

**NORM INTERNALIZATION THROUGH TRIALS FOR  
VIOLATIONS OF INTERNATIONAL LAW: FOUR  
CONDITIONS FOR SUCCESS AND THEIR APPLICATION TO  
TRIALS OF DETAINEES AT GUANTANAMO BAY**

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ABSTRACT

Norm internalization, an objective for trials for violations of international law, seeks to use the trial to demonstrate to a target audience, usually the community of the defendant, the costs of violating international law and the stigma of being a violator. The purpose of this exercise is to internalize in that audience a respect for international law and for the norm in question that drives the audience not to repeat the violation in the future. Some scholars have argued that this purpose should be the primary purpose behind international criminal trials. Others have argued that it should, at minimum, be the primary objective of trials for those detained at Guantanamo Bay, with the goal of internalizing an anti-terrorism norm in the Islamic world. Despite the prominence of norm internalization in the literature of international criminal law, however, trials for violations of international law have generally failed to internalize norms in the community of the defendant.

This Article examines these past failures and inductively derives four necessary, but not necessarily sufficient, conditions for the success of norm internalization in the community of the defendant: consistency, selectivity, accessibility, and integration. Meeting these conditions avoids pitfalls that have prevented successful norm internalization in past trials. Application of these conditions to past and future trials at Guantanamo Bay reveals such trials are ill-suited to internalization of an anti-terrorism norm in the Islamic world. Military commissions, which did not include norm internalization as a prominent objective, failed to meet the four required conditions. More importantly, future trials of this detainee population, regardless of venue, appear incapable of meeting them. Given these failures, this Article suggests that trials

of Guantanamo detainees would more profitably focus on alternative, more attainable trial objectives. These failures also raise real questions about whether trials for violations of international law can contribute to norm internalization in the community of the defendant.

#### TABLE OF CONTENTS

|    |  |     |
|----|--|-----|
| 1. | INTRODUCTION.....  | 428 |
| 2. | NORM INTERNALIZATION AS A TRIAL OBJECTIVE FOR<br>INTERNATIONAL CRIMINAL LAW .....  | 434 |
| 3. | FOUR CONDITIONS DERIVED .....  | 438 |
|    | 3.1. <i>Past Practice</i> .....  | 438 |
|    | 3.1.1. <i>Victor's Justice</i> .....   | 440 |
|    | 3.1.2. <i>Selection Problems</i> .....   | 445 |
|    | 3.1.3. <i>Access to Information</i> .....  | 447 |
|    | 3.1.4. <i>Trials as Part of a Larger Norm Internalization<br/>    Effort</i> ..... | 450 |
|    | 3.2. <i>Four Conditions</i> .....  | 452 |
| 4. | ISLAMIC TERRORISM AND NORM INTERNALIZATION .....                                   | 459 |
|    | 4.1. <i>The Case for Norm Internalization</i> .....                                | 459 |
|    | 4.2. <i>History of Trials at Guantanamo Bay</i> .....                              | 465 |
|    | 4.3. <i>Guantanamo Trials and the Four Conditions</i> .....                        | 471 |
|    | 4.3.1. <i>Consistency</i> .....  | 475 |
|    | 4.3.2. <i>Selectivity and Accessibility</i> .....                                  | 482 |
|    | 4.3.3. <i>Integration</i> .....  | 488 |
| 5. | CONCLUSION .....   | 490 |

#### 1. INTRODUCTION

In May 2009 President Obama delivered a clarion call for a new approach to those detained at Guantanamo that he believes will better protect the United States and its allies from al Qaeda and affiliated groups and at the same time protect American values.<sup>1</sup>

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Unlike the Bush Administration, it appears that the Obama White House is embracing a counterterrorism strategy that will more centrally feature trials. After criticizing the Bush-era military commissions for completing only three cases in nearly seven years of existence, the President called for trials to proceed against Guantanamo detainees in two venues. First, President Obama indicated his support for conducting trials in the U.S. federal courts for terrorists who have violated "American criminal laws." Second, he declared that modified military commissions should be convened against those "who violate the laws of war." The President acted on this planned approach in the fall. In October he signed into law the Military Commissions Act of 2009, revamping military commissions with greater procedural protections for the defendants.<sup>2</sup> He then announced his intention to move the prosecutions of those involved in the 9/11 attacks to the U.S. federal courts, while leaving in military commissions other cases, including that of a detainee suspected of involvement in the 2000 attack on the USS *Cole*.<sup>3</sup>

In these announcements, the Obama Administration, like the Bush Administration before it, left vague the exact reasons why the United States is interested in conducting trials of those detained at Guantanamo. Attorney General Eric Holder testified to the Senate Judiciary Committee that at least one reason for the shift in prosecution strategy was, "the nation and the world will see [Khalid Sheikh Mohammed, alleged 9/11 planner] for the coward that he is."<sup>4</sup> Holder's testimony dovetails with the writing of some international legal scholars, who have argued that at least those trials convened for violations of international law should be oriented around developing and deepening an anti-terrorism norm in those communities where tacit support of or silent indifference

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and the Junior Faculty Group at Cardozo without whose thoughtful engagement this piece would not be possible.

<sup>1</sup> Barack Obama, Remarks by the President on National Security (May 21, 2009) (transcript available in the National Archives) [hereinafter Obama Address].

<sup>2</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (codified in scattered sections of 10 U.S.C.) [hereinafter "MCA09"].

<sup>3</sup> See Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 14, 2009, at A1 (describing planned Obama approach).

<sup>4</sup> Charlie Savage, *Holder Defends Decision to Use U.S. Court for 9/11 Trial*, N.Y. TIMES, Nov. 18, 2009, at A18.

towards terrorism has allowed it to flourish.<sup>5</sup> This Article calls this trial objective the “norm internalization” theory of trials and punishment.<sup>6</sup> Under this theory, trials of terrorists for violations of international law can strengthen the acceptance of the international legal prohibition on terrorism in communities where that norm is not well rooted. Trials do so by inculcating within society a sense that these violations are morally unacceptable. More specifically, trials internalize norms by bolstering respect for international law through fair trials;<sup>7</sup> by dramatizing the effect of the lawbreaking conduct through the spectacle of trial, in the process developing an accurate historical narrative;<sup>8</sup> and by stigmatizing those who commit these violations through punishment indicative of international disapproval of the conduct in question.<sup>9</sup> The ultimate goal of norm internalization in this context is an internalized social

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<sup>5</sup> See Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1187 (2007) (arguing that this is the “most plausible justification” for punishing al Qaeda terrorists); Anne-Marie Slaughter, *Tougher than Terror: To Fight Criminal Terrorism, We Need to Strengthen Our Domestic and Global System of Criminal Justice, Not Militarize It*, 13 AM. PROSPECT, Jan. 28, 2002, at 22, 24–25 (contending that trials can cement public condemnation of attacks against civilians by any actor, state or non-state, for any cause).

<sup>6</sup> Different authors use different names for this theory. Mark Drumbl uses the term “expressive” theory of punishment to describe the view that the purpose of punishment is to strengthen faith in the rule of law and to develop and disseminate a historical narrative for distribution to the public. MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 173 (2007). Mirjan Damaška writes about the “didactic objective” for trials, which he defines as the “socio-pedagogical” role of strengthening accountability for violations of international law through exposure and stigmatization of wrongdoing. Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 345 (2008). See also LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 3 (2001) (using the term “pedagogic” for this trial function). I have chosen the term “norm internalization” to describe this theory of the purpose of trial and punishment because it most clearly explains why observers hope that trials contain expressive content that educates a target audience: internalization of norms and respect for law that will ensure future compliance with the law.

<sup>7</sup> Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1462 (2002).

<sup>8</sup> See David Luban, *Beyond Moral Minimalism*, 20 ETHICS & INT’L AFF. 353, 355 (2006) (explaining that the “dramaturgy of the trial process” is a tool for norm projection in international criminal law).

<sup>9</sup> See DRUMBL, *supra* note 6, at 174 (citing DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY ON SOCIAL THEORY* 252 (1990) and EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1933) (additional citations omitted)).

commitment to the prohibition of terrorism within the Islamic world,<sup>10</sup> which would provide the most stable route to prevention of future terrorist activity.<sup>11</sup>

Applying norm internalization theory to terrorism trials fits comfortably within an emerging strand of scholarship, which argues that norm internalization is the most important purpose for international criminal law writ large.<sup>12</sup> Norm internalization appears to be an attractive trial objective when three conditions are met. First, there is a clear international criminal prohibition on the conduct in question and the cost of continued violations of the norm is high. This creates a great desire to prevent future violations. Second, the prohibition in question is not deeply rooted

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<sup>10</sup> For purposes of this Article, the Islamic world refers to majority Muslim States, as well as to significant communities of Muslims in non-Muslim States. *But see* Lee Smith, *Obama the Underminer: By Addressing the "Muslim World" from Cairo, the President is Helping Tehran*, SLATE, June 3, 2009, <http://www.slate.com/id/2219706> (arguing that there has been no "Muslim world" since the demise of the Ottoman Empire after World War I).

<sup>11</sup> Of course, terrorism is not a phenomenon unique to the Islamic world. The Liberation Tigers of Tamil Eelam used suicide bombings and other terror techniques to fight for a homeland in Sri Lanka. *See* Preeti Bhattacharji, *Liberation Tigers of Tamil Eelam (aka Tamil Tigers) (Sri Lanka, Separatists)*, COUN. ON FOREIGN REL., May 20, 2009, available at <http://www.cfr.org/publication/9242> (describing numerous suicide attacks committed by the group: including assassination of former Indian Prime Minister Rajiv Gandhi and Sri Lankan president Ranasinghe Premadasa). The Irish Republican Army (I.R.A.) and the Basque Fatherland and Liberty (E.T.A.) have used terrorism for similar reasons in Europe. *See* Kathryn Gregory, *Provisional Irish Republican Army (IRA) (aka, PIRA, "the provos," Óglaigh na hÉireann) (U.K., separatists)*, COUN. ON FOREIGN REL., July 16, 2008, available at <http://www.cfr.org/publication/9240> (describing attacks by the I.R.A. that have killed at least 650 civilians since the late 60s); Preeti Bhattacharji, *Basque Fatherland and Liberty (ETA) (Spain, separatists, Euskadi ta Askatasuna)*, COUN. ON FOREIGN REL., Nov. 17, 2008, available at <http://www.cfr.org/publication/9271> (quoting Spanish government as attributing 1600 terrorist attacks to the group). The Chinese Government has prosecuted Buddhist monks for what it alleges were bombings of civilian property in Tibet. Keith Bradsher, *16 Monks Arrested in Tibet Bombing*, N.Y. TIMES, June 6, 2008, at A7. This Article is focused on Islamic terrorism because the severity of the problems currently posed by al Qaeda and the Taliban creates an immediate need for internalization of an anti-terrorism norm in the Islamic world.

<sup>12</sup> Mirjan Damaška argues that "socio-pedagogical" considerations should drive international criminal justice, as he believes exposing violations of international law through trials and stigmatizing violations through punishment will deepen commitment to international law. Damaška, *supra* note 6. Gary Bass has written that development of an accurate historical narrative, key to norm internalization success, is the only consistently legitimate purpose for conducting trials for violations of international law. GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 287 (2000).

in the personal or social morality of the community, creating a risk that this community will violate the norm. Generally, this community is that of the defendant. Often the defendant is just one of many members of his community who has violated international law, creating a need to deepen that community's commitment to international law.<sup>13</sup> Third, there exists a population of potential defendants whose trials might produce narratives sufficient to deepen social commitment to the norm in question.

Such efforts seek to achieve a new "Nuremberg moment," the colloquial term used to refer to the wrenching social changes in Germany that followed World War II and the International Military Tribunal ("IMT") war crimes trials. As a historical matter there is good reason to believe that the IMT's contribution to the change in German attitudes was limited at best.<sup>14</sup> An aggressive Allied de-Nazification campaign involving schools, local trials and the media are largely credited with the evolution in German attitudes.<sup>15</sup> Moreover, norm internalization in the defendant's community has not been a successful outcome of trials for violations of international law since Nuremberg. This failure leads to two questions. First, why have trials for violations of international law failed to internalize norms in the community of the defendant? Second, can trials of Guantanamo detainees overcome the deficiencies of the past?

This Article begins to answer these questions by examining the reasons past trials for violations of international law have failed at norm internalization.<sup>16</sup> From this past practice, this Article

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<sup>13</sup> A particular set of trials may draw defendants from multiple communities. The ICTY prosecuted Serbs, Croats, and to a lesser extent Bosnian Muslims, and internalizing respect for international legal norms in all three communities would be an aim of norm internalization.

<sup>14</sup> While 78% of Germans initially approved of the IMT as "just," by 1949 that figure had dropped to 38% and by 1952 to 10%, contributing to the sense that the IMT's direct impact on German attitudes was limited. Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 5-6 (2002).

<sup>15</sup> See MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 211 (2008) (detailing factors that led to the post-war attitude changes in Germany).

<sup>16</sup> This Article considered the IMT at Nuremberg, the Tokyo Tribunal, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone, and the hybrid tribunal currently operating in Cambodia. The municipal war crimes prosecutions considered were the Israeli trial of Adolf Eichmann and the Iraqi High Tribunal. See Patricia M. Wald, *Foreword: War Tales and War Trials*,

inductively derives four conditions for norm internalization success in the community of the defendant: consistency, selectivity, accessibility, and integration. While it is impossible to conclude that meeting these conditions will produce norm internalization success, given the paucity of successful historical examples, meeting these conditions will avoid the pitfalls that appear to have prevented norm internalization in past trials. Application of these conditions to trials of Guantanamo detainees reveals that the trials are unlikely to meet these conditions, regardless of forum. Therefore, trials of Guantanamo detainees may be more profitably oriented around alternative objectives, such as incapacitation or retribution. More fundamentally, the nature and relationship of the four factors presented here suggest that trials for violations of international law are a poor vehicle for norm internalization.

This Article will proceed in four Sections. Section 2 begins by providing a brief overview of the theoretical framework underlying norm internalization. This Section considers why norm internalization may be preferable to other consequential trial aims, such as deterrence. It also considers why the defendant's community is the typical target audience for such efforts.

Section 3 examines past trials for violations of international law to search for common threads that explain the failure of these trials to achieve norm internalization in the community of the defendant. These common threads reveal four conditions necessary to avoid repetition of past problems with international trials that prevented norm internalization success: consistency, selectivity, accessibility, and integration.

Section 4 applies these conditions to past and future trials of Guantanamo detainees for violations of international law. This Section begins by explaining why the problem of Islamic terrorism is a paradigmatic case where the desire to use trials to internalize an international norm is great. The remainder of Section 4 looks at whether past or future trials of detainees at Guantanamo Bay could contribute to internalization of an anti-terrorism norm in the Islamic world. Application of the four conditions to these trials suggests that, regardless of forum, the trials are doomed to repeat the problems that have plagued past efforts.

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106 MICH. L. REV. 901, 907-09 (2008) (providing a useful timeline of international criminal tribunals).

Section 5 concludes that trials for violations of international law seem unlikely to succeed at norm internalization. This suggests trials are more profitably oriented around alternative objectives, while alternative routes to norm development are identified.

## 2. NORM INTERNALIZATION AS A TRIAL OBJECTIVE FOR INTERNATIONAL CRIMINAL LAW

Why should trials for violations of international law prioritize norm internalization in the community of the defendant? Retribution can provide an adequate justification for criminal trials, separate and apart from any consequential goals.<sup>17</sup> Society punishes criminals in order to reset the moral balance that was shifted out of kilter by their crimes.<sup>18</sup> Nevertheless, the events that precede a trial also create a desire that the trial serve consequential aims, meaning that the trial help prevent recurrence of the crimes in question. Society desires that the lawbreaking at issue not recur, whether from this individual or in society in general. Deterrence and norm internalization provide two different routes to meet this consequential aim.

Deterrence uses the threat of external punishment to enforce the law. As understood by social control theory,<sup>19</sup> human behavior, like that of Pavlov's dogs, is influenced by rewards and punishments. Thus, law should dispense benefits and harms in such a manner as to induce compliance with the norms preferred by society. Such an approach squares with public choice theory, which assumes that people maximize their personal positions in relation to the law. The only way to get an individual to follow the law is to create inducements and penalties that weight the individual's cost-benefit analysis to arrive at the socially preferred, lawful outcome. Trials and punishment are the means by which society introduces law into the cost-benefit analyses of its citizens. Without the certainty of trial and punishment, the rational actor will ignore legal prohibitions that are disadvantageous to his interests.

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<sup>17</sup> Retributivists argue that retribution by definition takes precedence over consequential aims for trials. Jean Hampton, *The Moral Education Theory of Punishment*, in *PHILOSOPHY AND PUBLIC AFFAIRS* (1984), reprinted in *READINGS IN THE PHILOSOPHY OF LAW* 520, 547-50 (Jules L. Coleman ed., 1999).

<sup>18</sup> Drumbl, *supra* note 5, at 1185-86.

<sup>19</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 20-21 (1st ed. 1990) (describing social control theory of law).



Deterrence cannot fully explain the phenomenon of the law-abiding citizen, however. Deterrence turns on the ability of the law to punish transgressions, and most free societies lack the resources or will to be able to adequately monitor individual behavior to ensure that all or even most transgressions are punished.<sup>20</sup> Norm internalization recognizes this gap, and focuses on developing internal drives to follow the law, given that stable compliance with the law depends on an internal drive to follow the law regardless of enforcement. The internal drive to follow the law may have two sources.<sup>21</sup> Personal morality, the individual's sense of right and wrong, can be a powerful influence in deciding to follow the law. A person may choose not to murder not only because he will be punished severely for doing so, but also because committing murder would violate his personal morality. But not all laws align with personal morality. An alternative internal drive to follow the law may come from a sense that the institution promulgating the law has legitimate authority to regulate individual behavior, regardless of whether a particular law accords with individual morality. Thus, an individual may refrain from smoking marijuana neither because he fears getting caught, nor because he thinks it is morally wrong, but rather because he accepts the right of the external authority promulgating the law to regulate his behavior.

Trials are central to the norm internalization process. Trials can bolster within society the legitimacy of the external authority that promulgates law.<sup>22</sup> The greater that authority's legitimacy, the greater the likelihood society will comply with that authority's laws regardless of individuals' independent moral judgments about the law. The law-promulgating authority achieves legitimacy by using trial procedures that meet basic due process guarantees, imposing penalties that are proportionate to the crime being committed, punishing different categories and classes of people for the same offenses, and only punishing conduct society

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<sup>20</sup> See *id.* at 22-23 (using drunk driving as an example of a crime where social control theory cannot explain the decision to abide by the law). Authoritarian societies may rely more upon deterrence to enforce laws because of a greater willingness to use intrusive means to seek compliance with the law, and because of the reduced legitimacy of the government as a behavior regulation agent.

<sup>21</sup> See *id.* at 25 (summarizing literature on two types of internalized obligations).

<sup>22</sup> See Hampton, *supra* note 17, at 713 (arguing that democratic legitimacy of state gives it the authority to morally educate its citizens through criminal law).

agrees must be reformed. The trial can also educate society on why the crime was morally unacceptable by dramatizing the effects of the wrongdoing and stigmatizing the offender. Social education through trials can be an influential force in shaping a society's collective morality.<sup>23</sup>

These general observations about criminal trials can be applied to trials for violations of international law. Such trials generally include among their aims retribution for wrongs committed.<sup>24</sup> Retributivists will argue that the heinous crimes that are generally the subject of international trials require balancing the moral ledger through punishment of the wrongdoer. But retribution is rarely thought to be the only purpose behind such trials, as the international community generally also has consequential goals<sup>25</sup> The events that preceded these trials are usually among the most heinous known to man, including genocide, crimes against humanity, and serious war crimes. The international community seeks to pursue any strategy that might reduce the risk that these crimes will be repeated in the future. Such a strategy generally requires focusing on the community of the defendant, who has just engaged in illegal conduct, and who may be predisposed to doing so again. This risk makes that community the natural target for consequentialist efforts.

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<sup>23</sup> Uma Narayan has argued that trials are not a vehicle for moral education because competency rules require a defendant who understands her actions are immoral. See Uma Narayan, *Moral Education and Criminal Punishment*, in VALUES AND EDUCATION 69, 70 (Thomas Magnell ed., 1998) ("responsibility would be hard to attribute to an agent that lacked the understanding that her conduct was immoral"). Certainly, it would violate basic procedural norms to subject an incompetent defendant to trial and punishment to further social objectives. See, e.g., *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (summarizing common law history preventing this practice). Nevertheless, a good faith belief that one's illegal actions are morally correct is insufficient in itself to support a finding of incompetence to stand trial. See *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (requiring only that defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and... rational as well as factual understanding of the proceedings against him" to stand trial).

<sup>24</sup> See e.g., MARIHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 25 (1998) (describing the benefits of the retribution achieved in international criminal trials). Indeed, this may be the primary aim in most international criminal trials. DRUMBL, *supra* note 6, at 61 (arguing that survey of international criminal trials suggests preference for retributivist aims over consequential aims).

<sup>25</sup> DRUMBL, *supra* note 6, at 60-62 (discussing role of consequential aims in international tribunals).

Deterrence provides one route towards meeting consequentialist goals. Deterrence would use the threat of trial and punishment to alter the individual (specific) or collective (general) cost-benefit analyses of the crime in the community of the defendant. Deterrence through threat of prosecution may not always be possible, however.<sup>26</sup> Deterrence through trials depends upon predictability in enforcement of the law and a rational actor, neither of which may be present in the context of violations of international law.<sup>27</sup> Where deterrence is possible, its effects may be ephemeral. Once the external pressure preventing commission of the crime is removed, the threat of recidivism may emerge.<sup>28</sup>

Norm internalization theory seeks to deal with the limitations of deterrence by using trials to inculcate respect for international law and for the specific norm at issue in the defendant's community. Rather than seeking to deter the potential wrongdoer through alteration of his cost-benefit analysis, norm internalization seeks to modify personal morality, thereby reducing the number of people willing to commit atrocities and the social acceptance of those who do. Trials can strengthen respect for international law through the use of trial procedures that comport with international due process standards. Trials also internalize the norm in question through dramatization of the effects of the wrongdoing and stigmatization of the offender.<sup>29</sup>

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<sup>26</sup> See Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 21-22 (2003-04) (arguing that international criminal trials have failed at deterring violations of international law).

<sup>27</sup> See, e.g., DRUMBL, *supra* note 6, at 170-71 (arguing that deterrence of serious violations of international law is unlikely).

<sup>28</sup> It is possible that deterred behavior can morph into that which is morally unacceptable. As political considerations prevent key actors from continuing destructive behaviors, society's willingness to return to that behavior may decrease over time. See Michael Slackman, *5 Years After It Halted Weapons Programs, Libya Sees the U.S. as Ungrateful*, N.Y. TIMES, Mar. 11, 2009, at A6 (explaining that Libya was unlikely to return to terrorist activity despite the failure of the United States to live up to promises that initially altered Libya's cost-benefit analysis on terrorism).

<sup>29</sup> Trials are just one venue where the effects of war crimes on society are dramatized in an effort to reduce future occurrence of the crimes. Artists, such as Jacques Callot or Goya, have for centuries depicted the horrible crimes soldiers commit against civilians during armed conflict, in part to shock the viewer regarding these events. See SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 41-43 (Farrar, Straus & Giroux 2002) (detailing the history of artistic depictions of war crimes). Photographs from war coverage often serve this purpose today.

Trials for violations of international law have two advantages in advancing norm internalization in the community of the defendant. First, such trials are often the only forum where the factual history of serious war crimes and human rights violations are developed, as the trials are often conducted in societies where alternative fora such as municipal courts or local media have broken down or been corrupted by partisan influences.<sup>30</sup> The power to discover and represent facts provides these trials a unique opportunity to shape the historical knowledge of the atrocities that transpired. Graphic accounts of past human rights abuses and war crimes may be a powerful tool to internalize norms prohibiting such conduct.<sup>31</sup> Second, in communities where the municipal courts have lost legitimacy due to armed conflict or neglect, fair trials have the ability to begin to rebuild respect for law and legal institutions, especially international law. If the defendant's community believes that international law may validly restrict its conduct, regardless of whether the law aligns with personal morality, there may be a reduced risk of serious violations of international law.

### 3. FOUR CONDITIONS DERIVED

#### 3.1. *Past Practice*

The closest norm internalization has come to fruition through trials for violations of international law were the trials at Nuremberg. The IMT at Nuremberg is remembered today for

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<sup>30</sup> This may suggest that a truth commission would be an alternative venue to push norm internalization, because it may be better than trials at recording the history behind severe violations of international law. *But see* Jonathan Tepperman, TRUTH OR CONSEQUENCES IN FOREIGN AFFAIRS., Mar.-Apr. 2002, at 128 (describing criticism that truth commissions fail to uncover the truth because of the constructed nature of narratives and prejudices of their framers). Truth commissions are missing a key component of norm internalization efforts, however, as they lack the ability to impose a punishment that demonstrates the depth of international revulsion towards the act in the question. Nevertheless, it is worth considering in future scholarship whether that drawback is outweighed by the benefits of truth commissions, including the fact that they may be less likely to be seen as "victor's justice."

<sup>31</sup> *See* Damaška, *supra* note 6, at 345 (explaining that "exposure and stigmatization of these extreme forms of humanity" contributes to "the recognition of basic humanity"). *See also* SONTAG, *supra* note 29, at 14-16 (describing work of novelists, photographers, and filmmakers to graphically demonstrate the costs of war in order to prevent its recurrence).

creating an authoritative factual history of the crimes committed by the Nazi regime, and for employing that history to reorient the German population from a militaristic past to its liberal democratic present.<sup>32</sup> Historians dispute the notion that the IMT was itself responsible for this evolution, however, pointing instead to a complex series of reeducation efforts and historical events, including trials conducted by German authorities of mid-level Nazi officials, as an explanation for the inculcation of new values in Germany.<sup>33</sup> While it is indisputable today that the concept of Germans repeating Nazi crimes is inconceivable, the role of international trials in this evolution may have been minimal.

Whatever the cause of the “Nuremberg moment,” it does not appear to have been repeated in subsequent war crimes trials. While Nuremberg’s version of history is widely lauded as accurate, many scholars derisively refer to the narrative produced by the Tokyo Tribunal as the “Tokyo Trial version of history,” and today the narrative is largely rejected in Japan and even the West.<sup>34</sup> This has resulted in the continuation of historical disputes between Japan and its neighbors stemming from Japan’s refusal to accept responsibility for its actions during World War II.<sup>35</sup> As for subsequent trials, it may be too early to measure their impact on norms in the community of the defendant. Respect for international law, and a sense of morality modified to encompass prohibitions on genocide, crimes against humanity, and serious war crimes must be developed over time; the appropriate measurement of success may not be months or years but rather decades. Nevertheless, early signs are not promising. In Serbia, a

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<sup>32</sup> See M. Cherif Bassiouni, *The Nuremberg Legacy: Historical Assessment Fifty Years Later*, in *WAR CRIMES: THE LEGACY OF NUREMBERG* 291, 301–02 (Belinda Cooper ed., 1999) (laying out the “moral-ethical legacy” of Nuremberg).

<sup>33</sup> NEWTON & SCHARF, *supra* note 15. See also Koskenniemi, *supra* note 14, at 5–6 (describing didactic effects of the IMT as “obscure”).

<sup>34</sup> MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 139 (1997) (illustrating Japanese perception as the “Tokyo Trial version of history”).

<sup>35</sup> This refusal is demonstrated by the regular visits by Japanese Prime Ministers to the Yasukuni shrine, where Japan’s Class A war criminals are buried. See Norimitsu Onishi, *A War Shrine, for a Japan Seeking a Not-Guilty Verdict*, N.Y. TIMES, June 22, 2005, at A4 (explaining that rejection of the Tokyo Trials has allowed many Japanese to believe that Japan’s wartime conduct was just). See also Martin Fackler & Choe Sang-Hun, *Japanese Researchers Rebut Premier’s Denials on Sex Slavery*, N.Y. TIMES, Apr. 18, 2007, at A3 (explaining that conservative Japanese have used the Tokyo Tribunal’s reputation as “victors’ justice” to disavow the conclusion that the Japanese military had been involved in sex slavery during World War II).

2002 survey indicated that only 20% of Serbs believed that cooperation with the ICTY was “morally right” and only 10% saw the ICTY as the best way to serve justice.<sup>36</sup> These numbers suggest that the ICTY’s impact on Serb morality or perceptions of the legitimacy of international law has been minimal to date.<sup>37</sup> In Cambodia, only 15% of people were aware of the mixed tribunal convened there to hear war crimes cases against former Khmer Rouge leaders before the hearings started, and many Cambodians remained unaware of the trials or the genocide that spawned them even as trials proceeded.<sup>38</sup> Low levels of popular knowledge about trials suggest a minimal future impact on society.

Why have trials struggled to achieve internalization of international norms in the community of the defendant? This Section proceeds in an inductive manner, identifying four common threads that may explain these failures: perceptions of victor’s justice; selection problems; limited access to information; and failure to situate trials within a larger social norm internalization effort. As with any exercise in inductive reasoning, the goal here is not a formal proof of the reasons that norm internalization failed in the past. Rather, past pitfalls suggest what may need to be avoided if future trials for violations of international law are to have norm internalization success. The following Section uses these past failings to develop four conditions that must be met to avoid past norm internalization problems: consistency, selectivity, accessibility and integration.

### 3.1.1. *Victor’s Justice*

Hermann Göring, Nazi Reichsmarschall and convicted war criminal, scrawled on his indictment by the International Military Tribunal (“IMT”) at Nuremberg, “The victor will always be the

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<sup>36</sup> Snyder & Vinjamuri, *supra* note 26, at 21–22.

<sup>37</sup> Serbian leaders have cooperated with the ICTY at times in the hopes that doing so will improve their chances of joining the EU. See Nicholas Wood, *Serbia Acts on War Crimes to Strengthen Ties to West*, N.Y. TIMES, Apr. 25, 2005, at A11. But such cooperation is not indicative of the deeper social change required to ensure the conduct will not recur in the future. See *id.* (quoting Human Rights Watch Serbia Montenegro and Bosnia Director Bogdan Ivanisevic, “[a]bsolutely nothing in how the government is cooperating with The Hague tribunal would affect the way a person in the street thinks about war crimes.”).

<sup>38</sup> Seth Mydans, *Young Cambodians are Oblivious of Khmer Rouge Horrors*, N.Y. TIMES, Apr. 9, 2009, at A6 (detailing how Cambodians under thirty years old are unaware of the tribunals).

judge and the vanquished the accused.”<sup>39</sup> As Göring’s remark presages, international war crimes trials have struggled to overcome the perception within the accused’s community that they represent illegitimate “victor’s justice.” This notion interferes with norm internalization by casting the trial as an arbitrary exercise of raw power by the war’s winner, as opposed to an objective condemnation of illegal acts. If trials are perceived as an effort to subjugate the defendant’s community, the community will neither develop greater respect for international law nor learn the importance of adhering to international norms.

The perception of victor’s justice arises for at least two reasons. First, international war crimes trials often reflect a change of legal regime, from that of the vanquished – which tolerated, and in some instances codified, the acts being prosecuted – to that of international law – which condemns those acts.<sup>40</sup> This change in legal authority can make criminalization of past acts appear *ex post facto*, even if the international law in question was well established at the time of the underlying offense. Second, the community of the accused is particularly susceptible to perceptions of victor’s justice because of its natural skepticism of the accuser, who is usually somehow linked to the conflict’s winner. In the face of that skepticism, any international law violations by the accuser undermine his standing as a prosecutor. International war crimes trials have fed into this skepticism by failing to prosecute the crimes of all sides in a conflict. Sometimes this is as simple as limiting the jurisdiction of the tribunal to crimes committed by one side in the conflict;<sup>41</sup> other times seemingly neutral authorizing statutes have imbedded conditions that prevent the tribunal from taking full account of the events that led to trial.<sup>42</sup> Failure to deal

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<sup>39</sup> NEWTON & SCHARF, *supra* note 15, at 99–100.

<sup>40</sup> See, e.g., Jörg Friedrich, *Nuremberg and the Germans*, in *WAR CRIMES: THE LEGACY OF NUREMBERG*, *supra* note 32, at 87–89 (describing the dissonance experienced by post-war Germans who saw actions that were legitimate under Nazi law labeled criminal under the Allied law).

<sup>41</sup> Charter of the International Military Tribunal art. 1, Aug. 8, 1945, available at <http://avalon.law.yale.edu/imt/imtconst.asp#art/> (explicitly limiting jurisdiction to “trial and punishment of the major war criminals of the European Axis”).

<sup>42</sup> For example, by limiting the statute of the ICTR to crimes committed in 1994, the ICTR excluded from its scope consideration of atrocities committed by the Rwandan Patriotic Front (“RPF”) against the previous Hutu-led government from 1990–93. See HUMAN RIGHTS FIRST, *PROSECUTING GENOCIDE IN RWANDA: A*

with the crimes committed by the accuser quickly discredits the trial in the eyes of the community of the accused, both as a fact-finding exercise and as a moral guidepost.<sup>43</sup>

The post-World War II tribunals at Nuremberg and Tokyo were victor's justice in the truest sense of the term: they were conceived of and conducted by the victorious Allies at the end of the war.<sup>44</sup> Not surprisingly, they displayed both features that allowed the accused's community to dismiss the trials as victor's justice. Both tribunals criminalized conduct that was legal in Germany or Japan at the time it was conducted, and which was not clearly a criminal violation of international law. Many top Nazi and Japanese officials were tried for the crime of aggression even though it was not a criminal violation of international law prior to World War II,<sup>45</sup> and remains ill-defined today.<sup>46</sup> The post-World War II tribunals failed to recognize the traditionally accepted defense of superior orders, holding lower level officials fully liable for conduct that they were ordered to perform.<sup>47</sup> Also, the IMT

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HUMAN RIGHTS REPORT ON THE ICTR AND NATIONAL TRIALS pt. III (1997) (describing effects of ICTR's limited temporal jurisdiction).

<sup>43</sup> See OSIEL, *supra* note 34, at 124-25 (describing the problem of accusers with "unclean hands"); Damaška, *supra* note 6, at 361 (noting that "corrosive cynicism engendered by the perception of double standards" is mostly likely to occur in the community where atrocities were committed).

<sup>44</sup> See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 10, U.N. Doc. A/49/342 (Aug. 29, 1994) (explaining how the Nuremberg and Tokyo War Crimes Tribunals were organized).

<sup>45</sup> See Christopher P. DeNicola, Comment, *A Shield for the "Knights of Humanity": The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression*, 30 U. PA. J. INT'L L. 641, 647-48 (2008) (describing the "shaky ground" of IMT aggression prosecutions because of "nullum crimen sine lege" concerns). See TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG (sic) WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 219 (1949), for a discussion of how those involved in the IMT acknowledged these concerns, but argued that there was no such problem because any reasonable defendant would have understood the wrongness of his actions.

<sup>46</sup> See Rome Statute of the International Criminal Court art. 5(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.").

<sup>47</sup> See Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1, 17 (2007) (describing break in traditional practice at Nuremberg). See also, Damaška, *supra* note 6, at 353 (explaining how dispensing with the superior orders defense



and Tokyo Tribunals prosecuted only Axis criminals, a form of selective condemnation that created the perception of hypocrisy. The Allies sat in judgment of Axis war crimes, while alleged Allied war crimes—including Stalin’s massacres, the British and U.S. firebombing of Dresden,<sup>48</sup> and the U.S. decision to use the atomic bomb at Hiroshima and Nagasaki—were not investigated.<sup>49</sup>

The modern international war crimes tribunals prosecuting crimes committed in the former Yugoslavia (“ICTY”) and in Rwanda (“ICTR”) have two significant differences from the post-World War II tribunals. First, the U.N. Security Council, which created the tribunals, did not formally engage on either side in the armed conflict.<sup>50</sup> Second, the mandates of both tribunals encompassed potential violations by all sides to the conflict.<sup>51</sup> Nevertheless, allegations of “victor’s justice” have plagued both tribunals. The ICTY has an inconsistent stance on prosecuting ex post facto offenses since the prohibition on such prosecutions is subject to subordination when the ICTY’s sense of substantive justice requires that the case proceed.<sup>52</sup> The ICTY and ICTR also

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blurs levels of moral culpability recognized in municipal legal systems, thereby undermining the moral education offered by trial).

<sup>48</sup> See Koskeniemi, *supra* note 14, at 21 (alleging that the Allies had skeletons in their closets too).

<sup>49</sup> See OSIEL, *supra* note 34, at 122, n.139 (stating that the Allied bombing of large Axis population centers including, *inter alia*, the atomic attacks on Hiroshima and Nagasaki, were war crimes).

<sup>50</sup> See S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR); S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY).

<sup>51</sup> The ICTY Statute defines the jurisdiction of the tribunal as extending to “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute,” and makes no distinction between potential defendant groups. Statute for the International Criminal Tribunal for the Former Yugoslavia art. 1, May 25, 1993, U.N. Doc. S/Res/827. Similarly, the ICTR Statute grants the tribunal jurisdiction “to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.” Statute for the International Criminal Tribunal for Rwanda art. 1, Nov. 8, 1994, U.N. Doc. S/Res/1534 [hereinafter ICTR Implementing Statute].

<sup>52</sup> See Beth Van Schaack, *Crimen Sine Lege: Judicial Law Making at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 140–41 (2008) (explaining that the principle of “nullo crimen sine lege” is more flexible at ICTY than in municipal courts and gives way where considerations of justice balance in favor of permitting prosecution).

have no clear prohibition on the use of hearsay evidence and allow evidence from anonymous witnesses to be admitted on a regular basis at trials.<sup>53</sup> One commentator has argued that this practice “call[s] into question the fairness of the underlying trials.”<sup>54</sup> Moreover, neither has consistently prosecuted the crimes of all parties to the conflict. The ICTY failed to open a formal investigation into allegations of war crimes stemming from the NATO air campaign in Yugoslavia.<sup>55</sup> Croatia also succeeded in delaying prosecution of its war criminals at the ICTY, further alienating Serbs from the tribunal.<sup>56</sup> These decisions allowed former Yugoslav President Slobodan Milosevic to make credible claims of victor’s justice, arguing that the court was “false,” and “invented as [a] reprisal for disobedient representatives of a disobedient people.”<sup>57</sup> The ICTR suffered from similar problems, as the U.S. and other Security Council members allegedly pushed out former chief prosecutor Carla del Ponte, at least partially because she began to investigate massacres of Hutus committed by the Tutsi-led Rwandan Patriotic Front (“RPF”), which currently

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<sup>53</sup> David Aronofsky, *International War Crimes & Other Criminal Courts: Ten Recommendations for Where We Go From Here and How to Get There—Looking to a Permanent International Criminal Tribunal*, 34 DENV. J. INT’L L. & POL’Y 17, 24-25 (2006).

<sup>54</sup> *Id.* at 24.

<sup>55</sup> ICTY chief prosecutor Carla del Ponte announced that she was declining to open an investigation into war crimes allegations stemming from the NATO bombing campaign because she was “satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign.” Press Release, Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, Prosecutor’s Report on the NATO Bombing Campaign U.N. Doc. PR/P.I.S./510-e (June 13, 2000), available at <http://www.icty.org/sid/7846>. But see Anne-Sophie Massa, *NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Court for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion*, 24 BERKELEY J. INT’L L. 610, 644-45 (2006), for a criticism of the ICTY’s decision not to investigate NATO’s actions as politically motivated.

<sup>56</sup> See Victor Peskin, *Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213, 218-19 (2005) (detailing efforts of the Tudjman government to obstruct ICTY investigation of Croatian atrocities). Former Croatian President Franjo Tudjman is believed to have orchestrated an ethnic cleansing campaign against Serbs, driving 150,000-200,000 Serbs out of Croatia during the war. *Id.* at 216.

<sup>57</sup> Gary J. Bass, Op.-Ed., *Why Not Victor’s Justice*, WASH. POST, Feb. 15, 2002, at A33 (quoting Milosevic).

governs Rwanda.<sup>58</sup> Not surprisingly, some Hutus resent the failure of the ICTR to prosecute Tutsis who violated the laws of war.<sup>59</sup>

Trials conducted by an accused's municipal court are also susceptible to as the label of "victor's justice." Iraqis insisted that trials of Baathist leaders conducted after the 2003 U.S. invasion of Iraq be conducted by Iraqis, largely to preserve the legitimacy of the trials with the Iraqi people.<sup>60</sup> Nevertheless, in a fractured society like Iraq, sub-groups that feel alienated from the government will not view trials conducted by a government dominated by another sub-group as inherently legitimate. Many Sunnis—the community of most Baathist defendants—dismissed the trials of Saddam Hussein's regime conducted by the Iraqi High Tribunal as Shiite victor's justice.<sup>61</sup> Iraqi authorities unwittingly bolstered this impression by executing Saddam on a Sunni holy day, contrary to Iraqi law.<sup>62</sup>

### 3.1.2. Selection Problems

International war crimes trials have failed to consistently prosecute the most important defendants for the most important crimes, which include the possibility of imposing the most important sentences. Prosecuting minor figures can undermine norm internalization by failing to create a sufficiently dramatic spectacle to communicate the perils of transgressing international law and express the stigma associated with such violations. The defendant's community will not develop greater respect for international law, nor internalize international norms, if the trial's narrative is insufficiently powerful to spawn moral reflection.

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<sup>58</sup> See Peskin, *supra* note 56, at 225–26 (alleging that the United States did not want the RPF prosecuted).

<sup>59</sup> See Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 62 (2006) (quoting a Hutu man who had fled to Burundi as asking, "How come those who killed Hutu are not prosecuted?").

<sup>60</sup> See NEWTON & SCHARE, *supra* note 15, at 55 (explaining that Iraqis rejected a U.N. Security Council tribunal because it would lack legitimacy among Iraqis).

<sup>61</sup> See Sabrina Tavernise, *In a Divided Iraq, Reaction to Saddam Death Sentence Conforms to Sectarian Lines*, N.Y. TIMES, Nov. 6, 2006, at A11 (quoting a Sunni doctor who discounted Saddam's trial and verdict based on the government's continued support of Shiite militias).

<sup>62</sup> See Marc Santora et al., *Saddam Hussein Hanged in Baghdad; Swift End to Drama; Troops on Alert*, N.Y. TIMES, Dec. 30, 2006, at A1 (explaining that the execution was carried out on the Sunni holiday Eid al-Adha, seemingly contrary to Iraqi law).

Trials for violations of international law frequently have failed to prosecute the most important perpetrators of crimes. Sometimes this is because potential defendants are not available for trial. Many high-ranking members of the Khmer Rouge, including Pol Pot, died before the mixed tribunal in Cambodia began its prosecutions.<sup>63</sup> The ICTY has been unable to prosecute Bosnian Serb leaders Radovan Karadzic and Ratko Mladic because they eluded capture for many years;<sup>64</sup> while its attempt to prosecute Serbia's former President Slobodan Milosevic was cut short when he died during trial.<sup>65</sup> Other times politics plays a role. The United States made a political decision after World War II that the Tokyo Tribunals would not prosecute Emperor Hirohito—a choice that allowed him to retain his throne, but prevented the trials from unearthing his role in Japan's wartime atrocities.<sup>66</sup>

The failure to prosecute the most culpable defendants is compounded by the emphasis on prosecution of relatively minor crimes. Sometimes the prosecution is precluded from prosecuting the most important crimes by a limited jurisdiction. The IMT has been criticized for interpreting its statute not to include pre-World War II crimes committed by the Nazis against its own Jewish citizens,<sup>67</sup> resulting in a narrative that insufficiently appreciates the scope of Nazi crimes against Jews.<sup>68</sup> Similarly, the ICTR was limited to prosecuting events that occurred during selected months

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<sup>63</sup> See Seth Mydans, *First on Cambodia's Docket: A Man Whose Jail Sent 14,000 to a Killing Field*, N.Y. TIMES, Feb. 17, 2009, at A5 (noting that some Cambodians fear more defendants will die before being brought to trial).

<sup>64</sup> See Dan Bilefsky, *Karadzic Sent to Hague for Trial Despite Violent Protest by Loyalists*, N.Y. TIMES, July 30, 2008, at A9, for a discussion of how Karadzic was finally arrested and sent to The Hague for trial in the summer of 2008. Meanwhile, Mladic remains free. See Thom Shanker, *In Serbia, Top U.S. Officer Seeks Military Cooperation*, N.Y. TIMES, Oct. 21, 2008, at A13 (describing efforts by the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, to push Serbia to increase its effort to capture Mladic).

<sup>65</sup> See generally DRUMBL, *supra* note 5, (describing the expressive value of prosecuting a living perpetrator of war crimes).

<sup>66</sup> OSIEL, *supra* note 34, at 184–85.

<sup>67</sup> See DOUGLAS, *supra* note 6, at 48 (explaining that while Article 6(c) of the IMT Charter did allow for prosecution of crimes against humanity, the IMT judges determined the jurisdictional scope of the charge was limited to crimes committed in “execution of or in connection with” crimes against peace or war crimes).

<sup>68</sup> See *id.* at 57 (explaining that the narrator of the legendary film *Nazi Concentration Camps* only mentions “Jew” once because of the expansive scope of the crimes prosecuted at Nuremberg).

of 1994, preventing it from fully prosecuting crimes committed by all sides in Rwanda.<sup>69</sup> Plea-bargaining can also prevent the trial authority from prosecuting the gravest crimes. Plea-bargaining away the most serious charges in return for a guilty plea on less serious charges means that factual histories are not developed for important charges, or are developed in a diminished manner and are therefore forgotten.<sup>70</sup> ICTY prosecutors, for example, have in many cases accepted plea-bargains for lesser charges in exchange for dropping the charge of genocide, thus stunting the full appreciation of the genocide's magnitude.<sup>71</sup>

Even where an important defendant is prosecuted and convicted for an important crime, the sentence can send an incorrect message about the narrative in question and the power of the norm at issue. In Rwanda, where punishment by death is an accepted penalty for the most serious crimes, the absence of the death penalty at the ICTR has degraded the significance of the crimes among the Hutu audience.<sup>72</sup> It may be impossible to convey the seriousness of violations of international law if they are punished less severely than common crimes. By contrast, undignified executions, such as that of Saddam Hussein, can also undermine norm internalization, as they call into question the legitimacy of the external authority that allowed such events to take place.<sup>73</sup>

### 3.1.3. *Access to Information*

Another difficulty norm internalization has faced is the inaccessibility of trials to the average person. Most people receive

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<sup>69</sup> See ICTR Implementing Statute, *supra* note 51 (explaining ICTR jurisdiction extended only to events which took place in 1994).

<sup>70</sup> DRUMBL, *supra* note 6, at 179.

<sup>71</sup> See e.g., *id.* (describing the cases of Plavšić and Simić, who were never prosecuted for the most serious crimes of which they were accused because of plea-bargaining).

<sup>72</sup> See Jens D. Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT'L L. 747, 748 (2005) (describing the dissonance resulting from prohibition on capital punishment in the ICTR, while less serious common criminals receive death sentences in Rwandan municipal courts). See also Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 415 (1999) (noting the inconsistencies created where those guilty of massive human rights tragedies are given lesser sentences than common criminals).

<sup>73</sup> See NEWTON & SCHARF, *supra* note 15, at 214-15 (stating that the conduct of Saddam's executioners will always "cloud the historic perception of the fairness and legitimacy of the Iraqi High Tribunal").

their information about trials from the media because usually only the media is positioned to translate the complexities of the legal form for lay audiences.<sup>74</sup> Because the media serves as a filter between the trial itself and the public, it can color the portrayal and thereby undermine public confidence in the trials. This problem can manifest itself in at least three ways. First, the media may genuinely not understand the law, or may portray it in misleading or oversimplified ways. During the Nuremberg trials, newspapers within the United States were very active in conveying information and opinions to the American public about the trials. Nevertheless, few newspapers covered serious criticisms about the IMT's use of *ex post facto* offenses because they generally lacked a sufficiently nuanced understanding of the issue.<sup>75</sup> The result was that most of the American public approved of the trials without knowledge of their most important legal defect.<sup>76</sup> While in this case media ignorance actually bolstered the trial's legitimacy in the community of the accuser, the effect is likely to be more pernicious where the media is less inclined to support the trials.

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<sup>74</sup> See WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIMES TRIALS 88 (1970) (explaining that the average American learned about the Nuremberg trials from newspapers and magazines); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 796 (1993) (explaining that television is the source most Americans use to receive information about legal issues); Elliot E. Slotnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21 (1993) (explaining that media has an exclusive role in communicating the importance of U.S. Supreme Court decisions to the American people). Undoubtedly, the internet revolution that post-dates the work of Bosch, Harris, and Slotnick has provided another media outlet to rival newspapers and television news in providing information about trials.

<sup>75</sup> See BOSCH, *supra* note 74, at 99 (explaining that few newspapers covered concerns about the use of *ex post facto* laws "because few editors comprehended the objection"). Newspaper coverage was limited despite the criticism of *ex post facto* charges by Senator Robert Taft and others. See Senator Robert A. Taft, *Equal Justice Under the Law*, Address at Kenyon College (Oct. 5, 1946) (condemning Nuremberg trials because, *inter alia*, they "violate the fundamental principle of American law that a man cannot be tried under an *ex post facto* statute"). See also, JOHN F. KENNEDY, PROFILES IN COURAGE 216 (1955) (quoting Supreme Court Justice William O. Douglas: "[T]he crime for which the Nazis were tried had never been formalized as a crime with the definiteness required by our legal standards . . . Goering [sic] et al. deserved severe punishment. But their guilt did not justify us in substituting power for principle.").

<sup>76</sup> See BOSCH, *supra* note 74, at 109 (noting that polls showed 75% of Americans approved of the Nuremberg trials—a figure that matched the 69% of columnists, 73% of newspapers, and 75% of periodicals that supported the trials).

Second, ignorance is often linked to bias against the accuser and the trials. A community, including its media, will be more skeptical of trials of its members that are conducted outside of the country because of the risk that the prosecutions are in fact engaging in “victor’s justice,” and media coverage may reflect this bias. Legal professionals in Bosnia and Herzegovina have complained that the information they receive from the local media about the ICTY is slanted by the nationalist fervor of the media outlets serving each of the Bosnian ethnic groups. Serbs, Croats, and Bosnian Muslims shared the concern that their respective outlets were substituting their political judgments for actual reporting.<sup>77</sup> Powerful groups opposed to the expressive message of the trials may manipulate media bias to turn public opinion against the trials as well. The clergy, looking to reassert its role in German society after World War II, used their relatively untainted position to use the German media to turn the German public against the IMT.<sup>78</sup> Where the media uses its biases to undermine support for the trial in the community of the defendant, the effectiveness of the planned moral education is reduced.

Third, media coverage tends towards the sensational, and at trial this may mean a disproportionate focus on the antics of the defendant. The British initially opposed an American proposal to try Nazi leaders in part because they feared the defendants would use the trials as propaganda to convince Germans and the international community that the trials were a farce, perhaps becoming martyrs in the process.<sup>79</sup> Defendants in war crimes trials have often acted as the British feared, presenting their defense in the court of public opinion. When they do, the media is too willing to focus on their antics, especially where prosecutors choose to present their evidence in less dramatic ways. The Nuremberg trials may be better remembered for the performance of Hermann Göring than for the prosecution’s case, which chief prosecutor

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<sup>77</sup> Human Rights Ctr. & the Int’l Human Rights Law Clinic, Univ. of Cal., Berkeley & Ctr. Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKLEY J. INT’L L. 102, 140 (2000) (detailing the lack of information provided to citizenry and the nationalist slant of local news reporting that did exist).

<sup>78</sup> See JÖRG FRIEDRICH, *Nuremberg and the Germans*, in WAR CRIMES: THE LEGACY OF NUREMBERG, *supra* note 40, at 93–95 (critiquing the clergy’s post-war attitude towards war crimes prosecutions).

<sup>79</sup> M. CHERIF BASSIOUNI, *The Nuremberg Legacy: Historical Assessment Fifty Years Later*, in WAR CRIMES: THE LEGACY OF NUREMBERG, *supra* note 32, at 294.

Robert Jackson chose to make through a treasure trove of documentary evidence.<sup>80</sup> Media coverage of the Iraqi High Tribunal was dominated by the theatrical outbursts of Saddam Hussein, often even overshadowing dramatic victim testimony from those harmed by Saddam's regime.<sup>81</sup> These performances by defendants can subvert the historical record created by the trial insofar as they create an alternative narrative that reduces the power of the norm intended to be projected.

#### 3.1.4. *Trials as Part of a Larger Norm Internalization Effort*

Trials since Nuremberg have failed to integrate trials for violations of international law into larger social re-education efforts. If the IMT did have an impact on the change in German attitudes after World War II, that change is generally attributed to the complementary work of German and international actors who built upon the IMT through an intensive de-Nazification campaign that used media, education and the local courts to inculcate respect for international law.<sup>82</sup> Given the large number of alternative and more powerful institutions contributing to norm development, trials alone cannot succeed in internalizing international legal prohibitions. Instead, the effects of the trials are likely to be significant only as an ever larger number of local actors, who have internalized the norms in question and used local institutions, such as Non-Governmental Organizations ("NGOs"), local social movements, media, religious houses and educational institutions, to deepen social commitment to the norms.<sup>83</sup>

Practice indicates, however, that trials for violations of international law since Nuremberg have generally been conducted with indifference, at best, and hostility, at worst, towards local

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<sup>80</sup> See DOUGLAS, *supra* note 6, at 11, 18, 19–20 (noting how the Nuremberg trial was described both as a "citadel of boredom" and, at other times, a "moment of high drama").

<sup>81</sup> See NEWTON & SCHARF, *supra* note 15, at 3 (describing how Saddam's "animal magnetism" and "powerful and aggressive manner" competed with the court for control over the trial). *But see* DRUMBL, *supra* note 6, at 178–79 (arguing that IHT did a much better job than ICTY of controlling the trial process).

<sup>82</sup> See NEWTON & SCHARF, *supra* note 15, at 211 (attributing changed German attitudes today in large part to post-World War II changes to German law, education, and popular culture).

<sup>83</sup> Cf. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 9 (1998) (listing major actors in international advocacy networks).



institutions in the community of the defendant. This problem is evident in the relationship between international tribunals and municipal courts in the community of the defendant. International or mixed tribunals have taken precedence over municipal justice and fact-finding efforts, and in the process, they have missed out on opportunities to co-opt local courts in norm inculcation efforts. Both the ICTY and ICTR claimed primary jurisdiction over crimes within their mandate, consequently ignoring the power of municipal judges and lawyers to augment norm internalization efforts. The Human Rights Center at the University of Berkeley interviewed 32 Bosnian judges in 1999 on their relationship with the ICTY. Those interviews revealed that Bosnian judges knew very little about the institution, despite an outreach effort, and that many judges believed that the ICTY had prevented the Bosnian courts from developing the expertise needed to pursue supplementary war crimes prosecutions on their own.<sup>84</sup> In Rwanda, the ICTR was granted primacy over the objection of the Rwandan government, which wanted trials conducted in Rwanda with the participation of the Rwandan judiciary.<sup>85</sup> Because the Rwandan judiciary was not included in the trial process, a potentially powerful ally was excluded from the norm internalization effort.<sup>86</sup>

Post-Nuremberg trials for violations of international law have missed opportunities to achieve synergies with other institutions in society as well. The Iraqi High Tribunal was constructed with an eye toward maintaining Iraqi control over the prosecution of Baath Party officials, including Saddam Hussein, for violations of international law committed by that regime.<sup>87</sup> But the power of trials to internalize international legal norms among Iraqi Sunnis, the community of the defendant, was greatly reduced by the failure to integrate the message emanating from trial with broader re-education efforts among Sunnis. Indeed, the government did the opposite: continuing with intense de-Baathification efforts

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<sup>84</sup> See Human Rights Ctr. & the Int'l Human Rights Law Clinic, Univ. of Cal., Berkeley, & Ctr. Human Rights, University of Sarajevo *supra* note 77, at 139-40 (detailing various judges' responses).

<sup>85</sup> Alvarez, *supra* note 72, at 393.

<sup>86</sup> See *id.* at 404 (discussing how use of a municipal tribunal would have improved Rwandans' access to international proceedings).

<sup>87</sup> See NEWTON & SCHARE, *supra* note 15, at 55 (explaining that Iraqis preferred to run their own trials of Saddam to preserve the legitimacy of the trials with the Iraqi people).

aimed at excluding Sunnis from Iraqi society, while supporting Shiite militias that were engaged in extrajudicial killings of Sunnis.<sup>88</sup> The result was a failure to reinforce the historical narrative of Baath Party crimes developed during the trials – a failure that undermined the impact of the trials themselves. The ICTY similarly neglected to integrate its trial efforts with broader social re-education efforts in the former Yugoslavia; thus, allowing opposition to trials, and the norms projected from them, to persist in the media.<sup>89</sup>

### 3.2. Four Conditions

Avoiding the problems that appear to have prevented past trials from internalizing international norms in the community of the defendant is a good starting point for norm internalization success. Past practice suggests four necessary, but not necessarily sufficient, conditions for successful norm internalization: consistency, selectivity, transparency, and integration. Two points are worth noting here about these conditions. First, because they were derived inductively, they are designed merely to be hypotheses based on observations of past facts. Second, meeting these conditions may not result in future norm internalization success. The paucity of past norm internalization success stories prevents any conclusion about what would be sufficient to achieve success. Rather, these conditions are required to avoid problems that appear to have prevented norm internalization in past practice.

The first condition for success in norm internalization is *consistency*. The trial authority must act consistently in applying international law in order to avoid the perception in the target audience that the trials represent victor's justice. Such perceptions have eroded the impact of past trials on norm development because target audiences have refused to draw lessons from trials perceived as arbitrary. Consistency can overcome this perception by demonstrating that the trial authority's interest in conducting

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<sup>88</sup> See Edward Wong, *Shiite Cleric Opposes U.S. Plan to Permit Former Baath Party Members to Join Government*, N.Y. TIMES, Apr. 3, 2007, at A1 (describing the continued push by Shiite religious leaders to marginalize Sunnis through de-Baathification campaign).

<sup>89</sup> See Human Rights Ctr. & the Int'l Human Rights Law Clinic, Univ. of Cal., Berkeley & Ctr. Human Rights, University of Sarajevo, *supra* note 77, at 140 (explaining that prejudices of Bosnian media kept accurate ICTY information from reaching the Bosnian public).

the trial is upholding international law, as opposed to continued prosecution of a recently completed war. The most obvious step in this direction is that any trial for violation of international law be conducted consistently with minimum international standards with respect to due process for the defendant.<sup>90</sup> All past trials analyzed here have deviated from these standards, be it with respect to the crimes charged,<sup>91</sup> defenses recognized,<sup>92</sup> or evidence admitted,<sup>93</sup> thus inviting the charge that the trials were “show trials.”<sup>94</sup> Crooked trials, though more effective in terms of securing convictions of defendants, are not venues for moral education because the historical narrative produced at such a trial will not be accepted as accurate by the defendant’s community.<sup>95</sup> Less obvious is that the trial authority must be willing to prosecute violations of international law committed by all sides to the conflict.<sup>96</sup> Here, too, most past trials studied fell short, as most selectively prosecuted crimes committed by the loser in the conflict, while leaving the winner’s crimes unaddressed.<sup>97</sup> But consistently applying international law, regardless of the actor to whom it is being applied, is essential to the trial’s message being accepted as a moral judgment by the international community, and

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<sup>90</sup> See DOUGLAS, *supra* note 6, at 3 (noting the pedagogical benefits of conducting trials according to the “sober authority of the rule of law”).

<sup>91</sup> See *supra* text accompanying note 40 (discussing ex post facto problems with charging defendants with the crime of aggression).

<sup>92</sup> See *supra* text accompanying note 47 (describing deviations from traditional practice at Nuremberg and Tokyo in disallowing a superior orders defense).

<sup>93</sup> See Aronfsky, *supra* note 53 (explaining how extensive admission of hearsay evidence at ICTY and ICTR may be undermining the fairness of trials).

<sup>94</sup> See generally HANNAH ARENDT, EICHMANN IN JERUSALEM 232 (1963) (arguing that using trials for pedagogic purposes creates show trials by “detract[ing] from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out just punishment”).

<sup>95</sup> This is not to say that there may not be such a thing as too much due process for a defendant. Mark Drumbl has pointed out that too many procedural protections for the defendant may allow him to grandstand at trial, thereby disrupting the trial’s narrative. Drumbl, *supra* note 5, at 1188.

<sup>96</sup> Mirjan Damaška has called this problem “selectivity of enforcement,” noting that most trials for violations of international law are directed at “citizens of states that are weak actors in the international arena.” Damaška, *supra* note 6, at 360–361.

<sup>97</sup> See *supra* text accompanying notes 42–43 & 49–53 (detailing instances where only crimes of the defeated in a conflict were prosecuted).

not another attempt by the armed conflict's winner to subjugate the loser.<sup>98</sup>

Two responses to this last point are worth noting here. First, Mirjan Damaska explains that it is unrealistic to expect that war crimes from all sides of an armed conflict will be prosecuted, and that this problem of selective enforcement should not prevent prosecution where possible.<sup>99</sup> While Damaska recognizes that such a prosecution pattern can engender "corrosive cynicism" in the community of the defendant, he believes this may be overcome if that community is convinced that the trials in question benefit them through reduced risk of future violence.<sup>100</sup> Damaska does not explain, however, how trials selectively enforcing international law against the defendant's community will contribute to reducing violence directed against that community. One source of reduced violence may be an end to violations of international law within the defendant's community itself. But trials will achieve this goal through norm internalization only if either the norm in question matches the personal morality of the community (a scenario that is unlikely in a community where violations were recently widespread), or because international law is accepted as a legitimate regulatory agent. The "corrosive cynicism" Damaska acknowledges would appear to prevent such acceptance. Another path to reduced violence would be to prevent the commission of future crimes against the community of the defendant by the community of the victor. But it is unlikely the community of the victor will be deterred from future atrocities when that community enjoys impunity for past committed crimes.

Second, some may worry that consistency in application of international law risks blurring the message on wrongdoing. Mark

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<sup>98</sup> Adam Smith argues that consistency not only requires prosecuting all crimes in the contemporary conflict at issue, but also taking into account historical crimes that contributed to the current situation. ADAM M. SMITH, *AFTER GENOCIDE: BRINGING THE DEVIL TO JUSTICE* 131-37 (2009) (detailing how the ICTR, ICTY, and the Special Court in Sierra Leone could have enjoyed greater legitimacy had their respective jurisdictions dipped further back into history). It is hard to imagine how such a suggestion could be practically implemented, however, given the ancient roots of many disputes that lead to massive human rights and humanitarian law violations.

<sup>99</sup> I am not, in Damaška's words, "an ironic academic scherzo" arguing that lack of consistency means there should be no prosecution at all. I am merely arguing that norm internalization will not succeed in the face of selective prosecution.

<sup>100</sup> Damaška, *supra* note 6, at 360-62.

Osiel has noted that one argument made against prosecuting crimes by all sides of a conflict is that it may imply a sense of moral equivalency regarding wrongdoing in the war.<sup>101</sup> This response misses the ultimate point of the trials under norm internalization theory. Norm internalization requires acceptance by the audience of the accuracy of the narrative developed at trial, and as Osiel himself explains, it is that accuracy that is at question where the crimes of all sides are not prosecuted.<sup>102</sup> The different narratives produced by different crimes can be sorted through by the target audience, with each narrative assigned its appropriate level of moral opprobrium.

The second condition for success is *selectivity*. Successful norm internalization depends on sufficiently spectacular trials that dramatize the effect of international law violations, followed by serious punishment stigmatizing the atrocities. Past trials have failed to create such spectacles because they have not prosecuted the most serious offenders for the most serious charges.<sup>103</sup> Such narratives are unlikely to reach popular society, thus ensuring that the trial will have little impact in norm development. Past trials have also failed in not sentencing those convicted of the most serious crimes to sentences indicative of the nature of the crime in question, allowing audiences to shrug off serious wrongdoing.<sup>104</sup> Selectivity addresses this problem by limiting prosecutions to the most important defendants for the most important charges.<sup>105</sup> Selectivity also means sentencing those convicted of the most serious crimes to sentences that will indicate to the target audience the seriousness of the wrongdoing involved.<sup>106</sup> Such prosecutions can penetrate popular consciousness because the graphic tales they depict are the most likely to generate significant media attention amid a glut of atrocious stories and images.

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<sup>101</sup> OSIEL, *supra* note 34, at 124-125.

<sup>102</sup> *See id.* at 125.

<sup>103</sup> *See supra* notes 64-71 and accompanying text for a discussion of the effect of shorter sentences.

<sup>104</sup> *See supra* notes 72-73 and accompanying text (discussing the impact of capital punishment's absence in international trials).

<sup>105</sup> Selectivity also presumes that prosecutions for these major charges proceed and are not merely plead out. *See DRUMBL, supra* note 6, at 179 (discussing the narrative problems created by "charge bargaining" at ICTY).

<sup>106</sup> This condition runs into the deep opposition of many international human rights lawyers to the death penalty. *But cf. Ohlin, supra* note 72, at 748 (explaining that opposition by veto-bearing Security Council members France and the United Kingdom to the use of the death penalty by the ICTR took the issue off the table).

The likely objection to the condition of selectivity is that it runs counter to the traditional practice of prosecutors. Prosecutors generally seek to try all potential defendants for all the crimes committed. The desire to prosecute all conceivable crimes may be greater with high profile defendants, as prosecutors may wish to pursue minor charges in the hope that “something sticks.”<sup>107</sup> While there may be other justifications for pursuing minor charges—such as incapacitation—prosecutions of this sort do not contribute to norm internalization efforts. Such trials do not send a sufficiently strong message about the international legal prohibition on such violations. Put another way, if it is the prohibition on genocide that is in need of internalization, the genocidaire’s prosecution for bank fraud sends no message to society about genocide. Worse, it may actually suggest to the target audience that when committing genocide, impunity is likely so long as you steer away from more easily prosecutable, common crimes.<sup>108</sup> Similarly, prosecuting the foot soldier, while allowing the general to remain free, creates narrative dissonance. The target audience may be tempted to equate the extent of crimes committed with the crimes prosecuted, thereby minimizing the tragedy for the audience and lessening the likelihood of moral transformation.<sup>109</sup>

The third condition for success is *accessibility*. Norm internalization depends upon the facts developed at trial reaching the target audience, as the trial narrative will have no impact if the audience does not receive information about the trial. Past trials have failed in this regard because they have used opaque trial procedures or anonymously provided evidence, hiding key portions of the narrative from the public.<sup>110</sup> Prosecutors have also

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<sup>107</sup> This strategy is often referred to as the “Al Capone” strategy, after the U.S. federal government used charges of tax fraud to convict mobster Al Capone. For a general discussion of this strategy, see Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583–84 (2005).

<sup>108</sup> See *id.* at 586 (“[T]he Capone prosecution sent a much more complicated and much less helpful message: If you run a criminal enterprise, you should keep your name out of the newspapers and at least pretend to pay your taxes.”).

<sup>109</sup> Selectivity may also run counter to the preferences of victims groups, who may prefer to see the prosecution of those individuals who had a hands-on involvement in the crimes in question. See SMITH, *supra* note 98, at 138–39 (describing complaints from locals in Sierra Leone that the Special Court has failed to prosecute the rank and file militants who directly perpetrated atrocities).

<sup>110</sup> See *infra* notes 242–47 and accompanying text (describing problems with “secret” legal processes).

selected evidence for trial that is unlikely to reach the public, preferring presentation of dry documentary evidence to the more dramatic presentation of victim testimony. Norm internalization has also suffered because the media—the filter between the trials and the public—has distorted trial coverage. Whether due to bias or mere sensationalism, distortion undermines the trial narrative’s impact on the target audience.<sup>111</sup> Increasing accessibility requires prioritizing the availability of information to the public. Such prioritization demands trial procedures designed to ensure open trials, including limiting the use of classified evidence. It also requires a prosecutorial commitment to select evidence that maximizes the impact of a victim’s testimony, which is much more likely to have a dramatic effect than standard documentary evidence.<sup>112</sup> Accessibility also means that the trial authority must have a media outreach strategy to reduce the media distortions that undermine norm internalization.

However, making trials for violations of international law accessible may prove difficult for at least three reasons. First, information that is critical to the prosecution of war crimes or massive human rights tragedies may be classified or otherwise sensitive. As a result, governments may resist the idea that such information be made public through open trial. Second, procedures designed to ensure that the defendant receive a fair trial may make the trial difficult for press to understand. For example, in international tribunals the adversarial process is currently thought to provide the greatest likelihood of a fair trial. Such a process may be misinterpreted by the media in civil law countries who are not accustomed to the defendant’s robust role in the trial.<sup>113</sup> Third, trial officials rarely view public relations work as part of their job description, preferring to try their cases in courts of law, not the in the court of public opinion. These concerns are rooted in both legitimate fears regarding the defendant’s fair trial

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<sup>111</sup> See *supra* notes 74–81 and accompanying text (discussing the problems in media representations of trials).

<sup>112</sup> Israel’s prosecution of Adolf Eichmann successfully magnified the power of the trial’s narrative through extensive use of victim testimony, as reflected in powerful media accounts of that testimony. See DOUGLAS, *supra* note 6, at 104–07 (explaining that victim testimony was designed to “penetrate the citadel of boredom” at trial) (citation omitted).

<sup>113</sup> Cf. Damaška, *supra* note 6, at 357 (worrying about perceptions of equivalency created by trials where the defense and prosecution case are presented as rival versions of the truth).

rights,<sup>114</sup> and less legitimate perceptions that lawyers are above public relations work. But without accessible trials, norm internalization is impossible, since the target audience will be insufficiently exposed to any kind of morally instructive narrative.

The fourth condition for success is *integration*. No matter how coherent a narrative of wrongdoing and punishment is presented at trial, trials cannot succeed at norm internalization on their own. Past trials have failed to utilize local institutions to deepen and reinforce the stories created by trials.<sup>115</sup> Integration recognizes that trials for violations of international law must be just one part of a larger effort at internalizing norms within society in order to succeed. These internal institutions are uniquely capable of taking on the advocacy functions necessary to socialize new norms. Margaret Keck and Kathryn Sikkink developed a typology of tactics that advocacy groups can use to advance the norms they promote. These include generating and disseminating information; identifying and leveraging power sources that can affect the needed change; and leading efforts to hold those powerful actors accountable for their commitment to the norm in question.<sup>116</sup> Without the advocacy efforts of these institutions, it is hard to imagine the norm in question taking root.

Prescribing integration is considerably easier than achieving it. Ironically, the very reason that trials are promoted as a venue for norm internalization—the limited ability of international law to influence other institutions in society—also limits the success of the trials at the enterprise. It is unlikely that institutions that contributed to the commission of war crimes or massive human rights tragedies will immediately reverse course and instead begin socializing international legal norms. Trial authorities should aim to use trials to develop and buttress what are likely to be fledgling

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<sup>114</sup> In the United States, this is rooted in the tension between the press and public's First Amendment right to access trials, and the defendant's Sixth Amendment right to a fair trial. See generally Katherine Flanagan-Hyde, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585, 604–06 (2006) (describing this tension).

<sup>115</sup> See *supra* Section 3.1.4. of this Article.

<sup>116</sup> KECK & SIKKINK, *supra* note 83, at 16. Keck and Sikkink argue that organizations outside the country in question can serve an important advocacy function through the indirect “boomerang effect.” See *id.*, at 13 (arguing that international NGOs can influence governments and international institutions that can in turn influence a rights-violating government). Whatever the scope of the “boomerang effect,” it is hard to believe such external pressures can succeed in altering local beliefs without support from local institutions.



local efforts to alter the social acceptability of international law violations. This means empowering, not marginalizing, local legal institutions when trials take place outside the community of the defendant. Integration also requires actively using trials to influence key opinion makers in society who may in turn push local institutions into a supportive posture. In carrying out such a strategy, courts must be careful not to sacrifice the judicial independence necessary for a fair trial. Indeed, care must be taken so that the synergies created with local institutions are not a proxy for political influence in the trials. One way to limit this potential pitfall is for the trial authority to create a separate entity to handle public outreach. Such an entity could be less concerned about appearances of propriety, and instead reach out to relevant religious, education, and media figures.

As a final point, these conditions are developed in the context of norm internalization in the community of the defendant. While the past transgressions in the defendant's community make that a natural focus of norm internalization efforts, many of the problems described in this Article are unique to a community that has just lost a war. The problem of "victor's justice," for example, is far less likely to resonate in communities outside of the defendant's. Similarly, media bias against the trials—which skews coverage in the defendant's community—may actually augment the trial's message among less suspicious audiences.<sup>117</sup> Thus, while application of the four conditions may suggest problems for norm internalization in the community of the defendant, it does not reflect on the ability of trials to serve alternative messaging functions with different audiences.<sup>118</sup>

#### 4. ISLAMIC TERRORISM AND NORM INTERNALIZATION

##### 4.1. *The Case for Norm Internalization*

There are at least four reasons why it may be appealing to use trials for violations of international law to internalize an anti-

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<sup>117</sup> See *supra* notes 75–76 and accompanying text (describing U.S. media bias in favor of Nuremberg trials).

<sup>118</sup> Indeed, such trials may serve an indirect salutary effect in the community of the defendant. See Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 *CHI. J. INT'L L.* 1, 4 (2001) (arguing that justice events external to a society may create a "justice cascade" that promotes human rights and accountability within that society).

terrorism norm in the Islamic world. First, terrorism is a clear violation of international law that results in grave human costs; so it generates an immense international desire to reduce the phenomenon. While a definition of terrorism under international law has proven elusive,<sup>119</sup> U.S. law defines the concept as, “premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents.”<sup>120</sup> Using this definition, terrorist acts can violate either human rights law or international humanitarian law, depending on the context.<sup>121</sup> A series of international treaties require states to criminalize particular forms of terrorist activity, and to then prosecute or extradite those found engaged in such activity in their territory. These international treaties are augmented by a series of similar regional treaties designed to spur state action against terrorists acting within their territory.<sup>122</sup> Where states are unable or unwilling to prosecute or extradite terrorists operating within

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<sup>119</sup> Definitions of terrorism have traditionally floundered on the problem of distinguishing between legitimate “freedom fighters” and “terrorists.” For a useful discussion on the difficulties the international community has faced in defining terrorism, as well as an argument on what the core definition may include, see generally Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23 (2006).

<sup>120</sup> See 22 U.S.C. § 2656f(d)(2) (defining terrorism for use in annual country reports on terrorism; note that this definition excludes attacks on military targets, such as al Qaeda’s 2000 attack on the USS Cole).

<sup>121</sup> Terrorism can violate international humanitarian law if the act in question occurs during the course of an armed conflict, such as the ongoing war between the United States and al Qaeda. See Hans-Peter Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law*, 84 INT’L REV. RED CROSS 547, 549 (providing detailed support for the illegality of terrorism in armed conflict under IHL). Terrorism may also constitute a crime against humanity when committed as part of a widespread or systematic attack against a civilian population. See Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?*, 19 AM. U. INT’L L. REV. 1009, 1029 (2004) (arguing that terrorism meets the Rome Statute definition of crime against humanity). Finally, terrorism can be a violation of human rights, at least when perpetrated by governments against its own people, and maybe more broadly. See Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 41–44 (2008) (marshaling evidence to argue that terrorism committed by non-state actors also amounts to a human rights violation).

<sup>122</sup> For a comprehensive discussion of international and regional treaties against terrorism, including the activities covered and the scope of the extradition or prosecution regime, see Daniel O’Donnell, *International Treaties Against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces*, 88 INT’L REV. RED CROSS 853 (2006).

their territory, the 1998 Rome Statute grants the International Criminal Court jurisdiction in certain cases.<sup>123</sup>

In addition to the clear prohibition on terrorism in international law, terrorist acts inflict a significant human cost. Nowhere are these costs felt greater than in the Islamic world, where the majority of today's terrorists and their victims are Muslim. The U.S. National Counterterrorism Center ("NCTC") 2008 Report on Terrorism found that 55% of the 11,800 terrorist attacks committed in 2008 took place in Iraq, Afghanistan, and Pakistan. Islamic extremist groups such as the Taliban, al Qaeda, and al Qaeda-affiliated groups like the Somali Shabaab claimed responsibility for the largest number of attacks.<sup>124</sup> Over 50,000 people worldwide were injured or killed due to terrorism in 2008, and "well over 50%" of those were Muslim.<sup>125</sup> Added to this great human cost is the tremendous financial cost terrorism imposes on society, both in terms of direct costs from property damage and destroyed infrastructure and indirect costs to consumer and investor confidence.<sup>126</sup>

Second, lasting deterrence of terrorism is hard to achieve. For groups like al Qaeda, the motivation for acts of terrorism is not malice per se, but rather a distorted sense of saving the world from a present danger for future good.<sup>127</sup> If a terrorist is willing to die for the good he believes he is achieving, it seems unlikely that the threat of life in prison—or even the death—will serve as a meaningful restraint on behavior.<sup>128</sup> Even more rational actors, such as some state sponsors of terrorism, can be difficult to deter.

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<sup>123</sup> See Rome Statute, *supra* note 46, art. 7(1), 8(1), 8(2)(b)(i)–(ii), (iv) (granting ICC jurisdiction to consider corresponding crimes against humanity and international humanitarian law violations). The effort by some states to include terrorism as a crime against humanity was rejected at the Rome Conference, due in large part to opposition by the United States. Proulx, *supra* note 121, at 1023.

<sup>124</sup> NATIONAL COUNTERTERRORISM CENTER, 2008 REPORT ON TERRORISM 11 (Apr. 30, 2009) available at <http://wits.nctc.gov/ReportPDF.do?f=crt2008nctcannexfinal.pdf>.

<sup>125</sup> *Id.* at 12.

<sup>126</sup> See R. Barry Johnston & Oana M. Nedelescu, *The Impact of Terrorism on Financial Markets* 3–4 (Int'l Monetary Fund, Working Paper No. 60, 2005).

<sup>127</sup> Cf. Koskenniemi, *supra* note 14, at 8 (referring to Nazi and Soviet evils as non-deterrable because they were perpetrated in an effort to do social good).

<sup>128</sup> See Damaška, *supra* note 6, at 344 ("[I]t is not clear how deterrence could work against people who regard death in pursuit of their actions as vindication and beatification."); see also Drumbly, *supra* note 5, at 1185–86 (arguing that terrorists do not use a "rational actor cost-benefit analysis" required for successful deterrence).

Those engaged in terrorist activity should be cognizant of the poor record of international law in apprehending, convicting and punishing terrorists. There have been many examples within the Islamic world of states that fail to arrest or prosecute known terrorists within their territory,<sup>129</sup> sentence those caught and convicted to very short sentences,<sup>130</sup> or just outright release terrorists—allowing them to freely return to their prior activities.<sup>131</sup> Efforts in the West to prosecute terrorists have been similarly stymied by evidentiary problems, resulting in acquittals or reversed convictions.<sup>132</sup> Despite these problems, there has been no real effort to use the ICC's jurisdiction over attacks on civilians to prosecute terrorists whom states are unable or unwilling to prosecute. Moreover, while the West has promised various benefits to states that renounce terrorism, it has been inconsistent in delivering on these incentives, creating the risk of recidivism.<sup>133</sup>

Third, there is evidence to suggest the anti-terrorism norm has failed to adequately permeate Islamic societies. As a consequence, terrorism remains a socially acceptable method for achieving political aims in significant parts of the Islamic world. At times over the last several years, a majority of people in Lebanon, Jordan,

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<sup>129</sup> For example, Kuwait refused to prosecute three former Guantanamo detainees suspected of involvement in terrorism after their return; one subsequently traveled to Iraq and committed a suicide bombing in Mosul. Alissa J. Rubin, *Former Guantánamo Detainee Tied to Mosul Suicide Attack*, N.Y. TIMES, May 8, 2008, at A8.

<sup>130</sup> For example, Indonesia sentenced Abu Bakar Bashir, inspirational leader of the terror group Jemaah Islamiyah, to just thirty months in prison for his involvement in the conspiracy that led to the 2002 bombing of a nightclub in Bali, and then cut four and a half more months off the sentence in honor of Indonesia's Independence Day. Evelyn Rusli, *Bali Bomb Sentences Cut*, N.Y. TIMES, Aug. 18, 2005, at A12.

<sup>131</sup> Yemen released Jamal al-Badawi, architect of the 2000 attack on the USS Cole, in October 2007 in return for help in tracking down Islamic radicals who had escaped from prison. He was re-arrested by the Yemenis after the U.S. threatened to cut off counter-terrorism aid over the release. Robert F. Worth, *Yemen's Deals with Jihadists Unsettle the U.S.*, N.Y. TIMES, Jan. 28, 2008, at A1.

<sup>132</sup> German courts acquitted Abdelghani Mzoudi, a Moroccan national and Mohammed Atta's Hamburg roommate, for his involvement in the 9/11 attacks because U.S. officials refused to allow Ramzi bin al-Shibh, then in CIA custody, to testify at trial. See Desmond Butler, *Faulting U.S., Germany Frees a 9/11 Suspect*, N.Y. TIMES, Feb. 6, 2004, at A1 (quoting the judge stating: "You are acquitted not because the court is convinced of your innocence, but because the evidence was not enough to convict you.").

<sup>133</sup> See Slackman, *supra* note 28 (discussing Libyan complaints on American follow-through after it gave up terrorism in return for political and economic benefits).

and Egypt believed that suicide bombing of civilian targets could in some instances be justified in defense of Islam, and significant percentages of people in Nigeria, Pakistan, and Indonesia agreed.<sup>134</sup> While there have been some positive signs regarding attitudes towards al Qaeda and terrorism in the Islamic world in the last two years,<sup>135</sup> year to year fluctuations in poll numbers do not demonstrate a deep rooted abhorrence of terrorism as a means to a political end. Indeed, there was a slight increase in support for suicide bombings in Jordan and Indonesia last year, and over a quarter of the population in Nigeria, Jordan, and Lebanon continues to support such tactics.<sup>136</sup>

Thomas Friedman, a columnist for the New York Times, has argued that the failure of ordinary Muslims to condemn terrorism has done more to perpetuate its use by extremists than any other factor.<sup>137</sup> This passivity, he believes, is at least partially motivated by a belief that it is legitimate to kill civilians of different faiths, ostensibly in defense of your own religion.<sup>138</sup> Friedman believes that the best weapon against terrorism is a response from the terrorist's community saying, "No more. What you have done in murdering defenseless men, women and children has brought shame on us and on you."<sup>139</sup> A broadly accepted anti-terrorism norm may go a long way towards creating the social condemnation

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<sup>134</sup> PEW GLOBAL PROJECT ATTITUDES, THE GREAT DIVIDE: HOW WESTERNERS AND MUSLIMS VIEW EACH OTHER 4 (2006) available at <http://pewglobal.org/reports/pdf/253.pdf>. In 2006, 35% of French Muslims believed that violence against civilian targets could at least rarely be justified by defense of Islam. *Id.*

<sup>135</sup> Support for suicide bombing has dropped since 2006, most notably in Pakistan, where it fell from 33% in 2002 to 5% in 2008. THE PEW GLOBAL PROJECT ATTITUDES, GLOBAL PUBLIC OPINION IN THE BUSH YEARS (2001-2008) 7 (Dec. 18, 2008) available at <http://pewglobal.org/reports/pdf/263.pdf>. Confidence in al Qaeda as an organization and Osama bin Laden as a leader is also slumping; confidence dropped among Jordanian Muslims from 56% in 2003 to 19% in 2008. *Id.* In 2008, only 3% of Muslims in Turkey, and 2% of Muslims in Lebanon expressed confidence in Bin Laden. *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., Thomas L. Friedman, Op.-Ed., *Calling all Pakistanis*, N.Y. TIMES, Dec. 3, 2008, at A31 (arguing that terrorism will only stop when the home society of the terrorists condemns it).

<sup>138</sup> Thomas L. Friedman, Op.-Ed., *Sunni Arabs May Ask "Why Us?" They Should Ask, "Why Anyone?"*, N.Y. TIMES, Nov. 16, 2005, at A23 (describing the lack of protest when Christian, Jews, Hindus, and even Shiites are murdered).

<sup>139</sup> Friedman, *supra* note 137.

of terrorism Friedman believes is necessary to combat the phenomenon.<sup>140</sup>

Fourth, international law wields limited influence over other social institutions in the Islamic world that are central to norm development. The international legal prohibition on terrorism has only weakly influenced schools, religious institutions, and the media in the Islamic world. As a result, these institutions have made only halting efforts to combat militancy. Religious schools have taken the place of secular government-run schools in parts of places like Pakistan and have bred Islamic militancy where it did not previously exist. Pakistani police say that more than two-thirds of the suicide bombers that have struck in Punjab province were educated through these madrasas.<sup>141</sup> Radical clerics have been the inspirational backbone of Islamic terrorists. For example, Abu Qatada, a radical Palestinian cleric linked to the Finsbury Park mosque in London, has been accused of inspiring shoe bomber Richard Reid and 9/11 conspirator Zacharias Moussaoui.<sup>142</sup> While many Islamic clerics have spoken out forcefully against terrorism, their message is frequently drowned out by more radical voices — often in violent ways.<sup>143</sup> The media has not been helpful either. Children's television shows use puppet characters like Assud the Rabbit to glorify martyrdom as part of the Palestinian struggle against Israel.<sup>144</sup> Given international law's limited influence over critical institutions in the Islamic world, trials for violations of international law are a potential rare vehicle for influencing norm development.

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<sup>140</sup> See Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 85 (2002) (arguing that "the creation of a legal and social norm that condemns terrorism is a necessary mid- to long-term project").

<sup>141</sup> Sabrina Tavernise, *Pakistan's Islamic Schools Fill Void, but Fuel Militancy*, N.Y. TIMES, May 3, 2009, at A1.

<sup>142</sup> Alan Cowell, *Fugitive Muslim Cleric, an Outspoken Supporter of Al Qaeda, Is Arrested in London*, N.Y. TIMES, Oct. 26, 2002, at A9.

<sup>143</sup> See Waqar Gillani & Sabrina Tavernise, *Moderate Cleric Among 9 Killed in Pakistan Blasts*, N.Y. TIMES, June 13, 2009, at A10 (describing Taliban murders of moderate Pakistani clerics).

<sup>144</sup> Steven Erlanger, *In Gaza, Hamas's Insults To Jews Complicate Peace Effort*, N.Y. TIMES, Apr. 1, 2008, at A1. Assud tells the kids, "We are all martyrdom-seekers, are we not . . . ? . . . We are all ready to sacrifice ourselves for the sake of our homeland." *Id.*

#### 4.2. History of Trials at Guantanamo Bay

Given the four factors above, it is not surprising that some scholars have looked to trials of terror suspects detained at Guantanamo Bay as a potential locus for norm internalization efforts in the Islamic world.<sup>145</sup> Before analyzing whether these trials could meet the four conditions laid out in Section 2, this Section provides a brief account of the efforts of the U.S. government to date in trying those detained at Guantanamo for violations of international law.

On November 13, 2001, President Bush issued a Military Order authorizing the Secretary of Defense to set up military commissions.<sup>146</sup> The Military Order potentially subjected all aliens to trial by military commission, including resident aliens, but excluded American citizens from the commission's jurisdiction.<sup>147</sup> The Department of Defense implementation order specified that detainees would be tried by military commission for "violations of the laws of war and all other offenses triable by military commission"<sup>148</sup> but did not define specific offenses. The initial iteration of commissions was criticized for departing significantly from the procedural protections traditionally provided to defendants in U.S. federal courts or in UCMJ courts martial. The commissions did not include any evidentiary protections from the use of hearsay evidence or evidence obtained through coercive means short of torture;<sup>149</sup> allowed for admission of secret classified evidence never seen by the defendant, provided it did not result in "deni[al] of a full and fair trial";<sup>150</sup> permitted the Secretary of

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<sup>145</sup> See *supra* Section 2.

<sup>146</sup> Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order].

<sup>147</sup> *Id.* § 2(a).

<sup>148</sup> U.S. DEP'T OF DEFENSE, MILITARY COMMISSIONS ORDER NO. 1 (Mar. 21, 2002), § 3(b), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter MCO 1].

<sup>149</sup> See *id.* § 6D(1) (allowing admission of evidence that "would have probative value to a reasonable person"). MCO1 did not initially restrict evidence obtained through the use of torture, but a restriction was added shortly before oral arguments in *Hamdan v. Rumsfeld*. See also Jess Bravin, *White House Will Reverse Policy, Ban Evidence Elicited by Torture*, WALL ST. J., Mar. 22, 2006, at A3 (describing Defense Department regulation that had been approved but not publicly released).

Defense to make changes to the rules mid-trial;<sup>151</sup> and provided judicial review of convictions as a right only where the defendant was sentenced to death or a term of imprisonment greater than ten years, making review of shorter sentences a discretionary decision of the D.C. Circuit.<sup>152</sup> Ten detainees were referred for prosecution under the initial commissions system, although no detainee was charged with involvement in high profile terrorist activity.<sup>153</sup> This reflected a deliberate strategy by the Bush Administration to use the initial trials at Guantanamo as a “shake-down cruise for the new procedures” before trying higher-level suspects.<sup>154</sup>

The first iteration of commissions came to a close with the U.S. Supreme Court decision in *Hamdan v. Rumsfeld*,<sup>155</sup> which found that the President’s military commissions violated Congressional mandate.<sup>156</sup> The Military Commissions Act of 2006 (“MCA”)<sup>157</sup>

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<sup>150</sup> U.S. Dep’t of Defense, News Release, Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures (Aug. 31, 2005), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=8837>. This was a modification of earlier procedures that had no full and fair trial requirement. MCO1 § 6D(5)(b).

<sup>151</sup> See MCO1 § 11 (permitting Secretary of Defense to amend commission rules “from time to time”).

<sup>152</sup> 28 U.S.C. § 2241(e)(3)(B)(i)–(ii). Review would consist of whether the standards and procedures in MCO1 were followed, as well as whether the use of those standards and procedures to arrive at a final decision was consistent with the laws and constitution of the United States, to the extent applicable. *Id.* § 2241(e)(3)(D). This right created in the Detainee Treatment Act of 2005 was a significant modification of the original commissions system envisioned by the President, which included no judicial review at all. MCO1 § 6H(4)–(6).

<sup>153</sup> The ten detainees charged were Ali Hamza al-Bahlul (Yemen); Ibrahim al-Qosi (Sudan); David Hicks (Australia); Salim Ahmed Hamdan (Yemen); Omar Khadr (Canada); Ghassan al-Sharbi (Saudi Arabia); Jabran Qahtani (Saudi Arabia); Sufyian Barhoumi (Algeria); Binyam Muhammad (Ethiopia); and Abdul Zahir (Afghanistan), most of whom were charged only with conspiracy based on their involvement with al Qaeda and the Taliban. David Hicks and Omar Khadr were also charged with murder and aiding the enemy based on their involvement in firefights between the Taliban and the U.S. military in the course of the war in Afghanistan. Only Abdul Zahir was charged with directly attacking civilians. U.S. Dep’t of Defense, Military Commissions, [http://www.defenselink.mil/news/Nov2004/charge\\_sheets.html](http://www.defenselink.mil/news/Nov2004/charge_sheets.html) (last visited Dec. 4, 2009).

<sup>154</sup> See Neil A. Lewis, *Six Detainees May Soon Face Military Trials*, N.Y. TIMES, July 4, 2003, at A1 (quoting Bush Administration officials).

<sup>155</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>156</sup> The Court found that military commissions violated the Uniform Code of Military Justice (“UCMJ”) in two ways. First, commissions violated Article 36(b) of the UCMJ by deviating significantly from court-martial rules with respect to admissibility of evidence, including hearsay and coerced evidence, as well as the right of the defendant to see all the evidence against him presented at trial. *Id.* at



revived military commissions after *Hamdan*. Unlike the earlier iteration of commissions, the MCA opted to legislatively define the offenses within the jurisdiction of the commissions. Congress indicated its intent not to define any new offenses in the MCA, but rather to limit the jurisdiction of the commissions only to “offenses that have traditionally been triable by military commission.”<sup>158</sup> While one may assume that these offenses would have been those recognized as customary under IHL,<sup>159</sup> in fact the definition of murder,<sup>160</sup> conspiracy<sup>161</sup> and material support for terrorism<sup>162</sup> exceeded the scope of traditional law of war offenses.

The MCA also modified the controversial evidentiary rules from the initial iteration of commissions, increasing protection for defendants but still providing fewer procedural rights than are afforded defendants in courts-martial or U.S. federal courts. The MCA specifically barred statements obtained through torture as well as those obtained in violation of the DTA’s prohibition on cruel, inhuman or degrading treatment.<sup>163</sup> But the MCA was careful to distinguish between evidence obtained before and after the enactment of the DTA. The MCA allows admission of evidence obtained through coercion short of torture—including cruel,

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623–25. Second, commissions violated Article 21’s requirement of compliance with the “law of war,” by failing to meet the requirements of Common Article 3 of the Geneva Conventions. *Id.* at 632–33, n.65.

<sup>157</sup> Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.) [hereinafter MCA].

<sup>158</sup> *Id.* § 950p(a).

<sup>159</sup> *But see* John C. Dehn, *The Hamdan Case and the Application of a Municipal Offense*, 7 J. INT’L CRIM. JUST. 63, 81 (2009) (arguing that MCA codified a U.S. common law offense of “murder in violation of the law of war” even though that offense is not an IHL war crime, but rather a municipal offense “permitted” by IHL).

<sup>160</sup> Unlawful or unprivileged combatants, defined as combatants without combatant immunity, can be prosecuted under existing and applicable municipal law for their actions in combat precisely because they lack immunity. They may also be prosecuted under international humanitarian law but only for violations of the laws of war, such as attacks targeting civilians. Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 I.R.R.C. 45, 70–71. Only a small number of those slated for prosecution were charged with murdering civilians.

<sup>161</sup> *See Hamdan*, 548 U.S. at 601 (Stevens, J., plurality) (concluding that conspiracy is not an “[o]ffence[] against the Law of Nations”).

<sup>162</sup> *See* Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT’L L. 56, 60–61 (2007) (arguing that MCA offense of providing material support for terrorism extends beyond traditional law of war offenses).

<sup>163</sup> MCA § 948r(a), (d)(3).

inhuman and degrading treatment—which was collected before the DTA was enacted, provided the statement was reliable and probative, and admission best served the interests of justice.<sup>164</sup> Hearsay evidence remained admissible, but the defendant was given a greater opportunity to get hearsay excluded if he could demonstrate that the evidence was unreliable.<sup>165</sup> As for classified evidence, the MCA took the important step of recognizing the right of the defendant to be present, absent courtroom disruptions,<sup>166</sup> and guaranteed the defendant the right to receive all relevant exculpatory evidence or an unclassified substitute.<sup>167</sup> It did, however, allow the government to admit evidence without revealing the sources and methods behind the evidence, where the military judge determined the sources and methods were classified and the evidence was reliable.<sup>168</sup> Finally, the MCA included a catchall provision requiring the military judge to exclude evidence whose prejudicial effect substantially outweighed its probative value.<sup>169</sup>

Finally, the MCA built on the judicial review process created in the Detainee Treatment Act. It created a Court of Military Commission Review, consisting of panels of at least three appellate military judges, to hear appeals of legal questions stemming from final military commission orders.<sup>170</sup> The MCA also maintained the role of the D.C. Circuit in reviewing final military commission orders but extended the right of appeal to all convicted by a commission. The scope of review from the DTA was essentially maintained, as the D.C. Circuit was granted the right to review whether commission proceedings abided by the regulations within the MCA, as well as whether those regulations were consistent with the laws and Constitution of the United States, to the extent applicable.<sup>171</sup>

Only three MCA commissions—all of minor al Qaeda figures—were completed before President Obama temporarily suspended

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<sup>164</sup> *Id.* § 948r(c).

<sup>165</sup> *See id.* § 949a(b)(2)(E) (requiring government provide defendant notice of intention to use hearsay and particulars of the evidence).

<sup>166</sup> *Id.* § 949d(a)(2).

<sup>167</sup> *Id.* § 949j(d).

<sup>168</sup> *Id.* § 949d(f)(2)(B).

<sup>169</sup> *Id.* § 949a(b)(2)(F).

<sup>170</sup> *Id.* § 950f.

<sup>171</sup> *Id.* § 950g.

commissions upon taking office.<sup>172</sup> Australian David Hicks pled guilty to providing material support for terrorism for training at the al-Farooq training camp in Kandahar, where he allegedly learned kidnapping techniques and urban fighting skills. He received a nine month sentence, which he was allowed to serve in Australia, amid allegations that the plea bargain was motivated by political pressure from Australia.<sup>173</sup> Yemeni Salim Hamdan was convicted of providing material support for terrorism for his work as Osama bin Laden's bodyguard and driver, and was sentenced to just five additional months of imprisonment.<sup>174</sup>

Hamdan's trial was marred by allegations of abuse<sup>175</sup> and extensive use of classified evidence not available to the public.<sup>176</sup> Ali Hamza al-Bahlul, an al Qaeda propaganda chief, was convicted of material support for terrorism, solicitation to commit murder, and conspiracy after he refused to participate or allow his lawyers to participate in his trial.<sup>177</sup> Meanwhile, charges against six defendants for conspiring to commit the 9/11 attacks,<sup>178</sup> against

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<sup>172</sup> Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

<sup>173</sup> See Raymond Bonner, *Critics Say Australian Leader Was Alert to Politics in Detainee Deal*, N.Y. TIMES, Apr. 1, 2007, at A26 (quoting Green Party leader Bob Brown describing Hicks' deal as "more about saving Mr. Howard's political hide than about justice for Hicks"); see also Jess Bravin, *Political Sway at Guantanamo? Former Prosecutor Says Pressure Began with Australian's Case*, WALL ST. J., Oct. 27, 2007, at A4 (noting Morris Davis' account that Hicks' charges were rushed based on political pressure from Australia).

<sup>174</sup> William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1.

<sup>175</sup> The military judge excluded statements made by Hamdan to interrogators in Afghanistan, prior to being sent to Guantanamo, because those statements were made at a time when he was in solitary confinement, with restrained hands and feet, and subjected to aggressive interrogation tactics by guards. See William Glaberson & Eric Lichtblau, *Guantanamo Detainee's Trial Opens, Ending a Seven-Year Legal Tangle*, N.Y. TIMES, July 22, 2008, at A12. Hamdan also claimed he was part of Operation Sandman at Guantanamo, a program in which the Defense Department subjected detainees to intense sleep deprivation to soften them for interrogation. William Glaberson, *Detainee's Lawyers Make Claim on Sleep Deprivation*, N.Y. TIMES, July 15, 2008, at A15.

<sup>176</sup> See William Glaberson, *Prosecution Rests, Then Terror Trial Enters Secret Session to Hear Defense Testimony*, N.Y. TIMES, Aug. 1, 2008, at A13 (noting that even a portion of the defense's case resting on the 9/11 Commission Report was deemed classified).

<sup>177</sup> William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19 (describing Ali Hamza al Bahlul's conviction).

<sup>178</sup> See William Glaberson, *Hurdles Seen as Capital Charges Are Filed in 9/11 Case*, N.Y. TIMES, Feb. 12, 2008, at A14 (describing charges against Khalid Shaikh

another detainee for involvement with the bombing of the U.S. embassy in Tanzania,<sup>179</sup> and against another for masterminding the 2000 attack on the USS *Cole*,<sup>180</sup> were suspended because of problems created by complicated evidence, limited defense resources, translation problems,<sup>181</sup> and torture.<sup>182</sup>

One of President Obama's first actions after taking office as President of the United States was to suspend military commissions.<sup>183</sup> In May the President laid out in broad terms his vision for future trials of those detained at Guantanamo.<sup>184</sup> Obama indicated his preference for conducting trials in the U.S. federal courts "whenever feasible" for violations of U.S. criminal law. By contrast, he advocated for use of revamped military commissions, with greater procedural protections for defendants for those persons believed to have committed violations of the laws of war. To implement these goals, President Obama signed the Military Commissions Act of 2009 ("MCA09") into law in October 2009.<sup>185</sup> MCA09 expanded numerous procedural protections for defendants, including: implementing a ban on statements

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Mohammed, Mohammed al-Qahtani, Ramzi bin al-Shibh, Ali Abd al-Aziz Ali, Mustafa Ahmed al-Hawsawi, and Walid bin Attash).

<sup>179</sup> See William Glaberson, *Guantánamo Detainee, Indicted in '98, Now Faces War Crimes Charges*, N.Y. TIMES, Apr. 1, 2008, at A16 (describing charges against Ahmed Khalfan Ghailani for coordinating and planning the attack). Ghailani has now been transferred to the Southern District of New York for trial. See Benjamin Weiser, *Guantanamo Detainee Pleads Not Guilty in a Manhattan Court*, N.Y. TIMES, June 10, 2009, at A25 (describing Ghailani's trial process).

<sup>180</sup> See William Glaberson, *Guantánamo Detainee Faces War Crimes Charges in Attack on Destroyer*, N.Y. TIMES, July 1, 2008, at A15 (describing charges against Abd al-Rahim al-Nashiri).

<sup>181</sup> William Glaberson, *New Roadblocks Delay Tribunals at Guantánamo, Frustrating the Pentagon*, N.Y. TIMES, Apr. 10, 2008, at A16 (describing problems with Guantanamo detainees' trials, including translation difficulties).

<sup>182</sup> Charges against Mohammed al-Qahtani, an alleged 9/11 co-conspirator, were dropped after Susan Crawford, the convening authority of military commissions, determined that al-Qahtani had been tortured by the Defense Department through "sustained isolation, sleep deprivation, nudity, and prolonged exposure to cold." Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1.

<sup>183</sup> See Exec. Order No. 13,492 74 Fed. Reg. 4897 (ordering the closure of the detention facilities at Guantanamo Bay).

<sup>184</sup> See Obama Address, *supra* note 1 (describing President Obama's plans for trials for Guantanamo detainees).

<sup>185</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (codified in scattered sections of 10 U.S.C.) [hereinafter "MCA09"].

obtained through cruel, inhuman, or degrading treatment;<sup>186</sup> imposing an obligation on the government to provide exculpatory evidence to the defense similar to the *Brady* rule in civilian courts;<sup>187</sup> restricting the use of hearsay;<sup>188</sup> and developing classified information rules to closely match those found in the Classified Information Protection Act (“CIPA”).<sup>189</sup> The Administration is currently proceeding with trials against those believed to be involved in 9/11 and African Embassy bombings in federal court, while restarting military commissions for those involved in the USS *Cole* attack, among others.<sup>190</sup>

#### 4.3. *Guantanamo Trials and the Four Conditions*

In some ways, the trials of the detainee population at Guantanamo Bay present excellent opportunities for promoting an anti-terrorism norm in the Islamic world.<sup>191</sup> Many high-level members of al Qaeda and affiliated groups are or have been detained there, including those believed to have been behind 9/11, the attack on the U.S. embassy in Tanzania, the Bali nightclub bombing, and other major terrorist attacks. Norm internalization theory argues that trials that develop a legitimate history of these events, and produce a graphic account of the facts and the role of Islamic terrorists in the attacks, can strengthen opposition to these acts in the Islamic world.<sup>192</sup> Demonstration of the human costs of violating international law may be the most powerful argument in favor of following it. Trials of these detainees also can stigmatize the offenders and offenses through imposition of serious sentences,

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<sup>186</sup> *Id.* § 948r(a)

<sup>187</sup> *Id.* § 949j.

<sup>188</sup> *Id.* § 949a.

<sup>189</sup> *Id.* § 949p-4.

<sup>190</sup> Savage, *supra* note 4, at A18.

<sup>191</sup> Of course there are many other reasons for conducting prosecutions of detainees at Guantanamo, including retribution for terrorist acts that killed many Americans. See Jeff Zeleny & Elisabeth Bumiller, *Suspects Will Face Justice, Obama Tells Families of Terrorism Victims*, N.Y. TIMES, Feb. 7, 2009, at A11 (describing pressure from some victims’ families to bring of Guantanamo detainees to trial).

<sup>192</sup> Polling suggests there is a great deal of misinformation in the Islamic world about 9/11. For example, a 2006 study found that a majority of people in Indonesia, Turkey, Egypt, and Jordan, and a plurality in Pakistan and Nigeria, do not believe that Arabs were behind the 9/11 attacks. PEW GLOBAL PROJECT ATTITUDES, *supra* note 134, at 4. That view was shared by 56% of British Muslims. *Id.*

including the death penalty, thus deepening revulsion towards terrorism in the defendant's community.

Nevertheless, the Bush Administration never claimed an intent to use trials to advance pedagogical goals among Muslim audiences.<sup>193</sup> The primary purpose for Guantanamo was incapacitation and interrogation of terrorist suspects, and military commissions were an extension of those objectives. Not surprisingly, the trials that have taken place so far do not appear to have been successful at promoting an anti-terrorism norm in the Islamic world. While measurement of the effect of trials on norm internalization is a long-term project, the reaction of opinion leaders in the Islamic world to commissions suggests, at minimum, current resistance to the messages produced by these trials. The weekly Egyptian news magazine *Al-Ahram* compared the first iteration of military commissions to political trials in China, and declared the trials "'victor's justice' in the era of a one-superpower world."<sup>194</sup> The *Arab News*, an English-language newspaper published in Saudi Arabia, discounted the possibility that David Hicks' guilty plea was honest, instead noting that "[m]any believe him entirely innocent,"<sup>195</sup> and discussed the theory that Hicks pleaded guilty because of his desire to escape Guantanamo.<sup>196</sup> The same newspaper dismissed the significance of the announcement of charges against the 9/11 conspirators by arguing that the "confessions" upon which these charges were based were likely elicited by torture.<sup>197</sup> The Lebanese newspaper the *Daily Star* published an opinion piece crediting the relatively implausible

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<sup>193</sup> Former Attorney General Alberto Gonzales, however, did state in general terms, "it is important that the public have the chance to see both the fairness of the commission proceedings, and the evidence against the terrorists in our custody." Alberto Gonzales, *Ask the White House* (Oct. 18, 2006), <http://georgewebush-whitehouse.archives.gov/ask/20061018.html>. This statement was meant to address concerns raised by American critics of commissions, not as a statement of intent to use trials to influence norms in the Islamic world.

<sup>194</sup> Nyier Abdou, *Fire and Brimstone*, AL-AHRAM WEEKLY (Egypt), July 10-16, 2003, available at <http://weekly.ahram.org.eg/2003/646/in8.htm>.

<sup>195</sup> Editorial, *Victory for Bigotry*, ARAB NEWS (Saudi Arabia), Apr. 1, 2007, available at <http://www.arabnews.com/?article=94448>.

<sup>196</sup> *Id.*

<sup>197</sup> See Editorial, *Flawed Trial*, ARAB NEWS (Saudi Arabia), Feb. 13, 2008, available at <http://www.arabnews.com/?article=106719> ("Most . . . people would confess to anything their torturers wanted to hear in order to save their lives and escape further horrific treatment.").

accounts of two Kuwaiti detainees whom the Bush Administration referred charges against in November 2008.<sup>198</sup> This generally negative reaction to commissions suggests that their impact on attitudes in the Islamic world is limited, or even affirmatively negative, at least as a contemporary matter.

Moving forward, many alternative venues exist for trials of Guantanamo detainees, all of which allude to norm internalization as a potential reform gain. The Obama Administration supports trials in the U.S. federal courts and in revamped military commissions, which provide greater procedural protections for defendants. While the primary reason behind providing these added protections is increasing the number of completed trials,<sup>199</sup> increased international legitimacy appears to be, at least, a secondary goal.<sup>200</sup>

Another alternative is trying detainees in their home countries where, some have argued, trials have the greatest opportunity to influence norm development.<sup>201</sup> Application of the four conditions suggests why these types of trials may be more effective. Fair trials conducted by the defendant's own community may more easily meet the consistency threshold because they are less susceptible to being diminished as "victor's justice." Local forums may also be best positioned to be selective, as the community of perpetrators of mass human rights atrocities may have the best access to the most culpable defendants, and hence the greatest opportunity to

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<sup>198</sup> See Andy Worthington, *More Funny Business at Guantanamo*, DAILY STAR (Lebanon), Nov. 21, 2008, available at <http://www.andyworthington.co.uk/2008/11/21/more-dubious-charges-in-the-guantanamo-trials/> (last visited Nov. 17, 2009) ("[T]heir cases do nothing to suggest that the [Bush] Administration has correctly identified them as terrorists worthy of war crimes trials.").

<sup>199</sup> See Obama Address, *supra* note 1 (contrasting his approach to trials to a Bush approach that completed just 3 trials).

<sup>200</sup> See Savage, *supra* note 4, at A18 (quoting Attorney General Holder that one of purposes at trial will be "the nation and the world will see [Khalid Sheikh Mohammed] for the coward that he is"); see also SARAH MENDELSON, CTR. FOR STRATEGIC & INT'L STUD., CLOSING GUANTÁNAMO: FROM BUMPER STICKER TO BLUEPRINT 15 (2008) (arguing that one advantage of using existing institutions to try Guantanamo detainees is increased legitimacy in the international community); Harold H. Koh, *The Case against Military Commissions*, 96 AM. J. INT'L L. 337, 342-43 (2002) ("To ensure that the international community perceives that those convicted for the September 11 attacks will receive fair and impartial justice, the United States should send suspects only to standing tribunals that have demonstrated their capacity to dispense such justice in the past.").

<sup>201</sup> See Alvarez, *supra* note 72, at 459-60 (arguing that local trials have greater opportunity to stigmatize those violating international norms because they enjoy the greatest legitimacy in their community).

prosecute the most serious crimes under international law.<sup>202</sup> In so doing, they are more likely to have access to the most severe sanction, the death penalty, which has been cast out of most international legal proceedings.<sup>203</sup> The trials conducted in the community of the defendant will also be the most accessible to that community, as they can be viewed directly by the relevant public and are likely to be the subject of more extensive media coverage.<sup>204</sup> Local media, more comfortable with local processes, prosecutors and judges, may be less inclined to obscure or distort trial coverage. And local courts will be the best positioned to integrate their efforts with the other institutions in society necessary to amplify trial messaging.<sup>205</sup>

Still others have pressed for use of an international forum to prosecute Guantanamo detainees, be it an ad hoc institution created for the purpose of hearing terrorism cases<sup>206</sup> or, where possible, the International Criminal Court ("ICC").<sup>207</sup> One variant of these proposals is to include Islamic jurists and elements of Shariah law in a tribunal.<sup>208</sup> Incorporation of Shariah law and

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<sup>202</sup> Radovan Karadzic may have been tried far earlier for his alleged genocidal acts in Bosnia had the Serbian government not had to face the unsavory prospect of his trial by a foreign court. See Dan Bilefsky, *Karadzic Arrest Is Big Step for a Land Tired of Being Europe's Pariah*, N.Y. TIMES, July 23, 2008, at A10 (describing traditional Serb resistance to an international trial of one of its nationals).

<sup>203</sup> See Alvarez, *supra* note 72, at 406-07 (noting inconsistency where ICTR does not permit use of the death penalty for those most culpable of genocide, while Rwandan courts do impose death sentences for those more tangentially involved).

<sup>204</sup> See *id.* at 403-04 (detailing accessibility benefits of local trials).

<sup>205</sup> See NEWTON & SCHARF, *supra* note 15, at 211 (describing the belief that trials conducted by German courts after World War II of lower-ranking Nazi officials have been more influential on reshaping German morality than the IMT).

<sup>206</sup> See Drumbl, *supra* note 5, at 1195-96 (arguing that "the value of rhetorical consistency" and "the transnational nature of terrorist violence" should lead to consideration of an international tribunal to try al Qaeda members); Anton L. Janik, Jr., *Prosecuting al Qaeda: America's Human Rights Policy Interests Are Best Served By Trying Terrorists Under International Tribunals*, 30 DENV. J. INT'L L. & POL'Y 498, 531 (2002) (arguing that the preservation of "moral high ground" requires moving trials to an international forum); Anne-Marie Slaughter, Op-Ed., *Terrorism and Justice*, FIN. TIMES (London), Oct. 12, 2001, at 23 (supporting use of an ad hoc tribunal composed of U.S. and Islamic judges).

<sup>207</sup> See Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 21-24 (2003) (advocating for use of the ICC to try terrorism crimes).

<sup>208</sup> Slaughter, *supra* note 206 (extolling the virtues of participation by Islamic jurists in an international tribunal). See also Drumbl, *supra* note 140, at 79 (arguing



judges familiar with Shariah law into an international tribunal may increase the likelihood that such trials make a didactic impact in the Islamic world.<sup>209</sup> To the extent that the target audience accepts Shariah law as a legitimate source of behavioral regulation, a judgment that terrorism violates Islamic teachings would have the greatest potential to inculcate an anti-terrorism norm.<sup>210</sup>

This section uses the four conditions developed in Section 2 to analyze the failures of the Bush Administration's commissions with respect to norm internalization in the Islamic world. It then analyzes whether the Obama approach, or any alternative proposed approach could meet the four conditions. The objective here is to understand the difficult challenges any set of trials of those detained at Guantanamo will face in internalizing an anti-terrorism norm.

#### 4.3.1. Consistency

Consistent application of international law by the trial authority is necessary to dispel the corrosive impression that prosecution is motivated more by a desire to continue a recently completed war than to vindicate international law. Past international war crimes trials have been dismissed as victor's justice by the community of the defendant when the trial authority has used procedures that do not comport with international law. Such trials appear to apply the law selectively. Inconsistency in application of international law has also been demonstrated where the trial authority prosecutes the crimes of just one side to a

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that trials of the Taliban and Afghan terrorists should "involve Islamic jurists, judges, and prosecutors, and take place in mixed forum situated in Islamic countries").

<sup>209</sup> Indeed, 66% of Egyptians, 60% of Pakistanis, and 54% of Jordanians support using Shariah as the only form of law in their country. See Noah Feldman, *Why Shariah?*, N.Y. TIMES, Mar. 16, 2008, (Magazine) at 47 (describing the support for the use of Shariah law).

<sup>210</sup> Islamic countries have used condemnations of terrorism by moderate Islamic clerics as a central tool in "de-radicalizing" Islamic militants. See Shefali Rekhi, *Spiritual Rehab for Terrorists*, STRAITS TIMES (Sing.), Mar. 8, 2009, available at <http://www.asianewsnet.net/news.php?id=4393> (describing the role of clerics in instruction on moderate Islam in rehabilitation programs in Saudi Arabia and Yemen). But see Jack Goldsmith & Bernard Meltzer, Op.-Ed., *Swift Justice for Bin Laden*, FIN. TIMES (London), Nov. 7, 2001, at 15, available at <http://specials.ft.com/theresponse/FT39N0I3QIC.html> (arguing that even an international tribunal with a Muslim judge would be viewed by some Muslims as "a biased tool of Western power").

conflict, reinforcing the sense that trials have little to do with accurate fact finding and norm implementation.

The Bush Administration's military commissions displayed both of these problems. To begin with, military commissions, while prosecuting defendants for their violations of international law, failed to provide them with the full set of procedural protections provided by that same body of law. The vast majority of defendants in both iterations of commissions were charged with murder in violation of the laws of war, conspiracy, and material support for terrorism, all dubious as criminal violations of international law.<sup>211</sup> Relaxed admissions standards for coerced evidence<sup>212</sup> and reduced confrontation rights<sup>213</sup> similarly departed

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<sup>211</sup> See *supra* notes 159-162 & accompanying text (detailing inconsistencies between IHL and the definitions of crimes used in the MCA).

<sup>212</sup> The Torture Convention bars the admission of evidence obtained through torture in any legal proceeding. Convention Against Torture art. 15, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."). The Human Rights Committee ("HRC") has interpreted Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") as prohibiting admission of any evidence obtained "through torture or other prohibited treatment," which would include cruel, inhuman or degrading treatment. Office of High Commissioner for Human Rights, *General Comment No. 20*, CCPR 20, ¶ 12 (Oct. 3, 1992). The United States does not believe that the HRC has the right to issue binding interpretations of the ICCPR, and has in other contexts questioned the legitimacy of the broad scope of the HRC's interpretation of Article 7. See U.N. Human Rights Comm., *Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 1P 16 (Feb. 2, 2008) (rejecting Comment 20's interpretation of Article 7 as including a non-refoulement obligation).

<sup>213</sup> Article 75 of Additional Protocol I, which is thought to provide the customary international law minimum requirements for procedural protections for defendants in war crimes prosecutions, guarantees defendants "the right to examine, or have examined, the witnesses against him." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3. The United States during the Bush Administration was unclear on whether it accepted Article 75 as customary international law. Compare Julian E. Barnes, *Internal Critics Seek a Softer Line; Bush Administration Moderates Push to Change Detention and Interrogation Policies Before Their Time's Up*, L.A. TIMES, Nov. 12, 2008, at A20 (quoting Sandra D. Hodginkson, then Defense Department Assistant Secretary for Detainee Affairs, describing lack of agreement within Bush Administration on Article 75's status as custom), with William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 321-22 (2003) (noting the general objections of the United States to Protocol 1 but concluding that the United States considers Article 75 customary international law).

from minimum protections traditionally provided defendants in international law. Not only is it counterintuitive to believe that trials skewed to aid the prosecution will convince a skeptical public of anything other than the might of the entity conducting the trial, but also, unfair procedures undermine the respect for the rule of law that is an essential component of norm projection.<sup>214</sup>

Military commissions also acted inconsistently by only prosecuting the war crimes committed by members of al Qaeda and affiliated groups. There is strong evidence that the United States committed war crimes in the course of the conflict with al Qaeda,<sup>215</sup> sometimes against the very defendants who were being prosecuted.<sup>216</sup> Despite this evidence, Americans responsible for these crimes were not investigated or prosecuted during the Bush

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<sup>214</sup> See DOUGLAS, *supra* note 6, at 3 (“[T]he notion that a trial can succeed as pedagogy yet fail to do justice is crucially flawed.”); Drumbl, *supra* note 5, at 1188 (explaining that too little due process in trials will increase perception of victor’s justice and that the value of law will increase if the process is considered legitimate).

<sup>215</sup> Former Bush Administration officials have recently come forward with admissions that detainees in the war on terrorism have been tortured. Susan Crawford, Convening Authority to the Military Commissions, stated that the reason she dropped charges against Mohammed al-Qahtani for his involvement in the 9/11 attacks was because the Defense Department tortured him. Woodward, *supra* note 182. More recently, President Obama stated his belief that some interrogation techniques, in particular waterboarding, constituted torture. President Barack Obama, News Conference by the President (Apr. 29, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/News-Conference-by-the-President-4/29/2009](http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-4/29/2009) (“I believe that waterboarding was torture. And I think that the – whatever legal rationales were used, it was a mistake.”).

<sup>216</sup> Nearly every prosecution of a detainee included allegations of mistreatment. See Raymond Bonner, *Detainee Says He Was Abused While in U.S. Custody*, N.Y. TIMES, Mar. 20, 2007, at A10 (describing allegations from David Hicks, the first detainee to be formally charged under new tribunal rules, that he was thrown around, walked on, injected with strange substances, and rectally probed by U.S. forces prior to arriving at Guantanamo); William Glaberson, *U.S. Drops War Crimes Charges for 5 Guantanamo Detainees*, N.Y. TIMES, Oct. 22, 2008, at A1 (stating Binyam Mohamed claims he was tortured while in American custody or in countries where he was sent by the United States); William Glaberson, *Detainee’s Lawyers Make Claim on Sleep Deprivation*, N.Y. TIMES, July 15, 2008, at A15 (describing Operation Sandman in which Hamdan was subjected to intense sleep deprivation for 50 days); William Glaberson, *Arraigned, 9/11 Defendants Talk of Martyrdom*, N.Y. TIMES, June 6, 2008, at A1 (recording Khalid Shaikh Mohamed’s allegation of “torturing”); William Glaberson, *A Legal Filing Alleges a Detainee was Abused*, N.Y. TIMES, Apr. 5, 2008, at A11 (describing Hamdan’s allegation of being beaten and sexually humiliated during interrogations); Woodward, *supra* note 182 (describing alleged-9/11 terrorist Mohamed al-Qahtani’s subjection to prolonged isolation, forced nudity, sexual humiliation, and trained dogs).

Administration.<sup>217</sup> Given the widespread knowledge in the Islamic world of the evidence of these American transgressions,<sup>218</sup> the failure to address them greatly undermined any effort to portray military commissions as an attempt to vindicate international norms.

Will the Obama plan to bifurcate trials between the U.S. federal courts and revamped military commissions fare any better on the consistency front? As discussed, MCA09 was designed to address the most glaring procedural problems associated with the Bush-era commissions. MCA09 moves closer to international standards by absolutely barring evidence obtained through illegal means, and by adjusting discovery, classified information and hearsay rules to approximate those used in the federal courts.<sup>219</sup> However, it appears that future military commissions may still significantly depart from the protections provided to defendants in international trials. Material support for terrorism, conspiracy as a stand alone offense, and murder in violation of the laws of war all remain as potential offenses for use by the prosecutor. As for the use of classified information, while the MCA09 does push for greater evidentiary transparency,<sup>220</sup> a major purpose for using military commissions remains the protection of intelligence sources and the admission of evidence not otherwise admissible in a federal court. It is unclear whether those goals can be met in trials that still provide defendants with the opportunity to confront all the evidence against them.

Nevertheless, the very premise of a bifurcated approach has built-in consistency problems. While the MCA09 increased procedural protections for the defendants, it still provides less in

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<sup>217</sup> While the Bush Administration refused to appoint a special prosecutor to investigate its treatment of detainees, there have been some internal investigations within the military and government agencies. Almost all of the targets of these investigations have been cleared. David Johnston, *Rights Group Cites Rumsfeld And Tenet in Report on Abuse*, N.Y. TIMES, Apr. 24, 2005, at A14.

<sup>218</sup> A 2006 survey found that 80% of Egyptians, 79% of Jordanians, and 68% of Turks had heard of U.S. abuse of Muslim detainees, either at Guantanamo or Abu Ghraib. THE PEW GLOBAL PROJECT ATTITUDES, NO GLOBAL WARMING ALARM IN THE U.S. AND CHINA: AMERICA'S IMAGE SLIPS, BUT ALLIES SHARE U.S. CONCERNS OVER IRAN, HAMAS 21 (2006). Interestingly, only 21% of Pakistanis reported knowing about either Abu Ghraib or Guantanamo detainee abuse. *Id.*

<sup>219</sup> See *supra* notes 187-90 (describing procedural changes to commissions).

<sup>220</sup> See MCA09 §949p-1(c) (requiring that evidence used at trial "is declassified to the maximum extent possible, consistent with the requirements of national security").

the way of process than the federal courts, and purposely so.<sup>221</sup> The image of one set of defendants receiving greater procedural protections, while other sets receive less, is exactly the sort of inconsistency that risks the legitimacy of the trial process.<sup>222</sup> The Obama Administration could attempt to reduce this inconsistency through articulation of a neutral principle that explains how it selects detainees for a trial forum. Indeed, Attorney General Holder suggested the reason the accused Cole bomber was treated differently from the 9/11 plotters was that the Cole was a military target outside the United States, as opposed to a civilian domestic target. But it will be difficult for such explanations to break through the perception that commissions are selected where the government believes its evidence is insufficient to withstand the rigors of federal court.<sup>223</sup> Moreover, those being tried in federal courts will not be tried for violations of international law, but rather for violations of U.S. domestic law. While such an approach is consistent with the law of war,<sup>224</sup> not using international law sacrifices the legitimacy potentially associated with international norms. Although the same substantive conduct will be at issue regardless of applicable law, trials conducted using U.S. law may be more easily dismissed as victor's justice.

Even if future trials do provide procedural protections to the defendant that adhere to international law, future trials in any venue must wrestle with the problem of consistently dealing with violations committed by all parties to the conflict. The United States has admittedly violated the *jus cogens* prohibition on torture

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<sup>221</sup> See Obama Address, *supra* note 1 (describing the advantages of using military commissions as providing for the "protection of sensitive sources and methods of intelligence-gathering" and "allow[ing] for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts").

<sup>222</sup> See Morris Davis, Op-Ed., *Justice and Guantanamo Bay*, WALL ST. J., Nov. 11, 2009, at A21 (stating that the "legal double standard" of Obama approach will "only perpetuate the perception that Guantanamo and justice are mutually exclusive").

<sup>223</sup> See Jack Goldsmith & James Comey, Op-Ed., *Holder's Reasonable Decision*, WASH. POST, Nov. 20, 2009, at A23 (dismissing Holder's contention, and arguing instead that the decision to send the Cole bomber to a commission was motivated by a "relatively weak" case).

<sup>224</sup> See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMAN RIGHTS 84 (2009) (explaining that because non-state actors who take up arms lack combatant immunity they may be prosecuted under municipal law).

in its conflict with al Qaeda. It has also failed to prosecute those who committed torture, or to compensate torture victims—two further violations of international law.<sup>225</sup> No set of trials will successfully internalize an anti-terrorism norm in the Islamic world so long as those trials are seen to solely target the crimes of Muslims, while crimes committed against Muslims go unpunished. Nevertheless, it is difficult to envision any authority trying those involved in war crimes committed by the United States. The Obama Administration has ruled out prosecuting CIA officers for their involvement in detainee abuse.<sup>226</sup> It also does not appear to favor investigation or prosecution of high-ranking Bush Administration officials who authorized abuse.<sup>227</sup>

If the Obama approach seems doomed with respect to consistency, what about potential alternative trial forums? Municipal courts in the Islamic world are notorious for failing to provide defendants with fair trials and other critical protections guaranteed under international law.<sup>228</sup> These problems create real restrictions on the ability of the United States to transfer detainees from Guantanamo to their home countries for trial.<sup>229</sup> More fundamentally, norm internalization cannot depend on legal

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<sup>225</sup> See Convention Against Torture, *supra* note 212, art. 7(1) (mandating that, absent extradition, cases of those engaged in torture be submitted to competent authorities for prosecution); *id.* art. 14(1) (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”). The Military Commissions Act deprives those detained at Guantanamo who were properly determined to be enemy combatants (or who are awaiting such determination) from seeking damages for their treatment at Guantanamo. 28 U.S.C. § 2241(e)(2) (2006).

<sup>226</sup> See Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1 (reporting President Obama’s decision not to prosecute the officers).

<sup>227</sup> See David Johnston & Scott Shane, *Torture Memos: Inquiry Suggests No Prosecutions*, N.Y. TIMES, May 6, 2009, at A1 (reporting that an internal Justice Department inquiry concluded not to prosecute Bush Administration lawyers for their role in authorizing torture).

<sup>228</sup> See, e.g., U.S. DEP’T OF STATE, HUMAN RIGHTS REPORT: EGYPT (2008) (stating that in practice the Egyptian judiciary is “subject to executive influence and corruption”); U.S. DEP’T OF STATE, HUMAN RIGHTS REPORT: SAUDI ARABIA (2008) (describing court system with closed trials, no presumption of innocence, and de jure discrimination on the basis of gender and religion); U.S. DEP’T OF STATE, HUMAN RIGHTS REPORT: PAKISTAN (2008) (describing courts as “corrupt, inefficient, and subject to pressure from prominent wealthy, religious, and political figures”).

<sup>229</sup> See Ashley S. Deeks, *Avoiding Transfers to Torture* 6–7 (Council on Foreign Relations, CSR No. 35, 2008) (describing international legal restrictions on the ability to transfer persons to a country where there is a risk of mistreatment).

systems that do not meet international standards to serve as the primary internalization mechanism, if for no other reason than that procedural failing would erode the confidence of locals in their courts.<sup>230</sup> Moreover, it is unclear that municipal courts in particular Islamic states would even be recognized as “local” courts by their respective populations. Municipal courts of states friendly to the United States may be viewed as “stooges” of the United States, as opposed to an entity genuinely prosecuting offenses against the community. In fractured states, like Iraq, municipal courts may also be viewed as victor’s justice imposed by one subgroup on another, limiting the potential norm internalization impact of proceedings in those courts.<sup>231</sup>

Providing due process protections that meet minimal international standards may also be difficult for an international court that incorporates Sharia principles. The European Court of Human Rights has questioned the compatibility of Sharia rules of evidence, criminal procedure, and punishment, including the death penalty, with human rights law.<sup>232</sup> Incorporation of Sharia law into an international tribunal may be the political death knell for such a tribunal.<sup>233</sup> On the other hand, the compromises that would be required to render Sharia law consistent with human rights law may, paradoxically, deprive Sharia of the legitimacy with Islamic audiences necessary for successful norm internalization, who may discount findings from a legal institution that does not fully comply with Islamic law.

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<sup>230</sup> See, e.g., Michael Slackman, *Tycoon Gets Death in Singer’s Murder, Stunning an Egypt Leery of its Courts*, N.Y. TIMES, May 22, 2009, at A4 (quoting Egyptian political observers on the general distrust of the local population of the Egyptian government and its courts).

<sup>231</sup> *Supra* notes 61–62 and accompanying text.

<sup>232</sup> See *Refah Partisi v. Turkey*, 14 Eur. Ct. H.R. at 39–40 (2003) (describing Sharia law as inconsistent with democracy in part because of its rules regarding criminal law and criminal procedure). See also Kenneth Anderson, *What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591, 605 (2001) (rejecting inclusion of Sharia in international trials of terrorists because of its incompatibility with Western legal tradition).

<sup>233</sup> For example, France and the United Kingdom would likely veto creation of a tribunal through the Security Council that included the death penalty as a potential sentence—a sentence that would be expected from a tribunal consistent with the Sharia. See Ohlin, *supra* note 72, at 748 (explaining that France and the United Kingdom prevented the International Criminal Tribunal for Rwanda from including the death penalty in its punishment scheme).

If the Obama Administration is opposed to U.S. courts investigating detainee abuse, it is fair to assume it would oppose any international effort to do the same.<sup>234</sup>

#### 4.3.2. *Selectivity and Accessibility*

Selectivity demands that war crimes prosecutions focus on the most important war criminals, charges and punishments. Norm internalization depends upon the spectacle of trial dramatizing the effect of wrongdoing and the stigma associated with wrongdoers. Only the most important narratives will create a spectacle sufficiently dramatic to pierce the consciousness of the target audience in the manner necessary for norm internalization. Accessibility builds upon selectivity by requiring that the public have access to the narrative developed through the trial. The most spectacular trial will contribute to norm internalization only if the public can learn about what occurred. Therefore, accessibility requires that prosecutors make decisions about evidence with the goal of creating a dramatic case to present to the public. Because the media is the primary outlet through which the public learns about trials, accessibility also demands a strategy to overcome media biases that will otherwise distort trial coverage.

The Bush Administration's military commissions failed both the selectivity and accessibility tests. As to the former, potential key defendants, including Osama bin Laden and Ayman al-Zawahiri, were not available for prosecution because they could not be captured. While Guantanamo did house other potential defendants of importance, such as Khalid Sheikh Mohammed, the strategy to front-load prosecutions of low-level al Qaeda and Taliban members to test the system resulted in completed prosecutions of only minor figures. Unimportant defendants led to

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<sup>234</sup> It is possible that the United States' unwillingness to seriously investigate war crimes committed by its officials would confer jurisdiction on the ICC to consider such crimes at the prosecutor's behest, provided they occurred within the territory of a state party to the Rome Statute. See Rome Statute, *supra* note 46, arts. 12-17 (conferring jurisdiction over actions taking place in territory of a State Party to the agreement on the ICC). Nevertheless, it is difficult to imagine the ICC burdening its burgeoning relationship with the United States in this way. See Agence France-Presse, *Under Obama U.S. Drops Hostility to ICC: Experts*, TRUTHOUT (Mar. 22, 2009), available at <http://www.truthout.org/032309S> (describing gradually improving relations between the United States and the International Criminal Court under the Obama administration).



relatively unimportant charges<sup>235</sup> and relatively short sentences after conviction.<sup>236</sup> These banal narratives created by the military commissions were unlikely to influence norms in the Islamic world.

Commissions also failed to be accessible. Military commissions valued secrecy above all else, undermining their didactic impact.<sup>237</sup> The initial iteration of commissions even permitted proceedings to be closed from even to the defendant and his civilian lawyer under certain circumstances.<sup>238</sup> While the Military Commissions Act guaranteed the defendant's right to be present at trial, it still allowed the judge to close the proceedings from the public to protect national security.<sup>239</sup> The military judge in the *Hamdan* trial frequently employed this rule, as significant portions of the trial, including most of the defense case, were closed from public view.<sup>240</sup> The amount of classified evidence not available to the public was expected to increase in cases involving detainees who had been part of the CIA interrogation program.<sup>241</sup> While

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<sup>235</sup> Pre-Hamdan military commissions accused most of the ten detainees charged only with conspiracy based on their involvement with al Qaeda and the Taliban. David Hicks and Omar Khadr were also charged with murder (attempted murder in Hicks' case) and aiding the enemy based on involvement in firefights between the Taliban and the U.S. military during the war in Afghanistan. Only Abdul Zahir was charged with directly attacking civilians. U.S. Dep't of Defense, Military Commissions, [http://www.defenselink.mil/news/Nov2004/charge\\_sheets.html](http://www.defenselink.mil/news/Nov2004/charge_sheets.html) (last visited Dec. 6, 2009). Post-Hamdan commissions did charge defendants with much more serious crimes, but with the exception of the Bahlul case, the only charges that proceeded to trial were for relatively minor offenses of material support for terrorism and conspiracy. *Id.*

<sup>236</sup> Hicks and Hamdan received less than a year of additional prison time based on their convictions. *See supra* text accompanying notes 162-163 (reporting sentences of only five and nine months for two Guantanamo convicts). Bahlul was the exception, as he received a life sentence after refusing to offer a defense at trial in protest over the legitimacy of commissions. *Supra* note 166.

<sup>237</sup> *See* Drumbl, *supra* note 5, at 1196 (arguing that "secretiveness" would minimize the educational impact of MCA commissions).

<sup>238</sup> MCO 1, *supra* note 148, at § 6(b)(3).

<sup>239</sup> MCA, § 949d(d)(2)(A).

<sup>240</sup> *See* William Glaberson, *A Conviction, but a System Still on Trial*, N.Y. TIMES, Aug. 10, 2008, at A27 (describing problems in Hamden's trial stemming from "secret filings," "closed sessions," and the inability of anyone to attend proceedings without military orders).

<sup>241</sup> *See* Josh White, *Detainees May Be Denied Evidence for Defense*, WASH. POST, June 15, 2008, at A3. *But see* Dan Ephron, "Fair, Open, Just, Honest", NEWSWEEK, June 2, 2008, available at <http://www.newsweek.com/id/139664/output/print> (quoting the military commission's legal adviser Brig. Gen. Thomas Hartmann as stating that "relatively little" of the trials would be closed to reporters).

preserving the secrecy of classified information is understandable, insofar as it is necessary to protect sources and methods in the war on terrorism, conducting trials largely hidden from the public prevents the trials from having any didactic impact and raises suspicions about the process that may actively undermine the trial's legitimacy among Muslims.

This secrecy augmented the problems the commissions faced in using the media to spread the expressive content of trials. The procedures of military commissions were not familiar to reporters in a way that procedures in the U.S. federal courts or courts-martial would be, resulting in ignorance about the process that impeded coverage.<sup>242</sup> American reporters were puzzled by trials featuring secret evidence, secret witnesses, an empty court gallery, and other tight restrictions on the access of reporters to trials.<sup>243</sup> The press in the Islamic world largely relied on reports produced by newswires and American newspapers for their coverage of the trials at Guantanamo, generally choosing not to send reporters to the trials.<sup>244</sup> Both U.S. and international media also displayed the traditional bias that favors reporting on the antics of the defendant, rather than on the prosecution's case.<sup>245</sup> Allegations of torture by defendants continuously dominated press coverage of the cases, as defendants sought to use treatment issues as part of a public

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<sup>242</sup> See Drumbl, *supra* note 5, at 1196 (arguing that the "opacity" of the commissions' process reduced their narrative impact).

<sup>243</sup> See Glaberson, *supra* note 240 (describing "mysteries" that marked differences between commissions and normal American trials). Of course, trials in U.S. federal courts can use classified evidence not available to the public consistent with the Classified Information Procedures Act. See 18 U.S.C. App. III, § 1-16 (regulating use of protective orders to prevent disclosure of classified information).

<sup>244</sup> E-mail from Tara A. Jones, Office of Detainee Affairs, U.S. Dep't of Defense, to author (Mar. 16, 2009) (on file with author) (noting that the only Islamic world media that attended military commissions were the Saudi Press Agency, Al Jazeera English and Arabic, al Arabiya, and al Hurrah).

<sup>245</sup> Ironically, in some instances the media's desire to cover the statements of the defendants may have actually helped norm internalization. Khalid Sheikh Mohammed, on trial for involvement in the 9/11 attacks, and four other men filed a document with the military commission to proudly claim responsibility for the attacks as a "model of Islamic action," and a "badge of honor." William Glaberson, *Detainees Say They Planned Sept. 11*, N.Y. TIMES, Mar. 10, 2009, at A17. These sorts of declarations confirm the responsibility of Islamic radicals for the terror of 9/11, potentially opening the door to a shared factual understanding of that day's events.

relations strategy against the commissions.<sup>246</sup> Furthermore, the failure of commissions to employ victim testimony that would compete for attention with the torture narrative aided this strategy.<sup>247</sup>

Will Obama's bifurcated approach resolve these problems? It does appear that the Administration is committed to greater selectivity in its prosecution decisions. Priority has been given to prosecution of top al Qaeda members in custody for involvement in important crimes like the 9/11 attacks, the attacks on the African embassies, and the attack on the USS *Cole*. With these important suspects and alleged crimes comes the potential of serious sentences, as the Administration has indicated its intent to seek the death penalty in certain cases.<sup>248</sup> Such trials should involve charges and potential sentences of a sufficient force to pierce the consciousness of the Islamic world to the degree necessary for norm internalization.

Accessibility may also be improved under the Obama plan. For those being tried in military commissions, MCA09 requires that evidence used at trial is "declassified to the maximum extent possible, consistent with the requirements of national security."<sup>249</sup> This provision may work to reverse the presumption of secrecy that permeated the Bush-era commissions. For those being prosecuted in the federal courts, there should be greater media coverage than in commissions. There is an established pool of reporters covering federal trials, and their coverage should reflect

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<sup>246</sup> See William Glaberson, *Detainees' Mental Health is Latest Legal Battle*, N.Y. TIMES, Apr. 26, 2008, at A1 (quoting defense counsel Clive Stafford Smith stating "[t]he issue of mistreatment of prisoners . . . will come up in every case").

<sup>247</sup> The impact of statements by victim's families was on display during a rare hearing where they were allowed to attend. Their presence offered a powerful rebuttal to critics of commissions. See William Glaberson, *Relatives of 9/11 Victims Add a Passionate Layer to Guantanamo Debate*, N.Y. TIMES, Dec. 10, 2008, at A28 (describing the unsettling effect presence of victims' families had on critics of commissions).

<sup>248</sup> See Eric Lichtblau & Benjamin Weiser, *9/11 Trial Poses Unparalleled Legal Obstacles*, N.Y. TIMES, Nov. 14, 2009, at A14 (quoting Attorney General Holder regarding his intent to seek the death penalty against Khalid Shaikh Mohammed). This differs from the decision of the Attorney General with respect to Ahmed Ghailani, who is on trial in federal court for his involvement in the African Embassy bombings. Benjamin Weiser, *U.S. Won't Seek Death for ex-Guantanamo Detainee*, available at <http://cityroom.blogs.nytimes.com/2009/10/05/us-wont-see-death-for-ex-guantanamo-detainee/?scp=2&sq=holder%20death%20penalty%20ghailani&st=cse> (last visited Dec. 1, 2009).

<sup>249</sup> See MCA09 §949p-1(c).

greater understanding of the trial procedures.<sup>250</sup> Islamic world press must have greater access to trials not taking place on a restricted military base, increasing their ability to cover the trials.

Still, these trials appear destined to involve large amounts of classified information.<sup>251</sup> The need to protect intelligence sources and methods will result in parts of trials being closed to the public, or otherwise restricted, to prevent the disclosure of classified information.<sup>252</sup> While this may make sense from the perspective of national security, from the perspective of norm internalization there is nothing worse than a closed trial. It is impossible for trials to have didactic impact when the evidence that creates the historical record is shielded from public view. This clash between selectivity and accessibility is highlighted by a dispute that hindered the Bush Administration's commissions. Former chief prosecutor Morris Davis and Convening Authority Legal Adviser Brig. Gen. Tom Hartmann had a much-publicized dispute over the commissions' selective strategy.<sup>253</sup> Davis argued that for trials to be meaningful they needed to be transparent, and therefore pushed for prosecutions of small fish who could be tried using unclassified material. Hartmann countered with a strategy that called for trying high-ranking al Qaeda members in order to demonstrate to the public that the detentions at Guantanamo were worthwhile. Of course, such an approach would result in partially closed trials and large amounts of classified information. From the perspective of norm internalization, both the Davis and Hartmann approaches fail. While the trials Davis advocated for would be more transparent, their didactic impact would be lost through projection of unimportant narratives. While Hartmann's approach is more selective, the educative force of the trials of high value detainees would be lost in secrecy. It may be that the Obama Administration has adopted the Hartmann approach with its attendant limitations.

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<sup>250</sup> *But see* Slotnick, *supra* note 74, at 22 (discussing ways in which American media coverage of the U.S. Supreme Court is oversimplified).

<sup>251</sup> *See* Jack Goldsmith, *Long-Term Terrorist Detention and our National Security Court 4* (Brookings Institution, Working Paper, 2009) (explaining that prosecutions of high ranking al Qaeda figures will require the use of information derived from overseas intelligence sources).

<sup>252</sup> *Id.*

<sup>253</sup> For a thorough description of this dispute and the facts described here, see Jess Bravin, *Dispute Stymies Guantanamo Terror Trials*, WALL ST. J., Sept. 26, 2007, at A4.

The problem posed by classified information is just one accessibility problem faced with any forthcoming set of trials. Accessibility requires navigating the difficult terrain of media bias, and here that involves confronting at least two major problems. First, the torture allegations that plagued military commissions will continue regardless of where the detainee is prosecuted. Ahmed Ghailani—a former Guantanamo detainee who is now being prosecuted in U.S. federal court for his involvement in the African Embassy bombings—has asked for information about his mistreatment in the CIA interrogation program to be introduced into trial.<sup>254</sup> Such allegations, especially where unaddressed through separate investigation and prosecution, will continuously disrupt the narrative produced at trial. Second, the Islamic world's local media has been surprisingly uninterested in terrorism trials, except in reporting torture allegations. This bias, based as much on sensationalism as anti-Americanism, may be difficult to counter in any trial venue absent equally spectacular factual development of the wrongs committed by members of al Qaeda. Such a counter-narrative will be difficult to develop publicly when based on classified information.

Still, the Obama approach may be the best available with respect to selectivity and accessibility. The general opposition of the United States to allowing use of its classified information in foreign or international trials suggests that trials of top al Qaeda figures from Guantanamo in any non-American tribunal is highly unlikely, at least using information provided by the United States.<sup>255</sup> Even if an international tribunal were to gain custody of a current detainee, the problems the ICTY and ICTR have faced in making their narratives accessible to target audiences suggest that accessibility issues remain. An international tribunal mixing in Sharia concepts with existing international law seems sure to be as baffling to reporters as the Bush-era commissions, if not more.

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<sup>254</sup> See Benjamin Weiser, *Secret CIA Jails an Issue in Terror Case*, N.Y. TIMES, July 2, 2009, at A20 (describing request by Ghailani defense counsel to visit CIA "black sites" to seek exculpatory evidence).

<sup>255</sup> See American Service-Members' Protection Act, 22 U.S.C. § 7425 (2002) for the prohibition on transferring classified information to the ICC. See also *supra* note 132 (describing unwillingness of U.S. to provide evidence to a German tribunal, resulting in acquittal of al Qaeda suspect).

### 4.3.3. Integration

Integration requires that trials for violations of international law be just one piece of a larger effort to inculcate the norm in question. Other institutions in society must strengthen and magnify the narratives produced at trial through techniques including generating and disseminating information; identifying and leveraging power sources that can affect the needed change; and leading efforts to hold those powerful actors accountable for their commitment to the norm in question. While it is unlikely that institutions in the target audience are already supportive of the norms in question, war crimes trials achieve the greatest integration when they support developing efforts within societies to inculcate greater respect for international law.

Military commissions were not integrated into any larger norm development effort within the Islamic world. There is no evidence to suggest that commissions attempted to recruit key Islamic religious, educational, or media figures in supporting the commissions' message. This is not surprising since norm internalization was not a primary objective of commissions. Integration, perhaps more than the other conditions, requires an affirmative effort outside the traditional prosecutorial process.

The Obama approach seems no better situated to integrate trial efforts with local institutions in the Islamic world. As a general matter, prosecution and court officials in the United States have not viewed social outreach as a part of the judicial function.<sup>256</sup> Given the difficulties high-profile defendants like Khalid Shaikh Mohammed may face in securing a free trial in the United States, prosecutors may be particularly wary of any public diplomacy effort regarding the trials.<sup>257</sup> Even if interested, U.S. officials probably lack the knowledge of social conditions in the Islamic world necessary for effective integration.<sup>258</sup> The ICTY, concerned

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<sup>256</sup> See *supra* text accompanying note 114 (noting tension between a trial's public accessibility, protected by the First Amendment, and a defendant's Sixth Amendment Right to a fair trial).

<sup>257</sup> See Lichtblau & Weiser, *supra* note 248 (noting that defense is sure to challenge whether KSM can have a fair trial in close proximity to the World Trade Center site).

<sup>258</sup> The U.S. military appears to have learned this lesson. Captain Brian Huysman explains the reason the United States needs more Afghan troops to communicate with locals: "We can't read these people; we're different." Richard A. Opper, Jr., *Allied Officers Concerned by Lack of Afghan Forces*, N.Y. TIMES, July 8, 2009, at A8.

about the gulf separating itself from the people of the former Yugoslavia, began the Outreach Program in 1999. That program sought to provide information about the ICTY and to initiate a dialogue with the people “to engage existing local legal communities, non-governmental organizations, victims’ associations and educational institutions.”<sup>259</sup> The Outreach Program is not viewed as particularly successful, however, at least partly because of the ICTY staff’s lack of familiarity with conditions in the former Yugoslavia.<sup>260</sup> Similar limitations seem likely to plague any U.S. integration efforts.

Of course, local trials in the municipal courts of Islamic states would be most effective at integration, as municipal courts would best positioned to identify the opinion leaders who may be most influential in assisting norm internalization efforts. As discussed above, however, the municipal courts of the Islamic world appear ill suited to conduct trials for violations of international law, given their generally decrepit condition. The international community could consider large-scale assistance to these institutions.<sup>261</sup> Such an effort is not without precedent. The United States has invested heavily in developing the Central Criminal Court in Iraq (“CCCI”) and the Afghan National Detention Center (“ANDC”) in Afghanistan to prosecute and detain locals involved in terrorist activity. But major concerns about the fairness of trials provided by these institutions persist.<sup>262</sup> Moreover, providing assistance to improve the municipal courts of Islamic states is a long-term plan that will run far beyond the time allocated to deal with the remaining cases at Guantanamo.<sup>263</sup>

Assuming local trials are unlikely to be available for the majority of cases, an international court employing Islamic jurists and Shariah concepts may be the best suited to integrate with and

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<sup>259</sup> Hum. Rts. Center, *supra* note 77, at 110-111.

<sup>260</sup> *See id.* at 140 (detailing local legal professionals’ lack of information about ICTY despite Outreach Program).

<sup>261</sup> *See Alvarez, supra* note 72, at 461 (arguing that the international community should make an effort to improve local courts in the first instance).

<sup>262</sup> *See* HUMAN RIGHTS WATCH, THE QUALITY OF JUSTICE: FAILINGS OF IRAQ’S CENTRAL CRIMINAL COURT (2008) (detailing serious due process and fair trial violations in the CCCI despite the role of the United States in assisting the court); Tim Golden, *Defying U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1 (describing the difficulties associated with the ANDC).

<sup>263</sup> *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (ordering closure of Guantanamo within one year on January 22, 2009).

promote local norm internalization efforts. Islamic jurists will have the best available knowledge of institutions within the Islamic world, and may be best positioned to target appropriate opinion leaders to create working synergies.

## 5. CONCLUSION

This Article developed four conditions for norm-internalization success that trials for international law violations must possess to avoid the pitfalls that have prevented norm internalization within the defendant's community in the past: consistency, selectivity, accessibility, and integration. Application of these four conditions to the trials of detainees at Guantanamo Bay reveals three reasons such trials are unlikely to contribute to internalization of an anti-terrorism norm in the Islamic world. First, the mistreatment of detainees by the Bush Administration robs future trials of their full normative impact. The failure to prosecute Bush Administration officials involved in violations of international law displays an inconsistent application of the law that will allow the Islamic world to dismiss the trials as "victor's justice." Allegations of torture will also plague trials of these detainees, distorting the narrative emerging from the trial and reducing its normative impact. Second, the need to use classified information to convict those involved in the most serious terrorist acts creates a troubling paradox regarding norm internalization. Selectively prosecuting the most serious offenders is a requisite of successful norm internalization, but it is precisely those trials that will use the most classified information, thereby undermining the goal of accessibility. The alternative of prosecuting only those lower level offenders who can be tried with unclassified information also fails the four-conditions test; the marginal narratives such an approach creates are unlikely to pierce the consciousness of the Islamic world. Third, integrating the Guantanamo trials with local norm internalization efforts is difficult. Municipal courts—those best situated to create synergies with local institutions—are decrepit in most Islamic states, making them poor venues for trials international law violations. Non-Islamic tribunals, which may be more procedurally sound, are unlikely to be able to identify the appropriate local actors who can augment the trial message.<sup>264</sup>

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<sup>264</sup> International tribunals employing Sharia law may be best positioned to integrate their message with other institutions in the Islamic world, provided



This analysis is important because policy makers confront difficult trade-offs in deciding which trial objectives should be favored in determining trial venue and strategy. Given that norm internalization is unlikely to succeed in this context, policy makers may be more successful in focusing on alternative objectives.

Moving beyond the Guantanamo context, this analysis also sheds light on the important debate surrounding whether it is reasonable to believe that trials can contribute to norm internalization.<sup>265</sup> The absence of a clear norm internalization success story creates a natural skepticism about the ability of trials to aid in norm internalization in the defendant's community. The conclusion that trials of Guantanamo detainees are unlikely to achieve norm internalization in the Islamic world deepens that skepticism. This is not to say that Guantanamo is an ideal test case. American abuses and missteps at Guantanamo make it difficult to project the conclusions developed there onto other contexts. But no trial authority prosecuting detainees for events emerging from an armed conflict or massive human rights tragedy will be ideally situated to internalize norms in the community of the defendant. Resentments and deep suspicion within the community of the defendant exist even where the circumstances of capture and detention are not as provocative as in Guantanamo Bay. Indeed, even when presented with evidence of in-community misdeeds, the reaction may be more to reject the reality of the evidence, than to accept its consequences.<sup>266</sup>

The nature of the four factors raises real questions regarding whether these problems may be overcome to allow norm internalization to succeed. Consistency will almost always run into alternative penological goals.

As important as following international legal procedures is to norm internalization, providing defendants the full panoply of protections can run against the interest in incapacitating and punishing the defendant, concerns that have been preeminent in trials to date. Similarly, while the trial authority may wish to

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other concerns about such tribunals were addressed. *See supra* text accompanying notes 232-33 (detailing problems with international tribunals).

<sup>265</sup> Compare Damaska, *supra* note 6, at 346 (dismissing critics who are skeptical of the didactic power of trials), with Snyder & Vinjamuri, *supra* note 26, at 39-41 (questioning the power of international trials to trigger norm cascades).

<sup>266</sup> *See* Sontag, *supra* note 29, at 11 (describing groups in Spain and the former Yugoslavia that refused to accept the reality of war crimes, choosing instead to ascribe the atrocities to their enemies or dismiss them as propaganda).

conduct investigations and trials that encompass the crimes of all involved in a conflict, the reality is that political considerations trump this concern. Indeed, the demand of consistency becomes overwhelming if the concept to include the historical contexts behind current atrocities, as criminal tribunals would struggle in holding persons criminally liable for long-since passed events.

The paradoxical relationship between selectivity and accessibility also seem likely to stymie norm internalization events. So long as the prosecutions of the most important figures in human rights and law of war atrocities involve large amounts of classified information, conducting open trials where the public can learn from the evidence presented is difficult. This problem is compounded where the charges against these defendants are so complicated that the trial becomes so long as to be essentially unwatchable. Resolving this problem through prosecution of simpler cases, involving publicly available evidence is usually an inadequate answer, as such cases tend to be insufficiently spectacular to capture the public imagination as is required for norm internalization.

Finally, integration presents its own irony. The appeal of norm internalization as a trial goal stems from the unique influence that international law has over the conduct of trials for its violation. In societies where international law has little or no other influence over institutions that contribute to norm development, the appeal of this trial objective grows. Yet, it is precisely this condition that makes norm internalization unlikely to succeed without the message reinforcement efforts that only key actors and social institutions can provide.

These problems suggest that trials may be ill suited to achieving norm internalization. Trials may be better oriented around alternative aims, like retribution or incapacitation; alternative institutions in society may be better entrusted with informational, political and social tasks necessary for norm internalization.