
Constructing an Atrocities Regime: The Politics of War Crimes Tribunals

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It is the bidding of mercy, if not of justice, that, except for reasons that are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction.

—Hugo Grotius (1583–1645)¹

Images of destruction are often incomprehensible. Describing the aftermath of ethnic violence in Rwanda in the spring of 1994, one reporter wrote,

Blood flowed down the aisles of churches where many sought refuge; five priests and twelve women hiding out in a Jesuit center were slaughtered. A Red Cross ambulance was stopped at a check-point, the six wounded patients dragged out and bayoneted to death. Toddlers lay sliced in half, and mothers with babies strapped to their backs sprawled dead on the streets of Kigali. The fighting was hand to hand, intimate and unspeakable, a kind of bloodlust that left those who managed to escape it hollow-eyed and mute.²

Unfortunately, Rwanda is but one of many cases where conflict has been marked by atrocities. The linkage between ethnic conflict and unspeakable brutality, as well as their propensity to spread across borders, has caused some analysts to warn that “the ever-increasing number of identity-based conflicts suggests that we may be facing an epidemic of potentially catastrophic proportions—a new world disorder.”³ Surveying the evidence of Serbia’s program of “ethnic cleansing” in Kosovo, UN war crimes prosecutor Louise Arbour remarked, “the scale of the destruction is

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1. Grotius [1925] 1962, 733–34.
2. *Time*, 16 May 1994, 58.
3. Lake and Rothchild 1998b, 339.

really very overwhelming.”⁴ From the notorious “killing fields” of Cambodia to recent evidence of brutality in Sierra Leone, the grizzly nature of ethnic and other identity-oriented conflict incites horror, outrage, and a human desire for justice.

In response to reports of atrocities in Bosnia, Kosovo, and Rwanda the international community established ad hoc international war crimes tribunals to investigate crimes and prosecute perpetrators.⁵ Successive efforts have been made to expand the atrocities regime by forming a permanent tribunal, the International Criminal Court (ICC), a process guided by the International Law Commission (ILC). This process culminated in the Rome Statute of the International Criminal Court (Rome Statute) created in June and July 1998.⁶ When ratified by at least sixty nations, the statute will establish the ICC at The Hague. Proponents support international tribunals not only as a means of holding perpetrators of atrocities accountable but also as a mechanism of peace by establishing justice and promoting reconciliation in war-torn regions. Former U.S. Secretary of State Madeline Albright proposed that, “In the end, it is very difficult to have peace and reconciliation without justice.”⁷

This analysis has two primary purposes—the first is constitutive (regime as dependent variable), the other is causal (regime as independent variable).⁸ I seek to identify and analyze the myriad political and procedural obstacles to establishing an effective atrocities regime by examining humanitarian norms, the strategic interests of powerful states, and bureaucratic factors. I also seek to determine how the emergent regime may or may not be effective in achieving its primary goal (individual convictions) as well as its secondary and perhaps more salient goal: to manage violent conflict and reduce the likelihood of future transgressions. I argue that although liberal humanitarian ideas have created the demand for political action, the process of dealing with brutality in war has been dominated by *realpolitik*—that is, furthering the strategic interests of the most powerful states. However, by understanding the political interests and procedural obstacles involved, the international community can make institutional adjustments in the design and implementation of an atrocities regime to bridge the gap between *idealpolitik* and *realpolitik*. This analysis is a first step toward explaining both how a new international legal regime is constituted and how it may function in managing a formidable problem in world politics.

Although events in areas such as the Balkans, Rwanda, Sierra Leone, and Cambodia (among others) are truly horrific, they are not unique in the history of warfare; however, the current drive to establish humanitarian norms of conflict is novel in human history. Historically, warfare has been viewed as consistent with the

4. Interview with Louise Arbour by Francine Pelletier, *The National Magazine*, Canadian Broadcasting Corporation, 29 July 1999.

5. Another is being established for Sierra Leone pursuant to S.C. Res. 1315, UN SCOR, UN Doc. S/RES/1315 (2000).

6. Rome Statute available at (<http://www.un.org/law/icc/statute/romefra.htm>).

7. *Los Angeles Times*, 19 October 1999, A6.

8. On constitutive versus causal analyses, see Wendt 1999.

laws of nature. Hugo Grotius, in his seminal work *De Jure Belli ac Pacis Libri Tres* (*The Law of War and Peace*), provides vivid accounts of wartime brutality consistent with norms of the time, citing Hellenic, Roman, and Biblical texts. Moreover, though Grotius includes some limitations on what was permissible in war, they would certainly be considered barbaric by modern liberal sensibilities. These norms permitted, for example, the killing or injuring of all who were in the territory of the enemy, including women, children, captives, and those whose surrender had not been accepted.⁹ Rather than focusing on the *jus in bello*, Grotius is in fact more concerned with notions of the *jus ad bello*.¹⁰

In matters involving acts of war and treatment of a nation's citizenry, the dominant norm in the modern period is deference to national sovereignty. In fact, "prior to 1945, no principle of international law was more widely revered in practice than the idea of 'domestic jurisdiction' on matters relating to human rights."¹¹ Since the Holocaust, however, there has been tremendous interest in promoting human rights and creating more stringent standards of international conduct, including during armed conflicts, that is consistent with these evolving ideas.¹² This normative and institutional development prompts several related questions: What explains the dramatic turn in the 1990s toward legalization? What drives the process of forming and applying the regime in given cases? Once established, what makes tribunals more or less effective? How useful is legalization in curbing abhorrent behavior and promoting national reconciliation?

Ideas, Interests, and Institutions

Scholars of international law (IL) focus essentially on precedent and procedure, whereas scholars of international relations (IR) focus on explicating the political dynamics that shape outcomes, the approach used here. By introducing an IR perspective to the process of legalization, Kenneth Abbott suggests that, "IR helps us describe legal institutions richly, incorporating the political factors that shape the law; the interests, power, and governance structures of states and other actors; the information, ideas, and understandings on which they operate; [and] the institutions within which they interact."¹³ Although the movement to establish a universal atrocities regime (through an international criminal court) is predicated on the international community's desire to strengthen norms of human rights and justice, it is fraught with political obstacles and differing views on how to negotiate this complicated normative and strategic terrain. In this analysis I synthesize approaches

9. Grotius [1925] 1962, 641–62.

10. *Jus in bello* focuses on conduct in war and the protection of civilians during armed conflict (crimes of war), whereas *jus ad bello* refers to acceptable justifications for the resort to armed force (the just war). See Christopher 1994.

11. Beres 1988, 124.

12. See Sikkink 1993 and 1998; and Finnemore 1996.

13. Abbott 1999, 362.

in IL and IR to explain the linkages between law and politics in the international arena.

Within the domain of IR theory, realists have traditionally said little about issues in world politics that do not involve questions of relative power and material interest. Realists generally argue that in a world of asymmetrical power distribution with no international body to exert pressure, “logics of consequences dominate logics of appropriateness.”¹⁴ However, although power and material interests do not explain the establishment of a humanitarian-based regime, they do explain state responses to domestic pressures for regime formation.¹⁵ Realists predict that powerful states will not accept a regime that significantly undermines its ability to respond to perceived security threats. Moreover, they would predict that both the forms such institutions take and the application of their jurisdictions in particular cases will thus reflect the interests and relative power of the states involved. Thus, “humanitarian” policies may in fact be manifestations of what Stephen Krasner refers to as “organized hypocrisy.”¹⁶ In contrast to realists, constructivists reject this notion that state interests are static and centered only on material factors; they suggest that such factors explain neither state behavior regarding human rights nor humanitarian intervention.¹⁷ Regarding the creation of war crimes tribunals, constructivists would argue that evolving liberal ideas and concern for human rights explain outcomes and that analysis should focus on these variables in explaining regime formation. Ideas and norms produce outcomes either through “path dependence” or international socialization and gain strength as they become increasingly embedded, producing an *idealpolitik* to complement *realpolitik*.¹⁸

Bridging the gap between these two points of view, liberal institutionalism suggests that the proclivity for conflict in the anarchic international system can be overcome through carefully designed institutions whose purpose is international cooperation.¹⁹ States engage in international regimes and abide by international treaties to realize gains contingent on cooperation, and states may forgo short-term gains to obtain long-term objectives. In the case of the emerging atrocities regime, these goals clearly are attempts to alleviate political and identity-based conflict, both in space and time (by containing the spread of conflict and by preventing conflict in the future). These goals have both normative (human rights) and instrumental (international stability) dimensions.²⁰ Obviously, establishing an atrocities regime

14. See Krasner 1999, 51; see also Morgenthau 1985; and Carr 1961.

15. In the case of the atrocities regime, this pressure comes primarily from international lawyers and nongovernmental human rights organizations.

16. Krasner 1999.

17. See Finnemore 1996; Goldstein and Keohane 1993; Katzenstein 1996; Sikkink 1993; and Wendt 1992 and 1999.

18. On “path dependence,” see Weber 1920; Goldstein and Keohane 1993; and Meyer, Boli, and Thomas 1987. On international socialization, see Bull 1977; and Watson 1992.

19. See Abbott and Snidal 1998; Axelrod 1984; Axelrod and Keohane 1985; Keohane and Martin 1995; Oye 1986; and Stein 1990. On regime theory, see Hasenclever, Mayer, and Rittberger 1997; and Krasner 1983.

20. Lake and Rothchild 1998c.

goes beyond problems of collective action and coordination. Legalization along these lines is intended to produce compliance (that is, deterrence).²¹ The IL variant of institutionalism suggests that codified norms of conduct coupled with specific sanctions will affect state behavior directly, a distinct broadening of the scope of institutionalism within IR.²² Applied to the case of war crimes tribunals, this perspective suggests that success hinges on regime design and the strength of the resulting institution.²³ The central tension here is between “hard” and “soft” law.²⁴ Those who favor hard law in international legal regimes argue that it enhances deterrence and enforcement by signaling credible commitments, constraining self-serving auto-interpretation of rules, and maximizing “compliance pull” through increased legitimacy.²⁵ Those who favor soft law argue that it facilitates compromise, reduces contracting costs, and allows for learning and change in the process of institutional development.²⁶ Other issues of institutional design and procedure crucial to the creation and functioning of an effective regime include such key factors as jurisdiction, evidence collection, witness protection, and coordination with national governments and their domestic legal systems. Institutionalists would predict that a well-structured atrocities regime will not only hold orchestrators of genocide and crimes against humanity accountable but also deter future atrocities and help to alleviate tensions in sensitive regions prone to egregious acts of violence.

I begin my analysis with three cases where tribunals were successfully established: Bosnia, Rwanda, and Kosovo. These cases show the strong link between political challenges and legal (and procedural) challenges, especially when strategic interests of powerful states are not at stake. Whereas the case of Bosnia reveals the political obstacles to initially establishing an international legal regime, the cases of Rwanda and Kosovo illustrate both the dynamic process of legalization and the effects of institutional learning; they also reveal the limited deterrent capability of the atrocities regime—at least in the early stages of its development. I then examine two cases where tribunals were not successfully established: Cambodia and East Timor. I also examine the case of the ICC, which continues to be marked by difficulties in achieving great power support. These difficulties show how power and strategic interests dominate regime formation; they also point to the need for a

21. On “legalization,” see Abbott et al. 2000.

22. Goldstein et al. 2000.

23. Keohane 1997, 501. Oran Young identifies three types of regimes: spontaneous, negotiated, and imposed. While constructivists might focus on “spontaneous” orders, liberal institutionalists would examine the factors at play as the elements of a new regime are negotiated, as I do here. Young 1983, 98–101.

24. Kenneth Abbott and Duncan Snidal define “hard” legalization as legally binding obligations characterized by high degrees of obligation, precision, and delegation, and define “soft” legalization as a more flexible manifestation characterized by varying degrees along one or more of these same dimensions. Abbott and Snidal 2000.

25. See Abbott and Snidal 2000; and Franck 1990.

26. Abbott and Snidal 2000; on flexibility and learning in international agreements, see Koremenos 1999.

“softening” of the legalization process if political obstacles are to be successfully overcome. Finally, I present an analytical section that addresses my primary questions: why and when are tribunals established, how successful are they in addressing and preventing atrocities, and what factors shape the development of the atrocities regime?

The ICTY in Bosnia

The case of the International Criminal Tribunal for the former Yugoslavia (ICTY) illustrates the political difficulties associated with establishing an international legal regime where the strategic interests of powerful states are not directly at stake, though such challenges are not insurmountable. This case is especially salient given international lawyers’ initial desires to form a regime based on hard law, that is, one that could transcend *realpolitik* by eliminating distinctions between powerful states and weak states (equality under the law) and could challenge long-held notions of sovereignty. There are legal obstacles to creating hard law in an institution built on internationalism and attempting to bring together states with very disparate legal foundations. The case of the ICTY reveals the relevance of realism in explaining tribunal action and the process of institutionalization. Although norms and ideas of human rights prompt calls for state action in cases of genocide and war crimes, the case of the ICTY illustrates how the strategic interests of powerful states (through the UN Security Council) shape the process of institutionalization and its use.

Calls for an international tribunal were first made in spring 1992, and the ICTY was established on 25 May 1993 by the UN Security Council.²⁷ The resolution was approved by a unanimous vote and established the first tribunal of its kind since World War II. However, even though the resolution passed unanimously, the tribunal since its inception has been fraught with political conflict and doubt. As one representative of the UN Office of the Legal Counsel lamented, “In my twenty years of experience in the United Nations, I have never encountered as much skepticism as has surrounded the establishment of this tribunal.”²⁸ That war broke out in Bosnia on 6 April 1992 certainly should not have come as a tremendous surprise given the long history of ethnic violence in the region.²⁹ At the end of the Cold War the disintegration of Soviet bloc nations proceeded with considerable speed, a process that augmented majority-minority relations and exacerbated ethnic tensions in Yugoslavia. Whereas the ethnic demographics in Croatia were strongly dominated by Croats, with Serbians representing only a small minority, the ethnic mix in Bosnia was more diverse and so the situation was much more problematic. In

27. S.C. Res. 827, UN SCOR, UN Doc. S/RES/827 (1993).

28. Quoted in Cohen 1997, 149.

29. War broke out ten months earlier in Croatia, coinciding with its claim of independence (along with Slovenia) on 25 June 1991. Bosnia was officially recognized as an independent nation by the United States and the European Community on 7 April 1992. See Bennett 1995; and Silber and Little 1996.

Bosnia, Serbs represented roughly one-third of the prewar population of 4.3 million; the remaining population was composed of Slavic Muslims (43.7 percent), Croats (17.3 percent), and a small minority with mixed heritage.³⁰ Serbian nationalism, spearheaded by the ascension of Slobodan Milosevic to the position of Serbian president, was met with apprehension and a revival of Croat and Slovene separatism that led, after claims of independence, to conflict with the Serb-dominated Yugoslavian army (JNA). Tales of wartime atrocities surfaced soon after the outbreak of civil war.

In the early stages of the war in Yugoslavia (1990–91), the international community seemed intent on preserving the territorial integrity of the country and was hesitant to become entangled in a turbulent region that had ignited World War I.³¹ The Brioni Accords, created with the help of negotiators from the European Community, established a cease-fire on 8 July 1991; however, violence soon broke out again. Unrest spread quickly, and although Western nations desired stability, they were generally unwilling to intervene militarily to establish and maintain order in the region. One of the first events to prompt decisive international action was the discovery of atrocities at the Omarska detention camp near Prijedor. On 2 August 1992 *New York Newsday* reported that Bosnian Muslims held at the camp were being slaughtered by their Serbian guards. Moreover, subsequent reports likened conditions in the camp to Nazi concentration camps.³² Similar conditions were alleged at another camp at Trnopolje. Television coverage worldwide showed striking images of men with protruding rib cages, recalling for viewers images of inmates freed from concentration camps at the close of World War II.³³ The similarity between events in Nazi Germany and contemporary Bosnia served to cultivate close associations with World War II and its lessons. Considerations of the “Munich analogy” necessitated some kind of intervention.³⁴

Further prompting analogies to Nazi-era crimes against humanity was the program of “ethnic cleansing” being undertaken in Bosnia. Before this program was initiated, the population in the Prijedor municipality of northwestern Bosnia, for example, was 112,470, of which 44 percent were Muslim, 42.5 percent were Serbian, 5.6 percent were Croat, 5.7 percent were of mixed ethnicity, and 2.2 percent were “other.”³⁵ By June 1993, figures released by the Serbian media showed that the number of Muslims living in Prijedor had declined from 49,454 to 6,124; and the number of Croats from 6,300 to 3,169; but the number of Serbs had increased from 47,745 to 53,637.³⁶ An international consensus developed that Serbs were the principal instigators of wartime atrocities; however, those who were to

30. Neier 1998, 112.

31. Germany’s early recognition of Croatia and Slovenia conspicuously went against the European consensus regarding the Balkan conflict. See Crawford 1994.

32. Gutman 1993.

33. Neier 1998, 135.

34. *Ibid.*, 136–37.

35. *Ibid.*, 138.

36. *Ibid.*, 139.

investigate the situation would find it more complex than it appeared at the time. Cedric Thornberry noted that “all three sides were responsible for appalling developments in Bosnia. The actions of some of the Croats of western Herzegovina rivaled in barbarity those of Serb chieftains of eastern Bosnia, and what was done to the Muslims of Mostar by Croats was perhaps as bad as the Serb shelling of the mainly Muslim parts of Sarajevo.”³⁷ While documented atrocities demanded international humanitarian intervention, the political and strategic complexities involved provided an unappealing scenario for the international community. Some observers drew an analogy between Bosnia and the Vietnam War, and pundits considered the Balkan crisis a conflict that presented a “slippery slope” for all who dared to involve themselves.

Although a UN-sanctioned arms embargo was levied on the combatants, direct military intervention was eschewed, even amidst striking reports of the growing humanitarian crisis. Europeans generally favored sending ground troops to the area, but this policy option was unpopular in the United States given the fate of eighteen U.S. soldiers who had been brutally killed during the intervention in Somalia. Policymakers were left with a difficult political choice: On the one hand were domestic demands that the well-publicized atrocities be dealt with. On the other hand, domestic support for intervention plummets as the propensity for casualties increases, as the events in Mogadishu well evidenced. Torn between the ethical desire to promote human rights and the tactical and political challenges of intervention, the creation of a UN tribunal represented a palatable compromise. As one analyst noted, “It was a way to do *something* about Bosnia that would have no political cost domestically.”³⁸

Using its authority under Chapter VII of the UN Charter, the Security Council passed the resolution to create the ICTY for the purpose of prosecuting four clusters of offenses: (1) Grave breaches of the 1949 Geneva Conventions (Art. 2), (2) violations of the laws or customs of war (Art. 3), (3) genocide (Art. 4), and (4) crimes against humanity (Art. 5).³⁹ The substantive and procedural norms crucial to the success of the ICTY are based on those established at Nuremberg. Yet the challenges faced by the ICTY are unique; they not only speak to the probability of success in adjudicating war crimes in an ad hoc, case-specific setting but also provide useful insights into the process of establishing a working international criminal court whose ultimate goal is deterring atrocities and alleviating tensions that may lead to violence.

The first challenge of the ICTY was to establish guidelines for fairness within its institutional structure, considered by international lawyers to be a key component of its legitimacy. As one ICTY prosecutor remarked, “If the tribunal is necessary . . . to bring a sense of justice to the victims, and thereby undercut the hopeless cycle of

37. Thornberry 1996, 79.

38. Neier 1998, 129.

39. ICTY Fact Sheet, 16 September 1999, available at (<http://www.un.org/icty/glance/fact.htm>).

revenge, then it is imperative that everything the tribunal does be fair to the accused and conducted according to the highest standards of due process.”⁴⁰ Hence, there has been a strong push to make the body truly “international,” though the influence of the UN Security Council is omnipresent. Judges are nominated and elected by the member states of the UN General Assembly, but the list of nominees must first be approved by the UN Security Council.⁴¹ Moreover, the chief prosecutor—a key figure in the adjudication process—is appointed exclusively by the Security Council on the recommendation of the Secretary General, rather than being nominated by the General Assembly, as is the case for judges. To avoid drawing criticism that the chief prosecutor merely serves the interests of the powerful, council members have carefully selected “neutral” parties for this position.⁴² To date, there have been three chief prosecutors for the ICTY: Richard Goldstone, justice of the South African Constitutional Court; Louise Arbour, justice of the Canadian Court of Appeal in Ontario, and current chief prosecutor Carla Del Ponte, the Swiss attorney general.

While the international character of the institution may promote a sense of fairness, it has also presented legal and procedural challenges. Processes for resolving substantive legal issues are further complicated by the appointment of judges with differing legal backgrounds. This lack of a unified conceptual framework and common operating procedures has presented considerable institutional inertia that initially affected the functioning of the ICTY. One ICTY prosecutor noted, “In a context where there is no particular authority and where no jurisdiction necessarily carries more weight than any other, we have found no better way than to consider each issue as it comes up, debate it, and try to find a sensible consensus.”⁴³ Needless to say, such endeavors can result in bureaucratic and organizational gridlock.

The tribunal’s legal jurisdiction poses another challenge. According to currently accepted notions of international humanitarian law, war crimes are limited to situations of international armed conflict.⁴⁴ Moreover, while the ICTY may prosecute breaches of the 1949 Geneva Convention, its jurisdiction is limited to “grave breaches.” As one legal analyst noted, “A ‘grave breach’ can only be committed against a person protected by the Convention; that is, only a person of a nationality different from that of the perpetrator.”⁴⁵ Therefore, the grave breach clause does not cover, for example, the slaughter or rape of a Bosnian Muslim by a Bosnian Serb. While international legal sovereignty was granted to Croatia, facilitating adjudication by making the domestic/international line more distinct, less clear are cases involving Kosovo and Rwanda because the conflict was between rival ethnic groups

40. Shrag 1995, 194.

41. The roster of judges is diverse, though nationals of the permanent members of the Security Council comprise nearly 30 percent of the presiding judges.

42. However, the selection of Goldstone was, in fact, fraught with political maneuvering. See Bass 2000, 215–19.

43. See Schrag 1995, 191; and Van Schaack 1999.

44. Morris and Scharf 1995, 391.

45. Scharf and Epps 1996, 651.

and no such sovereignty has been granted. These crucial issues of jurisdiction were brought up by the defense in the case of Dusko Tadic, a former official at the Omarska prison camp. However, the court ruled that although Article 2 of the Geneva Convention applies only to international conflicts, Article 3 applies to war crimes whether or not combatants are from different countries, adding that “the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.”⁴⁶

Other procedural challenges facing the ICTY concern collection of evidence. To document war crimes and other atrocities the prosecutors at Nuremberg benefited from the meticulous records kept by the Nazis.⁴⁷ No such paper trail was evident in Bosnia. Prosecutors must rely primarily on eyewitness accounts and forensic evidence uncovered by investigators. This is problematic for several reasons. First, access to witnesses is limited where either domestic security has not been established or domestic governments are uncooperative. Second, witnesses may fear retaliation and so are wont to step forward. This is compounded by the absence of comprehensive programs to protect witnesses, a problem owing to budget constraints of the ICTY. Although the ICTY’s Victims and Witnesses Unit protects witnesses while they are testifying, no such protection is afforded once they return home, leaving them vulnerable. Moreover, critics have challenged the tribunal’s practice of concealing witnesses’ identity during their testimony, charging that it undermines the due process rights of the accused and the overall fairness of the proceedings—a primary legal goal of the ICTY.⁴⁸ Conversely, some witnesses may provide false testimony in order to further their own aims of retribution, forcing investigators to find corroborating evidence to support witnesses’ claims. This increases the burden of proof on the prosecution, adds to the cost of investigations, and significantly slows the adjudication process. Drawn out adjudication processes are doubly damaging. First, the sooner a witness testifies after an event, the more accurate and credible the testimony; slowing down the process may undermine the quality of witness testimony prosecutors depend on. Second, prolonging the legal proceedings separates the crime from its punishment, weakening both the deterrent effect of the tribunal and its ability to foster reconciliation among former combatants.

The most pressing challenge the ICTY faces is apprehending and detaining defendants. At Nuremberg most surviving instigators of Hitler’s “final solution” were apprehended by the Allies and detained for trial. The ICTY began with no defendants in custody. The problem this presents is clear: “The ad hoc tribunal for former Yugoslavia has itself to arrange the capture of those it is to try. For this crucial element in the procedure it will be totally dependent on the assistance of belligerent and third states.”⁴⁹ This challenge is further compounded by the

46. *Prosecutor v. Tadic*, IT-94-1-AR72, P77 (1995).

47. See Taylor 1992; and Conot 1983, 38.

48. See Leigh 1996.

49. Fox 1993, 194.

tribunal's prohibition on trials in absentia, a component of the institutional structure intended to bolster fairness of the proceedings; however, as Theodor Meron noted, "without *in absentia* trials, the tribunal is left with few options. The international community has given the tribunal strong rhetorical support, but little aid in enforcement."⁵⁰ Consequently, the tribunal initially tried those having little political power or significance, since those masterminding wartime atrocities were better able to elude apprehension. Thus, as one analyst remarked, "the securing of the attendance of the accused war criminal may be random, ineffectual, and arbitrary."⁵¹

Such obstacles, though initially daunting, have not been insurmountable. As of 1 March 2001, thirty-five defendants were awaiting trial in the ICTY detention unit, and twelve cases had been concluded through the appeals stage. On 26 August 1999, Austrian police arrested General Momir Talic, a key commander during the war in Bosnia, who was then flown to The Hague and handed over to the tribunal.⁵² In April 2000 French authorities arrested Momcilo Krajisnik, president of the Bosnian Serb assembly from 1990 to 1995. In January 2001 Biljana Plavsic, former deputy to Radovan Karadic, was arrested.⁵³ On the capture of Krajisnik, NATO Secretary-General George Robertson optimistically remarked, "The net is closing in."⁵⁴ The recent arrest of Slobodan Milosevic by Yugoslav police on 1 April 2001 and subsequent extradition to The Hague on 28 June 2001 certainly represents a milestone for the tribunal regime. Milosevic is the first head of state to face trial at the tribunal.

The ICTY's experience in the Balkans reveals not only the legal and procedural difficulties in designing a regime to combat atrocities but also the influence of powerful states during the process of institutionalization. While vivid images from Balkan prison camps recalled memories of the Holocaust and engendered public calls for action, powerful states used the ICTY as a means to respond to such calls in a politically inexpensive way. Moreover, once the international community decided to establish an ad hoc tribunal, the influence of the UN Security Council was omnipresent in key aspects of its design, in particular, its jurisdiction and the appointment of judges and the chief prosecutor. These same factors are also evident in the application of the atrocities regime in Rwanda.

Genocide in Rwanda

In 1994 the atrocities regime was extended to Rwanda.⁵⁵ This case is instructive for two reasons: it illustrates how the interests of the great powers affect the process of

50. Meron 1997, 4.

51. Fox 1993, 196.

52. *New York Times*, 26 August 1999, A10.

53. See *Los Angeles Times*, 4 April 2000, A1, A6; and *Los Angeles Times*, 11 January 2001, A1, A12.

54. *Ibid.*

55. An excellent historical account of the tragedy in Rwanda can be found in Des Forges 1999.

regime formation, and, perhaps more importantly, it demonstrates that negotiating the political terrain between “hard” and “soft” law is a dynamic process involving degrees of institutional learning. Given the scope and magnitude of the atrocities committed in Rwanda and the procedural, bureaucratic, and budgetary obstacles involved in developing an effective tribunal, this case illustrates the need for institutional flexibility. Moreover, because the tribunal in Rwanda followed the precedent set by the ICTY, this case allows us to assess the regime’s broader goals: deterrence and national reconciliation.

Violence plagued Rwanda for most of the late 1980s and early 1990s, and on 6 April 1994 the plane carrying Juvénal Habyarimana, president of Rwanda, and Cyprien Ntaryamira, president of Burundi, was shot down over Kigali, Rwanda. Ethnic Hutus immediately blamed Tutsi rebels of the Rwandan Patriotic Front, and within minutes after the crash soldiers of the presidential guard began hunting down Tutsis and indiscriminately killing all they encountered. Aid workers estimated that as many as 500,000 Tutsis were killed in the month after the assassination.⁵⁶ More than three-quarters of the Tutsi population in Rwanda are estimated to have been killed.⁵⁷ Another estimate suggests that in April, May, and June 1994 more than half of Rwanda’s population of 7.5 million people were either killed or displaced.⁵⁸ As was the case in the early stages of ethnic conflict in the former Yugoslavia, Western governments were reluctant to intervene for fear of casualties. Some observers suggested that Rwanda simply was not in the strategic interests of Western nations.⁵⁹ Even more caustic were charges that the failure to intervene was yet another example of Western racism.⁶⁰ The bloodshed continued until the Rwandan Patriotic Front secured victory in September 1994.

While military intervention was not forthcoming after the events of April and May 1994,⁶¹ the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR) on 8 November 1994. Its jurisdiction is time specific—that is, it covers only the period from 1 January 1994 to 31 December 1994; its scope is limited to those events temporally proximate to the assassination of President Habyarimana. To promote consistency between the two ad hoc tribunals—considered crucial to establishing a clear precedent and consistent legal norms—Article 12 of the statute specifies that the appeals chamber of the ICTY will also serve as the appeals chamber for cases brought before the ICTR. Moreover, to encourage consistency in investigations and prosecutorial strategy Article 15 specifies that the chief prosecutor of the ICTY will also serve as the chief prosecutor of the ICTR.

That the basic structure of the ICTY was implemented in another atrocities scenario speaks to its success in being perceived as an appropriate policy option in

56. *Time*, 16 May 1994, 57.

57. Kuperman 2000, 101.

58. *Time*, 13 June 1994, 36.

59. Lawyers’ Committee for Human Rights 1997.

60. *Time*, 6 June 1994, 34.

61. See Des Forges 1999; and Kuperman 2000.

cases where massive human rights violations have occurred. By 22 February 2001 forty-four suspects were being held at the UN detention facility in Arusha, Tanzania.⁶² The ICTR was initially more successful than the ICTY in detaining high-profile defendants, including former military commanders and political leaders, whereas those detained in The Hague have tended to be low-level figures without command responsibility.⁶³ Yet the ICTR faces many of the same political and procedural challenges as the ICTY.

Although it can be argued that the war in Bosnia and Croatia was an international conflict stemming from international legal recognition granted to the separatist republics, this was clearly not the case in Rwanda. However, by ruling that Article 3 of the Geneva Convention applies to both interstate and intrastate conflict, the ICTY opened the door to international adjudication of internal conflicts, such as that in Rwanda.⁶⁴ The normative importance of this precedent cannot be overstated, for it clearly expands the jurisdiction of the tribunal and applies international law to issues that traditionally have deferred to national sovereignty.⁶⁵ While this precedent certainly aids the ICTR in trying suspected war criminals in Rwanda, this expansion of jurisdiction may become a significant obstacle to a working international criminal court, since powerful states have expressed concern about an international court that seeks to expand its authority.

The limited temporal jurisdiction applied to the ICTR is also a point of contention that initially threatened cooperation between the tribunal and the Rwandan government. In fact the Rwandan government opposed the establishment of the tribunal as articulated in the Security Council's resolution, even though it initially solicited Security Council action.⁶⁶ The Rwandan ambassador to the United States explained, "the government of Rwanda regarded the dates set for the *ratione temporis* competence of the international tribunal for Rwanda . . . as inadequate. The genocide which the world witnessed in April 1994 had been the result of a long period of planning during which pilot projects for extermination had been successfully tested before this date."⁶⁷ Reports of massacres and ethnic violence taking place in 1991–93 were documented by several agencies, including the Special Rapporteur of the UN (May 1993). Because of this, the Rwandan government proposed that the tribunal's jurisdiction be extended back to 1 October 1990, a proposal ultimately rejected by the Security Council. While the Security Council's decision clearly helps to expedite the adjudication process by limiting its investigation, Rwandan representatives have countered that this will severely curtail its ability to achieve domestic reconciliation: "An international tribunal which refused to consider the causes of the genocide . . . cannot be of any use to Rwanda because

62. <http://www.ictor.org>.

63. LCHR 1997, 2.

64. *Prosecutor v. Tadic*, IT-94-1-AR72 (1995).

65. Meron 1995.

66. *New York Times*, 29 December 1994, A1.

67. Bakuramutsa 1995, 645.

it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation.”⁶⁸ Here we see acute political tension between the need for expediency in the adjudication process and the need for domestic cooperation and holistic efforts to deal with the causes of the conflict.

Another issue related to jurisdiction is the interaction between the tribunal and the national courts. While the intent of the tribunal statute was for international law to work in concert with the national courts when dealing with such widespread human rights violations as those in Rwanda, it also intended the tribunal to take a more active role when either the national legal system was inadequate or unjust rulings were likely. Rwanda began its own genocide trials in the national courts in December 1996; many analysts predicted, however, that “the sheer magnitude of the genocide and violence of 1994 would overwhelm the system.”⁶⁹ While early trials were criticized on several counts—accused had not been granted legal representation, suspects had been tortured during interrogation, requests for defense witnesses had been denied—more recent trials show improvement in due process and legal safeguards for defendants. One analysis confirmed that “even with enormous logistical weaknesses and shortages of trained personnel, Rwanda can provide trials that meet or approach minimum guarantees of fairness and due process.”⁷⁰ Yet exactly how the tribunal and the domestic courts may share a “mixed jurisdiction” remains unclear.

According to the tribunal statute, the ICTR’s jurisdiction has primacy over national courts, and it may request national courts to defer to it at any stage of ongoing proceedings.⁷¹ Clearly, for such transfers to take place, cooperation with state authorities is imperative. In addition Article 9 of the statute conforms to the principle of *non bis in idem*.⁷² These two principles are clearly at odds when national court proceedings are underway or have been completed. In cases where an ongoing national trial is not impartial or independent, jurisdiction is to be transferred to the ICTR; however, the ICTR’s rules of procedure and evidence offer no clear guidelines for doing this, nor do they specify who is to make such decisions. Moreover, the primacy of the ICTR’s jurisdiction over that of the national courts also pays little heed to the cultural elements of local legal norms, an element that may be crucial to the tribunal’s goal of achieving national reconciliation and alleviating ethnic tensions. The ICTR is authorized to impose a maximum sentence of life imprisonment, whereas the Rwandan national courts may impose the death penalty for those found guilty of capital crimes. Rwandan diplomats have expressed the common belief that those tried by the tribunal “would get off more lightly than

68. *Ibid.*, 646.

69. LCHR 1997, 23.

70. *Ibid.*, 29.

71. ICTR statute, Art. 8(2). Similar jurisdictional primacy is codified in Art. 9.

72. *Non bis in idem* refers to prohibitions against trying defendants twice for the same crime(s), often referred to as “double jeopardy.”

ordinary Rwandans who faced the death penalty in local courts.”⁷³ The provisions prohibiting double jeopardy leave the national courts no recourse when the tribunal’s decisions are seen as unjust. According to Rwandan legal sensibilities, the ICTR does not offer an adequate range of sentencing options to distinguish top-level planners from those who carried out the plans. Because it is possible that those who devised and organized the genocide may escape capital punishment (if tried by the tribunal) but those who simply carried out the orders may not (if tried by domestic courts), such incongruities may not be conducive to national reconciliation in Rwanda.⁷⁴ This perceived incongruity was also cited by the Rwandan government as a reason they could not support the tribunal; instead, Rwanda established the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990.⁷⁵ These new national laws, to be adjudicated in the national courts, classify suspects into four categories according to degree of culpability—leaders and organizers are subject to the death penalty, whereas those accused of lesser crimes may be eligible for reduced penalties in exchange for a complete confession, a guilty plea, and an apology to victims.⁷⁶

Other procedural and bureaucratic problems impede the ICTR’s likelihood of success. As is the case with the ICTY, in the absence of material evidence tribunal investigators must rely primarily on witness testimony. This presents several prescient challenges: (1) obtaining testimony amid mass refugee flows, (2) witness protection, (3) validity of witness testimony and the ICTR’s attempt at “ethnic neutrality,” and (4) the slow pace of proceedings.

Finding witnesses that were a part of the mass exodus from Rwanda will not only be time consuming for investigators but also costly. The need for witness protection is at odds with the tribunal’s goal of maintaining fair trial proceedings. Pursuant to Rule 69 of the ICTR statute, the prosecution may keep confidential the identity of victims or witnesses who may be at risk of retaliation; however, once under the protection of the tribunal, their identities must be disclosed to the defense. Given the meager resources available for an effective witness protection program, the “protection of the tribunal” may offer little assurance to witnesses reluctant to testify. During 1996, the UN Human Rights Field Operation in Rwanda documented more than sixty-four separate incidents in which genocide survivors and their family and friends were killed (227 people) or were injured (56 people) as a consequence of their testimony before the tribunal. The report also contains numerous accounts of threats and intimidation directed at potential witnesses and their associates. Establishing the validity of witness testimony is especially challenging in cases of ethnic hate crimes. The tribunal is committed to impartiality in the belief that the divisive

73. Bakuramutsa 1995, 648.

74. Bakuramutsa 1995. See also *New York Times*, 2 November 1994; and *International Herald-Tribune*, 9 November 1994.

75. Available online at <http://www.rwandemb.org/prosecution/law.htm>.

76. As specified in Art. 2, 5, and 14–16.

issue of ethnicity may be transcended “when confronted with the irrefutable truths at trial by judges who share none of these biases.”⁷⁷ Such tactics did not garner the desired effects when applied in the Balkans, where reactions to tribunal decisions remain strongly divided along ethnic lines.⁷⁸ A dearth of material evidence and a strong reliance on witness testimony that may or may not be tainted by ethnic biases could actually spur ethnonationalist tensions and violence; one ethnic group may feel that the evidence used to convict their kinsmen was fraudulent and that the tribunal was used by the enemy to further persecute their ethnic group, aggravating the group’s sense of threat. Finally, proceedings moved at a snail’s pace because of the challenge of investigating cases dependent on witness testimony (especially when witnesses are geographically dispersed) and bureaucratic mismanagement by the ICTR that led to forensic investigations at mass graves being thwarted due to lack of funds and necessary equipment.⁷⁹ If preserving an accurate collective memory facilitates not only accurate witness testimony but also the process of national reconciliation, the pace of investigations and proceedings is crucial.

Further hindering the ICTR’s ability to foster national reconciliation is the tribunal’s lack of relevance to the Rwandan population. While the statute identifies neutrality and independence as institutional imperatives—largely because Security Council members believed the tribunal’s neutrality was essential for reconciliation—neutrality may in fact work against reconciliation. “The structural distance of the ICTR from the Rwandan social process makes it very difficult for the ICTR’s work to be relevant and even more unlikely that its work will address the root causes of the genocide.”⁸⁰ This “social distance” takes place at several levels. The tribunal convenes in Arusha, Tanzania, not in Rwanda. This location, though chosen to promote neutrality, instead separates the proceedings from the people they were intended to help. Moreover, “there is a disconnection between the ICTR trials and the internal social process. Not only the physical distance, but the way in which the ICTR has operated and publicized its efforts does not involve the population in any real sense.”⁸¹ While the government-operated radio station provides limited coverage of trial proceedings, there are no television broadcasts outside the capital city, and few Rwandans understand the legal procedures and proceedings.

From the outset, the relationship between the largely Tutsi government of Rwanda and the ICTR has been, in the words of one analyst, “frosty.”⁸² While simple logistics give the ICTR a strong incentive to limit the duration of its legal jurisdiction—in August 1999 Rwandan detention facilities held over 124,000 prisoners awaiting legal procedures⁸³—this limitation may profoundly affect the tribunal’s success in establishing reconciliation among the Rwandan population.

77. Alvarez 1999, 437.

78. *Ibid.*, 437.

79. *The Boston Globe*, 11 December 1996, A1.

80. Howland and Calathes 1998, 161.

81. *Ibid.*, 155.

82. *New York Times*, 21 November 1997, A10.

83. *Deutsche Presse-Agentur*, 13 August 1999.

Other analysts counter that other forces are at play: “Those [temporal] limits were the product of a highly political process within the Security Council and reflect diplomatic concerns. Broader jurisdiction for the ICTR could well have led to inquiries that would have embarrassed either the UN as a whole or particular permanent members of the Security Council.”⁸⁴ Yet dealing with a war crimes scenario as vast as that encountered by the ICTR often poses a dilemma: Limiting the scope of the investigation and trials may impede justice by not holding all of the guilty accountable for their actions and reduce the tribunal’s success in achieving reconciliation in Rwanda (and elsewhere); however, a more expansive role burdens an already over-extended institution and may significantly affect its ability to quickly resolve cases. Recently, the slow pace of legal proceedings in the case of Jean-Bosco Barayagwiza, former Rwandan director of Political Affairs and minister of Foreign Affairs, resulted in the ICTR’s decision to release him because he had been held too long without trial.⁸⁵ In response the Rwandan government immediately refused to further cooperate with the tribunal, stating that “Barayagwiza’s release serves as a pretext for all other perpetrators of the genocide to live with impunity all over the world.”⁸⁶ Without cooperation of the Rwandan government, the tribunal’s ability to conduct trials will certainly be curtailed. How to “soften” the legalization of the atrocities regime to promote effective “mixed jurisdiction” and cooperation remains an important challenge to institutional design.

The ICTY in Kosovo

Further application of the tribunal system became necessary in 1999 as ethno-nationalist warfare broke out between ethnic Albanian nationalist forces and the Serbian army. While initial casualties were light by international standards, numbering some 2,500, accusations of renewed “ethnic cleansing” by Serbian forces surfaced after the failure of the Rambouillet talks and subsequent NATO air strikes. Reports of mass graves, torture, rape, and executions of ethnic Albanians poured out of Kosovo as quickly as the thousands of refugees who left their homeland under duress; calls for war crimes investigations were nearly concurrent with NATO action. On 29 September 1999 it was announced that the ICTY’s jurisdiction under its original statute would be extended to Kosovo. Like the case of Rwanda, this case sheds light on whether the tribunal’s actions in Bosnia had any effect on deterrence and national reconciliation. It not only addresses a conflict that occurred after a tribunal action elsewhere but also allows us to assess whether fear of adjudication affects the decisions of political and military leaders. In this case many of those accused of atrocities had already been named as perpetrators in the Bosnian conflict.

84. Alvarez 1999, 397.

85. *Los Angeles Times*, 7 November 1999, A12. The decision to release Barayagwiza was later reversed in response to public outrage. See *Los Angeles Times*, 1 April 2000, A11.

86. *Los Angeles Times*, 7 November 1999, A12.

The re-application of the atrocities regime to the volatile situation in the Balkans also brings to the surface the public's perception of tribunal action, that is, whether decollectivization of guilt can promote national reconciliation and peace. On both accounts, the case of ICTY action in Kosovo is not encouraging.

To gain "institutional momentum" during the Bosnia investigations, the ICTY actively pursued investigations against defendants at all levels of culpability. Most of the defendants and detainees in the Bosnia trials were at the lower rungs of command and control, yet they were considered important for establishing procedural norms and precedent. Functional considerations have prompted the tribunal to pursue exceptionalism, focusing investigations on successful prosecution of the significant players. One court official noted, "As far as I'm concerned, [the tribunal] simply can't try every Tom, Dick, and Harry."⁸⁷ The tribunal prosecutor added, "It is clear that the OTP [Office of the Prosecutor] ICTY has neither the mandate, nor the resources, to function as the primary investigative and prosecutorial agency for all criminal acts committed on the territory of Kosovo."⁸⁸ While there are tactical benefits to prosecuting low-level perpetrators, most analysts have stressed that the ICTY's deterrence value hinges ultimately on its ability to successfully prosecute those at the highest levels.⁸⁹

The Kosovo case is also very useful in analyzing the tribunal's ability to shape state action, since the conflict in Kosovo followed two tribunals that successfully tried war crimes cases. Clearly, the evidence emerging from Kosovo—mass graves, witness accounts of summary executions of civilians, torture—suggest that Serbs were clearly undeterred by the presence of the ICTY. This was documented by Cedric Thornberry, who in his dealings with those involved in war crimes atrocities observed that

Our interlocutors plainly were skeptical that the "international community" would do anything. In Belgrade and Zagreb, they usually preserved the diplomatic niceties and kept straight faces, but often the sneer around the table was nearly audible. In less sophisticated circles, when we spoke directly with those we knew had been the instigators and warned them that justice would some day come, the local establishment and its forces of law and order often snickered aloud.⁹⁰

Similar attitudes were also evident during hearings on Rule 61 held in The Hague in July 1996 (discussed later); a witness testified that Ratko Mladic scoffed openly at NATO's inability to protect the Muslims in Srebrenica in July 1995, an event that occurred two years after the ICTY was created.⁹¹ Clearly, the desired effect of

87. *Los Angeles Times*, 27 August 1999, A5.

88. Statement by Carla del Ponte, 29 September 1999. Available online at (<http://www.un.org/icty/pressreal/p437-e.htm>).

89. See Scharf 1997, 219, 225; Alvarez 1999; and Morris 1997.

90. Thornberry 1996, 77.

91. Guest 1996, 80.

adjudication, to deter war crimes, has been significantly hampered by the difficulty of arresting suspects, especially during the tribunal's early period. Even prosecutors in The Hague agree that "the only true deterrents . . . are not investigations but arrests."⁹² Yet members of the international community seem to have little desire to take the tactical risks involved in apprehending the high-level perpetrators currently indicted.⁹³ After the Dayton Accords brought the conflict in Bosnia to a close, the NATO implementation force (IFOR) was given extremely cautious instructions for dealing with indicted war criminals.⁹⁴ Initial operating procedures authorized IFOR troops to arrest those they encountered but did not permit IFOR to seek them out.⁹⁵ Rumors surfaced that because of this "hands off" policy, indicted war criminal Radovan Karadzic was able to pass through several NATO checkpoints unmolested, even after the Dayton Accords were signed, though these rumors were never substantiated.⁹⁶ After NATO bombed Serbia during the conflict in Kosovo, the United States opposed any operation to seize Slobodan Milosevic, opting instead to offer a \$5 million reward for his arrest.⁹⁷ President Clinton remarked, "I do not believe that the NATO allies can invade Belgrade to try to deliver the indictment. . . . Our heaviest responsibility . . . is to get the Kosovars back home in safety."⁹⁸ Policymakers were clearly sensitive to "mission creep," a painful lesson from the Vietnam era.

In an effort to increase the deterrence value of the tribunal, given the difficulties involved in arresting indicted war criminals, the ICTY established Rule 61 (under Art. 15 of the statute), which provides for a "super-indictment" in certain instances. The purpose of this rule is to broaden world awareness of perpetrators' actions without violating the mandate forbidding trials in absentia. It allows the indictment and all supporting evidence to be submitted to the tribunal in an open court session. This may include examination of witnesses whose testimony becomes part of the record. Under the provisions of Rule 61, the prosecution may present highlights of the case in the absence of the accused, essentially for the media.⁹⁹ While the line between executing Rule 61 and prohibiting absentia trials is rather thin, the aim of the super-indictment is unmistakable: to ensure that those indicted will be considered international pariahs, even if they manage to elude arrest.¹⁰⁰ Some legal

92. *New York Times*, 15 September 1999, A3.

93. A detailed plan to capture Radovan Karadzic, called "Operation Amber Star," was completed in April 1997 and involved several hundred French and U.S. commandos. When advised of the plan, President Clinton wanted French forces to spearhead the raid; however, Jacques Chirac was reluctant to assume such a "high risk" position for fear of reprisals against French troops in the region. Likewise, Clinton and British Prime Minister Tony Blair were reluctant because of concerns over potential casualties, and so the plan was never executed. *Time*, 10 August 1998, 68–70.

94. IFOR was later renamed "Stabilization Force" (SFOR).

95. See Meron 1997, 5; and Bass 2000.

96. *Time*, 10 August 1998, 68–69.

97. *New York Times*, 26 June 1999, A6.

98. *San Diego Union Tribune*, 18 June 1999, A21.

99. Thornberry 1996, 83.

100. Scharf and Epps 1996, 649.

analysts are not optimistic: "The contribution of publicizing evil acts, although worthy, alone falls far short of meeting a comprehensive punishment objective for a court system. An increase in international awareness . . . probably does not equate to generally deterring others."¹⁰¹ Rather than establishing closure through justice, these measures seem to be stop-gap attempts to provide some sense of "justice" to victims of war crimes until the guilty parties can be brought to trial. The question is, will such stop-gap measures provide the necessary deterrence and reconciliation to mitigate future transgressions of the *jus belli*, especially as time between transgression and adjudication becomes ever greater?

Although the slow pace of proceedings is understandable given the legal and logistical hurdles facing the ICTY, it may hinder both deterrence and national reconciliation.¹⁰² In a recent news report, interviews revealed that many Serbs are avoiding responsibility for the ethnic hatred that drove the program of ethnic cleansing, and many deny that atrocities, such as those committed at Srebrenica, ever really occurred.¹⁰³ In an opinion poll published in June 1999 by the newsmagazine *Nin*, almost two-thirds of Serbs do not believe that the atrocities alleged in the tribunal proceedings occurred; instead they "emphasize the high price that Serbs are now paying."¹⁰⁴ This sense of "reversal" was well articulated by a Serb lawyer: "I didn't kill anyone, but an Albanian neighbor told me I would never be safe in Kosovo. I am a victim of their ethnic cleansing."¹⁰⁵ Others considered tribunal reports as nothing less than anti-Serb propaganda. Ethnic Albanians seem particularly sensitive to what they perceive as a whitewashing by the Serbian government. Pajazit Nushi, member of the Council for Defense of Human Rights and Freedoms in Pristina, notes, "Still, now, there is no single Serbian political voice that has condemned the crimes."¹⁰⁶ Moreover, the withdrawal of Serbian troops from Kosovo has been accompanied by acts of violent retribution by ethnic Albanians. One news account noted, "In the early days of NATO occupation, many Serbs who stayed [in Kosovo] were optimistic that they could forge a future with their Albanian neighbors. But a wave of retaliatory killings of Serbs by Albanians enraged by wartime atrocities has calcified emotions."¹⁰⁷ Time is certainly not assisting efforts to create a peaceful, multiethnic Kosovo, as new justifications for animosity between ethnic groups are kindled and old hatreds reinforced.

Clearly, the deterrence value of the emergent regime has been, to this point, quite weak, owing largely to the reluctance of the international community to aggress-

101. Howland and Calathes 1998, 150.

102. One tribunal judge remarked that if Milosevic were turned over to the ICTY for trial, it would be three years before his case would find a place on the docket. See *Los Angeles Times*, 27 August 1999, A5. In a June 2000 report to the UN Security Council, it was estimated that it would take sixteen years to complete the ICTY's current caseload. See *Los Angeles Times*, 6 July 2000, A10.

103. *Los Angeles Times*, 6 July 2000, A1, A10.

104. *Los Angeles Times*, 2 July 1999, A1.

105. *Ibid.*

106. *Los Angeles Times*, 10 October 1999, A1.

107. *Ibid.*, A30.

sively pursue high-level perpetrators; however, the arrest of Milosevic and the possibility of his extradition for trial at the Hague tribunal leaves considerable room for optimism that the regime's deterrence power may dramatically increase. The case of ICTY action in Kosovo also illustrates the limitations of the atrocities regime in promoting national reconciliation in ethnically torn states. It remains to be seen whether the arrest of Milosevic will serve to disclose the truth of events that occurred during the Balkan conflict and promote national healing, or whether his arrest and extradition in response to Western pressure will further calcify animosities between ethnic groups in the region. The ability of the ICTY to obtain Milosevic's extradition is a crucial point in the development of a more viable atrocities regime.

Justice in Southeast Asia?

That the ICTY has not only survived but has served as a model for other ad hoc tribunals, including a permanent international criminal court, could indicate that war crimes adjudication is a successful policy tool. However, although the regime has overcome considerable procedural and structural obstacles in the Balkans and Rwanda, these obstacles remain formidable in other cases. In regions dominated by power politics, regime/norm development remains in the formative stage, especially in situations where powerful states have strong incentives *not* to become involved. Without the direct intervention by strong states and cooperation by governments in states where atrocities are alleged to have occurred, the atrocities regime lacks strength.

Cambodia

It has been estimated that more than a million Cambodians died from execution, torture, disease, or hunger from 1975 to 1979 under the Khmer Rouge regime; some estimates go as high as 2 million. Although it is unclear why a war crimes tribunal was not established earlier in the wake of such a profound human tragedy, the institutional momentum of the atrocities regime has prompted the UN to seek to establish a judicial mechanism for Cambodia. The failure to establish a tribunal earlier can be attributed to the interests of several Security Council member states and to the recalcitrance of the current Cambodian government.

At the time atrocities were committed a tribunal was not in the strategic interests of the United States; in the aftermath of the Vietnam War there was little incentive once again to become entangled in Southeast Asia's political quagmire. Moreover, in adjudicating charges of war crimes, information about U.S. secret bombings of Cambodia and other sensitive information could become part of the public record. William Dowell, UN correspondent for *Time*, suggests that many countries, including the United States, "have used the Khmer Rouge to pursue their own political interests in the region at one time or another, and all are reluctant to talk about their

relationship with the Khmer Rouge.”¹⁰⁸ This fear may be particularly acute for China, already dealing with image problems that complicate its bid for membership in the World Trade Organization. Given the current political climate, Beijing is understandably hesitant to have its role in supporting the Khmer Rouge regime exposed to the international community it wishes to engage.¹⁰⁹ While such reasons may discourage powerful governments from becoming involved, public demands for action in Cambodia have also been less acute than was the case for the Balkans or Rwanda. In the United States public desire for justice and accountability has been tempered by an equally compelling desire to “close the book” on the Vietnam era, reducing domestic demands for state action.

Domestic resistance is also an important factor in Cambodia. Initial UN attempts to establish a tribunal for Cambodia were met with little cooperation from the Cambodian government, especially Prime Minister Hun Sen. The UN has proposed several possible tribunal configurations, all of which display institutional adjustments stemming from the lessons learned in the Balkans and Rwanda. First, the UN wishes to try in a single trial only twelve former political and military leaders of the Khmer Rouge, thereby avoiding the protracted proceedings that plague other ad hoc tribunals currently in operation; however, the Cambodian government has expressed little interest. “We have no confidence in an international court of law,” noted Hun Sen, showing concern that a trial may upset his fragile hold on power in Cambodia.¹¹⁰ Hun Sen has been concerned that the scope of criminal culpability may make reconciliation through justice problematic in Cambodia. As one observer remarked, “justice itself seems a rusty chain that will only bloody anyone who tries to touch it. To try Khmer Rouge chieftains would be, in a sense, to prosecute the whole country.”¹¹¹

Attempts by tribunal advocates to bypass the Cambodian government by extending the jurisdiction of existing ad hoc tribunals have been vetoed by China, forcing UN officials to consider concessions in tribunal design in order to garner Cambodian government support.¹¹² Since its first proposals, the UN modified its rigid stance on “international impartiality” by suggesting an institutional structure that allows Cambodian representation among the justices.¹¹³ The UN would select an independent prosecutor and international judges, and the Cambodian government could select national judges, who would be in the minority, to serve on the bench. Again, the Cambodians were not responsive. The UN has since agreed to allow majority representation of Cambodian judges should a tribunal be established.¹¹⁴ This “mixed tribunal” reflects both logistical interests and an increased sensitivity to connecting legal proceedings with the Cambodian people. On 2 January 2001, after

108. *Time*, 22 January 1999.

109. *South China Morning Post*, 25 August 1999, 14.

110. *Time*, 22 March 1999, 56.

111. *Time*, 16 August 1999.

112. *New York Times*, 18 April 1998, A5. See also *Boston Globe*, 1 May 1998, A10.

113. *New York Times*, 12 August 1999, A8.

114. *Los Angeles Times*, 3 January 2001, A1, A11.

considerable international pressure, Cambodia's National Assembly approved the new UN guidelines; however, significant political obstacles remain, including approval by the Cambodian Senate, legal determination of the guidelines' constitutionality, and King Norodom Sihanouk's signature.

The case of Cambodia also illustrates the problem time poses when relying on adjudication to promote peace and reconciliation. Although there is no statute of limitations on tribunal indictments, human rights groups argue that because of the advanced age and poor health of many suspects, quick action to create a tribunal is imperative lest Cambodia lose its chance to bring Khmer Rouge leaders to justice.¹¹⁵

Indonesia and East Timor

In response to a successful referendum in September 1999 declaring East Timor's independence from Indonesia, pro-Indonesia militias mounted a campaign of violence and intimidation throughout East Timor. The acts of violence were in many cases gruesome. A Reuters news team documented victims found in a truck who appeared to have been tied up, hacked with machetes, and set ablaze after being soaked with gasoline.¹¹⁶ Eyewitnesses claimed that Indonesian police had joined the militiamen in this atrocity. The UN High Commissioner for Human Rights declared, "there was overwhelming evidence that there had been a deliberate, vicious, and systematic campaign of gross violations of human rights in East Timor, including mass killings, forcible expulsions, violence against women, and a breakdown of law and order. The extreme violence . . . was initiated by different militia groups, in which elements of security forces were also involved."¹¹⁷ In light of evidence of human rights abuses, the UN Commission for Human Rights (UNCHR) opened a special session that resulted in a resolution calling for a preliminary investigation into war crimes in East Timor, seen by many as the first step toward establishing a war crimes tribunal.¹¹⁸ The resolution specifically refers to Security Council Resolution 1264, in which the Council "demanded that those responsible for such acts be brought to justice."¹¹⁹ However, the government of Indonesia quickly rejected the UNCHR resolution, a move that denied UN investigators access to Jakarta's military files. During the special session of the UNCHR, the Indonesian representative dismissed the need for international intervention: "The Government last night had established a fact-finding commission to compile information on human-rights violations and bring the perpetrators to justice. It was important to ensure that this august body not do anything that would open old wounds and

115. *New York Times*, 12 August 1999, A8.

116. *The Independent* (London), 30 September 1999, 15.

117. UNCHR press release HR/CN/99/67, 23 September 1999.

118. UNCHR Res. 1999/S-4/1.

119. S.C. Res. 1264, UN Doc. S/RES/1264 (1999). See also S.C. Res. 1272, Art. 16, UN Doc. S/RES/1272 (1999), available online at (<http://www.un.org/Docs/scres/1999/99sc1272.htm>).

exacerbate problems in the territory.”¹²⁰ Indeed, the Indonesian government’s lack of cooperation makes the creation of a tribunal quite unlikely.

That tribunals were not established in Cambodia and Indonesia reflects two weaknesses in relying on international law to provide peace and reconciliation in war-torn regions: the need for cooperation, both internationally and in war-torn regions, and the hesitancy of the international community to intervene militarily. While ad hoc tribunals may be formed by fiat of the Security Council, the difficulties encountered by the ICTY show how lack of cooperation may stifle institutional effectiveness and regime development. Proponents of an international criminal court point to Cambodia and East Timor, where the atrocities regime appears beholden to the interests of the powerful, as evidence that such a permanent institution is necessary if a truly effective regime is to be established.

The International Criminal Court

Kofi Annan, speaking at the Rome conference to establish an International Criminal Court (ICC), declared, “Victims of past crimes and potential victims are watching us. They will not forgive us if we fail.”¹²¹ While the ICC is not a specific case of the application of a legal regime to an instance of genocide or crimes against humanity, examining its development is crucial to understanding the political challenges of expanding the existing ad hoc tribunal system to a more universal atrocities regime. This case illustrates the tension between the need for great power support and the desire to establish a hard law regime that transcends power and political interests (that is, holds strong and weak states equally accountable). The difficulty in achieving great power support for the ICC was anticipated by some legal analysts: “If a permanent international criminal court were created, it is extremely unlikely, at this juncture, that any of the more powerful nations would allow it mandatory jurisdiction or would opt to submit to its jurisdiction.”¹²² The ad hoc system employed in the existing atrocities regime is appealing to powerful states because it facilitates adjudication, yet control over its application in a given case remains with the Security Council. It is understandable, therefore, that powerful states are reluctant to delegate authority to an independent body. While the statute to create the ICC is an established fact, its power as part of the atrocities regime remains contested and indefinite, and its development is marked by concessions made to great power interests. This case suggests that if the atrocities regime is to gain widespread acceptance, the process of legalization will likely undergo “softening” in order to mitigate the political contracting costs of the new regime. As noted by Kenneth W. Abbott and Duncan Snidal, hardening the legal foundations of

120. UN press release, HR/CN/99/67, 23 September 1999, 6.

121. Quoted in *Time International*, 27 July 1998, 46.

122. Scharf and Epps 1996, 639.

the atrocities regime is a sensitive and protracted process that may involve initially taking softer positions.¹²³

Although President Clinton signed the Rome Statute on 31 December 1999 that created the ICC, the United States has long opposed several key components of the Rome Statute, opposition still expressed by the Bush administration.¹²⁴ The first involves the universal jurisdiction provisions as articulated in the statute that subject any state, signatory to the statute or not, to the court's jurisdiction.¹²⁵ While agreeing that such expansive jurisdictional provisions are reasonable in cases of genocide, U.S. representatives sought a clause to allow a state to opt out of the ICC's jurisdiction for a period of ten years in cases of war crimes and crimes against humanity. In compromise, the Rome Statute now allows states to opt out for seven years but only in cases of alleged war crimes.¹²⁶

The United States was also concerned that the scope of crimes covered under the court's jurisdiction was overly broad. "Crimes of aggression," for example, is included, though no precise definition of "aggression" was agreed on during the drafting of the statute. James Rubin, U.S. State Department representative, lamented the drafters' unwillingness to address reservations about the treaty and expressed concern that use of nuclear weapons may be included under the current definition of crimes of aggression.¹²⁷

Another concern was the prosecutor's authority to investigate crimes even in cases where no state party had issued a complaint. Under Articles 13 and 15, the prosecutor may investigate crimes *proprio motu* based on information provided by parties within the court's jurisdiction.¹²⁸ U.S. negotiators wanted to limit the power to bring cases to the court to the Security Council, consistent with the precedent set by the ad hoc tribunals. Without this limitation, U.S. negotiators argued, members of the U.S. armed forces "would be subject to frivolous, politically motivated charges" that may hinder crucial peacekeeping missions in the future if there was a possibility of "malicious prosecution."¹²⁹ In yet another attempt at political compromise ("softening" the process of legalization), Article 16 affords the Security Council the power to halt investigations and prosecutions for twelve months, and this moratorium may be renewed with the same conditions. Some delegates protested, arguing that "if states can simply opt in or out when they want, the court will be unworkable."¹³⁰ Yet this provision does not give single members of the Security Council veto power; instead, prosecution may be deferred only by unan-

123. Abbott and Snidal 2000.

124. *Los Angeles Times*, 15 February 2001, A4.

125. Rome Statute, Article 4(2).

126. Rome Statute, Article 124.

127. U.S. Department of State, Daily Press Briefing, 20 July 1998.

128. Rome Statute, Article 13(c); 15(1)

129. David 1999, 357.

130. *Time*, 27 July 1998, 46.

amous vote of the Security Council. And if deferral is to be extended for additional periods, the political consensus favoring delay must be maintained.¹³¹

Finally, the Clinton administration insisted on an exception for personnel involved in official military action. David Scheffer, U.S. ambassador-at-large for war crimes issues, stated that the United States wanted “a clear recognition that states sometimes engage in very legitimate uses of military force to advance international peace and security.”¹³² The argument is that questions of the *jus ad bello* supersede questions of the *jus in bello*. During the NATO air strikes in Kosovo, Serbia insisted that NATO was violating international law. Additional claims were made by China after the errant bombing of the Chinese embassy in Belgrade. Similarly, given recent evidence of civilian deaths at the hands of U.S. troops at No Gun Ri during the Korean War, those high in the military’s chain of command could be investigated and prosecuted by the ICC.¹³³ Skepticism is also on the rise among other key members of the Security Council, including Russia, which faced considerable international criticism over its handling of the conflict in Chechnya. Critics, however, argue that exceptions would render the ICC an empty vessel. Richard Dicker, associate counsel for Human Rights Watch, argued that the exceptions favored by the United States represent “a loophole the size of the Grand Canyon that any rogue state would drive right through.”¹³⁴

Although 139 nations had signed the Rome Statute as of 12 February 2001, whether it will be ratified by the 60 nations necessary for its establishment remains to be seen.¹³⁵ Moreover, even if it does succeed in garnering the necessary signatories, how effective it will be without the support of the major powers, especially the United States, is also not clear. One U.S. official remarked, “We have shown that the only way to get war criminals to trial is for the U.S. to take a prominent role. If the U.S. is not a lead player in the creation of this court, it doesn’t happen.”¹³⁶ While Clinton’s signing of the Rome Statute was lauded by ICC proponents and human rights organizations, it may be more symbolic than instrumental. Articulating the Bush administration’s stance at the UN, Secretary of State Colin Powell declared, “As you know, the United States . . . does not support the International Criminal Court. President Clinton signed the treaty, but we have no plans to send it forward to our Senate for ratification.”¹³⁷ As normative considerations press for harder legalization in the emergent atrocities regime,¹³⁸ negotiating the political dimensions necessary to building institutional strength seems predi-

131. David 1999, 368.

132. Quoted in *Associated Press*, 14 August 1999, PM Cycle.

133. *Los Angeles Times*, 14 October 1999, A1.

134. Quoted in *Associated Press*, 14 August 1999, PM Cycle.

135. See (<http://www.un.org/law/icc/statute/status.htm>).

136. *Time*, 27 July 1998, 46.

137. *Los Angeles Times*, 2 February 2001, A4.

138. For example, holding perpetrators of genocide, war crimes, and crimes against humanity accountable independent of political power and interests involved.

cated on softening some aspects to gain the necessary international consensus. The evidence suggests that such softening measures have already taken place.

Evaluating the Atrocities Regime

Formation

The evidence suggests that expanding liberal norms of state conduct and protecting human rights certainly explain the existence of tribunals in locales with little strategic or material importance. The proliferation of human rights norms is evident in current legal trends in both the United States and Europe.¹³⁹

In the United States the term *human rights* was articulated in only 19 federal court cases prior to 1900; this number grew to 34 from 1900 to 1944, 191 from 1945 to 1969, 803 in the 1970s, 2000 times in the 1980s, and over 4000 times in the 1990s. In Europe the case load of the European Court of Human Rights jumped from 11 cases during 1959–73 to 395 cases during 1974–92.¹⁴⁰ The increasing frequency of calls for investigations into war crimes and crimes against humanity is a strong indicator of changing norms and sensibilities. Moreover, evolving notions of human rights are reconfiguring the norms of sovereignty that have limited international intervention in cases of internal atrocities.¹⁴¹

Exponential growth in the articulation of human rights norms is not only a function of what Oran Young termed “spontaneous regime development”; it is also being cultivated by nongovernmental human rights organizations and aided by growing media coverage, often generated by such groups as Human Rights Watch and Amnesty International.¹⁴² In addition the emergent atrocities regime itself may be seen as a norm entrepreneur.¹⁴³ Once established, the tribunal articulates and reinforces norms of state conduct and may also apply direct pressure to states through calls for investigations or by releasing information to the media. Such pressures may be manifest at the systemic level, through states’ desiring to avoid being labeled “pariahs” or “rogues” or simply through emulation.¹⁴⁴ In a world of interdependence, reputation is a valuable asset in maintaining positive relations with key partners.¹⁴⁵ Pressures may also follow a “bottom-up” path, especially in liberal democracies where public exposure can generate policy demands. Certainly, additional research is necessary to trace such demand-side questions and to identify the role of the tribunals themselves in generating demands for political action.

However, though these developments signal the evolution of norms to protect civilians during armed conflict, they may also be building norms that preclude

139. Henkin 1990.

140. See Jacobson 1996; and Lutz and Sikkink 2000.

141. Abbott 1999, 372. See also Finnemore 1996; and Risse, Ropp, and Sikkink 1999.

142. Young 1983, 98–99.

143. I thank an anonymous *IO* reviewer for this important observation.

144. Rosecrance 1999.

145. See Chayes and Chayes 1995, 230; and Keohane 1997, 501.

military intervention at early stages of crises. The danger of relying on mechanisms that only respond *ex post facto* to atrocities is clearly evident in both Bosnia and Rwanda. Though cognizant of atrocities in Bosnia, “the major powers . . . backed away from significant armed intervention. Facing domestic criticism for allowing the slaughter to continue unchecked, some governments seemed to feel obliged to show that they were doing *something*. It was in this vacuum that the proposal for a tribunal advanced.”¹⁴⁶ It has been suggested that while intervention may not have prevented genocide in Rwanda, armed intervention may have been able to save as many as 125,000 Tutsi lives—about 25 percent of the victims.¹⁴⁷ Although human rights norms may be strengthening, norms of military intervention (often necessary for successful atrocities adjudication) make action increasingly difficult to initiate. The same groups that lobby for adjudication and accountability are often the most vocal opponents of military intervention. Moreover, norms of intervention increasingly require multilateral rather than unilateral action for both operational (cost-sharing) and political (legitimacy) reasons.¹⁴⁸ Clearly, this has troubling implications for enforcement, for as the evidence presented here suggests, military intervention may be necessary in many cases for successful adjudication.

Application

Realist variables of power and interest best explain why tribunals may be established in some cases but not in others. Power and interest strongly influence a state’s reluctance to establish a given ad-hoc tribunal or be signatory to a comprehensive international legal regime. In the cases of Cambodia, East Timor, Chechnya, and Korea, great power nations were obviously reluctant to expose sensitive issues in a public arena, especially past or present collusion with despotic regimes (in the Cambodian case). In addition, strategic interests figure prominently in the reluctance of strong states to ratify the Rome Statute. Modern warfare often necessitates destroying “civilian” targets for military victory, and in general “collateral damage” from bona fide military missions has rarely been considered a violation of human rights, even by critics.¹⁴⁹ These military actions may further the overall good, even when the human cost is high; in other words, the “just war” may sometimes involve regrettable human costs that should not be prosecutable offenses under international law. The evidence presented here suggests that powerful states are reluctant to engage any regime that may *significantly* impede measures deemed necessary to achieving security. The dominance of the Security Council in decisions to establish ad hoc tribunals has been, to date, driven by state interests. While it can be argued that the Balkans and Rwanda offer no particularly salient security incentives,

146. Neier 1998, 112.

147. Kuperman 2000, 108. See also Des Forges 1999.

148. Finnemore 1986, 180–85.

149. Donnelly 1998, 531. See also Morgenthau 1985, 253–60.

establishing tribunals was certainly not seen as threatening or compromising to great power interests.

Finally, intelligence problems figure prominently in decisions to intervene in conflicts and adjudicate war crimes; and this may also be a function of great power interests. In the case of Rwanda, Alan Kuperman noted that “U.S. intelligence agencies committed virtually no in-country resources to what was considered a tiny state in a region with little strategic value.”¹⁵⁰ With insufficient information on the magnitude and nature of the conflict, it was initially depicted as a two-sided civil war rather than one-sided genocide. Moreover, intelligence failures resulted in reports of declining violence when violence was, in fact, increasing.¹⁵¹ Thus, realist variables of great power interests can generate outcomes directly, by declining to initiate investigations in politically sensitive areas, and indirectly, by not allocating adequate resources for intelligence gathering in areas perceived to have little strategic importance.

Expanded Goals and Institutional Adjustments

What factors drive the manner in which an atrocities regime is constituted? Once established, what makes the regime more or less effective? How is “success” to be defined? While evolving norms of human rights may initiate the construction of the atrocities regime in the first place, differentials in power and the interests of the most powerful states clearly shape the process of institutionalization. E. H. Carr suggested that, “The law is . . . the weapon of the stronger. . . . Law reflects not any fixed ethical standard, but the policy and interests of the dominant group in a given state at a given period.” As such, “Politics and law are indissolubly intertwined.”¹⁵² This certainly applies to the case of war crimes adjudication. Iain Guest suggests that suspicions ran high, especially early in the tribunal’s development, that the tribunal was serving as “a substitute, an alternative, to the kind of tough political action which would put an end to the ethnic cleansing that was taking place.”¹⁵³ States find establishing a tribunal system appealing because it provides an economically and politically inexpensive means of responding to demands for international action; it enables states to commit at a level commensurate with their strategic interest in the region involved. From the standpoint of *realpolitik*, the regime is a success whether or not it succeeds in bringing justice or alleviating ethnic conflict. From the standpoint of *idealpolitik*, the measures of success—reducing human suffering, protecting human rights, and promoting regional stability—are certainly left wanting. Here we must assess the tribunal’s success from another dimension—as a component of conflict management.

150. Kuperman 2000, 101.

151. *Ibid.*, 102.

152. Carr 1961, 176–77.

153. Quoted in Commission on Security and Cooperation in Europe 1996, 12.

Theodor Meron offers the best articulation of the regime's more expansive and idealistic aims: "The great hope of tribunal advocates was that the individualization and decollectivization of guilt . . . would help bring about peace and reconciliation. . . . Another of the tribunal's objectives was deterrence of continued and future violations of the law."¹⁵⁴ For international lawyers the connection between a functioning legal regime and political order is clear: "There can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance."¹⁵⁵ If peace is a function of law and justice, is an atrocities regime the panacea for the problem of ethnonationalist violence? Here, the current evidence is certainly not compelling. Effective deterrence requires three elements—commitment, capability, and credibility.¹⁵⁶ The existence of war crimes tribunals and the successful prosecution of initial cases did little to curb actions in any of the cases examined. The record of U.S. and NATO intervention in ethnic conflicts over the past thirty years has been marked by very limited commitments, especially in cases where threats to U.S. interests were limited.¹⁵⁷ Because of the rather spotty record of the West regarding intervention and the formidable institutional obstacles facing the fledgling tribunal system, perpetrators of brutality have had little reason to take UN commitment seriously. In terms of capability, the United States has certainly possessed the power to apprehend war criminals and political despots indicted by the tribunal. However, the difficulty of apprehending such people came at an unacceptably high logistical and political cost, considering that a large-scale military commitment would be necessary and that to ensure stability such forces would need to remain for prolonged periods.¹⁵⁸ The relationship between a functioning atrocities regime and other elements of a more comprehensive strategy for managing conflict—primarily armed intervention—is abundantly clear when assessing the regime's deterrence value. As one analyst noted, in the Bosnian case "U.S. and European (NATO) officials failed to satisfy even the most basic strategic requirements of deterrence. These conditions include definition of unacceptable behavior, clear communication of a commitment to punish transgressors, and demonstration of intent (that is, resolve) to carry out retaliation."¹⁵⁹

Preliminary evidence does not seem to support notions that decollectivization of guilt through war crimes adjudication is, on its own, an effective means to achieving national reconciliation—seen as essential in dealing with ethnic or religious vio-

154. Meron 1997, 6. See also Pejic 1998.

155. Ferencz 1980, 1.

156. See Morgan 1977; George and Smoke 1974; Lebow and Stein 1990; and Spiegel and Wheling 1999, 497–500.

157. See Callahan 1997, 187–199; and Harvey 1998.

158. Chaim Kaufmann remarked that "such peaces last only as long as the enforcers remain." Once peacekeepers are removed from the situation, the artificially established balance of power shifts, an "ethnic security dilemma" arises, and the credibility of majority commitment not to exploit minority ethnic groups falters, threatening to renew the cycle of violence. See Kaufmann 1996, 137; Posen 1993; and Fearon 1998.

159. Harvey 1998, 230.

lence (identity-based conflict). In the former Yugoslavia, ethnic tensions remain high and are accompanied by sporadic violence and acts of retaliation on both sides.¹⁶⁰ While instrumentalists may argue that ethnic tensions are manipulated by actors to further material or political interests, the ability to generate group solidarity and ethnic blood-lust is certainly facilitated by a historical cycle of violence.¹⁶¹ In this sense, ethnic violence is congruent with other forms of identity conflict, including religious wars, and groups have long endured cycles of violence and reprisal.¹⁶² Decollectivizing guilt is a curative measure taken by the state to break this historical cycle. However, the effectiveness of such a strategy is contingent on detaining high-level perpetrators and, presumably, giving amnesty to those at lower levels (perhaps in return for admitting guilt, fully disclosing events, and testifying at trials of political and military leaders, as has occurred in truth and reconciliation proceedings elsewhere). Yet early precedent set by the tribunals runs an opposite course.

In theory, decollectivizing guilt may provide one way to stop the impulse for retribution and violence, but other approaches may be necessary as well. Chaim Kaufmann suggests that spatial separation and “ethnic unmixing” is important, at least in the short run, to defuse the ethnic security dilemma.¹⁶³ However, such an approach to multiethnic societies is anathema to Western liberal sensibilities, which regard forced population transfers as promoting rather than alleviating human suffering.

Decollectivizing guilt also does not provide a means of promoting tolerance by shaping ethnic and national identities. Social constructivists argue that ethnic identities are malleable and shaped by continually changing social contexts, yet none of the currently debated elements of ethnic conflict management incorporate a mechanism for “re-imagining” the sociopolitical community.¹⁶⁴ It would seem that some mechanism of social education should accompany decollectivization of guilt if the atrocities regime is to succeed within these more expansive agendas.

Overcoming political obstacles and achieving these higher aspirations are largely functions of both regime design and effective operating procedures. Institutionalists would predict that a well-functioning regime influences state behavior, but the evidence here does not support this, at least where atrocities and ethnic conflict are involved. However, it may be premature to assess results, for similar to the constructivist view of newly emergent norms, the atrocities regime is a “work in progress.” In the process of establishing a well-functioning institution, the atrocities regime must continue to refine its legal foundations, moderate the scope of its

160. See *Los Angeles Times*, 25 March 2000, A5; and *Los Angeles Times*, 4 March 2001, A1, A9.

161. Instrumentalist accounts also do not explain why ethnic and religious conflict tend to be so much more barbaric than other forms of conflict. Targeting of women and children and organized programs created to terrorize a population certainly carry no specific advantages to conventional conflict in attaining material gains. See Lake and Rothchild 1998a, 5–7; and Brown et al. 1997.

162. Girard 1977, 24.

163. See Kaufmann 1996; and Posen 1993.

164. Anderson 1983.

jurisdiction, and streamline its operating procedures. If we examine the evolution of the atrocities regime, there is considerable evidence of “institutional learning.” Three adjustments made between the first international tribunal and the Rome Statute may prove significant in making the regime more effective: (1) focusing on major transgressions and pursuing a policy of exceptionalism toward those being prosecuted, (2) defining and refining key legal issues (definitional and procedural), and (3) recognizing a need to coordinate with national courts in the adjudication process. The fact that in several cases adjudication proceedings have been completed in multiple jurisdictions must be seen as a success given the dearth of precedent and the desire to establish consensus among jurists with diverse and disparate legal backgrounds. Both the ICTY and the ICTR have successfully established initial procedural guidelines and have articulated specific legal rules and principles that may strengthen norms of compliance regarding the *jus in bello*. Indeed, it can be argued that concretely articulating and clarifying norms of conduct are prerequisites to garnering widespread compliance. Since both ad hoc tribunals aided in constituting such prerequisites, compliance/deterrence must be measured after such norms have been articulated and disseminated in the international community. Important challenges remain, however, such as (1) allaying fears of great powers about expanding jurisdiction, (2) avoiding ineffectiveness in the absence of international cooperation or when a despotic regime remains in power, (3) addressing European legal/cultural bias, (4) establishing a balance between consistency of legal norms and flexibility in specific cases, (5) accelerating the pace of proceedings, and (6) mitigating the cost of investigations.

Conclusion

What lessons can be drawn from these initial developments in the atrocities regime? Realist factors have dominated the politics of war crimes adjudication, but the atrocities regime is in its infancy. To dismiss the efficacy of the atrocities regime at this stage is premature, and the evidence here suggests that its development is proceeding rapidly. From an institutionalist perspective, we can ask how the regime can be strengthened, and what lessons can be learned from the existing ad hoc tribunal system. IL analysts suggest that the strength of legal regimes centers on consistency (precedent) and legitimacy, on hard law.¹⁶⁵ Conversely, regime analysts, most notably in the field of international political economy, suggest that flexibility, rather than rigidity, increases regime strength.¹⁶⁶ Robert Keohane argues that “Institutions based on substantive rules have proven to be fragile entities,” adding “flexibility and openness . . . may increase the usefulness of an international

165. See Franck 1990; Jackson 1984; and Trimble 1990.

166. Krasner 1983.

institution.”¹⁶⁷ Flexibility is also important when the long-term impacts of the institution are uncertain, especially when state sovereignty and/or national security are involved.¹⁶⁸ The key to establishing an effective regime lies in squaring the circle between hard legalization and political flexibility and locating the regime within a comprehensive program of ethnic conflict management. On the first point, examining the cases as part of a dynamic political development suggests that steps are being taken to “soften” the legalization process—at least in the short run—in order to attain flexibility and minimize concerns about sovereignty and security. On the second point, the regime must be linked with other policy tools applicable to ethnic violence, including preventive diplomacy, foreign aid, international intervention, spatial separation and reconfiguring political spaces, and social education programs.¹⁶⁹

War crimes adjudication also presents analytical challenges. A purely legalistic (IL) view cannot accurately explain many of the political dimensions involved in forming an atrocities regime nor can the highly macroscopic, analytical view of IR. The issues presented here suggest the need for a war crimes vocabulary and more mid-level theories for understanding war crimes tribunals and their use in establishing justice and promoting peace.¹⁷⁰ Clearly, to understand and inform the development of the atrocities regime, we need research that incorporates the overlap between IL and IR.¹⁷¹ While researchers remain at the forefront of this agenda, promoting peace and ameliorating human suffering provide strong incentives for further analysis.

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167. Kahler 1995, 137. See also Goldstein et al. 2000, 392.

168. Abbott and Snidal 2000.

169. See Jentleson 1998; Kaufmann 1996; Lake and Rothchild 1998b; and Walter and Snyder 1999.

170. I owe this important insight to an anonymous *IO* reviewer.

171. See Goldstein et al. 2000; Keohane 1997; and Slaughter 1993.

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