Norm Internalization through Trials for Violations of International Law: Four Conditions for Success and their Application to Trials of Detainees at Guantanamo Bay

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

This paper examines these past failures and inductively derives four necessary, but not necessarily sufficient, conditions for the success of norm internalization in the community of the defendant: consistency, selectivity, accessibility, and integration. Meeting these conditions avoids pitfalls that have prevented successful norm internalization in past trials. Application of these conditions to past and future trials at Guantanamo Bay reveals such trials are ill-suited to internalization of an anti-terrorism norm in the Islamic world. Military commissions, which did not include norm internalization as a prominent objective, failed to meet the four conditions. More importantly, future trials of this detainee population, regardless of venue, appear incapable of meeting them. Given these failures, this paper suggests that trials of Guantanamo detainees would more profitably focus on alternative, more attainable trial objectives. These failures also raise real questions about whether norm internalization through trial in the community of the defendant is possible, and if so, when and in what forum it could be successful.
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I. INTRODUCTION

In May President Obama delivered a clarion call for a new approach to those detained at Guantanamo that he believes will better protect the United States and its allies from al Qaeda and affiliated groups and at the same time protect American values.1 Unlike the Bush Administration, it appears that the Obama counterterrorism strategy will feature trials more centrally. After criticizing the Bush-era military commissions for only completing three cases in nearly seven years of existence, the President called for trials to proceed against Guantanamo detainees in two venues. First, President Obama indicated his support for conducting trials in the U.S. federal courts for terrorists who have violated “American criminal laws.” Second, he declared that modified military commissions should be convened against those “who violate the laws of war.” While the President was vague on specifically what reforms he supported for future commissions, he suggested they would be designed to grant greater procedural protections to defendants than was provided by Bush-era commissions.

Left unsaid by this President, as was the case with the prior President, is why exactly the United States is interested in conducting trials of those detained at Guantanamo. Amid many competing motivations for conducting such trials, including incapacitation and retribution, some international legal scholars have argued that at least those trials convened for violations of international law should be oriented around developing and deepening an antiterrorism norm in those communities where tacit support or silent indifference towards terrorism has allowed it to flourish.2 This paper calls this trial

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objective the “norm internalization” theory of trials and punishment. Under this theory, trials of terrorists for violations of international law can strengthen the acceptance of the international legal prohibition on terrorism in communities where that norm is not well rooted. Trials do so by inculcating within society a sense that these violations are morally unacceptable. More specifically, trials internalize norms by bolstering respect for international law through fair trials; dramatizing the effect of the lawbreaking conduct through the spectacle of trial, in the process developing an accurate historical narrative; and by stigmatizing those who commit these violations through punishment indicative of international disapproval of the conduct in question. The ultimate goal of norm internalization in this context is an internalized social commitment to the prohibition on terrorism within the Islamic world, which would provide the most stable route to prevention of future terrorist activity.


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Application of norm internalization theory to terrorism trials fits comfortably within an emerging strand of scholarship which argues this is the most important purpose for international criminal law writ large. Norm internalization appears to be an attractive trial objective when three facts are true. First, there is a clear international criminal prohibition on the conduct in question and the cost of continued violations of the norm in question is high. This creates a great desire to prevent future violations. Second, the prohibition in question is not deeply rooted in the personal or social morality of the community in question, creating a risk this community will violate the norm. Generally, this community is that of the defendant. Often the defendant is just one of many members of his community that has violated international law, creating a need to deepen commitment to international law within that community. Third, there exists a population of potential defendants whose trial might produce narratives sufficient to deepen social commitment to the norm in question.

Such efforts seek to achieve a new “Nuremberg moment,” the colloquial term used to refer to the wrenching social changes in Germany that followed World War II and the International Military Tribunal (IMT) war crimes trials. But norm internalization in the community of the defendant has not been a successful outcome of trials for violations of international law since Nuremberg. This failure leads to two questions. First, why have trials for violations of international law failed to internalize norms in the community of the defendant? Second, can trials of Guantanamo detainees overcome the deficiencies of the past?

This paper begins to answer these questions by examining the reasons past trials for violations of international law have failed at norm internalization. From this past practice, this paper inductively derives four

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9 Mirjan Damaska argues that “socio-pedagogical” considerations should drive international criminal justice, as he believes exposing violations of international law through trials and stigmatizing violations through punishment will deepen commitment to international law. Damaska, supra note 3. Gary Bass has written that development of an accurate historical narrative, key to norm internalization success, is the only consistently legitimate purpose for conducting trials for violations of international law. GARY J. BASS, STAY THE HAND OF VENGEANCE 287 (2000).

10 There may be more than one community from which defendants are drawn in a particular set of trials. The ICTY prosecuted Serbs, Croats, and to a lesser extent Bosnian Muslims, and internalizing respect for international legal norms in all three communities would be an aim of norm internalization.

11 In reality, the IMT is just one part of the reasons for the post-war attitude changes within Germany. MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE 211 (2008).

12 International criminal tribunals considered in this paper were the IMT at Nuremberg, the Tokyo Tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), the

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conditions for norm internalization success in the community of the defendant: consistency, selectivity, accessibility, and integration. While it is impossible to conclude meeting these conditions will produce norm internalization success, given the paucity of successful historical examples, meeting these conditions will avoid the pitfalls that appear to have prevented norm internalization through past trials. Application of these conditions to trials of Guantanamo detainees reveals that they are unlikely to meet these conditions, regardless of trial forum. Therefore, trials of Guantanamo detainees may be more profitably oriented around alternative objectives, such as incapacitation or retribution. The difficulties in using trials of Guantanamo detainees for norm internalization in the community of the defendant suggests more thought must be given to when and where trials for violations of international law can meet these conditions, if at all.

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

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

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

Part V concludes with a call for further research on what situations, if any, may exist where trials can meet these four conditions.

International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, and the hybrid tribunal currently operating in Cambodia. The municipal war crimes prosecutions considered were the Israeli trial of Adolf Eichmann and the Iraqi High Tribunal. For a useful timeline of these trials, see Patricia Wald, *Foreword: War Tales and War Crimes*, 106 Mich. L. Rev. 901, 907 (2008).

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II. NORM INTERNALIZATION AS A TRIAL OBJECTIVE FOR INTERNATIONAL CRIMINAL LAW

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

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

Deterrence cannot fully explain the phenomenon of the law-abiding citizen, however. Deterrence turns on the ability of the law to punish transgressions, and most free societies lack the resources or will to be able to adequately monitor individual behavior to ensure that all or even most transgressions are punished. Thus, the stability of compliance with the law depends on norm internalization because the internal drive to follow the law persists regardless of enforcement. This internal drive to follow the law may

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14 Drumbl, supra note 2, at 1185-86.
16 See id. at 22-23 (using drunk driving as an example of a crime where the social control theory cannot explain the decision to abide by the law). Authoritarian societies may rely more upon deterrence to enforce laws because of a greater willingness to use intrusive means to seek compliance with the law, and because of the reduced legitimacy of the government as a behavior regulation agent.

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have two sources.\textsuperscript{17} Personal morality, or the individual’s sense of right and wrong, can be a powerful force for abiding by the law when it is consistent with the law. A person may choose not to murder not only because he will be punished severely for doing so, but also because it violates his personal morality. But not all laws align with personal morality. An alternative internal drive to follow the law may come from a sense that the institution promulgating the law has legitimate authority to regulate individual behavior, regardless of whether a particular law accords with individual morality. Thus, an individual may refrain from smoking marijuana neither because he fears getting caught, nor because he thinks it is morally wrong, but rather because he accepts the right of the external authority promulgating the law to regulate his behavior.

Trials are central to the norm internalization process. Trials can bolster within society the legitimacy of the external authority that promulgates law.\textsuperscript{18} The greater the legitimacy of that authority, the greater the likelihood society will comply with that authority’s laws regardless of independent moral judgments about the law. The law promulgating authority achieves legitimacy by using trial procedures that meet basic due process guarantees, imposing penalties that are proportionate to the crime being committed, punishing different categories and classes of people for the same offenses, and only punishing conduct society agrees must be reformed. The trial also can educate society on why the crime was morally unacceptable through dramatization of the effects of the wrongdoing, and stigmatizing the offender. Social education through trials can be an influential force in shaping a society’s collective morality.\textsuperscript{19}

These general observations about criminal trials can be applied to trials for violations of international law. Such trials include among their aims retribution for wrongs committed.\textsuperscript{20} Retributivists will argue that the heinous

\textsuperscript{17} See id. at 25 (summarizing literature on two types of internalized obligations).

\textsuperscript{18} See Hampton, supra note 13, at 713 (arguing that democratic legitimacy of state gives it the authority to morally educate its citizens through criminal law).

\textsuperscript{19} Uma Narayan has argued against viewing trials as a forum for moral education because she believes those committing crimes already recognize that the action they take is immoral, as otherwise they would lack competence for trial. See Uma Narayan, Moral Education and Criminal Punishment, in VALUES AND EDUCATION 69, 70 (Thomas Magnell ed., 1998) (“responsibility would be hard to attribute to an agent that lacked the understanding that her conduct was immoral”). International crimes like genocide or religiously-inspired terrorism often involves a perpetrator who believes her act is moral regardless of the law. See Marti Koskenniemi, Between Impunity and Show Trials, 6 MAX PLANCK Y.B. U.N. L. 1, 8 (2002) (noting that atrocities such as Ukrainian famine and Nazi genocide were perpetrated from a perceived “desire to good”). It’s hard to believe Narayan would argue that a genocidaire lacks criminal responsibility because she believed her actions were morally correct.

\textsuperscript{20} See e.g., Martha Minow, BETWEEN VENGEANCE AND FORGIVENESS 25 (1998) (describing the benefits of the retribution achieved in international criminal trials). Indeed, this may be the primary aim in most international criminal trials. DRUMIL, supra note 3, at 61 (arguing that survey of international criminal trials suggests preference for retributivist aims over consequential aims).
crimes that are generally the subject of international trials require balancing the moral ledger through punishment of the wrongdoer. But retribution is rarely thought to be the only purpose behind such trials, as the international community generally also has consequential goals for the trials. The events that preceded these trials are usually among the most heinous known to man, including genocide, crimes against humanity, and serious war crimes. The international community seeks to pursue any strategy that might reduce the risk that these crimes will be repeated in the future. Such a strategy generally requires focusing on the community of the defendant, which has just engaged in illegal conduct, and which may be predisposed to doing so again. This risk makes that community the natural target for consequentialist efforts.

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

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

21 DRUMBL, supra note 3, at 60-62 (discussing role of consequential aims in international tribunals).
23 See, e.g., DRUMBL, supra note 3, at 170-171 (arguing that deterrence of serious violations of international law is unlikely).
24 It is possible that deterred behavior can morph into that which is morally unacceptable. As political considerations prevent key actors from continuing destructive behaviors, the willingness of a society to return to that behavior may decrease over time. See Michael Slackman, 5 Years After It Halted Weapons Programs, Libya Sees the U.S. as Ungrateful, N.Y. TIMES, Mar. 11, 2009, at A6 (explaining that Libya was unlikely to return to terrorist activity despite the failure of the U.S. to live up to promises that initially altered the Libyan cost-benefit analysis on terrorism).
Trials for violations of international law have two advantages in advancing norm internalization in the community of the defendant. First, such trials are often the only forum where the factual history of serious war crimes and human rights violations are developed, as they are often conducted in societies where alternative fora, such as municipal courts or local media, have broken down or have been corrupted by partisan influences. The power to discover and represent facts provides these trials a unique opportunity to shape the historical knowledge of the atrocities that transpired. Graphic accounts of past human rights abuses and war crimes may be a powerful tool to internalize norms prohibiting such conduct. Second, in communities where the municipal courts have lost legitimacy due to armed conflict or neglect, fair trials have the ability to begin to rebuild respect for the law and legal institutions. If the community of the defendant believes that international law may validly restrict its conduct, regardless of whether the law aligns with personal morality, there may be a reduced risk of serious violations of international law.

III. FOUR CONDITIONS DERIVED

A. Past Practice

The closest norm internalization has come to fruition through trials for violations of international law were the trials at Nuremberg. The IMT at Nuremberg is remembered today for creating an authoritative factual history of the crimes committed by the Nazi regime, and for employing that history to re-orient the German population from a militaristic past to its liberal democratic present. Historians dispute the notion that the IMT was itself responsible for this evolution, pointing instead to a complex series of reeducation efforts and historical events, including trials conducted by German authorities of mid-level Nazi officials, as an explanation for the inculcation of new values in Germany. Nevertheless, it is indisputable that the documentary evidence collected at the IMT remains an authoritative historical source on Nazi

25 This may suggest that a truth commission would be an alternative venue to push norm internalization, because it also has as its goal recording the history behind severe violations of international law. Truth commissions are missing a key component of norm internalization efforts, however, as they lack the ability to impose a punishment that demonstrates the depth of international revulsion towards the act in the question. Nevertheless, it is worth considering in future scholarship whether that drawback is outweighed by the benefits of truth commissions, including the fact that they may be less likely to be seen as “victor’s justice.”

26 See Damaska, supra note 3, at 345 (explaining, “exposure and stigmatization of these extreme forms of humanity” contributes to “the recognition of basic humanity”).


28 Supra note 11.
Germany, and that today the concept of Germans repeating Nazi crimes is inconceivable.

Whatever the cause of the “Nuremberg moment,” it does not appear to have been repeated in subsequent war crimes trials. While Nuremberg’s version of history is widely lauded as accurate, many scholars derisively refer to the narrative produced by the Tokyo Tribunal as the “Tokyo Trial version of history,” and today the narrative is largely rejected in Japan and even the West. This has resulted in the continuation of historical disputes between Japan and its neighbors stemming from disagreement over the causes of and lessons emerging from World War II. As for subsequent trials, it may be too early to measure the impact of the trials on norms in the community of the defendant. Respect for international law, and a sense of morality modified to encompass prohibitions on genocide, crimes against humanity, and serious war crimes must be developed over time; the appropriate measurement of success may not be months or years but rather decades. Nevertheless, early signs are not promising. In Serbia, a 2002, survey indicated that only 20% of Serbs believed that cooperation with the ICTY was “morally right” and only 10% saw the ICTY as the best way to serve justice. These numbers suggest that the ICTY’s impact on Serb morality or perceptions of the legitimacy of international law has been minimal. In Cambodia, only 15% of people were aware of the mixed tribunal convened there to hear war crimes cases against former Khmer Rouge leaders before the hearings started, and many Cambodians remained unaware of the trials or the genocide that spawned them even as trials proceeded. Low levels of popular knowledge about trials suggest a minimal impact on society.

Why have trials struggled at achieving internalization of international norms in the community of the defendant? This section proceeds in an inductive manner, identifying four common threads that may explain these failures: perceptions of victor’s justice; selection problems; limited access to information; and failure to situate trials within a larger social norm internalization effort. As with any exercise in inductive reasoning, the goal here is not a formal proof of the reasons that norm internalization failed in the

30 See Norimitsu Onishi, A War Shrine for a Japan Seeking a Not-Guilty Verdict, N.Y. TIMES, June 22, 2005, at A4 (explaining that rejection of the Tokyo trials has allowed many Japanese to believe that Japan’s wartime conduct was just).
31 Snyder & Vinjamuri, supra note 22, at 21-22.
32 Serbian leaders have cooperated with the ICTY at times in the hopes that doing so will improve their chances of joining the EU. Nicholas Wood, Serbia Acts on War Crimes to Strengthen Ties to the West, N.Y. TIMES, Apr. 25, 2005, at A11. But such cooperation is not indicative of the deeper social change that is the target of norm internalization. See id. (quoting Human Rights Watch Serbia Director Bogdan Ivanisevic, “Absolutely nothing in how the government is cooperating with The Hague tribunal would affect the way a person in the street thinks about war crimes.”)
33 Seth Mydans, Young Cambodians are Oblivious of Khmer Rouge Horrors, N.Y. TIMES, Apr. 9, 2009, at A6.
past. Rather, past pitfalls suggest what may need to be avoided if future trials for violations of international law are to have norm internalization success. The following section uses these past failings to develop four conditions that must be met to avoid past norm internalization problems: consistency, selectivity, accessibility and integration.

(i) Victor’s Justice

Hermann Göring, Nazi Reichsmarshall and convicted war criminal, scrawled on his indictment by the International Military Tribunal (IMT) at Nuremberg, “The victor will always be judge and the vanquished the accused.” As Göring’s remark presages, international war crimes trials have struggled to overcome the perception in the community of the accused that they represent illegitimate “victor’s justice.” The claim of victor’s justice interferes with norm internalization by representing the trial as an arbitrary and raw exercise of power by the war’s winner, as opposed to an objective condemnation of illegal acts. The community of the defendant will neither develop greater respect for international law, nor learn lessons regarding the importance of adhering to international norms, if trials are perceived as an effort to subjugate their community.

The perception of victor’s justice arises for at least two reasons. First, international war crimes trials often reflect a change of legal regime, from that of the vanquished, which tolerated, and in some instances codified, the acts being prosecuted, to international law, which condemns them. This change in legal authority can make criminalization of past acts appear ex post facto, even if the international law in question was well established at the time of the underlying offense. Second, the community of the accused is particularly susceptible to perceptions of victor’s justice because of its natural skepticism of the accuser, who is usually somehow linked to conflict’s winner. In the face of that skepticism, any international law violations by the accuser further undermine his standing as a prosecutor. International war crimes trials have fed into this skepticism by failing to prosecute the crimes of all sides in a conflict. Failure to deal with the crimes committed by the accuser quickly discredits the trial in the eyes of the community of the accused, both as a fact-finding exercise and as a moral guidepost.

The post-World War II tribunals at Nuremberg and Tokyo were victor’s justice in the truest sense of the term: they were conceived of and

34 NEWTON & SCHARF, supra note 11, at 99-100.
35 See, e.g., Jörg Friedrich, Nuremberg and the Germans, in WAR CRIMES: THE LEGACY OF NUREMBERG, supra note 27, at 87, 88-89 (describing dissonance for post-war Germans who saw actions that were legitimate under Nazi law labeled criminal under the law imposed by the Allies).
36 See OSIEL, supra note 29, at 124-25 (describing problems of unclean hands); Damaska, supra note 3, at 361 (noting that “corrosive cynicism engendered by double standards” is mostly likely to occur in the community where atrocities were committed).
conducted by the victorious Allies at the end of the war.\textsuperscript{37} Not surprisingly, they displayed both features that allowed the community of the defendant to dismiss the trials in question as victor’s justice. Both tribunals criminalized conduct that was legal in Germany or Japan at the time it was conducted, and which was not clearly a criminal violation of international law. Many top Nazi and Japanese officials were tried for the crime aggression even though it was not a criminal violation of international law prior to World War II,\textsuperscript{38} and remains ill-defined today.\textsuperscript{39} The post-World War II tribunals also failed to recognize the traditional defense of superior orders, holding lower level officials fully liable for conduct which they were ordered to perform, in contravention of traditional military practice.\textsuperscript{40} The IMT and Tokyo Tribunals also prosecuted only Axis crimes, a selective condemnation that created the perception of hypocrisy. The Allies sat in judgment of Axis war crimes, while alleged Allied war crimes, including Stalin’s massacres, the British and U.S. firebombing of Dresden,\textsuperscript{41} and the U.S. decision to use the atomic bomb at Hiroshima and Nagasaki were not investigated.\textsuperscript{42}

The modern international war crimes tribunals prosecuting crimes committed in the former Yugoslavia (ICTY) and in Rwanda (ICTR) have two significant differences from the post-World War II tribunals. First, the U.N. Security Council, which created the tribunals, did not formally engage on either side in the armed conflict.\textsuperscript{43} Second, the mandates of both tribunals encompassed violations by all sides to the conflict.\textsuperscript{44} Nevertheless, allegations


\textsuperscript{39}See Rome Statute of the International Criminal Court, art. 5(2), adopted July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”)

\textsuperscript{40}See Martha Minow, Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence, 52 McGill L.J. 1, 17 (2007) (describing break in traditional practice at Nuremberg). See also, Damarska, supra note 3, at 353 (explaining how dispensing with superior orders defense blurs levels of moral culpability recognized in municipal legal systems, thereby undermining moral education offered by trial).

\textsuperscript{41}Koskenniemi, supra note 19, at 21.

\textsuperscript{42}Osiel, supra note 29, at 122n.139.


\textsuperscript{44}The ICTY Statute defines the jurisdiction of the tribunal as extending to, “persons responsible

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of “victor’s justice” have plagued both tribunals. The ICTY has a mixed practice on the use of ex post facto offenses, as the prohibition on such offenses is subject to subordination when the ICTY’s sense of substantive justice requires that the case proceed.\textsuperscript{45} ICTY and ICTR also have no clear prohibition on the use of hearsay evidence, allowing evidence from anonymous witnesses to be admitted on a regular basis at trials.\textsuperscript{46} One commentator has argued that this practice “calls into question the fairness of the underlying trials.”\textsuperscript{47} Moreover, despite the broad mandate of both tribunals, neither has consistently prosecuted the crimes of all parties to the conflict. The ICTY failed to open a formal investigation into allegations of war crimes stemming from the NATO air campaign in Yugoslavia.\textsuperscript{48} Croatia also succeeded in delaying prosecution of its war criminals at the ICTY, further alienating Serbs from the tribunal.\textsuperscript{49} These decisions allowed former Yugoslav President Slobodan Milosevic to make credible claims of victor’s justice, arguing that the court was “false,” and “invented as a reprisal for disobedient representatives of a disobedient

\begin{footnotesize}
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\item Id.
\item ICTY chief prosecutor Carla del Ponte announced that she was declining to open an investigation into war crimes allegations stemming from the NATO bombing campaign because she was “satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign.” Press Release, Office of the Prosecutor for the Int’l Criminal Tribunal for the Former Yugo., Prosecutor’s Report on the NATO Bombing Campaign (June 13, 2000), available at \texttt{http://www.icty.org/sid/7846}. But see Anne-Sophia Massa, \textit{NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Court for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion}, 24 Berkeley J. Int’l L. 610, 644-645 (2006), for a criticism of the decision of the ICTY not to investigate NATO actions as politically motivated.
\item See Victor Peskin, \textit{Beyond Victor’s Justice? The Challenge of Prosecuting Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda}, 4 J. Hum. Rts. 213, 218-219 (detailing efforts of the Tudjman government to obstruct ICTY investigation of Croatian atrocities). Former Croatian President Franjo Tudjman is believed to have orchestrated an ethnic cleansing campaign against Serbs, driving 150,000-200,000 Serbs out of Croatia during the war. \textit{Id.} at 216.
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\end{footnotesize}
people.\textsuperscript{50} The ICTR suffered from similar problems, as the U.S. and other Security Council members allegedly pushed out former chief prosecutor Carla del Ponte, at least partially because she began to investigate massacres of Hutus committed by the Tutsi-led Rwandan Patriotic Front (RPF), which currently governs Rwanda.\textsuperscript{51} Not surprisingly, some Hutus resent the failure of the ICTR to prosecute Tutsis who violated the laws of war.\textsuperscript{52} Trials conducted by the municipal courts of a defendant are also susceptible to being viewed as victor’s justice. Iraqis insisted that trials of Baathist leaders conducted after the 2003 U.S. invasion of Iraq be conducted by Iraqis, largely to preserve the legitimacy of the trials with the Iraqi people.\textsuperscript{53} Nevertheless, in a fractured society like Iraq, sub-groups that feel alienated from the government will not view trials conducted by a government dominated by another sub-group as inherently legitimate. Many Sunnis, the community of most Baathist defendants, dismissed as Shiite victor’s justice the trials of Saddam Hussein’s regime conducted by the Iraqi High Tribunal.\textsuperscript{54} Iraqi authorities unwittingly bolstered this impression by executing Saddam on a Sunni holy day, contrary to Iraqi law.\textsuperscript{55}

(ii) Selection Problems

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

Trials for violations of international law frequently have failed to prosecute the most important perpetrators of crimes. Sometimes this is because


\textsuperscript{51} Peskin, supra note 49, at 225-226.


\textsuperscript{53} See NEWTON & SCHAEF, supra note 11, at 55 (explaining that Iraqis rejected a U.N. Security Council tribunal because it would lack legitimacy among Iraqis).

\textsuperscript{54} See Sabrina Tavernise, \textit{In a Divided Iraq, Reaction to Saddam Death Sentence Conforms to Sectarian Lines}, N.Y. TIMES, Nov. 6, 2006, at A ____ (quoting Sunni doctor who discounted Saddam trial and verdict based on government’s continued support of Shiite militias).

\textsuperscript{55} See Marc Santora, et al., \textit{Dictator Who Ruled Iraq is Hanged for Crimes Against Humanity}, N.Y. TIMES, Dec. 30, 2006, at A1 (explaining that execution was carried out on Sunni Id al-Adha holiday, contrary to Iraqi law).
potential defendants are not available for trial. Many high ranking members of the Khmer Rouge, including Pol Pot, died before the mixed tribunal in Cambodia began prosecutions. The ICTY has been unable to prosecute Bosnian Serb leaders Radovan Karadzic and Ratko Mladic because they eluded capture for many years, and its attempt to prosecute Serbia’s former President Slobodan Milosevic was cut short when he died during trial. Other times politics play a role. The U.S. made a political decision after World War II that the Tokyo Tribunals would not prosecute Emperor Hirohito, a choice that allowed him to retain his throne, but prevented the trials from unearthing his role in Japan’s wartime atrocities.

The failure to prosecute the most culpable defendants is compounded by the emphasis on prosecution of relatively minor crimes. Sometimes the prosecution is precluded from prosecuting the most important crimes by limited jurisdiction. The IMT has been criticized for interpreting its statute not to include pre-World War II crimes committed by the Nazis against its own Jewish citizens, resulting in a narrative insufficiently appreciative of the scope of Nazi crimes against Jews. Similarly, the ICTR was limited to prosecuting events that took place during selected months of 1994, preventing it from fully accounting for crimes committed by all sides in Rwanda. Plea bargaining can also prevent the trial authority from prosecuting the gravest crimes. Plea bargaining away the most serious charges in return for a guilty plea on less serious charges means that factual histories are not developed for important charges, or are developed in a diminished manner and are therefore forgotten. ICTY prosecutors, for example, have in many cases accepted plea bargains for lesser charges in exchange for dropping the charge of genocide, in

56 See Seth Mydans, First on Cambodia’s Docket: A Man Whose Jail Sent 14,000 to a Killing Field, N.Y. TIMES, Feb. 17, 2009, at A5 (describing fears of Cambodians that more defendants will die before being brought to trial).


58 See DRUMBL, supra note 3, at 177-78 (describing negative effect on expressivism caused by Milosevic’s untimely death).

59 See OSIEL, supra note 29, at 185 (describing MacArthur’s opposition to the prosecution of the Emperor due to concern it would lead to mass resistance in Japan to Allied occupation).

60 While Article 6(c) of the IMT Charter did allow for prosecution of crimes against humanity, the IMT judges determined the jurisdictional scope of the charge was limited to crimes committed in “execution of or in connection with” crimes against the peace or war crimes. DOUGLAS, supra note 3, at 48.

61 See id. at 57 (explaining that the legendary film Nazi Concentration Camps only mentioned Jews once because of the scope of crimes prosecuted at Nuremberg).

62 Supra note 44 (explaining ICTR jurisdiction extended only to events which took place in 1994).

63 DRUMBL, supra note 3, at 179

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the process stunting full appreciation of the magnitude of the genocide.\textsuperscript{64}

Even where an important defendant is prosecuted and convicted for an important crime, the sentence can send an incorrect message about the narrative in question and the power of the norm at issue. In Rwanda, where punishment by death is an accepted penalty for the most serious crimes, the absence of the death penalty at the ICTR has degraded the significance of the crimes committed with the Hutu audience.\textsuperscript{65} It may be impossible to convey the seriousness of violations of international law if they are punished less severely than common crimes. By contrast, undignified executions, such as that of Saddam Hussein, can undermine norm internalization also, as they call into question the legitimacy of an external authority that allowed such events to take place.\textsuperscript{66}

(iii) Access to Information

Another difficulty norm internalization has faced is the inaccessibility of trials to the average person. Most people receive their information about trials from the media because only the media is usually in a position to translate the complexities of the legal form for lay audiences.\textsuperscript{67} Because the media serves as a filter between the trial itself and the public, the media can color the portrayal and, thereby undermine public confidence in the trials. This problem can manifest itself in at least three ways. First, the media may genuinely not understand the law, or may portray it in misleading or oversimplified ways. During the Nuremberg trials, newspapers within the United States were very active in conveying information and opinions to the American public about the trials. Nevertheless, few newspapers covered serious criticisms about the use

\textsuperscript{64} See id. (describing cases of Plavšić and Simić who were never prosecuted for the most serious crimes of which they were accused because of plea bargaining).


\textsuperscript{66} See Newton & Scharf, supra note 11, at 214-215 (stating that the images of Saddam’s execution will always “cloud the historic perception of the fairness and legitimacy of the Iraqi High Tribunal”).

\textsuperscript{67} See William J. Bosch, Judgment on Nuremberg: American Attitudes Toward the Major German War-Crimes Trials 88 (1970) (explaining that the average American learned about the Nuremberg trials from newspapers and magazines); David A. Harris, The Appearance of Justice: Court TV, Conventional Television and Public Understanding of the Criminal Justice System, 35 ARIZ. L. REV. 785, 796 (1993) (explaining that television is the source most Americans use to receive information about legal issues); Elliot E. Slotnick, Television News and the Supreme Court: A Case Study, 7 JUDICATURE 21, 21 (1993) (explaining that media has exclusive role in communicating the importance of U.S. Supreme Court decisions to the American people). Undoubtedly, the internet revolution that post-dates the work of Bosch, Harris, and Slotnick has provided another media outlet to rival newspapers and television news in providing information about trials.
of *ex post facto* offenses by the IMT because they generally lacked sufficient understanding of the issue to adequately cover it.68 The result was that most of the American public approved of the trials without knowing their most important legal defect.69 While in this case media ignorance bolstered the legitimacy of the trial in the community of the accuser, the effect is likely to be more pernicious where the media is less inclined to support the trials.

Second, ignorance is often linked to bias against the accuser and the trials. A community, including its media, will be more skeptical of trials of its people that are conducted outside of the country because of the risk that the prosecutions are in fact “victor’s justice,” and media coverage may reflect this bias. Legal professionals in Bosnia and Herzegovina have complained that the information they receive from the local media about the ICTY is slanted by the nationalist fervor of the media outlets serving each of the Bosnian ethnic groups. Serbs, Croats, and Bosnian Muslims shared the concern that their respective outlets were substituting their political judgments for actual reporting.70 Powerful groups opposed to the expressive message of the trials may manipulate media bias to turn public opinion against the trials as well. The clergy, looking to reassert its role in German society after World War II, used their relatively untainted position to use the German media to turn the German public against the IMT.71 Where the media uses its biases to undermine support for the trial in the community of the defendant, the effectiveness of the planned moral education is reduced.

Third, media coverage tends towards the sensational, and at trial this may mean a disproportionate focus on the antics of the defendant. The British initially opposed an American proposal to try Nazi leaders in part because they feared the defendants would use the trials as propaganda to convince Germans and the international community that the trials were a farce, perhaps becoming

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68 See Bosch, supra note 67, at 99 (explaining that few newspapers covered concerns about the use of *ex post facto* laws “because few editors comprehended the objection”). This was despite public criticisms of the use of *ex post facto* charges by Senator Robert Taft and others. Senator Robert A. Taft, Equal Justice Under the Law, Address at Kenyon College (Oct. 6, 1946) (condemning Nuremberg trials because, *inter alia*, they “violate the fundamental principle of American law that a man cannot be tried under an *ex post facto* statute”). See also, John F. Kennedy, Profiles in Courage 190 (1955) (quoting Supreme Court Justice William O. Douglas as writing, “[T]he crime for which the Nazis were tried had never been formalized as a crime with the definiteness required by our legal standards... Goering et al. deserved severe punishment. But their guilt did not justify us in substituting power for principle.”)

69 See Bosch, supra note 67, at 109 (describing polls showing 75% of Americans approved of the Nuremberg trials, matching the 69% of columnists, 73% of newspapers and 75% of periodicals that did).


71 See Friedrich, supra note 35, at 93-95 (critiquing the clergy’s post-war attitude towards war crimes prosecutions).

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Defendants in war crimes trials have often acted as the British feared, presenting their defense in the court of public opinion. When they do, the media is too willing to focus on their antics, especially where prosecutors choose to present their evidence in less dramatic ways. The Nuremberg trials may be better remembered for the performance of Hermann Göring, than for the prosecution’s case, which chief prosecutor Robert Jackson chose to make through a treasure trove of documentary evidence. Media coverage of the Iraqi High Tribunal was dominated by the theatrical outbursts of Saddam Hussein, often even overshadowing dramatic victim testimony from those harmed by Saddam’s regime. These performances by dominant defendants can subvert the historical record created by the trial insofar as they create an alternative narrative that reduces the power of the norm intended to be projected.

(iv) Trials as Part of a Larger Norm Internalization Effort

Trials since Nuremberg have failed to integrate trials for violations of international law into larger social re-education efforts. Whatever impact the IMT had on German attitudes is generally attributed to the complementary work of German and international actors who built upon the IMT through an intensive de-Nazification campaign that used media, education and the local courts to inculcate respect for international law. Trials alone cannot succeed in internalizing international legal prohibitions, given the large number of alternative and more powerful institutions contributing to norm development. Instead, the effects of the trials are likely to be significant only as an ever larger number of local actors, who have internalized the norms in question, use local institutions, such as the local courts, media, religious houses, and schools, to deepen social commitment to the norms.

Practice indicates, however, that trials for violations of international law since Nuremberg have generally been conducted with indifference at best and hostility at worst towards local institutions in the community of the defendant. This problem is evident first in the relationship between international tribunals and municipal courts in the community of the defendant.

72 Bassiouni, supra note 27, at 294.

73 Compare DOUGLAS, supra note 3, at 11 (quoting reporter for the New Yorker describing Nuremberg trial as “a citadel of boredom”), and id., at 18 (describing prosecution readings of evidence into the record as “boring” and “anticlimactic”), with id., at 19-20 (calling Jackson cross-examination of Göring a “moment of high drama” characterized by Göring rattling Jackson with “clever, indignant, time consuming responses”).

74 See NEWTON & SCHARF, supra note 11, at 3 (describing how Saddam’s “animal magnetism” and “powerful and aggressive manner” competed with the court for control over the trial). But cf., DRUMBL, supra note 3, at 178-79 (arguing that IHT did a much better job than ICTY of controlling the trial process).

75 See NEWTON & SCHARF, at 211 (attributing changed German attitudes today in large part to post World War II changes to German law, education, and popular culture).
International or mixed tribunals have taken precedence over municipal justice and fact-finding efforts, in the process missing out on opportunities to co-opt local courts in norm inculcation efforts. Both ICTY and ICTR claimed primary jurisdiction over crimes within their mandate, in the process ignoring the power of municipal judges and lawyers to augment norm internalization efforts. The Human Rights Center at the University of Berkeley interviewed 32 Bosnian judges in 1999 on their relationship with the ICTY. Those interviews revealed that Bosnian judges knew very little about the institution, despite an outreach effort, and that many judges believed that the ICTY had prevented the Bosnian courts from developing the expertise needed to pursue supplementary war crimes prosecutions on their own. In Rwanda, the ICTR was granted primacy over the objection of the Rwandan government, which wanted trials conducted in Rwanda with the participation of the Rwandan judiciary. Because the Rwandan judiciary was not included in the trial process, a potentially powerful ally was excluded from the norm internalization effort.

Post-Nuremberg trials for violations of international law have also missed out on opportunities to achieve synergies with other institutions in society to reinforce norm internalization trial efforts. The Iraqi High Tribunal was constructed with an eye toward maintaining Iraqi control over the prosecution of Baath Party officials, including Saddam Hussein, for violations of international law committed by that regime. But the power of trials to internalize international legal norms among Iraqi Sunnis, the community of the defendant, was greatly reduced by the failure to integrate the message emanating from trial with broader re-education efforts among Sunnis. Indeed, the government did the opposite, continuing with intense de-Baathification efforts aimed at excluding Sunnis from Iraqi society, while supporting Shiite militias who were engaged in extrajudicial killings of Sunnis. The result was a failure to reinforce the historical narrative of Baath Party crimes developed during the trials, a failure that undermined the impact of the trials themselves. ICTY similarly neglected to integrate its trial efforts with broader social re-education efforts in the former Yugoslavia, allowing opposition to trials, and the norms projected from them, to persist in the media.

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76 See Hum. Rts. Center, supra note 70, at 139-140 (detailing judges’ responses).
77 Alvarez, supra note 65, at 393.
78 See id. at 404 (discussing how use of a municipal tribunal would have improved the access of Rwandans to international proceedings).
79 See NEWTON & SCHARF, supra note 11, at 55 (explaining that Iraqis preferred to run their own trials of Saddam to preserve the legitimacy of the trials with the Iraqi people).
81 See Hum. Rts. Center, supra note 70, at 140 (explaining that prejudices of Bosnian media kept accurate ICTY information from reaching the Bosnian public).
B. Four Conditions

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

The first condition for success in norm internalization is consistency. The trial authority must act consistently in applying international law in order to avoid the perception in the target audience that the trials represent victor’s justice. Such perceptions have eroded the impact of past trials on norm development because target audiences have refused to draw lessons from trials perceived as arbitrary. Consistency can overcome this perception by demonstrating that the trial authority’s interest in conducting the trial is upholding international law, as opposed to continued prosecution of a recently completed war. The most obvious step in this direction is that any trial for violation of international law be conducted consistently with minimum international standards with respect to due process for the defendant.82 All past trials analyzed here have deviated from these standards, be it with respect to the crimes charged,83 defenses recognized,84 or evidence admitted,85 thus inviting the charge that the trials were “show trials.”86 Crooked trials, though more effective in terms of securing convictions of defendants, are not venues for moral education because the historical narrative produced at such a trial will not be accepted as accurate by the defendant’s community.87 Less obvious is that the trial authority must be willing to prosecute violations of international law

82 See Douglas, supra note 3, at 3 (refuting concerns raised by Hannah Arendt regarding the risk that trials conducted for pedagogic purposes risk becoming “show trials”).
83 See supra note 38 & accompanying text (discussing ex post facto problems with charging defendants with the crime of aggression).
84 See supra note 40 & accompanying text (describing deviations from traditional practice at Nuremberg and Tokyo in disallowing a superior orders defense).
85 See supra notes 46-47 & accompanying text (explaining how extensive admission of hearsay evidence at ICTY and ICTR may be undermining the fairness of trials).
86 See generally Hannah Arendt, Eichmann in Jerusalem 233 (1963) (arguing using trials for pedagogic purposes creates show trials by “detract[ing] from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out just punishment”).
87 This is not to say that there may not be such a thing as too much due process for a defendant. Mark Drumbl has pointed out that too many procedural protections for the defendant may allow him to grandstand at trial, thereby disrupting the trial’s narrative. Drumbl, supra note 2, at 1188.
law committed by all sides to the conflict.\textsuperscript{88} Here, too, most past trials studied fell short, as most selectively prosecuted crimes committed by the loser in the conflict, while leaving the winner’s crimes unaddressed.\textsuperscript{89} But consistently applying international law, regardless of the actor to whom it is being applied, is essential to the trial’s message being accepted as a moral judgment by the international community, and not another attempt by the armed conflict’s winner to subjugate the loser.

Two responses to this last point are worth noting here. First, Mirjan Damaska explains that it is unrealistic to expect that war crimes from all sides to an armed conflict will be prosecuted, and that this problem of selective enforcement should not prevent prosecution where possible.\textsuperscript{90} While Damaska recognizes that such a prosecution pattern can engender “corrosive cynicism” in the community of the defendant, he believes this may be overcome if that community is convinced that the trials in question benefit them through reduced risk of future violence.\textsuperscript{91} Damaska does not explain, however, how trials selectively enforcing international law against the defendant’s community will contribute to reducing violence directed against that community. One source of reduced violence may be an end to violations of international law within the defendant’s community itself. But trials will achieve this goal through norm internalization only if either the norm in question matches the personal morality of the community, a scenario that is unlikely in a community where violations were recently widespread, or because international law is accepted as a legitimate regulatory agent. The “corrosive cynicism” Damaska acknowledges would appear to prevent such acceptance. Another path to reduced violence would be to prevent the commission of future crimes against the community of the defendant by the community of the victor. But it is unlikely the community of the victor will be deterred from future atrocities when that community enjoys impunity for past committed crimes.

Second, some may worry that consistency in application of international law risks blurring the message on wrongdoing. Mark Osiel has noted that one argument made against prosecuting crimes by all sides to a conflict is that it may imply a sense of moral equivalency regarding wrongdoing in the war.\textsuperscript{92} This response misses the ultimate point of the trials under norm internalization theory. Norm internalization requires acceptance

\begin{itemize}
\item \textsuperscript{88} Mirjan Damaska has called this problem “selectivity of enforcement,” noting that most trials for violations of international law are directed at “citizens of states that are weak actors in the international arena.” Damaska, \textit{supra} note 3, at 360-361.
\item \textsuperscript{89} See \textit{supra} notes 41-42 & 48-52 & accompanying text (detailing instances where only crimes of the defeated in a conflict were prosecuted).
\item \textsuperscript{90} I am not, in Damaska’s words, “an ironic academic scherzo” arguing that lack of consistency means there should be no prosecution at all. I am merely arguing that norm internalization will not succeed in the face of selective prosecution.
\item \textsuperscript{91} Damaska, \textit{supra} note 3, at 360-62.
\item \textsuperscript{92} Osiel., \textit{supra} note 29, at 124-125.
\end{itemize}
by the audience of the accuracy of the narrative developed at trial, and as Osiel himself explains, it is that accuracy that is at question where the crimes of all sides are not prosecuted. The different narratives produced by different crimes can be sorted through by the target audience, with each narrative assigned its appropriate level of moral opprobrium.

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

The likely objection to the condition of selectivity is that it runs against the traditional practice of prosecutors. Prosecutors often will seek to try all potential defendants for all crimes committed. The desire to prosecute all conceivable crimes may be greater with high profile defendants, as prosecutors may wish to pursue minor charges in the hope that “something sticks.” While there might be other justifications for pursuing minor charges, such as incapacitation, prosecutions of this sort do not contribute to norm internalization efforts because such trials are do not send a message about the

93 See id. at 125 (explaining that trials cannot create a minimally competent historiography without considering the wrongs committed by all parties).
94 Supra notes 56-64 & accompanying text.
95 See supra notes 65-66 & accompanying text (discussing impact of absence of the death penalty in international trials).
96 Selectivity also presumes that prosecutions for these major charges proceed, and are not merely plead out. See DRUMBL, supra note 3, at 179 (discussing problems to narratives created by “charge bargaining” at ICTY).
97 This condition runs into the deep opposition of many international human rights lawyers to the death penalty. Cf. Ohlin, supra note 65, at 748 (explaining that opposition by veto-bearing Security Council members France and the U.K. to the use of the death penalty by the ICTR took the issue off the table).
98 This strategy is often referred to as the “Al Capone” strategy, after the U.S. federal government used charges of tax fraud to imprison mobster Al Capone. Daniel C. Richman & William J. Stuntz, Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 COLUM. L. REV. 583, 583-84 (2005).
international legal prohibition that is in need of strengthening. Put another way, if it is the prohibition on genocide that is need of internalization, prosecution for bank fraud by the genocidaire sends no message to society about genocide. Worse, it may actually suggest to the target audience that when committing genocide impunity is likely so long as you steer away from more easily prosecutable, common crimes.\(^{99}\) Similarly, prosecuting the foot soldier, while allowing the general to remain free, creates a narrative dissonance. The target audience may be tempted to equate the extent of crimes committed with the crimes prosecuted, thereby minimizing the tragedy with the audience and lessening the likelihood of moral transformation.

The third condition for success is *accessibility*. Norm internalization depends upon the facts developed at trial reaching the target audience, as the trial narrative will have no impact if the audience does not receive information about the trial. Past trials have failed in this regard because opaque trial procedures or anonymous evidence hides key portions of the narrative from the public.\(^{100}\) Prosecutors have also selected evidence for trial that is unlikely to reach the public, preferring presentation of dry documentary evidence to the more dramatic victim testimony. Norm internalization has also suffered because the media, the filter between the trials and the public, has distorted trial coverage, either due to bias or mere sensationalism, undermining the impact of the trial narrative on the target audience.\(^{101}\) Increasing accessibility requires prioritizing the availability of information to the public. Such prioritization demands trial procedures designed to ensure open trials, including limitations on the use of classified evidence. It also requires a commitment by prosecutors to select evidence that maximizes the impact of victim’s testimony, which is much more likely to have a dramatic effect than dry documentary evidence.\(^{102}\) Accessibility also means that that the trial authority must have a media outreach strategy to reduce media distortions that undermine norm internalization.

However, making trials for violations of international law accessible may be difficult for at least three reasons. First, information that is critical to the prosecution of war crimes or massive human rights tragedies may be classified or otherwise sensitive. As a result, governments may resist the idea

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\(^{99}\) See id. at 586 (“The Capone prosecution sent a much more complicated and much less helpful message: If you run a criminal enterprise, you should keep your name out of the newspapers and at least pretend to pay your taxes.”)

\(^{100}\) See infra notes 218-221 & accompanying text (noting how opaque procedures and secret evidence has undermined public knowledge of the trials).

\(^{101}\) See supra notes 70-74 & accompanying text (discussing problems in media representations of trials).

\(^{102}\) Israel’s prosecution of Adolf Eichmann successfully magnified the power of the trial’s narrative through extensive use of victim testimony, as reflected in powerful media accounts of that testimony. See **DOUGLAS, supra** note 3, at 104-107 (explaining that victim testimony was designed to “penetrate the citadel of boredom” at trial).
that such information be made public through open trial. Second, procedures designed to ensure that the defendant receive a fair trial may make the trial difficult to understand for the press. For example, the adversarial process that has been preferred to date in international tribunals as the best guarantee of a fair trial may be misinterpreted by the media in civil law countries not used to such a robust trial role for the defendant. Third, trial officials rarely view public relations work as part of their job description, preferring to try their cases in courts of law, not the court of public opinion. These concerns are rooted in both legitimate fears regarding the defendant’s fair trial rights, and less legitimate perceptions that lawyers are above public relations work. But without accessible trials, norm internalization will prove impossible, as the target audience will be insufficiently exposed to any kind of morally instructive narrative.

The fourth condition for success is integration. No matter how coherent a narrative of wrongdoing and punishment is presented at trial, trials cannot succeed at norm internalization on their own. Past trials have failed to utilize local institutions to deepen and reinforce the stories created by trials. Integration recognizes that trials for violations of international law can be just one part of a larger effort at internalizing norms within society. The IMT’s putative success in contributing to altering German values was due to the combined efforts of schools, media, and churches to de-Nazify society.

Prescribing integration is considerably easier than achieving it. International law has limited ability to influence whether other institutions in society are reinforcing the message emanating from trials. It is also unlikely that institutions that contributed to committing war crimes or massive human rights tragedies will immediately reverse course, and instead work on socializing international legal norms. Trial authorities should aim to use trials to develop and buttress what are likely to be fledgling local efforts to alter social acceptance of international law violations. This means empowering, not marginalizing, local legal institutions when trials take place outside the community of the defendant. Integration also requires actively using trials to influence key opinion makers in society who may in turn push local institutions into a supportive posture. In carrying out such a strategy, courts must be careful not to sacrifice the judicial independence that is required for a fair trial. Indeed, care must be made that synergies with local institutions are not a proxy for political influence in the trials. One way to limit this potential pitfall is for the trial authority to create a separate entity to handle public outreach. Such an

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103 Cf. Damaska, supra note 3, at 357 (worrying about perceptions of “equivalency” created by trials where the defense and prosecution case are presented as rival versions of the truth).

104 In the U.S., this is rooted in the tension between the press and public’s 1st Amendment right to access trials, and a defendant’s 6th Amendment right to a fair trial. See generally Katherine Flanagan-Hyde, Note, The Public’s Right of Access to the Military Tribunals and Trials of Enemy Combatants, 48 ARIZ. L. REV. 585, 604-06 (2006) (describing this tension).

105 See supra Part IIA(iv).
entity could be less concerned about appearances of propriety, and reach out to relevant religious, education, and media figures.

As a final point, these conditions all are requisite conditions for norm internalization success in the community of the defendant. While the reason for targeting the defendant’s community for norm internalization is understandable, many of the problems described in this paper are unique to a community that has just lost a war. The problem of “victor’s justice,” for example, is far less likely to resonate in communities outside of the defendant’s. Similarly, media bias against the trials, which skews coverage in the defendant’s community, may actually augment the trial’s message among less suspicious audiences. Thus, while application of the four conditions may suggest problems for norm internalization in the community of the defendant, it does not speak to the ability of trials to serve alternative messaging functions with different audiences.

III. ISLAMIC TERRORISM AND NORM INTERNALIZATION

A. The Case for Norm Internalization

There are at least four reasons why one may wish to use trials for violations of international law to internalize an anti-terrorism norm in the Islamic world. First, terrorism is a clear violation of international law that results in grave human costs, and so it generates an immense international desire to reduce the phenomenon. While a definition of terrorism under international law has been elusive, U.S. law defines the concept as, “premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents.” Using this definition, terrorist acts can violate either human rights law or international humanitarian law, depending on the context. A series of international treaties require

106 See supra note 68–69 (describing U.S. media bias in favor of Nuremberg trials).
107 Definitions of terrorism have traditionally founndered on the problem of distinguishing between legitimate “freedom fighters” and “terrorists.” For a useful discussion on the difficulties the international community have faced in defining terrorism, as well as an argument on what the core definition may include, see generally Reuven Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation, 29 B.C. Int’l & Comp. L. Rev. 23 (2006).
108 See 22 U.S.C. § 2656f(d)(2) (defining terrorism for use in annual country reports on terrorism). Note that this definition excludes attacks on military targets, such as al Qaida’s 2000 attack on the USS Cole.
109 Terrorism can violate international humanitarian law when the act in question occurs during the course of an armed conflict, such as the ongoing war between the United States and al Qaida. See Hans-Peter Gasser, Acts of Terror, “Terrorism,” and International Humanitarian Law, 84 Int’l Rev. Red Cross 547, 549 (providing detailed support for illegality of terrorism in armed conflict under IHL). Terrorism may also constitute a crime against humanity when committed as part of a “widespread or systematic attack against a civilian population.” See Vincent-Joël Proulx, Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of

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States to criminalize particular forms of terrorist activity, and to then prosecute or extradite those found engaged in such activity in its territory. These international treaties are augmented by a series of similar regional treaties designed to spur State action against terrorists acting within their territory.\textsuperscript{110} Where States are unable or unwilling to prosecute or extradite terrorists operating within their territory, the 1998 Rome Statute grants the International Criminal Court jurisdiction in certain cases.\textsuperscript{111}

Despite the clear prohibition on terrorism in international law, terrorist acts inflict a significant human cost. Nowhere are these costs felt greater than in the Islamic world, as the majority of today's terrorists and their victims are Muslim. The U.S. National Counterterrorism Center (NCTC) 2008 Report on Terrorism found that 55\% of the 11,800 terrorist attacks committed in 2008 took place in Iraq, Afghanistan, and Pakistan. Islamic extremist groups such as the Taliban, al Qaida, and al Qaida affiliated groups like the Somali Shabaab claimed responsibility for the largest number of attacks.\textsuperscript{112} Over 50,000 people worldwide were injured or killed by terrorism in 2008, and “well over 50\%” of those were Muslim.\textsuperscript{113} Added to this great human cost is the tremendous financial cost terrorism imposed on society, both in terms of direct costs from property damage and destroyed infrastructure, and indirect costs to consumer and investor confidence.\textsuperscript{114}

Second, lasting deterrence of terrorism is hard to achieve. For groups like Al Qaida, the motivation for acts of terrorism is not malice per se, but rather a distorted sense of saving the world from a present danger for future good.\textsuperscript{115} If a terrorist is willing to die for the good he believes he is achieving, it seems unlikely that the threat of life in prison, or even the death penalty, will


\textsuperscript{110} For a comprehensive discussion of international and regional treaties against terrorism, including the activities covered and scope of the extradite or prosecute regime, see Daniel O’Donnell, \textit{International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces}, 88 INT’L REV. OF THE RED CROSS 853 (2006).

\textsuperscript{111} See Rome Statute, supra note 39, art. 7(1), 8(2)(b)(i)-(ii), (iv) (granting ICC jurisdiction to consider corresponding crimes against humanity and international humanitarian law violations). An effort by some States to include terrorism as a crime against humanity was rejected at the Rome Conference, in large part due to opposition by the United States. Proulx, supra note 109, at 1023.

\textsuperscript{112} NATIONAL COUNTERTERRORISM CENTER, 2008 REPORT ON TERRORISM 11 (Apr. 30, 2009).

\textsuperscript{113} Id. at 12.


\textsuperscript{115} Cf. Koskenniemi, supra note 19, at 8 (referring to Nazi and Soviet evils being undeterrable because they were perpetrated in an effort to do social good).
serve as meaningful restraint on behavior.\textsuperscript{116} Even more rational actors, such as some state sponsors of terrorism, can be difficult to deter. Those engaged in terrorist activity should be cognizant of the poor record of international law in apprehending, convicting and punishing terrorists. There have been many examples within the Islamic world of States that fail to arrest or prosecute known terrorists within their territory;\textsuperscript{117} sentence those caught and convicted to very short sentences;\textsuperscript{118} and just outright release terrorists, allowing them to freely return to their prior activities.\textsuperscript{119} Efforts in the West to prosecute terrorists have similarly been stymied by evidentiary problems resulting in acquittals or reversed convictions.\textsuperscript{120} Despite these problems, there has been no real effort to use the ICC’s jurisdiction over attacks on civilians to prosecute terrorists whom States are unable or unwilling to prosecute. Moreover, while the West has promised various benefits to States that renounce terrorism, it has been inconsistent in delivering these incentives, creating the risk of recidivism.\textsuperscript{121}

Third, there is evidence to suggest the anti-terrorism norm has failed to adequately permeate Islamic societies. As a consequence, terrorism remains a socially acceptable method to achieve political aims in significant parts of the Islamic world. At times over the last several years, a majority of people in Lebanon, Jordan and Egypt believed that suicide bombing of civilian targets could in some instances be justified in defense of Islam, and significant

\textsuperscript{116} See Damarska, supra note 3, at 344 (“[I]t is not clear how deterrence could work against people who regard death in pursuit of their actions as vindication and beatification.”); Drumbl, supra note 2, at 1185-86 (arguing that terrorists do not use a “rational cost-benefit analysis” required for successful deterrence).

\textsuperscript{117} For example, Kuwait refused to prosecute three former Guantanamo detainees suspected of involvement in terrorism after their return, with one subsequently traveling to Iraq and committing a suicide bombing in Mosul. Alissa J. Rubin, Former Guantanamo Detainees Tied to Attack, N.Y. TIMES, May 8, 2008, at A8.

\textsuperscript{118} For example, Indonesia sentenced Abu Bakar Bashir, inspirational leader of the terror group Jemaah Islamiyah, to just 30 months in prison for his involvement in the conspiracy that led to the 2002 bombing of a nightclub in Bali, and then cut 4 and ½ more months off the sentence in honor of Indonesia’s Independence Day. Evelyn Rusli, Bali Bomb Sentences Cut, N.Y. TIMES, Aug. 18, 2005, at A12.

\textsuperscript{119} Yemen released Jamal al-Badawi, architect of the 2000 attack on the USS Cole, in October 2007 in return for help in tracking down Islamic radicals who had escaped from prison. He was re-arrested by the Yemenis after the U.S. threatened to cut off counter-terrorism aid over the release. Robert F. Worth, Yemen’s Deals with Jihadists Unsettle the U.S., N.Y. TIMES, Jan. 28, 2008, at A1.

\textsuperscript{120} German courts acquitted Abdelghani Mzoudi, a Moroccan national and Mohammed Atta’s Hamburg roommate, for his involvement in the 9/11 attacks because U.S. officials refused to allow Ramzi bin al-Shibh, then in CIA custody, to testify at trial. See Desmond Butler, Faulting U.S., Germany Frees at 9/11 Suspect, N.Y. TIMES, Feb. 6, 2004, at A1 (quoting judge stating, “You are acquitted not because the court is convinced of your innocence, but because the evidence was not enough to convict you.”)

\textsuperscript{121} See Slackman, supra note 24 (discussing Libyan complaints on American follow through after it gave up terrorism in return for political and economic benefits).
percentages of people in Nigeria, Pakistan and Indonesia agreed. While there have been some positive signs regarding attitudes towards al Qaida and terrorism in the Islamic world in the last two years, year to year fluctuations in poll numbers do not demonstrate a deep rooted abhorrence of terrorism as a means to a political end. Indeed, there was a slight increase in support for suicide bombings in Jordan and Indonesia last year, and over a quarter of the population in Nigeria, Jordan, and Lebanon continues to support such tactics.

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

Fourth, international law wields limited influence over other social institutions in the Islamic world that are central to norm development. The international legal prohibition on terrorism has only weakly influenced schools, religious institutions, and the media in the Islamic world. As a result, these institutions have only made halting efforts to combat militancy. Religious schools have taken the place of secular government-run schools in parts of places like Pakistan, breeding Islamic militancy where it previously did not exist. Pakistani police say that two-thirds of suicide bombers that have struck

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122 Pew Global Project Attitudes, The Great Divide: How Muslims and Westerners View Each Other 4 (2006). In 2006 35% of French Muslims believe that violence against civilian targets could at least rarely be justified by defense of Islam. Id.

123 Support for suicide bombing has dropped since 2006, most notably in Pakistan, where it fell from 33% in 2002 to 5% in 2008. The Pew Global Project Attitudes, Global Public Opinion in the Bush Years 7 (Dec. 18, 2008). Confidence in al Qaida as an organization and Osama bin Laden as a leader is also slumping, at it dropped among Jordanian Muslims from 56% in 2003 to 19% in 2008. In 2008, only 3% of Muslims in Turkey, and 2% of Muslims in Lebanon expressed confidence in Bin Laden. Id.

124 Id.

125 See e.g., Thomas L. Friedman, Op.-Ed., Calling all Pakistanis, N.Y. Times, Dec. 2, 2008, at A31 (arguing that terrorism will only stop when the home society of the terrorists condemns it).


127 Friedman, supra note 125.

in Punjab province were educated through these madrasas.\textsuperscript{129} Radical clerics have been the inspirational backbone of Islamic terrorists. For example, Abu Qatada, a radical Palestinian cleric linked to the radical Finsbury Park mosque in London, has been accused of inspiring shoe bomber Richard Reid and 9/11 conspirator Zacharias Moussaoui.\textsuperscript{130} While many Islamic clerics have spoken out forcefully against terrorism, their message is often drowned out by more radical voices, often in violent ways.\textsuperscript{131} The media has not been helpful either. Children’s television shows use puppet characters like Assud the Rabbit to glorify martyrdom as part of the Palestinian struggle against Israel.\textsuperscript{132} With limited influence over critical institutions within the Islamic world, trials for violations of international law emerge as an important venue where international law may be able to influence norm development.

B. History of Trials at Guantanamo Bay

Given the four factors above, it is not surprising that some scholars have looked to trials of the terror suspects detained at Guantanamo Bay as a potential locus for norm internalization efforts in the Islamic world.\textsuperscript{133} Before analyzing whether trials for this group of detainees could meet the four conditions laid out in Part II, this Part provides a brief account of the efforts of the U.S. government to date in trying those detained at Guantanamo for violations of international law.

On November 13, 2001 President Bush issued a Military Order authorizing the Secretary of Defense to set up military commissions.\textsuperscript{134} The Military Order potentially subjected all aliens to trial by military commission, including resident aliens, but excluded American citizens from the commission’s jurisdiction.\textsuperscript{135} The Department of Defense implementation order specified that detainees would be tried by military commission for “violations of the laws of war and other applicable laws,”\textsuperscript{136} but did not define

\begin{itemize}
  \item See Waqar Gillani & Sabrina Tavernise, \textit{Moderate Cleric Among 9 Killed in Pakistan Blasts}, N.Y. TIMES, June 13, 2009, at A10 (describing Taliban silencing through murder of moderate Pakistani cleric)
  \item Steven Erlanger, \textit{In Gaza, Hamas’s Insults Towards Jews Complicates Peace}, N.Y. TIMES, Apr. 1, 2008, at A1. Assud tells the kids, “We are all martyrdom-seekers, are we not…?...We are all ready to sacrifice ourselves for the sake of our homeland.” \textit{Id.}
  \item \textit{Supra} note 2 & accompanying text.
  \item \textit{Id.} § 2(a).
\end{itemize}
specific offenses. The initial iteration of commissions were criticized for departing significantly from the procedural protections traditionally provided defendants in the U.S. federal courts or in UCMJ courts martial. They did not include any evidentiary protections from the use of hearsay evidence or evidence obtained through coercive means short of torture; 137 allowed for admission of secret classified evidence never seen by the defendant, provided it did not result in “denial of a full and fair trial”; 138 permitted the Secretary of Defense to make changes to the trial rules mid-trial; 139 and provided judicial review of convictions as a right only where the defendant was sentenced to death or term imprisonment greater than 10 years, making review of shorter sentences a discretionary decision of the D.C. Circuit. 140 Ten detainees were referred for prosecution under the initial commissions system, although none were charged with involvement in high profile terrorist activity. 141 This reflected a deliberate strategy by the Bush Administration to use the initial trials at Guantanamo as a “shake-down cruise for the new procedures,” before trying higher level suspects. 142

The first iteration of commissions came to a close with the U.S. Supreme Court decision in Hamdan v. Rumsfeld, 143 which found the

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137 Id. § 6D(1) (allowing admission of evidence that “would have probative value to a reasonable person”). MCO1 initially did not have any restriction on torture obtained evidence, but such a restriction was added shortly before oral argument in Hamdan v. Rumsfeld. Jess Bravin, White House Will Reverse Policy, Ban Evidence Elicited by Torture, WALL ST. J., Mar. 22, 2006, at A3 (describing Defense Department regulation that had been approved but not publicly released).


139 See MCO1 § 11 (permitting Secretary of Defense to change commission rules “from time to time”).

140 28 U.S.C. § 2241(e)(3)(B)(i)-(ii). Review would consist of whether the standards and procedures in MCO 1 were followed, as well as whether the use of those standards and procedures to arrive at a final decision was consistent with the laws and constitution of the United States, to the extent applicable. Id. § 2241(e)(3)(D). This right created in the Detainee Treatment Act of 2005 was a significant modification of the original commissions system envisioned by the President, which included no judicial review at all. MCO1 § 6H(4)-(6).

141 The ten detainees charged were Ali Hamza al-Bahlul (Yemen); Ibrahim al-Qosi (Sudan); David Hicks (Australia); Salim Ahmed Hamdan (Yemen); Omar Khadr (Canada); Ghassan al-Sharbi (Saudi Arabia); Jabran al-Qahtani (Saudi Arabia); Sufyian Barhoumi (Algeria); Binyam Mohammed (Ethiopia); and Abdul Zahir (Afghanistan), most of whom were charged only with conspiracy based on their involvement with al Qaeda and the Taliban. David Hicks and Omar Khadr were also charged with murder and aiding the enemy based on their involvement in firefightes between the Taliban and the U.S. military in the course of the war in Afghanistan. Only Abdul Zahir was charged with directly attacking civilians. U.S. Dep’t of Defense, Military Commissions, http://www.defenselink.mil/news/Nov2004/charge_sheets.html (last visited Feb. 25, 2009).


President’s military commissions violated Congressional mandate. The Military Commissions Act of 2006 (“MCA”) revived military commissions after *Hamdan*. Unlike the earlier iteration of commissions, the MCA opted to legislatively define the offenses within the jurisdiction of the commissions. Congress indicated its intent not to define any new offenses in the MCA, but rather to limit the jurisdiction of the commissions only to “offenses that have traditionally been triable by military commission.” While one may assume that these offenses would have been those recognized as customary under IHL, in fact the definition of murder, conspiracy and material support for terrorism exceeded the scope of traditional law of war offenses.

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

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144 The Court found that military commissions violated the Uniform Code of Military Justice (UCMJ) in two ways. First, commissions violated Article 36(b) of the UCMJ by deviating significantly from court-martial rules with respect to admissibility of evidence, including hearsay and coerced evidence, as well as the right of the defendant to see all the evidence against him presented at trial. *Id.* at 623-25. Second, commissions violated Article 21’s requirement of compliance with the “law of war,” by failing to meet the requirements of Common Article 3 of the Geneva Conventions. *Id.* at 632-33 & n.65.


146 *Id.* § 950p(a).


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

149 *See Hamdan*, 548 U.S. at 601 (Stevens, J., plurality) (concluding at conspiracy is not an “Offence against the Law of Nations”).


151 MCA § 948r(a), (d)(3).
probative, and admission best served the interests of justice.\textsuperscript{152} Hearsay evidence remained admissible, but the defendant was given a greater opportunity to get hearsay excluded if he could demonstrate the evidence was unreliable.\textsuperscript{153} As for classified evidence, the MCA took the important step of recognizing the right of the defendant to be present, absent courtroom disruptions,\textsuperscript{154} and guaranteed the defendant the right to receive all relevant exculpatory evidence, or an unclassified substitute.\textsuperscript{155} It did, however, allow the government to admit evidence without revealing the sources and methods behind the evidence, where the military judge determined the sources and methods were classified, and the evidence was reliable.\textsuperscript{156} Finally, the MCA included a catch-all provision requiring the military judge to exclude evidence where the probative value was outweighed by the prejudicial effect of the evidence on the commission.\textsuperscript{157}

Finally, the MCA built on the judicial review process created in the Detainee Treatment Act. It created a Court of Military Commission Review, consisting of panels of at least three appellate military judges, to hear appeals of legal questions stemming from final military commission orders.\textsuperscript{158} The MCA also maintained the role of the D.C. Circuit in reviewing final military commission orders, but extended the right of appeal to all convicted by a commission. The scope of review from the DTA was essentially maintained, as the D.C. Circuit was granted the right to review whether the commissions proceedings abided by the regulations within the MCA, as well as whether those regulations were consistent with the laws and Constitution of the United States, to the extent applicable.\textsuperscript{159}

Only three commissions were completed under the MCA, all of figures of minor importance in al Qaida, before President Obama suspended military commissions.\textsuperscript{160} Australian David Hicks pled guilty to providing material support for terrorism for training at the al-Farooq training camp in Kandahar, where he allegedly learned kidnapping techniques and urban fighting skills. He received a nine month sentence, which he was allowed to serve in Australia, amid allegations that the plea bargain was motivated by political pressure from Australia.\textsuperscript{161} Yemeni Salim Hamdan was convicted of providing material

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\item[152] Id. § 948r(c).
\item[153] See id. § 949a(b)(2)(E) (requiring government provide defendant notice of intention to use hearsay and particulars of the evidence).
\item[154] Id. § 949d(a)(2).
\item[155] Id. § 949j(d).
\item[156] Id. § 949d(f)(2)(B).
\item[157] Id. § 949a(b)(2)(F).
\item[158] Id. § 950f.
\item[159] Id. § 950g.
\item[161] See Raymond Bonner, Australian Critics See Politics in Detainee Deal, N.Y. TIMES, Apr. 1, 2007, at A26 (quoting Green Party leader Bob Brown describing Hicks’ deal as “more about saving
\end{itemize}
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support for terrorism for his work as Osama bin Laden’s bodyguard and driver, and was sentenced to just five additional months of imprisonment.\(^{162}\) Hamdan’s trial was marred by allegations of abuse\(^ {163}\) and extensive use of classified evidence not available to the public.\(^ {164}\) Ali Hamza al-Bahlul, an al Qaeda propaganda chief, was convicted of material support for terrorism, solicitation to commit murder and conspiracy after he refused to participate, or allow his lawyers to participate, in his trial.\(^ {165}\) Meanwhile charges against six defendants for conspiring to commit the 9/11 attacks,\(^ {166}\) against another detainee for involvement with the bombing of the U.S. embassy in Tanzania,\(^ {167}\) and against another for masterminding the 2000 attack on the USS Cole,\(^ {168}\) were suspended because of problems created by complicated evidence, limited defense resources, translation problems,\(^ {169}\) and torture.\(^ {170}\)

Mr. Howard’s political hide than about justice for David Hicks”); Jess Bravin, Political Sway at Guantanamo? Former Prosecutor Says Pressure Began with Australian’s Case, WALL ST. J., Oct. 27, 2007, at A4 (noting Morris Davis’ account that Hicks’ charges were rushed based on political pressure from Australia).


\(^{163}\) The military judge excluded statements made by Hamdan to interrogators in Afghanistan, prior to be sent to Guantanamo, because those statements were made at a time when he was in solitary confinement, with restrained hands and feet, and subjected to aggressive interrogation tactics by guards. William Glaberson & Eric Lichtblau, Military Trial Begins for Guantanamo Detainee, N.Y. TIMES, July 22, 2008, at A12. Hamdan also claimed he was part of Operation Sandman at Guantanamo, a program in which the Defense Department subjected detainees to intense sleep deprivation to soften them for interrogation. William Glaberson, Detainee’s Lawyer Makes Claim on Sleep Deprivation, N.Y. TIMES, July 15, 2008, at A15

\(^{164}\) See William Glaberson, Prosecution Rests then Terror Trials Enters Secret Session to Hear Defense Testimony, N.Y. TIMES, Aug. 1, 2008, at A13 (noting that even portion of defense case resting on 9/11 Commission report was deemed classified)

\(^{165}\) William Glaberson, Detainee Convicted on Terrorism Charges, N.Y. TIMES, Nov. 4, 2008, at A19.


\(^{170}\) Charges against Mohammed al-Qahtani, an alleged 9/11 co-conspirator, were dropped after Military Commissions Convening authority Susan Crawford determined that al-Qahtani had been tortured by the Defense Department through “sustained isolation, sleep deprivation, nudity, and prolonged exposure to cold.” Bob Woodward, Detainee was Tortured, Says U.S. Official, WASH. POST, Jan. 14, 2009, at A1.
One of President Obama’s first actions after taking office as President was to suspend military commissions.\(^{171}\) In May the President laid out in broad terms his vision for future trials of those detained at Guantanamo.\(^{172}\) Obama indicated his preference for conducting trials in the U.S. federal courts “whenever feasible” for violations of U.S. criminal law. As evidence of this preference, he announced the decision to transfer Ahmed Ghailani from Guantanamo to New York for trial for his involvement in the 1998 African Embassy bombings. The President then indicated that military commissions would be resumed to try those believed to have committed violations of the laws of war, albeit with greater procedural protections for the defendant. In subsequent Congressional testimony, the Administration has asked Congress to modify the MCA in several ways, including: codifying a ban on statements obtained through cruel, inhuman or degrading treatment; imposing an obligation on the government to provide exculpatory evidence to the defense similar to the \textit{Brady} rule in civilian courts; restricting use of hearsay; developing classified information rules to closely match those found in the Classified Information Protection Act (CIPA); and elimination material support for terrorism as an offense because it is not a traditional violation of the law of war.\(^{173}\)

\textbf{C. Guantanamo Trials and the Four Conditions}

In some ways, trials of the detainee population at Guantanamo Bay present excellent opportunities for promoting an anti-terrorism norm in the Islamic world.\(^{174}\) Many high level members of al Qaida and affiliated groups are, or have been, detained there, including those believed to have been behind 9/11; the attack on the U.S. embassy in Tanzania; the Bali nightclub bombing; and other spectacular terrorist attacks. Norm internalization theory argues that trials that develop a legitimate history of these events and produce a graphic account of the facts and the role of Islamic terrorists in the attacks can strengthen opposition to these acts in the Islamic world.\(^{175}\) Demonstration of the human costs of violating international law may be the most powerful


\(^{172}\) Obama Address at the Nat’l Archives, supra note 1.


\(^{174}\) Of course there are many other reasons for conducting prosecutions of detainees at Guantanamo, including retribution for terrorist acts that killed many Americans. See Jeff Zeleny & Elizabeth Bumiller, \textit{Suspects Will Face Justice, Obama Tells Families of Terrorism Victims}, N.Y. TIMES, Feb. 6, 2009, at A11 (describing political pressure of victims’ families for trials of Guantanamo detainees).

\(^{175}\) Polling suggests a great deal of misinformation in the Islamic world about 9/11, for example. A 2006 study found that a majority of people in Indonesia, Turkey, Egypt, and Jordan, and a plurality in Pakistan and Nigeria do not believe that Arabs were behind the 9/11 attacks. Pew Global Project Attitudes, supra note 122, at 4. That view was shared by 56% of British Muslims. \textit{Id.}
argument in favor of following it. Trials of these detainees also can stigmatize the offenders and offenses through imposition of serious sentences, including the death penalty, thus deepening revulsion towards terrorism in the defendant’s community.

Nevertheless, the Bush Administration never claimed intent to use trials to advance pedagogical goals among Muslim audiences. The primary purpose for Guantanamo was incapacitation and interrogation of terrorist suspects, and military commissions were an extension of those objectives. Not surprisingly, the trials that have taken place so far do not appear to have been successful at promoting an anti-terrorism norm in the Islamic world. While measurement of the effect of trials on norm internalization is a long-term project, the reaction of opinion leaders in the Islamic world to commissions suggests at minimum current resistance to the messages produced by these trials. The weekly Egyptian news magazine al Ahram compared the first iteration of military commissions to political trials in China, and declared the trials “victor’s justice in the era of a one-superpower world.” The Arab News, an English-language newspaper published in Saudi Arabia, discounted the possibility that David Hicks’ guilty-plea was honest, instead noting that “many believe him entirely innocent,” and attributed the guilty plea to Hicks’ desire to escape Guantanamo. The same newspaper dismissed the significance of the announcement of charges against the 9/11 conspirators by arguing that the “confessions” upon which these charges were based were likely elicited by torture. The Lebanese newspaper the Daily Star published an opinion piece crediting the relatively implausible accounts of two Kuwaiti detainees against whom the Bush Administration referred charges in November 2008. This generally negative reaction to commissions suggests that their impact on attitudes in the Islamic world is limited, at least as a contemporary matter.

Moving forward, many alternative venues exist for trials of Guantanamo detainees, all of which allude to norm internalization as a potential reform gain. The Obama Administration supports trials in the U.S.

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176 Former Attorney General Alberto Gonzales did state in general terms, “it is important that the public have the chance to see both the fairness of the commission proceedings, and the evidence against the terrorists in our custody.” Alberto Gonzales, Ask the White House (Oct. 18, 2006), available at http://georgewbush-whitehouse.archives.gov/ask/20061018.html. But Gonzales made the statement to respond to concerns raised by American critics of commissions, not as part of a plan to use trials to influence norms in the Islamic world.

177 Nyier Abdou, Fire and Brimstone, AL-AHRAM WEEKLY (Egypt), July 10-16, 2003.


179 See Editorial, Flawed Trial, ARAB NEWS (Saudi Arabia), Feb. 13, 2008 (noting that detainees “would confess to anything their torturers wanted to hear in order to save their lives and escape further horrific treatment.”)

180 See Andy Worthington, Op.-Ed., DAILY STAR (Lebanon), Nov. 21, 2008, at (“[T]heir cases do nothing to suggest that the Bush Administration has correctly identified them as terrorists worthy of war crimes trials.”)

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federal courts and in revamped military commissions, which provide greater procedural protections for defendants. While the primary reason behind providing these added protections is increasing the number of completed trials, increased international legitimacy appears to be at least a secondary goal.

Another alternative is trying detainees in their home countries where, some have argued, trials have the greatest opportunity to influence norm development. Application of the four conditions suggests why. Fair trials conducted by the defendant’s own community may more easily meet the consistency threshold because they are less susceptible to being diminished as “victor’s justice.” Local forums may also be best positioned to be selective, as the community of perpetrators of mass human rights atrocities may have the best access to the most culpable defendants, and hence the greatest opportunity to prosecute the most serious crimes under international law. In so doing they are more likely to have access to the most severe sanction, the death penalty, which has been cast out of most international legal proceedings. The trials conducted in the community of the defendant will also be the most accessible to that community, as they can be viewed directly by the relevant public and are likely to be the subject of more extensive media coverage. Local media, more comfortable with local processes, prosecutors and judges, may be less inclined to obscure or distort trial coverage. And clearly local courts will be the best positioned to integrate their efforts with the other institutions in society necessary to amplify trial messaging.

Still others have pressed for use of an international forum to prosecute Guantanamo detainees, be it an ad hoc institution created for the purpose of

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181 See Obama Address at the Nat’l Archives, supra note 1 (contrasting his approach to trials to a Bush approach that completed just 3 trials).


183 See Alvarez, supra note 65, at 459-460 (arguing local trials have greater opportunity to stigmatize those violating international norms because they enjoy the greatest legitimacy in their community).

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

185 See Alvarez, supra note 65, at 406-07 (noting inconsistency where ICTR does not permit use of the death penalty for those most culpable of genocide, while Rwandan courts do hand out death sentences for those more tangentially involved).

186 See id. at 404 (detailing accessibility benefits of local trials).

187 Trials conducted by German courts after World War II of lower-ranking Nazi officials are thought by some to have been more influential on reshaping German morality than the IMT. NEWTON & SCHARF, supra note 11, at 211.
hearing terrorism cases\textsuperscript{188} or, where possible, the International Criminal Court (ICC).\textsuperscript{189} One variant of these proposals is to include Islamic jurists and elements of Shariah law in a tribunal.\textsuperscript{190} Incorporation of Shariah law and judges familiar with Shariah law into an international tribunal may increase the likelihood that such trials make a didactic impact in the Islamic world.\textsuperscript{191} To the extent that the target audience accepts Shariah law as a legitimate source of behavioral regulation, a judgment that terrorism violates Islamic teachings would have great potential to inculcate an anti-terrorism norm.\textsuperscript{192}

This section uses the four conditions developed in Part II to analyze the failures of the Bush Administration’s commissions with respect to norm internalization in the Islamic world. It then analyzes whether any of the proposals for future trials of these detainees could meet the four conditions. The objective here is to understand the difficult challenges any set of trials of those detained at Guantanamo will face in internalizing an anti-terrorism norm.

(i) Consistency

Consistent application of international law by the trial authority is necessary to dispel the corrosive impression that prosecution is motivated more by a desire to continue a recently completed war than to vindicate international law. Past international war crimes trials have been dismissed as victor’s justice by the community of the defendant when the trial authority has used trial procedures that do not comport with international law. Such trials appear to

\textsuperscript{188} See Drumbl, supra note 2, at 1195-1196 (arguing that “value of rhetorical consistency” and “transnational nature of terrorist violence” should lead to consideration of an international tribunal to try al Qaeda members); Anton Janik, Prosecuting al Qaeda: America’s Human Rights Policy Interests are Best Served by Trying Terrorists Using International Tribunals, 30 DENY. J. INT’L L. & Pol’y 498, 531 (2002) (arguing preservation of “moral high ground” requires moving trials to an international forum); Anne-Marie Slaughter, Terrorism and Justice: An International Tribunal Comprising U.S. and Islamic Judiciary Should Be Set Up to Try Terrorists, FIN. TIMES (London), Oct. 12, 2001, at 23 (supporting use of an ad hoc tribunal composed of U.S. and Islamic judges).


\textsuperscript{190} Slaughter, supra note 188 (extolling virtues of participation by Islamic jurists in an international tribunal). See also, Drumbl, supra note 128, at 79 (arguing for mixed tribunal in Afghanistan to try Taliban and other terrorist suspects to use Islamic jurists and law to increase trial legitimacy in Afghanistan).

\textsuperscript{191} Indeed, 66% of Egyptians, 60% of Pakistanis, and 54% of Jordanians support using Shariah as the only form of law in their country. Noah Feldman, Why Shariah?, N.Y. TIMES, Mar. 16, 2008, at MM46.

\textsuperscript{192} Indeed, Islamic countries have used condemnations of terrorism by moderate Islamic clerics as a central tool in “de-radicalizing” Islamic militants. See Shefali Rekhi, Spiritual Rehab for Terrorists, STRAITS TIMES (Sing.), Mar. 8, 2009, at ___ (describing role of clerics in instruction on moderate Islam in rehabilitation programs in Saudi Arabia and Yemen). But see Jack Goldsmith & Bernard Meltzer, Op.-Ed., Swift Justice for Bin Laden, FIN. TIMES (London), Nov. 7, 2001, at 15 (arguing that even an international tribunal with a Muslim judge would be viewed by some Muslims as “a biased tool of Western power”).

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apply the law selectively. Inconsistency in application of international law has also been demonstrated where the trial authority prosecutes the crimes of just one side to a conflict, reinforcing the sense that trials have little to do with accurate fact finding and norm implementation.

The Bush Administration’s military commissions were victor’s justice in the truest sense of the term: tribunals constructed by one side in an armed conflict to punish only the crimes committed by the other side.\textsuperscript{193} Not surprisingly, commissions suffered from consistency problems. To begin with, military commissions, while prosecuting defendants for their violations of international law, failed to provide them with the full set of procedural protections provided by that same body of law. The vast majority of defendants in both iterations of commissions were charged with murder in violation of the laws of war, conspiracy, and material support for terrorism, all dubious as criminal violations of international law.\textsuperscript{194} Relaxed admissions standards for coerced evidence\textsuperscript{195} and reduced confrontation rights\textsuperscript{196} similarly departed from minimum protections traditionally provided defendants in international law. Not only is it counter-intuitive to believe that trials skewed to aid the prosecution will convince a skeptical public of anything other than the might of the entity conducting the trial, but also unfair procedures undermine the respect

\textsuperscript{193} See supra note 135 (explaining that jurisdiction of military commissions was limited to aliens).

\textsuperscript{194} See supra notes 148-150 & accompanying text (detailing inconsistencies between IHL and the definitions of crimes used in the MCA).

\textsuperscript{195} The Torture Convention bars the admission of evidence obtained through torture in any legal proceeding. Convention Against Torture art 15, Dec. 10, 1984, 1465 U.N.T.S. 85 (“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”) The Human Rights Committee (HRC) has interpreted Article 7 of the International Covenant on Civil and Political Rights as prohibiting admission of any evidence obtained “through prohibited treatment,” which would include cruel, inhuman or degrading treatment. Office of High Commissioner for Human Rights, General Comment No. 20, CCPR 20 ¶ 12 (Oct. 3, 1992). The United States does not believe that the HRC has the right to issue binding interpretations of the ICCPR, and has in other contexts questioned the legitimacy of the broad scope of the HRC’s interpretation of Article 7. See U.N. Human Rights Comm., Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/USA/CO/3/REV.1/ADD.1 9 (Feb. 2, 2008) (rejecting Comment 20’s interpretation of Article 7 as including a non-refoulement obligation).

\textsuperscript{196} Article 75 of Additional Protocol I, which is thought to provide the customary international law minimum requirements for procedural protections for defendants in war crimes prosecutions, guarantees defendants “the right to examine, or have examined, the witnesses against him.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3. The United States during the Bush Administration was unclear on whether it accepts Article 75 as customary international law. Compare Julian E. Barnes, Internal Critics Seek a Softer Line; Bush Administration Moderates Push to Change Detention and Interrogation Policies Before Their Time’s Up, L.A. TIMES, Nov. 12, 2008, at A20 (quoting Sandra D. Hodginson, then Defense Department Assistant Secretary for Detainee Affairs, describing “lack of agreement” within Bush Administration on Article 75’s status as custom), with William H. Taft IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 YALE INT’L L.J. 319, 321-22 (2003) (describing Article 75 as custom).
for the rule of law that is an essential component of norm projection.\textsuperscript{197}

Military commissions also acted inconsistently by only prosecuting the war crimes committed by members of al Qaida and affiliated groups. There is strong evidence that the U.S. committed war crimes in the course of the conflict with al Qaida,\textsuperscript{198} sometimes against the very defendants who were being prosecuted.\textsuperscript{199} Despite this evidence, Americans responsible for these crimes were not investigated or prosecuted during the Bush Administration.\textsuperscript{200} Given the widespread knowledge in the Islamic world of these American transgressions,\textsuperscript{201} the failure to address them greatly undermined any effort to portray military commissions as an attempt to vindicate international norms.

Can future trials of Guantanamo detainees achieve greater consistency with respect to international law? Local courts in the Islamic world may struggle the most to achieve the consistency required for norm internalization. Municipal courts in the Islamic world are notorious for failing to provide defendants with fair trials and other critical protections guaranteed under

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\textsuperscript{197} See \textit{Douglas}, \textit{supra} note 3 (“[T]he notion that a trial can succeed as pedagogy yet fail to do justice is crucially flawed.”); Drumbl, \textit{supra} note 2, at 1188 (explaining that too little due process in trials will increase perception of victor’s justice).

\textsuperscript{198} U.S. government officials have recently begun to admit that detainees in the war on terrorism have been tortured. Susan Crawford, Convening Authority to the Military Commissions, stated that the reason she dropped charges against Mohammed al-Qahtani for his involvement in the 9/11 attacks was because the Defense Department tortured him. Woodward, \textit{supra} note __. More recently, President Obama stated his belief that detainees were tortured by the United States. President Barack Obama, News Conference by the President at the White House East Room (Apr. 29, 2009) (available at \url{http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-4/29/2009}) (“I believe that waterboarding was torture. And I think that the -- whatever legal rationales were used, it was a mistake.”)

\textsuperscript{199} Nearly every prosecution of a detainee included allegations of mistreatment. \textit{See} Raymond Bonner, \textit{Detainee Says He Was Abused While in U.S. Custody}, \textit{N.Y. Times}, Mar. 20, 2007, at A10 (describing Hicks allegation he was thrown around, walked on, injected with strange substances, and rectally probed by U.S. forces prior to arriving at Guantanamo); William Glaberson, \textit{Arraigned, 9/11 Defendants Talk About Martyrdom}, \textit{N.Y. Times}, June 6, 2008, at A1 (recording KSM allegation of “torturing”); William Glaberson, \textit{Detainee’s Lawyer Makes Claim on Sleep Deprivation}, \textit{N.Y. Times}, July 15, 2008, at A15 (describing Operation Sandman in which Hamdan was subjected to intense sleep deprivation for 50 days); William Glaberson, \textit{A Legal Filing Alleges a Detainee was Abused}, \textit{N.Y. Times}, Apr. 5, 2008, at A11 (describing Hamdan allegation of being beaten and sexually humiliated during interrogations); William Glaberson, \textit{U.S. Drops Charges for 5 Guantanamo Detainees}, \textit{N.Y. Times}, Oct. 22, 2008, at A1 (stating Binyam Mohamed claims he was tortured while in American custody or in countries where he was sent by the U.S.); Woodward, \textit{supra} note 170 (describing al-Qahtani being subjected to prolonged isolation, forced nudity, sexual humiliation, and trained dogs).


\textsuperscript{201} A 2006 survey found that 80% of Egyptians, 79% of Jordanians, and 68% of Turks had heard of U.S. abuse of Muslim detainees, either at Guantanamo or Abu Ghraib. \textit{The Pew Global Project Attitudes, No Global Warming Alarm in the U.S. and China: America’s Image Slips, But Allies Share U.S. Concerns Over Iran}, \textit{Hamas 21} (June 13, 2006). Interestingly, only 21% of Pakistanis reported knowing about either Abu Ghraib or Guantanamo detainee abuse. \textit{Id.}

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international law. These problems create real restrictions on the ability of the U.S. to transfer detainees from Guantanamo to their home countries for trial. More fundamentally, norm internalization cannot depend on legal systems that do not meet international standards to serve as the primary internalization mechanism, if for no other reason than that procedural failing would erode the confidence of locals in their courts. Moreover, it is unclear that municipal courts in particular Islamic States would even be recognized as “local” courts by their respective populations. Municipal courts of States friendly to the United States may be viewed as “stooges” of the U.S., as opposed to an entity genuinely prosecuting offenses against the community. In fractured States, like Iraq, municipal courts may also be viewed as victor’s justice imposed by one subgroup on another, limiting the potential norm internalization impact of proceedings in those courts.

Providing due process protections that meet minimal international standards may also be difficult for an international court that incorporates Shariah principles. The European Court of Human Rights has questioned the compatibility of Shariah rules of evidence, criminal procedure, and punishments, including the death penalty, with human rights law. Incorporation of Shariah law into an international tribunal may be the political death knell for such a tribunal. On the other hand, making the compromises to Shariah law that would be required to integrate it with human rights law to be part of a legal institution set up consistently with human rights law may paradoxically deprive Shariah of the legitimacy with Islamic audiences necessary for successful norm internalization. Islamic audiences may discount

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203 See Ashley S. Deeks, Avoiding Transfers to Torture, 6-7 (Council on Foreign Relations, CSR No. 35, 2008), for a description of international legal restrictions on the ability to transfer persons to a country where there is a risk of mistreatment.


205 Supra notes 54-55 & accompanying text.

206 See Refah Partisi v. Turkey, 14 BHRC 1, ¶ 123 (describing Sharia law as inconsistent with democracy in part because of its rules regarding criminal law and criminal procedure). See also Kenneth Anderson, What to Do with Bin Laden and al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base, 25 HARV. J.L. & PUB. POL’Y 591, 605 (rejecting inclusion of Shariah in international trials of terrorists because of its incompatibility with Western legal tradition).

207 For example, France and the U.K. would veto creation of a tribunal through the Security Council that included the death penalty as a potential sentence, as would be expected in a tribunal created consistently with Shariah. See Ohlin, supra note 65, at 748 (explaining that France and the U.K. prevented the ICTR from including the death sentence within its punishment scheme).
findings from a legal institution that does not fully comply with Islamic law.

The Obama Administration’s bifurcated approach to trials ensures that defendants would either receive either the full panoply of constitutional protections offered in the U.S. federal courts, or beefed up rights in military commissions. The President’s May 2009 speech indicated that future commissions may improve upon the most significant of the due process shortcomings in trials by barring absolutely evidence obtained through illegal means and upholding confrontation rights through imposition of a burden on the government to justify the use of hearsay. Still, it appears that future military commissions may depart in significant ways from protections provided defendants in international trials. Obama has recognized that protecting intelligence sources and allowing for admission of evidence not otherwise admissible in a federal court are the main reasons for retaining military commissions. It is unclear whether those goals can be met in trials that still provide defendants the opportunity to confront all the evidence against them.

Even if future trials do provide procedural protections to the defendant consistent with international law, future trials in any venue must wrestle with the problem of consistency in dealing with violations committed by all parties to the conflict. The U.S. has admittedly violated the jus cogens prohibition on torture in the conduct of its conflict with al Qaida. It has also failed to prosecute those who committed torture, or to compensate torture victims, both further violations of international law. No set of trials will successfully internalize an anti-terrorism norm in the Islamic world so long as those trials are seen to solely target the crimes of Muslims, while crimes committed against Muslims go unpunished. Nevertheless, it is difficult to envision any trial authority trying those involved in war crimes committed by the United States. The Obama Administration has ruled out prosecuting CIA officers for their involvement in detainee abuse. It also does not appear to favor investigation

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208 Provision of some of these rights may be constitutionally mandated. See Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008) (holding that Guantanamo detainees have a constitutional habeas corpus right protected by the Suspension Clause).

209 See Obama Address at the Nat’l Archives, supra note 1 (describing proposed procedural changes to commissions).

210 See id. (describing advantages for using military commissions as including “protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.”)

211 See Convention Against Torture, supra note 195, art. 7(1) (mandating that absent extradition, cases of those engaged in torture be submitted to competent authorities for prosecution); art. 14(1) (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”) The Military Commissions Act deprives those detained at Guantanamo who were properly determined to be enemy combatants from seeking money damages for their treatment at Guantanamo. 28 U.S.C. § 2241(e)(2).

or prosecution of higher ranking Bush Administration officials who authorized abuse.\textsuperscript{213} If the Administration is opposed to U.S. courts investigating detainee abuse, it is fair to assume it would oppose any international institution created through the Security Council doing the same.\textsuperscript{214}

(ii) Selectivity and Accessibility

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

The Bush Administration’s military commissions failed both the selectivity and accessibility tests. As to the former, potential key defendants, including Osama bin Laden and Ayman al-Zawahiri, were not available for prosecution because they could not be captured. While Guantanamo did house other potential defendants of importance, such as Khalid Sheikh Mohammed, the strategy to front-load prosecutions of low-level al Qaeda and Taliban members to test the system resulted in completed prosecutions only of minor figures. Unimportant defendants led to relatively unimportant\textsuperscript{215} and

\textsuperscript{213} See David Johnston & Scott Shane, \textit{Interrogation Memos: Inquiry Suggests No Charge}, N.Y. TIMES, May 6, 2009, at A1 (explaining that while Obama will leave decision on whether to prosecute Bush Administration lawyers for their role in authorizing torture to the Justice Department, its recommendation will be against prosecution).

\textsuperscript{214} It is possible that the unwillingness of the United States to seriously investigate the war crimes committed by its officials would confer jurisdiction on the ICC to consider such crimes at the prosecutor’s behest, provided they occurred within the territory of a State Party to the Rome Statute. Rome Statute, \textit{supra} note 39, art. 12, 17. Nevertheless, it is difficult to imagine the ICC burdening its burgeoning relationship with the United States in this way. \textit{See Under Obama U.S. Drops Hostility to ICC: Experts}, Mar. 22, 2009, http://http://www.truthout.org/032309S (describing improved relationship to ICC under Obama).

\textsuperscript{215} Pre-\textit{Hamdan} military commissions accused most of the ten detainees charged only with conspiracy based on their involvement with al Qaeda and the Taliban. David Hicks and Omar Khadr were also charged with murder and aiding the enemy based on their involvement in firefight between the Taliban and the U.S. military in the course of the war in Afghanistan. Only Abdul Zahir was charged with directly attacking civilians. U.S. Dep’t of Defense, Military Commissions, http://www.defenselink.mil/news/Nov2004/charge_sheets.html (last visited Feb. 25, 2009). Post-\textit{Hamdan} commissions did charge defendants with much more serious crimes, but with the exception

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relatively short sentences after conviction.\textsuperscript{216} The banal narratives created by military commissions were unlikely to influence norms in the Islamic world.

Commissions also failed to be accessible. Military commissions valued secrecy above all else, undermining their didactic impact.\textsuperscript{217} The initial iteration of commissions contemplated proceedings closed even from the defendant and his civilian lawyer.\textsuperscript{218} While the MCA guaranteed a defendant the right to be present at trial, it still allowed the judge to close the proceedings from the public to protect national security.\textsuperscript{219} The military judge in the Hamdan trial frequently employed this rule, as significant portions of the trial, including most of the defense case, was closed from public view.\textsuperscript{220} The amount of classified evidence not available to the public was expected to increase in cases involving detainees who had been part of the CIA interrogation program.\textsuperscript{221} While preserving the secrecy of classified information is understandable insofar as it is necessary to protect sources and methods in the war on terrorism, conducting trials largely hidden from the public prevents the trials from having any didactic impact, and raises suspicions about the process that may actively undermine the trial’s legitimacy among Muslims.

This secrecy augmented the problems the commissions faced in using the media to spread the expressive content of trials. The procedures of military commissions were not familiar to reporters in a way that procedures in the U.S. federal courts or courts-martial would be, resulting in ignorance about the process that impeded coverage.\textsuperscript{222} American reporters puzzled at trials featuring secret evidence, secret witnesses, an empty court gallery, and other of the Bahlul case, the only charges that proceeded to trial were for relatively minor offenses of material support for terrorism and conspiracy.

\textsuperscript{216} Hicks and Hamdan received less than a year of additional prison time based on their convictions. Supra notes 161-162, and accompanying text. Bahlul was the exception, as he received a life sentence after refusing to offer a defense at trial in protest over the legitimacy of commissions. Supra note 165.

\textsuperscript{217} See Drumbl, supra note 2, at 1196 (arguing that “secretiveness” would minimize the narrative impact of MCA commissions).


\textsuperscript{219} MCA § 949d(d)(2).

\textsuperscript{220} See William Glaberson, War Crimes System is Still on Trial, N.Y. TIMES, Aug. 10, 2008, at A27 (describing problems stemming from “secret filings,” “closed sessions,” and inability of anyone to attend proceedings without military orders).


\textsuperscript{222} See Drumbl, supra note 2, at 1196 (arguing that “opacity” of commissions process reduced their narrative impact).

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tight restrictions on the access of reporters to trials. The press in the Islamic world largely relied on reports produced by newswires and American newspapers for their coverage of the trials at Guantanamo, generally choosing not to send reporters to the trials. The U.S. and international media also displayed the traditional bias that favors reporting on the antics of the defendant rather than on the prosecution case. Allegations of torture by defendants continuously dominated press coverage of the cases, as defendants sought to use treatment issues as part of a public relations strategy against the commissions. This strategy was aided by the failure of commissions to employ victim testimony that would compete for attention with the torture narrative.

At first blush, remedying the selectivity errors of commissions in future trials in any venue appears easy. Selectivity requires future trials of Guantanamo detainees to feature prosecution of those responsible for atrocities like the 9/11 attacks, the African embassy bombings, and the bombings in Bali. Trials of those involved in perpetrating such events should involve charges and potential sentences of a sufficient force to pierce the consciousness of the Islamic world necessary for norm internalization. Trials of that sort may also be more accessible to the public, as prosecutors can introduce more victim testimony than for victimless crimes, increasing the power of the narrative with the public. Such trials appear destined to involve large amounts of American classified information, however. This fact would appear to preclude trials of

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223 See Glaberson, supra note 220 (describing “mysteries” that marked differences between commissions and normal American trials). Of course, trials in U.S. federal courts can use classified evidence not available to the public consistent with the Classified Information Protection Act (CIPA). 18 U.S.C. App. III.

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

225 Ironically, in some instances the media’s desire to cover the statements of the defendants may have actually been helpful to norm internalization. Khalid Sheikh Mohammed, on trial for involvement in the 9/11 attacks, used his courtroom appearances to proudly claim responsibility for the attacks as a “model of Islamic action,” and a “badge of honor.” William Glaberson, Detainees Say They Planned Sept. 11, N.Y. TIMES, Mar. 9, 2009, at A17. These sorts of declarations confirms the responsibility of Islamic radicals for the terror of 9/11, potentially opening the door to a shared factual understanding of that day’s events.

226 See William Glaberson, Detainees’ Mental Health is Latest Legal Battle, N.Y. TIMES, Apr. 26, 2008, at A1 (quoting defense counsel Clive Stafford Smith stating “issue of mistreatment of prisoners…will come up in every case”).

227 The impact of statements by victim’s families was on display during a rare hearing where they were allowed to attend. Their presence offered a powerful rebuttal to critics of commissions. See William Glaberson, Relatives of 9/11 Victims Add a Passionate Layer to the Guantanamo Debate, N.Y. TIMES, Dec. 10, 2008, at A28 (describing “unsettle[ing]” effect presence of victims’ families had on critics of commissions).

top al Qaida figures in any non-American tribunal, at least using information provided by the United States.\textsuperscript{229}

In a municipal American tribunal, where the U.S. would feel more secure sharing classified information, selectivity and accessibility come into conflict. The need to protect intelligence sources and methods will result in parts of trials being closed to the public, or otherwise restricted to prevent the disclosure of classified information.\textsuperscript{230} While this may make sense from the perspective of national security, from the perspective of norm internalization there is nothing worse than a closed trial. It is impossible for trials to have didactic impact when the evidence that creates the historical record is shielded from public view.

This clash between selectivity and accessibility is highlighted by a dispute that hindered the Bush Administration’s commissions. Former chief prosecutor Morris Davis and Convening Authority Legal Adviser Tom Hartmann had a much publicized dispute over strategy for commissions.\textsuperscript{231} Davis argued that for trials to be meaningful they needed to be transparent, and therefore pushed for prosecutions of small fish who could be tried using unclassified material. Hartmann countered with a strategy that called for trying high-ranking al Qaida members in order to demonstrate to the public that detentions at Guantanamo were worthwhile. But the trade-off for that approach would be partially closed trials using large amounts of classified information. From the perspective of norm internalization, both the Davis and Hartmann approaches fail. While the trials Davis advocated for would be more transparent, their didactic impact would be lost through projection of unimportant narratives. As for Hartmann, his approach is more selective, but the educative force of the trials of high value detainees would be lost through secrecy. The fact that the two could not agree on a strategy whereby high ranking al Qaida members were prosecuted using unclassified information suggests such an option was not available.

The problem posed by classified information is just one accessibility problem faced with any future set of trials. Accessibility requires navigating the difficult terrain of media bias, and here that involves confronting at least two major problems. First, the torture allegations that plagued military commissions will continue regardless of where the detainee is prosecuted. Ahmed Ghailani, a former Guantanamo detainee who is now being prosecuted in U.S. federal court for his involvement in the African Embassy bombings, has

\textsuperscript{229} See American Service-Members’ Protection Act of 2002 § 2006, 22 U.S.C. § 7425 (2009) (prohibiting transfer of classified information to the ICC). See also supra note 120 (describing unwillingness of U.S. to provide evidence to German tribunal, resulting in acquittal of al Qaida suspect).

\textsuperscript{230} Goldsmith, supra note 228.

\textsuperscript{231} For a thorough description of this dispute and the facts described here, see Jess Bravin, Dispute Stymies Guantanamo Terror Trials—Chief Prosecutor Claims Interference; Office in Disarray, WALL ST. J., Sep. 26, 2007.
asked for information about his mistreatment in the CIA interrogation program

to be introduced into trial. 232 Such allegations, especially where unaddressed through separate investigation and prosecution, will continuously disrupt the narrative produced at trial. Second, the local media of the Islamic world has been surprisingly uninterested in terrorism trials, except for reporting on torture allegations. This bias, based as much on sensationalism as anti-Americanism, may be difficult to counter in any trial venue absent equally spectacular factual development of the wrongs committed by members of al Qaida. Such a counter-narrative will be difficult to develop publicly when based on classified information.

(iii) Integration

Integration requires that trials for violations of international law be just one piece of a larger effort at inculcating the norm in question. Other institutions in society can deepen and magnify the narratives produced at trial. While it is unlikely that institutions in the target audience are already supportive of the norms in question, given that the community had just engaged in serious violations of international law, war crimes trials best integrate where they support developing efforts within societies to inculcate greater respect for international law.

Military commissions were not integrated into any larger norm development effort within the Islamic world. There is no evidence to suggest that commissions attempted to influence key religious, educational, or media figures in the Islamic world, with the goal of recruiting these institutions to support the messaging developed through the commissions. This is not surprising given that norm internalization was not a primary objective of commissions. Integration, perhaps more than the other conditions, requires an affirmative effort outside the traditional prosecution process.

The more interesting question is whether future trials of Guantánamo detainees can integrate their messaging with other institutions in the Islamic world. Clearly, local trials in the municipal courts of Islamic States would be the most effective at this task, as municipal courts will be best positioned to identify the opinion leaders who may be influenced to assist in norm internalization efforts. As discussed above, however, the municipal courts of the Islamic world appear ill-suited to conducting trials for violations of international law. The international community could consider large scale assistance to these institutions. 233 Such an effort is not without precedent. The U.S. has invested heavily in developing the Central Criminal Court in Iraq

232 See Benjamin Weiser, Secret CIA Jails Issue in Terror Case, N.Y. TIMES, July 2, 2009, at A20 (describing request by Ghailani defense counsel to visit CIA black-sites to seek exculpatory evidence).

233 See Alvarez, supra note 65, at 461 (arguing that international community should make effort to improve local courts in the first instance).
(CCC-I) and the Afghan National Detention Center (ANDC) in Afghanistan to prosecute and detain locals involved in terrorist activity. But major concerns persist about the fairness of trials provided by these institutions.\textsuperscript{234} Moreover, providing assistance to improve the municipal courts of Islamic States is a long-term plan that will run far beyond the time allocated to deal with the remaining cases at Guantanamo.\textsuperscript{235}

Assuming local trials are unlikely to be available for the majority of cases, an international court employing Islamic jurists and Shariah concepts may be the best suited to integrate with and promote local norm internalization efforts. Islamic jurists will have the best available knowledge of institutions within the Islamic world, and may be best positioned to target appropriate opinion leaders to create working synergies. The ICTY, concerned about the gulf between itself and the people of the former Yugoslavia, began the Outreach Program in 1999. That Program sought to provide information about the ICTY and to initiate a dialogue with the people “to engage local legal communities, victims’ associations and educational institutions.”\textsuperscript{236} The Outreach Program is not viewed as particularly successful, at least in part because of the lack of familiarity of ICTY staff with conditions in the former Yugoslavia.\textsuperscript{237} Islamic jurists and court personnel may be better situated to conduct similar outreach efforts given their greater connection to the local community.

Trials conducted in U.S. municipal courts are the least well situated to integrate trial efforts with local institutions in the Islamic world. As a general matter, prosecution and court officials in the U.S. have not viewed social outreach as a part of the judicial function.\textsuperscript{238} Moreover, these officials probably lack the knowledge of social conditions in the Islamic world necessary for effective integration.\textsuperscript{239} These limitations suggest that U.S. court proceedings are likely to go it alone in norm internalization efforts.


\textsuperscript{236} Hum. Rts. Center, supra note 70, at 110-111.

\textsuperscript{237} See id. at 140 (detailing lack of information on ICTY possessed by local legal professionals despite Outreach Program).

\textsuperscript{238} Supra note 104 and accompanying text.

\textsuperscript{239} The U.S. military appears to have learned this lesson. Captain Brian Huysman explains the reason the U.S. needs more Afghan troops to communicate with locals. He says, “We can’t read this people. We’re different.” Richard A. Oppel, Jr., Allied Officers Concerned by Lack of Afghan Forces, N.Y. Times, July 8, 2009, at A8.
IV. CONCLUSION

This paper developed 4 conditions for norm internalization success to identify the attributes trials for violations of international law must possess to avoid pitfalls that have prevented norm internalization in the community of the defendant in the past. Application of the four conditions to trials of detainees at Guantanamo Bay reveals three reasons such trials are unlikely to contribute to internalization of an anti-terrorism norm in the Islamic world. First, the mistreatment of detainees by the Bush Administration robs any future trials of their full normative impact. The failure to prosecute Bush Administration officials involved in violations of international law displays an inconsistent application of the law that will allow the Islamic world to dismiss trials as victor’s justice. Allegations of torture also will plague trials of these detainees, distorting the narrative emerging from the trial and reducing its normative impact. Second, the need to use classified information to convict those involved in the most serious terrorist acts creates a troubling paradox from the perspective of norm internalization. Selectively prosecuting the most serious offenders is requisite for successful norm internalization, but it is precisely those trials that will use the most classified information, thereby undermining the goal of accessibility. The alternative of prosecuting only those lower level offenders who can be tried with unclassified information also fails the norm internalization conditions, as the marginal narratives such an approach creates are unlikely to pierce the consciousness of the Islamic world. Third, integration of trials of Guantanamo detainees with local norm internalization efforts is difficult. Municipal courts, best situated to create synergies with local institutions, are decrepit in most Islamic states, making them poor vehicles for trials for violations of international law. Non-Islamic tribunals, which may be more procedurally sound, are unlikely to be able to identify the appropriate local actors who can augment the trial message.\footnote{240} This analysis is important because policy makers confront difficult trade-offs in deciding which trial objectives to preference in determining trial venue and strategy. Given that norm internalization is unlikely to succeed in this context, policy makers may be more successful in focusing on alternative objectives.

Moving beyond the Guantanamo context, this analysis also sheds light on two important debates surrounding norm internalization as an objective for trials for violation of international law. The first debate is whether it is reasonable to believe that trials can contribute to norm internalization.\footnote{241} The

\footnote{240} International tribunals employing Shariah law may be best situated to integrate messaging with other institutions in the Islamic world, provided other concerns about such tribunals were addressed. See supra notes 206-207, 214, 229 & accompanying text (listing problems with international tribunals).

\footnote{241} Compare Damarska, supra note 3, at 346 (dismissing critics who are skeptical of the didactic power of trials), with Snyder & Vinjamuri, supra note 22, at 39-41 (questioning the power of international trials to trigger norm cascades).
absence of a clear norm internalization success story creates a natural skepticism about the ability of trials to aid in norm internalization in the community of the defendant. The conclusion that trials of Guantanamo detainees are unlikely to achieve norm internalization in the Islamic world deepens that skepticism. This is not to say that Guantanamo is an ideal test case. U.S. abuses and missteps at Guantanamo make it difficult to project conclusions developed there to other contexts. But no trial authority prosecuting detainees for events emerging from an armed conflict or massive human rights tragedy will be ideally situated to internalize norms in the community of the defendant. Resentments and deep suspicion within the community of the defendant exist even where the circumstances of capture and detention are not as provocative as in Guantanamo Bay. Work must be done to identify which situations, if any, exist where trials may be sufficiently consistent, selective, accessible and integrative to avoid repeating past norm internalization failures.

Assuming such circumstances exist, this paper also sheds light on a second debate regarding whether trials in municipal or international tribunals are more likely to succeed at norm internalization in the community of the defendant. While “in-community” trials would intuitively appear to have a greater opportunity to internalize norms, application of the 4 conditions to the Guantanamo example suggests that municipal courts are not always a panacea. Municipal courts may struggle at displaying sufficient consistency in application of international law, especially where those courts are corrupt. These consistency problems will be magnified in fractured societies, where the community of the defendant may view the municipal court as “foreign” because it is controlled by another sub-group in society, raising the specter of victor’s justice. Trials in the local courts may not be any more accessible to the local population than international trials where the trials feature large amounts of classified information. These problems suggest that municipal trial may not be the per se best solution for achieving norm internalization goals. Instead, the four conditions need to be applied on a case by case basis. The goal in such an analysis is to determine whether in a particular case one or the other potential forum can avoid the mistakes that have derailed norm internalization in past trials.

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242 Compare Alvarez, supra note 65, at 459-460 (arguing local trials have greater opportunity to stigmatize those violating international norms because they enjoy the greatest legitimacy in their community), with Antonio Cassese, Reflections on International Criminal Justice, 61 Mo. L. Rev. 1, 7 (1998) (arguing national feelings may be less hurt by international rather than national prosecutions).