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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.

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."[30]

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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."[31] This challenge is further compounded by the 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."[32] 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."[33]

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. *** The *** 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

[30] *Prosecutor v. Tadic*, IT-94-1-AR72, P77 (1995).
[31] Fox 1993, 194.
[32] Meron 1997, 4.
[33] Fox 1993, 196.

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.[34] This case is instructive for two reasons: it illustrates how the interests of the great powers affect the process of 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.[35] More than three-quarters of the Tutsi population in Rwanda are estimated to have been killed.[36] 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.[37] 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. ***

[34] An excellent historical account of the tragedy in Rwanda can be found in Des Forges 1999.
[35] *Time,* 16 May 1994, 57.
[36] Kuperman 2000, 101.
[37] *Time,* 13 June 1994, 36.

While military intervention was not forthcoming after the events of April and May 1994,[38] 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 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.[39] The ICTR was initially more successful than the ICTY in detaining high-profile defendants, including former military commanders and political leaders ***.[40] 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.[41] 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.[42] 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.

[38] See Des Forges 1999; and Kuperman 2000.
[39] <http://www.ictr.org>.
[40] LCHR 1997, 2.
[41] *Prosecutor v. Tadic*, IT-94-1-AR72 (1995).
[42] Meron 1995.

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.[43] 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."[44] 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 it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation."[45] 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.

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.[46] 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*.[47] 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

[43] *New York Times,* 29 December 1994, A1.
[44] Bakuramutsa 1995, 645.
[45] Ibid., 646.
[46] ICTR statute, Art. 8(2). Similar jurisdictional primacy is codified in Art. 9.
[47] *Non bis in idem* refers to prohibitions against trying defendants twice for the same crime(s), often referred to as "double jeopardy."

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 ordinary Rwandans who faced the death penalty in local courts."[48] 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.[49] 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.[50] 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.[51]

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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

[48] Bakuramutsa 1995, 648.

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

[50] Available online at <http://www.rwandemb.org/prosecution/law.htm>.

[51] As specified in Art. 2, 5, and 14–16.

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."[52] 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."[53] 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."[54] 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 procedure[55] – this limitation may profoundly affect the tribunal's success in establishing reconciliation among the Rwandan population. 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."[56] 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. ***

[52] Howland and Calathes 1998, 161.
[53] Ibid., 155.
[54] *New York Times,* 21 November 1997, A10.
[55] *Deutsche Presse-Agentur,* 13 August 1999.
[56] Alvarez 1999, 397.

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. 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."[57] 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."[58] While there are tactical benefits to prosecuting low-level

[57] *Los Angeles Times,* 27 August 1999, A5.

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

perpetrators, most analysts have stressed that the ICTY's deterrence value hinges ultimately on its ability to successfully prosecute those at the highest levels.[59]

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.[60]

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 Srebenica in July 1995, an event that occurred two years after the ICTY was created.[61] Clearly, the desired effect of 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."[62] 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.[63] After the Dayton Accords brought the conflict in Bosnia to a close, the NATO

[59] See Scharf 1997, 219, 225; Alvarez 1999; and Morris 1997.
[60] Thornberry 1996, 77.
[61] Guest 1996, 80.
[62] *New York Times,* 15 September 1999, A3.
[63] 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.

implementation force (IFOR) was given extremely cautious instructions for dealing with indicted war criminals.[64] Initial operating procedures authorized IFOR troops to arrest those they encountered but did not permit IFOR to seek them out.[65] ***

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.[66] 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.[67] *** 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.[68] 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 Srebenica, ever really occurred.[69] In an

[64] IFOR was later renamed "Stabilization Force" (SFOR).
[65] See Meron 1997, 5; and Bass 2000.
[66] Thornberry 1996, 83.
[67] Scharf and Epps 1996, 649.
[68] 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.
[69] *Los Angeles Times,* 6 July 2000, A1, A10.

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."[70] 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."[71] 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."[72] 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."[73] 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 aggressively 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.

[70] *Los Angeles Times,* 2 July 1999, A1.
[71] Ibid.
[72] *Los Angeles Times,* 10 October 1999, A1.
[73] Ibid., A30.