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reveals a highly asymmetrical impact; however, a move from zero to 5 on the democracy scale increases the chances of violating a commitment by only 2.89 percent, whereas a move from 5 to 10 on that scale increases the probability of violating by 10.8 percent. Why this might be so is not difficult to understand. A rich literature in political economy suggests that a potential cost of democracy is that the public does not always fully anticipate the consequences of its aggregate demands. For example, if democracies allow for macroeconomic policies that exhibit an inflationary bias,[58] participatory politics may complicate the international compliance problem. However, a strong domestic commitment to the rule of law contributed positively to Article VIII compliance. Again, the impact is somewhat asymmetrical for values on the explanatory variable. A move from 1 to 3 on the six-point rule-of-law scale reduced the probability of violating Article VIII by 17.7 percent, whereas a move from 4 to 6 reduced the probability of violating by about 4 percent. The effect of the rule of law is understandable in light of the argument about uncertainty and reputation: governments that have invested heavily in a reputation for respecting the rule of law – one aspect of which is protecting property rights – have a lot to lose by reneging on their international obligations.

None of the control variables affects these findings. As anticipated, a weakening balance of payments, as well as higher volatility, contributes to violation, as does a worsening business cycle. Governments of more open economies work hard to abide by their obligation of policy openness, consistent with our expectation. Surprisingly, compliance with these obligations does not improve over time; if anything, violations worsen over the years when other variables in the model are held constant. Flexible exchange rates, GATT membership, and the use of IMF resources may be important institutional contexts for international economic relations, but they do not systematically affect the compliance decision.

CONCLUSIONS

The legalization of some central aspects of the international monetary regime after World War II allows us to examine the conditions under which law can influence the behavior of governments in the choice of their international monetary policies. Historically, this policy area has been devoid of international legal rules. The classical gold standard did

[58] See the review of this literature in Keech 1995.

not depend on international legal commitments for its reputed stability. "Soft" international legal commitments began to develop only in the interwar years, largely in response to markets' shattered confidence in the ability of governments to maintain the commitments they had made unilaterally in the previous period. Driven by the need to limit the externalization of macroeconomic adjustment costs, some governments sought international commitments as a way to enhance certainty and reassure markets. However, these commitments were in the softest possible form and did little to constrain behavior or encourage the confidence of economic agents.

The Bretton Woods agreement brought to an end the unbridled national legal sovereignty over monetary affairs. They hardly represent the triumph of legalization over market forces, however, as attested to by the breakdown of the original legal obligation to defend a par value system. Legal obligations cannot stifle market forces: capital mobility has made fixed rates very nearly unmanageable, treaty arrangements to the contrary notwithstanding. The end of the legal obligation to defend pegged rates is a clear reminder that legalization cannot be viewed in teleological terms. Obligations that increasingly frustrate major players as market conditions change are not likely to remain obligations for long.

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Legalization is one way governments attempt to make credible their international monetary commitments. The evidence shows that governments are hesitant to make international legal commitments if there is a significant risk that they will not be able to honor them in the future. The hazard models of the rate of acceptance of Article VIII indicate that commitment is associated with conditions that one can reasonably anticipate will make compliance possible. Balance-of-payments weakness and volatility could and did delay the acceptance of obligations for openness significantly. Furthermore, economic downturns and unanticipated balance-of-payments difficulties were associated with noncompliance among Article VIII countries. However, both the archival evidence and the quantitative analysis presented here suggest that governments wanted to be relatively sure they could comply before they committed legally to the open foreign exchange regime. Legal commitment was part of a strategy to make a credible commitment to maintain a liberal foreign exchange regime.

Among Article VIII countries, two regime effects had clear consequences for compliance. Surprisingly for those who view the international

behavior of democracies as somehow distinctive with respect to law and obligation, the more democratic the Article VIII country, the more likely it may have been ($p = .10$) to place restrictions on current account. On the other hand, regimes that were based on clear principles of the rule of law were far more likely to comply with their commitments. This finding indicates that rules and popular pressures can and apparently sometimes do pull in opposite directions when it comes to international law compliance. There is no reason to think, based on these findings, that democracy itself is a positive influence on the rule of law in international relations. On the contrary, there is more reason to associate compliance with the extent to which the polity in question respects institutional channels for mediating domestic conflict and protecting property rights than with a participatory or competitive political system. Some analysts have argued that this finding can be understood as a normative constraint on foreign policy choice. But it is also consistent with rational market incentives, since rule-of-law regimes have more to lose reputationally than do capricious regimes in the event of a legal violation.

One of the most interesting findings of this research has been the evidence that commitment and compliance are related to the commitment and compliance patterns beyond one's own borders. The hazard model clearly indicates that the breadth of acceptance influenced acceptance by uncommitted governments. Both worldwide and regional acceptance of Article VIII status had this effect, even when controlling for time. Furthermore, the pervasiveness of restrictions within a region has a negative effect on the compliance decision among Article VIII countries. It is impossible to know from these associational effects, of course, exactly what kinds of mechanisms might be at play in such a relationship. I have argued that these kinds of regional and universal effects likely reflect the strategic nature of implementing restrictions: punishment by economic agents and retaliation or other pressures by trading partners, for example, may be minimal where restrictions are common (since it is prohibitively costly to punish everyone). Those who offer more normative explanations of state behavior might interpret this pattern as an example of the importance of regional norms of appropriate behavior. Or perhaps it is simply the case that although governments feel some moral obligation to obey the law, their willingness to comply breaks down as others abandon the rules at will. Although these tests cannot distinguish these distinct explanations, the ability to document a degree of contingent compliance provides a basis for disentangling the possible mechanisms in future research. What we can say is that compliance and commitment are likely influenced,

for whatever reason, by the actions taken by other members of the international system.

This research has broader implications for the study of legalization and compliance with international legal obligations. It shows that legalization as a tool for commitment is limited by economic conditions and market forces. International monetary legalization can be characterized by an inverted "J" pattern: legalization was nonexistent under the classical gold standard and soft during the interwar years. It peaked between 1946 and 1971, when treaty obligations regulated the central relationship among currencies, and now involves definite obligations over a more limited range of policies. Much of the behavior that constitutes international monetary relations remains completely outside of legalized relationships, especially rules and practices with respect to the provision of liquidity.[59]

Rather than debating whether compliance is pervasive or minimal,[60] my purpose here has been to examine the conditions under which compliance is likely. The study of international law compliance is rife with problems of conceptualization and measurement,[61] but in this case it has been possible to match a treaty obligation with authoritative assessments of behavior over time for a large number of countries and to match the suggested mechanisms with contextual archival materials. The evidence taken together points to law as a hook for making a credible commitment, with compliance largely "enforced" by the anticipation of reputational consequences.

[59] Art. VII, sec. 2 empowered the IMF to borrow from a member but also provided that no member should be obliged to lend to the IMF. Thus the General Agreement to Borrow was negotiated by the managing director and representatives of the signatory countries outside normal IMF channels. Reminiscent of the Tripartite Agreement, it was enshrined as a series of identical letters among participating countries. Swaps are also soft arrangements created by central banks and operating through the Bank of International Settlements. These were developed completely outside of the IMF framework. Dam 1982, 150. Nor are IMF standby arrangements a contract in the legal sense. Failure to carry out the performance criteria in the letter of intent is not a breach of any agreement and certainly not a breach of international law. All the "seal of approval" effects come despite the nonlegal nature of this commitment. The Executive board's decision of 20 September 1968 explicitly concerns the nonlegal status of standby arrangements. Gold 1979, 464–66.

[60] On this point, compare Chayes and Chayes 1993 and 1995 and Henkin 1979 with Downs, Rocke, and Barsoom 1996.

[61] These issues are discussed in Simmons 1998.

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Constructing an Atrocities Regime: The Politics of War Crimes Tribunals

Christopher Rudolph

* * *

*** 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.[1] Successive efforts have been made to expand the atrocities regime by forming a permanent tribunal, the International Criminal Court (ICC). *** 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."[2]

*** 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 argue that although liberal humanitarian ideas have

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

[2] *Los Angeles Times,* 19 October 1999, A6.

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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*. ***

*** Historically, warfare has been viewed as consistent with the 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.[3] Rather than focusing on the *jus in bello,* Grotius is in fact more concerned with notions of the *jus ad bello*.[4]

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."[5] 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.[6] What explains the dramatic turn in the 1990s toward legalization? What drives the process of forming and applying the regime in given cases? ***

IDEAS, INTERESTS, AND INSTITUTIONS

*** [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;

[3] Grotius [1925] 1962, 641–62.

[4] *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.

[5] Beres 1988, 124.

[6] See Sikkink 1993 and 1998; and Finnemore 1996.

the information, ideas, and understandings on which they operate; [and] the institutions within which they interact."[7] Although the movement to establish a universal atrocities regime *** 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. ***

Within the domain of IR theory, *** [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."[8] *** 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. *** 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.[9] 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*.[10]

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.[11] 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

[7] Abbott 1999, 362.

[8] See Krasner 1999, 51; see also Morgenthau 1985; and Carr 1961.

[9] See Finnemore 1996; Goldstein and Keohane 1993; Katzenstein 1996; Sikkink 1993; and Wendt 1992 and 1999.

[10] 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.

[11] 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.

clearly are attempts to alleviate political and identity-based conflict *** and to produce compliance (that is, deterrence).[12] *** Applied to the case of war crimes tribunals, this perspective suggests that success hinges on regime design and the strength of the resulting institution.[13] The central tension here is between "hard" and "soft" law.[14] 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.[15] 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.[16] *** 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 "softening"

[12] On "legalization," see Abbott et al. 2000.

[13] 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.

[14] 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.

[15] See Abbott and Snidal 2000; and Franck 1990.

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

of the legalization process if political obstacles are to be successfully overcome. ***

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 ***. 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.

* * *

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.[17] *** 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.[18] 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.[19] The similarity between events in

[17] Germany's early recognition of Croatia and Slovenia conspicuously went against the European consensus regarding the Balkan conflict. See Crawford 1994.
[18] Gutman 1993.
[19] Neier 1998, 135.

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.[20]

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."[21] 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.[22] An international consensus developed that Serbs were the principal instigators of wartime atrocities; however, those who were to 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 Herzogovina 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."[23] 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.

*** 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."[24]

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

[20] Ibid., 136–37.
[21] Ibid., 138.
[22] Ibid., 139.
[23] Thornberry 1996, 79.
[24] Neier 1998, 129.

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).[25] ***

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 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."[26] 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.[27] 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. ***

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.[28] 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."[29] 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 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

[25] ICTY Fact Sheet, 16 September 1999, available at <http://www.un.org/icty/glance/fact.htm>.

[26] Schrag 1995, 194.

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

[28] Morris and Scharf 1995, 391.

[29] Scharf and Epps 1996, 651.