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Violence and Peace

Confronting Impunity in the 21st Century

By Trevor Sutton October 2016

Center for American Progress



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Introduction and summary

One of the most profound developments in international affairs since the end of the Cold War has been the rise of a global accountability movement that seeks to hold political authorities responsible for abuses inflicted on their own citizens and those of neighboring countries.¹ During the decades between the Nuremberg and Tokyo War Crimes tribunals of the late 1940s and the collapse of the Soviet Union, the world's great powers demonstrated little interest in establishing international justice mechanisms to redress gross human rights abuses.² That changed in 1993, however, when the United Nations passed a resolution establishing the International Criminal Tribunal for the former Yugoslavia, or ICTY.³ The decade that followed saw the creation of supranational tribunals to try the perpetrators of atrocities in Rwanda, Sierra Leone, East Timor, and Cambodia, and also the founding of an International Criminal Court, or ICC, whose jurisdiction has been recognized by more than 120 nations.⁴ The purpose of these institutions was to end impunity—that is, the absence of criminal liability—in countries where political and military authorities had committed horrific violence against civilians.

It is hard to overstate the remarkable pace with which accountability norms have taken hold in the international system. What in 1991 was a glimmer in the eye of human rights advocates evolved in a matter of years into a pillar of the international order.⁵ Today, most governments and international institutions support the use of supranational tribunals as a means of redressing wartime atrocities. Even constituencies that are openly hostile to the ICC are often willing to support other forms of international criminal justice. In March 2016, for example, all but two Republican members of the U.S. House of Representatives joined a majority of Democrats to pass a resolution advocating for the establishment of a U.N. tribunal to try war crimes in Syria.⁶

As the ICC nears its third decade, it is worth reflecting on whether the prevailing understanding of impunity needs refreshing. The global accountability movement has achieved some remarkable successes, not least among them being the conviction of many of the key figures behind the massacres in Bosnia and Rwanda in the mid-1990s.⁷ Yet it remains an open question whether the movement's focus on historical instances of politically motivated violence has significantly advanced the broader goals of ending human suffering and creating inclusive and peaceful societies. Such a focus has neglected more subtle—but no less devastating—failures of justice rooted in the pernicious intersection of organized crime, weak governance, and political corruption. This second type of impunity does not arise from military conflict or political struggle, but rather from economic interests—that is, from the ruthless pursuit of illicit wealth by means of exploitation, enslavement, and terror. Such economically rooted impunity brings misery and death to thousands of innocent people each year, yet it is frequently overlooked because it occurs outside of the arenas of interstate war, political revolution, and armed insurgency.

This report examines why and how the international community—and especially the United States—should invest far more than it currently does in the fight against economically rooted impunity. It contends that there is little basis, either from the perspective of preserving human rights or protecting national security, for treating crimes committed in peace differently than those committed during war or under the banner of ideology. Finally, the report advocates for direct international intervention into impunity-plagued countries to expose and hold accountable the public officials and organized crime groups who profit from systemic human rights abuses.

What should accountability efforts accomplish?

The guiding principle at the heart of the global accountability movement is that certain behaviors are so heinous that no one—not even heads of state—can engage in them and escape criminal sanction. It follows that where domestic police and courts are either unwilling or incapable of investigating such acts, the international community must assume this responsibility. This principle has its roots in the war crimes trials organized at Nuremberg by the victorious Allied Powers in the wake of World War II.⁸ Drawing on decades of human rights activism and experiments with regional justice mechanisms, the international community moved swiftly after the end of the Cold War to broaden the precedent set at Nuremberg to include human rights abuses committed outside of the arena of interstate conflict. These included abuses perpetrated by repressive regimes, such as the Khmer Rouge, as well as combatants in civil wars and armed insurgencies, such as the Rwandan genocide. It also empowered international bodies, such as the United Nations, to create special justice mechanisms staffed by citizens of countries with no direct connection to the alleged offenses.⁹

However, unlike the Nuremberg trials, contemporary international criminal justice is not carried out by occupying powers following an existential conflict in which tens of millions of people lost their lives. As a result, the legal and political justification for tribunals such as the ICTY and the International Criminal Tribunal for Rwanda, or ICTR, are in tension with older international norms of sovereignty and noninterference in a way that Nuremberg was not. Indeed, one of the most common critiques of international criminal justice is that it is a imperialistic exercise imposed on less powerful countries by the world's major powers—who, in turn, are exempt from international accountability.¹⁰ In part for this reason, accountability advocates have buttressed the case for international criminal justice by claiming two additional benefits of supranational tribunals beyond the moral need to punish wrongs.

The first of these claims is that supranational tribunals help societies heal from horrific trauma, promote reconciliation and peace, and build stronger institutions in post-conflict states. Carla Del Ponte, chief prosecutor of both the ICTY and the ICTR, spoke for many when she remarked in 2007 that “peace and reconciliation cannot be achieved without the pursuit of justice.”¹¹ This argument seeks to attribute to supranational tribunals the same cathartic properties ascribed to domestic transitional justice bodies, such as South Africa’s Truth and Reconciliation Commission, or the trials of former military leaders in Argentina during the 1980s.

The second claim is that international justice acts as a deterrent for future atrocities. Luis Moreno Ocampo, the first prosecutor of the ICC, observed at a speech in Nuremberg in 2007 that “experience has taught us that such a law is the only efficient way to prevent recurrent violence and atrocities.”¹² Moreover, Ocampo observed that, in the case of the ICC, “deterrence has started to show us its effect.”¹³ More dramatically, in 1999 the chief jurist of the ICTY, Gabrielle Kirk McDonald, directly linked the limitations on the tribunal’s ability to try war criminals in former Yugoslavia to human rights violations that were then occurring in Kosovo. According to McDonald, the ICTY could still have “some deterrent effect in Kosovo” but only if “all indictees still at liberty in Bosnia and Herzegovina [were] arrested and arrested immediately.”¹⁴

Evaluating whether the ICC and other supranational criminal tribunals are an effective means of advancing the goals of reconciliation and deterrence is a complex project that turns on thorny issues of causality in the face of a thin empirical record.¹⁵ Most countries that have hosted or been the focus of international justice initiatives are now peaceful; yet most were peaceful at the time the first trials were convened, having been established after the cessation of hostilities. With respect to deterrence, the continuing existence of atrocities—down to the present day in Syria and South Sudan—would suggest that the deterrent effect is not especially strong. Yet there remains the possibility that additional human rights abuses would have transpired were it not for the examples of the ICTY and similar bodies. Without access to the private thoughts and deliberations of political elites, such questions rarely transcend speculation.

Needless to say, the debate over the broader effects of international justice remains heated, especially with respect to the ICC, which the United States has yet to join as a full state party. However, it is worth asking whether there are even more pressing questions facing the accountability movement today.

Impunity as a peacetime phenomenon

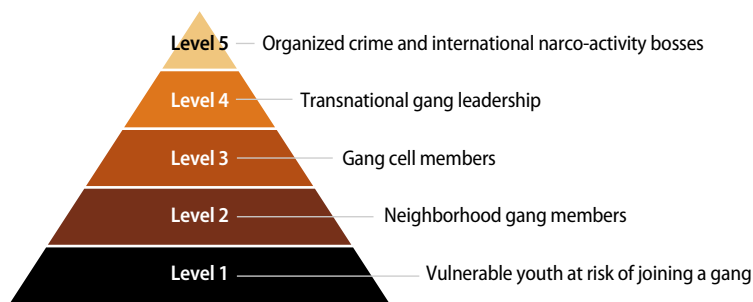
In 2015, there were more than 6,600 homicides in El Salvador—or 116 killings per 100,000 people—making it the most violent peacetime country in the world.¹⁶ By comparison, the death toll for civilians in the Syrian civil war in 2015 is currently estimated at approximately 74 killings per 100,000 people.¹⁷ While the concept of civilian deaths becomes blurred in a country riven with gang violence and organized crime, it is not an exaggeration to observe that exposure to violence in El Salvador approximates that of brutal military conflict and many of those killed are bystanders and innocent civilians. Women, in particular, have suffered disproportionately relative to other conflicts: El Salvador had the highest rate of homicides against women in the world in 2015.¹⁸ The wider societal devastation wrought by this pervasive insecurity also mirrors that produced by interstate and civil war: Since 2010, hundreds of thousands of migrants, including many unaccompanied minors, have fled from El Salvador and neighboring Honduras and Guatemala—which also suffer from extraordinary crime rates and violence against women. This spike in migration has created a refugee crisis unlike any seen recently in the Western Hemisphere.¹⁹

It is tempting to view the insecurity crisis in Central America as the result of a storm of complex socio-economic forces that well-intentioned yet ineffective governments have failed to contain. But that narrative is misleading. Behind the startling crime rates in these countries lies a profound and deliberate political indifference to—and in some cases, active complicity in—violence against civilians.

To understand why Central America is different than many other regions that are stricken with violent crime, some history is instructive: The governments in El Salvador, Honduras, and Guatemala all emerged from decades of civil war with profoundly crippled institutions that had little capacity for governance.²⁰ This institutional weakness allowed members of the military and paramilitary forces that had committed atrocities in wartime years to reconstitute themselves as criminal organizations.²¹ Former combatants on all sides of the conflict shed previous

ideological and political aims and sought profit in illicit economic activity such as drugs, weapons, and human trafficking.²² As a report from the Wilson Center observed in 2011, military and paramilitary organizations in Central America “simply adapted wartime structures and tactics to criminal activities.”²³ As part of their efforts to control territory and supply chains, these clandestine criminal networks began coordinating with and exerting leadership over local gangs, as well as collaborating—and on occasion, fighting—with international cartels based outside of the region.²⁴ As a result, much of the street-level violence in El Salvador and elsewhere in Central America—while appearing at a superficial level to reflect local conflicts between small-time criminals—is enabled and in some cases driven by national and transnational criminal organizations.

FIGURE 1
USAID analysis of gang and organized crime networks in Central America and Mexico



Source: USAID, “Central America and Mexico Gang Assessment” (2006), p. 13, available at http://pdf.usaid.gov/pdf_docs/Pnag834.pdf.

Of critical importance, these criminal organizations have not flourished simply because of limited policing resources in the jurisdictions where they operate, but rather because they have actively infiltrated and coopted government institutions at both the local and national levels.²⁵ On occasion, this infiltration has resulted in public officials directly engaging in targeted violence: For example, three members of El Salvador’s legislature were gunned down by Guatemalan police officers, including the head of the country’s organized crime unit, during an official visit.²⁶ The more common consequence, however, is systemic inaction—especially with regard to the investigation and prosecution of violent crime. In 2014, the year Honduras held the mantle of world murder capital, only 1 percent of homicides committed in the country’s three largest cities resulted in a criminal conviction.²⁷ More recently, Honduras has become the most dangerous place in the

world for environmental activists, many of whom have been murdered without consequence.²⁸ The same pattern of indifference is prevalent across other Latin American countries, often alternating with high-profile but largely ineffective sweeps of low- and mid-level gang members that do little to alter the structural causes of violence.²⁹ In Mexico, for example, entire police forces have at various points been on the payroll of the Sinaloa cartel.³⁰

In summary, these are countries where direct and indirect perpetrators of large numbers of murder, rape, and other violent crimes escape justice—and often wield considerable power—either directly through public office or indirectly through the exercise of improper influence. They are, in other words, societies gripped by impunity on a systemic scale. And the glue that holds this systemic impunity together is an especially corrosive form of corruption, characterized not by one-off bribes, but rather a convergence of political and criminal interests to the point where state officials are themselves conspirators—and in some cases kingpins—of illicit business enterprises steeped in violence. This was the conclusion reached by Iván Velásquez Gómez, the third and most effective head of a unique U.N.-backed anti-impunity commission that has operated in Guatemala since 2006.³¹ Since assuming his post in 2013, Velásquez has reoriented the focus of the commission—known by its Spanish acronym CICIG—away from individual human rights abuses to the political-economic networks that underpin them. This reorientation has netted some remarkable results, including the exposure of an organized crime-linked customs fraud scheme that led to the arrest and resignation of the country’s president and vice president in 2015.³²

Central America is by no means the only region where economically rooted impunity is endemic. Southeast Asia—although less violent than Latin America—suffers from high levels of transnational crime and human rights abuses, including forced labor, illegal wildlife trafficking, and extrajudicial killings and disappearances, all abetted by highly corrupt and dysfunctional governance.³³ Earlier this year, Thomas Fuller—a *New York Times* correspondent formerly based in Bangkok—wrote the following appraisal of the decade he spent in the region: “I come back to one theme again and again: impunity.”³⁴ Of the many examples Fuller offers about the region’s entwined hierarchies of crime and power, perhaps the most illustrative is the fate of the head of an internal investigation into the Thai military’s complicity in the traffic of desperate Burmese migrants under appalling conditions. The investigator fled the country and sought asylum in Australia, claiming he feared for his life because his findings implicated influential figures in the Thai government, including the police and military.³⁵

Other examples abound. Afghans who are not under the rule of the Taliban nonetheless suffer under one of the most thoroughly corrupt governments in the world—one where influential politicians, ministers, and military officers profit immensely from diversion of state resources and complicity in nominally illegal activities, such as the opium trade.³⁶ Militias, soldiers, and even policemen loyal to these power brokers are widely acknowledged to have engaged in serious human rights violations, such as murder, torture, and abduction, yet there has been little effort to hold them or their commanders to account.³⁷ And across much of West Africa, the growth of illicit economies has weakened state institutions, enriched political elites, and contributed to sporadic outbreaks of political violence.³⁸ In both cases, U.S. security and counternarcotics assistance has not significantly ameliorated the cycle of impunity, in large part owing to political elites' vested interests.³⁹

In some of these countries—for example Mexico and Guatemala—the presence of reformist actors both inside and outside of the government has prevented total state capture. In other states, the convergence between political and criminal interests is so profound that the state serves as an extension of illicit interests and vice-versa. In such polities—of which Afghanistan is arguably one—senior political figures, business leaders, and underworld actors are part of a common kleptocratic network that, as characterized in a recent report from the Carnegie Foundation, “[has] deliberately bent or crippled key elements of state function in order to capture important revenue streams, ensure impunity for network members, and provide opportunities to secure and flaunt the gains.”⁴⁰ In both cases, ordinary citizens suffer at the hands of untouchable elites.

Taking peacetime impunity seriously

As the previous examples illustrate, the main preoccupation of the accountability movement that emerged in the 1990s—international criminal justice mechanisms for human rights abuses committed in the name of military, political, or ideological goals—fails to account for much of the impunity that exists in the world today. This is not to say that the ICC and other international and hybrid tribunals should not be viewed as having contributed to the global good or that the pain and loss that led to their creation did not deserve the world’s attention. But there is little basis for treating one kind of impunity as so grievous that it requires a coordinated and costly international response that contravenes traditional notions of sovereignty and to treat another kind as something lesser—perhaps a local issue of policing or governance challenge best addressed through routine development channels—when both give rise to profound suffering.

Moreover, if the goals of stopping impunity are to deter future violence and build peaceful and stable polities, then the patterns of violence seen in Central America present a more urgent challenge than war crimes from conflicts that ended years ago—more than two decades in the case of the ICTY. International criminal justice, for all its virtues, is ultimately retrospective, focused on punishing a distinct set of historical offenses rather than addressing the underlying conditions driving current criminality and social fracture. Peacetime impunity, by contrast, poses no tricky questions of causation. If impunity is allowed to flourish in El Salvador, Thailand, or Afghanistan, then wide-scale human rights abuses will continue to occur in these places, and the odds of profound internecine strife and political rupture will increase.

From the perspective of U.S. national security interests, peacetime impunity also constitutes a global threat. The Central American refugee crisis currently roiling U.S. immigration policy is an especially grave example of the consequences of unchecked impunity.⁴¹ So too is the continued prevalence of the narcotics trade and the associated violence in the Americas, Africa, and Central Asia—to

say nothing of the terrorist organizations that have flourished in the face of weak governance, from Afghanistan to Nigeria and even in the remote jungles of South America.⁴² And for policymakers concerned about global ecological sustainability, the devastating environmental degradation—from wildlife trafficking to illegal timber harvesting to irresponsible mining and manufacturing operations—that has grown in the shadow of impunity should be a grave concern.

Rising to the challenge

None of analysis presented above is intended to suggest that peacetime impunity—or more precisely, its consequences—has gone unnoticed by the international community. To the contrary, the United States and other international actors have spent enormous sums of money trying to build rule of law and dismantle drug cartels and other transnational criminal networks in strategically important regions, including Central America and Afghanistan.⁴³ These efforts have largely taken the form of targeted law enforcement and military operations and foreign and security assistance programs focused on training and vetting law enforcement officers and judges.⁴⁴ Some countries, including the United States, have also sought to punish corrupt and criminal actors by freezing their foreign bank accounts and imposing visa bans.⁴⁵

These programs have had varying levels of effectiveness in achieving their stated objective to end narcotics trafficking and strengthen institutions. A recent exhaustive review of the signature U.S. security initiative in Central America identified a handful of “modest” successes alongside “areas of considerable weakness.”⁴⁶ What the international community has not done, or even attempted to do, is confront impunity head-on by holding the organizers and perpetrators of widespread violence to account for their crimes against local communities under international or domestic law. Nor have international actors sought to expose and punish government officials for their complicity in illicit economic activity that fuels human rights abuses.⁴⁷

If the international community is serious about confronting the lack of accountability in the face of large-scale human suffering, it should consider direct interventions into impunity-plagued states with the cooperation of local governments. Such interventions could take a variety of forms depending on the receptiveness of the host government, the strength of existing institutions, and the specific impediments to accountability. The most robust of these options would be a fully constituted international justice mechanism that employs local staff but also operates separate from domestic institutions, similar to the Special Court for Sierra

Leone or the Special Panels for Serious Crimes in East Timor. The least intrusive option would be an ad hoc international reporting body with wide-ranging powers to subpoena documents, compel testimony, and protect witnesses. The space in between could accommodate any number of variations—for example, a hybrid tribunal where victims and civil society advocates can file criminal complaints under domestic laws before a neutral panel of magistrates.

Regardless of their precise form, these peacetime accountability bodies should not be dependent on the host government for financing and must be allowed to operate autonomously, particularly with respect to accessing evidence. They must also be given a flexible mandate focused on criminal-political networks, rather than specific classifications of crime. And they need to be given an adequate timeframe to achieve their missions—with the possibility of renewal—to avoid the inevitable stonewalling from hostile factions in the host country.

These mechanisms to fight impunity need not occur in a vacuum, nor should they disregard the work that has already been undertaken in strengthening rule of law and fighting corruption in many places around the world. In addition to seeking financial support from the international community, accountability bodies could pursue strategic alignment and intelligence exchange with domestic and international agencies focused on transnational crime and corruption, such as the U.S. Department of State's Bureau of International Narcotics and Law Enforcement, Interpol, and the U.N.'s Office on Drugs and Crime. In the same vein, the accountability bodies' prosecutorial strategy and reform agenda would benefit from the insight and knowledge of nongovernmental organizations such as Global Witness, Transparency International, and the Washington Office on Latin America.

In addition, peacetime accountability bodies could form partnerships with national law enforcement agencies aimed at identifying opportunities for joint or complementary prosecution. The United States, in particular, with its far-reaching, anti-racketeering and anti-foreign-corruption statutes, already engages in prosecution of cartels and corrupt actors in connection with activities that occur in large part outside of the United States, as exemplified by recent indictments of senior leaders of FIFA.⁴⁸ Prosecutors or presiding judges of accountability tribunals could coordinate with the United States and other foreign governments to arrange for extradition of or simultaneous prosecution of powerful actors within political-criminal networks that might otherwise be beyond the reach of the tribunal, either because those actors are outside the tribunal's host country or they are actively protected by the host government.

Proposals of the kind described above are no doubt ambitious, but no more so than the establishment of an international criminal court with jurisdiction over half of the world's population or the creation of a war crimes tribunal at the height of the Yugoslav Wars. Furthermore, the international community's sole experiment in using post-conflict justice to combat peacetime impunity, Guatemala's CICIG, has evolved into a highly effective institution over its decade-long operations.⁴⁹ CICIG receives funding from the United Nations and its head is selected by the secretary-general but must bring cases under Guatemalan law inside Guatemalan courts alongside Guatemalan prosecutors.⁵⁰ The commission's core mandate is to combat "clandestine networks" within the country, which encompasses not only prosecution but also assistance with legislative and administrative reform.⁵¹ This unique blend of the domestic and international, as well as the punitive and reformist, has borne significant fruits: Within the past four years alone, the commission has racked up a string of convictions of high-profile Guatemalan figures on charges of corruption and abuse of office, including the country's president, as previously noted; two interior ministers; two directors general of the National Civil Police; the director of the country's prison system; and numerous military officials and organized crime figures.⁵² While the Guatemalan model may not be suitable for every jurisdiction, its success should nonetheless be encouraging for justice experiments in other countries.

Choosing partners

The promise and urgency of peacetime accountability does not, of course, mean that the mechanisms proposed above will be welcome in countries plagued by impunity. Peacetime accountability necessarily implies a relinquishment of sovereignty on the part of host governments. Even commissions of inquiry with no powers to prosecute or try wrongdoers will expect political authorities to provide access to data and witnesses. Given the correlation between impunity and government capture, it is highly likely that powerful figures within many host governments will strongly oppose such intrusions.

In this sense, peacetime accountability bodies will likely encounter operational challenges from which most international justice bodies have been spared. Although state assistance to the ICTR, the ICTY, and other ad hoc tribunals has been uneven, most of these bodies have not faced a crippling level of obstructionism from national governments and have been moderately successful in fulfilling their mandates.⁵³ By contrast, the ICC's efforts to prosecute sitting officials—including heads of state—for atrocities committed while in office have encountered major obstacles and in many cases, failed outright. The outstanding ICC indictment against Sudanese President Omar al-Bashir—which now enters its seventh year—and the discontinued case against Kenyan President Uhuru Kenyatta make this all too plain.⁵⁴

Proponents of peacetime accountability cannot afford to ignore the lessons of the ICC, nor should they be demoralized by them. CICIG itself grappled with episodes of overt hostility from Guatemalan authorities, and at several junctures its existence appeared in jeopardy. In the end, the strong support of civil society and an effective public relations campaign allowed the institution to weather these headwinds and develop into an influential player in Guatemalan society with broad popular support.⁵⁵ But Guatemala also began its experiment of peacetime accountability with a notable advantage: The modern Guatemalan state was in key respects midwifed by the United Nations and other international actors who played a prominent role in brokering the ceasefire that ended the country's decades-long civil war and who have contributed to peace-building efforts since

then.⁵⁶ For this reason, Guatemalans at all levels of society—including elites—are to a large degree desensitized to the concept of an international presence within their borders working to strengthen domestic institutions.⁵⁷ The same cannot be said of other countries where impunity prevails.

These histories suggest that the best approach to implementing a peacetime accountability agenda is a gradualist one—the first step of which would be to establish a limited number of pilot initiatives in promising jurisdictions. Such jurisdictions should be democracies with an open and active civil society and political leaders committed—at least in their rhetoric—to political reform and transparency. Middle-income countries that are transitioning away from highly kleptocratic regimes, such as Tunisia and Ukraine, would be ideal candidates, as would some low-income countries that have demonstrated good-faith progress toward sustainable development goals but still struggle with elementary rule-of-law issues, such as Malawi and Myanmar. Countries that lack basic democratic freedoms or that remain fully captured by kleptocratic networks, such as Uzbekistan or Zimbabwe, would necessarily be excluded from consideration.

Such pilot initiatives could be pursued under the broader umbrella of the Millennium Challenge Corporation, or MCC—an independent U.S. federal foreign aid agency—or other assistance programs that condition eligibility on periodic performance reviews. Tying the pilot project to a comprehensive aid package could mitigate the effects of a deterioration in relations between a host government and an accountability body. It could also deter local authorities from stonewalling or attempting to sabotage the body. If an MCC or other compact is not an option, the Open Government Partnership, or OGP—a multinational transparency initiative that requires members to submit to periodic independent evaluations by outside experts—could also prove to be a vehicle for encouraging political authorities to collaborate with accountability bodies.

These pilot initiatives, if successful, could help define protocols and best practices for further peacetime accountability initiatives, as well as set precedents for cooperation with existing institutions, such as U.N. Office of Drugs and Crime and Interpol. More importantly, the pilot initiatives would add to the empirical case that the international community has an important role to play in assisting local reformers in the struggle for just and honest government. The stronger such a case becomes, the harder it will be for leaders of impunity-plagued states to ignore calls for international intervention in their own countries, creating new opportunities for local civil society to enlist outside assistance in the pursuit of their reform agenda.

Conclusion

The rapid globalization and technological advances of the past quarter century have brought prosperity and convenience to many corners of the globe, but they have also made it easier for malevolent actors to capture entire governments and to murder, enslave, and traumatize vulnerable populations. These injustices are different in nature than the wartime atrocities that the accountability movement set out to rectify in the early 1990s, but they are no less deserving of international attention. Twenty-first century impunity deserves 21st century solutions.

About the author

Trevor Sutton is a Senior Fellow with the National Security and International Policy team at the Center for American Progress, where he focuses on governance, transparency, and development issues.

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