

## Modes of Participation in Mass Atrocity

Mark J. Osiel

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# Modes of Participation in Mass Atrocity

Mark J. Osieł†

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## Introduction

In my remarks today, I am going to focus on the question of how to hold the “big fish” responsible for the misconduct of the “small fry.” It is equally relevant to the trials of Slobodan Milošević and Saddam Hussein. The question is especially hard when there is no direct evidence of criminal orders from top superiors to subordinates in the field. It is also hard when the subordinates are not part of any formal chain of command, as with paramilitaries.<sup>1</sup> And it is especially difficult when heads of state act through civilian leaders, such as the leadership of the Bosnian Serbs, who again are not within any formal chain of command.<sup>2</sup>

The basic legal choice is between “command responsibility” and “participation in a joint criminal enterprise.”<sup>3</sup> To cut to my conclusions: I think

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1. See generally LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* (Cambridge Univ. Press 2002) (examining accountability for armed groups fighting against government powers who commit abuses during internal conflict).

2. See generally Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 *YALE J. INT'L L.* 89, 138-41 (2000) (speculating about the different approaches to Milošević's trial under the Rome Statute given that he acted outside of a formal chain of command).

3. Article 7(3) of the ICTY Statute provides for command (superior) responsibility as a form of individual criminal liability. Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(3), May 25, 1993, 32 *I.L.M.* 1192, available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute]. “Joint criminal enterprise” (also referred to as “common purpose” or “common plan” liability) is not 38 *CORNELL INT'L L.J.* 793 (2005)

the International Criminal Tribunal for the former Yugoslavia (ICTY) is making it too hard to find people liable under command responsibility, but too easy to hold them liable as participants in a joint criminal enterprise. If we could find a way to relax the requirements for classifying a defendant as an irresponsible commander, then we would not have to rely so heavily on the notion of participation in criminal enterprise, a notion that is dangerously illiberal and trusts too much in prosecutorial self-restraint.

## I. Incentives of Prosecutors

An adequate legal response to mass atrocity requires taking account of the incentives faced by prosecutors, perpetrators and acquiescent bystanders. International and domestic courts are developing the applicable law, but prosecutors face divergent incentives in each, driving doctrine into contradiction. In The Hague, prosecutors strive to construct the emergent field of “international criminal law” within which they hope to make their professional lives.<sup>4</sup> Their self-interest lies in maximizing convictions of multiple defendants on the most grievous charges, leading them to allege “participation in a joint criminal enterprise.”<sup>5</sup>

By contrast, national prosecutors in a newly democratic state have strong incentives to placate executives—on whom they yet remain dependent—wishing to minimize prosecution of all but high-ranking past leadership, in the interests of social reconciliation and regime consolidation. To this end, prosecutors employ the law of command responsibility since it severely restricts the acts and actors’ susceptibility to serious punishment. The unfortunate upshot is that national and international courts are employing disparate legal methods to characterize similarly situated offenders.

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mentioned in the Statute, but it was established as an implicit part of Article 7(1) of the ICTY Statute in the first case heard by the ICTY. *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, ¶¶ 220-26 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

4. See generally Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510 (2003) (discussing the political motivations for and the legitimacy of actions of ICC prosecutors).

5. Between 64% and 81% of all ICTY indictments filed between June 25, 2001 and January 1, 2004 rely explicitly on joint criminal enterprise. Alison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 107-08 (2005); see also Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 911 (2003) (“[P]articipating in a joint criminal enterprise has become the principal charging preference in ICTY indictments . . .”). All three indictments against Slobodan Milošević (Bosnia, Croatia and Kosovo) are based on joint criminal enterprise. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Amended Indictment, ¶ 6 (Nov. 22, 2002) (Bosnia); *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶¶ 24-26 (Oct. 23, 2002) (Croatia); *Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Second Amended Indictment, ¶ 16 (Oct. 16, 2001) (Kosovo). Note, however, that the second indictment for Kosovo is also based on command responsibility. *Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Second Amended Indictment, ¶ 16 (Oct. 16, 2001) (Kosovo).

Thus, the question becomes: What are the relative strengths and weaknesses of each approach in answering the question of how to link the big fish to the small fry?

## II. Command Responsibility

First, then, command responsibility. Here, the principal risk has been making it too hard for prosecutors to show that superiors exercised “effective control” over subordinates. The existence of effective control is resolved at the stage of determining liability.

The binary character of liability—guilt or acquittal—forces us into a dilemma: If we make it very hard to find that effective control exists, we risk acquitting many whose role in the ultimate result was quite considerable—even if they did not completely dominate the behavior of other participants in all respects. But there is danger in going very far in the opposite direction as well. If we make it very easy to find sufficient control, then we risk classifying too many people as “commanders” when their contribution was actually little different from that of many around them, including those of inferior rank.

After all, often the nominal commander greatly influences the behavior of others without completely controlling it. This is especially true when he offers them incentives rather than punishment, carrots rather than sticks, as by tacitly authorizing looting and pillaging. Control can be highly fluid. It ebbs and flows over time, between one location and another, depending on many factors, not least the degree to which combat with adversaries disrupts lines of authority and communication.

If we insist that such power must have been continuously great over the entire period of subordinate criminal activity, then we make it extremely difficult for prosecutors to supply the necessary evidence. Another problem with command responsibility is that it is often hard to satisfy the basic legal requirement of “but for” causation. To convict under Article 7(3) of the ICTY Statute, we must conclude that but for the commander’s misconduct, his subordinates would not have committed their criminal acts.<sup>6</sup> This can be devilishly difficult to show on account of the fungibility of operatives within a large organization, even at very high levels.

If this superior had not misbehaved, then very often someone else would have done so in his place, producing the same result, namely the same criminal conduct from inferiors. Some authoritarian regimes, particularly military juntas in South America, have been so fully institutionalized that even the head of state is merely first among equals.<sup>7</sup> Even he can credibly claim that had he sought to do more little would have turned out differently. At the other extreme, a regime may be so unstable, so lacking

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6. See *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 399 (Nov. 16, 1998).

7. See e.g. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 45 (Oxford Univ. Press 2000) (discussing the co-authorship theory of command responsibility in trials of Argentina’s military junta).

in institutional capacity, that its titular ruler simply cannot effectively control parts of the ruling coalition. Parts of the state are governed as independent fiefdoms—more repressively, sometimes, than the nominal head of state would like, as has been true of several so-called “failed” states in Africa.<sup>8</sup>

Another problem: Prosecutors have to prove commission by omission. A superior sometimes exercises his power most effectively, after all, by seeming *not* to exercise it, or not even to have it. For instance, once you control the criteria for selecting state officials, you no longer need to involve yourself directly in selecting them to get the ones you want. Similarly, a commander has sometimes exercised his authority precisely by abandoning it—and not just seeming to, as in permitting his troops to operate autonomously. In what sense, at that point, can he be said still to have effective control over them?

Defendants accused of causing war crimes by omission are free to defend with evidence that their *de facto* power was less than their *de jure* authority. In American civil suits, where victims are seeking damages from torturers under the Torture Victim Protection Act, courts reverse the burden of production, so that the defendant must rebut the *prima facie* inference that his formal authority accurately reflected his *de facto* power.<sup>9</sup> But criminal trials are surely different. Presuming a crucial element of criminal guilt, through a bureaucratic formality, is something we are surely wary about, at very least.

There is yet another puzzle about command responsibility. We surely need quite different definitions of effective control for soldiers at very different hierarchical levels. Otherwise, we have no answer to such obvious and troubling questions as: If even a detention camp’s commandant lacks effective control over one of its torturers, as the court once found,<sup>10</sup> how can we possibly say that the head of state, many miles away, having never met either man, had effective control over both?

Control over critical policy is simply not the same as, and does not translate into control over specific individuals, that is to say, micro-management of their behavior at the lowest echelons. Thus, effective control must surely mean something rather different at these various levels in the chain of command, as we move down from strategic to operational to tactical tier. International tribunals need to work out just what these differences might involve while straining to keep all of them convincingly under the same rubric of effective control. There is little judicial experience with this, and few pertinent precedents.

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8. See generally *STATE FAILURE & STATE WEAKNESS IN A TIME OF TERROR* (Robert I. Rotberg ed., A World Peace Found. Book 2003); *Rebuilding Failed States: From Chaos, Order*, *ECONOMIST*, Mar. 5, 2005, at 59.

9. *Ford v. Garcia*, 289 F.3d 1283, 1290-93 (11th Cir. 2002); see generally *Contemporary Practice of the United States Relating to International Law* 96 AM. J. INT’L L. 706, 719-724 (2002) (outlining the doctrine of command responsibility in U.S. human rights cases).

10. *Prosecution v. Delalic*, Case No. IT-96-21-A, Judgment (Feb. 20, 2001).

Moreover, the lines between strategic, operational, and tactical authority are clear only at the conceptual level, as ideal-types. In real armies, such lines often blur at the margins, with particular officers exercising more than one type of authority, depending on the situation. Also, those with operational authority, for instance, often greatly influence, even “control,” one might say, the range of tactics that lower echelons are authorized to employ, as through rules of engagement.

### III. Enterprise Participation

#### A. Advantages of “Joint Criminal Enterprise” Liability

Confronted with such puzzles, the Yugoslav tribunal has developed an affinity, instead, for holding defendants liable for offenses committed through “participation in a joint criminal enterprise.”<sup>11</sup> The participation theory is understandably very appealing, especially since it can reach conduct by those outside any formal chain of military command. Such individuals may include paramilitaries or civilian leaders, or officers in staff rather than line positions, who provide advisory expertise or intelligence, but lack command authority over anyone.

This approach is also attractive because it lets us view those engaged in criminal conduct, jointly and voluntarily, as evidencing a variety of relationships that are more multifarious, though equally pernicious, than that of domination-subordination. In fact, this last sort of relationship becomes completely irrelevant to liability. The idea of joint participation in crime well captures the way mass atrocity is often the result of a mutual connivance, in which no one involved can really be said to thoroughly control any other.

After all, participants in an enterprise—lawful or otherwise—can contribute to one another’s actions and advance a common purpose in many ways. Command responsibility also forced us to consider how its original application, to military officers, would need to be altered when extended to civilian leaders, like the Bosnian Serbs, who had no command authority.<sup>12</sup> With the participation doctrine, civilians are now treated just like military officers, in the sense that both are defined by identical criteria as “participants” in the same “criminal enterprise.”

In any effective enterprise, there is generally a climate of shared commitment to its purposes, a feeling of voluntary spontaneity, effacing the difference—as much as possible—between leaders and followers. There is an élan, a sense of “one for all and all for one.” Leaders “coordinate” rather than “control.” In such organizations, we can still distinguish between those with greater and lesser degrees of influence over events and fellow participants. But we do so now at the punishment stage of the proceeding. Since such distinctions are no longer part of determining liability, it is not a question that must be answered with a yes or no.

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11. See *supra* note 5.

12. See *supra* note 2 and accompanying text.

Participation admits of degrees, as liability does not, and so it can be moved to the punishment phase. The ICTY has developed a list of relevant considerations, useful in making the appropriate distinctions.<sup>13</sup> These include the length of time the defendant was involved, his proximity to policy making, the fungibility of his contributions, his motivation for participation, his degree of knowledge about the larger enterprise to which his actions contributed, and so forth.<sup>14</sup> Now, instead of a binary opposition, a choice between acquittal and conviction, we have a range of possibilities, permitting more subtle and fine-grained assessment of the relative importance of different contributors to the result.

The distinction between perpetrators and accessories remains, however, and that distinction is still binary. But before using it to classify a defendant as a perpetrator or an accessory, we now have a wider range of morally relevant factors to consider. Moreover, factfinders no longer have to try to imagine what subordinates would have done differently had their superior behaved differently. Now, we can look simply at what a particular participant actually did—rather than what he did not do, but hypothetically might have done—and what difference that might have made. Another advantage is that it is not necessary to identify any chain of command or to ascribe to each contributor, from top to bottom, a particular position with delimited responsibilities in an organizational hierarchy.

#### B. Disadvantages of “Joint Criminal Enterprise” Liability

But in what sense is it fair or accurate to lump together those with radically different degrees of power, conceptualizing them all, identically, as joint participants in the same criminal conduct? And, can it make sense for prosecutors to be able essentially to tell the accused: “We’ll sort out the details of how involved you really were after you’re found guilty, when we get around to choosing your punishment.”

A result of this approach is that even the most minor participant in a criminal enterprise can be held liable for genocide or crimes against humanity. These offenses necessarily heap loads of opprobrium on anyone convicted of them. So, it is unsatisfactory to confront issues about their degree of participation and the extent of their wrongdoing only after they have already been found guilty.

In categorizing everyone as a participant here, we also risk distorting the process by which episodes of state-sponsored mass atrocity occur, and so distort the history such trials can teach. It is always a separate subset of identifiable leaders, after all, that instigates and incites much larger numbers of followers to participate in the leaders’ criminal aims. We risk losing sight of this in classifying everyone simply as co-participants. Clarifying the historical record is surely one legitimate purpose, among others, of such prosecutions. To that end, a judicial judgment must

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13. Prosecutor v. Tadic, ICTY Trial Chamber, Case No. IT-94-1-T, Sentencing Judgment, ¶¶ 7-10 (July 14, 1997).

14. *Id.*

emphasize, for its public audience, what was most causally salient and most morally weighty in what transpired. The agreement to participate is generally *not* the most important fact here. Moreover, if the prosecution defines the purpose of the criminal enterprise broadly enough, it appears to blame defendants for their country's entire conflagration—surely another distortion.

Also, the ICTY's treatment of participation does not construe it as a form of complicity—by using aiding and abetting, for instance. That charge would be much more demanding of prosecutors than conspiracy. Through aiding and abetting, prosecutors cannot hold each participant in the enterprise liable for the criminal acts of every other, unless the prosecutor can show how each individual contributed significantly to the crimes of every other participant. Complicity, in other words, requires the prosecutor to demonstrate, separately and seriatim, the link between each individual participant to another, viewing the enterprise as simply a series of dyadic relationships—no more and no less. That would be impossible, of course, as a practical matter, if the enterprise were defined to include more than a handful of people.

It would also obscure the genuinely collective nature of the wrong, the way the whole was greater than, or at least different from, the sum of the parts. Conspiracy and participation do not require any such painstaking analyses of the relation between particularized individuals, as monads.

That is both its attraction and its danger. There are good reasons why the civil law has had no truck with conspiracy doctrine, and why its adoption by the ICTY has therefore been covert, unacknowledged, and internally contested. Before we can say that all members of an enterprise are in agreement about its purposes, how are we to determine the scope of that agreement? Who defined its terms and limiting conditions?

These conditions are virtually never written down, of course. Should such leaders be held accountable for the broadest effects of their policies, despite acting through agents who do not themselves share these broad goals? Was there one enterprise, or several; that is, was there one or were there a number of linked enterprises, perhaps closely related? The answer to that question makes a big difference to the range and number of criminal acts for which “members” can be held responsible. This is because the doctrine authorizes every participant in the enterprise to be held liable for the criminal acts of every other, as held in the *Pinkerton* doctrine.<sup>15</sup> The Prosecutor's Office at the ICTY has shown admirable restraint in often limiting its definition of “enterprises” to people who regularly interacted with one another, proximately in time and space, such as those who ran a single detention camp.

But there is nothing in the concept or theory of joint participation ensuring such limitation. That is a virtual invitation to guilt by association, where the defendant is many steps removed from its most malicious actors, as in a loosely knit network spread over many countries—such as al-Qaeda.

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15. *Pinkerton v. United States*, 328 U.S. 640 (1946).



Joint participation is potentially so broad a notion that it requires enormous self-restraint by prosecutors to ever be defensible, in practice.

A head of state, for instance, may be indicted as part of an enterprise including several others, such as a selected subset of national or regional leaders, either civilian or military. That may well be convenient as an administrative matter. But on what basis, conceptually and morally, does the Prosecutor's Office determine the scope of the criminal enterprise in this way and with these particular contours? There is no way to know because the concept of an enterprise operates essentially as a legal fiction, since none of its supposed members would have thought to define themselves this way.

Perhaps such a fictional device is defensible here. But why are we prepared to rely so heavily on fiction in the context of joint criminal enterprise, while not at all in regard to command responsibility? There, after all, we might just as readily presume "effective control" or "constructive control" to exist wherever there is a *de jure* relationship of superior and subordinate, and when this approach produces a similarly convenient result; a result that just sort of feels right on the facts. With enterprise participation, after all, we are no longer ascribing responsibility on the basis of an organizational hierarchy, whose bureaucratic formalities help determine who is responsible for preventing what sort of misconduct and by whom.

### C. Limiting Enterprise Participation

What about paramilitary forces? They are sometimes set up by national leadership simply to create an appearance of deniability, to distance the leadership from events it actually and fully controls. But that is by no means always true, and cannot be presumed. Sometimes, paramilitaries are genuinely independent of national leadership, as in Colombia today.<sup>16</sup> Or a group that starts as dependent may become independent over time, or vice versa. In such cases, how is a court to define the criminal enterprise, the scope of its membership, the precise nature of its purposes? Thus far, the ICTY has not offered much guidance toward an answer to that question.

## IV. Enterprise Participation and U.S. Posture Toward International Criminal Law

The promiscuous reach of participation liability has not been lost upon lawyers in the Pentagon and White House. It has contributed in non-trivial ways to the recent decline in U.S. support for international criminal tribunals. In its current form, the doctrine greatly facilitates criminal indictment of national political and military elites for virtually any association in war crimes, however circuitous, convoluted, or *de minimus*. For

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16. See U.S. DEP'T OF STATE, COLOMBIA: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41754.htm>.

instance, “rendering”<sup>17</sup> alleged terrorists to states known to engage in torture could plausibly be viewed as participating in a criminal enterprise, for the “common purpose” of extracting information from detainees under torture. That the world’s greatest military power would be reluctant to endorse a legal development with such repercussions should scarcely be surprising.

One may respond that U.S. skepticism about this doctrinal direction simply reflects a much wider skepticism about, or even opposition to public international law as such. To be sure, the vagueness here identified is common to many areas of international criminal law,<sup>18</sup> including crucial elements in the definition of offenses, notably torture. All such imprecision causes considerable concern in circles of power. Its expression in the particular legal doctrine here examined may rightly be seen as part of a larger U.S. concern with what international courts might do when asked to interpret highly ambiguous language in many of the treaties we have ratified, particularly in the human rights area.

That the ICTY could ever have taken the law of enterprise participation so far in the direction it has, to a position so deeply at odds with U.S. geo-strategic interest, is worthy in itself of some remark.<sup>19</sup> The explanation lies in the fact that the court’s creation was not perceived to pose any such risks. It was anticipated that prosecutors and judges would remain attentive to vital interests of the court’s principal sponsors. These lawyers, however, have followed their more strictly professional impulses, to empower the field of practice they were charged to create. Once established, moreover, the court possessed a measure of autonomy that could not readily be curtailed from afar in transparently self-interested ways.

This is not the first time that international courts, through expansive interpretation of their mandates, have engaged in such incremental self-assertion. It is conspicuous in the recent history of the European Court of Human Rights, the European Court of Justice, and the Inter-American Commission and Court of Human Rights. Such extension of international judicial power occurred, moreover, without evoking major backlash from the national governments whose policy latitude was thereby significantly circumscribed. So it is perhaps to be anticipated that the ICTY could extend the law of enterprise participation as far as it has before encountering backlash.

That the ICTY could ever have wandered so far from its political tether might be said to support “constructivist” accounts of international rela-

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17. See e.g. Reuel Marc Gerecht, *Against Rendition*, WEEKLY STANDARD, May 16, 2005, at 47, 53 (discussing moral and ethical issues raised by the United States’ use of rendition post-9/11).

18. Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003, at 49 (noting that “international criminal law is extraordinarily vague.”).

19. The United States strongly backed the ICTY’s creation and provided most of its funding, as well as much evidence invaluable for the prosecution. The United States was also actively involved in all negotiations leading to the creation of the ICC, permitting these to reach a point where the court could soon be established.

tions,<sup>20</sup> in that humanitarian norms seemed to take on an expansionary dynamic of their own—a possibility “realists” deny.<sup>21</sup> This conclusion must be tempered, however, not only by the brevity of unqualified U.S. support for the ad hoc tribunals, but also by how the law’s expansion, via enterprise participation, served the interests of international prosecutors, whatever it may or may not have done disinterestedly for humanitarian norms. In any event, the counter-revolution ultimately came.<sup>22</sup> With hindsight, it seems likely that a less capacious reading of the doctrine, accompanied by greater reliance on the older law of superior (formerly known as command) responsibility, with which military officers have long grown comfortable, could have moderated U.S. discomfiture with the court.<sup>23</sup> That discomfiture led the United States to impose strict deadlines for completion of its labors.

America’s wariness about the breadth of enterprise participation has not been entirely consistent, to be sure. Pentagon and White House lawyers find much of merit in the doctrine’s scope, in fact, when seeking ways to reach very “small fry” on the outermost fringes of terrorist organizations. This is clear in their intention, revealed in recent regulations on military commissions, to apply the doctrine to those detained at Guantánamo.<sup>24</sup>

The preference of national prosecutors in these pending cases for enterprise participation over superior responsibility might seem at first to contradict this Article’s prediction that national prosecutors will prefer the latter, international prosecutors the former.

The United States is not, however, a weak new regime whose executive must restrain prosecutions to ensure successful democratic transition. The doctrine of enterprise participation, though first developed through cases from such societies, is advantageous to rulers whenever political circumstances permit and encourage the broadest use of criminal law in redressing mass atrocity. That the United States has not yet worked out an entirely consistent stance toward recent legal developments here—one that

20. See MARGERT KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS*, 3-4, 214-17 (1998); see also Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 889, 909 (1998).

21. JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 53 (2001) (arguing that economic/military power will always underlie cooperative efforts to fight a common enemy); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 105, 205 (1979) (discussing the potential for misguided third party interference in pursuit of the “common good”).

22. Colloquium, John Hagan et al., *Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia*, NORTHWESTERN U. SCHOOL OF LAW, COLLOQUIUM SERIES: INT’L LAW, Jan. 31, 2005, at 24-31, <http://www.law.northwestern.edu/colloquium/international/Hagan.pdf> (describing the impact of the second Bush administration on ICTY resource allocation and deadlines for work completion).

23. The court did ultimately recognize the limits of its powers when compelled by the Security Council to set a 2008 deadline for completion of its labors. *Id.* at 29-30.

24. See 32 C.F.R. § 11.6(c)(6)(i) (2005) (applicable where the accused has “joined an enterprise of persons who shared a common criminal purpose”); 32 C.F.R. § 11.6(c)(3)-(4) (command responsibility).

it would at once decry and exploit them—is entirely predictable, given the ambiguous mix of threat and promise this novel doctrine poses to U.S. geostrategic interests in the world today.

## V. The Domestic Politics of International Justice

International criminal law has become a field of professional practice in recent years, with occupational concerns much like other such fields. The more ambitious its acknowledged claims to breadth and power, the more “effective demand” that will in turn exist for the work of its practitioners, and the more social prominence they will thereby garner. Criminal defendants have an interest in a narrow definition of the field, to be sure, so that their misconduct will fall outside of it. (For small fry, this position is most persuasive.) But their legal representatives have a professional stake in a broad conception of its proper claims, since this enlarges the range of prosecutorial allegations to which they will be called upon to respond, on their clients’ behalf.<sup>25</sup>

It is not only prosecutors’ incentives that differ between national and international planes. Different too is the wider policy argument about the purposes of punishment. One will surely notice, for instance, the odd reconfiguration of ideological antagonists. The same left-ish, human rights activists who press uncompromisingly for retributive (and deterrent) responses from international tribunals invariably favor rehabilitative and restorative ideals for domestic penalty,<sup>26</sup> whereas conservatives who long touted retribution and deterrence in national courts turn suddenly skeptical of both rationales for punishment in international ones.<sup>27</sup> Both sides clearly agree, if on nothing more, that something rather different is at stake in punishing nationally versus internationally.

Each side surely believes its sundry positions reflect a coherent worldview. The paradox dissolves once we recognize that the debate is not really about the general merits of abstract theories of punishment. Rather, it concerns each side’s degree of confidence, at the global level, in extant legal norms versus emergent judicial institutions likely to redefine them. Retribution and deterrence become suddenly persuasive to “liberals” because—on the international plane, unlike the domestic—these policies are seen to empower victims of fundamental human rights abuse. Stronger international courts are necessary to bolster such claims against repressive

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25. In addition, several lawyers who served the ICTY’s prosecutor, or served as judicial clerks, later accepted positions representing defendants before the Tribunal.

26. To be sure, such people often turn much more retributive when considering penalties for “white-collar” criminals.

27. John R. Bolton, Under Secretary for Arms Control and International Security, Remarks at the Twentieth Anniversary of the Federalist Society: The United States and the International Criminal Court 1, 3–4 (Nov. 14, 2002), <http://www.state.gov/t/us/rm/15158.htm> [hereinafter Bolton Remarks]; John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America’s Perspective*, 41 VA. J. INT’L L. 186, 199–201 (2000); ROBERT H. BORK, COERCING VIRTUE 10, 20–21 (2003).

rulers and reinterpret relevant law accordingly. If this entails cabining national sovereignty to some extent (including our own), then so be it.

Conversely, in discussions of international criminal law, “conservatives” find the rehabilitation of criminals (and other forms of restorative justice) newly compelling, because these goals are clearly best implemented by domestic institutions, like South Africa’s Truth and Reconciliation Commission or Rwanda’s *gacaca* tribunals.<sup>28</sup> Domestic courts are preferable to international ones, on this view, because the latter are unaccountable to domestic publics and therefore free to override democratic will. Preserving the international law of state sovereignty is essential to preserving popular sovereignty at home, as embodied in our Constitution.<sup>29</sup> If criminal law’s normal aims of retribution and deterrence must be compromised accordingly and a few dictators thereby escape justice, then so be it.

## VI. Justice and the Modes of Criminal Participation

Because the law seeks justice (among its most prominent aims), it is natural to ask which of the two legal doctrines here examined is most likely to advance it. To this question one could apply theories of justice. From behind a Rawlsian veil of ignorance, for instance, one might ask: Which rule would one choose to govern law’s response to mass atrocity if one did not know whether one would find oneself as victim or perpetrator?

At first blush, this seems an impossible question since its premise—that one would not already know one’s status as aggressor or aggrieved—is so improbable. If one expected to commit war crimes, one would prefer prosecution as a commander, in that this rule imposes harder burdens for prosecutors to meet and does not necessarily impose any greater punishment than the alternative. Conversely, as the victim, one would favor enterprise participation, insofar as it casts a wider net for defendants, permits their greater punishment, and, thus, may ultimately have greater deterrent effect on a larger number of potential perpetrators. Not knowing, a priori, whether one would later prove accuser or accused prevents one from choosing either of the two rules *ex ante*. The Rawlsian method thus fails to

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28. Such domestic approaches receive considerable praise in John Bolton’s denunciations of the ICC, for instance. See Bolton Remarks, *supra* note 27 (noting that favoring criminal prosecution over amnesty may act to prolong conflict and suffering). Bolton was, at the time, U.S. Under Secretary for Arms Control and International Security.

29. See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 1981 (2004); Goldsmith & Krasner, *supra* note 18, at 59–61 (noting that to require humanitarian intervention without domestic support runs contrary to both the principle of nonintervention embodied in the U.N. Charter and to the democratic decision making process); Stephen Holmes, *Why International Justice Limpes*, 69 Soc. Res. 1056, 1066 (2002) (“If well-functioning criminal justice systems presuppose well-functioning political systems, what sort of performance can we expect from international criminal justice?”); Paul Kahn, *On Pinochet*, BOSTON REV., Feb.–Mar. 1999, at 18 (discussing the conflict between exercise of universal jurisdiction to enforce international humanitarian law and a nation’s right to self-determination, including prosecution of its own nationals).

enlighten us, because we simply cannot really imagine anyone ever agreeing to step behind the veil of ignorance in the first place.

More might be said, however. Let us acknowledge that one might both contemplate suffering war crimes and also committing them. The second scenario might ensue simply from finding oneself in an unfortunate circumstance where such conduct, though not actively desired, became virtually inexorable.<sup>30</sup> This is not as unrealistic an assumption as might first appear. In many episodes of mass atrocity, victims also often become victimizers, once viewed from a broader temporal frame<sup>31</sup> (this has become a frequent theme in sophisticated analyses of many such episodes).<sup>32</sup> Thus, it is not preposterous at once to imagine prosecution for one's own wrongs and also suffering from others'. Described in this way, the hypothetical world one inhabits "behind the veil" is not impossible to contemplate.

Rawls defines the person in this position as highly risk-averse,<sup>33</sup> in that he must imagine himself ending up "worst off" and choose legal rules or institutions accordingly. If we accept this view of rationality, then he would surely seek, above all else, to prevent his own violent death. It would matter far less to be able to harm others wrongfully, unless such acts reduced his own risks of death, as war crime generally does not. He would therefore clearly choose the law of enterprise participation, due to its wider compass of liability and consequently greater deterrent effect.

If we alter his hazard propensity, giving him more "taste for risk,"<sup>34</sup>

30. MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR* 132-33 (1999).

31. In Guatemala, for instance, though the state was responsible for most victims of the country's long civil war, guerrilla groups murdered some 6,000 people in thirty-two separate massacres. COMMISSION FOR HISTORICAL CLARIFICATION, *GUATEMALA, MEMORY OF SILENCE* ¶¶ 128, 134, <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> (last visited Oct. 7, 2005); see also SUSANNE JONAS, *OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS* 154 (2000).

32. See, e.g., HELLA PICK, *GUILTY VICTIM: AUSTRIA FROM THE HOLOCAUST TO HAIDER* *passim* (2000) (examining moral ambiguities in Austria's recent history, arising from its status as both party to, and victim of German aggression); Tristan Anne Borer, *A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa*, 25 *HUM. RTS. Q.* 1088, 1098-99 (2003) (examining South African "perpetrators who became victims" and "heroes who became perpetrators," such as Winnie Mandela); LEORA BILSKY, *TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL* 19-84 (2004) (describing Israeli prosecutions of Jews who collaborated in administering Nazi concentration camps and ghetto "councils" within occupied Europe).

33. JOHN RAWLS, *A THEORY OF JUSTICE* 23, 137, 162, 323 (1972).

34. There is some empirical evidence to suggest that this is a more accurate account of risk propensity, at least in contemporary American society, exemplified by the popularity of "thrill" sports. In such activities, the risk to life and limb is a source of appeal and attraction, not aversion. Jonathan Simon, *Taking Risks: Extreme Sports and the Embrace of Risk in Advanced Liberal Societies*, in *EMBRACING RISK* 177, 179-81 (Tom Baker & Jonathan Simon, eds., 2002). For an influential utilitarian/welfare-maximizing moral theory developed from critique of Rawls's premise of complete risk aversion, see John Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 *J. POL. ECON.* 434, 434-435 (1953). Harsanyi argues that in the "original position," a rational person would not be preoccupied with averting the worst case scenario and so would not insist on maximizing his minimum outcome; rather, he would aim to maximize his expected utility and, to that end, assess the probabilities of various outcomes,

his choice may change, however. He may now be perfectly prepared to suffer somewhat greater risk of wrongful victimization at his enemy's hands in order to gain the military advantage—sometimes significant, alas—afforded by war crimes. As with so much in philosophy, where we land at the end of the argument thus depends on where we begin, that is, on the first premises we adopt.

The need to choose between incompatible premises, like alternative assumptions about appetite for risk, presents issues largely beyond the scope of moral philosophy itself. Such appetites, after all, vary widely along lines of culture, history, geography, and socioeconomic status, to an extent that it is pointless to bracket these out for purposes of writing rules and designing institutions. As in many areas of public policy, then, moral philosophy here delivers less than it first seems to promise.<sup>35</sup> First principles of “what justice requires” are similarly silent about whom to punish, and for which offenses. In such decisions, competing policies are at stake,<sup>36</sup> and these are best balanced by elected leadership, responsive to democratic opinion.<sup>37</sup>

## VII. The Limits of Complicity

Complicity is a third possibility, distinct from superior responsibility and enterprise participation. In the civil law world, it always does much of the work done by conspiracy and RICO in the United States.<sup>38</sup> It has been occasionally employed by both of the ad hoc international tribunals, notably by the ICTY Appeals Chamber in *Krstic*.<sup>39</sup> But it is unappealing to international prosecutors when pursuing heads of state and other high-ranking initiators of mass atrocity.

Once viewed as instigators—through incitement to genocide, for instance—such defendants must be classed as accessories, according to most legal systems (from which international courts derive their

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using these in turn to weigh the corresponding utilities. Only if the original position presented one with a zero-sum game, such that the other's gain entails one's loss, and only if nature itself is somehow an adversary conspiring against one, would the rational person choose Rawls's maximin strategy over alternatives offering greater overall welfare. See also Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281 (2001).

35. See Richard Posner, *The Problems of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1694-98 (1998).

36. “Policy” may here be contrasted to “principle,” as Dworkin employs the terms. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-28, 90-100 (1977).

37. See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002) (arguing that we should first identify the goals of transitional justice, and then determine which paradigm—retribution, restorative justice, non-prosecutorial alternatives—will best meet those goals.); CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* 288 (2000) (arguing that “transitional criminal justice is not partial merely because full justice is logistically or politically difficult. It is partial because this best serves the transition.”).

38. Germany, for instance, recognizes several different degrees of complicity, as well as a separate offense of criminal instigation.

39. *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, ¶ 78 (Apr. 19, 2004), available at <http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>.

sources).<sup>40</sup> That classification much understates the contribution of regime rulers to the criminal result, for accessories do not cause harm, but merely assist that caused by others. The stigmatizing effect of conviction as an accessory is much less than as a perpetrator, prosecutors stress.<sup>41</sup> Accessories also receive shorter sentences, *ceteris paribus*.<sup>42</sup>

In this respect, the goals of international prosecutors coincide with those of new rulers in transitional societies. The political aims of transitional justice require accentuating the contribution of former dictators, which is inconsistent with their classification as mere accessories to the crimes of subordinates. Conceiving their contribution merely as assistance implicitly subsidiary in nature—to more heinous wrongdoing by others—minimizes their stigma and so sends the wrong signal to pertinent publics.

Closely related, the acts of distant accessories are typically—almost always, in fact—less wrongful than those of perpetrators on the scene. One of the hallmarks of state-sponsored mass atrocity, however, is that this assumption proves entirely inapplicable and unwarranted. The accessories among top chieftains are considerably more blameworthy, their conduct more wrongful, than on-the-scene perpetrators, in most cases. Our customary legal categories thus get the moral valences entirely wrong—almost backwards, in fact.<sup>43</sup>

Such conceptual niceties may initially strike the reader as a no more than a professorial shell game. But they have had lethal consequences. In the late 1980s, justices on Argentina's Supreme Court sought to reverse an appellate court's characterization of the country's former military juntas as perpetrators,<sup>44</sup> reclassifying them instead as (instigating) accessories. Junior officers were outraged at the implication that *they* were the true perpetrators. Indicted on that basis, they staged a series of barracks uprisings, gravely threatening the democratic transition then in progress.<sup>45</sup> When

40. The domestic law of many countries mandates lesser punishment for accessories than perpetrators.

41. Author's interviews, The Hague.

42. Prosecutor v. Krstic, *supra* note 39, ¶ 268 (“[A]iding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.”).

43. This has been a prominent theme in European and Latin American legal debate. CLAUS ROXIN, *AUTORIA Y DOMINIO DEL HECHO EN DERECHO PENAL 276-77* (Joaquín Cuello Contreras trans., 2000).

44. Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 30/12/1986, “Causa Originariamente Instruida por el Consejo Supremo de las Fuerzas Armadas en Cumplimiento del Decreto 158/83 del Poder Ejecutivo Nacional / recurso extraordinario,” Fallos (1986-309-5, 10-12, 23, 29-30) (Arg.).

45. CARLOS NINO, *RADICAL EVIL ON TRIAL* 116 (1999) (describing how the prospect of more trials produced a backlash in moderate military opinion, favoring their curtailment). The Justices' approach offended junior officers because it appeared to minimize the facts that the latter had acted pursuant to superiors' orders, issued through a formal chain of command, enforced by a hierarchical organization with considerable disciplinary powers. None of these undoubted circumstances found any recognition in a legal theory of complicity, conceiving the juntas as mere accessories to wrongs perpetrated by inferiors at lower ranks. Such a legal account of events was hence entirely unacceptable to them.



complicity takes the form of incitement, moreover, there are always objections that freedom of speech will be unduly encroached.<sup>46</sup>

Argentina's experience notwithstanding, it may usually be wrong to suppose that this or that way of classifying the relations among parties to mass atrocity much affects the response such trials elicit.<sup>47</sup> Perhaps the elaborate effort to inculcate a favored interpretation of recent history is simply too clever by half. Maybe all that matters to public opinion is the fact of conviction or acquittal.<sup>48</sup> Criminal law may be too blunt an instrument to engage self-consciously in complex efforts to influence collective memory by the more particular story it tells.

But prosecutors and their executive sponsors often clearly *believe* that the new "official story" must be told in a manner that will most contribute to shoring up a precarious new democracy in a country just emerging from oppressive rule or civil strife. To this end, they eschew accessorial liability in prosecuting prior rulers wherever law permits otherwise. The new round of pending prosecutions against chiefs of state and top military officers—in Chile, Argentina, Peru, and elsewhere—thus rely heavily on the law of superior responsibility.

These concerns about signaling and storytelling do not exhaust the problems with trying former rulers as accessories. A more basic obstacle is finding admissible evidence of their instigations. The surreptitious character of most such communication presents a very serious problem here. The Rwandan genocide was quite almost unique in this regard. The state-sponsored radio campaign called directly for attack on the nonruling ethnic group and was followed, almost immediately, by such attacks.<sup>49</sup> More typical is the former Yugoslavia, where the link between rulers' speech and ensuing violence was weaker. Radio broadcasts from Belgrade called only for formation of self-defense groups, to protect against anticipated violence by non-Serb neighbors.<sup>50</sup> Neither superior responsibility nor enterprise participation requires any such direct evidence of communication from the defendant to criminal compatriots.

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46. This is true even when the speech in question has apparently incited atrocity and been accompanied by more material forms of support. C. Edwin Baker, *Genocide, Press Freedom, and the Case of Hassan Ngeze* 20-22 (Univ. of Pennsylvania Law Sch. Pub. Law and Legal Theory Research Paper Series, Paper No. 46, 2003), <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1004&context=upenn/wps>.

47. There is certainly no significant evidence in support of this proposition.

48. This is what neoclassical economic theory would predict, at any rate. Christine Jolls, Cass Sunstein & Richard Thaler, *The Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 50 (Cass Sunstein, ed., 2000) (noting that traditional "economic theory assumes that choices are invariant to the manner in which a problem is framed," so that "the language of a media account or advertisement has no effect on behavior, holding the information content constant.").

49. See Gregory S. Gordon, *A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 150-152 (2004).

50. Prosecutor v. Jelusic, Case No. IT-95-10-A (Jul. 5, 2001), available at <http://www.un.org/icty/jelusic/appeal/judgement/jel-aj010705.pdf>.

It is possible to construe enterprise participation as a form of complicity, though the ICTY has not done so. This approach would be much more demanding of prosecutors than enterprise participation or common law conspiracy. Through aiding and abetting, prosecutors can hold each participant in the enterprise liable for the criminal acts of every other, but only if they can show how each individual “contributed substantially” to the criminal acts or results of every other. Finding substantiality can only be done case by case, and so would require the prosecutor to demonstrate, separately and seriatim, the link between each participant and every other. This would entail conceptualizing the enterprise as simply a series of dyadic relationships, no more and no less.<sup>51</sup>

That would be impossible, as a practical matter, if the enterprise was defined to encompass more than a handful of people. Defining the enterprise in this modest way might not be such a bad idea, however, at least insofar as it reduces risks of prosecutorial overreach. But a turn to complicity would obscure the genuinely collective nature of the wrong, the way the whole was greater than—or at least different from—the sum of the parts. Conspiracy does not require any such painstaking analysis of the relation between particularized individuals, as monads. That is both its attraction and its danger.<sup>52</sup>

The preceding observations explain the reluctance of ICTY prosecutors and judges to rely on accessorial liability, though authorized by the court’s statute, when alternatives counting the accused as perpetrators can credibly be advanced.

### VIII. Amnesty—If Conditional and Revocable

Persuading declining dictators and their minions to part with power is never easy. Their repressive policies are often self-sustaining. Having resorted for so long to sticks, these become sunk costs, as in an experienced cadre of secret police. Continued reliance on sticks thereby becomes cheaper than switching to carrots. Even if carrots would have been more efficient earlier on, buying back a modicum of public support, depleted long ago, can be very costly. (Victims too may have sunk costs in

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51. This way of characterizing an organization, as a series of bilateral contracts, is central to an influential school of economic thought. See, e.g., *THE FIRM AS A NEXUS OF TREATIES passim* (Masahiko Aoki et al. eds., 1990). Sociologists of organization rightly reject its dismissal of horizontal and other interactional processes among triads not linked to one another through formal agreements. Harrison White, *Agency as Control in Formal Networks*, in *NETWORKS AND ORGANIZATIONS* 92, 96 (Nitin Nohria & Robert G. Eccles eds., 1992) (arguing that it is “a retreat from institutional reality” to view organizations as simply “an aggregation . . . or field of pair ties”).

52. Nowhere in the Tribunal’s judgments, moreover, will one find any acknowledgment that Anglo-American conspiracy doctrine has positively influenced its thinking, much less RICO. Perhaps this is not entirely surprising, since all the well-known objections to conspiracy and RICO charges reemerge with the Tribunal’s woolly doctrine of enterprise participation. For such criticisms, see Susan Brenner, *RICO, CCE, and Other Complex Crimes*, 2 *WM. & MARY BILL RTS. J.* 239, 303 (1993).

a traumatic past, i.e., psychic costs they similarly mistake as recoverable through persistence in political resistance to a now-liberalizing regime.)

This is path dependence at its most perverse. As political resistance to their rule increases, the temptation for autocrats to stay with methods tried and true, ratcheting up repression, is strong.<sup>53</sup> Undeterred by threat of later prosecution, they may gamble they will win outright, with no need for compromise—or die gloriously while trying, in a blaze of bullets.<sup>54</sup>

This descent has nonetheless often been averted, by promises of amnesty from prosecution. An amnesty—whether explicit and legislative, or implicitly through prosecutorial discretion—can often facilitate democratic transition and help end civil wars.<sup>55</sup> It best achieves its practical objectives when the carrot it extends, in exchange for confession of vital information (about the location of victims' bodies, for instance), is accompanied by the stick of possible prosecution, the credible threat of material consequences if its beneficiary fails to deliver the quid pro quo. This amnesty without illusions, at its least sentimental, stripped of all appeal to normative ideals of reconciliation, which often harbor woolly theological and other illiberal notions.

Amnesties are not of a piece, cut from the same cloth.<sup>56</sup> The best ones are narrowly tailored to political constraints and form part of a larger set of reforms, enacted (rather than executively decreed) after public debate, designed to alter military and police training in ways that integrate human rights standards. Continued amnesty will be conditioned on effective implementation of such reforms. Otherwise, it may legally be revoked.<sup>57</sup>

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53. On the “economic” logic of such repression, see GORDON TULLOCK, *AUTOCRACY* 63–65 (1987); RONALD WINTROBE, *THE POLITICAL ECONOMY OF DICTATORSHIP* 127–144 (1998); Adam Przeworski & Jennifer Gandhi, *Cooperation, Cooptation, and Rebellion Under Dictatorship*, in *ECON. THEORY* (forthcoming 2006), available at [http://www.nyu.edu/gsas/dept/politics/faculty/przeworski/papers/ndicts\\_final\\_all.pdf](http://www.nyu.edu/gsas/dept/politics/faculty/przeworski/papers/ndicts_final_all.pdf).

54. Their appetite for risk is one any theory of regime transition must acknowledge and confront, even if few law professors could begin to fathom it.

55. See, e.g., RACHEL M. MCCLEARY, *DICTATING DEMOCRACY: GUATEMALA AND THE END OF VIOLENT REVOLUTION* 3 (1999) (demonstrating how, through an agreement embodying symmetrical amnesties, “elites compromised on their most basic disputes and established informal networks that secured each other’s vital interests, thus laying the basis for political stability and a consolidating of democratic governance.”).

56. William Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 *HARV. INT’L L.J.* 467, 518–33 (2001) (proposing a typology of amnesties, distinguishing them on the basis of whether they are “locally legitimate” and/or “internationally recognized”).

57. The Colombian Congress seriously considered making such revocability a prominent feature of its recent legislation aimed at inducing right-wing paramilitary leaders to lay down their arms and disgorge the narcotrafficking profits. The statute as ultimately enacted, however, accorded much less weight to conditioning benefits on demonstrated performance. See HUMAN RIGHTS WATCH, *SMOKE AND MIRRORS: COLOMBIA’S DEMOBILIZATION OF PARAMILITARY GROUPS* 1, 27 (2005), available at <http://hrw.org/reports/2005/colombia0805/colombia0805.pdf>. (criticizing this feature of the legislation). The dilemmas arising from Colombia’s current efforts to negotiate a legally satisfactory solution to its longstanding civil war are ably assessed by RODRIGO UPRIMNY & LUIS LASSO, *VERDAD, REPARACIÓN, Y JUSTICIA PARA COLOMBIA: ALGUNAS REFLEXIONES Y RECOMENDACIONES* (2004) (manuscript on file with editors).

This condition is essential in getting the incentives right, in holding military authorities to the terms of their bargain.

A possible problem with making amnesty revocable,<sup>58</sup> on condition of implementing promised reforms, is that those initially benefiting from the deal are generally not the same people as those later in a position to honor reform promises. Such promises may be made lightly by those who know they will not be around to pay the price of implementing them. The new rulers who replace departing dictators, moreover, will not necessarily feel any obligation to honor their predecessors' commitments in this regard, even where they have hitherto been close allies.

These facts admittedly make it harder to strike an amnesty pact that is morally acceptable and likely to be respected by international courts and those of other countries. But again, the risks may well be ones that departing power holders are prepared to take, where more appealing options are absent. If an amnesty deal can be struck on such terms, then a later "failure" to enforce its reform requirements would not present an entirely negative scenario, from the perspective of human rights and criminal law. Failure to reform would, after all, effectively invalidate the prior amnesty, revoking its immunities, permitting prior rulers to be prosecuted.

Legal scholarship purporting to show that amnesties fail to advance peace and reconciliation tend to practice most flagrant selection bias.<sup>59</sup> Countries whose relevant experience of transition does not support the author's favored position on this question (such as Spain, El Salvador, Brazil, and several others) are simply ignored, like inconvenient cases that an opposing advocate can be expected to call to the court's attention. Such methods should be no more acceptable in serious legal scholarship than in social science, where the main point is precisely to compel our confrontation of "inconvenient facts."<sup>60</sup>

That amnesty is often necessary for successful transition is not to say that it is sufficient, by any means.<sup>61</sup> It often fails when not accompanied

58. Leila N. Sadat, *Exile, Amnesty, and International Law*, 81 NOTRE DAME L. REV. (forthcoming 2006), at n.260, available at <http://law.wustl.edu/faculty/workingpapers/sadat/exileamnestyintl.law.apr2005.pdf> (contending that "even where amnesties are generally prohibited, pardons and conditional amnesties may be acceptable . . .").

59. See *id.* at 2 (invoking only three countries—Haiti, Sierra Leone, and the former Yugoslavia—and no social scientific data for the proposition that "longitudinal studies . . . suggest that amnesty deals typically foster a culture of impunity in which violence becomes the norm, rather than the exception.")

60. Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 147 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) ("The primary task of a useful teacher is to teach his students to recognize 'inconvenient' facts—I mean facts that are inconvenient for their party opinions.")

61. Angola, for instance, has seen six amnesties granted as part of the continuing peace process there. None had any discernible effect in ending the civil war. According to one observer, in fact, "each has served as little more than an invitation to further bloodshed and atrocities." Mary Margaret Penrose, *It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 COLUM. J. TRANS-NAT'L L. 193, 204–06 (2000). In Sierra Leone, the attempt to neutralize warlord Foday Sankoh by granting amnesty and incorporating him into state rule not only failed, but endowed him with renewed resources that facilitated his reinitiation of the war.

by power transfer to new leaders genuinely committed to human rights. It is not always easy to assess their bona fides in this regard ex ante, as the case of Haiti reveals.<sup>62</sup> While amnesties eliminate or defer the possibility of mass prosecution, other non-criminal remedies will often suffice, at least in the short-term, such as truth commissions, civil compensation, and more informal mechanisms of restorative justice (such as apology and forgiveness as means of interpersonal reconciliation) among neighbors.<sup>63</sup>

To a degree little recognized or acknowledged, amnesty from prosecution is so controversial because monetary compensation, through civil recovery (for wrongful death, battery, infliction of distress, etc.) is virtually unavailable in countries where mass atrocity occurs. If civil litigation were to make such remedies practically accessible, political pressures for prosecution would much diminish, because victims are often content with (even prefer) financial and other redress.<sup>64</sup> Monetary settlements also allow a degree of compromise, through “splitting the difference,” that criminal liability for serious wrong does not.

Civil claims also appear to “depoliticize” the wrongs—as allegations of genocide, for instance, obviously do not—in ways that can help reestablish social equilibria. To reform a country’s civil justice system is much more difficult, however, than initiating a few criminal prosecutions. Still, in wealthier countries, such as South Africa and Argentina, civil compensation is playing a major and increasing role in redressing the legacies of mass atrocity and other state-sponsored violence.<sup>65</sup> Such remedies make

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Bronwyn Leebaw, *Transitional Justice, Conflict, and Democratic Change: International Interventions and Domestic Reconciliation* 12 (paper presented at the Annual Meeting of the Amer. Polit. Science Ass., Sept. 2005).

62. David Gonzalez, *Aristide of Haiti: Pragmatist or Demagogue?*, N.Y. TIMES, Dec. 31, 2002, at A3; Human Rights Watch, *Aristide Should Uphold the Law*, HUMAN RIGHTS NEWS, Feb. 14, 2004, <http://www.hrw.org/english/docs/2004/02/14/haiti7476.htm>. On the failure of amnesty to end human rights abuse in Haiti, see Sadat, *supra* note 58, at 31.

63. Concerning the last of these alternatives (or supplements) to prosecution, the considerable literatures (at the domestic level) includes ANDREW RIGBY, *JUSTICE AND RECONCILIATION* (2001); HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE* (2002); and DECLAN ROCHE, *ACCOUNTABILITY IN RESTORATIVE JUSTICE* (2003). In the international arena, human rights advocates often speak as if tough trade-offs were never necessary. But experience suggests that as criminal indictments threaten to reach further into society, inclinations to defend oneself (and one’s allies) by justifying past conduct come naturally to the fore, undermining more conciliatory impulses taking root.

64. Klauss Boers & Klaus Sessar, *Do People Really Want Punishment?* in DEVELOPMENTS IN CRIME AND CRIME CONTROL RESEARCH 126, 130 (K. Sessar & H.J. Kerner eds., 1991) (concluding that for over half of the types of crimes considered, victims were willing to accept private settlement, and only in the case of rape did more than half of respondents demand punishment, regardless of restitution); LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 185, 324 (1996); cf. Metin Başoğlu et al., *Psychiatric and Cognitive Effects of War in Former Yugoslavia*, 294 J. AMER. MED. ASS. 580, 580 (2005) (finding incidence of depression and post-traumatic stress syndrome to be “independent of [their] sense of injustice arising from perceived lack of redress from [war-related] trauma.”).

65. South Africa has distributed over 100 million dollars, through its Truth and Reconciliation Commission, to 20,000 of apartheid’s immediate victims. See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT* (2003), <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf>.

amnesty from prosecution less controversial domestically.<sup>66</sup>

As long as new rulers are democratic, their decisions about whom to prosecute and not prosecute will soon be tested against public opinion at the polls. A democratic public may there reasonably conclude—in the aftermath of bloody civil strife, often with atrocities by both sides<sup>67</sup>—that preserving new constitutional institutions and public order is more important in the short-term than prosecuting all such criminals to the limits of the law.<sup>68</sup> Several democratic transitions have taken this path.

No democratic society on earth, in human history, has yet successfully resisted a violent revolutionary movement, enjoying nontrivial social support, by means wholly consistent with the rule of law. Whether such success is possible thus remains an open question, empirically speaking.<sup>69</sup> Even the well-established democracies of Western Europe, notably Germany and Spain, departed decidedly from punctilious adherence to human rights when fighting off well-armed terrorist groups in recent decades.<sup>70</sup> Public opinion there did not later demand criminal prosecution of the state officials who authorized such departures.

This disinclination should scarcely be surprising, especially in countries where the rule of law is less thoroughly established. Many people in

66. They do not eliminate the controversy in international law, however. The Inter-American Human Rights Commission, for instance, has repeatedly ruled that such compensation programs do not meet the duty of member states, under the American Convention, to investigate and prosecute abuses of basic human rights. Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L. L. REV. 651 (2003) (summarizing compensation cases in Peru, Uruguay, Honduras, Argentina, El Salvador, and Chile).

67. Iván Orozco Abad, *Dealing with Symmetrical Barbarism: A Challenge for the Human Rights Movement (The Colombian Case)* 1 (Paper presented at the Conference on Curbing Human Rights Violations by Non-State Armed Groups, University of British Columbia, November 13-15, 2003), [http://webapps2.ucalgary.ca/~nfriess/mambo/images/stories/pdfs/orozco\\_paper.pdf](http://webapps2.ucalgary.ca/~nfriess/mambo/images/stories/pdfs/orozco_paper.pdf) (arguing that “dealing with symmetrical barbarism requires a very different balance between justice and reconciliation,” a balance that could take the form of reciprocal pardon, conditional on a negotiated settlement specifying institutional reforms designed to prevent recurrent violence).

68. This legal resolution of the predicament is particularly compelling where it is not difficult for many contemporaries to comprehend, at least in retrospect, how so many people of good will could once have come to sign on to either side in the conflict, imagining the country’s undoubted troubles to be soluble only through fill in the blank: revolution, or counter-revolution. Author’s interviews with human rights lawyers, social scientists, legal scholars, and journalists in Bogota, in November, 2004, suggest that this is probably the case in contemporary Colombia.

69. Serious methodological problems arise, to be sure, in explaining why an anticipated event or activity did not transpire, despite historical conditions suggesting a high probability that it would occur. James Mahoney & Gary Goertz, *The Possibility Principle: Choosing Negative Cases in Comparative Research*, 98 AM. POL. SCI. REV. 653, 666-68 (2004).

70. Craig Whitney, *Death Squad Killings of Basques: Was Spain’s Government the Mastermind?* N.Y. TIMES, Feb. 12, 1997, at A10; PADDY WORDSWORTH, *DIRTY WAR, CLEAN HANDS: ETA, THE GAL AND SPANISH DEMOCRACY* 407-418 (2001); ANTONIO VERCHER, *TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS* 231-33, 245-46, 389-90 (1992).

weak democracies, facing armed revolutionary insurgencies,<sup>71</sup> are clearly willing to indulge extra-legal methods to combat what they perceive as genuine threats to public order, to the security of their lives and property, and to their understanding of a decent society.<sup>72</sup> Hence too the enthusiasm with which military coups against democratic rulers—widely perceived as corrupt or incompetent—are often greeted throughout the world.<sup>73</sup> This indulgence is still stronger where political repression proves to be mild, or simply confined to the regime's active foes,<sup>74</sup> and where new economic policies are successful, improving the material condition of most citizens<sup>75</sup> (Chile under Pinochet is the clearest recent case here).<sup>76</sup>

Those holding such views are not confined, moreover, to the "landed oligarchy" or "big business," and often comprise a very substantial portion of public opinion.<sup>77</sup> During an ensuing democratic transition, these people either continue to endorse what dictators did, regardless of its admitted illegality, or recognize their own complicity in now-acknowledged wrongs.

71. The situation in Allende's Chile immediately preceding the military coup, for instance, was one of extreme instability and social disorder. It was celebrated as such at the time by the left as a "revolutionary situation," foreshadowing more radical change. See generally Henry Landsberger & Timothy McDaniel, *Hypermobilization in Chile, 1970-1973*, 28 *WORLD POL.* 502 (1983); MARK ENSALACO, *CHILE UNDER PINOCHET* 1, 8-17 (2000); TOMAS MOULIN, *CHILE ACTUAL: AUTONOMÍA DE UN MITO* 97 (1997) (celebrating "the headlong rush that arose from plebian protagonism, the behavior of the masses who took seriously their role as historical actors and who . . . acted with autonomy," creating for Allende "the difficulty of containing the movement once it had set itself loose").

72. WINTROBE, *supra* note 53, at frontispiece (observing that "dictatorships . . . are often more popular than is commonly accepted").

73. Notable in this regard was the recent experiences of Pakistan and Uganda. Tim Weiner & Steve LeVine, *Pakistan's Ruler Pledges to Curb Corruption*, *N.Y. TIMES*, Oct. 16, 1999, at A1, A10 (observing that Gen. Perez Musharraf's coup "was overwhelmingly popular in a nation weary of corrupt and incompetent politicians . . . even among the most outspoken liberals," and quoting one such newspaper editor, "[w]hat happens in these situations is that when the bad guys get thrown out, whoever throws them out looks like good guys").

74. SCOTT MAINWARING ET AL., *ISSUES IN DEMOCRATIC CONSOLIDATION* 26, 32 (1992). Recent research on the Third Reich concludes, for instance, that "the persecution of social outsiders between 1933 and 1939 won more support for Hitler's regime than it lost, and that the early successes of the Second World War turned Hitler into Germany's most popular leader of all time." Robert Gellately & Ben Kiernan, *The Study of Mass Murder and Genocide*, in *THE SPECTER OF GENOCIDE* 3, 11 (Gellately & Kiernan eds., 2003).

75. Insofar as its data may be trusted, the Soviet bloc generated consistently higher growth rates than most capitalist societies, on average, from 1929 through the mid-1970s. Gur Ofer, *Soviet Economic Growth, 1928-1985*, 25 *J. ECON. LIT.* 1767, 1781 (1987). Memories of this fact may have influenced public opinion in the 1990s against prosecution of regime rulers for human rights abuse.

76. An opinion poll in May 2000, conducted two months after General Pinochet's return from London, revealed that over forty percent of Chileans did not endorse the view that he was "guilty of human rights violations." NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT* 79 (2005). On the relative success of Pinochet's economic policies, especially relative to those of comparable South American countries in this period, see JUAN GABRIEL VALDÉS, *PINOCHET'S ECONOMISTS: THE CHICAGO SCHOOL IN CHILE* 267 (1995).

77. Frances Hagopian, *What Makes Democracies Collapse?* 15 *J. DEMOCRACY* 166, 168 (2004). "Polls show that today many Latin Americans would back a heavy-handed government if it proved able to resolve their countries' problems." *Id.* at 169.

If the latter, then to absolve and forgive prior criminal rulers is to absolve and forgive oneself—always tempting, and hardly limited to transitional politics. Either way, for either reason, such people support amnesty.<sup>78</sup>

To be sure, public opinion can be fickle. Forgetting their own prior acquiescence in state criminality,<sup>79</sup> voters may soon conclude that their first, unseasoned representatives employed amnesty to purchase short-term stability for their country at too high a price in retributive justice. They may punish such officials by voting into office others who will accord such justice higher priority and pursue it with greater gusto. The choice between justice and stability is not one, however, to which abstract thinking about regime transition should speak.<sup>80</sup>

Its aims attained, an amnesty may later be overturned by national courts as unconstitutional or by regional ones as inconsistent with the country's treaty obligations.<sup>81</sup> Several Latin American states have followed this path in recent years, permitting additional prosecutions decades after the wrongs,<sup>82</sup> when political circumstances eventually permitted.

To be sure, the salubrious effect of amnesty on regime transition will likely decline insofar as potential defendants may anticipate that an execu-

78. Their views find no expression in elite U.S. law reviews, of course. In Argentina, convicted torturers have no compunction about publishing well-selling books defending their crimes, and such views continue to generate considerable support in the public debate that ensues. MIGUEL O. ETCHECOLATZ, *LA OTRA CAMPANA DEL "NUNCA MAS"* (2003). A rare recognition in English of such facts is offered by Michael Feher, *Terms of Reconciliation*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS* 325, 333–34 (Hesse & Post, eds., 1999). Writing of Argentina and Chile, he observes: “[T]he contention that threats of chaos and communism had justified the suspension of democratic institutions remained a defensible position within the new public discourse—in other words, repudiating such a position was not considered a necessary condition for seeking to reconcile with the people holding the opposite position, namely that a coup against a democratic regime is never justified.” *Id.*

79. GUILLERMO O'DONNELL, *Y A MÍ, QUE ME IMPORTA: NOTAS SOBRE SOCIABILIDAD Y POLÍTICA EN ARGENTINA Y BRASIL* 23 (1984) (reporting survey results during military rule suggesting that middle class informants endorsed unlawful methods in resisting leftist guerrilla groups).

80. Carla Hesse & Robert Post, *Introduction*, *HUMAN RIGHTS IN POLITICAL TRANSITIONS*, *supra* note 78, at 13, 18 (“In a given transition, . . . the specific functions of punishment and amnesty must be compared; the relative priority between the two cannot be theoretically established.”).

81. If statutes of limitations permit, a tacit amnesty—not enacted by legislation of executive decree—may be overturned simply by a later decision to prosecute. This occurred, for instance, in Poland and Germany during the early 1990s, as well as in Greece in 1975. Passage of time is no obstacle to much-delayed prosecution for genocide and crimes against humanity, which carry no temporal prescription in international law.

82. Wilson & Perlin, *supra* note 66, at 651. The Inter-American Commission and Court of Human Rights have repeatedly held that national legislation precluding judicial investigation into the identity of offenders or the location of victims' bodies violates the Inter-American Convention on Human Rights. The most recent Supreme Court to overturn such an amnesty, on these grounds, is Argentina's. Corte Suprema de Justicia [CSJN] [Supreme Court], 5/5/2005, *causa no. 17.768*, “Julió Héctor Simon y otros s/privación ilegítima de la libertad, etc.”; Fannie Lafontaine, *No Amnesty or Statute of Limitation for Enforced Disappearance: The Sandoval Case Before the Chilean Supreme Court*, 3 *J. OF INT'L CRIM. JUST.* 469 (2005).



tive or even legislative promise of impunity will not hold up in the long-term. Even so, gains in short-term protection will often outweigh such long-term uncertainties in the immediate calculations of a transition's potential "spoilers."<sup>83</sup> Evidence suggests that they often gamble that retributive passions will subside over time.<sup>84</sup> This bet has usually proven correct,<sup>85</sup> but may nonetheless reflect a measure of "optimism bias."<sup>86</sup> That amnesty will be successfully challenged in the courts, or reversed by legislation, is a risk with high costs but low probability.<sup>87</sup>

Just how credible must the promise of impunity be for it to induce spoilers to leave office? It need not be indubitably enforceable, in the long-term, to accomplish its short-term purpose. If spoilers perceive a serious risk of displacement in any event, even if they do not leave willingly, then they will surely seize a promise of nonprosecution with little hesitation. In the uncertainty of a regime transition, this is often the situation faced by the rulers' immediate underlings—among senior officers and civilian administrators—who may already face prosecution. In short: Better to jump than be pushed, especially if doing so means one will not have nearly so far to fall.

Such "pacts" between old and new rulers are made in times that are obviously "transitional." It is therefore predictable to both that the bargains they strike may obsolesce.<sup>88</sup> An effective democratic transition

83. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 18, 33-34, 43-44 (2004) (noting the central role of such spoilers and the consequent likelihood of amnesty following most cases of mass atrocity).

84. If demand for criminal justice declines over time, this might suggest that such demand is better understood as "a situated passion" than a self-sustaining "universal ideal." Holmes, *supra* note 29, at 1066. But such pessimism stands radically at odds with the recurrent "irruptions of memory" in such countries as Chile and Argentina, where demand for prosecution powerfully reemerged some thirty years after the wrongs. Alexander Wilde, *Irruptions of Memory: Expressive Politics in Chile's Transition to Democracy*, in GENOCIDE, COLLECTIVE VIOLENCE, AND POPULAR MEMORY 3, 3 (David Lorey & William Beezley eds., 2002).

85. JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 228-229 (2004) (describing, for several transitional societies, the "spontaneous decay of emotion, and abatement of the desire for retribution once it has been satisfied for some wrongdoers"). In postwar France, for instance, sentences of Nazi collaborators became more lenient over time. See PETER NOVICK, THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN LIBERATED FRANCE 161-67, 187-90 (1968); Snyder & Vinjamuri, *supra* note 83, at 33-39 (describing enduring bargains with potential spoilers in several countries which contributed to successful in peaceful settlement of lengthy civil wars.).

86. For an influential study on this frequent source of social misperception, see Neil Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).

87. This "risk" is technically an "uncertainty," in that statistical probabilities cannot meaningfully be attached. FRANK KNIGHT, RISK, UNCERTAINTY, AND PROFIT 19-21, 259 (Sentry Press 1964), available at <http://www.econlib.org/library/Knight/knRUPContents.html> (1st ed. 1921) (distinguishing the two concepts in this way).

88. RAYMOND VERNON, SOVEREIGNTY AT BAY 46-59 (1971) (introducing the now-influential theory of obsolescing bargains between multinational corporations and host countries, according to which contracts initially favorable to foreign companies will often tend to be renegotiated as host countries take "hostage" the plant facility and other sunk costs).

almost necessarily reallocates power in ways likely to call the terms of the initial deal into question later on, when former rulers and their allies no longer occupy prominent positions enabling them to obstruct regime change. Multinational corporations have long learned to expect their bargains to obsolesce in this way. Departing dictators and their minions accept a similar risk, and bargain around it as best they can.<sup>89</sup>

Accompanied by a truth commission, amnesty is by far the single most common legal response by states to mass atrocity, numerically dwarfing the few prosecuting perpetrators criminally.<sup>90</sup> In a word, amnesty plus (highly varying degrees of) truth largely defines state practice—massively and pervasively, throughout the world. We prefer to lavish scholarly attention on emergent tendencies to the contrary but cannot deny that even recent cases often confirm older, less laudatory practice, such as the Nigerian exile accorded former Liberian President Charles Taylor and the refuge given former Haitian President Jean Bertrand Aristide by the Central African Republic and South Africa.<sup>91</sup>

The precommitment to prosecute—grounded in treaty—is perhaps then best viewed not primarily as a normative duty as such, but a bargaining chip in the hands of opposition leaders, seeking to ease autocrats from office on favorable terms. Treaty obligations become politically salient only because of what they imply about costs the country may suffer if it dishonors these commitments, eliciting international disapproval. To date, however, such costs have been minor and not borne by those who incurred them on the state's behalf. Thus, the leverage that opposition leadership can bring to bear in invoking such speculative future costs, when negotiating regime transition, remains slight.

States bestowing amnesties to facilitate democratic transition or end civil wars<sup>92</sup> clearly do not view themselves as legally obliged to this. But

89. On how former dictators later view their prior departures from power, see RICCARDO ORIZIO, *TALK OF THE DEVIL: ENCOUNTERS WITH SEVEN DICTATORS* (Avril Bardoni trans., Walker Publishing Co., 2003) (2002).

90. Countries that have accorded amnesty in recent years for abusers of human rights and humanitarian law include *inter alia* Peru, Chile, Argentina, Honduras, Guatemala, El Salvador, Nicaragua, Uruguay, Colombia, Sierra Leone, Mozambique, Macedonia, Namibia, Bangladesh, Ivory Coast, Liberia, Northern Ireland, Spain, Afghanistan, Brazil, Cambodia, Haiti, Iraq, and Angola. Most such amnesties have been de jure; a few—such as Guatemala, Namibia, and Spain—only de facto. Since many of these amnesties have been granted by states in Africa, one might respond that this state practice therefore makes custom only for fellow Africans. But that interpretation would effectively disenfranchise this entire continent from any influence over the making of broader customary law.

91. The circumstances of both exiles are described in Sadat, *supra* note 58, at 2, 32.

92. For three recent efforts of the latter sort, see Carlotta Gall, *Top Suspects in Afghanistan are Included in Amnesty*, N.Y. TIMES, May 10, 2005, at A7 (“The head of Afghanistan’s peace and reconciliation commission offered an amnesty . . . for all rebels fighting American and government forces, and even extended the offer to two of the most wanted Afghan terrorism suspects: the Taliban leader Mullah Muhammad Omar and the renegade warlord Gulbuddin Hekmatyar.”); Muan Forero, *New Colombia Law Grants Concessions to Paramilitaries*, N.Y. TIMES, June 23, 2005, at A3 (describing enactment granting immunity from extradition to the United States for leaders of the country’s largest paramilitary group, in exchange for public confession of drug trafficking,

they indubitably perceive themselves as permitted to do so.<sup>93</sup> In publicly defending their amnesties, states do not describe these as knowing violations of their international legal obligations, granted only in grudging recognition of political constraints.<sup>94</sup> Rather, they defend their amnesties as presenting a welcome opportunity for the country to turn a new leaf and to embrace international human rights prospectively.<sup>95</sup>

Still less do neighboring countries condemn such states for violating international legal duties.<sup>96</sup> To the contrary, they often rejoice at the reduced risk of refugee flows into their own territory presented by peace accords in the neighboring state, which is often emerging from civil war. This too is pertinent state practice.<sup>97</sup> In short, the principal source of customary international law continues to authorize amnesty, when accompanied by truth, as an acceptable national response to mass atrocity, at least where this path appears necessary to end civil war or consolidate a genuine democratic transition.<sup>98</sup> That this fact is almost nowhere acknowledged in the enormous legal literature on the subject of amnesty for mass atrocities simply attests to its near-complete monopolization by those favoring prosecution.<sup>99</sup> In practice, however, as international relations “realists” would

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disarmament, and promises to dissolve their organization); Michael Ware, *Talking with the Enemy: Inside the Secret Dialogue between the U.S. and Insurgents in Iraq*, TIME, Feb. 28, 2005, at 26, available at <http://www.time.com/time/archive/preview/0,10987,1029862,00.html> (reporting that the United States was secretly negotiating with Sunni insurgents for an agreement whereby they would abandon arms in exchange for amnesty from prosecution). See also *World This Week*, ECONOMIST (U.S. Edition), Mar. 19, 2005, at 8 (“A Ugandan delegation begged the ICC not to indict the leaders of the Lord’s Resistance Army, a Uganda rebel group, that often tortures children” because “Ugandans worry that the threat of prosecution would scupper efforts to end the civil war by offering amnesty to those who surrender.”).

93. This is sufficient to constitute their *opinio juris*, according to many views of customary international law. See, e.g., Robert Kolb, *Selected Problems in the Theory of Customary International Law*, NETHERLANDS INT’L L. REV. 119, 121–22, 138 (2003) (discussing several scholars holding such views).

94. They may say this privately, to be sure. But what public officials might privately say, when contradicting their public proclamations, has never been regarded as relevant to their state’s *opinio juris* under any respectable theory of customary international law.

95. See e.g., Agreement Reached in Multi-Party Negotiations pmbll., U.K.- N. Ir.-Ir., Apr. 10, 1998, available at <http://www.ucc.ie/celt/published/E900003-006/> (the “Good Friday Agreement”) (agreeing to resolve much of the longstanding military conflict in Northern Ireland).

96. Thomas Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION 204 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (arguing that one state’s acceptance of the legality of another’s conduct may be inferred from the first’s silence about, or non-criticism of such conduct).

97. Kolb, *supra* note 93, at 139.

98. The near-universal acceptance of South Africa’s Truth and Reconciliation Commission by the international community evidences this consensus. The recent suggestion by the Special Court for Sierra Leone, in *Prosecutor v. Morris Kallon*, Case Nos. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004), that customary international law now prohibits amnesty may thus fairly be described as “absurd.” Prof. William Schabas, personal communication with author.

99. But see John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 693, 698 (Antonio Cassese et al. eds., 2002). Dugard writes: “A general duty to prosecute interna-

predict, treaty law—with its frequent duty to prosecute or extradite—has nonetheless cast only the smallest shadow over most amnesty negotiations.

We ignore this palpable fact only at great peril to any understanding of international criminal law aspiring to some purchase on social reality, i.e., as an enterprise existing outside the professorial echo-chamber. The rationale of those resisting this conclusion seems to be that, since Article 38 of the Statute of the International Court of Justice treats “respected jurists” as formal “sources” of international law, it follows that for us to admit state practice flagrantly departs from treaty law ipso facto weakens the claim that there is duty to prosecute. In other words, by denying the reality of state practice, we—as potentially countervailing sources of law—move the law in the desired direction. Through a virtuous circle of self-fulfilling prophecy, if we insist—often and vigorously enough—that X is true, then X will eventually *become* true. This is a misconstrued constructivism run amok; to describe its adherents as succumbing to a bout of professorial megalomania would be charitable.

Many legal scholars also tend wishfully to assume that the process of democratic transition can be unilinear: it must begin at one point and ends at another, the latter established by international law, both known in advance.<sup>100</sup> Under the beneficent influence of the international community and its law, dictatorships—guilty of human rights abuse—transform themselves into democracies respecting the rule of law. Civil wars, producing war crime and genocide, end in legal agreements producing peace. Departures from these acceptable paths become “reversals.” Because amnesty deviates from the path of “accountability” increasingly mandated by treaty, it falls outside the circle of acceptable possibilities, even provisional and temporary ones, that transitional societies may legitimately employ.<sup>101</sup>

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tional crimes under international law is not supported by state practice. On the contrary modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution. The decisions of national courts likewise give no support to the duty to prosecute.” *Id.*; See also Penrose, *supra* note 61, at 204–05 (concluding that “state practice for prosecution of international crimes based on torture, genocide, and other similarly heinous crimes is practically non-existent” and thus “honest scholarship requires an admission that the Pinochet precedent cuts against existing state practice”).

100. In this respect such legal scholarship resembles the more overtly policy-oriented writing on democratic transition, produced by professed experts selling their services as consultants to nation-states. On the perils of this phenomenon, by one of its most distinguished practitioners, see THOMAS CAROTHERS, *CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION* 168 (2004) (criticizing the tendency to reduce the complexities of democratic transition to simplistic nostrums and off-the-rack formulae).

101. Legal scholarship here risks an error very similar to that which “modernization theory” made a generation before in holding that—through increased economic and political integration—Western nation-building will be replicated throughout the non-Western world. If social science in this area now teaches anything, however, it is that “the more things come together, the more they remain apart: the uniform world is not much closer than the classless society,” then extolled by Marxist critics of moderniza-

The evidence from scholarship in comparative politics suggests, however, that it is better to understand such developments not as detours off a single transitional highway, but as manifesting a wider array of empirical possibilities, conceptualized more complexly. These would reflect how countries vary considerably in both their points of departure and destination. In fact, democratic transitions sometimes lead, in the short run, to increased inter-ethnic conflict, prompting mass atrocity, especially where electoral mobilization precedes stable legal institutions for channeling it.<sup>102</sup>

It is an article of faith among academicians in international law—apparently requiring no empirical confirmation—that amnesty is unnecessary to establish new democratic institutions, because criminal prosecution of repressive former leadership itself helps establish and legitimize these very institutions.<sup>103</sup> The picture emerging from comparative social science suggests something quite different from, if not quite the opposite of, what international legal scholars here assume.<sup>104</sup> Specifically, they confuse what is necessary to later consolidation—the rule of law—with what is necessary for initial transition—a transfer of power.

The problem is not merely the one long-recognized: that trials will anger their immediate targets, whose friends often retain power, which can be used to stop the transition in its tracks. The more serious problem is subtler. It is that the very conditions making prosecution possible also threaten the political transition on which its ultimate success depends. Considerable experience now suggests that trials are more likely to occur when transition is least regulated by negotiation between departing and emerging rulers, where repression has been recently severe, and where the old regime was least successful in its economic policies and military adventures.

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tion theory. CLIFFORD GEERTZ, *AVAILABLE LIGHT: ANTHROPOLOGICAL REFLECTIONS ON PHILOSOPHICAL TOPICS* 248 (2000).

102. See, e.g., EDWARD MANSFIELD & JACK SNYDER, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* (2005); MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY* 4, 22–25, 426 (2005); BENJAMIN A. VALENTINO, *FINAL SOLUTIONS: MASS KILLINGS AND GENOCIDE IN THE TWENTIETH CENTURY* 237 (2004) (observing that at least three of the twentieth century's largest mass killings, in the Soviet Union, Germany, and Rwanda, "followed close on the heels of failed democratization efforts").

103. Diane Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 *Geo. L.J.* 1057, 1119 (2004).

104. The same must be said of another issue in international criminal law to which social science has consistently spoken in a different key. International lawyers now pride ourselves for finally extricating the offenses of genocide and crimes against humanity from the (long-required) nexus to armed conflict. At the same time, however, social scientists studying these same wrongs increasingly conclude that they are caused by, or are otherwise inextricable from, the waging of modern war. Eric Weitz, *The Modernity of Genocides*, in Gellately & Kiernan, *supra* note 74, at 53, 56 ("Genocides . . . almost invariably develop in the context of warfare . . ."); MARTIN SHAW, *WAR AND GENOCIDE* 5 (2003) (contending that "genocide is best understood as a distinctive form of war," because it "uses the logic of war" and "has occurred mostly in the context of war . . ."); MANN, *supra* note 102, at 32 (observing that "most 20th century cases of ethnic cleansing occurred during wars or during the chaotic transfer from war to peace . . .").

Hence, for instance, high levels of recent repression (often against the new leaders themselves) may combine with low levels of national welfare (owing to failed economic policies) to reduce trust between parties to the negotiation.<sup>105</sup> This diminishes prospects for reaching a “pact” by which power may be effectively and nonviolently transferred.<sup>106</sup> With less chance of harmonious compromise, stakes rise dangerously: If repressive rulers cannot be persuaded to go peacefully, they must be driven from power. This is very difficult and hence rare. It often requires violence, which breeds resentment that later impedes harmonious consolidation. Perhaps the only thing to be said in favor of this scenario is that if it plays out, trials become quite possible, even likely.<sup>107</sup>

Still, short of tossing out the dictator through popular, nonviolent uprising,<sup>108</sup> no one sensitive to the plight of a transitional society would wish upon it the circumstances facilitating prosecution of repressive rulers—however otherwise desirable such prosecution, considered in isolation. The prospect of military backlash that prosecutions forebode<sup>109</sup> becomes important on account of these situational factors. Such backlash tends to arise exactly where and when transitions are most precarious and vulnerable, not merely to momentary “setback” but outright failure.<sup>110</sup>

To speak with much confidence about prosecution’s contribution to democratic transition is thus, to say the least, lacking in scientific sup-

105. Trust is already problematic enough during transitions, because the instability defining them weakens reliable expectations about others’ behavior. Margaret Levi, Lecture presented at the University of Iowa: *Trust in Transition* (Feb. 2004).

106. MAINWARING, *supra* note 74, at 26; GRETCHEN CASPER & MICHELLE TAYLOR, *NEGOTIATING DEMOCRACY: TRANSITIONS FROM AUTHORITARIAN RULE* 10 (1996).

107. Carlos Nino went so far to suggest an equation here, comprised of factors encouraging and discouraging prosecution during regime transition. NINO, *supra* note 45, at 127. He would surely have acknowledged, however, that numbers could be attached to the variables, which he presents in conceptual terms, only through prudent exercise of political judgment, exogenous to the equation itself. For a similar formula, see ELSTER, *supra* note 85, at 220–221.

108. There have been notable such incidents in recent history, to be sure, from the overthrow of Ferdinand Marcos in 1984 to that of Uzbek President Islam Karimov in 2004.

109. Adam Przeworski, *The Games of Transition*, in *ISSUES IN DEMOCRATIC CONSOLIDATION* 132 (Scott Mainwaring et al. eds., 1992) (noting that “the specter of military intervention is a permanent constraint on the political process and the eventual reaction by the military is a consideration that permeates everyday political life in such new democracies”).

110. Conversely, the very conditions that make prosecutions unlikely often make much easier the other mechanisms of transitional justice, particularly victim reparations. A repressive state that, through prudent economic policy and property protection, proved successful in wealth-creation, for instance, is clearly in a better position later to compensate its victims than one that did not. South Africa, in particular, has distributed over 100 million dollars, through its Truth and Reconciliation Commission, to 20,000 of apartheid’s immediate victims. Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES, Apr. 15, 2003, at A7. Rwanda’s victims, unlike South Africa’s, will see many of their victimizers prosecuted, but would likely trade places with apartheid’s in a heartbeat.

port.<sup>111</sup> It would be one thing if such confidence issued from careful refutation of the relevant researches in comparative politics, or showed their apparent lessons to be unduly pessimistic. Rather, we simply ignore them. Their implication is surely that national prosecution, where possible at all, should be limited to top chieftains, so that their most active supporters and “core constituencies”<sup>112</sup> (often subject to prosecution as accessories) are not given incentives to continue their support, obstructing transition. Such trials should also be effected quickly, when defendants’ popularity is at its nadir.

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111. There is recent empirical evidence, however, that truth commission may somewhat contribute to reconciliation and levels of democracy. Charles Kenney & Dean Spears, *Truth and Consequences: Do Truth Commissions Promote Democratization* 1 (paper presented at the 2005 Annual Meeting of the Amer. Political Science Assoc.); JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* 150-168 (2005). Such trials often comprise part of a broader political strategy to reassert civilian supremacy over the officer corps.

112. This term refers to those beyond regime elites and militant shock troops to their larger base of support within a political party, ethnic group, or mass movement, always well short of a societal majority, however. MANN, *supra* note 102, at 20, 505-06. Amnesty for such people, threatened by the transition, seeks to reassure them that they are not at risk, and so encourage them to switch sides.