutional manifestations, especially but not only in authoritarian or semiauthoritarian states.

In the years after they were set up, both the Yugoslav and Rwandan tribunals were plagued by the difficulties of securing the cooperation necessary to execute their mandates. The Yugoslav tribunal was created during the war in Bosnia, more than two years prior to the signing of the Dayton Peace Accords. Not surprisingly, neither the international community nor any leaders in the Balkan States displayed much interest in shoring up the institutional weaknesses of the ICTY during this time. After four years, the ICTY had convicted only one low-level suspect. Arrest warrants issued in 1995 for Bosnian Serb political leader Radovan Karadžić and his military counterpart Ratko Mladić remained unenforced until Karadžić's arrest in 2008. Three years later, Mladić was sent to The Hague.

When conflicts are ongoing, the decision even by liberal states about whether to support tribunals has reflected broader political calculations. When trials threaten to undermine the credibility and viability of leaders who are crucial to peace, support for trials has rarely been forthcoming. The decision taken by the United States to back the ICTY indictments of Karadžić and Mladić was contingent on its choice of a negotiating strategy that placed Yugoslav president Slobodan Miloŝević, rather than Bosnian Serb leaders, at the center of peace talks to end the war in Bosnia.

In the face of institutional weakness, many scholars stress that the agency of tribunal prosecutors is highly consequential. Prosecutorial strategies have worked to solicit cooperation both from target states and from the international community (Peskin 2008). At the Yugoslav tribunal, prosecutors solicited cooperation through adversarial and conciliatory strategies, such as shaming and negotiation, and turned to tactics such as the use of sealed indictments to manage especially controversial cases (Peskin 2008, p. 237). Cooperation with states that harbored suspected war criminals was often driven by coercion rather than by social expectations or shared norms. The threat to withhold foreign aid and the promise to engage in talks about membership in the European Union were powerful motivators that encouraged Serbia and Croatia to cooperate with the tribunal (Subotic 2009). In Serbia, there was an absence of leadership that advocated supporting the tribunal on moral grounds (Orentlicher 2008).

Under the right circumstances, political pressure has been central to overcoming enforcement problems. The timing of pressure relative to political transition is one important factor driving outcomes. Peskin's (2008) study of the ICTY has aptly demonstrated that international pressure on Serbia and Croatia to compel arrests was critical, but its success came several years after the creation of the Yugoslav tribunal, in the 2000s, only after Serbia and Croatia began to transition away from authoritarianism. External pressure from the international community was crucial in ensuring cooperation by governments in Serbia and Croatia, as well as Rwanda. But linking cooperation with international tribunals to material goods has also had perverse and unintended consequences. Governments have sent suspects to The Hague in exchange for EU talks, but avoided any real reckoning with the past, and nationalist ideologies have remained strong (Subotic 2009).

The ICC has faced even greater barriers in its drive to enforce its mandate, relying on prosecutorial efforts to solicit cooperation from states that have not always been readily forthcoming. By its tenth anniversary, only one trial, that of warlord Thomas Lubanga Dyilo of the Democratic Republic of Congo (DRC), was complete. Several high-profile arrest warrants remained unenforced. In some cases, the perception that the ICC had overreached generated a backlash.

President Omar al-Bashir of Sudan responded to the ICC's arrest warrant by expelling several leading humanitarian relief agencies working in the country. This had surprisingly little effect on his domestic popularity. In Kenya, Uhuru Kenyatta and William Ruto joined forces after the ICC issued arrest warrants against them and completed a successful electoral campaign for President and Vice President of Kenya on a platform of ethno-nationalist opposition to the court's neo-imperialism. ICC witnesses were killed.

Bosco's (2014) *Rough Justice* describes the strategy pursued by Luis Moreno Ocampo, the first Chief Prosecutor of the ICC, to solicit and sustain the cooperation of the ICC's most powerful state backers. Rather than maximizing the pursuit of justice, the Prosecutor sought to accommodate the interests of the most powerful states. Because the Court depended on the support of the United States and other great powers, it was careful not to alienate them. This meant that the ICC was more cautious than it would have been if it had had stronger independent enforcement powers.

The ICC's dependence on state cooperation has also created the possibility for states to instrumentalize the Court, enlisting it to designate which parties are legitimate and which are not (Rodman 2014). In Uganda, the government effectively used the ICC intervention to delegitimate rebel groups and thereby bolster its own legitimacy (Branch 2007, Clark 2010b). By contrast, in Sudan, leaders of Darfuri rebel groups welcomed the ICC's intervention and capitalized on it to delegitimate the government (Nouwen & Werner 2010).

The role of great powers in limiting international justice has been considerable when such states perceive a threat to their interests (Ralph 2007). During the Bush administration, the United States went to great lengths to negotiate Article 98 agreements with states that were members of the ICC, confirming that military aid would be withdrawn unless these states promised not to send any US soldiers to the ICC. Despite the use of coercion to compel compliance, states with a high level of domestic rule of law refused to sign, citing the moral importance of their commitment to the ICC (Kelley 2007). The doctrine of universal jurisdiction for war crimes and crimes against humanity, championed in the 1990s by states such as Belgium and Spain, also came under pressure from the United States when threats to prosecute US officials traveling abroad emerged. The United States threatened to retaliate by moving NATO out of Belgium, and the Belgians promptly responded by taking measures that would limit universal jurisdiction to individuals who were citizens of Belgium or who committed crimes in its territory.

The Security Council's ability to refer cases to the ICC creates an institutionalized opportunity for three great powers that have so far not joined the ICC—China, Russia, and the United States—to legitimately and legally obstruct international justice by exercising their veto. The United States has so far not had to exercise this veto, acting behind the scenes instead to delay a Resolution coming to a vote until it has come on board. For more than one year after European leaders drafted a memo proposing that Syria be referred to the ICC, the United States withheld its support. Perhaps unsurprisingly, authoritarian states have been more vocal in their obstruction of the ICC. At the Security Council, Russia and China vetoed a proposed Resolution to refer Syria to the Court. Perhaps surprisingly, this was the first time that a Resolution seeking to refer a state to the ICC had been vetoed. Failing to back referrals is another strategy of resisting the insertion of justice into complex conflicts.

The problem of implementing justice within states may be even greater. Fletcher et al.'s (2009) study of seven country cases finds that economic development, the history of the rule of law, and democracy are critical to the ability of countries to implement transitional justice. And indeed, studies of transitional justice implementation *within* semiauthoritarian states have emphasized the perverse uses to which transitional justice is put. Authoritarian elites have used courts to cement their rule either by constructing a historical narrative that reinforces their own legitimacy

or by directly neutralizing their opponents. Although this may sometimes have the advantage of strengthening legitimate rulers, it may also be used to ensure the impunity of dominant groups and reinforce power hierarchies regardless of their legitimacy (Thomson 2011). In Serbia, politicians responded to the coercion of international norms entrepreneurs and international organizations that demanded accountability by hijacking transitional justice and deploying it to delegitimate political enemies (Subotic 2009).

Scholars debate whether the *gacaca* courts in Rwanda represent an effort to consolidate a Tutsi victory or an alternative mechanism emphasizing reconciliation as a strategy for dealing with the past. Faced with more than 100,000 Rwandans in prison and a decimated judicial system, Rwanda's postgenocide president Paul Kagame turned away from his early efforts to hold domestic trials. Instead, he revived the traditional *gacaca* courts to deal with perpetrators of atrocities that took place during the 1994 genocide. Despite the practical reasons for adopting an alternative justice strategy, scholars have identified this as a form of victor's justice to control the genocide narrative in Rwanda and have drawn attention to Kagame's active obstruction of any consideration of Tutsi crimes against Hutus (Waldorf 2006). Despite the strong critique by many scholars of transitional justice in weak or authoritarian states, some scholars suggest more positive outcomes. Lake (2014) argues that state fragility in the DRC has created openings for transnational and domestic actors to exert influence over justice and contribute to progressive judicial decisions. Clark (2010a) argues that in Rwanda, the very unconventionality of the *gacaca* trials created space for new types of participation, and its openness and flexibility created an effective forum for reconciliation.

Proponents of reconciliation often claim that apologies or truth commissions are an indispensable step in healing relations between the communities of the victims and the perpetrators. Lind (2008) finds instead that in relations between historical adversaries, acknowledgment is crucial, but apology can do more harm than good and generate a nationalist backlash in the apologizing state. Among truth commissions, the South African TRC, more than any other, has generated intense scholarly debate with very little confirmation of the claims made by proponents of truth commissions. Wilson (2001) has argued that the law was mobilized to serve the interest of the postapartheid state in securing political legitimacy but that it failed to meet the needs of local communities. Leebaw's (2011) detailed study shows how the TRC's original hope of providing a forum for contestation about past histories succumbed to a more singular narrative of reconciliation with religious overtones.

Sometimes hearing the truth but then seeing the perpetrators go unpunished increases bitterness, reopens wounds, and causes backlash against the perpetrators and the truth process. Surveys have reported such adverse reactions to the South African TRC (Gibson & Gouws 1999). Gibson (2004) finds that white South Africans who evaluate the work of the TRC highly have been more likely to reconcile with black South Africans, but for blacks the truth telling was no revelation and did not have this effect. Even for the whites, though, Gibson's method is unable to distinguish whether the truth changed their minds or whether they had a prior preference for reconciliation and therefore tended to view the TRC positively.

Implementation of course may affect attitudes toward transitional justice. Backer's (2010) careful survey research in South Africa showed that popular support for amnesty dropped as disillusionment with the process of postapartheid transition increased. In Burundi, attitudes toward transitional justice varied along regional and ethnic lines. Residents of war-affected areas were less interested in trials than those in areas that were not affected by war. Gains in security suppressed demand for transitional justice. As groups perceived themselves to be gaining institutional power, their willingness to forgo compensation for past losses decreased (Samii 2013). These findings suggested a potential gap between public attitudes and the kind of civil society activism identified by Sikkink as central to the justice cascade.

Even traditional justice has not escaped critique. Allen (2006), for example, demystifies the romanticism that has surrounded the Mato Oput rituals in Northern Uganda. According to Allen, many Ugandans preferred the ICC. Baines (2007) argues that local community officials in Uganda saw the amnesty program as essential to peace and opposed local justice because they feared that the demand for compensation which accompanied this would inhibit rebels from coming in from the bush.

If reconciliation and traditional justice run up against roadblocks when they are implemented locally, has ICC justice fared better? In fact, ICC justice has been heavily critiqued for its selectivity and also for its proximity to the interests of powerful states (Bosco 2014, Tiemessen 2014). In the DRC and Uganda, researchers have argued that then Chief Prosecutor Luis Moreno Ocampo solicited referrals and that his success was secured by an implicit agreement that government crimes would not be investigated (Clark 2010b). The early phases of justice, preinvestigation and predictment, may equally be shaped by politics.

Although such critiques often see politics as tainting the purity of the legal process, other observers have thought that the threat of international legal accountability might provide leverage to bargain for domestic accountability, legal reforms, and an end to violations and thus serve the interests of peace and justice simultaneously. These aspirations have been abundant throughout the peace process in Colombia. Existing legal rules, however, make bargaining with justice difficult (Ocampo 2013, Mendeloff 2014). Once the Prosecutor has opened a preliminary investigation, there is little scope for the equivalent of plea bargaining. The Security Council can defer action on a case if it determines that action would threaten international peace and security. But in principle, the Prosecutor can only make decisions on the basis of jurisdiction, admissibility (which in turn is based on the gravity of crimes and complementarity), and the interests of justice. Despite ongoing ambiguity and heated debate, the Office of the Prosecutor has so far shunned calls to integrate a concern for peace into its definition of the interests of justice. In cases referred by the Security Council, a Resolution may establish the Court's jurisdiction in ways that inadvertently minimize the scope for bargaining. For example, UN Security Council Resolution 1970 on the Libya case listed a series of targeted sanctions against individuals in conjunction with a referral to the ICC, each of these sanctions contingent on its target's decision to use or abandon violence. But the Resolution established jurisdiction over crimes that had already taken place, leaving the Prosecutor little ability to guarantee individuals on the ground that he would tailor his legal decisions to subsequent improvements in compliance. Once a preliminary investigation has formally been announced, the rules of the ICC diminish this latitude. Bargaining under the shadow of international justice holds more promise before a referral or an indictment, for example, at the early stages of investigation. This was the hope that led UN Secretary-General Kofi Annan in 2008 to mediate in the wake of Kenya's electoral violence, wielding the implied threat of an ICC intervention if Kenyans' own efforts at reform and accountability were inadequate. However, this strategy does not guarantee success. The ICC threat failed to induce Kenya's politicians to mount an effective domestic accountability process or to undertake significant legal or political reforms, and the ICC indictment went forward, although subsequent electoral violence declined dramatically. The Kenyans' ire was, for a time, directed at the ICC rather than at each other. During the period that he was under an ICC arrest warrant, President Kenyatta sought to reassert the principle of immunity of heads of state and to obstruct ICC investigations in Kenya.

CONCLUSION: ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE

In the last ten years, transitional justice scholarship has moved rapidly to study the impact of trials and other accountability mechanisms on outcomes such as peace and human rights, drawing

increasingly on quantitative as well as qualitative methods. Although advocates have become more cautious in the past few years, de-emphasizing the goal of deterrence, scholars continue to consider this an important impact to be studied. We conclude by offering thoughts on how this research could be advanced.

In 2004, prominent scholars noted that the field of transitional justice was dominated by speculation, assertions and hypotheses rather than systematic empirical tests (Mendeloff 2004, Stover & Weinstein 2004). Six years later, an often-cited review essay argued that evidence from research on transitional justice impact is still too preliminary to offer conclusive results (Thoms et al. 2010). We especially agree with its call for studies that evaluate the conditions under which specific mechanisms can deliver desired results. We raise five areas for improvement to move this research agenda closer to its goal.

First, it is important to take political context into account in assessing the causes and consequences of justice efforts. Evaluative studies often ask generic questions about whether trials tend on average to deter subsequent atrocities or promote rule of law, or how trials compare to amnesties in this regard (Olsen et al. 2010a). Posing the question this way is rarely productive because the effectiveness of trials, amnesties, or other justice mechanisms is highly likely to be conditional on political circumstances. Moreover, these conditions include not only gross ones, such as whether it is peacetime or wartime or how democratic the country is, but also fine-grained conditions that may defy easily comparable quantitative measurement, such as the political strength of perpetrators or the credibility of threats to prosecute or promises to guarantee an amnesty. Methodologically, this means measuring and testing the factors that produce these conditional effects. It also means taking into account selection effects—that is, the actors' knowledge that justice mechanisms are unlikely to work well in adverse settings, leading them to choose more appropriately tailored policies (Snyder & Vinjamuri 2003). Research shows, for example, that the politics that shapes impact often takes place in the pretrial phase, determining which cases come to trial, which do not, and when (Tiemessen 2014).

Second, another limitation of existing research is the theoretical validity of the measurement of key variables. For example, to assess whether trials deter future atrocities, it is important to specify conceptually what kind of legal process should be expected to have a deterrent effect on what kinds of actors making decisions to violate rights in what kinds of circumstances. Is it any trial, a threshold number or frequency of trials, only fair trials, only convictions, only convictions with daunting sentences, or only trials backed with a high likelihood of apprehension and punishment that theory predicts will deter atrocities and promote peace (Cronin-Furman 2013)? Studies so far have rather loose connections between the logic of the theory and measurements of its core concepts. In a widely referenced study, for example, for each year in which either an indictment or a trial took place, a country is given a positive coding—even for years in which very little justice was carried out and none involving significant individuals (Kim & Sikkink 2010, Sikkink 2011).

Jo & Simmons (2014, p. 8) have sought to rectify this problem by theorizing two types of deterrence, prosecutorial and social. Prosecutorial deterrence works through legal sanction. Individuals are more likely to be deterred when the chances and severity of a legal sanction increase. Social deterrence works through the application of extralegal social pressure and depends on the existence of social groups that targets care about and that can apply pressure. Deterrence, Jo & Simmons argue, will be more effective against those actors that care about their legitimacy. They expect some but not all rebel actors to be more apt targets for deterrence.

However, Jo & Simmons (2014) contradict the implications of Simmons's (2009) very convincing, monumental book, *Mobilizing for Human Rights*. Simmons (2009) finds that treaty signing does not reduce violations in authoritarian hard cases, where signing is cheap talk. Jo & Simmons (2014) depart from that book's well vetted arguments and imply that signing up for the ICC works

even in hard cases, which they match with other hard cases that did not sign. An interpretation that is more consistent with the findings of Simmons's book is that Jo & Simmons (2014) show that the ICC treaty mainly screens for states that believe that complying will not hurt their interests. Simmons's book is convincing because it not only shows statistical correlations between international legal obligations and behavior but also distinguishes carefully when obligations matter and when they do not (transitional semi-democracies with active civil society and semi-independent courts); it proceeds with an awareness of the problem of why states sign a treaty in the first place; and it uses a mutually reinforcing combination of case studies and fine-grained statistical tests to trace the causal mechanisms that she claims lie behind the correlations.

In contrast, the widely discussed working paper by Jo & Simmons (2014)—invoked by such prominent figures as Kenneth Roth, the executive director of Human Rights Watch—remains a more preliminary effort to assess the deterrent effects of the ICC. Jo & Simmons use a statistical matching technique to control for certain predictors of ICC ratification, such as having peacekeepers, regime type, or having been in a war. This can be a good procedure for aiding causal inference, but it remains a rather blunt instrument, because it cannot discriminate between finer-grained contextual factors that affect the authoritarian government's perceived incentives when it signs the treaty (in particular, whether it believes it has the opposition under control or whether it anticipates a need to repress them brutally). If the impact of signing on deterrence were huge and the matching process captured all the major incentives, this selection bias would not be crippling. But in fact, the size of the impact is fairly small: "Counterfactually, were a government who has not ratified the ICC statutes to kill 100 civilians, its most similar counterpart who had ratified would be likely to kill dramatically fewer—perhaps 40 fewer—civilians" (Jo & Simmons 2014, p. 29). These small results need to be probed by process tracing in case studies.

A third less studied but conceptually important question is whether theory expects that one-sided justice, where perpetrators on only one side of a conflict are held accountable (as in Rwanda), will deter subsequent atrocities or strengthen rule of law. Similarly, when trials, truth commissions, and amnesties are used instrumentally for political objectives, does theory expect these mechanisms to strengthen rule of law? Case studies have found that political instrumentalization of key justice institutions, including the ad hoc tribunals and the ICC, tarnishes the lessons they impart about rule of law (Subotic 2009). Large-N datasets of trials have used different measures to deal with this problem. Sikkink, for example, uses a method of exclusion to avoid accidentally considering politicized trials. Her dataset only counts justice processes (indictments and trials) in countries where "reasonably fair trials with some protections for the rights of the accused *could* occur" (emphasis added, Sikkink 2011, p. 136).

A fourth issue in need of attention is whether trials deter future atrocities. Meaningful findings about the effects of justice on deterrence remain limited. Scholars make conflicting claims about the deterrent capacity of trials (Akhavan 1998, 2009; Snyder & Vinjamuri 2003; Cronin-Furman 2013). Indeed, some of the most eminent scholars have refrained from making claims about the deterrent capacity of justice, arguing that the evidence that would be needed to verify or refute deterrence hypotheses is not available (Orentlicher 2008). Quantitative research has struggled to convincingly adjudicate these claims, producing contested and inconclusive results (Sikkink & Walling 2007; Human Rights Watch 2009; Kim & Sikkink 2010; Thoms et al. 2010; Sikkink 2011, p. 185; Binningsbo et al. 2012).

Fifth, a core conceptual question that complicates assessing the deterrent value of trials is whether trials can generate positive outcomes in settings where spoilers to peace agreements are strong. One of the key mechanisms debated by advocates and scholars is the ability of justice to marginalize powerful perpetrators of mass atrocities, effectively paving the way for a peace settlement (Human Rights Watch 2009, Vinjamuri 2010, Broache 2014). Perhaps trials have succeeded

only in cases where other tools, such as decisive military victories or amnesties, have neutralized spoilers. Although case studies have assessed the strength of spoilers, successful attempts to measure spoilers' power quantitatively have been rare. Nalepa's (2010) study of bargaining over East European lustration laws directly measures the electoral power and incentives of former perpetrators. Other studies have tried to take spoiler strength into account indirectly by controlling for the country's level of democracy and whether the justice activities took place during peace or war (Kim & Sikkink 2010, Sikkink 2011). These controls are rather distant from an actual measure of spoiler strength and are vulnerable to a likely selection bias: When spoilers are strong, states are likely to be averse to holding meaningful trials and are more likely to give amnesties or delay justice. In other words, even taking into account war and democracy, states are more likely to pursue justice in easy cases than in hard ones. Owing to this selection bias, on average, one would expect trials to be associated with better outcomes for peace, justice, rule of law, and democracy, compared to outcomes in cases of amnesty or delay of justice, even if trials themselves are exerting no causal effect.

This selection issue is methodologically similar to the problem that Fortna (2008) faced in studying whether peacekeeping works. Did peacekeepers go to the hard cases or to the easier ones, and did peacekeeping yield better outcomes than would have been expected given the difficulty of the cases? Answering these questions required a combination of qualitative case studies to trace decision-making processes in detail and a quantitative research design that took into account the difficulty of the case. The latter part required devising a multivariate yardstick to measure the inherent difficulty of a potential case of peacekeeping, based on factors that could be shown empirically to affect the likelihood that war would resume after a settlement. Constructing such a yardstick was a challenge, since the existence of a peacekeeping option in civil wars in the 1990s meant that a potential selection effect would taint that whole pool of cases. Cases in that era with no peacekeeping might have been known to be too hard for peacekeeping (or too easy to need peacekeeping) when the decision about intervention was being made, introducing a bias into the selection of cases without peacekeeping. Fortna's solution was to construct a model of the factors increasing the likelihood of a relapse into civil war based on cases before 1990, when peacekeeping was generally not available as an option for civil wars. A similar strategy of inference could be adopted by scholars of transitional justice because trials in civil wars were rare before 1990. In the absence of this kind of research design, quantitative studies suffer from a basic limitation of causal inference due to likely selection bias.

This kind of statistical procedure should be complemented with structured narrative case studies that are designed to focus on the analytical issues in the debate over the effects of trials, amnesties, and other justice processes. The criteria for evaluating the efficacy of trials or amnesties would include whether later atrocities did in fact occur; whether an indictment did marginalize its subjects from peace negotiations and what other tools it relied on to accomplish this goal; whether a basic standard for free and fair trials was met; whether the amnesties were enforceably conditioned on good behavior; whether democracy and rule of law were already consolidated before the trial; whether the perpetrators were decisively defeated in war, and so had no opportunity to act as spoilers; whether the perpetrators' communities were oppressed or threatened with trial (if not, they had no motive to active as spoilers); whether the case is so hard that counterfactually no justice remedy, including doing nothing, could have prevented atrocities or installed rule of law or democracy; whether trials did happen, and atrocities were avoided, but for some reason other than the trials (e.g., international peacekeepers occupied the country); and whether the outcome was good despite rather than because of the trials or amnesties (e.g., in Argentina the trials almost sunk democracy by provoking spoilers). This kind of contextual analysis is almost impossible to conduct in a statistical study but is not especially difficult using comparative case methods. To date,

however, only a few scholars have deployed mixed methods (Nettelfield 2010, Wiebelhaus-Brahm 2010).

Although scholars have paid the most attention to the impact of trials on human rights abuse, some studies have also examined the effectiveness of truth commissions. A statistical study by Olsen et al. (2010b) finds that truth commissions are more likely to generate positive human rights outcomes when they are balanced by trials and amnesties. The authors speculate that a dual strategy of trials and amnesties splits perpetrators, prosecuting a few, but granting amnesty to most others to eliminate their incentive to resist accountability by turning to violence.

Wiebelhaus-Brahm's (2010) study of the impact of truth commissions on democracy utilizes mixed methods. The large-N part of his study shows no significant relationship between truth commissions and subsequent democratic developments. He also finds a negative relationship between truth commissions and subsequent human rights practices (Wiebelhaus-Brahm 2010, p. 140). He then draws on four case studies to trace causal mechanisms, including conditional interactions with other variables, to evaluate the impact of truth commissions. The case studies demonstrate the role of truth commissions in enabling reform-minded governments to mobilize a supportive political coalition for their program. He also stresses the role of truth commissions in providing political cover to governments in South Africa and Chile, facilitating purges of perpetrators from the military and the police (Wiebelhaus-Brahm 2010, pp. 147–52). Wiebelhaus-Brahm suggests that these four cases are among the most effective truth commissions. Nonetheless, he argues that the case studies do not support a claim that truth commissions affected the countries' level of democracy.

Some critics argue that scholarly efforts in political science to measure the impact of transitional justice have set the bar for success too high. Instead, these scholars argue that careful process tracing is necessary to capture the micro-level engagement with transitional justice institutions (Backer 2009). Nettelfield (2010), for example, challenges skeptics who focus on elite perpetrators and spoilers of justice. She shows that the legal proceedings in The Hague constructively shaped Bosnian attitudes toward justice and the rule of law by provoking fruitful debates, even if not everyone immediately drew the conclusion that the justice process had been fair. Even weak or controversial transitional justice institutions may have unexpectedly positive consequences on the development of the rule of law. This also suggests that attitudes may evolve through discourse and contestation over time. Indeed, timing is an important issue in studying transitional justice impact. Longitudinal studies of implementation are rare, and the causal mechanisms that some scholars have identified may not bring change quickly (Backer 2009).

Notwithstanding the methodological challenges in studying the impact of transitional justice, this literature has made a good start in investigating the relationships between law and politics in this realm. As this research goes forward, scholars may want to reflect on the words of the great scholar of legalism, Judith Shklar (1964, pp. 122–23), who wrote that "to show that justice has its practical and ideological limits is not to slight it." The law is "not above the political world but in its very midst."

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Annual Review of
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Contents

Indexes

Errata

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