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### **A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms, 45 Vand. J. Transnat'l L. 405 (2012)**

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#### **Recommended Citation**

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# A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms

Stuart Ford\*

## ABSTRACT

*There is a large body of literature arguing that positive perceived legitimacy is a critical factor in the success of international criminal courts, and that courts can be engineered in such a way that they will be positively perceived by adjusting factors such as their institutional structure and outreach efforts. But in many situations the perceived legitimacy of international criminal courts has almost nothing to do with these factors. This Article takes the latest research in social psychology and applies it to survey data about perceptions of international criminal courts in order to understand how affected populations form attitudes about courts. The resulting conclusions are at odds with most other theorists' understanding of perceived legitimacy. Where there is a high degree of identification between large parts of the affected population and the "sides" in the conflict that led to the establishment of a court, the way in which the court is perceived will be determined largely by whom the court prosecutes. Indictments that conflict with the dominant internal narratives among the various groups will lead directly to lower perceptions of the court's legitimacy.*

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## I. INTRODUCTION

Domestic perceived legitimacy<sup>1</sup> is supposed to be a critical factor in the success of all transitional justice mechanisms. For example,

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1. Perceived legitimacy, as it is used in this Article, refers only to how audiences subjectively perceive the legitimacy of international criminal courts. It has

Professor Jaya Ramji-Nogales argues that effective transitional justice mechanisms are those that “successfully reconstruct social norms opposing mass violence,” and that the local population must perceive such mechanisms as legitimate before it will internalize the norms these mechanisms represent.<sup>2</sup> In this way, she makes perceived legitimacy a prerequisite to the success of all transitional justice mechanisms, including international criminal courts.<sup>3</sup> Others have made similar arguments. For example, Professor Laura Dickinson made perceived legitimacy a key aspect of her seminal article on hybrid tribunals,<sup>4</sup> and perceived legitimacy is also

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no normative component (i.e., it says nothing about whether courts should be perceived as legitimate). Indeed, in many of the circumstances discussed here, the perceived legitimacy of courts among particular groups is at odds with the apparent moral and legal legitimacy of those courts' actions. Cf. Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400, 1436–38 (2008) (discussing different kinds of legitimacy and noting the potential for tension between perceived legitimacy and moral or legal legitimacy). Perceived legitimacy is functionally similar to sociological legitimacy, which has been studied by legal scholars. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2008); Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 12–13 (2010) (“[Sociological legitimacy] affects the decision calculus of actors with respect to compliance . . .”). Furthermore, this Article focuses on domestic perceived legitimacy—the perception of the legitimacy of the tribunal among those individuals and communities that were directly affected by the crimes the tribunal is investigating. Of course, this is not the only perceived legitimacy that matters. The international community's perception of a court's legitimacy also matters, particularly for issues like funding, but this would be international perceived legitimacy. See, e.g., deGuzman, *supra*, at 1444–46 (discussing the international perceived legitimacy of the International Criminal Court). This Article will confine itself to a discussion of domestic perceived legitimacy. In fact, unless otherwise noted, references to perceived legitimacy should be read as references to domestic perceived legitimacy.

2. Ramji-Nogales, *supra* note 1, at 3–4. There is a theoretical basis for this emphasis on perceived legitimacy. Numerous studies by psychologists and sociologists have concluded that legitimacy is important to political and legal institutions because individuals are more likely to voluntarily adopt the norms of such institutions to regulate their own conduct when the institutions are perceived as legitimate. See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376–79 (2006) (providing an overview of psychological research relating to legitimacy). But see James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court*, 65 J. POL. 1, 23 (2003) (concluding that the perceptions of the South African Constitutional Court's legitimacy did not readily translate into acquiescence in the Court's decisions); *infra* Part III.D (arguing that the existing research on why institutions are perceived as legitimate does not do a good job of explaining how affected populations perceive international criminal courts).

3. Ramji-Nogales, *supra* note 1, at 13 (“[A]chieving legitimacy is of paramount importance to transitional justice mechanisms.”).

4. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 301–03, 306 (2003) (arguing that both fully international courts and solely domestic courts will face problems of perceived legitimacy that can be mitigated by the use of hybrid courts).

important to arguments about the success of international criminal courts advanced by William Burke-White,<sup>5</sup> Etelle Higonnet,<sup>6</sup> Jane Stromseth,<sup>7</sup> Sarah Nouwen,<sup>8</sup> and James Cockayne.<sup>9</sup> In short, there is a large body of literature arguing that positive perceived legitimacy is an important factor not only in the success of international criminal courts, but also in the success of all transitional justice mechanisms.

That same body of literature also argues that international criminal courts (and other transitional justice mechanisms) can be engineered in such a way that they will be positively perceived. Thus, Professor Ramji-Nogales argues that individual transitional justice mechanisms should be consciously designed to maximize their perceived legitimacy,<sup>10</sup> while Professor Dickinson famously argued that changes to outreach efforts and institutional structure can improve perceptions of legitimacy.<sup>11</sup> Other scholars have made arguments along these lines.<sup>12</sup> The result of this literature is a list of factors that various scholars have argued can be adjusted to improve the perceived legitimacy of courts, including: (1) the process by which the court is created,<sup>13</sup> (2) the location of the court<sup>14</sup> (3) the

5. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 736–37 (2003).

6. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 359–61 (2005).

7. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 260, 268–69, 281 (2007).

8. Sarah M.H. Nouwen, *'Hybrid Courts': The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190, 191 (2006).

9. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 638 (2004).

10. See Ramji-Nogales, *supra* note 1, at 14–16. She argues that this can be done by paying careful attention to the sources from which the institution is constituted, the procedure by which it was created, and the substance of the rules it uses. *Id.* at 16.

11. For example, she attributed the poor perceived legitimacy of the International Criminal Tribunal for the former Yugoslavia (ICTY) to: (1) the physical distance between the Hague and the Federal Republic of Yugoslavia (FRY); (2) the failure to engage in outreach; (3) the lack of participation by domestic personnel; and (4) the use of a fundamentally common law process in a civil law country. Dickinson, *supra* note 4, at 303.

12. Burke-White, *supra* note 5, (stating that location of the court and the composition of the staff both can affect perceived legitimacy); Higonnet, *supra* note 6, at 361–63, 418–19, 423–26 (noting that local participation and physical proximity will increase perceived legitimacy, and that the ICTY and International Criminal Tribunal for Rwanda (ICTR) were perceived negatively because they did not engage in sufficient outreach); Stromseth, *supra* note 7, at 260, 268–69, 281 (arguing that locally situated courts will be perceived as more legitimate, incorporation of more national staff can increase legitimacy, and that lack of outreach efforts led to negative perceptions of the ICTR and ICTY).

13. This has been advocated by Professor Ramji-Nogales. Ramji-Nogales, *supra* note 1, at 16; see *supra* note 10.

composition of the staff,<sup>15</sup> (4) the institutional structure,<sup>16</sup> (5) the procedures used during the trials,<sup>17</sup> and (6) the court's outreach efforts.<sup>18</sup> But is it true that the perceived legitimacy of international criminal courts among affected populations<sup>19</sup> is driven primarily by these factors? Both theory and abundant evidence indicate that in the majority of situations the answer is no.

This Article takes the latest research in social psychology and applies it to extensive survey data about how affected populations perceive international criminal courts in order to understand how these populations form attitudes about courts and to propose a new model of perceived legitimacy. The resulting conclusions are at odds with most other theorists' understanding of perceived legitimacy. To begin with, only a tiny percentage of the affected population will know how the court was created, the institutional structure it has, or the procedures it uses, and outreach efforts are unlikely to overcome this fundamental ignorance.<sup>20</sup> If almost none of the population knows about these factors, then it follows that perceptions of legitimacy cannot be a direct result of such factors. Of course, perceptions of legitimacy could be indirectly driven by these factors, but this does not appear to be the case.

Both theory and numerous attitude surveys indicate that where there is a high degree of identification between groups within the affected population and the "sides" in the conflict that led to the involvement of a court, the affected population's perception of the

14. Burke-White, *supra* note 5, at 737; Higonnet, *supra* note 6, at 361–63; Stromseth, *supra* note 7, at 260, 281; *see* Dickinson, *supra* note 4, at 305.

15. This has been advocated by Professors Dickinson, Burke-White, Stromseth, and Higonnet. *See supra* notes 11–12 (arguing that local presence is important for the perceived legitimacy of a court).

16. This has been advocated by Professor Dickinson. *See supra* note 11 (discussing the advantages of hybrid courts, that is, courts with both a national and an international component).

17. This has been advocated by Professor Ramji-Nogales. Ramji-Nogales, *supra* note 1, at 16; *see supra* note 10.

18. Burke-White, *supra* note 5, at 737–38; Higonnet, *supra* note 6, at 361, 365; Stromseth, *supra* note 7, at 260–61, 281; *see* Dickinson, *supra* note 4, at 304 (relating the importance of links between the formal institutions and the local population). This has been advocated by Professors Dickinson, Stromseth, and Higonnet. *See supra* notes 11–12.

19. In this Article, "affected population" means those individuals within a country or society that have been affected by whatever violations of international criminal law the court is tasked with addressing. It includes both direct victims (i.e., rape victims, torture victims, victims of physical violence, etc.) as well as whole communities that were affected whether directly or indirectly by the atrocities. In contrast, the term "group" is used to denote a particular subset of the affected population that is usually defined by its attitude toward other groups, the conflict and the resulting court. *See infra* Part IV.A and text accompanying notes 33–35.

20. *See infra* Part II.B.2.a, II.B.2.c.

court will be determined largely by whom the court prosecutes.<sup>21</sup> When the court's indictments and prosecutions conflict with a group's dominant internal narrative about responsibility for the conflict, members of the group are likely to perceive the court as biased and unjust, which allows the group to discount the indictments and preserve its internal narrative. This can lead directly to lower perceptions of the court's legitimacy. Not all indictments undermine a court's legitimacy, though. For example, indictments will sometimes agree with dominant internal narratives within particular affected populations, and will not produce lower perceptions of legitimacy.<sup>22</sup> Nor will all indictees have a large following that identifies strongly with them.<sup>23</sup>

Nonetheless, in a majority of situations, perceptions of a court's legitimacy among the affected population will be driven primarily by whom the court indicts.<sup>24</sup> Moreover, in circumstances where all of the participants in a conflict have significant followings, perceived legitimacy will often be a negative sum game.<sup>25</sup> In these circumstances, virtually any attempt to assign responsibility for crimes will cause a net loss in perceived legitimacy among the affected population as a whole. This has important implications for transitional justice, as many scholars have argued that positive perceived legitimacy is crucial to the success of international criminal courts.<sup>26</sup> If these scholars are correct, courts in some situations cannot succeed because virtually everything they do causes them to be viewed negatively, and this problem is not limited to courts. There is reason to believe that other transitional justice mechanisms also face situations where perceived legitimacy is a negative sum game.<sup>27</sup> One possibility is that transitional justice mechanisms simply cannot be successful in situations where different affected groups identify strongly with different sides in the conflict.

The Author does not believe that this is the case. Rather, the fundamental problem in such situations is the mismatch between

21. See *infra* Part II.B.2.b.

22. The fact that the ICTY assigned primary responsibility for serious violations of international criminal law in the former Yugoslavia to ethnic Serbs mirrored the dominant internal narrative among ethnic Bosniaks and thus did not induce poor perceptions of the ICTY among Bosniaks. For a discussion of Bosniak support for the ICTY, see *infra* text accompanying notes 56–59.

23. For example, the Special Court for Sierra Leone (SCSL)'s indictment of leaders of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) did not seem to lower perceptions of the SCSL's legitimacy in Sierra Leone because neither the RUF nor AFRC had significant numbers of followers. See *infra* text accompanying notes 200–09.

24. See *infra* Part IV.A.

25. See *infra* Part IV.B.

26. See *supra* notes 1–9 and accompanying text.

27. See *infra* note 298.

dominant internal narratives about the conflict and what actually happened in the conflict—groups are very likely to view themselves as the victims of aggression by other groups, even when this is not true.<sup>28</sup> This mismatch ultimately causes negative perceptions of the court when members of the group are indicted and prosecuted. It also serves as an obstacle to post-conflict reconciliation as it prevents the participants from accepting responsibility and causes each group to blame the other groups for what happened during the conflict.<sup>29</sup> Courts can serve a useful purpose in transitional justice if they can help align the dominant internal narratives within the various affected populations with what actually happened—and there is evidence that they can—although they cannot be expected to do this on their own, and the process is very slow.<sup>30</sup> Ultimately, this will simultaneously improve perceptions of their legitimacy and remove an obstacle to reconciliation. From this perspective, short-term negative perceived legitimacy is not necessarily a sign of failure. Rather, it is the price to be paid for trying to break down internal narratives that are hindering reconciliation between groups. In the long term, if a court can help break down these internal narratives, it will improve its own perceived legitimacy while at the same time opening the door to reconciliation.

Part II of this Article begins by describing how the International Criminal Tribunal for the former Yugoslavia (ICTY) was perceived in the Balkans and shows that the traditional model of perceived legitimacy cannot explain the attitudes toward the ICTY.<sup>31</sup> Subpart II.B presents an alternative model of perceived legitimacy, the social psychology model, which provides a better explanation of how the ICTY was perceived. Part III applies the social psychology model to perceptions of the legitimacy of the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Regulation 64 Panels in Kosovo. The implications of the social psychology model for the success of international criminal courts are explored in Part IV.

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28. See *infra* Part IV.C.

29. See *infra* text accompanying notes 303–04.

30. See *infra* Part IV.D–E (proposing that courts can break down inaccurate internal narratives over time by making available evidence about the conflict).

31. When this Article uses the phrase “traditional model of perceived legitimacy,” it is a reference to the model most previous scholars have used, where courts largely have control over how they are perceived, and perceptions of their legitimacy can be improved by changes to things like institutional structure and outreach efforts. See *supra* notes 10–18 and accompanying text.



## II. TOWARD A BETTER MODEL OF PERCEIVED LEGITIMACY

Most theorists assume that domestic perceptions of legitimacy of international criminal courts are driven largely by factors such as: (1) the process by which they are created, (2) the location of the court, (3) the composition of the staff, (4) the institutional structure, (5) the procedures used during the trials, and (6) the court's outreach efforts.<sup>32</sup> But a detailed review of the theoretical and empirical evidence, including numerous surveys that explore attitudes toward various international criminal courts, demonstrates that these factors do not adequately explain how affected populations perceive such courts. Thus, this Article proposes a new model, called the social psychology model, which provides a better explanation of the perceived legitimacy of international criminal courts.

### A. *The Example of the ICTY*

The perception of the ICTY among various groups in the former Yugoslavia demonstrates that the way in which an affected population perceives a court can be driven primarily by whom the court indicts and prosecutes.<sup>33</sup> To begin with, there are often multiple groups within an affected population that react in different ways to the tribunal. Often these groups divide along ethnic, national, or religious lines that correlate with the "sides" in the conflict that led to the involvement of the tribunal.<sup>34</sup> In Bosnia-Herzegovina there are three identifiable groups that are relevant to this Article: ethnic Bosniaks, ethnic Croats, and ethnic Serbs. One's ethnicity largely determined which side in the conflict one identified with and supported.<sup>35</sup>

32. See sources cited *supra* notes 12–18.

33. This Article principally uses the example of the ICTY to demonstrate the social psychology model for two reasons. First, there was a strong identification between the affected population and the sides in the conflict. Thus one would predict that the effect of motivated reasoning and cognitive dissonance on attitudes toward the court would be strong. See *infra* text accompanying notes 118–21. Second, there have been many good surveys of attitudes toward the ICTY among the various affected groups in the former Yugoslavia. Thus there is much more data that can be used to test the validity of the social psychology model than is available for other courts. Several other courts are discussed in later sections. See *infra* Part III. However, the lack of survey data for these other courts in some cases limits the conclusions that can be drawn about them. On a related note, the Author would have liked to address the International Criminal Tribunal for Rwanda in this Article, but was unable to find sufficient survey data to draw any meaningful conclusions about how the ICTR has been perceived by Rwandans or what drives those perceptions.

34. See *infra* Part IV.A.

35. A survey of attitudes toward the conflict in Bosnia-Herzegovina found a very strong correlation between ethnic identity and support for a particular side during

Unsurprisingly, each side had a dominant internal narrative about what happened during the conflict in the former Yugoslavia. The International Committee of the Red Cross's People on War Project,<sup>36</sup> which interviewed thousands of people affected by the conflict, found that all three of the groups viewed themselves as waging a fundamentally defensive war against aggression by the other groups.<sup>37</sup> In effect, each group perceived itself as the victim. Ethnic Serbs in particular rejected responsibility for the disintegration of Yugoslavia and the resulting atrocities.<sup>38</sup> One 2004 survey found that 84 percent of Serbians believed Serbs had been the largest group of victims of the conflict, while only 8 percent believed

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the conflict. INT'L COMM. RED CROSS [ICRC], PEOPLE ON WAR PROJECT: BOSNIA-HERZEGOVINA COUNTRY REPORT 2 (1999). According to that survey, 87 percent of Serbs, 72 percent of Bosniaks, and 70 percent of Croats took sides during the conflict. "The conflict divided almost the whole of the population along national/ethnic lines . . ." *Id.* at 2. This will not always be the case, however. The section below on the Special Court for Sierra Leone indicates that only one of the main participants in the conflict, the Civil Defense Forces (CDF), had a close identification with a particular ethnic group, the Mende. The other two armed groups, the RUF and the AFRC, do not appear to have been supported by particular ethnic, religious or national groups. *See infra* Part III.A.

36. ICRC, *supra* note 35.

37. *See id.* at 14–22.

The distinction between defender and aggressor defines this as a war with sides. People did not just identify with the various parties to the conflict; they did not just take up a nationalist identity. They adopted an historical interpretation of events that established their own community as the defenders against aggression . . . .

*Id.* at 16–17; *see also* Human Rights Ctr. & Ctr. for Human Rights, *Report: Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L JUST. 102, 127–36 (2000).

38. *See* Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 93 (2009) (discussing the Serbs' negative opinion of the ICTY and decreasing percentages of Serbs who feel that "facing the truth in war is important for the future"); Bojan Tonicic, *Serbia: Milosevic Trial Grips Nation*, INST. FOR WAR & PEACE REPORTING (Feb. 15, 2002), <http://iwpr.net/report-news/serbia-milosevic-trial-grips-nation> ("The Serbs are not only unable to acknowledge war crimes but they are also convinced they never occurred . . ."). The Serbs interviewed for Bojan Tonicic's article tended to refer to themselves as victims and viewed the West as the criminals. Tonicic, *supra*. One person described Milosević as the "defender of Serbs," while another viewed the trial of Milosević as an attempt by the West to portray Serbs as "prone to genocide." *Id.* This was echoed by the party secretary of Milosević's Socialist Party, who said: "This is not a trial against Milosevic but a trial against the whole country. The consequences of this trial could be catastrophic for the Serbian nation because it will be written in history that the Serbs are responsible for genocide." Emily Shaw, *The Role of Social Identity in Resistance to International Criminal Law: The Case of Serbia and the ICTY* 3 (May 1, 2003) (Berkeley Program in Soviet & Post-Soviet Studies, Working Paper No. 5, 2003), available at [http://iseees.berkeley.edu/bps/publications/2003\\_05-shaw.pdf](http://iseees.berkeley.edu/bps/publications/2003_05-shaw.pdf).

that Serbs had committed the largest number of crimes.<sup>39</sup> Each group also felt that the laws of war should be applied primarily to those they viewed as the aggressors (the other groups).<sup>40</sup>

Serbs not only overwhelmingly rejected being labeled as responsible for the largest number of crimes committed during the conflict, but a sizable minority continues to believe that Serbs committed no crimes at all. According to one survey conducted in Serbia in 2002, nearly half of the respondents said that Serbs had not committed a single crime during the Balkan conflict.<sup>41</sup> The person responsible for carrying out the survey summarized it this way: “The Serbs are not only unable to acknowledge war crimes but they are also convinced they never occurred.”<sup>42</sup> In a similar vein, Mirko Klarin has noted that polls consistently show that between 35 and 38 percent of Serbs believe that “once [the] truth becomes known, ‘it will be proven once and for all that Serbs are not responsible for the crimes they are blamed for . . .’”<sup>43</sup> Slobodan Milosević played to this narrative during his trial, where he blamed the West for the conflict, described himself and all Serbs as victims, and alleged that the breakup of Yugoslavia was the result of a “neo-colonial” design by the West to create a Greater Albania out of the ruins of the former Yugoslavia.<sup>44</sup>

In this milieu, the ICTY was charged with impartially and justly identifying and prosecuting those responsible for the most serious atrocities that had occurred,<sup>45</sup> and most commentators have

39. See DIANE F. ORENTLICHER, OPEN SOC’Y JUSTICE INITIATIVE, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA 86 (2008), available at [http://www.humansecuritygateway.com/documents/OSJI\\_Shrinking\\_the\\_Space.pdf](http://www.humansecuritygateway.com/documents/OSJI_Shrinking_the_Space.pdf) (“84 percent of Serbian respondents said that they believe Serbs had the largest number of victims during the wars in the former Yugoslavia from 1991 through 1995; . . . only eight percent responded that Serbs committed the greatest number of war crimes in that period.”). These beliefs contrast sharply with demographic studies of deaths caused by the conflict, which generally conclude that Bosniaks represented by far the largest group of victims. See, e.g., Jan Zwierzchowski & Ewa Tabeau, Census-Based Multiple System Estimation of Casualties’ Undercount 15 fig.3 & tbl.4, 17–18 tbl.6 (Feb. 1, 2010) (unpublished conference paper), available at <http://epc2010.princeton.edu/download.aspx?submissionId=100880>.

40. ICRC, *supra* note 35, at 14–22.

41. See Tonic, *supra* note 38 (“When we asked them to cite three war crimes committed by Serbs, half of the interviewees said Serbs did not commit a single crime.”). This position is hard to reconcile with the large number of confessions by Serb perpetrators that were entered into evidence at the ICTY. See *infra* notes 346–50 and accompanying text.

42. Tonic, *supra* note 38.

43. Klarin, *supra* note 38, at 93.

44. Anthony Borden, *Milosevic Rages Against the West*, INST. FOR WAR & PEACE REPORTING (Feb. 15, 2002), <http://iwpr.net/report-news/milosevic-rages-against-west>.

45. See U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 1, U.N. Doc. S/25704 (May 3, 1993) (noting that the ICTY had the power to prosecute “persons responsible for

concluded that the ICTY's trials were largely just and impartial.<sup>46</sup> However, the ICTY's investigations resulted in large numbers of trials against ethnic Serbs, and a much smaller number of trials against Bosniaks and ethnic Croats.<sup>47</sup> Ethnic Serbs, in particular, were charged with the most serious crimes. For example, ethnic Serbs were found to be responsible for genocide at Srebrenica,<sup>48</sup> and the ICTY essentially accused Slobodan Milosević and the Serb political leadership of masterminding the whole conflict.<sup>49</sup> In effect, the ICTY

serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"). ICTY judges were required to be "persons of high moral character, impartiality and integrity." *Id.* Annex art. 13. Trials were required to be "fair and expeditious" and carried out in accordance with due process and with regard to the rights of the accused. *Id.* Annex art. 20.

46. See Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT'L CRIM. JUST. 585, 586 (2004) ("[T]he ICTY not only got off the ground but has since proved to be a superb judicial enterprise, capable of dispensing justice in a fair manner . . ."); Stromseth, *supra* note 7, at 319–20 ("The ICTY and ICTR have accomplished a great deal in terms of bringing to justice, in fair legal proceedings, individuals accused of major atrocities."); Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 J. INT'L CRIM. JUST. 466, 466 (2004) ("I believe it would be almost impossible to find an impartial commentator in 2003 in Europe, Africa, Asia or the United States who would contend that ICTY trials are not fair and in accordance with internationally accepted criminal-law standards."). *But see, e.g.*, Robert Hayden, *Biased "Justice": Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 CLEV. ST. L. REV. 549, 551 (1999) (accusing the ICTY of being biased and a tool for Western interests). Of course, the ICTY has been repeatedly criticized for other aspects of its operation, including the cost and length of trials. *See, e.g.*, Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 543 (2004) ("The delays in bringing detainees to trial—and the trials themselves—have generally been so lengthy that questions have been raised as to the violation by the tribunals of the basic human rights guarantees set out in the International Covenant on Civil and Political Rights (ICCPR).").

47. Professor Orentlicher reports that two-thirds of the ICTY's defendants were ethnic Serbs. ORENTLICHER, *supra* note 39, at 14–30. The Author's own analysis of the ethnicity of the indictees at the ICTY finds that 68 percent of the indictees were Serb, 20 percent were Croat, and only 4 percent were Bosniak; the remaining indictees were a mix of Kosovar Albanian, Macedonian, and a small number of individuals of unknown ethnicity. This information is taken from a spreadsheet, "ICTY Case Database," compiled by the Author after reviewing all of the indictments issued by the ICTY.

48. Mark Drumbl, Case Note, *Prosecutor v. Radislav Krstic: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting*, 5 MELB. J. INT'L L. 434, 434 (2004); Katherine G. Southwick, Note, *Srebrenica as Genocide? The Krstić Decision and the Language of the Unspeakable*, 8 YALE HUM. RTS. & DEV. L.J. 188, 188 (2005).

49. See INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET FOR SLOBODAN MILOSEVIC (2006), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/cis/en/cis\\_milosevic\\_slobodan\\_en.pdf](http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf) (summarizing the indictments against Milosević); *see also* ORENTLICHER, *supra* note 39, at 30–31 ("The Prosecutor's case against Milosević in effect placed the former Serbian leader at the epicenter of the violence that ravaged the former Yugoslavia . . .").

assigned primary responsibility to Serbs for the serious violations of international criminal law committed during the conflict.

The ICTY's prosecutions ran counter to the dominant ethnic Serbian narrative of victimhood. Thus, it hardly comes as a surprise that ethnic Serbs perceived the ICTY as biased and partial.<sup>50</sup> A number of surveys have been carried out regarding Serb attitudes toward the ICTY. The South Eastern Europe Public Agenda Survey,<sup>51</sup> conducted in 2002, assessed how well various international institutions were trusted in parts of South Eastern Europe. Only 5 percent of ethnic Serbs in Serbia<sup>52</sup> and 2 percent of ethnic Serbs in the Republika Srpska<sup>53</sup> rated the ICTY as trustworthy. Another survey carried out at the beginning of Milosević's trial in February 2002 found that four-fifths of Serbians viewed the ICTY as biased.<sup>54</sup> A 2007 survey by the Belgrade Center for Human Rights similarly found that only 7 percent of Serbians believed the ICTY was unbiased.<sup>55</sup>

Ethnic Bosniaks, on the other hand, were predisposed to support the ICTY because it essentially confirmed their internal narrative by assigning blame largely to ethnic Serbs. In 1999, the International Committee of the Red Cross's People on War Project found that 91 percent of Bosniaks supported prosecutions for war crimes.<sup>56</sup> Fully two-thirds further believed that the ICTY should be responsible for the prosecutions.<sup>57</sup> Three years later, in 2002, the South Eastern

50. Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 231–34 (2006); see also Cassese, *supra* note 46, at 595 (noting that ethnic Serbs in the former Yugoslavia considered the ICTY to be anti-Serb); Human Rights Ctr. & Ctr for Human Rights, *supra* note 37, at 131–33 (“In general, [Bosnian Serb] participants viewed the [ICTY] as a political body that was an instrument of Western influence rather than an independent judicial institution.”).

51. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE [IDEA], SOUTH EAST EUROPE (SEE) PUBLIC AGENDA SURVEY (2002), available at [http://www.idea.int/europe\\_cis/balkans/see\\_survey.cfm](http://www.idea.int/europe_cis/balkans/see_survey.cfm). The survey was the

first ever professional measurement of public opinion undertaken simultaneously throughout South East Europe [and] involved a total of 10,000 face-to-face interviews conducted during January and February 2002 in Serbia, Montenegro and Kosovo, and in Bosnia and Herzegovina (with two separate surveys, one for the Federation and one for Republika Srpska), Croatia, Macedonia, Bulgaria and Romania.

*Id.*

52. IDEA, SURVEY RESULTS: INTERNATIONAL ISSUES: SERBIA (2002), available at [http://archive.idea.int/balkans/results/Serbia/ser\\_int3.htm](http://archive.idea.int/balkans/results/Serbia/ser_int3.htm).

53. IDEA, SURVEY RESULTS: INTERNATIONAL ISSUES: SRPSKA (2002), available at [http://archive.idea.int/balkans/results/Srpska/srp\\_int3.htm](http://archive.idea.int/balkans/results/Srpska/srp_int3.htm).

54. Tonic, *supra* note 38.

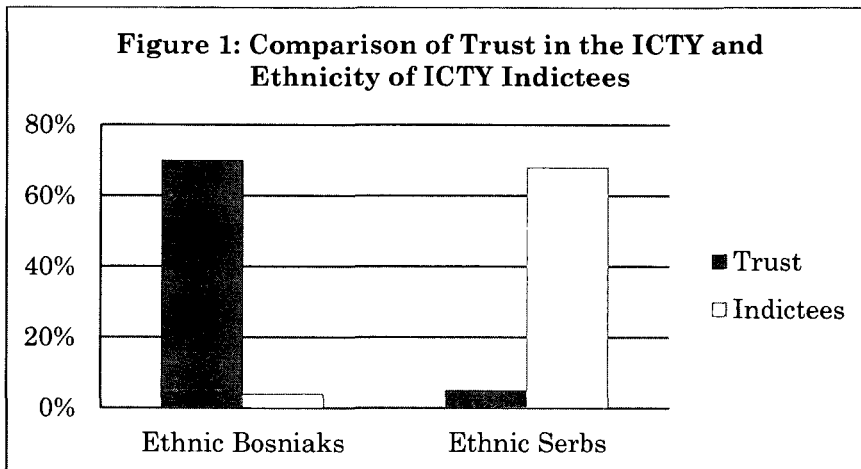
55. Klarin, *supra* note 38, at 92.

56. ICRC, *supra* note 35, at 24.

57. *Id.*

Europe Public Agenda Survey returned similar results: within Bosnia-Herzegovina, 70 percent of Bosniaks reported trusting the ICTY.<sup>58</sup> In a series of surveys undertaken between 2001 and 2004, the percentage of Bosniaks who said they supported the ICTY's work hovered around 90 percent.<sup>59</sup>

When the percentage of ethnic Bosniaks and Serbs indicted at the ICTY is compared to the levels of trust in the ICTY among those ethnic groups, a strong correlation appears, as demonstrated in Figure 1 below.<sup>60</sup> This data bears out Mirko Klarin's observation that "[t]he 'popularity' of the ICTY in the former Yugoslavia is inversely proportional to the number of accused that come from these countries, entities and particularly, ethnic communities."<sup>61</sup> For ethnic Serbs, apparently justifiable decisions by the ICTY, such as identifying ethnic Serbs as responsible for the systematic execution of thousands of Bosniak men and boys in the aftermath of the fall of Srebrenica, directly caused negative perceptions of its legitimacy.



58. IDEA, *supra* note 51.

59. DIANE F. ORENTLICHER, OPEN SOC'Y JUSTICE INITIATIVE, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 49 (2010), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf>.

60. The data on trust in the ICTY is taken from the reported responses to question three of the "International Issues" part of the South Eastern Europe Public Agenda Survey. That question read "I will read you a list of international institutions from our country. For each of them, please tell me how much you trust them." IDEA, COMPLETE QUANTITATIVE SURVEY RESULTS (2002), available at [http://archive.idea.int/balkans/survey\\_detailed.cfm](http://archive.idea.int/balkans/survey_detailed.cfm). The results shown are for ethnic Bosniaks in Bosnia and ethnic Serbs in Serbia. See also *supra* notes 52, 58. The data on the ethnicity of the ICTY indictees is taken from the Author's own analysis of the ICTY indictments. See *supra* note 47.

61. Klarin, *supra* note 38, at 92.

The dramatically different ways in which Bosniaks and Serbs viewed the ICTY cannot be explained with the factors traditionally thought to determine the perceived legitimacy of courts.<sup>62</sup> These disparate perceptions cannot be the result of institutional structure because the institutional structure of the court was the same for both groups. Similarly, they cannot be the result of the location of the court, the manner in which it was created, the composition of its staff, or its procedural rules. Again, these factors were the same for both Bosniaks and Serbs. In short, the factors most often identified as being important to perceived legitimacy cannot explain how the ICTY was perceived in the former Yugoslavia.<sup>63</sup> Something else has to be driving perceptions of legitimacy. In the case of the ICTY, perceptions of legitimacy appear to be determined largely by how the court attributed responsibility for the atrocities that were committed during the conflict.

This explanation for how the ICTY was perceived in the Balkans seems intuitively reasonable, but is there a theoretical basis for it? Perhaps more importantly, can this explanation be generalized to account for the reactions of affected populations to other courts? Answers to these questions are most likely to be found in social psychology, a subdiscipline of psychology that includes the study of how groups make decisions and form attitudes.<sup>64</sup> This Article looks to social psychology to develop a general model of how affected populations perceive international criminal courts.<sup>65</sup>

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62. For a discussion of the traditional factors, see *supra* text accompanying notes 13–18.

63. See Klarin, *supra* note 38, at 90 (“[P]ublic opinion in the former Yugoslavia is influenced very little by what the prosecution and the judges are actually doing in the Hague.”).

64. Social psychology is defined as “the scientific field that seeks to understand the nature and causes of individual behavior and thought in social situations.” ROBERT A. BARON, NYLA R. BRANSCOMBE & DONN BYRNE, *SOCIAL PSYCHOLOGY* 6 (12th ed. 2008).

65. It is becoming increasingly common for legal academics to incorporate research and methodologies that come from other fields. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) (noting and encouraging the intersection of law, political science, and economics in “New Legal Realism”). There are now a number of articles that turn to social psychology to improve our understanding of how people interact with both the law and legal institutions. See, e.g., Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, The Supreme Court 2010 Term*, 125 HARV. L. REV. 1, 6–7 (2011) (stating that analyses of the neutrality of the law have focused on doctrine, mistakenly leaving “social-psychological dynamics” out of the discussion, and proposing an account centered on psychological mechanisms of analysis).

### B. Motivational and Cognitive Biases That Can Affect Perceptions of Legitimacy

One of the most significant insights of social psychology is that people are not fundamentally rational decision makers.<sup>66</sup> People do not carefully weigh all of the available evidence before making every decision. Nor do people always come to the correct decision even given the evidence they do consider. Instead, human decision making is often driven by motivational and cognitive biases, and the result is a distorted view of the world and ourselves—a view that is often at odds with the evidence. For example, among other things, people tend to view themselves as causal agents even over events that they cannot control, they selectively view themselves as more responsible for positive outcomes than negative ones, they downplay the importance of things they do not do well, and they generally overestimate both their own competence and their likelihood of future success.<sup>67</sup>

Cognitive biases are ways in which our reasoning fails to live up to the ideal of the rational actor, even in circumstances where our only motivation is accuracy in decision making. In effect, such biases are ways in which human cognition is incapable of reaching a rational ideal, even under perfect circumstances. Confirmation bias is one example of a cognitive bias, and it can be present even in the absence of a directional goal.<sup>68</sup> Motivational biases, on the other hand, occur

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66. See Thomas D. Gilovich & Dale W. Griffin, *Judgment and Decision Making*, in HANDBOOK OF SOCIAL PSYCHOLOGY 542, 555 (Susan T. Fiske et al. eds., 5th ed. 2009) (“The normative force of the axioms of rational choice is unassailable and hence cannot be dispensed with. And yet it is an empirical fact that people’s choices often fail to conform to the axioms.”); Eldar Shafir & Robyn A. LeBoeuf, *Rationality*, 53 ANN. REV. PSYCHOL. 491, 493 (2002) (arguing that the assumption of human rationality is misguided and presenting summaries of dozens of experiments that show that humans have been found to act in ways that are not rational). *But see* Gerald R. M. McKenzie, *Judgment and Decision Making*, in HANDBOOK OF COGNITION 321, 321–38 (Koen Lamberts & Robert Goldstone eds., 2005) (arguing that much of the apparently non-normative behavior identified in many laboratory settings is actually behavior that works well in the real world and that some remaining differences from ideal normative behavior can be explained by a rational trade-off between accuracy and the effort needed to make a decision).

67. David K. Sherman & Geoffrey L. Cohen, *The Psychology of Self-Defense: Self-Affirmation Theory*, in 38 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 184 (M. P. Zanna ed., 2006); *see also* Steven J. Heine et al., *Is There a Universal Need for Positive Self-Regard?*, 106 PSYCHOL. REV. 766, 779 (1999) (noting that people selectively remember their past performance as better than it was and judge positive personality attributes to be more appropriate in describing themselves than in describing others).

68. For example, the seminal study that identified confirmation bias used a design that did not give the participants any goal other than accuracy. P.C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q.J. EXPERIMENTAL PSYCHOL. 129, 131 (1960). Subsequent explorations of the effect of motivated reasoning



when our reasoning is affected by our desire to achieve a particular outcome.<sup>69</sup> Motivational biases can occur separately from cognitive biases, and vice versa.<sup>70</sup> However, human reasoning appears to be most biased when motivational biases and cognitive biases reinforce one another.<sup>71</sup>

### 1. Motivated Reasoning

While cognitive biases were identified and studied first,<sup>72</sup> psychologists eventually realized that cognitive biases on their own could not explain the extent to which human reasoning appeared to be biased in favor of reaching self-serving conclusions.<sup>73</sup> This gave rise to the study of motivated reasoning. The central tenet of motivated reasoning is that “[p]eople are more likely to arrive at

on confirmation bias have duplicated Wason’s initial finding that confirmation bias exists even in the absence of motivated reasoning. Erica Dawson et al., *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1379 (2002). Confirmation bias is explained in detail in Part II.B.2.c of this Article.

69. See *infra* note 74 and accompanying text.

70. See *supra* note 68, *infra* notes 92–95 and accompanying text (discussing the interplay of cognitive and motivational biases).

71. For example, studies have shown that the impact of cognitive biases is greater when people have directional goals. See Dawson et al., *supra* note 68, at 1385–86 (showing that people suffered greater effects from confirmation bias when they wished to maintain a particular belief); *infra* notes 112–17, 150–55 (discussing how cognitive dissonance is produced by cognitions that are inconsistent with one’s self-concept and how a stronger confirmation bias exists among those who have the most preexisting knowledge about the subject matter); cf. Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 767 (2006) (noting that confirmation bias is much weaker when the issue being tested does not generate a strong response from the individual).

72. For example, confirmation bias was identified in 1960. *E.g.*, Wason, *supra* note 68. Cognitive dissonance was first proposed in the 1950s by Leon Festinger. See Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 209 (1959) (“If a person is induced to do or say something which is contrary to his private opinion, there will be a tendency for him to change his opinion so as to bring it into correspondence with what he has done or said.”).

73. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 493 (1990) (discussing the role cognitive processes play in producing biases). Of course, people have understood motivated reasoning in a general sense for far longer than it has been studied by psychologists. See, e.g., FRANCIS BACON, *THE NEW ORGANON* ch. XLVI (Lisa Jardine & Michael Silverthorne eds., Cambridge Univ. Press 2000) (1620) (“Once a man’s understanding has settled on something (either because it is an accepted belief or because it pleases him), it draws everything else also to support and agree with it. And if it encounters a large number of more powerful countervailing examples, it either fails to notice them, or disregards them, or makes fine distinctions to dismiss and reject them, and all this with much dangerous prejudice, to preserve the authority of its first conceptions.”).

those conclusions that they want to arrive at.”<sup>74</sup> This is accomplished in a number of ways. For example, people may selectively search their memories for information that supports their desired outcome and then use that information to construct beliefs that are biased toward achieving that outcome.<sup>75</sup> They may also use different evidentiary standards to evaluate new information depending on whether the information is consistent with their directional goals or not.<sup>76</sup> Collectively, these strategies bias people in favor of the conclusion they want to reach.

However, motivated reasoning has its limits. People are not at liberty to believe anything they want, no matter how unlikely, simply because it serves their interests.<sup>77</sup> Rather, people strive to maintain

74. Kunda, *supra* note 73, at 495; *see also* Dawson et al., *supra* note 68, at 1379 (noting that there is now extensive evidence that people are inclined to draw self-serving conclusions); John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 *PSYCHOL. BULL.* 339 (2003) (presenting evidence that people’s political beliefs are partly the result of motivated reasoning); Matthew J. Lebo & Daniel Cassino, *The Aggregated Consequences of Motivated Reasoning and the Dynamics of Partisan Presidential Approval*, 28 *POL. PSYCHOL.* 719, 742–43 (2007) (presenting evidence that motivated reasoning plays a role in presidential approval ratings); Kahan, *supra* note 65, at 7 (defining motivated reasoning as the tendency to unconsciously process information in a way that promotes goals or interests extrinsic to the decision-making task).

75. Kunda, *supra* note 73, at 483, 493–94 (noting that when people engage in motivated reasoning, they only consider a biased subset of the relevant information and rules, and that directional goals can enhance the accessibility of memories, beliefs and rules that support the desired solution); Lebo & Cassini, *supra* note 74, at 722–23 (arguing that motivated reasoning is the result of selectively searching for confirmatory information, selectively evaluating information depending on whether it is consistent or inconsistent with existing beliefs, and selectively viewing inconsistent information as consistent); Shailendra Pratap Jain & Durairaj Maheswaran, *Motivated Reasoning: A Depth-of-Processing Perspective*, 26 *J. CONSUMER RES.* 358, 358 (2000) (arguing that the motivation to arrive at a preferred conclusion enhances the use of those beliefs and strategies that are most likely to yield the desired conclusion); David P. Redlawsk, *Hot Cognition or Cool Consideration? Testing the Effects of Motivated Reasoning on Political Decision Making*, 64 *J. POL.* 1021, 1023, 1033 (2002) (arguing that motivated reasoners may discount, counter-argue, or simply ignore new information inconsistent with their beliefs and demonstrating experimentally that people selectively searched for information about preferred topics).

76. Dawson et al., *supra* note 68, at 1379–80, 1385 (arguing that people essentially ask themselves, “can I believe this?” when evaluating evidence that supports a desired conclusion, but ask themselves, “must I believe this?” when evaluating evidence that is inconsistent with their desired conclusion); Jain & Maheswaran, *supra* note 75, at 359 (arguing that less information is required to reach a preferred conclusion than a nonpreferred conclusion and that motivated reasoners spend more time looking for alternative explanations when confronted with information inconsistent with their preferences); Lebo & Cassini, *supra* note 74, at 723 (noting that people tend to uncritically accept information that is consistent with their desired outcome while expending effort to counter-argue contrary information).

77. Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 *AM. J. POL. SCI.* 940, 943 (2007) (noting that motivated reasoning is not unbounded); Kunda, *supra* note 73, at 482–83.

an illusion of objectivity—the sense that they are acting rationally and without bias.<sup>78</sup> This constrains motivated reasoning as people attempt to construct rationales that they can present (both internally and externally) as objective.<sup>79</sup> The illusion of objectivity both limits motivated reasoning and simultaneously prevents people from recognizing that their reasoning is biased. People honestly believe that their beliefs are constructed in a fair and objective manner, free from bias and self-interest.<sup>80</sup> Among other things, this means that the effects of the social psychology model described in this Article are probably not the result of conscious choices for the majority of people.<sup>81</sup>

Despite being bad at recognizing when our own reasoning is biased, we are good at identifying when others are engaging in biased reasoning.<sup>82</sup> The result is something called naïve realism, a situation where people recognize that others are affected by motivated reasoning but fail to recognize that they are also subject to it.<sup>83</sup> Naïve realism can have particularly adverse consequences in situations where there are contentious disagreements between groups, as each group perceives itself to be acting objectively while simultaneously

78. Dawson et al., *supra* note 68, at 1379, 1386; Jost et al., *supra* note 74, at 340; Sherman & Cohen, *supra* note 67, at 220; *see* Kunda, *supra* note 73, at 482–83 (arguing that people attempt to construct a justification for their desired conclusion that they believe would satisfy a dispassionate observer).

79. Kunda, *supra* note 73, at 483.

80. *See* Braman & Nelson, *supra* note 77, at 940–41 (noting that judges believe that the law guides their decision making despite evidence that political preferences provide a better explanation for judicial outcomes than the law); Gilovich & Griffin, *supra* note 66, at 573–74 (arguing that people perceive the world subjectively but believe that their internal representations of the world mirror objective reality); Kunda, *supra* note 73, at 483 (observing that motivated reasoning appears to be objective to the individual because they do not realize that subconscious bias is affecting the information they are considering and how they are weighing it); Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 415 (1995).

81. *See* Braman & Nelson, *supra* note 77, at 954 (noting that there was no evidence that any of the subjects in their studies were aware that they were engaging in motivated reasoning); Kunda, *supra* note 73, at 483 (“The objectivity of [motivated reasoning] is illusory because people do not realize that the process is biased by their goals . . .”); Sherman & Cohen, *supra* note 67, at 188 (noting that self-defensive reasoning can be unconscious and automatic). *See generally* John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOL. 462 (1999) (arguing that people generally use nonconscious mental systems to process information and interpret their world).

82. *See* Kahan, *supra* note 65, at 5.

83. *See* Kahan, *supra* note 65, at 21–22; Robinson et al., *supra* note 80, at 404, 414; Sherman & Cohen, *supra* note 67, at 187–88; David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, II CURRENT DIRECTIONS PSYCHOL. SCI. 119, 119–20 (2002) (describing how people distort perceived information to maintain a sense of self-worth).

perceiving the other group as acting subject to biases. This causes intergroup distrust, tends to polarize the groups' views, and makes it harder for the groups to reconcile their differences.<sup>84</sup>

A particular form of motivated reasoning that has been studied extensively, and that is relevant to this Article, is self-defensive reasoning.<sup>85</sup> People tend to have strongly positive self-views<sup>86</sup> and are motivated to defend those views.<sup>87</sup> The result is a form of motivated reasoning where people are likely to reject information that threatens their sense of self.<sup>88</sup> Moreover, people's views of themselves are intricately bound up with their social identities.<sup>89</sup> Thus attacks on social or group identities can be treated as attacks on the self that will trigger the same self-defensive reasoning.<sup>90</sup> As a result, group members are resistant to information that is critical of the group.<sup>91</sup>

As noted above, there are links between motivated reasoning and cognitive biases, and motivated reasoning can amplify the distorting effects of cognitive biases. It appears that this is partly because cognitive biases are a mechanism through which motivation distorts human judgments.<sup>92</sup> Motivated reasoning operates on two levels. It can bias the information people consider, but it can also bias the information processing model used.<sup>93</sup> In effect, motivational biases can cause people to selectively use information processing models that incorporate cognitive biases when those cognitive biases result in

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84. See Kahan, *supra* note 65, at 21–22; Robinson et al., *supra* note 80, at 404–05; Sherman & Cohen, *supra* note 67, at 190–213.

85. See generally Sherman & Cohen, *supra* note 67.

86. Heine, *supra* note 67, at 766 (“People have a need to view themselves positively. This is easily the most common and consensually endorsed assumption in research on the self.”); Sherman & Cohen, *supra* note 67, at 185–86. *But see* Heine, *supra* note 67, at 775–77 (arguing that positive self-views are partly a result of North American cultural values, and that self-views are not as positively skewed in Japanese culture); William B. Swann & Jennifer K. Bosson, *Self and Identity*, in HANDBOOK OF SOCIAL PSYCHOLOGY 580, 592 (Susan T. Fiske et al. eds., 5th ed. 2009).

87. Sherman & Cohen, *supra* note 67, at 187.

88. See Kahan, *supra* note 65, at 18 n.95 (noting that goals like our need to maintain a positive self-image can bias reasoning); Sherman & Cohen, *supra* note 67, at 191.

89. Sherman & Cohen, *supra* note 67, at 205.

90. Kahan, *supra* note 65, at 18 n.96; Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 470 (2007); Sherman & Cohen, *supra* note 67, at 205–06.

91. Kahan, *supra* note 90, at 469–70; Sherman & Cohen, *supra* note 67, at 208–10.

92. Kunda, *supra* note 73, at 480 (noting that motivation plays a role in determining which cognitive processes to use); *id.* at 493 (arguing that motivated reasoning operates, in part, by activating cognitive biases).

93. Serena Chen et al., *Motivated Heuristic and Systematic Processing*, 10 PSYCHOL. INQUIRY 44 (1999).

a conclusion that favors their directional goals,<sup>94</sup> and there is experimental evidence that the effect of cognitive biases is strongest when people are pursuing directional goals.<sup>95</sup>

## 2. Cognitive Biases

The rest of this section discusses three particular cognitive biases that appear to influence how affected populations perceive international criminal courts: heuristics, cognitive dissonance,<sup>96</sup> and confirmation bias.<sup>97</sup> However, it must be remembered that these cognitive biases do not operate in a vacuum. Rather, there is reason to believe that they are operating—most likely subconsciously<sup>98</sup>—to bias decision making in favor of a particular goal. In this sense, their collective use constitutes a form of motivated reasoning.<sup>99</sup> How these motivational and cognitive biases affect perceptions of the legitimacy of international criminal courts will be referred to as the social psychology model, and this model will be used to make and test predictions about how affected populations perceive courts.

### a. Heuristics

It is undisputed that people do not need to understand an entity to form an attitude toward it. Indeed, people often form attitudes toward entities about which they have relatively little information.

94. See, e.g., *id.* at 45 (arguing that threats to self-esteem can cause us to selectively use heuristics over systematic processing because use of heuristics biases the result in favor of the desired conclusion—affirmation of our self-esteem).

95. See *supra* note 71.

96. While cognitive dissonance is treated in this Article as a cognitive bias, it has been suggested by some researchers that it is actually a specialized form of motivated reasoning. See, e.g., Kunda, *supra* note 73, at 491; Sherman & Cohen, *supra* note 67, at 201. While it is true that motivated reasoning can increase the effect of cognitive dissonance, this Article will follow the majority of researchers that have treated it as a separate cognitive bias. Having said that, there are obvious similarities between self-defensive reasoning and how cognitive dissonance is thought to operate in response to threats to the self. See *supra* text accompanying notes 85–91, *infra* notes 114–19 and accompanying text.

97. There are, of course, lots of other psychological processes that affect our decision making, including, for example, construal theory. See Gilovich & Griffin, *supra* note 66, at 570–71 (describing construal theory). However, due to space limitations, this Article will confine itself to the subset of psychological processes that seems most useful in explaining perceptions of international criminal courts.

98. See *supra* note 81.

99. The way in which these cognitive and motivational biases influence populations affected by violence appears to be a form of what Professor Kahan calls “cultural cognition,” which he defines as the tendency of individuals to conform their beliefs to those of their culture and their culture’s worldview. Kahan, *supra* note 65, at 23–24.

This is done through the use of “heuristics.” When confronted with complex decisions or limited information, people often rely upon mental shortcuts, referred to as heuristics, to come to a decision without going through the time-consuming and difficult process of obtaining and evaluating the evidence.<sup>100</sup> Thus there is no reason to believe that everybody who has an attitude toward an international criminal court will understand it. In fact, there is good reason to believe the opposite is true—that most people in an affected population have an attitude toward their court despite knowing almost nothing about it.

Evaluating the work of an international criminal court is a complicated and difficult task that involves consideration of its negotiating history, constitutive documents, rules of procedure and evidence, and decisions, among other things. This is not an easy task, even for people that are already experts in international criminal law. Thus, one would not expect most people in an affected population to form a belief about whether a particular court is legitimate by evaluating factors like the court’s institutional structure, its procedural rules, or the process by which it was created.<sup>101</sup> And indeed, the evidence demonstrates that the majority of people in affected populations have definite opinions about the legitimacy of tribunals despite having very little concrete knowledge about them.<sup>102</sup> Despite suggestions to the contrary,<sup>103</sup> this level of ignorance

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100. See Shafir & LeBoeuf, *supra* note 66, at 492–93. See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982). Shafir and LeBoeuf point out that our reliance on heuristics can result in systematic biases and errors that cause people to deviate significantly from a rational ideal. Shafir & LeBoeuf, *supra*. Heuristics are not all bad, however. They serve a useful purpose in many situations by allowing us to conserve cognitive resources. Gilovich & Griffin, *supra* note 66, at 566 (noting that people are motivated to minimize the amount of effort they devote to information processing and thus prefer information processing models that require less effort over those that require more effort); see also Chen et al., *supra* note 93, at 44–45 (noting that people are cognitive misers and that we prefer to use the least effort necessary to achieve our goals, which in many cases means preferring the use of heuristics over more systematic information processing).

101. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 119 (2007); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1312 (2003); see also Human Rights Ctr. & Ctr. for Human Rights, *supra* note 37, at 140 (noting that even judges and lawyers in the former Yugoslavia knew very little about the ICTY).

102. See ORENTLICHER, *supra* note 39, at 88 (noting that in 2005, 72 percent of Serbs indicated they knew “little” or “very little” about the ICTY); see also Timothy Longman, *The Domestic Impact of the International Criminal Tribunal for Rwanda*, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 33, 37 (Steven R. Ratner & James L. Bischoff eds., 2004) (finding that only 11 percent of respondents claimed to be informed or well-informed about the ICTR); *infra* note 185 (noting that very few Sierra Leoneans have a good understanding of what the SCSL does or how it operates); *infra* note 217 (noting that 15 percent of Cambodians indicated that they had “moderate” or better knowledge of the ECCC but that only 3 percent of respondents

is neither surprising nor something that we should expect to change. Given the complexity of both international criminal courts and international criminal law, and the nature of human decision making, it is virtually a foregone conclusion that most people in an affected population will have opinions about such courts without understanding them in any detail.

This demonstrates that most people cannot be forming their opinions about international criminal tribunals based on a direct evaluation of the factors that most commentators suggest influence perceptions of courts.<sup>104</sup> Of course, people might still be influenced by these factors indirectly if the things that do influence their opinions are themselves based on these factors. For example, if people formed their opinions about courts based on the advice of experts who based their own conclusions on factors such as how the court was created, its institutional structure, or its procedures, then opinions within the affected population could be driven by those factors even though most of the affected population was unaware of them. However, this does not appear to be the case. As the next section demonstrates, in certain common circumstances, the manner in which a court is perceived is largely a function of whom it indicts and whether that indictment contradicts dominant narratives within large sections of the affected population.

#### b. Cognitive Dissonance

Cognitive dissonance theory<sup>105</sup> offers an explanation as to why some affected populations might perceive a tribunal as biased and

could correctly identify the five individuals who had been charged by the court); *infra* note 240 (noting that only 4 percent of respondents indicated that they were “well informed” about the Regulation 64 Panels in Kosovo). This result is not unique to international criminal courts, and a similar effect is present in the United States. For example, most Americans have strong opinions about the Supreme Court despite knowing very little about it. See Kahan, *supra* note 65, at 6 n.21, 29 n.147.

103. See, e.g., Ramji-Nogales, *supra* note 1, at 37 (suggesting that a relatively low literacy rate and lack of access to information about the court may have led to citizens’ lack of understanding of the Special Court for Sierra Leone).

104. See *supra* notes 13–18 (listing the factors that most commentators believe influence perceptions of international criminal courts).

105. The operation of cognitive dissonance was first demonstrated in the 1950s by Leon Festinger. E.g., Festinger & Carlsmith, *supra* note 72, at 209. Dissonance theory has subsequently been described as “the most important single development in the history of social psychology.” Elliott Aronson, *Back to the Future: Retrospective Review of Leon Festinger’s “A Theory of Cognitive Dissonance,”* 110 AM. J. PSYCHOL. 127, 129 (1997) (book review). It remains a vigorous field of psychological research. See, e.g., Louisa C. Egan et al., *The Origins of Cognitive Dissonance: Evidence from Children and Monkeys*, 18 PSYCHOL. SCI. 978 (2007) (demonstrating that children and nonhuman primates change their current preferences to match their previous behaviors). *But see* Daryl J. Bem, *Self-Perception: An Alternative Interpretation of*

unjust without considering whether it is actually biased and unjust.<sup>106</sup> Cognitive dissonance is the uncomfortable feeling caused by simultaneously having conflicting thoughts or beliefs.<sup>107</sup> People are motivated to reduce dissonance through various dissonance reduction strategies, including attitude change, the addition of consonant cognitions, diminishing the importance of the dissonant cognitions, repression of the dissonant cognition, passive forgetting, misattribution of the dissonance, self-affirmation, and attitude bolstering.<sup>108</sup>

In the case of the ICTY, this Article posits that cognitive dissonance operated in the following way among many ethnic Serbians. The dominant internal narrative of ethnic Serbians immediately after the conflict in the Balkans is best described as “we were not responsible.”<sup>109</sup> The ICTY charged large numbers of ethnic

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*Cognitive Dissonance Phenomena*, 74 PSYCHOL. REV. 183, 196–97 (1967) (arguing that most of the early studies purporting to demonstrate cognitive dissonance “could be accounted for without postulating an aversive motivational drive”). Bem’s alternative explanation for the phenomena of cognitive dissonance studies has not stood the test of time. See Andrew J. Elliot & Patricia G. Devine, *On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort*, 67 J. PERSONALITY & SOC. PSYCHOL. 382, 390 (1994) (“The present pattern of data does not support the alternative hypothesis based on self-perception theory.”); Eddie Harmon-Jones et al., *Evidence that the Production of Aversive Consequences Is Not Necessary to Create Cognitive Dissonance*, 70 J. PERSONALITY & SOC. PSYCHOL. 5, 11, 13 (1996) (arguing that self-perception theory cannot adequately explain the results of dissonance experiments).

106. And also without regard to any of the factors that scholars say should drive perceptions of the legitimacy of international criminal courts. For a discussion of these factors, see *supra* notes 13–18.

107. To put it in more technical terms: “The term *cognitive dissonance* describes a psychological state in which an individual’s cognitions—beliefs, attitudes, and behaviors—are at odds. People experience cognitive dissonance as aversive, and are motivated to resolve the inconsistency between their discrepant cognitions.” Egan, *supra* note 105, at 978 (citations omitted). Other definitions are similar. See, e.g., Elliot & Devine, *supra* note 105, at 382 (“[T]he perception of an inconsistency among an individual’s cognitions generates a negative interpersonal state (dissonance), which motivates the individual to seek and implement a strategy to alleviate this aversive state.”).

108. Elliot & Devine, *supra* note 105, at 390–91; see also Bertram Gawronski & Fritz Strack, *On the Propositional Nature of Cognitive Consistency: Dissonance Changes Explicit but Not Implicit Attitudes*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 535, 536 (2004) (arguing that individuals reduce dissonance between two or more propositions “either by explicitly rejecting one proposition as being false or by finding an additional proposition that resolves the inconsistency”); Jeff Stone & Joel Cooper, *A Self-Standards Model of Cognitive Dissonance*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 228, 231–32 (2001) (describing competing theories of the self in the cognitive dissonance process).

109. See *supra* notes 37–44 and accompanying text. Denial of responsibility is itself a dissonance reduction mechanism. Patrick Gosling et al., *Denial of Responsibility: A New Mode of Dissonance Reduction*, 90 J. PERSONALITY & SOC. PSYCHOL. 722, 722 (2006). So, for example, ethnic Serbs confronted with evidence of the



Serbian, including many Serbian cultural and political elites, with serious violations of international criminal law and attributed responsibility for the worst atrocities primarily to Serbians.<sup>110</sup> In effect, the ICTY said, “Serbians were responsible.” This directly contradicted the “we were not responsible” narrative and induced cognitive dissonance. This cognitive dissonance caused mental discomfort for ethnic Serbians, which they were motivated to reduce. They reduced the dissonance by rejecting the ICTY’s attribution of responsibility. This rejection was rationalized by an attitude change in that they perceived the ICTY as being anti-Serb and biased.<sup>111</sup> If the ICTY was biased and unreliable, its accusations against Serbs could be discounted and the dissonance and accompanying mental discomfort were reduced.

This reasoning is consistent with our understanding of cognitive dissonance. First, not all inconsistent cognitions give rise to cognitive dissonance. Inconsistent cognitions have to produce affective feelings—essentially an emotional reaction<sup>112</sup>—before cognitive dissonance will occur.<sup>113</sup> However, people generally have very favorable self-views and are protective of their self-views.<sup>114</sup> Consequently, cognitions that are inconsistent with one’s self-concept can produce powerful cognitive dissonance.<sup>115</sup> Social identity,

commission of atrocities by other ethnic Serbs could reduce the cognitive dissonance this evidence would likely produce by rejecting responsibility for the atrocities. Indeed, there is widespread evidence in public opinion surveys that ethnic Serbs did deny responsibility for atrocities committed by other Serbs. *See supra* notes 39–44. There is also evidence that this tendency is a more or less universal aspect of human nature. *See infra* Part IV.A.

110. *See supra* notes 47–49 and accompanying text.

111. *See, e.g.*, Human Rights Ctr. & Ctr. for Human Rights, *supra* note 37, at 146 (concluding that ethnic Serb lawyers and judges in Bosnia labeled the ICTY “political” and biased, in part, to “delegitimize the Tribunal” and “dismiss its judgments as the result of a legal charade”).

112. Technically, affective feelings are “valenced subjective experiences that may or may not be directly related to an object,” and usually take the form of “moods, emotions and other affective experiences.” Rainer Greifeneder et al., *When Do People Rely on Affective and Cognitive Feelings in Judgment? A Review*, 20 *PERSONALITY & SOC. PSYCHOL. REV.* 107, 108 (2010).

113. Dolores Albarracín & Patrick Vargas, *Attitudes and Persuasion: From Biology to Social Responses to Persuasive Intent*, in *HANDBOOK OF SOCIAL PSYCHOLOGY*, *supra* note 86, at 394, 417.

114. David C. Matz & Wendy Wood, *Cognitive Dissonance in Groups: The Consequences of Disagreement*, 88 *J. PERSONALITY & SOC. PSYCHOL.* 22, 23 (2005); William B. Swann & Jennifer K. Bosson, *Self and Identity*, in *HANDBOOK OF SOCIAL PSYCHOLOGY*, *supra* note 86, at 580, 592; *see also supra* text accompanying notes 86–88.

115. *See* Aronson, *supra* note 105, at 131 (“In my judgment, dissonance is greatest and clearest when what is involved is not just any two cognitions but, rather, a cognition about the self and a piece of our behavior that violates that self-concept.”). Obviously, motivated reasoning also plays a role here. People are motivated to protect their sense of self, including their group identity, and thus are motivated to reach an

meanwhile, is very important to one's self-concept.<sup>116</sup> Thus, statements that were inconsistent with the dominant internal narrative within the ethnic Serb community were treated as attacks on Serbian social identity and thus on self-views, which produced the affective feelings necessary for the activation of cognitive dissonance.<sup>117</sup>

It is important that each of the main ethnic groups in the former Yugoslavia identified strongly with one of the sides in the conflict.<sup>118</sup> Thus, ethnic Serbs identified very strongly with the Serb "side" in the conflict, and the majority of them treated the indictment of Serbian political and military leaders by the ICTY as an attack on ethnic Serb identity.<sup>119</sup> Had ethnic Serbs not identified strongly with the Serb "side" in the conflict, the indictment of Serb political and military leaders might not have been treated as an attack on Serbian ethnic identity.<sup>120</sup> If that were the case, they would probably not have produced the affective feelings necessary to induce cognitive dissonance.<sup>121</sup>

Second, the mechanism of dissonance reduction identified above is consistent with what we know of cognitive dissonance. The dissonance occurs because of the conflict between the internal Serbian narrative of "we were not responsible" and the ICTY's assertion of responsibility. There are two obvious ways that this dissonance could be reduced. One is to rationalize the ICTY as anti-Serb and unreliable and therefore reject the ICTY's attribution of

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outcome that is consistent with protecting their sense of self. In effect, cognitive dissonance is the mechanism by which motivated reasoning occurs.

116. Demis E. Glasford et al., *Intragroup Dissonance: Responses to Ingroup Violation of Personal Values*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1057, 1058 (2008).

117. Dissonance may be created by the behavior of groups to which one belongs because individuals derive part of their self-concept from group membership. *Id.*; see also Michael J. Wohl & Nyla R. Branscombe, *Forgiveness and Collective Guilt Assignment to Historical Perpetrator Groups Depend on Level of Social Category Inclusiveness*, 88 J. PERSONALITY & SOC. PSYCHOL. 288, 288 (2005) (noting that even remembering transgressions committed against a group decades or centuries before can provoke intense emotional responses in group members); *supra* text accompanying notes 90–91.

118. See *supra* note 35.

119. Several of the sources cited above include very defensive statements by ethnic Serbs that treat the ICTY's prosecution of Serb leaders as a direct attack on what it means to be Serbian. See, e.g., Tonicic, *supra* note 41 ("The process against Milosevic is scandalous. It's another attempt to portray the Serbian people as prone to genocide.").

120. See Daniel Bar-Tal et al., *A Sense of Self-Perceived Victimhood in Intractable Conflicts*, 91 INT'L REV. RED CROSS 229, 234–35 (2009) (noting that whether group members feel distress or a sense of victimization from the suffering of other group members depends largely on whether they identify strongly with the group).

121. This issue is explored further in the context of the Special Court for Sierra Leone. See *infra* notes 208–18 and accompanying text.

responsibility; the other would be to accept that Serbs did bear significant responsibility for the crimes charged at the ICTY. Either change would eliminate the inconsistency between the cognitions. However, people are very protective of their positive self-views, and strongly endorsed attitudes are highly resistant to dissonance-related attitude change.<sup>122</sup> Thus one would not expect the “we were not responsible” narrative to change in response to cognitive dissonance, and studies have shown that a large percentage of ethnic Serbs continue to believe that Serbs did not commit any crimes during the Balkan conflict.<sup>123</sup> On the other hand, one would not expect many ethnic Serbs to be heavily invested in the legitimacy of the ICTY. Consequently, one would predict that attitudes to the ICTY would be more likely to change in response to the dissonance than Serbian self-views. And indeed, attitudes toward the ICTY among ethnic Serbs were extremely negative.

Two possible criticisms of this theory might be: (1) cognitive dissonance cannot be activated by perceived attacks on one’s social identity and (2) most Serbs did not anticipate any direct adverse consequences of the ICTY’s position and thus were not sufficiently motivated to engage in cognitive dissonance. However, neither criticism withstands scrutiny. Much dissonance research has taken place using a forced compliance model, which has generally involved forcing people to act inconsistently with their beliefs to cause dissonance. However, an act is not necessary for cognitive dissonance, which can result solely from the receipt of external information that produces inconsistent cognitions.<sup>124</sup> Furthermore, one does not have to anticipate any adverse consequences from inconsistent cognitions to experience dissonance and subsequent attitude change.<sup>125</sup> Simply possessing inconsistent cognitions can result in dissonance.<sup>126</sup> Thus, our current understanding of cognitive dissonance can explain why ethnic Serbs tended to view the ICTY negatively.

Another potential problem with this theory in the ICTY context is that cognitive dissonance occurs at the individual level (and is generally studied at the individual level), but this Article is concerned primarily with effects at the group level. Nevertheless, recent research into the effects of cognitive dissonance on group beliefs suggests that group dynamics might reinforce initial negative perceptions. First of all, group attitudes are affected by cognitive dissonance, and interacting with a group member that has opposing

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122. Elliot & Devine, *supra* note 105, at 387; Glasford et al., *supra* note 116, at 1060.

123. *See supra* notes 39–43 and accompanying text.

124. Harmon-Jones et al., *supra* note 105, at 14.

125. *Id.* at 9, 11, 13–14.

126. *Id.*

viewpoints can cause dissonance and invoke dissonance-reduction strategies.<sup>127</sup> In other words, if your views are different from the group, cognitive dissonance can cause your attitudes to change so that they are more consistent with those of the group.<sup>128</sup> This suggests an explanation for how initial negative perceptions might tend to propagate through an affected population. If most of one's neighbors, friends, coworkers, and family members perceive the court negatively, then you are more likely to do the same as a dissonance reduction method. This effect would operate alongside the dissonance caused by the ICTY's perceived attack on Serbian ethnic identity.

The widespread use of heuristics might also compound an initial negative perception induced by cognitive dissonance, or propagate that negative perception to group members that were not initially affected by cognitive dissonance.<sup>129</sup> Common heuristics include sampling the views of our associates and deferring to the opinion of experts we trust.<sup>130</sup> We tend to associate with and trust those who share our cultural outlook,<sup>131</sup> and we tend to impute credibility to putative experts that share our cultural outlook.<sup>132</sup> Thus, it comes as no surprise that group membership influences the values of the group's members.<sup>133</sup>

Most ethnic Serbs would probably be motivated to find a reason to reject the ICTY's attribution of responsibility and preserve their social identity. At the same time, most ethnic Serbs would not have made (nor would they have been able to make) an independent evaluation of the legitimacy of the ICTY.<sup>134</sup> Instead, they are likely to have relied on the opinions of those they trust, including friends, family, neighbors, and "experts" who share their cultural outlook,

127. Matz & Wood, *supra* note 114, at 27, 29.

128. Of course, this is not always the case. If an individual's identification with the group is low but their identification with their own contrary view is high, then the dissonance might be reduced by lowering one's identification with the group rather than changing one's attitude. Glasford et al., *supra* note 115, at 1060. However, the number of ethnic Serbs that identified more strongly with the ICTY than with their own ethnic identity seems likely to have been small. *See supra* Part II.A.

129. Heuristics are also discussed *supra* Part II.B.2.a.

130. Kahan, *supra* note 101, at 119.

131. Kahan & Braman, *supra* note 101, at 1314; *see also* Matz & Wood, *supra* note 114, at 35 ("Attitudinal homogeneity is a natural state of many real-world groups because of self-selection processes in group formation, especially the tendencies to form relationships with similar others and with others who are in close physical proximity and thus are subject to similar external forces.").

132. Kahan, *supra* note 101, at 121.

133. *Id.* at 120–21 ("Individuals generally conform their beliefs to those held by their associates—both because those are the persons from whom they obtain most of their information and because those are the ones whose respect they most desire.").

134. ORENTLICHER, *supra* note 39, at 88 (noting that in 2005, 72 percent of Serbs indicated they knew "little" or "very little" about the ICTY).

most of whom are likely to be other ethnic Serbs.<sup>135</sup> This would create an “echo chamber” effect where initial negative perceptions of the ICTY were reflected back by associates and elites. Indeed, there is widespread evidence that Serb political, cultural, and media elites vilified the ICTY.<sup>136</sup> In this way, a widespread reliance on heuristics could reinforce initial negative perceptions.<sup>137</sup>

Ultimately, it is hard to reconcile Serb attitudes and the evidence produced by the trials at the ICTY without invoking some decidedly biased thought process. Nearly 40 percent of ethnic Serbs apparently believe that no Serb committed crimes during the Balkan conflict despite the overwhelming evidence of Serb involvement in crimes, including many confessions by Serb perpetrators.<sup>138</sup> This disconnect can only be explained by a powerful nonobjective process, and the combination of motivated reasoning, heuristics, and cognitive dissonance is a plausible explanation.<sup>139</sup> Believing that the ICTY was biased and anti-Serb became a mechanism by which the dominant internal narrative within the Serb population was preserved. The result was negative perceptions of the legitimacy of the ICTY.

135. See Klarin, *supra* note 38, at 90 (“Public perception [of the ICTY] is influenced to a much greater extent by the views of the local political, academic and cultural elites . . . and by the manner in which the local media depict proceedings . . .”); see also Human Rights Ctr. & Ctr. for Human Rights, *supra* note 37, at 140 (noting that legal professionals in the former Yugoslavia reported receiving virtually all information about the ICTY from local sources despite being aware that those local sources were biased by their ethnic orientation).

136. Anti-ICTY feelings were encouraged by Serb politicians, some of whom had already been indicted by the ICTY. See ORENTLICHER, *supra* note 39, at 11–12 (describing the anti-ICTY sentiment of nationalist leader Slobodan Milosevic and his immediate successor Vojislav Kostunica); Klarin, *supra* note 38, at 90–91 (noting the influence of Serbian military and political elites in the shaping of public perception of the ICTY).

137. The use of heuristics would not necessarily create negative perceptions of international criminal courts among affected populations. Indeed, in an affected group that is predisposed to view the court positively, like ethnic Bosniaks, one would expect that relying on the views of associates and trusted experts would tend to reinforce positive perceptions of the court.

138. See *infra* notes 346–50. On the other hand, not all Serbs deny the evidence of crimes. Polls have shown that roughly half of Serbs agree that massacre at Srebrenica took place and that 43 percent thought it was a crime. Klarin, *supra* note 38, at 93. Moreover, acceptance of Serb responsibility appears to be growing slowly over time. ORENTLICHER, *supra* note 39, at 87. But Srebrenica is one of the most serious and well documented atrocities. Ethnic Serbs were much less likely to acknowledge that Kosovo Albanians were the victims of crimes in the run-up to the NATO bombing of Serbia, with only 14 percent of ethnic Serbs believing that crimes had occurred. Klarin, *supra* note 38, at 93.

139. It cannot be explained by simple ignorance of what happened during the conflict as Serb knowledge of the conflict is highly selective in nature. Polls have shown that huge majorities (between 75 and 90 percent) of ethnic Serbs are aware of and believe that crimes were committed against ethnic Serbs during the conflict. Klarin, *supra* note 38, at 93.

Perceptions of the ICTY in the former Yugoslavia are driven to a large degree by whom the court indicts and whether these indictments contradict the dominant internal narratives within the various affected populations.<sup>140</sup> The fundamental problem appears to be a mismatch between the dominant internal narrative within the Serb community and what actually happened in the former Yugoslavia. It is this mismatch that led to negative perceptions of the ICTY among ethnic Serbs when the court overwhelmingly indicted Serbians.<sup>141</sup> This suggests that courts will not be able to achieve a positive perception among groups that perceive them negatively until the mismatch can be eliminated. In practice, this means that courts will not be perceived in a positive light until group members accept responsibility for crimes committed by their group during the conflict.<sup>142</sup>

c. Confirmation Bias

When courts are identified as suffering from negative perceived legitimacy among affected populations, the suggested remedy is often more and better outreach.<sup>143</sup> For example, the ICTY did little or no outreach work in Serbia until 1999, despite the fact that Serbian media was filled with lies and distortions about the work of the ICTY.<sup>144</sup> Those who have criticized the ICTY for poor perceptions of

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140. This, more than anything else, explains why

positive attitudes toward the ICTY have tended to correlate with the degree to which the ICTY has prosecuted perpetrators who committed atrocities against members of the survey respondents' own ethnic communities and to correlate negatively with the degree to which subjects prosecuted by the ICTY come from respondents' ethnic group.

ORENTLICHER, *supra* note 39, at 49; *see also* deGuzman, *supra* note 1, at 1446–49 (noting that perceptions of legitimacy among affected populations are likely to be driven by decisions about who to indict).

141. *See* Human Rights Ctr. & Ctr. for Human Rights, *supra* note 37, at 147–148 (noting that ethnic Croats and Serbs in Bosnia viewed themselves as victims but the international community viewed them as aggressors, and that the “disparity” in these viewpoints led to negative attitudes toward the ICTY when its prosecutorial strategy validated the international position).

142. This point is addressed in more detail *infra* Part IV.C–E.

143. *See* Higonnet, *supra* note 6, at 423–26 (arguing that the ICTY did not place enough emphasis on outreach); Ramji-Nogales, *supra* note 1, at 28 (suggesting that negative perceptions of the ICTY and ICTR were the result of lack of knowledge about the tribunals); Stromseth, *supra* note 7, at 268–69, 274 (arguing that a lack of outreach, failure to indict particular leaders, and limited contributions to building domestic judicial capacity undercut the legitimacy of the ICTY).

144. *See* ORENTLICHER, *supra* note 39, at 95–96 (noting that delayed outreach efforts made it more difficult to dismantle well-established misperceptions and propaganda); Klarin, *supra* note 38, at 96 (suggesting that the ICTY's Outreach

legitimacy among ethnic Serbs have sometimes suggested that the solution should have been a robust ICTY outreach program in Serbia from the very beginning.<sup>145</sup> Underlying these arguments is a belief that negative perceptions of a court are driven by lack of impartial information and that outreach can educate the population and improve perceptions of the court.<sup>146</sup> However, as the discussion above indicates, the problem is not lack of impartial information, and, as this section illustrates, simply providing more information about how the court works is not likely to be the solution.

Confirmation bias<sup>147</sup> refers to the tendency for people to search for, interpret, and remember information in a way that systematically impedes their ability to reject a preexisting hypothesis.<sup>148</sup> In other words, under certain circumstances people tend to search for, recall, and interpret information in a way that has a tendency to confirm their existing beliefs.<sup>149</sup> The effect is stronger when the preexisting

Programme implemented in 1999 was ill-equipped to combat the powerful propaganda machines already in place).

145. See, e.g., Stromseth, *supra* note 7, at 274 (“If the ICTY had provided Serbs with a clearer idea of its operations and purpose, early on, they might have been less prone to view the tribunal so skeptically.”).

146. See Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1043–44 (2005) (arguing that the ICTY’s outreach efforts were predicated on the belief that “citizens would be more supportive of the court if they understood how the court worked as an adjudicative body”). She notes that this approach failed to acknowledge that many people rejected the court’s work because of its indictments against individuals with whom they shared an ethnic identity, rather than because of lack of information. *Id.* at 1044.

147. While some researchers treat confirmation bias as only the study of whether people selectively search for information and assign other names to the selective interpretation and remembrance of information, this Article will follow those who have used the term confirmation bias to refer generally to all three processes. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998) (“Confirmation bias has been used in the psychological literature to refer to a variety of phenomena. Here I take the term to represent a generic concept that subsumes several more specific ideas that connote the inappropriate bolstering of hypotheses or beliefs whose truth is in question.”).

148. Margit E. Oswald & Stefan Grosjean, *Confirmation Bias*, in COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT AND MEMORY 79, 79 (Rudiger Pohl ed., 2004).

149. See generally Nickerson, *supra* note 147, at 177 (“A great deal of empirical evidence supports the idea that the confirmation bias is extensive and strong and that it appears in many guises.”). Nickerson goes on to summarize that empirical evidence. *Id.* at 177–89. In contrast, Oswald and Grosjean offer a critique of the existing literature on confirmation bias and suggest that the evidence for it is not strong where people are exposed to a neutral hypothesis or where the costs of being wrong are particularly high. Oswald & Grosjean, *supra* note 148, at 81–90. They also argue that a positive test strategy is often the most effective one, even if it does under certain circumstances lead to confirmation bias (for example, where the true answer is a subset of the hypothesis being tested). *Id.* at 88–90; see also Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211, 218–20 (1987) (arguing that positive test strategies are often a

belief relates to an issue that has a strong affective response.<sup>150</sup> Thus, one would expect confirmation bias to occur when studying perceptions of international criminal courts because of the strong affective feelings produced by indictments among members of the affected population that identify with the indictees.<sup>151</sup>

Biased assimilation of new information is also particularly strong when the belief under challenge is one that is predominant within a group.<sup>152</sup> This biased processing of information may in part be a result of cultural or social groups acting as a de facto filter of the information that group members receive.<sup>153</sup> If the source of the new information is someone perceived to hold cultural commitments contrary to one's own, then there is intense pressure to reject that information.<sup>154</sup> Thus, one would predict that confirmation bias would affect perceptions of the legitimacy of international criminal courts in situations where affected groups have dominant internal narratives about responsibility for the conflict that are at odds with the court's attribution of responsibility. In short, there is good reason to believe that confirmation bias will affect how affected populations perceive international criminal courts.<sup>155</sup>

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useful heuristic device and not evidence of a negative confirmation bias). Nevertheless, Oswald and Grosjean concede that studies have shown the existence of confirmation bias in situations where confirmation of a preexisting hypothesis will result in positive emotions and the cost of being wrong is low. Oswald & Grosjean, *supra* note 148, at 90–93. Opinions about international criminal courts seem to be such a situation. Confirmation of preexisting negative (or positive) perceptions of the court is associated with positive emotions (confirming “we are not responsible” or “we were the victims” respectively) and being wrong about the court has a low cost, particularly in a situation where most people one knows share the same opinion about the court.

150. Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 756–57, 760 (2006). Taber and Lodge also reported stronger confirmation bias among sophisticated participants—those who had the most preexisting knowledge about the subject matter. *Id.* This suggests that “experts” may be particularly susceptible to confirmation bias. See also Shafir & LeBoeuf, *supra* note 66, at 502 (noting that experts are just as prone to information processing errors as nonexperts).

151. See *supra* notes 120–23.

152. Kahan, *supra* note 101, at 123.

153. See Nickerson, *supra* note 147, at 199 (“People tend to associate, on a long-term basis, with people who think more or less as they do on matters important to them; they read authors with whom they tend to agree, listen to news commentators who interpret current events in a way that they like, and so on.”).

154. Kahan, *supra* note 101, at 122.

155. Of course, not everyone exhibits confirmation bias. For example, in Wason's seminal study of confirmation bias, six of his twenty-nine subjects guessed the correct rule on the first try and also exhibited a statistically significant use of negative testing strategies to falsify their original hypothesis. Wason, *supra* note 68, at 138. In addition, not everyone who exhibits confirmation bias does so to the same degree. Taber & Lodge, *supra* note 150, at 765–67.



There is an obvious connection between confirmation bias and cognitive dissonance, as both may be the result of motivated reasoning.<sup>156</sup> In cognitive dissonance, when an individual is confronted with inconsistent cognitions, he or she tries to preserve the preferred belief, which often results in an attitude change about the disfavored belief that permits the dissonance to be reduced.<sup>157</sup> In the context of this Article, that usually means concluding that a court is unfair or biased as a means to reject the court's attribution of responsibility for atrocities. Confirmation bias can also be the result of motivated reasoning. If an individual is motivated to believe that an international criminal court is biased or unfair, then that individual will selectively review, interpret, and remember information about the court in a way that tends to confirm or even strengthen the negative attitude toward the court. Thus, information that one would expect to undermine the belief that a court is biased (evidence that ethnic Serbs were responsible for atrocities or evidence that the trials at the ICTY were fair) is ignored, discounted, forgotten, or treated as if it supports the belief that the court is biased. As a result, confirmation bias may make it very difficult to overcome the initial negative predisposition. The usual prescription—more and better outreach to counter misperceptions of the work of the court—might not make things better and might actually make things worse, as the example of the ICTY demonstrates.

Confirmation bias results in three principal effects, each of which will be discussed below: (1) attitude polarization, (2) the primacy effect, and (3) belief perseverance. First, attitude polarization occurs when exposure to evidence that does not support one's belief actually strengthens the preexisting belief.<sup>158</sup> This effect appears to be more pronounced when the issue is one that has a strong affective response.<sup>159</sup> There is some evidence of attitude polarization in the former Yugoslavia. Two surveys in 2003 and 2004 assessed the impact of exposure to ICTY trials on ethnic Serbs. While the number

156. See Nickerson, *supra* note 147, at 176 ("People may treat evidence in a biased way when they are motivated by the desire to defend beliefs that they wish to maintain."); *supra* notes 92–95.

157. See *supra* text accompanying notes 107–08.

158. One famous study found that exposure to an equal mix of supportive and nonsupportive evidence actually strengthened an individual's belief in a preexisting hypothesis. Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099, 2105–08 (1979); see also Oswald & Grosjean, *supra* note 148, at 89–90 (describing Lord's 1979 study and discussing the process of differential weighing conducted by individuals who have a preexisting hypothesis and who are confronted with new data); David P. Redlawsk, Andrew J. W. Civettini & Karen M. Emmerson, *The Affective Tipping Point: Do Motivated Reasoners Ever "Get It"?*, 31 POL. PSYCHOL. 563, 578–79 (2010).

159. Taber & Lodge, *supra* note 150, at 765–67.

of people who changed their minds after watching ICTY proceedings was small in both surveys, large majorities of those who did change their minds ended up holding more negative views of the court.<sup>160</sup> This is what we would expect from attitude polarization.

Second, confirmation bias can also cause people to treat information received earlier as more important than information received later.<sup>161</sup> This is called the primacy effect. To put it another way, the primacy effect demonstrates that first impressions really do color the way in which people interpret the evidence that supports a proposition. The primacy effect would thus favor retention of the initial negative perception. The obvious evidence of the primacy effect in this case is that Serb attitudes toward the ICTY have remained largely unchanged over the ICTY's lifetime, despite evidence that should have undermined that negative attitude.

Third, belief perseverance occurs when a belief persists even after the evidence supporting that belief has been conclusively demonstrated to be false.<sup>162</sup> Belief perseverance could cause negative perception of the ICTY to persist even in the face of overwhelming evidence that the court was largely fair and just. There is ample evidence of belief perseverance in Serbian attitudes toward responsibility for crimes committed in the former Yugoslavia, as a significant minority of Serbs continues to believe that Serbs were not responsible for any crimes despite overwhelming evidence that this is not true.<sup>163</sup>

All of this is consistent with what one would expect from confirmation bias. In this context, it seems unlikely that any amount of well-planned outreach would have been able to cause a positive perception of the ICTY among ethnic Serbs, at least during its lifespan.<sup>164</sup> Thus, while it is true that the ICTY was slow to begin an

160. ORENTLICHER, *supra* note 39, at 88 n.407.

161. See Nickerson, *supra* note 147, at 187 ("People often form an opinion early in the process and then evaluate subsequently acquired information in a way that is partial to that opinion.").

162. Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 100, at 129, 146–51; see also Nickerson, *supra* note 147, at 187 (surveying studies demonstrating a "primacy effect" (when individuals overweight familiar information) and explaining its close relationship to "belief persistence" (when individuals resist changing familiar beliefs)).

163. *Supra* notes 39–43 and accompanying text.

164. ORENTLICHER, *supra* note 39, at 96–97 (arguing that even an early and robust ICTY outreach program would not have had much impact on Serb perceptions of the court).

outreach program, it does not follow that a much earlier outreach program would have led to a different result.<sup>165</sup>

Of course, not all affected populations will be predisposed to view the tribunal negatively. Some groups will likely be predisposed to view the tribunal positively. In such a situation, confirmation bias effectively works to support positive perceptions. An individual with a positive perception of a court will probably favor information that supports this perception while selectively remembering and interpreting contrary information in a way that minimizes its impact.<sup>166</sup> In effect, courts may have difficulty changing the initial predispositions of the affected groups.<sup>167</sup>

This also casts doubt on the narrative that some courts have been particularly effective at outreach efforts (as measured by perceptions of the tribunal).<sup>168</sup> For example, one would expect Cambodians to view the Extraordinary Chambers in the Courts of Cambodia (ECCC) favorably and for confirmation bias to reinforce that view.<sup>169</sup> Of course, the ECCC also had a robust outreach effort compared to the initial efforts at the ad hoc courts.<sup>170</sup> But it does not

165. A corollary to this point is that if the tribunal cannot have much impact on negative perceptions, then perceptions of legitimacy cannot be a good way to measure the tribunal's success.

166. See *supra* note 147 (discussing the functioning of confirmation bias generally).

167. Of course, there is a limit to the effect of motivated reasoning, confirmation bias and cognitive dissonance. For a discussion of the limits of motivated reasoning, see *infra* Part IV.D.

168. See, e.g., Stromseth, *supra* note 7, at 304–05 (arguing that the SCSL was perceived positively because of its early and systematic outreach efforts).

169. See *infra* Part III.B for a discussion of Cambodian attitudes toward the ECCC.

170. During the ECCC's first trial, that of Kaing Guek Eav (alias Duch), more than 23,000 Cambodians came to watch the trial proceedings. Press Release, Extraordinary Chambers in the Courts of Cambodia, Presentation of Evidence in the "Duch-trial" Concluded (Sept. 17, 2009), available at [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_Press\\_Release\\_17\\_Sep\\_2009\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Press_Release_17_Sep_2009_Eng.pdf). In addition, the ECCC has had a robust public outreach capacity. For example, on March 1, 2010, officials from the ECCC met with more than 7,000 Phnom Penh high school students to increase awareness and understanding of the ECCC among Cambodian students. *7,000 Students and Teachers Briefed About the ECCC*, EXTRAORDINARY CHAMBERS COURTS CAMBODIA (Mar. 3, 2010), <http://www.eccc.gov.kh/en/articles/7000-students-and-teachers-briefed-about-eccc>. This outreach program was done as part of a nationwide program of visits by ECCC officials to schools. The school outreach program is itself part of an even broader outreach program that is described in more detail on the ECCC website. This outreach includes attendance at town hall meetings and bringing people to the ECCC to attend hearings. *32,633 Persons Visited ECCC in 2010*, EXTRAORDINARY CHAMBERS COURTS CAMBODIA (Dec. 30, 2010), [http://www.cambodiatribunal.org/sites/default/files/reports/eccc\\_30\\_dec\\_2010\\_eng.pdf](http://www.cambodiatribunal.org/sites/default/files/reports/eccc_30_dec_2010_eng.pdf). This capacity has been enhanced by cooperation with local NGOs that also engage in public outreach programs. For example, the Documentation Center of Cambodia (DC-Cam), a prominent local NGO, has an ambitious program to help up to 10,000 victims of the

follow that positive perceptions of the ECCC are a direct result of those outreach efforts any more than negative perceptions of the ICTY among ethnic Serbs were a result of the ICTY's lack of outreach efforts. The ECCC may simply be getting credit for something that was going to happen anyway.<sup>171</sup>

### C. Other Factors That Affect Perceived Legitimacy

While this Article argues that under certain circumstances motivational and cognitive biases have a large effect on how affected populations perceive international criminal courts, it is clear that attitudes are not driven entirely by these biases. For example, there have been detailed studies of public perceptions of the ICTY in Serbia by journalists, law professors, and political scientists. They all identify various specific events that have affected perceptions of the ICTY over the years. These events include, among other things: the overthrow of Slobodan Milosević by reformers, NATO's bombing of Serbia in 1999, the potential loss of international aid if Serbia did not hand over ICTY indictees, EU negotiations for Serbian accession, the assassination of Zoran Djindjic in 2003, and video of a Serb paramilitary unit executing Bosniak men at Srebrenica.<sup>172</sup> There is no doubt that these factors affected how the ICTY was perceived, but the magnitude of their effect appears to be much smaller than the effect stemming from motivated reasoning—they had modest impacts on how much the ICTY was disliked but none of them changed the underlying dislike and distrust of the ICTY among ethnic Serbs.

Factors like a court's institutional structure and its outreach efforts seem to have an even smaller effect than political events. For

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Khmer Rouge regime file the necessary paperwork with the court to be formally recognized as civil parties so that they can participate in the proceedings. *History*, DOCUMENTATION CENTER CAMBODIA (DC-CAM), <http://www.dccam.org/#/theorganization/history> (last visited Mar. 1, 2012); *Victim Participation Project (VPA)*, DOCUMENTATION CENTER CAMBODIA (DC-CAM), [http://www.dccam.org/Projects/Tribunal\\_Response\\_Team/Victim\\_Participation/Victim\\_Participation.htm](http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/Victim_Participation.htm) (last visited Mar. 1, 2012). In addition, DC-Cam has outreach programs directed toward communities particularly affected by the Khmer Rouge, like the Cham Muslim communities. See, e.g., Farina So, *Website Development: Building Bridges Between the Cambodian Cham Muslim Community and the Rest of the World*, DOCUMENTATION CENTER CAMBODIA (DC-CAM), [http://www.dccam.org/Projects/Public\\_Info/Building\\_Bridges\\_Between.htm](http://www.dccam.org/Projects/Public_Info/Building_Bridges_Between.htm) (last visited Mar. 1, 2012) (describing website outreach program concerning the Cham Muslim communities).

171. In fact, the positive perceptions of the ECCC seem to exist despite evidence that suggests a lack of moral and legal legitimacy in some areas. See *infra* Part III.B (discussing political interference by the Cambodian government in the decision making of Cambodian judges at the ECCC).

172. See ORENTLICHER, *supra* note 39, at 30–51, 65, 103–06; Klarin, *supra* note 38, at 91–94; Shaw, *supra* note 38, at 15, 20.

example, none of the above analyses of Serb attitudes toward the ICTY placed great emphasis on institutional structure or outreach efforts in explaining perceptions of the ICTY. Indeed, there are both theoretical and empirical reasons to believe that factors like institutional structure and outreach efforts do not have much impact on attitudes toward international criminal courts.<sup>173</sup> In short, while there are undoubtedly many factors that affect how affected populations perceive a tribunal, the principal factor appears to be whom the court indicts and whether the indictments contradict the dominant internal narrative of the various affected groups.

#### D. *The Social Psychology Model*

This Article uses the example of the ICTY to demonstrate that the factors most scholars have identified as driving the perceived legitimacy of international criminal courts cannot explain how the people in the former Yugoslavia perceived the ICTY. Then it uses the latest in social psychology research as well as numerous attitude surveys to construct a theoretical and empirical explanation for how the ICTY was perceived. This explanation, called the social psychology model, does a better job of explaining attitudes toward the ICTY than the traditional model.

The social psychology model predicts that when an affected group identifies strongly with one of the sides in a conflict and has a dominant internal narrative that denies responsibility for the conflict and any ensuing crimes, then indicting members of that group will cause the group to view the court negatively. This negative perception will be the result of various motivational and cognitive biases acting together, including motivated reasoning, use of heuristics, cognitive dissonance, and confirmation bias. Further, the effect of these biases, when they are present, will outweigh the effect of political events or any of the factors identified in the traditional model of perceived legitimacy.

### III. USING THE SOCIAL PSYCHOLOGY MODEL TO EXPLAIN THE PERCEIVED LEGITIMACY OF OTHER COURTS

Next, the social psychology model will be applied to several other courts, including the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the

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173. See *supra* Part II.B.2.a, II.B.2.c (discussing how studies of heuristics and confirmation bias suggest that institutional structure and outreach programs have little effect on a population's perception of international criminal courts).

Regulation 64 Panels in Kosovo, to see if it can explain how the affected populations in these countries perceive their respective courts.

### A. *The SCSL*

It is possible to see the effect of the social psychology model in the way that Sierra Leoneans perceive the Special Court of Sierra Leone. One of the armed groups that participated in the conflict in Sierra Leone was called the Civil Defense Forces (CDF). The CDF supported the government of Sierra Leone against the two primary rebel groups, the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).<sup>174</sup> The CDF was particularly strong in the south and east of Sierra Leone, where it was comprised largely of the Kamajors.<sup>175</sup> The Kamajors were commanded by Chief Samuel Hinga Norman,<sup>176</sup> and came almost exclusively from the Mende ethnic group.<sup>177</sup> While the Kamajors succeeded in keeping the RUF out of southern and eastern Sierra Leone, they also engaged in widespread human rights violations,<sup>178</sup> many of which were directed against non-Mende groups—particularly those from northern Sierra Leone.<sup>179</sup>

Samuel Hinga Norman was popular in southern and eastern Sierra Leone because of the success of his forces against the RUF, and there is anecdotal evidence that his indictment by the Special

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174. SIERRA LEONE TRUTH & RECONCILIATION COMM'N, 2 WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 76–77 (2004), available at <http://www.sierra-leone.org/TRCDocuments.html>. There was also evidence of some conflict between the Sierra Leone Army (SLA) and the CDF. *Id.* at 67–68, 77.

175. *Id.* at 9–10, 76–77, 79. The Kamajors are a Mende-based rural militia from the south and east of Sierra Leone. They were initially composed of traditional hunters with crude homemade weapons, but obtained more sophisticated weapons in the 1990s. Steve Riley, *Sierra Leone: The Militarist Strikes Again*, 24 REV. AFR. POL. ECON. 287, 288 (1997).

176. SIERRA LEONE TRUTH & RECONCILIATION COMM'N, *supra* note 174, at 67; see TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 6, 8 (2006), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf> (stating that Chief Samuel Hinga Norman led the CDF).

177. SIERRA LEONE TRUTH & RECONCILIATION COMM'N, *supra* note 174, at 77. The Mende are an ethnic group that make up about 30 percent of the population of Sierra Leone and are found primarily in the south of the country. PERRIELLO & WIERDA, *supra* note 176, at 5. Historically there have been tensions between the Mende and another large ethnic group called the Temne, who also comprise about 30 percent of the population and are found largely in the north of the country. *Id.* This ethnic tension between Mende and Temne was likely one of the causes of the conflict in Sierra Leone. *Id.* at 4.

178. SIERRA LEONE TRUTH & RECONCILIATION COMM'N, *supra* note 174, at 76.

179. *Id.* at 28, 77, 79.

Court for violations of international criminal law was unpopular among his supporters.<sup>180</sup> Applying the social psychology model, one would predict that Norman's indictment would cause those who had supported him and who identified with him (i.e., those who would treat his indictment as an attack on themselves and their group) to view the Special Court more negatively. Support for Norman appears to have been largely concentrated in the south and east of the country, particularly among members of the Mende ethnic group.<sup>181</sup> Thus, one would predict that perceptions of the court following Norman's indictment would be more negative in the south and east of Sierra Leone than in the rest of Sierra Leone, and that the perception of the court would be particularly negative among the Mende. Although there have been only two credible surveys of Sierra Leonean attitudes toward the SCSL, they indicate that it is perceived more negatively in the south and east of the country.<sup>182</sup> Further, although only one survey addresses this point, the perception of the court is even more negative among Mende respondents.<sup>183</sup>

Consistent with what one would expect,<sup>184</sup> virtually all Sierra Leoneans have an opinion about the Special Court, even though only a very small percentage of the population has a meaningful understanding of what the court does.<sup>185</sup> In one survey, 51 percent of

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180. See PERRIELLO & WEIRDA, *supra* note 176, at 38 (describing the "aggressive" criticism of the Special Court leveled by those believing Norman was "wrongfully indicted"); Arzt, *supra* note 50, at 234 (noting the belief held by many that Norman was inappropriately arrested); Edward Sawyer & Tim Kelsall, *Truth vs. Justice? Popular Views on the Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 7 ONLINE J. PEACE & CONFLICT RESOL. 36, 59 (2007) (quoting Sierra Leoneans who supported Norman); Chandra Lekha Sriram, *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 FORDHAM INT'L L.J. 472, 489, 494-95 (2006) (noting that Samuel Hinga Norman was "viewed by many as a national hero," particularly among former members of the CDF); Rachel Kerr & Jessica Lincoln, *The Special Court for Sierra Leone Outreach, Legacy and Impact 22* (Feb. 2008) (unpublished manuscript), available at <http://www.kcl.ac.uk/content/1/c6/04/95/60/SCSLOutreachLegacyandImpactFinalReport.pdf> (characterizing the "decision to indict Hinga-Norman" as "devisive and controversial"). One supporter said, "Hinga Norman should not be on trial because he brought peace in Sierra Leone—we are really troubled here about his arrest," and another said, "Hinga Norman should not be on trial—he fought for our lives." Sawyer & Kelsall, *supra*, at 59.

181. See *supra* text accompanying notes 175-77.

182. See *infra* text accompanying notes 190-93.

183. See *infra* note 195.

184. See *supra* Part II.B.2.a (discussing how people use heuristics to form opinions about entities which they do not have sufficient information to evaluate objectively).

185. Sawyer and Kelsall found that although 91 percent of the people they interviewed had heard of the SCSL, only 15 percent of those respondents that said they had heard of the SCSL had a "good" understanding of the organization. Sawyer & Kelsall, *supra* note 180, at 41, 44. People were deemed to have a "good" understanding

the respondents described the SCSL as either quite successful (32 percent) or very successful (19 percent).<sup>186</sup> This slightly outweighed the 49 percent of respondents who said the SCSL was either not successful or who did not know whether the SCSL had been a success.<sup>187</sup> Another survey found that 68 percent of respondents rated the SCSL's performance as either excellent or good, while the remaining 32 percent viewed the court's work as fair, poor, or neither good nor bad.<sup>188</sup> These results seem somewhat inconsistent, but there have been few surveys of attitudes toward the court by Sierra Leoneans,<sup>189</sup> so there is no easy way to reconcile the findings. Probably the best that can be said is that a majority of Sierra Leoneans appear to support the court, but it is unclear how large that majority is.

Nevertheless, if one looks at the regional variations in attitudes toward the court, there are identifiable differences that are consistent with the predictions made by the social psychology model. In one study conducted by Edward Sawyer and Tim Kelsall, the authors chose to administer their survey in Kenema District in the south of Sierra Leone because it had been a center of support for the CDF.<sup>190</sup> They wished to explore whether the indictment of Samuel Hinga

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of the court if they knew that it was created to prosecute those who bore the most responsibility for the war. *Id.* at 44. The vast majority of respondents had little or no understanding of what the court does. *Id.* A different survey conducted by the BBC World Service Trust found that 98 percent of men and 94 percent of women in Sierra Leone had heard of the SCSL. BBC WORLD SERV. TRUST, PEACE, JUSTICE AND RECONCILIATION IN SIERRA LEONE: A SURVEY OF KNOWLEDGE AND ATTITUDES TOWARDS TRANSITIONAL INSTITUTIONS IN POST-CONFLICT SIERRA LEONE 59 (2008). Only 7 percent of their respondents indicated that they knew "a lot" about the SCSL, but 86 percent offered an opinion about whether the Special Court had performed well or not. *Id.* at 60, 65.

186. See Sawyer & Kelsall, *supra* note 180, at 46–47.

187. *Id.*

188. BBC WORLD SERV. TRUST, *supra* note 185, at 65.

189. There is a third survey that was commissioned by the court. See MEMUNATU BABY PRATT, SPECIAL CT. FOR SIERRA LEONE, NATIONWIDE SURVEY REPORT OF PUBLIC PERCEPTIONS OF THE SPECIAL COURT FOR SIERRA LEONE (2007) [hereinafter SCSL NATIONWIDE SURVEY REPORT]. However, that survey has been criticized for its methodology and impartiality. Kerr & Lincoln, *supra* note 180, at 13. Some of its results also seem anomalous. For example, the court's survey found that 88 percent of people surveyed thought the outreach teams of the Special Court were doing a "great job." SCSL NATIONWIDE SURVEY REPORT, *supra*, at 32. It seems unlikely that 88 percent of respondents would even know about the outreach teams, let alone know enough about them to evaluate their effectiveness. See *supra* Part II.B.2.a (noting that few people know enough about courts to seriously evaluate their work). For these reasons, the court-commissioned survey has largely been discounted in this analysis.

190. See Sawyer & Kelsall, *supra* note 180, at 40 (explaining that "[t]he locations were chosen to allow for a relatively even national geography in the sample," that different regions of the country had varying experiences of the conflict, and that Kenema became a center for CDF resistance).



Norman had affected attitudes toward the SCSL in Kenema District.<sup>191</sup> What they found was that the percentage of people who viewed the SCSL as very successful was lower in Kenema District than anywhere else they studied (13 percent versus 19 percent for the study as a whole).<sup>192</sup> A similar effect was found in a study conducted by the BBC World Service Trust. While 15 percent of respondents nationwide said that the SCSL had done an “excellent” job, the rate was only 8 percent in Kenema District, and 0 percent in neighboring Kailahun District.<sup>193</sup> These surveys show that support for the SCSL is significantly lower in southern and eastern Sierra Leone than in the rest of the country.

Sawyer and Kelsall also asked respondents whether Samuel Hinga Norman should be on trial at the SCSL. Here again, results were different in Kenema District. While 28 percent of the respondents in the country as a whole said that Norman should not be on trial, 65 percent of the respondents in Kenema District said he should not be on trial—a rate more than twice as high as in the rest of the country.<sup>194</sup> The percentage of Mende respondents in Kenema District who opposed Norman’s trial was even higher.<sup>195</sup>

A similar effect was found in the survey conducted by the BBC World Service Trust. That survey found significant geographic variation in response to the question, “Do you think the right people are being brought to trial by the Special Court?” While 72 percent of the respondents nationwide said the court was trying the right people or mostly the right people, some districts like Bombali District in the north of the country had percentages as high as 94 percent, while many southern and eastern districts, like Bo (54 percent), Kenema (65 percent) and Kailahun (38 percent), had much lower figures.<sup>196</sup>

191. *Id.*

192. *Id.* at 45–47 & n.30.

193. BBC WORLD SERV. TRUST, *supra* note 185, at 66–67.

194. *See* Sawyer & Kelsall, *supra* note 180, at 58–59 (reporting, graphically and numerically, the differing proportions of responses to the inquiry into whether Norman should not be on trial).

195. Regrettably, Kelsall and Sawyer do not provide the exact level of Mende opposition to Norman’s trial. They report that non-Mende opposition was only 29 percent, indicating that Mende opposition was higher than 65 percent, but it is impossible to calculate the exact level of Mende opposition without knowing the ratio of Mende to non-Mende in the sample from Kenema District. *See id.* at 59 (“[A]lthough there was strong opposition to Norman’s indictment in Kenema (65%), this fell to only 29% from the non-Mende respondents in the region.”).

196. BBC WORLD SERV. TRUST, *supra* note 185, at 67–68. These results are consistent with opposition to the trials of CDF leaders in districts that were CDF strongholds. These results probably do not directly measure opposition to the trial of Samuel Hinga Norman because he died in February 2007, while the BBC World Service Trust survey was not administered until June 2007. *Id.* at 7; Sawyer & Kelsall, *supra* note 180, at 63 & n.104.

Kelsall and Sawyer found that, at least with respect to their study, these geographic variations were not the result of random chance, but represent statistically significant differences in the way the SCSL is perceived in Kenema District compared to the rest of Sierra Leone.<sup>197</sup> In short, perceptions of the SCSL are substantially more negative in Kenema District than in the rest of Sierra Leone, while opposition to the indictment and trial of Samuel Hinga Norman was significantly higher.<sup>198</sup> The opinions of respondents from the Mende ethnic group—the group most associated with the CDF and with Norman—were even more negative than the results for Kenema District as a whole.<sup>199</sup> These results are consistent with the outcomes predicted by the social psychology model. In other words, the indictment of Samuel Hinga Norman appears to have had a significantly and measurably negative effect on perceptions of the SCSL in Sierra Leone, particularly in areas and among groups that supported him.

The same does not appear to be the case with the indictments of senior members of the RUF and AFRC, but this is not necessarily inconsistent with the social psychology model because one would not expect the trials of RUF or AFRC leaders to generate the same negative perceptions of the court as the trial of Samuel Hinga Norman.<sup>200</sup> For the social psychology model to operate, a group has to identify with one or more of the accused. If no group identifies with the accused, then charges against the accused are much less likely to produce an affective response within the affected population and are correspondingly less likely to lower perceptions of legitimacy.<sup>201</sup>

In other words, if few people in Sierra Leone identified with either the RUF or AFRC, then one would not expect to see a large negative impact on perceptions of the SCSL caused by the indictments. And indeed, the evidence indicates that neither the RUF nor the AFRC had much support within Sierra Leone, largely because

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197. Cf. Sawyer & Kelsall, *supra* note 180, at 51. Statistical significance was established with greater than a 95 percent confidence level. *Id.* at 50.

198. Norman died in custody in February 2007. *Id.* at 63 n.104. Anecdotal reports suggest that Norman's supporters in the South and East blamed the court for his death. Kerr & Lincoln, *supra* note 180, at 22.

199. See *supra* note 195.

200. On a related note, one would expect that prosecution of AFRC and RUF leaders would be viewed positively among supporters of the CDF. And this appears to be true, as support for the prosecution of AFRC and RUF leaders was highest in Kenema District, a stronghold of the CDF, even as overall support for the court in Kenema District was the lowest in the country. See Sawyer & Kelsall, *supra* note 180, at 60 (reporting that feelings that Sessay should be on trial were "strongest in rural Kenema" and that support for Brima's trial was "greatest in the Kenema sample"); *supra* text accompanying notes 192–93.

201. See *supra* notes 120–23.

of their horrific treatment of civilians during the conflict.<sup>202</sup> Nor were the RUF or AFRC clearly associated with a particular ethnic, religious, or national group in the same way that the CDF was associated with the Mende.<sup>203</sup> Thus, one would not anticipate that a large affected population would strongly identify with the RUF or the AFRC. Consequently, one would predict that prosecuting RUF or AFRC leaders would not have as large of a negative effect on perceptions of the court as did the prosecution of Norman. The limited survey data that is available is consistent with this hypothesis.

Kelsall and Sawyer found that support for the prosecution of Issa Sessay, the most senior RUF indictee, was higher nationwide than for any other accused before the court.<sup>204</sup> This is consistent with the RUF's lack of a large constituency among Sierra Leoneans.<sup>205</sup> Support for the prosecution of Sessay was lowest in Tonkolili District, a northern district that had been controlled by Sessay and was reportedly sympathetic to him.<sup>206</sup> However, even in Tonkolili District, only 1 percent of respondents said Sessay should not be on trial, compared to 65 percent of respondents in Kenema District who said

202. PERRIELLO & WEIRDA, *supra* note 176, at 6–9. The RUF engaged in widespread and systematic human rights violations against civilians. Physicians for Human Rights estimated that more than half the women who came into contact with RUF forces suffered some form of sexual violence. *Id.* at 8. The RUF and the AFRC were also notorious for intentionally amputating the hands and feet of civilians and engaged in the widespread destruction of property. *Id.* at 9. As a result, both groups were deeply unpopular with the majority of Sierra Leoneans. *Id.* at 6; *see also* SIERRA LEONE TRUTH & RECONCILIATION COMM'N, *supra* note 174, at 42–45, 59–62 (detailing the human rights violations attributed to the RUF and AFRC and the public's negative reactions to these organizations). According to the Truth and Reconciliation Commission, the RUF and the AFRC were also responsible for the largest number of violations reported to the Commission, with 60.5 percent of the violations attributed to the RUF and 9.8 percent to the AFRC, versus only 6 percent attributed to the CDF. *Id.* at 38. The RUF was even unpopular among its former combatants, many of whom had been forcibly recruited by their commanders and felt betrayed by the RUF. *See* Sriram, *supra* note 180, at 495. This apparently translated into “relatively strong support” for the SCSL among former RUF combatants. *Id.*

203. *See supra* note 177 (discussing the affiliation between the CDF and the Mende).

204. *See* Sawyer & Kelsall, *supra* note 180, at 40, 60.

205. *See generally* Ibrahim Abdullah, *Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone*, 36 J. MOD. AFR. STUD. 203, 224 (1998). “Instead of implementing a revolutionary programme, [the RUF] embarked on a campaign of terror in the countryside. This aspect of the RUF explains why the peasantry, the natural ally of most revolutionary movements in the so-called Third World, deserted the movement.” *Id.* at 224; *see also supra* note 202 for a recounting of the RUF's human rights violations.

206. *See* Sawyer & Kelsall, *supra* note 180, at 40, 60 n.97 (explaining that Tonkolili District was controlled by the RUF and Sessay and that Tonkolili District “had a reputation of being sympathetic towards the rebels”).

that Norman should not be on trial.<sup>207</sup> Thus, opposition to the prosecution of RUF leaders in pro-RUF areas was dramatically lower than opposition to the prosecution of CDF leaders in pro-CDF areas.<sup>208</sup> This is consistent with the hypothesis that the RUF had a relatively small following and that therefore prosecution of RUF leaders would not produce widespread negative perceptions of the court. Indeed, prosecution of RUF leaders does not seem to have significantly affected perceptions of the SCSL, even in reportedly pro-RUF areas.<sup>209</sup>

In short, the survey evidence from Sierra Leone is consistent with the social psychology model, which predicts that whom the court indicts can have a large negative effect on how the court is perceived by affected groups that identify with one of the “sides” in the conflict. However, the survey data is not perfect. There is an obvious limitation in the data, but that limitation is likely to underestimate the effect of the social psychology model on perceptions of the court. None of the surveys asked the respondents about which side in the conflict (if any) they identified with. Kelsall and Sawyer attempted to get at this information by looking at ethnicity in Kenema District,<sup>210</sup> with the assumption that people from the Mende group would be more supportive of the CDF and Samuel Hinga Norman than non-Mende, but both the studies focus primarily on geographic differences.<sup>211</sup> This is a significant limitation because it is clear that even within areas that are thought of as strongholds of one group or another, there are significant numbers of people who do not identify with that group.<sup>212</sup> Thus, focusing on geographic regions and using them as a proxy for support for a side in the conflict most likely underestimates the extent to which indictments have caused negative perceptions of the court among groups that sided with one of the participants in the conflict. A survey that explicitly collected information on the side in the conflict that respondents identified

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207. *Id.* at 59–60. At the same time, only 29 percent of respondents in Kenema District thought Norman should be on trial, whereas 59 percent of respondents in Tonkolili District thought that Sessay should be on trial. *Id.*

208. Unsurprisingly, support for the prosecution of Norman was highest in Tonkolili District—probably the result of anti-CDF feelings in areas that had been controlled by the RUF. *Id.* at 58.

209. Unfortunately, Kelsall and Sawyer do not provide specific results for the percentage of respondents in Tonkolili District that thought the court had been “very successful.” However, it must not have differed significantly from the overall figures because they called particular attention to Kenema District when its results were different from the nationwide results. *Id.* at 45 & n.30.

210. *See supra* note 195.

211. *See supra* notes 194–95, 197.

212. For example, Kelsall and Sawyer identified significant differences in the responses of Mende and non-Mende respondents in Kenema District. *See supra* note 195.

with (if such a survey was possible) would probably reveal much more negative perceptions of the SCSL among Sierra Leoneans that identify with the CDF, RUF, or AFRC.

### B. *The ECCC*

The social psychology model does not predict that Cambodians will have negative perceptions of the ECCC. To begin with, the ECCC is only prosecuting the former Khmer Rouge, and the Khmer Rouge have very little constituency—in fact they are overwhelmingly reviled by the populace.<sup>213</sup> Thus there is no large group of Cambodians who are predisposed to view the ECCC negatively because of its prosecution of former Khmer Rouge leaders.<sup>214</sup> In this sense, the ECCC's prosecution of former Khmer Rouge cadres looks a little like the SCSL's prosecution of the RUF and AFRC—one would not expect it to produce negative perceptions of the court.<sup>215</sup>

However, the biases described in Part II do impact perceptions of the ECCC. The dominant internal narrative among Cambodians about responsibility for the period of Democratic Kampuchea is, “the Khmer Rouge were responsible.”<sup>216</sup> Thus, to the extent that the ECCC is perceived as “punishing” the Khmer Rouge by prosecuting their former leaders and assigning them blame for what happened during the period of Democratic Kampuchea, one would expect that the majority of the population would be motivated to view the court favorably. And indeed, that is the case.

In one recent survey of Cambodian attitudes toward the ECCC, more than half of the respondents reported having some knowledge of the ECCC, although detailed knowledge of the ECCC was rare.<sup>217</sup>

213. Overall, Cambodians have very negative feelings toward the Khmer Rouge. In one study, 82 percent of Cambodians indicated that they had “feelings of hatred” for those Khmer Rouge responsible for violence, while only 32 percent of respondents would feel “comfortable” living in the same community as former Khmer Rouge. PHUONG PHAM ET AL., HUMAN RIGHTS CTR., UNIV. OF CAL. BERKELEY, SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 28 fig.4, 29 tbl.5 (2009), available at <http://www.law.berkeley.edu/HRCweb/pdfs/So-We-Will-Never-Forget.pdf>.

214. See *supra* notes 120–23 (describing how members of the affected population must identify with the accused before the charges against the accused will cause cognitive dissonance and result in negative perceptions of the court).

215. See *supra* notes 200–09 and accompanying text.

216. More than 90 percent of those who lived through the period of Democratic Kampuchea identified themselves as victims of the Khmer Rouge. PHAM ET AL., *supra* note 213, at 24. In addition, more than 90 percent of respondents indicated that it was important to hold Khmer Rouge responsible for what happened during the period of Democratic Kampuchea. *Id.* at 31 tbl.7.

217. *Id.* at 36. Forty-six percent of respondents reported having “a little” knowledge about the ECCC, while 15 percent reported having “moderate” knowledge.

Those who indicated that they knew something about the ECCC were overwhelmingly supportive of the tribunal. Eighty-seven percent said the ECCC would respond to the crimes committed by the Khmer Rouge, while 67 percent believe the judges would be fair and the court would be neutral.<sup>218</sup> Sixty-eight percent felt that the ECCC would have a positive effect on the victims of the Khmer Rouge and their families.<sup>219</sup> Even a significant number of those who said they had little or no knowledge of the court nonetheless said that the ECCC would bring justice and punish the guilty.<sup>220</sup> Thus, perceptions of the legitimacy of the ECCC among the affected population are largely positive.

Most Cambodians are probably motivated to perceive the ECCC positively because they believe it will punish those whom they believe are responsible for the crimes committed against them and their families. Thus, one would expect confirmation bias to reinforce and preserve this positive perception, even in the face of evidence that should undermine positive perceptions of its legitimacy.<sup>221</sup> And indeed, the positive perception of the ECCC's legitimacy appears to exist despite some fairly serious concerns about the court's fairness and independence—concerns that procedural justice theory predicts should undermine a court's legitimacy.<sup>222</sup>

A majority of the ECCC's judges and the Cambodian Co-Prosecutor were appointed by the Cambodian government and come from the Cambodian judiciary.<sup>223</sup> This is potentially problematic because the Cambodian judiciary is corrupt<sup>224</sup> and subject to regular

Thirty-nine percent reported having no knowledge. *Id.* However, there may be difficulties taking self-reported knowledge at face value, as only 10 percent of respondents knew how many individuals had been charged, and only 3 percent could actually name those individuals. *Id.* at 37.

218. *Id.* at 3–4.

219. *Id.* at 3.

220. *Id.* at 4.

221. *See supra* Part II.B.2.c.

222. Procedural justice theory predicts that the fairness and independence of the process should drive perceptions of a court's legitimacy, not the outcome. However, this does not seem to be the case for international criminal courts. For such courts, outcomes seem to drive perceptions of legitimacy. *See infra* Part III.D (discussing procedural justice theory and its applicability to international criminal courts).

223. *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Law No. NS/RKM/1004/006, arts. 9, 16, 20, 23 (Oct. 27, 2004) (Cambodia) [hereinafter *Cambodian ECCC Law*], *unofficial translation available at* <http://www.derechos.org/human-rights/seasia/doc/krlaw.html> (stating that the ECCC Trial Chamber shall include Cambodian judges and that one of the Co-Prosecutors shall be Cambodian).

224. *See* OPEN SOC'Y JUSTICE INITIATIVE, POLITICAL INTERFERENCE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 4–5 (2010), *available at* [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/)

political interference.<sup>225</sup> As one report described the situation, “Power and patronage are the keys to success in Cambodian political life. The government does not permit court-administered justice to impose any restrictions or control over those who have power and influence.”<sup>226</sup> In a recent survey, only 36 percent of Cambodians said they trusted the Cambodian judiciary and only 37 percent said they trusted Cambodian judges.<sup>227</sup> There was a concern that this would spill over into the ECCC and that the Cambodian government would seek to influence the decisions of the Cambodian judges. As a result, various measures were built into the ECCC structure in an attempt to limit interference by the Cambodian government.<sup>228</sup>

Despite these measures, there is fairly strong evidence that there has been political interference in the court. In December 2008, the International Co-Prosecutor sought to open investigations against additional suspects, despite vocal opposition by members of the government, including Prime Minister Hun Sen. The Cambodian Co-Prosecutor refused to participate in the matter, even though she did not dispute the sufficiency of the evidence against the additional suspects. The matter eventually went before the Pre-Trial Chamber where all of the Cambodian judges voted against permitting the new investigation. The matter then moved to the Office of the Co-Investigating Judges, where the Cambodian Co-Investigating Judge refused to authorize any investigative acts.<sup>229</sup> Subsequently, the International Co-Investigating Judge resigned, complaining about the Cambodian government’s “attempted interference” in the

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publications/political-interference-report-20100706) (discussing a “permissive culture of bribery by parties wishing to influence judicial outcomes”). In a recent survey, more than 60 percent of respondents said that going to court meant paying bribes to judges. PHAM ET AL., *supra* note 213, at 33.

225. Cambodian judges are hired and promoted at the discretion of the executive. Moreover, there is an extensive patronage system among members of the judiciary in which judges must be obedient to the wishes of the ruling elite in order to keep their jobs. OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 224, at 5.

226. See ATLAS PROJECT, TRANSITIONAL JUSTICE IN CAMBODIA: ANALYTICAL REPORT 18 (Alex Bates ed., 2010), available at <http://projetatlas.univ-paris1.fr/spip.php?rubrique27>; PHAM ET AL., *supra* note 213, at 15–16 (discussing how “the judiciary system has been criticized for its lack of independence, incompetence, and corruption”).

227. See PHAM ET AL., *supra* note 213, at 33.

228. See OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 224, at 10–16 (discussing protections to prevent or remedy political interference).

229. See ATLAS PROJECT, *supra* note 226, at 52–53 (discussing how the Cambodian Co-Investigating Judge withdrew his signature for such investigations, “thereby reinforcing claims that the national judicial staff were being given instructions by the Cambodian government”); OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 224, at 16–22 (noting how some Cambodian officials refused to participate in judicial investigations).

investigations.<sup>230</sup> Shortly thereafter, a decision by the Pre-Trial Chamber over access to the case file resulted in a split decision in which all of the Cambodian judges refused to grant victims access to the file and the international judges wrote a separate opinion that cataloged a series of dubious decisions by the Co-Investigating Judges that seem to have been designed to prevent scrutiny of their decision not to investigate the additional suspects.<sup>231</sup>

A second instance of what appears to be political interference occurred in the context of the International Co-Investigating Judge's attempts to interview high-ranking members of the current government. The Cambodian Co-Investigating Judge refused to sign the summons that would compel the appearance of the government officials. The government stated that members of the government should not comply with the summons, and indeed, Cambodian government officials refused to comply.<sup>232</sup> When the question of the summons came before the Pre-Trial Chamber, the judges were once again split. The international judges described the government's actions as political interference and the national judges offered weak and largely irrelevant justifications for the failure of the witnesses to appear.<sup>233</sup>

While there is no "smoking gun," there is substantial circumstantial evidence of political interference by the Cambodian government in the decision making of Cambodian judges at the

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230. See *Statement by the International Co-Investigating Judge*, EXTRAORDINARY CHAMBERS COURTS CAMBODIA (Oct. 9, 2011), <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge> ("Because of these repeated statements, which will be perceived as attempted interference by Government officials . . . the International Co-Investigating Judge has submitted his resignation to the Secretary-General as of 9 October 2011."). See generally *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign*, HUM. RTS. WATCH (Oct. 3, 2011), <http://www.hrw.org/print/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign> (calling on the Co-Investigating Judges to resign after "politically motivated interference" at the court by the government of Hun Sen).

231. See Pre-Trial Chamber Decision No. D11/2/4/4, *Consideration of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill* (Oct. 24, 2011), <http://www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-regarding-appeal-against-order-admissibility-civil-p> (containing both opinions from the split decision).

232. At the time, a government spokesperson said that any international personnel at the ECCC who were unhappy with this position could "pack up their clothes and go home." ATLAS PROJECT, *supra* note 226, at 53; see also OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 224, at 22–23 (noting that "none of the individuals agreed to appear as requested").

233. See ATLAS PROJECT, *supra* note 226, at 53–58 (explaining how the Pre-Trial Chamber was divided between national and international judges); OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 224, at 22–23.



ECCC.<sup>234</sup> In a rational world, one would expect doubts about a court's fairness and independence to undermine belief in its legitimacy. Yet the ECCC is still perceived positively by most Cambodians, and what we know of confirmation bias suggests that this positive perception will be largely impervious to additional evidence that the court is not fair and neutral, so long as the court is seen as assigning blame to the Khmer Rouge.<sup>235</sup>

### C. Regulation 64 Panels in Kosovo

There is also evidence that the social psychology model explains how affected populations perceive domestic criminal courts receiving international assistance, like the Regulation 64 Panels in Kosovo.<sup>236</sup> The Panels were created because almost all of the newly appointed members of the judiciary were ethnically Albanian and seemed to be systematically favoring ethnic Albanians over ethnic Serbs in cases that came before them.<sup>237</sup> The Panels were designed to give international judges control over particular ethnically charged cases so as to "ensure the independence and impartiality of the judiciary."<sup>238</sup> It appears that the Panels largely achieved their

234. In addition, there is evidence of fairly pervasive corruption as well, although this may be in the process of being addressed. ATLAS PROJECT, *supra* note 226, at 58–60.

235. However, this does not mean that the ECCC cannot be viewed negatively by Cambodians. If the court were to acquit any of the senior leaders currently on trial, this would probably lead to negative perceptions of the court. In effect, positive perceptions of the ECCC's legitimacy are largely dependent on its ability to validate the dominant internal narrative among Cambodians and assign responsibility for past atrocities to the Khmer Rouge.

236. Although the Regulation 64 Panels do try cases involving violations of international criminal law and involve international judges and prosecutors, they are not international criminal courts. See Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the U.S. to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 953, 996–98 (2011) ("[T]he Regulation 64 Panels were not primarily designed to prosecute international crimes.").

237. See INT'L CRISIS GRP., BALKANS REPORT NO. 134, FINDING THE BALANCE: THE SCALES OF JUSTICE IN KOSOVO 5, 20 (2002); TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, LESSONS FROM THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO 12–14 (2006) (discussing the establishment of the internationalized UNMIK Regulation 64 panels); Robert F. Carolan, *An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 9, 15–19 (2008) (describing the creation of a court system in Kosovo under UNMIK).

238. U.N. Mission in Kosovo Reg. No. 2000/64, § 1.1, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000), available at <http://www.unmikonline.org/regulations/2000/reg64-00.htm> ("At any stage in the criminal proceedings, the competent prosecutor, the accused or the defence counsel may submit to the Department of Judicial Affairs a petition for an assignment of international

goals.<sup>239</sup> However, this did not cause the affected population to perceive the Panels in a positive manner.

As one would expect, knowledge about the Regulation 64 Panels was very low in both ethnic groups.<sup>240</sup> At the same time, the prerequisites to the application of the social psychology model—identification and a narrative of victimization—were present in both groups. Albanian Kosovars and Serbian Kosovars both identified strongly with their respective sides in the conflict,<sup>241</sup> and there was a widespread belief among both ethnic groups that crimes were exclusively carried out by members of the other group,<sup>242</sup> even though this was not true.<sup>243</sup> Thus, one would predict that indictments of Kosovar Albanians would lower perceptions of the Panels' legitimacy among ethnic Albanians, while indictments of Serbian Kosovars would lower perceptions of the Panels' legitimacy among ethnic Serbs. Indeed, this is what happened.<sup>244</sup> Ethnic Serbians largely

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judges/prosecutors and/or a change of venue where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.”).

239. See INT'L CRISIS GRP., *supra* note 237, at 20 (noting that the “use of international judges and prosecutors has eliminated bias and helped curtail the injustices that took place in the first trials” including by retrying earlier cases, which resulted in a number of acquittals and reduction in charges).

240. Fifty percent of respondents in one survey said they were “not informed” about the work of the Regulation 64 Panels, around 30 percent said they had some information, and only 4 percent said they were “well informed.” U.N. DEV. PROGRAMME, PUBLIC PERCEPTIONS ON TRANSITIONAL JUSTICE: REPORT ON TRANSITIONAL JUSTICE OPINION POLLING SURVEY CONDUCTED IN APRIL–MAY 2007 IN KOSOVO 17 fig.9 (2007), available at [http://www.kosovo.undp.org/repository/docs/transitional\\_justice\\_eng.pdf](http://www.kosovo.undp.org/repository/docs/transitional_justice_eng.pdf). On the whole, Kosovar Albanians indicated that they were better informed than Serbian Kosovars, but overall knowledge levels were still very low. *Id.*

241. See INT'L CRISIS GRP., *supra* note 237, at 5, 21 (noting that the arrest of former members of the Kosovo Liberation Army (KLA) resulted in street protests and attacks on the Panels by Albanian Kosovar politicians); PERRIELLO & WIERDA, *supra* note 237, at 4–5 (describing the long history of ethnic tension between Albanian Kosovars and Serb Kosovars).

242. See U.N. DEVELOPMENT PROGRAMME, *supra* note 240, at 17 fig.7 (noting that more than 80 percent of Albanian Kosovars denied that members of their ethnic group had committed crimes). Acceptance of the commission of crimes was higher among the Serbian Kosovar community, but significantly less than 40 percent of Serbian Kosovars believe that crimes were committed by their ethnic group. *Id.*; see also Klarin, *supra* note 38, at 93 (noting that only 14 percent of ethnic Serbs believed that Albanian Kosovars were the victims of crimes in the run-up to the NATO bombing of Serbia).

243. See PERRIELLO & WIERDA, *supra* note 237, at 5–6 (discussing how crimes were committed by both Albanian and Serbian forces).

244. See, e.g., INT'L CRISIS GRP., *supra* note 237, at 5, 21 (quoting a spokesperson for the Kosovo Protection Corps as saying: “It is very harmful and unacceptable, this tendency to draw parallels between the just war carried out by the KLA, and crimes carried out by Serb criminals . . . Those who committed crimes against the Albanian people in Kosovo should be sought only in the Serb side”); PERRIELLO & WIERDA, *supra* note 237, at 20, 31 (noting a widespread belief among Albanian Kosovars that ethnic

viewed the Regulation 64 Panels as unsatisfactory,<sup>245</sup> and Albanian Kosovars were only slightly less negative about them.<sup>246</sup> It seems unlikely that outreach or public education efforts could have compensated for these effects.<sup>247</sup>

#### D. Possible Problems with the Social Psychology Model

This section deals with two concerns that raise questions about the validity of this Article's conclusions: (1) the overwhelmingly Western bias of much psychology research and (2) the results of studies focusing on "procedural justice." The cross-cultural applicability of social psychology research will be addressed first.

This Article relies heavily on psychology research; however, it is well known that the vast majority of psychological research takes place on U.S. subjects, with most of the rest focusing on Western European subjects.<sup>248</sup> This has potentially significant implications because some psychological concepts may not apply cross-culturally,<sup>249</sup> and the majority of serious violations of international criminal law in the recent past have taken place in non-Western countries.<sup>250</sup> As a result, one can question whether psychological

Serbs had been protected by the Panels and that Albanians had been unfairly persecuted by them).

245. See U.N. DEVELOPMENT PROGRAMME, *supra* note 240, at 15 fig.3 (finding that only 25 percent of Kosovar Serbians were either "[s]omewhat satisfied" or "[v]ery satisfied" with the work of the Panels). Although no specific figure is given, it appears from Figure 3 that the percentage of Serbians that were "[v]ery satisfied" with the Panels was only 1-2 percent. In contrast, the number of Serbians who were "[n]ot satisfied" with the Panels' work was about 55 percent. *Id.* Kosovar Serbians were much more satisfied with the work of the Belgrade District Court. More than 70 percent of Serbians indicated they were either "[s]atisfied to some extent" or "[v]ery satisfied" with its work. *Id.* at 15 fig.4.

246. See U.N. DEVELOPMENT PROGRAMME, *supra* note 240, at 15 fig.3 (noting that 50 percent of Albanian Kosovars were either "[s]omewhat satisfied" or "[v]ery satisfied" with the work of the Panels). However, even for Albanian Kosovars, the percentage of people that were "[v]ery satisfied" with the work of the Panels was around 5 percent. *Id.* In contrast, Albanian Kosovars had much more negative views of the Belgrade District Court. *Id.* at 15 fig.4.

247. See *supra* Part II.B.2.c (discussing the effects of confirmation bias and how it can make it very hard to change perceptions of a court). *But see* Ramji-Nogales, *supra* note 1, at 36 (suggesting that "UNMIK could have performed more substantial outreach to the local populations").

248. See Steven J. Heine, *Cultural Psychology*, in HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 86, at 1423, 1425 (noting that by one recent estimate 94 percent of the subjects in social psychology experiments came from Western countries).

249. *Id.*

250. For example, the International Criminal Court's current caseload includes investigations and prosecutions in Libya, Uganda, the Democratic Republic of the Congo, the Central African Republic, Sudan, Côte d'Ivoire, and Kenya. *Situations and Cases*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases> (last visited Mar. 1, 2012).

models developed largely by experimenting on Westerners have validity for the affected populations that international criminal courts are likely to encounter.

There are theoretical reasons to believe that cognitive dissonance is cross-cultural,<sup>251</sup> but there is less research on the applicability of confirmation bias in other cultures.<sup>252</sup> In a general sense, it appears that members of collectivist cultures (e.g., some East Asian cultures) may not respond to threats to self-identity as strongly as members of individualist cultures (e.g., the United States), but members of collectivist cultures are still likely to respond to attacks on group identities.<sup>253</sup> Since the mechanisms proposed in this Article involve attacks on both individual and group identities, there is reason to believe they will affect both individualist and collectivist cultures. And, as a practical matter, the social psychology model offers a compelling explanation of how the affected populations of the ICTY, SCSL, ECCC, and Regulation 64 Panels have perceived their respective tribunals. The theory appears to explain perceived legitimacy in West Africa and Southeast Asia, which suggests that it is not limited to Western Europe and North America.

This Article will now address procedural justice theory. There has been considerable psychological research in recent decades into what legitimacy is and what it does.<sup>254</sup> More importantly, there has

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251. In one recent study, researchers demonstrated that monkeys exhibit cognitive dissonance, which suggests that it is a basic cognitive process that probably exists in all primates, including all humans. See Egan, *supra* note 105, at 982 (suggesting that cognitive dissonance may be a core cognitive process that exists in all primates). On the other hand, to the extent that dissonance is the result of cognitions that conflict with one's self-concept, individuals from cultures that have a more flexible and interdependent self-concept may experience less dissonance than the average American, although they may experience more dissonance in other contexts. Heine, *supra* note 248, at 1429–31. The motivation to conform is strongly cross-cultural, although it appears to be weaker in cultures that have an independent self-concept. *Id.* at 1440. Similarly, the desire to view oneself positively and to undertake self-protective responses when confronted with threats to self-esteem appears to be present in most cultures, although the strength of the motivation is strongest in cultures that have a disposition toward independent self-concepts. *Id.* at 1437. However, Heine notes that studies of East Asian populations have failed to produce evidence of self-serving motivations. *Id.*

252. See Heine, *supra* note 248, at 1430. One intriguing article suggests that Chinese subjects may not exhibit attitude polarization, an effect of confirmation bias, and may be much more willing to tolerate contradictions in general than Western subjects. Kaiping Peng & Richard E. Nisbett, *Culture, Dialectics, and Reasoning About Contradiction*, 54 AM. PSYCHOLOGIST 741, 741 (1999).

253. See Sherman & Cohen, *supra* note 67, at 214–15 (discussing how people tend to be defensive and group-serving when explaining the success or failure of their group).

254. See generally Tyler, *supra* note 2 (providing an overview of psychological research relating to legitimacy).

also been considerable work done to explain how legitimacy forms.<sup>255</sup> Professor Tom Tyler and others have shown that “authorities and institutions are viewed as more legitimate and, therefore, their decisions and rules are more willingly accepted when they exercise their authority through procedures that people experience as being fair.”<sup>256</sup> This “fair process effect” is central to procedural justice theory and has been replicated repeatedly,<sup>257</sup> including in the context of legal decision making.<sup>258</sup>

The existence of the fair process effect is potentially problematic because it suggests that the perception of international criminal courts should depend more on whether people perceive the process as fair than on the actual outcomes of the court proceedings.<sup>259</sup> Yet, it is hard to explain Bosniak and Serb attitudes toward the ICTY as a function of the fairness of the process. All the trials at the ICTY were conducted according to essentially the same procedural rules. Thus, procedural justice theory suggests that people in the former Yugoslavia should have viewed the legitimacy of the ICTY roughly the same across ethnic groups, but this is not what happened. Bosniaks viewed the court as largely trustworthy and successful, while Serbians almost universally distrusted it.<sup>260</sup> The best predictor of attitudes toward the ICTY is the outcome of the ICTY’s process (i.e., whom it indicted and whom it convicted), not the process itself.

Still, we know that the fair process effect exists. So why does it not drive perceptions of the ICTY’s legitimacy? There are several possibilities. First, it is possible that actual experience with the institution’s procedures is required before the fair process effect

255. *Id.* at 379 (providing citations to literature explaining how authorities come to be seen as legitimate).

256. *Id.*

257. See, e.g., Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425, 435 (2001) (noting that in their meta-analysis, once the authors controlled for distributive justice, procedural justice continued to have explanatory power).

258. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003) (“[P]eople’s reactions to legal authorities are based to a striking degree on their assessments of the fairness of the processes by which legal authorities make decisions and treat members of the public.”).

259. *Id.* at 294–95 (finding that the fairness of the process was much more important than the outcome in explaining people’s satisfaction with the decisions of the local police and courts).

260. See *supra* Part II.A (analyzing the perception of the ICTY among various groups in the former Yugoslavia). Procedural justice would also have trouble explaining the legitimacy of the ECCC, which has high levels of perceived legitimacy despite fairly strong evidence of political interference that the procedural justice literature suggests should lower evaluations of its fairness and therefore its legitimacy. See *supra* Part III.B (evaluating Cambodian attitudes to the ECCC).

occurs.<sup>261</sup> If true, this would minimize the fair process effect for international criminal courts because almost nobody within the affected population is likely to have a good grasp of the court's procedures or have personal experience with the court.<sup>262</sup> A second possibility is that the post-conflict situations in which many international criminal trials take place are simply not conducive to the fair process effect. For example, Professors James Gibson and Gregory Caldeira have noted that most studies of court legitimacy have taken place in stable Western democracies. They suggested that the findings of those studies may not have much applicability in deeply divided societies.<sup>263</sup>

A third possibility is that whatever fair process effect might otherwise exist is overwhelmed by outrage at the court's decisions. Recent research suggests that when someone has a "moral mandate,"<sup>264</sup> their assessment of whether a procedure is fair is "predicted nearly exclusively by whether procedures yield an outcome that threatens or affirms" that mandate.<sup>265</sup> In these circumstances, it is the outrage at the outcome that determines perceptions of the fairness of the procedure, not the other way around.<sup>266</sup> The

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261. For example, Gibson and Caldeira suggest an essential part of the procedural justice hypothesis is that people have reliable perceptions of the procedures. "[P]rocedural perceptions that are grounded in the experiences people have with legal institutions are likely to be influential. Without experience, however, procedural perceptions may not be of much import." If a person does not have a personal experience with the legal institution, their perception of fairness is "tapping only abstract views," which are not good predictors of behavior. James L. Gibson & Gregory A. Caldeira, *Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 467 (1995); see also Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 227 (2001) (finding that fair process effects are strongest among those people that have had personal experiences with the courts).

262. See *supra* notes 101–02 and accompanying text.

263. See Gibson & Caldeira, *supra* note 2, at 5–6, 8. Of course, Gibson and Caldeira were studying the South African Constitutional Court rather than an international criminal court, but the situations that confront most international criminal courts are probably more like post-apartheid South Africa than they are like the United States.

264. A moral mandate is a strong attitude a person has that they see as rooted in moral conviction. Elizabeth Mullen & Linda J. Skitka, *Exploring the Psychological Underpinnings of the Moral Mandate Effect: Motivated Reasoning, Group Differentiation, or Anger?*, 90 J. PERS. & SOC. PSYCHOL. 629, 630 (2006).

265. *Id.*

266. Linda J. Skitka, *Do the Means Always Justify the Ends, or Do the Ends Sometimes Justify the Means? A Value Protection Model of Justice Reasoning*, 28 PERS. & SOC. PSYCHOL. BULL. 588, 594 (2002) ("[E]ven imagining a threat to a moral mandate is associated with significant and important effects on perceived procedural fairness, outcome fairness, and moral outrage."); Linda J. Skitka, Christopher W. Bauman & Elizabeth Mullen, *Morality and Justice: An Expanded Theoretical Perspective and Empirical Review*, in 25 ADVANCES IN GROUP PROCESSES 21–22 (K.A.

indictments of ethnic Serbs contradicted the dominant group narrative and generated outrage in Serbia, and thus one might expect that the moral mandate effect would overwhelm any fair process effect. Ultimately, the evidence that perceptions of international criminal courts can be driven by outcomes is strong, and there are plausible reasons for the fair process effect being absent among affected populations. Therefore, the Author does not believe that procedural justice theory is sufficient reason to reject the social psychology model.

#### IV. IMPLICATIONS OF THE SOCIAL PSYCHOLOGY MODEL

Having proposed a new model for understanding the perceived legitimacy of international criminal courts, this Article will now explore the implications of that model. This Part first addresses the following important question: how often will the social psychology model determine the perception of international criminal courts? If it only applies rarely, then its implications may be modest. If it applies in the majority of situations, its implications may be profound. Second, this Part will explore whether affected populations can perceive international criminal courts positively, and if not, what this means for their success as transitional justice mechanisms. The Article will then propose a constructive role for international criminal courts in post-conflict reconciliation where negative perceptions of legitimacy are a both predictable and acceptable result of efforts to break down self-serving internal narratives within affected groups. Finally, this Article will explore how courts can succeed in this role.

##### *A. The Social Psychology Model Will Apply in the Majority of Post-Conflict Situations*

The social psychology model predicts that when an affected group identifies strongly with one of the sides in a conflict and has a dominant internal narrative that denies responsibility for the conflict and any ensuing crimes, then indicting members of that group will cause the group to view the court negatively.<sup>267</sup> Obviously this will not apply in every situation because it has two prerequisites: strong identification between a group and a participant in the conflict, plus a dominant internal narrative within that group that denies

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Hedgvedt & J. Clay-Warner eds., 2008) (discussing a study where participants were enraged by the outcome of cases rather than the moral principle governing the decision).

267. For a definition of the social psychology model, see *supra* Part II.D.

responsibility. But how often will it apply? Will its application be an anomaly or will it be the general rule?

In the examples discussed in this Article, all but one of the situations involved a significant portion of the population identifying strongly with one of the sides in the conflict. Thus, Bosniaks, Croats, and Serbs each identified with their respective sides in Bosnia-Herzegovina,<sup>268</sup> the Mende identified with the CDF in Sierra Leone,<sup>269</sup> and both Albanian Kosovars and Serbian Kosovars identified with their respective sides in Kosovo.<sup>270</sup> These are not anomalies. Whenever a conflict is characterized by sides that break down along ethnic, religious, or national lines, it is likely that there will be strong identification between groups within the society and the participants in the conflict. And it is clear that ethnic, religious, and national divisions are at the heart of many modern conflicts.<sup>271</sup> This suggests that the first prerequisite of the social psychology model will be met in the majority of situations.<sup>272</sup>

The social psychology model's second prerequisite will also be met in most situations. Most of the groups discussed in this Article denied responsibility for any violations and blamed other groups for violations against its own members. Serbs denied responsibility for violence and blamed Croats and Bosniaks.<sup>273</sup> Bosniaks denied responsibility and blamed Serbs and Croats.<sup>274</sup> Similarly, Albanian Kosovars denied responsibility in Kosovo and blamed Serbian Kosovars, while Serb Kosovars denied responsibility and blamed Albanian Kosovars.<sup>275</sup> In Cambodia, most Cambodians blame the Khmer Rouge for violations and consider themselves victims,<sup>276</sup> and it appears that members of the Mende group in Sierra Leone largely blamed the RUF while denying that the CDF was at fault.<sup>277</sup>

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268. See *supra* note 35.

269. See *supra* notes 194–200.

270. See *supra* note 242.

271. See Joan Esteban & Debraj Ray, *On the Salience of Ethnic Conflict*, 98 AM. ECON. REV. 2185, 2185 (2008) (noting that “many, if not most” of today’s conflicts are ethnic in nature); David A. Lake & Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflicts*, 21 INT’L SECURITY 41, 41 (1996) (noting that the end of the Cold War unleashed a “wave of ethnic conflict” that swept across Eastern Europe, the former Soviet Union, and Africa). Ethnicity is not the only source of conflict. See, e.g., Robert Petit et al., *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT’L L. 163, 163–64 (2008) (studying several examples of religiously motivated violence).

272. The example of the RUF and AFRC in Sierra Leone demonstrates that this will not always be true. See *supra* notes 200–09.

273. See *supra* notes 36–41.

274. See *supra* notes 36–38.

275. See *supra* note 242.

276. See *supra* note 216.

277. Members of the Mende group had the lowest perceptions of the legitimacy of the SCSL, the most opposition to the prosecution of Samuel Hinga Norman, and the



These examples are not anomalies either, because it is human nature both to deny responsibility and to believe that you are a victim. People are deeply committed to believing that they are essentially good.<sup>278</sup> This makes it very difficult for people to accept that they have committed crimes, as this would be inconsistent with their self-view.<sup>279</sup> For example, a significant portion of direct perpetrators of violations of international criminal law consider themselves victims rather than perpetrators.<sup>280</sup> In effect, we deny responsibility for bad acts as a way to preserve our sense of self.<sup>281</sup>

This has significant effects at the group level. Groups involved in ethnic conflicts have a strong tendency to see themselves as the victims of wrongs committed by other groups and to deny responsibility for crimes committed by members of their own groups.<sup>282</sup> This was clearly the case in the former Yugoslavia—where

highest levels of support for the prosecution of leaders of the RUF. See *supra* Part III.A. These facts are consistent with an internal narrative that assigned blame to the RUF and denied responsibility for crimes carried out by the CDF.

278. See Aronson, *supra* note 105, at 131 (arguing that most people strive to “preserve a morally good sense of self” and that dissonance is produced when people experience cognitions that induce feelings of guilt); *supra* note 115.

279. See Ervin Staub, *Reconciliation After Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps Toward a General Theory*, 27 POL. PSYCHOL. 867, 872 (2006) (“The profound changes in identity, values, views of themselves, and views of the victims . . . makes it extremely difficult for perpetrators of . . . mass violence to acknowledge . . . that their actions are wrong.”).

280. The Author has collectively interviewed and read interviews of hundreds of former Khmer Rouge cadres as part of his work for the ECCC. One striking thing about former Khmer Rouge cadres is that they often view themselves as being victims. They may be willing to acknowledge that crimes (executions, torture, beatings, etc.) occurred, but they are rarely willing to take personal responsibility for them. Regrettably, most of the statements taken by the ECCC remain confidential, but the Documentation Center of Cambodia has some statements by former Khmer Rouge cadres on its website. *Searching for the Truth*, DOCUMENTATION CENTER CAMBODIA (DC-CAM) (Apr. 12, 2011), <http://www.unil.ch/files/guard-stories.pdf>. Several of the statements, including those of Him Huy and Suos Thy, show a very clear denial of responsibility that is consistent with what the Author experienced at the ECCC. See also ROY F. BAUMEISTER, *EVIL: INSIDE HUMAN VIOLENCE AND CRUELTY* 47–52 (W.H. Freeman & Co. ed., 1997) (“Many perpetrators regard themselves as victims. In their accounts, in their recollections, and probably even in their most sincere gut feelings, many perpetrators see themselves as people who have been unjustly treated and hence deserve sympathy, support and extra tolerance for any wrongs they may have committed.”); Leigh A. Payne, *In Search of Remorse: Confessions by Perpetrators of Past State Violence*, 11 BROWN J. WORLD AFF. 115, 117 (2004) (“[P]erpetrators create ‘vital lies’—euphemisms and stories that diminish their role in violence . . .”).

281. See Gosling et al., *supra* note 109 (noting how denial of responsibility is itself a dissonance reduction mechanism).

282. See Staub, *supra* note 279, at 872 (“In intractable conflict group beliefs evolve about the group’s just cause and the enemy’s responsibility for the conflict and violence.”). See generally Bar-Tal, *supra* note 120 (discussing self-perceived collective victimhood in intractable conflicts allegedly imposed by another group). Naïve realism

each group viewed itself as the victim of aggression and crimes committed by the other groups, even when this did not appear to be objectively accurate<sup>283</sup>—but it is not limited to the former Yugoslavia.<sup>284</sup> Rather, this effect appears to be universal.<sup>285</sup> Intergroup conflicts are marked by a “shared narrative” among group members that “the rival group continuously inflicted unjust and immoral harm upon them throughout the conflict.”<sup>286</sup> For this reason, we would expect the second prerequisite of the social psychology model to be present in virtually all situations where the first prerequisite is present. As a result, it is likely that the social psychology model will be applicable in the majority of post-conflict situations. This suggests that the implications of the model will be profound.

### B. Perceived Legitimacy as a Negative Sum Game

We can now predict that the social psychology model will apply in the majority of situations, and that in those situations perceptions of an international criminal court will be driven largely by whom the court indicts. But this does not mean that courts will always be viewed negatively. For example, in Cambodia, there is only one identifiable group of any size, and it is firmly behind the prosecution of Khmer Rouge leaders.<sup>287</sup> Thus, there is a good chance that the court will be viewed positively.<sup>288</sup> In Sierra Leone, only one of the three main participants in the conflict had a significant following, and thus the court’s indictments only generated negative perceptions among supporters of the CDF.<sup>289</sup> The overall result was a court that

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probably complicates these issues by making it harder for groups to recognize that their perceptions of their own actions and those of the other group are affected by motivated reasoning. *See supra* text accompanying notes 82–84.

283. *See* DAVID BRUCE MACDONALD, *BALKAN HOLOCAUSTS? SERBIAN AND CROATIAN VICTIM CENTRED PROPAGANDA AND THE WAR IN YUGOSLAVIA* (Manchester Univ. Press ed., 2002) (chronicling the mythology of victimization among groups in the former Yugoslavia); *supra* notes 36–40.

284. *See* Bar-Tal, *supra* note 122, at 241–42 (noting that a similar dynamic has occurred in Northern Ireland, Palestine, Cyprus, and Sri Lanka).

285. *Id.* at 229–30 (“It is probably universal that in every serious, harsh and violent intergroup conflict, at least one side—and very often both sides—believe that they are the victim in that conflict.”).

286. *Id.* at 230. Once created, this perception of victimization is resistant to change. *Id.* at 233.

287. *See supra* note 213.

288. *See supra* Part III.B (analyzing Cambodian attitudes to the ECCC). Of course, if the ECCC fails to live up to the expectations of most Cambodians, it still could end up being viewed negatively. *See supra* note 235.

289. *See supra* Part III.A (evaluating the perception of Sierra Leoneans toward the Special Court of Sierra Leone).

was viewed positively, albeit by a relatively small majority of the population.<sup>290</sup>

However, in a situation where virtually the entire affected population has taken sides in the conflict, the perceived legitimacy of international criminal courts is likely to be a negative sum game. Kosovo is the simplest example of this. The conflict in Kosovo was marked by two sides, and the population was essentially split with different ethnic groups representing each side.<sup>291</sup> Indicting Serbian Kosovars caused negative perceptions among the Serbian Kosovar population, and indicting Albanian Kosovars caused negative perceptions among the Albanian Kosovar population.<sup>292</sup> Virtually every decision of the Regulation 64 Panels could be expected to offend one part of the population and result in a net reduction in perceived legitimacy. The situation in Bosnia-Herzegovina was more complicated because there were three participants in the conflict, but the result was essentially the same.<sup>293</sup> Every indictment by the ICTY caused a net loss of perceived legitimacy because it offended one of the three groups. The Bosniaks were the only group that did not view the ICTY negatively, but only because the ICTY largely validated the Bosniaks' internal narrative of victimhood.

The realization that the perceived legitimacy of international criminal courts can be a negative sum game has potentially significant consequences for transitional justice. Many scholars have argued that positive perceived legitimacy is crucial to the success of transitional justice mechanisms.<sup>294</sup> But there is a subset of international criminal courts for which perceived legitimacy is a negative sum game.<sup>295</sup> It will be virtually impossible for such courts to be perceived as legitimate because every act they take will lower their perceived legitimacy. If perceived legitimacy is crucial to transitional justice, this suggests that international criminal courts cannot be an effective transitional justice mechanism in situations

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290. See *supra* notes 185–87.

291. See *supra* note 241.

292. See *supra* Part III.C (analyzing how affected populations perceive the Regulation 64 panels in Kosovo).

293. See *supra* Part II.A (analyzing the perception of the ICTY among various groups in the former Yugoslavia).

294. See *supra* notes 1–9.

295. For courts created in response to a particular conflict or having jurisdiction over a single geographic area, perceived legitimacy will be evaluated for the court as a whole. Because the ICC is a permanent international criminal court that has jurisdiction over crimes occurring in multiple separate conflicts and involving multiple affected populations, the perceived legitimacy of the ICC will have to be evaluated independently for each situation. Perceived legitimacy may be a negative sum game in some situations, but not in others.

where all of the sides are supported by ethnic, religious, or national groups, which appears to be the majority of situations.<sup>296</sup>

But the problem is potentially worse than that. There is reason to believe that the social psychology model affects the perceived legitimacy of more than just international criminal courts. Affected populations that have dominant internal narratives of victimhood should react negatively to any attempt to attribute responsibility to their group, whether it comes from an international criminal court or not. The discussion of Kosovo indicates that domestic courts with international assistance are subject to the social psychology model,<sup>297</sup> and domestic criminal prosecutions would presumably be affected as well. Even a Truth and Reconciliation Commission that is simply tasked with identifying what happened could face negative perceptions of legitimacy.<sup>298</sup> Thus, one would expect that under the right conditions, any transitional justice mechanism could face a situation where its perceived legitimacy is a negative sum game. Are these other transitional justice mechanisms also doomed to failure? This Author believes they are not.

### *C. The Problem of Self-Serving and Inaccurate Internal Narratives*

The fundamental problem facing international criminal courts (and other transitional justice mechanisms) is a mismatch between dominant internal narratives within a group and what actually happened in the conflict. Most groups are predisposed to see themselves as victims in the conflict, whether or not this is historically accurate.<sup>299</sup> It is this mismatch between narratives and reality that causes problems when indictments are issued against members of the group. At the same time, virtually every group wants “justice,” often in the form of prosecution of those responsible for the violence. Large majorities of Cambodians, Bosniaks, Croats, Serbs, and Sierra Leoneans say that they want those responsible put on

296. Esteban & Ray, *supra* note 271; *see also* Lake & Rothschild, *supra* note 271 (noting the “wave of ethnic conflict” that followed the Cold War); Petit et al., *supra* note 271 (studying examples of religiously motivated violence).

297. For a discussion of the Kosovars’ negative perception of domestic courts receiving international assistance, *see supra* Part III.C.

298. For example, one would expect that the Sierra Leonean Truth and Reconciliation Commission’s determination that CDF forces were responsible for “considerable violations and abuses of human rights” would have much the same effect on perceptions of its legitimacy as Norman’s indictment had on perceptions of the SCSL’s legitimacy (at least among supporters of the CDF). SIERRA LEONE TRUTH & RECONCILIATION COMM’N, *supra* note 174, at 71; *see also id.* at 71–80 (discussing CDF responsibility for atrocities).

299. *See supra* Part IV.A.

trial.<sup>300</sup> Given that narratives of victimhood are nearly universal in ethnic conflicts, it is not surprising to find that demands for justice are nearly universal as well. The problem lies in what the various groups mean by justice.

What groups seem to mean by their demand for justice is a kind of justice that is consistent with their dominant internal narrative about the conflict. In other words, what they want is for the other groups to be held responsible and punished.<sup>301</sup> When courts validate this internal narrative they are perceived favorably, when they act inconsistently with this narrative, they are viewed negatively. This presents courts with a problem. Even if we were to pursue whatever form of justice resulted in positive perceived legitimacy of the court (on the theory that this is crucial to the success of transitional justice), it simply would not be possible to make everyone happy in Kosovo and Bosnia-Herzegovina because perceived legitimacy is a negative sum game in these two situations.<sup>302</sup>

If the fundamental problem is a mismatch between dominant internal narratives and the realities of the conflict, this suggests that the solution is to try to align the two. After all, if groups had a realistic view of their role in the conflict (both as victims in some instances and as perpetrators in others), then indictments of members of the group would not be as likely to lead to negative perceived legitimacy. But this is more than simply a solution to problems of perceived legitimacy. Inaccurate internal narratives that cast each group as the victim of crimes committed by other groups are an impediment to post-conflict reconciliation.<sup>303</sup> Thus, trying to align dominant internal narratives with reality not only helps rehabilitate

300. Eighty-eight percent of Sierra Leoneans would like to see those responsible for crimes during the war put on trial, while 91 percent of Cambodians would like to see those who were responsible for what happened during the Khmer Rouge regime held accountable. BBC WORLD SERV. TRUST, *supra* note 185, at 53; PHAM ET AL., *supra* note 213, at 31. Even in the former Yugoslavia, 90 percent of the population wants to see those responsible for war crimes put on trial. ICRC, *supra* note 35, at 24.

301. See, e.g., ICRC, *supra* note 35, at 24–25 (indicating former Yugoslavians' belief that members of ethnic groups other than their own should be prosecuted and punished for war crimes).

302. For a discussion of the competing groups in Kosovo and Bosnia-Herzegovina, see *supra* Part IV.B.

303. Professor Bar-Tal argues that reconciliation requires a change in attitudes toward the past and toward the group. Groups must examine their sense of victimization and come to terms with what really happened, including accepting responsibility for harms committed by the group. Bar-Tal, *supra* note 122, at 258; see also Staub, *supra* note 279, at 868 (“The essence of reconciliation is a changed psychological orientation toward the other [group].”); *id.* at 873 (“The inability to acknowledge harmdoing interferes . . . with reconciliation . . .”). Naïve realism may also play a role in increasing intergroup distrust, polarizing groups' views, and making reconciliation more difficult. See Kahan, *supra* note 65, at 22 (explaining how naïve realism can lead to even greater divisiveness between conflicted parties).

the image of international criminal courts (and other transitional justice mechanisms), it also opens the door to reconciliation within society.<sup>304</sup>

On the other hand, pursuing positive perceived legitimacy as an end in itself is self-defeating. Even in situations where perceived legitimacy is not a negative sum game, pursuing positive perceived legitimacy would require the court to determine its prosecution strategy by looking at how the indictment of certain individuals would offend groups within the affected population. For example, the Special Court could have refused to indict members of the CDF and simply indicted members of the RUF and AFRC. Perceptions of its legitimacy among Sierra Leoneans, particularly in the South and East of the country, would have probably been significantly better. But would this have led to greater internalization of norms of international criminal law or a more successful post-conflict reconciliation?

One obvious point is that prosecution strategy should be driven by evidence of responsibility for serious violations of international criminal law, not by which side has more supporters.<sup>305</sup> But perhaps an argument could be made that we should adopt a more flexible notion of justice if this is necessary to improve perceptions of legitimacy and thereby increase the chances of reconciliation. Unfortunately, focusing on improving perceptions of legitimacy would often require catering to inaccurate internal narratives about victimhood and is likely to make post-conflict reconciliation more difficult, not easier.<sup>306</sup> Groups that perceive themselves as victims exhibit biased information processing, reduced feelings of accountability, a sense of moral entitlement, the rationalization of immoral acts against members of other groups, and the perpetuation of violence.<sup>307</sup> Failing to address dominant internal narratives of

304. See Staub, *supra* note 279, at 881 (“Consideration of injuries to both sides, even if substantially unequal, makes the development of a shared history, of shared collective memories possible.”); Wohl & Branscombe, *supra* note 117, at 290 (arguing that intergroup conflict can be reduced if group members are able to relinquish negative feelings directed toward the perceived transgressor group).

305. See, e.g., deGuzman, *supra* note 1, at 1449 (arguing that perceived legitimacy is one factor, but not the decisive one, the ICC Prosecutor should consider when deciding which cases to pursue). Professor deGuzman identifies the scale of the crimes, the nature of the crimes, the manner of commission of the crimes, the impact of the crimes, the role of the perpetrator, and the intent of the perpetrator as key factors in prosecutorial discretion. *Id.* at 1451–56.

306. See Bar-Tal, *supra* note 120, at 230 (noting that the collective feelings of victimization is “a factor that feeds continuation of the conflict and [is] an inhibitor of peacemaking”).

307. *Id.* at 252–56; see also Sherman & Cohen, *supra* note 67, at 219–20 (discussing how a person’s motivation to preserve their sense of worth can lead to a sense of personal impunity and even immoral behavior).

victimhood can allow these narratives to become part of the groups' collective memory, where they may linger for generations, negatively affecting future attempts to resolve the underlying conflict between groups.<sup>308</sup> Such feelings of victimization may, in fact, be the catalyst of and justification for new episodes of violence against rival groups.<sup>309</sup> This strongly suggests that simply pursuing positive perceived legitimacy by catering to self-serving and inaccurate internal narratives about the conflict is not the solution.<sup>310</sup>

#### D. *The Limits of Motivated Reasoning*

The discussion above suggests a role for international criminal courts in reconciliation by trying to break down inaccurate internal narratives about the underlying conflict. Courts could do this by fairly and impartially prosecuting crimes committed by all groups, and by collecting and making available evidence that persuades groups that perceive themselves as victims to see their role in the conflict more realistically. This will almost certainly result in a negative perception of courts in the short term as they take actions that are inconsistent with various groups' dominant internal narratives. However, this technique might ultimately have a big payoff if it helps reconcile the various groups within society.<sup>311</sup> In this process, negative perceptions of legitimacy would be a necessary price paid by courts for trying to break down inaccurate internal narratives regarding responsibility for the crimes.

But is it possible for courts to play a role in breaking down dominant internal narratives of victimhood? Of course, courts cannot

308. See Bar-Tal, *supra* note 120, at 236–37 (indicating that a collective sense of victimhood can become encoded in the collective memory, lasting for generations); Staub, *supra* note 279, at 870 (explaining how victimized groups may carry the impact of the harms against them, frustrating their sense of place in the world); Wohl & Branscombe, *supra* note 117, at 288 (“[T]he negative feelings resulting from intergroup conflict linger on long after the violence itself has terminated.”).

309. See Bar-Tal, *supra* note 120, at 238 (suggesting that collective victimhood may lead to a sense of nationalism that can spark a war); Staub, *supra* note 279, at 871 (discussing how groups that were previously victimized might strike out against others who even later are still perceived to be dangerous).

310. See Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. L. 143, 144 (2001) (arguing that knowing about abuses of the past is a crucial part of the post-conflict reconciliation process, and that ignoring that past leads to a “collective amnesia” that is illusory as the “unresolved past will inevitably return to haunt the citizens”).

311. See Bar-Tal, *supra* note 120, at 258 (positing that conflicts could be resolved if each side assumed responsibility for its actions); Kahan, *supra* note 65, at 22 (explaining how self-victimization can further divide parties); Staub, *supra* note 279, at 868, 873 (suggesting that a party’s changed perception of the opposing group may increase the likelihood of reconciliation).

be expected to break down self-serving narratives on their own. Effective reconciliation is a process that requires a broad range of institutions to engage with all aspects of society.<sup>312</sup> Nevertheless, it may be possible for courts to play a part, however small, in that process.

We know that cognitive and motivational biases are powerful forces that can cause us to act in decidedly biased ways, but if they were all-powerful we would never change our minds about anything. Beliefs do change over time, so it must be possible to overcome the effects of these biases.<sup>313</sup> In fact, there are limits to what motivated thinking can accomplish. All humans believe that their belief systems are justified and justifiable.<sup>314</sup> People also prize consistency as an important component of rationality. At some point, if the countervailing evidence is strong enough and the supporting evidence weak enough, not even a desire to protect some preferred belief will prevent people from changing their minds.<sup>315</sup>

One recent experiment demonstrated both the desire to hold onto one's current beliefs and the existence of "tipping points" where the receipt of information inconsistent with a preexisting belief eventually overcame that initial belief.<sup>316</sup> The experiment involved the subjects' attitudes toward fictional presidential candidates. First, the subjects' political orientation was assessed and they were presented with a fictional candidate that matched their own political orientation. Unsurprisingly, they approved of this candidate. They were then given varying levels of incongruent information about their candidate (information which indicated the candidate did not share their political orientation). Consistent with the effect of attitude polarization,<sup>317</sup> subjects that received only small amounts of incongruent information actually had increased approval levels. However, as the amount of incongruent information was increased, subjects eventually reached a "tipping point" at which they reevaluated their initial positive attitude toward the candidate in light of the incongruent information they had received and then

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312. Staub, *supra* note 279, at 873.

313. Ross & Anderson, *supra* note 162, at 151–52.

314. See *supra* notes 77–80 (discussing the illusion of objectivity).

315. Nickerson, *supra* note 147, at 197; see also *supra* notes 77–80 (arguing that our desire to view ourselves as rational and objective limits the effects of motivated reasoning).

316. Redlawsk et al., *supra* note 158, at 579.

317. See Lord et al., *supra* note 158, at 2099 (discussing how proponents of a belief will rationalize evidence that contradicts their belief in a manner that lends support, ultimately bolstering their belief); Taber & Lodge, *supra* note 71, at 764–67 (demonstrating that people's biases are polarized when faced with contradictory data).



formed a new and significantly more negative attitude toward the candidate.<sup>318</sup>

There is no reason to believe the particular tipping point found in Professor David Redlawsk's experiment is a universal constant.<sup>319</sup> Nevertheless, his experiment elegantly demonstrates that tipping points do exist and that people will eventually revise their initial beliefs to take into account new evidence that is inconsistent with their beliefs.<sup>320</sup> Thus, it must be possible for groups to reevaluate their internal narratives of victimization. They will hold onto their beliefs long past the point where logic would suggest they should be reevaluated, but as evidence that their narrative is flawed accumulates, eventually they will reach a tipping point and a more reasonable narrative will emerge. There is evidence that this process has occurred in Germany and that it may be underway in the former Yugoslavia.<sup>321</sup>

#### E. *The Role of Courts in Changing Internal Narratives*

In the years after WWII, Germans adopted an internal narrative of victimhood and largely denied personal responsibility for the horrors of WWII and the Holocaust.<sup>322</sup> As the social psychology model predicts, reactions to the International Military Tribunal (IMT) among West Germans were overwhelmingly negative, with 59 percent of West Germans in the 1950s saying that they disapproved of the way the Allies handled war crimes trials, and only 10 percent

318. Redlawsk et al., *supra* note 158, at 579.

319. *Id.* at 590. One would not expect the subjects in his experiment to be deeply committed to fictional presidential candidates, and thus their tipping point might be quite low. One would expect the tipping point to be significantly higher in situations where the attitude being protected is much more important to the individual, for example in situations where the attitude relates to one's self-view or social identity.

320. *See id.* at 579 (demonstrating that once a person is presented with enough incongruent data, that person reconsiders their belief).

321. *See infra* Part IV.E (discussing the changing political perceptions in Germany and former Yugoslavia).

322. *See* Gunnar Theissen, *Between Acknowledgement and Ignorance: How White South Africans Have Dealt with the Apartheid Past* ch. 2.10 fig.2.8, CENTRE STUDY VIOLENCE & RECONCILIATION, <http://www.csvr.org.za/wits/papers/papgt0.htm> (last visited Mar. 1, 2012) (noting that in 1951, 63 percent of Germans agreed with the statement, "The Germans have no reason to feel guilty nor to feel responsible for compensations. Only those who have really been actively involved are guilty and should also feel responsible for what they have done," and that only 4 percent of Germans agreed with the statement, "Every German is to a certain degree guilty"). Theissen also notes that during the 1950s Germans identified German soldiers who died during the war and ethnic Germans expelled from Eastern Europe as the principal victims of WWII. *Id.* ch. 2.10.

expressing approval.<sup>323</sup> As Christoph Burchard has noted, “Reports of post-war Germany support the view that the Nuremberg trial was never endorsed, either politically or morally, by the West German public.”<sup>324</sup> Hannah Arendt believed that the lack of support for the IMT was a symptom of a “deep-seated, persistent and sometimes brutal refusal to acknowledge past events and to come to terms with them.”<sup>325</sup> It appears that Germans seized upon the flaws in the IMT<sup>326</sup> as a rationale for rejecting its conclusions and preserving their internal narrative of victimization.<sup>327</sup> The rejection of the IMT also caused most German academics to reject the norms of international criminal law.<sup>328</sup>

Over time, however, Germans underwent a change in their views about WWII. Beginning in the 1970s and 1980s, Germans generally came to accept responsibility for what happened during WWII,<sup>329</sup> at

323. Christoph Burchard, *The Nuremberg Trial and Its Impact on Germany*, 4 J. INT’L CRIM. JUST. 800, 812–13 (2006). West German lawyers and legal academics also viewed the IMT quite negatively, focusing on issues of victor’s justice and *nullum crimen sine lege*. *Id.* at 802–10.

324. *Id.* at 813; accord Donald Bloxham, *The Nuremberg Trials and the Occupation of Germany*, 27 CARDOZO L. REV. 1599, 1600 (2006) (arguing that in the aftermath of Nazi rule, both the “medium and the message” of the IMT were “decisively rejected” by the West German public).

325. Burchard, *supra* note 323, at 813.

326. There were undoubtedly flaws in the IMT. For instance, its approach to the principle of legality was driven largely by political rather than legal considerations. See Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, 140–41, 197 (2007).

327. Burchard suggests something along these lines, although without any specific reference to motivated reasoning or cognitive biases. See Burchard, *supra* note 323, at 823–25 (arguing that Germans used arguments about the flawed nature of the IMT as a means to claim the role of victim so as to deflect blame for the atrocities committed during WWII).

328. See *id.* at 802–06 (noting that German academics argued that the Nuremberg trial “highlight[ed] the low standard of international criminal justice” and that international criminal law was not generally accepted or taught in Germany). This is consistent with the more traditional literature on perceived legitimacy, which argues that courts must be perceived positively for populations to internalize the norms they represent. Ramji-Nogales, *supra* note 1, at 4. Negatively perceived legitimacy leads to rejection of both the court and the norms it represents. See *id.* (proposing that perceived legitimacy is “require[d]” for internalization of a justice institution’s norms).

329. Gunnar Theissen notes that support for the proposition that Germany was responsible for World War II grew slowly over time and only reached a clear majority in 1967. See Theissen, *supra* note 322, ch. 2.6 fig.2.2. In 1964, only 54 percent of Germans agreed that the Nazi state had been an unjust state and a criminal regime. By 1990, this had risen to 85 percent. *Id.* ch. 2.8 fig.2.6; see also Elisabeth Domansky, “Kristallnacht,” *the Holocaust and German Unity: The Meaning of November 9 as an Anniversary in Germany*, 4 HISTORY & MEMORY 60 (1992). While Domansky repeatedly suggests that this shift in internal narratives was partly a cynical ploy to rehabilitate Germany’s post-war image and secure international support, and that Germany’s remembrance of the Holocaust is incomplete, it is also equally clear that there was a

least in part because of the evidence collected by the IMT.<sup>330</sup> If negative perceptions of the court were created by the court's attack on the dominant internal narrative of victimhood, then one would expect that a more realistic internal narrative would reduce the tension caused by the IMT's judgment and pave the way for a more positive perception of the IMT in Germany. And indeed, this is what happened.<sup>331</sup> This development in turn led to Germany's internalization of the norms of international criminal law. Germany joined the ICC and incorporated international criminal law into its domestic criminal law, and international criminal law is now taught in German law schools.<sup>332</sup>

A similar process may be underway among ethnic Serbs in the former Yugoslavia. There is evidence that growing numbers of Serbs have accepted that some of the worst crimes committed in the Balkans, including the shelling of Sarajevo and the massacre at

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real change in the dominant internal narrative among Germans. *See, e.g., id.* at 62, 69, 70–71, 72–73.

330. *See* Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees of Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 438–39 (2009) (describing the IMT as the best example of an international court using its historical record to help “reorient the German population from a militaristic past to its liberal democratic present” even if direct evidence of its effect is hard to pin down); Staub, *supra* note 279, at 881 (suggesting that the evidence presented during the Nuremberg trials made it more difficult for the Germans to deny their actions or responsibility for the harm caused). *But see* Bloxham, *supra* note 324, at 1599–600 (arguing that the IMT trials were designed with the goal of “engineering a narrative of the Nazi period” that would reeducate Germans about their role in the Holocaust, but concluding that this largely failed, at least in the immediate aftermath of World War II). Part of the difficulty in showing whether the IMT affected German attitudes toward World War II is that German attitudes immediately after World War II were not positively affected by the IMT. The effect, if any, was felt much later. Yet historians have seemed to conclude that because no effect was felt immediately, no effect occurred. *See* Bloxham, *supra* note 324, at 1599–600 (arguing that the change in German attitude was due to a generational change and not any impact by the IMT); Martti Koskeniemi, *Between Impunity and Show Trials*, in 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 4–5 (Christiane E. Philipp ed., 2002) (focusing on whether the IMT had an immediate effect). Instead, emphasis is placed on the “generation of 1968” as a crucial turning point in German attitudes toward the Holocaust. *See infra* text accompanying note 337. However, it is clear that the generation of 1968 was itself deeply influenced by a desire to come to grips with their parents' generation's responsibility for what had happened during World War II. *See, e.g.,* HANS KUNDNANI, *UTOPIA OR AUSCHWITZ: GERMANY'S 1968 GENERATION AND THE HOLOCAUST* (2009).

331. *See* Burchard, *supra* note 323, at 820–22 (discussing Germany's later positive outlook on the IMT and support of the International Criminal Court).

332. *See* Bloxham, *supra* note 324, at 1600 (discussing Germany's now positive view of the Nuremberg trials and the International Criminal Court); Burchard, *supra* note 323, at 822 (discussing Germany's support of the International Criminal Court and international criminal law generally).

Srebrenica, occurred and were perpetrated by Serbs.<sup>333</sup> While most ethnic Serbs are not yet ready for a complete reevaluation of their role in the conflict, the beginnings of that process may be underway.<sup>334</sup> And this nascent reevaluation appears to be, at least in part, a result of the evidence accumulated by the ICTY during its prosecution of crimes committed during the conflict in the Balkans.<sup>335</sup>

The examples of the IMT and the ICTY demonstrate several important points. First, inaccurate internal narratives of victimization are not immutable, despite the influence of motivational and cognitive biases. Second, when a group adopts an internal narrative that is more consistent with what actually happened, perceptions of the court's legitimacy may rise. Third, there is some evidence that courts can play a role in causing groups to reevaluate their internal narratives by collecting evidence and prosecuting violations of international criminal law.<sup>336</sup> Fourth, when groups adopt more realistic internal narratives about responsibility, it can lead to the internalization of the norms of international criminal law and improve the likelihood of successful reconciliation. And fifth, this process is not likely to be quick or easy. It took nearly forty years in Germany, and after nearly twenty years we are just seeing the start of the process in the former Yugoslavia.<sup>337</sup>

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333. See ORENTLICHER, *supra* note 39, at 86–87 (describing survey results that show growing acceptance of Serb responsibility over time); Klarin, *supra* note 38, at 93 (noting that half of Serbs accept that the massacre at Srebrenica took place and that 43 percent think it was a crime). But Srebrenica is one of the most serious and best documented atrocities. Ethnic Serbs were much less likely to acknowledge that Kosovar Albanians were the victims of crimes in the run-up to the NATO bombing of Serbia. *Id.* (noting that only 14 percent of ethnic Serbs believed that crimes had been committed in Kosovo by Serbs).

334. See ORENTLICHER, *supra* note 39, at 93–94 (discussing how the public “accepts that Serbs committed enormous crimes” but is still “not yet ready to handle” ICTY evidence).

335. *Id.* at 92–94 (arguing that the work of the ICTY has imposed real constraints on the dominant internal narrative among the Serb population and made it much more difficult for Serbians to deny that atrocities took place).

336. The Author is not taking the position that the changes in the internal narratives of Germans or Serbs were entirely or even mostly the result of the work of the IMT or the ICTY, but they do seem to have been, in part, a response to the evidence those courts collected and publicized. See ORENTLICHER, *supra* note 39, at 92–94 (arguing that the ICTY has made it more difficult for Serbians to deny that atrocities took place); Padmanabhan, *supra* note 330, at 438–39 (discussing how the IMT used its historical record to “reorient” how Germans viewed its militaristic past); Staub, *supra* note 279, at 881 (suggesting that Nuremberg trial evidence made it more difficult for Germans to deny responsibility for their actions during WWII); Staub, *supra* note 312, at 873 (suggesting that the cooperation of several institutions is needed for effective reconciliation). Courts are never going to be the principal mechanism of post-conflict reconciliation, but they do have a role to play.

337. It appears that this is partly a generational process of change as younger generations are not as devoted to the causes and ideological positions of their

How can courts help break down inaccurate internal narratives of victimization? Obviously, their core function is to prosecute individuals for violations of international criminal law,<sup>338</sup> but they have other functions as well.<sup>339</sup> One of these additional functions is to help define what happened.<sup>340</sup> They do this by collecting evidence about violations of international criminal law. The primary purpose of this evidence is to determine the guilt or innocence of the accused. However, it also creates a (partial) record of what happened during the conflict.<sup>341</sup> Publication of this evidence might eventually lead to a reexamination of self-serving narratives of victimization.<sup>342</sup> This suggests that a court's record-setting function may, in the long run, be one of its most important functions with respect to its success as a transitional justice mechanism.

predecessors. For example, in Germany much has been made of the impact of what has been referred to as the "generation of 1968," a generation of Germans who had not lived under the Nazis. See Bloxham, *supra* note 324, at 1600 (arguing that the change in German attitudes was the result of "generational change" and economic stability); Burchard, *supra* note 323, at 820 (noting that German attitudes toward WWII and the IMT changed in part because "a new generation of judges, politicians and academics" took a different approach to the past); Domansky, *supra* note 329, at 72 (discussing the generation of 1968); Theissen, *supra* note 322, ch. 2.7 ("This apathy changed after 1968 when a new generation challenged the undemocratic values that had partly dominated the early years of the Federal Republic.").

338. Shahram Dana, *Turning Point for International Justice?*, in XI ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 962, 972 (Andre Klip & Goran Sluiter eds., 2007) ("The primary function of the international criminal tribunal is to determine the criminal responsibility and punishment of those individuals found guilty of the crimes under its jurisdiction.").

339. For example, the Rome Statute's preamble mentions various goals for the International Criminal Court, including: putting "an end to impunity"; preventing the commission of future crimes; and fostering respect for "international justice." Rome Statute of the International Criminal Court pmb., July 17, 1998, 2187 U.N.T.S. 90; see also Regina E. Rauxloh, *Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining*, 10 INT'L CRIM. L. REV. 739, 739 (2010) ("The most important function of international criminal justice is the restoration of peace.").

340. Rauxloh, *supra* note 339, at 740 (arguing that establishing "a historical record of the roots and the development of the violence is one of the main functions of all international criminal courts"); see also Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT'L L. 415, 425 (2009) (suggesting that the ICTY "considers one of its primary purposes to be the creation of a historical record").

341. The record created by international criminal courts is obviously not perfect. Court staff are not trained historians, courts often have temporal and personal limits on jurisdiction that exclude some parts of the conflict, and the record created by the court will largely be limited to evidence that relates to situations that have been the subject of trials. Nevertheless, in many circumstances the evidence assembled by the court will be the only large-scale contemporaneous investigation of what happened. Rauxloh, *supra* note 339, at 742-44; see also Dana, *supra* note 338, at 972.

342. See *supra* Part IV.D (discussing the possibility of reaching a "tipping point" where a person's beliefs change upon receiving enough incongruent data).

Moreover, we can make some tentative predictions about the forms of evidence that are most likely to cause groups to reconsider their internal narratives. To begin with, eyewitness testimony by victims from rival groups is most likely to be discounted because it contradicts the dominant internal narrative and because there are doubts about the source of the information.<sup>343</sup> Thus, one would probably expect ethnic Serbians to reject as unreliable the eyewitness evidence of ethnic Bosniaks or Croats (and vice versa). There is some evidence that expert evidence is more persuasive than eyewitness testimony,<sup>344</sup> although experts who are from a different group are probably still likely to be discounted.

Confessions by group members might fare better as they are admissions of responsibility by a member of one's own group, and thus there will be less pressure to reject the evidence because of its source.<sup>345</sup> But unfortunately, the nature of many confessions may undermine their persuasiveness.<sup>346</sup> Nevertheless, confessions by group members are likely to be more persuasive than testimony from victims of rival groups or expert testimony. For example, Biljana Plavšić, the former President of the Republika Srpska, made a dramatic courtroom confession of an organized plan to remove ethnic Bosniaks and Croats from territory claimed by ethnic Serbs.<sup>347</sup> At the time, this was regarded as an unprecedented admission that would do much to aid reconciliation,<sup>348</sup> although it is not clear how much direct

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343. See Kahan, *supra* note 101, at 122 (noting that there is intense pressure to reject information that contradicts one's beliefs when rival groups are the source of that information); Nickerson, *supra* note 147, at 199 (indicating that people tend to associate more with information sources that share their beliefs).

344. Jos Hornikx, *Comparing the Actual and Expected Persuasiveness of Evidence Types: How Good Are Lay People at Selecting Persuasive Evidence?*, 22 ARGUMENTATION 555, 564–66 (2008).

345. Of course, there will still be pressure to reject the confessions because they conflict with the dominant internal narrative.

346. For example, most perpetrators “speak about their past without necessarily admitting wrongdoing. . . . They admit to their role in the security apparatus, but remain silent or deny participation in, or even knowledge of [crimes].” Payne, *supra* note 280, at 116. They may also be vague about key details or portray themselves as victims. See *id.* at 117–18 (discussing how perpetrators will portray themselves as victims of violence and may “forget” certain details); see also Rauxloh, *supra* note 339, at 748 (citing *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003)) (providing an example of a confession that was evasive and not fully forthcoming); *supra* text accompanying note 280. In addition, their confessions may be dismissed as self-serving lies designed to secure a lower sentence by those who wish to deny their content. For an example, see Rauxloh, *supra* note 339, at 752.

347. Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY*, 3 J. INT'L CRIM. JUST. 666, 671–72 (2005); see also Nancy Amoury Combs, *Prosecutor v. Plavšić*, 97 AM. J. INT'L L. 929, 929–33 (2003) (recounting Plavšić's confession).

348. Rauxloh, *supra* note 339, at 750; see Tieger & Shin, *supra* note 347, at 671–74 (suggesting that Nikolić's public admission was a “step along a path of mounting

impact it had on Serb attitudes.<sup>349</sup> Serb witnesses in other confessions have acknowledged that thousands of Bosniaks were killed in the days following the fall of Srebrenica.<sup>350</sup> It appears that the cumulative nature of many such admissions has caused Serbs to reexamine the events surrounding the fall of Srebrenica.<sup>351</sup> And, while it is not germane to this Article, the effect of confessions on victims can be profound.<sup>352</sup>

Physical evidence seems to be the form of evidence most likely to have an effect on internal narratives. Images in particular appear to be objective in a way that other forms of evidence do not.<sup>353</sup> One video in particular is believed to have had a significant impact on how Serbians viewed the massacre at Srebrenica. The video showed

evidence that made acknowledgement inevitable"). *But see* Combs, *supra* note 347, at 933–34 (arguing that Plavšić's confession was too brief and too vague and that her refusal to testify against others undermined her claims of sincerity). Professor Dana argues that Plavšić's confession was limited in key ways, particularly in its failure to identify other leaders that acted with her and its refusal to describe her actions as ethnic cleansing, and that therefore it was much less likely to lead to true reconciliation than might have been the case. Dana, *supra* note 338, at 964–67. He ultimately cautions against the tendency to "uncritically treat guilty pleas as a major contributor to establishing the truth or reconciliation." *Id.* at 975.

349. *See* Combs, *supra* note 347, at 936 (noting that a majority of people in Republika Srpska denounced the confession as an act of treachery); Dana, *supra* note 338, at 972; Rauxloh, *supra* note 339, at 751 (suggesting that a confession made for tactical reasons may actually impede reconciliation). In addition, it appears that Plavšić has since publicly recanted her confession and stated that she is innocent. *See* Dana, *supra* note 338, at 966; *Jailed Plavsic Recants Hague Confession*, UPI (Jan. 27, 2009) [http://www.upi.com/Top\\_News/2009/01/27/Jailed-Plavsic-recants-Hague-confession/UPI-68351233070199](http://www.upi.com/Top_News/2009/01/27/Jailed-Plavsic-recants-Hague-confession/UPI-68351233070199) (announcing Plavšić's recantation).

350. Tieger & Shin, *supra* note 347, at 673; *see* Combs, *supra* note 347, at 937 (referencing the Nikolić and Obrenović confessions about their roles in the massacre).

351. *See* ORENTLICHER, *supra* note 39, at 86–87, 92–94 (discussing the ICTY impact on Serbians' gradual acknowledgement of war crimes). Of course, changing Serb attitudes toward Srebrenica are not solely the result of confessions by ethnic Serbs. *See id.* at 104–05 (discussing the impact of video evidence on Serbian perceptions). Nonetheless, it is reasonable to suppose that the confessions are at least partly responsible for the change in attitude.

352. *See* Clark, *supra* note 340, at 428–29 (discussing how a defendant's confession can provide victims with a degree of closure); Combs, *supra* note 347, at 937 (recounting a survivor's "sense of relief" upon surfacing of Serb confessions); Tieger & Shin, *supra* note 347, at 672 (discussing the "powerful impact" of admissions on the victims).

353. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). Professor Kahan's point was that, despite the fact that eight of the Justices of the Supreme Court in *Scott v. Harris* found the imagery so compelling that they thought no reasonable juror could doubt their interpretation, a significant minority of Americans did interpret the video differently. In other words, images may have an illusion of objectivity but they are still ultimately subjective because they must be interpreted by an individual to have meaning. Nonetheless, they may be more persuasive because of their appearance of objectivity.

members of a Serbian paramilitary group called the Scorpions executing Bosniaks in the aftermath of Srebrenica.<sup>354</sup> The power of the video lay principally in its authenticity—it was made by the Scorpions themselves—and its apparently objective representation of reality. The video was shown repeatedly on television throughout the former Yugoslavia and caused a palpable change in Serbian opinion toward the massacre at Srebrenica.<sup>355</sup> Having said that, one-third of Serbs still believed the video was fabricated.<sup>356</sup> Nonetheless, it is this sort of evidence that is most likely to prompt a reevaluation of inaccurate and self-serving narratives of victimization.

## V. CONCLUSION

Using surveys of attitudes toward various international criminal courts as well as the latest research in social psychology, this Article proposes a new model for understanding how populations affected by violence perceive the courts set up to address that violence. According to the social psychology model, when there is a strong identification between groups within the affected population and the participants in the conflict, perceptions of the legitimacy of tribunals are driven primarily by the interaction between who the tribunal indicts and the dominant internal narratives among the various groups. If the court's indictments contradict a group's dominant internal narrative about responsibility for the conflict, then the court will be perceived as biased and unjust by members of that group. This perception permits members of the affected group to dismiss the court's indictments and preserve their own internal narrative. This effect is probably the result of a combination of motivated reasoning and various cognitive biases, what Professor Dan Kahan has referred to as "cultural cognition."<sup>357</sup>

The social psychology model provides a better explanation of how the ICTY was perceived in the Balkans than the traditional model of perceived legitimacy. It also better explains attitudes toward the SCSL, the ECCC, the Regulation 64 Panels in Kosovo, and the IMT. Perhaps more importantly, the social psychology model will probably apply in the majority of post-conflict situations. In short, it has significantly more explanatory power and utility than the traditional model of perceived legitimacy, and represents an advance in how we understand the perceived legitimacy of international criminal courts.

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354. ORENTLICHER, *supra* note 39, at 104.

355. *Id.* at 105–06.

356. *Id.* at 105.

357. Kahan, *supra* note 65, at 23.



Moreover, there are good theoretical reasons to believe that the social psychology model is not limited to courts and that it is applicable to transitional justice mechanisms more broadly.

The implications of the social psychology model are profound. It suggests that, in many cases, the fundamental problem that courts face is a mismatch between different groups' internal narratives about the conflict and the realities of the conflict. This mismatch is a consequence of the human tendency to perceive our own actions in the best possible light, while simultaneously viewing the actions of rivals as aggressive and unjust. In effect, people have a strong tendency, both at the individual and group level, to view themselves as the victims of unjust and immoral acts by rivals, irrespective of whether this is true. This misplaced sense of victimization causes the negative perception of courts when they indict members of one's own group and acts as an impediment to post-conflict reconciliation.

If the problem is a mismatch between dominant internal narratives about responsibility and what actually happened during the conflict, then courts (and other transitional justice mechanisms) may be able to contribute to successful reconciliation by trying to break down inaccurate and self-serving narratives of victimization. Thus, contrary to what most theorists of perceived legitimacy have argued, negative perceived legitimacy may not be a sign of failure. Rather, a court that seeks to more closely align internal narratives with what actually happened will almost inevitably be perceived negatively in the short term. However, if the court contributes to altering narratives, then perceptions of the court's legitimacy should improve, the affected population will internalize the norms of international criminal law, and successful reconciliation will be more likely. Of course, courts cannot be expected to change internal narratives on their own. This is a process that involves actors throughout society. Nevertheless, courts can play a role in this process, and there is evidence that this has occurred in Germany and that it may be occurring in Serbia. Thus, in certain circumstances, short-term negative perceived legitimacy may simply be the price that must be paid for international criminal courts to be successful.