

BEYOND IMPUNITY: CAN INTERNATIONAL CRIMINAL JUSTICE PREVENT FUTURE ATROCITIES?

*By Payam Akhavan**

Although still in the early stages of their institutional life, the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) provide a unique empirical basis for evaluating the impact of international criminal justice on postconflict peace building. The pursuit of justice may be dismissed as a well-intentioned, but futile, ritualistic attempt to restore equilibrium to a moral universe overwhelmed by evil. Moreover, measuring the capacity of punishment to prevent criminal conduct is an elusive undertaking, especially when a society is gripped by widespread habitual violence and an inverted morality has elevated otherwise “deviant” crimes to the highest expression of group loyalty. Yet an appreciation of the determinate causes of such large-scale violence demonstrates that stigmatization of criminal conduct may have far-reaching consequences, promoting postconflict reconciliation and changing the broader rules of international relations and legitimacy.

Contrary to the simplistic myths of primordial “tribal” hatred, the conflicts in the former Yugoslavia and Rwanda were not expressions of spontaneous blood lust or inevitable historical cataclysms. Both conflicts resulted from the deliberate incitement of ethnic hatred and violence by which ruthless demagogues and warlords elevated themselves to positions of absolute power. At a volatile transition stage, the calculated manipulation of fears and tensions unleashed a self-perpetuating spiral of violence in which thousands of citizens became the unwitting instruments of unscrupulous political elites questing after supremacy. Against such a backdrop, the removal of leaders with criminal dispositions and a vested interest in conflict makes a positive contribution to postconflict peace building. In concert with other policy measures, resort to international criminal tribunals can play a significant role in discrediting and containing destabilizing political forces. Stigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence. Even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power. Failure to deliver on promises of economic growth and prosperity, together with the humiliation of pariah status in an interdependent world community, eventually exacts a cost on such leaders’ influence and authority. Moreover, political climates and fortunes change, and the seemingly invincible leaders of today often become the fugitives of tomorrow. Whether their downfall comes through political overthrow or military defeat, the vigilance of international criminal justice will ensure that their crimes do not fall into oblivion, undermining the prospect of an easy escape or future political rehabilitation. A postconflict culture of justice also makes moral credibility a valuable political asset for victim groups, rendering vengeance less tempting and more costly. Of course, the preventive effects of international criminal justice can extend beyond postconflict peace building in directly affected countries. The prosecution and related political demise of such

* Visiting senior lecturer and research fellow, E. M. Meijers Institute of Legal Studies and Faculty of Law, Leiden University, the Netherlands; formerly legal adviser, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia. The views expressed herein are those of the author in his personal capacity and do not necessarily represent the views of the United Nations. The author wishes to express his gratitude to Ameer Gopalani for his research assistance.

leaders sends a message that the cost of ethnic hatred and violence as an instrument of power outweighs its benefits. Precedents of accountability, however selective and limited, contribute to the transformation of a culture of impunity that has hitherto implied the political acceptability of massive human rights abuses.

The recent arrest of leaders indicted by the ICTY and the ICTR provides at least a preliminary basis for appraising the preventive potential of international criminal justice in post-conflict contexts. A notable example is the arrest of Momčilo Krajišnik¹ on April 3, 2000, by French commandos belonging to the Stabilization Force (SFOR) in Bosnia-Herzegovina, pursuant to a sealed ICTY indictment. Krajišnik was charged with war crimes, crimes against humanity, and genocide for his leadership role in the Serb "ethnic cleansing" campaign during the Bosnian war. After Bosnian Serb president Radovan Karadžić,² Krajišnik was the most influential wartime ultranationalist still active on the Bosnian political stage. His apprehension followed the arrest and demise of other indicted Serb wartime leaders.³ Equally notable, on September 24, 2000, Slobodan Milošević lost reelection to the presidency of the Federal Republic of Yugoslavia and, refusing to accept the results, was forced out of office through massive street demonstrations in Serbia. Like Karadžić, he is now a fugitive, from both the ICTY and the Serbian people, facing an uncertain future. The dramatic dethronement of these once seemingly invincible architects of "Greater Serbia" and ethnic cleansing, has gone far beyond what most observers imagined possible when the ICTY was first established in 1993.⁴ Similarly, despite initial skepticism as to its credibility,⁵ the ICTR has apprehended most of the significant leaders implicated in the 1994 genocide against the Tutsi minority. These include Théoneste Bagosora, a Defense Ministry official and major architect of the Tutsi extermination plan, as well as Jean Kambanda, prime minister of the 1994 Rwandese interim government, who pleaded guilty to conspiracy to commit genocide.⁶

Now that a mounting number of wartime leaders are in the dock or on the run, one can fairly say that both the ICTY and the ICTR have become viable international judicial institutions. The ICTY survived a potential amnesty deal in the Dayton peace process.⁷ The ICTY and the ICTR have gained financial support from the international community and surmounted significant operational difficulties, demonstrating a capacity to hold fair (if not always expeditious) trials. Nonetheless, even if all the senior accused are arrested and prosecuted, the hardest test of their effectiveness is whether the tribunals have contributed to postconflict peace building and reconciliation. Beyond dispensing retributive justice and vindicating the suffering of victims, have these institutions proved to be an effective instrument for preventing further interethnic

¹ Momčilo Krajišnik was the president of the Bosnian Serb Assembly during the 1992–1995 war, the Bosnian Serb signatory of the 1996 Dayton Peace Agreement, and the Serb member of the Bosnia-Herzegovina collective presidency during the post-Dayton period in 1996–1998.

² For a discussion of Karadžić's removal from public office, see Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUMAN RIGHTS QUARTERLY 259, 278–79 (1996) [hereinafter Akhavan, *Dayton Agreement*]; see also Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUMAN RIGHTS QUARTERLY 737, 810–11 (1998) [hereinafter Akhavan, *Justice*].

³ SFOR has also arrested, inter alia, General Stanislav Galić, commander of the forces responsible for the siege of Sarajevo; General Radoslav Krstić, commander of the forces responsible for the mass execution of several thousand men at Srebrenica; and General Momir Talić, chief of staff of the Bosnian Serb army and commander of forces responsible for the "ethnic cleansing" of some 60,000 non-Serbs in the Prijedor region. Talić was initially arrested in Vienna by Austrian police while attending a seminar sponsored by the Organization for Security and Co-operation in Europe.

⁴ For some early skeptical views on the potential success of the ICTY, see, for example, Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AJIL 500 (1994); David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401 (1994). For the present author's contrary views, see Akhavan, *Dayton Agreement*, *supra* note 2; Akhavan, *Justice*, *supra* note 2.

⁵ The Rwandan government, for example, expressed concern before the Security Council in 1994 that the ICTR would "disperse its energy by prosecuting crimes that come under the jurisdiction of internal tribunals" such as "crimes of plunder, corporal punishment or the intention to commit such crimes, while relegating to a secondary level the genocide that brought about its establishment." Rwanda also complained that "certain countries, which need not be named," had proposed candidates for judges and participated in their election despite the fact that they "took a very active part in the civil war in Rwanda." UN Doc. S/PV.3453, at 15 (1994).

⁶ See *Prosecutor v. Kambanda*, Judgment and Sentence, No. ICTR-97-23-S (Sept. 4, 1998), reprinted in 37 ILM 1411 (1998).

⁷ The question of amnesty as an incentive for a peace agreement was not so much at issue in the case of Rwanda since the Rwandese Patriotic Front had routed the government forces responsible for the 1994 genocide.

violence and human rights abuses? This consideration is particularly relevant to the ICTY and the ICTR since the Security Council established both as measures for the restoration of peace and security under Chapter VII of the United Nations Charter.⁸

The empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations. Both institutions have helped to marginalize nationalist political leaders and other forces allied to ethnic war and genocide, to discourage vengeance by victim groups, and to transform criminal justice into an important element of the contemporary international agenda. In Bosnia-Herzegovina, the work of the ICTY has dramatically changed the civic landscape and permitted the ascendancy of more moderate political forces backing multiethnic coexistence and nonviolent democratic process. In Yugoslavia, the ICTY helped to delegitimize Milošević's leadership, as revealed by his attacks on the Tribunal prior to his overthrow, as well as the later calls for his prosecution by the Serb and Montenegrin public. In Kosovo, the ICTY indictment did not stem the deportation and abuse of ethnic Albanians during the NATO campaign, but it has at least marginally discouraged anti-Serb vengeance by the Kosovo Liberation Army (KLA). In Croatia, cooperation with the ICTY has facilitated steps toward international integration, discrediting extremist elements and encouraging liberal political forces to consider the initiation of complementary war crimes prosecutions before national courts. In Rwanda, the ICTR has undermined the capacity of Hutu extremists to rehabilitate the remnants of their leadership abroad, and mitigated the severity of Tutsi reprisals against the Hutu by making accountability an important and constant political factor.

The impact of the ICTY and the ICTR is not necessarily limited to postconflict peace building in the former Yugoslavia and Rwanda. Nor should the prevention of future atrocities be measured solely by the effects of punishment on directly involved countries recovering from ethnic wars. Despite their ad hoc mandates, the ICTY and the ICTR directly influenced the adoption of the statute of the international criminal court (ICC) at the 1998 Rome Diplomatic Conference. Together with the ICTY and ICTR precedents, the ICC blueprint for a future international criminal justice system, however weak and limited, has raised accountability to unprecedented prominence in the politics of international legitimacy. Criminal accusations increasingly constitute a serious political impediment to the ambitions of existing or aspiring leaders. In the calls for the establishment of further ad hoc international criminal tribunals, mixed tribunals, and prosecutions before national or foreign courts, in places as diverse as East Timor and Sierra Leone, Senegal, and Chile, one finds an unmistakable contagion of accountability. This spread of accountability reflects the early glimmerings of an international criminal justice system and the gradual emergence of inhibitions against massive crimes hitherto tolerated or condoned by the international community.

I. PREVENTION OF ABERRANT CONTEXTS: INSTILLING INHIBITIONS AGAINST GENOCIDE

Evaluating the contribution of the ICTY and the ICTR to postconflict peace building depends on how prevention is defined in the context of large-scale violence. It is unrealistic to suppose that the ICTY could have instantaneously deterred crimes in the midst of a particularly cruel interethnic war in the former Yugoslavia.⁹ Hastily erected bulwarks cannot be expected to save lives when the deluge has already begun. The threat of punishment—let alone an empty threat—has a limited impact on human behavior in a culture already intoxicated with hatred and violence. Similarly, to expect that the ICTR would have brought immediate relief and

⁸ For the ICTY, see SC Res. 827, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993), *reprinted in* 32 ILM 1203 (1993); for the ICTR, see SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994).

⁹ Theodor Meron has noted that "the gravest atrocity, the Serb massacre of thousands of Muslims living in and around Srebrenica, happened in July 1995, when the tribunal was fully operational and Karadzic and Mladic had both been indicted." Theodor Meron, *Answering for War Crimes: Lessons from the Balkans*, FOREIGN AFF., Jan.-Feb. 1997, at 2, 6.

reconciliation to the survivors of the massacres in Rwanda misapprehends the social devastation left in their wake. In both the former Yugoslavia and Rwanda the impact of postconflict justice was diluted by unwillingness to intervene in a timely way to stop ongoing atrocities. Against this backdrop, the first experiments in international accountability could not have been expected to instantly transform an entrenched culture of impunity into an abiding respect for the rule of law.

Illusory closure can easily be sought through the ritual of legal process. To imagine that the horrors of genocide can be contained within the confines of judicial process is to trivialize suffering that defies description. Yet the potential impact of the ICTY and the ICTR on political behavior is subtle and long-term, profound and lasting. Publicly vindicating human rights norms and ostracizing criminal leaders may help to prevent future atrocities through the power of moral example to transform behavior. "Realism" is not founded on the appeasement of power, and ideals are not irrelevant to "pragmatic" considerations. Beyond retribution and the moral impulse to vindicate humanitarian norms, individual accountability for massive crimes is an essential part of a preventive strategy and, thus, a realistic foundation for a lasting peace.

The proposed conceptual framework for considering the deterrent effect of the ICTY and the ICTR focuses on violence that is extreme and unrestrained, but deliberate and systematically induced. Once mass violence has erupted, threats of punishment can do little to achieve immediate deterrence. However, the outbreak of such violence can be inhibited, and its resumption in postconflict situations prevented—because it often results from an elite's deliberate political choices. Both conflicts were the product of deliberate incitement to socio-ethnic hatred and violence—albeit within societies undergoing a volatile stage of political transition or dislocation.¹⁰ Through systematic indoctrination and misinformation, political leaders created an aberrant context of inverted morality in which dehumanization and violence against members of the "enemy" group were legitimized as purported acts of self-defense. The delicate fabric of interethnic coexistence was gradually torn apart and otherwise shameful and reprehensible behavior elevated to the status of heroism and group solidarity. The homogenization of the masses through collective hysteria, allowing for no dissent, was an expedient political instrument for leaders whose primary concern was to consolidate their power, as well as for those who aspired to a position of leadership and authority. Prevention and punishment should focus primarily on those unscrupulous leaders who goad and exploit the forces advocating a spiral of violence.

The notorious campaign of ethnic cleansing in the former Yugoslavia was hardly a spontaneous outburst of hatred. The organized and deliberate character of this policy emerged most clearly in Bosnia-Herzegovina, where half of the population had entered into mixed marriages. The siege of the historically multiethnic city of Sarajevo by Bosnian Serb forces captured the reality of the conflict as a war of values, and not of peoples. Cosmopolitan Sarajevo, home of Muslims, Serbs, Croats, and Jews, was a rebuke to the ideology of sanguinary ethnic war peddled by Milošević, Karadžić, and their ilk. The mobilization of political will through ethnic hysteria, and the elimination of rival leaders or ideologies, required the destruction of any belief that multiethnic coexistence was a viable alternative to ethnic partition. The indoctrination of the Serb public was accomplished in part through state-controlled media, the dismantling of multiethnic governmental structures, and their replacement with "crisis committees." The events of the war point to a deliberate strategy for power, rather than any abstract "clash of civilizations" divorced from the less romantic realities of power politics. This deliberation can be seen in the systematics of carefully coordinated large-scale military attacks against non-Serb towns and villages, the internment of tens of thousands in so-called collective centers or concentration camps, the violent interrogation of suspected "terrorists" by the police, the instigation and indulgence of execution, torture, and rape by both military and

¹⁰ For an elaboration of the author's views on the "instrumentalist" and "primordialist" views of ethnic conflict in the former Yugoslavia, see Akhavan, *Justice*, *supra* note 2, at 752–65; and for Rwanda, see Pavam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 328–43 (1997).

police forces, and the deportation and displacement of millions—as well as other elements of the ethnic-cleansing policy such as the pillage of public and private property, extensive war profiteering, and the perpetration of graft and corruption by the Bosnian Serb leadership.

In Croatia, President Franjo Tuđman's reckless policy of nationalism revived and rehabilitated Ustaša fascist symbols, a senseless provocation against the Serb minority that played directly into the hands of the proponents of "Greater Serbia." Belgrade painted Tuđman's historical revisionism and its reception among Croats as the harbinger of a fascist state in which Serbs would have no place, fortifying Milošević's prophecy of doom and his call for a preemptive war against the Croats. In Kosovo, the Serb public was distracted once more from the corruption and incompetence of Belgrade's leadership through another war of "self-defense." Resurrecting the specter of the "Turkish hordes" and the Serb defeat at the 1389 battle of Kosovo Polje, Milošević took his people on yet another odyssey of collective infantile regression. A long-standing civil conflict was transformed into an episode of ethnic cleansing, a military confrontation with the NATO powers, and a losing battle for a historically vital province. The former Yugoslavia need not have suffered such a cataclysm if its leaders had possessed the political wisdom and self-restraint of Nelson Mandela and F. W. de Klerk. Conversely, the post-apartheid transition of South Africa would not have avoided considerable violence if its leaders had acted like Tuđman and Milošević, inciting racial hatred as an instrument of power and self-promotion. In the words of Warren Zimmermann, "There was plenty of racial and historical tinder available in Yugoslavia. But the conflagrations didn't break out through spontaneous combustion. Pyromaniacs were required."¹¹

In Rwanda, the exceptional efficiency of violence allowed the extermination of 10 to 15 percent of the population during a three-month period, and culminated a process involving the complicated planning and expenditure of resources. The Rwanda conflict was not a spontaneous outburst of savagery. Radio-Télévision Libre des Milles Collines and other media organized the extermination of the Tutsi and Hutu moderates through the systematic incitement of the public, targeting a largely illiterate population with no access to other sources of information. They reviled the Tutsi as "cockroaches" that had infested the country, and the ensuing rage was sustained by the careful political-military organization of Hutu extremists. The Hutu Interahamwe and other volunteer militia systematically infiltrated every town and village in Rwanda and compiled accurate lists of those slated for extermination. Only when the Rwandese people were saturated with racist hatred and fallacies, and extremists had positioned themselves in every corner of the country, did it become possible to execute the monstrous "final solution" to the Tutsi "problem" with such exceptional efficiency. In the words of Gérard Prunier:

The death-lists had been carefully distributed to the future killers, who acted in coordinated and systematic ways in order to catch their intended victims. There was little spontaneity in the whole process, apart from some street urchins joining in the bloody fun, and everything went ahead with the precision of a well-rehearsed drill.¹²

This carefully orchestrated common design was the instrument by which corrupt and ambitious leaders sought to sabotage the Hutu-Tutsi power-sharing scheme envisaged under the 1993 Arusha peace accord sponsored by the United Nations and the Organization of African Unity.

The focus of punishment should be the prevention of such deliberately induced aberrant contexts, within which habitually lawful social relations degenerate into unrestrained violence. Once the population has fallen prey to a collective psychosis of ethnic fear and hatred, violent behavior becomes exceedingly difficult to circumscribe through threats of punishment. In this delusional context, criminal conduct that is normally characterized as "deviance" is transformed into acceptable, even desirable, behavior. As Michael Reisman astutely observes:

In liberal societies, the criminal law model presupposes some moral choice or moral freedom on the part of the putative criminal. In many of the most hideous international crimes,

¹¹ WARREN ZIMMERMANN, *ORIGINS OF A CATASTROPHE* 210 (1996).

¹² GÉRARD PRUNIER, *THE RWANDA CRISIS, HISTORY OF A GENOCIDE* 224 (1995).

many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense. After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility.¹³

Moral choice in such cases may be limited rather than nonexistent. Many examples can be found of courage and valor indicating a capacity for choice, even in the most extreme circumstances. ICTR deputy prosecutor Bernard Muna relates that “within the drama” of the Rwandese genocide, “those who were close . . . know there were heroes. There were those who hid their friends, those who tried to save some of them by taking them to safe houses.”¹⁴ Yet individuals are not likely to be easily deterred from committing crimes when engulfed in collective hysteria and routine cruelty. The central issue is whether and how punishment can prevent such aberrant contexts prior to their occurrence, or prevent their recurrence in postconflict situations.

Prevention of elite-induced mass violence can operate through both conscious and unconscious responses to punishment. Where leaders engage in some form of rational cost-benefit calculation, the threat of punishment can increase the costs of a policy that is criminal under international law. Leaders may be desperate, erratic, or even psychotic, but incitement to ethnic violence is usually aimed at the acquisition and sustained exercise of power. As Professor Ehrlich suggests, “willful engagement in even the most reprehensible violations of legal and moral codes does not preclude an ability to make self-serving choices.”¹⁵ Momentary glory and political ascendancy, to be followed by downfall and humiliation, are considerably less attractive than long-term political viability. Furthermore, in an integrated world community, international legitimacy is a valuable asset for aspiring statesmen, no matter how remote their fiefdoms may be. Even an isolated Somali or Afghan warlord cannot entirely disregard the relation between international acceptance and long-term survival. The stigmatization associated with indictment, as much as apprehension and prosecution, may significantly threaten the attainment of sustained political power.

The prevention of aberrant contexts through “deterrence” or conscious responses to threats of punishment can be both specific and general.¹⁶ Punishment of unlawful conduct can be directed against leaders who actually contemplate or are engaged in the pursuit of criminal policies and, generally, against other leaders who might be tempted absent a credible threat of punishment. In both scenarios, the threat of punishment may persuade potential perpetrators to adjust their behavior. This cost-benefit calculation has implications for preventing conflicts, and also for preventing their resumption. In preconflict scenarios, it may discourage decisions to foment ethnic hatred and violence, since power thus accrued would be undermined by international isolation and accountability. In postconflict scenarios, leaders may be incapacitated outright (by arrests or being forced to flee), and the message conveyed that further incitement and violence will incur a high political cost. The credible threat of punishment through vigorous arrests and prosecutions removes impediments to stability from the political stage, and provides an incentive for constructive political behavior.

Besides the conscious fear of punishment, there is another, more subtle, dimension to general prevention—almost “constructivist,” if you will—that operates to prevent aberrant contexts by instilling “unconscious inhibitions against crime” or “a condition of habitual lawfulness” in

¹³ W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 77 (1996).

¹⁴ Bernard Muna, *The ICTR Must Achieve Justice for Rwandans*, 13 AM. U. INT'L L. REV. 1480, 1481 (1998).

¹⁵ Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 43 (1996).

¹⁶ Although the terms are sometimes used interchangeably, the more pliable term “prevention” is used here instead of the more limited “deterrence” to avoid confusion. According to Johannes Andenæs,

a basic distinction is made between the effects of punishment on the man being punished—individual prevention or special prevention—and the effects of punishment upon the members of society in general—general prevention. The characteristics of special prevention are termed “deterrence,” “reformation” and “incapacitation” General prevention, on the other hand, may be described as the *restraining influences emanating from the criminal law and the legal machinery*.

Johannes Andenæs, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 949 (1966).

society.¹⁷ As Professor Andenæs has argued, the expression of social disapproval through the legal process may influence moral self-conceptions so that “illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught.”¹⁸ Although leadership roles in preventing future atrocities are emphasized here, the progressive entrenchment of a more lawful self-conception can occur among a wider public, which could stiffen resistance to the blandishments of a leader seeking to exploit ethnic enmity and thereby reduce the prospect of renewed violence after a conflict. Even where public access to unadulterated sources of information is restricted, leaders may be influenced by “moral propaganda” emanating from the implementation of international criminal justice, and understand how the rules of legitimacy are transformed among international elites. Despite the adoption of numerous international instruments affirming human rights and humanitarian standards, international relations in the modern age have perpetuated a culture of virtually complete immunity. Idi Amin, Mengistu Haile Mariam, Pol Pot, and a litany of other tyrants have never been held accountable for their deeds. Notwithstanding the plethora of pious resolutions, solemn declarations, and legally binding treaties, the international community has accepted international crimes committed as an instrument of statecraft and political control. The long-term consequences of such a culture of impunity cannot be underestimated. The failure to uphold elementary international norms has created a political climate in which extermination, deportation, and wanton destruction lie within the range of options available to rulers—not only as conscious decisions, but as a subliminal conception of viable conduct. Impunity erodes the inhibitions and restraints against such behavior, permitting an amoral account of *raison d'état*. Reversing this entrenched culture of impunity is a gradual and incremental process. By instilling such unconscious inhibitions in the international community over time, and gradually but definitively transforming the rules for the exercise of power, a new reality of habitual lawfulness may take root and develop.

II. YUGOSLAV ANOMALIES: WHITHER THE WORSHIP OF NATIONALIST SAVIORS?

The focus of the present inquiry is the long-term impact of the ICTY on postconflict peace building. Has the ICTY contributed to the stigmatization and marginalization of ultranationalist leaders and ideologies allied with ethnic hatred and violence? Or have indicted leaders been supported by local political institutions in an expression of ethnic solidarity? Has the broader public distanced itself from indicted leaders despite a common ethnic affiliation? Or has indictment only reinforced the martyred image of nationalist saviors, and the ICTY been dismissed as an illegitimate institution?

The Arrest of Krajišnik

The impact of Momčilo Krajišnik's arrest is an excellent subject for this empirical analysis because of Krajišnik's central role in the leadership of the Bosnian Serb Republic (Republika Srpska) both during and after the Bosnian war. The relative indifference of most Serbs to the

¹⁷ *Id.* at 951. Andenæs distinguishes this broader moral concept of general prevention from special and general “deterrence” as follows:

The effect of the criminal law and its enforcement may be *mere deterrence*. Because of the hazards involved, a person who contemplates a punishable offense might not act. But it is not correct to regard general prevention and deterrence as one and the same thing. The concept of general prevention also includes the *moral* or *socio-pedagogical* influence of punishment. The “messages” sent by law and the legal processes contain factual information about what would be risked by disobedience, but they also contain proclamations specifying that it is *wrong* to disobey.

Id. at 950. In other words, general prevention consists of both deterrence through fear of punishment in society and the moral influence of punishment as an expression of social disapproval.

¹⁸ *Id.* at 951.

arrest illustrates the ICTY's effect on peace building—discrediting the remnants of wartime ultranationalism and preventing the resumption of interethnic conflict.

The arrest of Krajišnik brought a surprisingly mild reaction, which demonstrates how dramatically the rules of political engagement have changed in post-Dayton Bosnia. Through the agency of the ICTY, association with the wartime leadership responsible for the criminal policy of ethnic cleansing has become a serious political liability. Moderation of the postconflict political configuration has thus been greatly facilitated. Many would have imagined that, in view of his immense political significance in Bosnian politics, the arrest of Krajišnik would have generated a vigorous response by the Serb public, as well as by the Serb political establishment. The Serb Democratic Party (SDS), which counted him as a founder and influential member, paid tribute to Krajišnik as a “symbol of Serb political will, articulated through the People's Assembly,” having served as a key leader in separating Republika Srpska from Bosnia and linking it to the Federal Republic of Yugoslavia.¹⁹ Fearing the creation of an SDS martyr, a moderate Bosnian Serb politician remarked that the arrest might play into the hands of the extremists and “radicalise the political environment.”²⁰ The opposition Serbian Renewal Movement in Belgrade also issued a statement claiming that the arrest “will strengthen the anti-European feelings of the citizens, and encourage the local extremists there as well as extreme forces in Serbia and Montenegro.”²¹ But despite these pessimistic prognoses, Krajišnik's arrest generated remarkably little reaction, save the usual polemics and platitudes. Protests from Bosnian Serb parties across the political spectrum seemed to express a sense of obligation more than genuine concern about Krajišnik's elimination from the political stage. The arrest provoked neither riots or reprisals against SFOR troops nor significant polarization of the elections. According to one source, Krajišnik's arrest “had no major impact on the electorate. For instance, the [more moderate] Serb [d]emocrats have scored a clear-cut victory in Banja Luka, where Krajišnik was never popular.”²²

Although the contest for the loyalty of Bosnian Serbs is far from over, the relative indifference to the arrest of Krajišnik suggests that once-powerful SDS leadership figures may be closer to the margins of the political stage. The Bosnian Serbs were so indifferent to this arrest that notorious Belgrade ultranationalist leader Vojislav Šešelj was moved to condemn their inaction. Šešelj protested that the Serbian Radical Party is

amazed by the Serb Democratic Party and its current leadership. They behave as if they were in collusion with NATO. Instead of organizing protest rallies throughout the [Republika Srpska], blocking traffic, preventing the movement of NATO troops, arresting NATO officers and demanding to exchange them for Krajišnik and other Serbs who have been taken to The Hague, they are convincing the people that they should remain cool and calm.²³

In response to Šešelj's call to arms, the Serbian Radical Party proposed that the Republika Srpska National Assembly formally condemn Krajišnik's arrest. But even this purely symbolic condemnation failed to attract the necessary majority. Representatives of moderate political parties, both Muslim and Serb, denounced the proposal as “anti-Dayton” since the Dayton Agreement requires cooperation with the ICTY.²⁴ (“Anti-Dayton” statements are grounds for the disqualification of appointed or elected officials from office.)

Contrary to the skeptical prognosis of a unified Serb response to the arrest of a nationalist “savior” by “outside enemies,” the arrest actually became part of the internal power struggle

¹⁹ *Krajišnik's Party Says His Arrest Represents “Brutal Showdown,”* BBC, Apr. 6, 2000, available in LEXIS, News Group File, Most Recent Two Years.

²⁰ *Serb War Crimes Suspect Seized by NATO Troops,* TIMES (London), Apr. 4, 2000.

²¹ *Serbian Opposition: Krajišnik's Arrest in Bosnia Will Strengthen Extremists,* Beta news agency, Belgrade, Apr. 3, 2000, trans. by BBC, Apr. 3, 2000.

²² *BETA Views Outcome of B-H Elections,* Foreign Broadcast Information Service [hereinafter FBIS], Doc. EUP20000413000039 (Apr. 13, 2000) (quoting Beta, Belgrade).

²³ *Nationalist Leader Šešelj Urges Arrest of NATO Officers to Free Krajišnik,* BBC, Apr. 8, 2000 (trans. of Radio Belgrade, Apr. 6, 2000).

²⁴ *Bosnian Serb Assembly Fails to Condemn Krajišnik's Arrest,* FBIS Doc. EUP20000530000361 (May 30, 2000) (trans. of ONASA news agency, Sarajevo).

among Bosnian Serb leaders. Initially, Republika Srpska's prime minister and moderate leader Milorad Dodik was quick to say that he bore "no responsibility" for the arrest, which was portrayed by the SDS as a betrayal of the Serb people. Dodik suggested that the SDS "is just using all available means to disqualify political opponents. I still believe that the SDS is detrimental to the Serb Republic and that we should see its political end."²⁵ A few weeks later, Dodik displayed little concern in distancing himself from SFOR arrests of Bosnian Serb leaders. During an official visit to the ICTY in The Hague, he pledged the cooperation of Republika Srpska, and made the remarkable suggestion that Karadžić and Mladić should be arrested by international forces.²⁶ Part of Dodik's strategy was to redefine the Bosnian Serb national interest and put into question the strident nationalism of the SDS. After the commemoration of the fifth anniversary of the Srebrenica massacre in July 2000, Dodik explained:

There were events in the nationalist euphoria that the nation in whose interests they happened cannot be proud of. The people who committed the crimes are personally responsible for them, and I think they must be held responsible for them before the court. . . .

. . . .

. . . One of them [General Radoslav Krstić] is in The Hague already.²⁷

The international policy of discrediting wartime leaders, and the criminalization of the former leadership of Republika Srpska by the ICTY, have allowed new leaders such as Dodik to emerge and to make statements that would have constituted political suicide in another context.

Even more exceptional is the political posture of the SDS itself, despite its condemnation of Krajišnik's arrest as a weapon against Prime Minister Dodik. Though still engaging in strong rhetoric, the SDS appears to be increasingly distancing itself from Radovan Karadžić, its founder and the former president of Republika Srpska, in order to claim a new, more moderate image. Association with a leader indicted by the ICTY has become perceived as an impediment to exercising power. Mirko Sarović, a leading SDS official and deputy president of Republika Srpska, has emphasized that "Radovan Karadzic no longer leads" the SDS, "nor is he in any way influencing its leaders. We want to build an open party, a party that does not scare anyone and we are prepared to fight for its new legitimacy and image."²⁸ Few would have imagined that Karadžić, the principal architect of the SDS, would become a liability to the party. Commentators have observed that "[s]ince Karadzic withdrew from political life in September 1996" because of his indictment by the ICTY, "the SDS has tried to present itself as a party which departed from the 'chains of dogma of the past'—its campaign during [the April 2000] local elections."²⁹ Indeed, the SDS finds itself doing the unthinkable: calling for the return of Muslim and Croat refugees, and interethnic reconciliation. In the words of SDS leader Dragan Kalinić: "We have both the political and moral obligation to . . . work on building reconciliation and trust in our relationship with the other two people[s] in Bosnia," and to this end Kalinić proposed the establishment of a commission for truth and reconciliation.³⁰ The SDS has maintained its political ascendancy but has still witnessed a gradual electoral shift away from nationalist policies and the erosion of its power, apparently because of the postwar disillusionment of the impoverished Bosnian Serb population and the high cost of international isolation. By necessity, the post-Dayton SDS has reinvented itself as a moderate force, and ICTY indictments and arrests appear to have directly affected the personalities of this newfound

²⁵ *Bosnian Serb Premier Denies Any Responsibility for Krajišnik's Arrest*, SRNA news agency, Bijeljina, Apr. 3, 2000, *trans.* by BBC, Apr. 3, 2000.

²⁶ *Bosnian Serb Leader Dodik Visits Hague, Discusses 'Reinforcing Cooperation' with War Crimes Tribunal*, FBIS Doc. EUP20000529000287 (May 29, 2000) (quoting Agence France-Presse, May 29, 2000).

²⁷ *Serb Republic Prime Minister Dodik Views Situation in Balkans*, FBIS Doc. EUP20000723000125 (July 20, 2000) (*trans.* of Rijeka Novi List, July 20, 2000).

²⁸ *Bosnian Serb Vice-President Says Karadzic Lost Influence over Party*, Beta, Belgrade, Apr. 1, 2000, *trans.* by BBC, Apr. 3, 2000.

²⁹ *SDS Calls for Return of Refugees, Reconciliation*, FBIS Doc. EUP20000710000344 (July 10, 2000) (quoting Agence France-Presse, July 10, 2000).

³⁰ *Id.*

moderation. “[O]bservers in Banja Luka and Pale say that the victorious faction in the party is not under Belgrade’s control the way the SDS used to be while Momcilo Krajišnik had a main say [prior to his arrest].”³¹ The removal of Krajišnik “also means that the Serb [d]emocrats will be far more willing to cooperate [with the more moderate SDS] than before.”³²

It is not suggested that a mechanical cause and effect operates between ICTY indictments and the moderation of Bosnian Serb politics. Although leaders such as Dodik call for cooperation with the ICTY, a significant part of the Bosnian Serb public continues to view the Tribunal as an anti-Serb institution with little credibility. Furthermore, as serious economic problems such as 90 percent unemployment afflict certain areas, people are preoccupied with daily survival and opportunities for progress. Although the situation has probably changed for the better in the intervening years, a 1997 U.S. Information Agency poll indicated that no more than 6 percent of the ethnic groups in Bosnia regarded the issue of war crimes prosecutions as urgent.³³ Nonetheless, the international community’s policy of using the ICTY as an instrument to eliminate indicted leaders has contributed to postconflict peace building by creating incentives for political parties to behave in a more conciliatory manner. Without the ICTY indictments, arrests, and pursuit of fugitives, the SDS and other Bosnian Serb political parties would be considerably less benign today, especially if Karadžić and Krajišnik had been amnestied and left unmolested. One does not have to give credence to the expressions of cooperation and reconciliation to credit their effect, for the collective psychosis of the war can be undone in part by a changed public iconography. Even the willingness of Bosnian Serb leaders to yield to the political demands of the Dayton Agreement or to feign reconciliation shows the broader public that they are not omnipotent.

Milošević’s reaction to Krajišnik’s arrest also illustrates how the ICTY can dishearten leaders once dismissive of its political relevance. According to a Bosnian source, after Krajišnik’s arrest, the Serbian State Security Service assembled a “team of lawyers” to represent accused Serbs standing trial before the ICTY. These lawyers were specially trained to control their clients. Accused Serbs were instructed to “hold their tongues” and to “refrain from badmouthing the Serbian leadership”; they were threatened with “extreme measures” if they went “too far,” including killing their immediate family members. Indeed, immediately after Krajišnik’s transfer to The Hague, Milošević sent his own lawyer, Igor Panteli, to explain bluntly that, “if he mentions in his testimony any link between his activity during the war in Bosnia-Herzegovina and the regime in Belgrade, he could expect the members of his immediate family, who live in Serbia, to be liquidated.”³⁴ Such desperate measures demonstrate that Milošević could not disregard the detrimental political and practical consequences of adverse testimony before the ICTY.

The impact of indicting Milošević on his political demise and the collapse of his rule is a matter for future review. In addition to the graft and corruption of his government, the stigma of Yugoslavia’s pariah status and the devastating consequences of economic sanctions on the people’s standard of living can reasonably be seen as primary reasons for the eventual collapse of the regime, through both the ballot box and massive street demonstrations and strikes. Milošević’s indictment by the ICTY for the ethnic cleansing of Kosovar Albanians was one expression of the international exclusion of his criminal state. Whether there was a more direct correlation between the opposition movement and his overthrow remains uncertain. Anecdotal accounts depict the student-led “Otpor” resistance movement as having invoked the Hague court in calling for his downfall. In anti-Milošević rallies in Belgrade during May 2000, students chanted “Milošević to The Hague.” According to Milorad Roganović, program director of the independent Studio B radio and television, Milošević “lost his head” because of the ICTY indict-

³¹ *BETA Views Outcome of B-H Elections*, *supra* note 22.

³² *Id.*

³³ The poll is referred to, without citation, in Charles G. Boyd, *Making Bosnia Work*, FOREIGNAFF., Jan. 1998, at 42, 51.

³⁴ *Milosevic Said to Be Threatening Families of Hague Defendants from Bosnia*, BBC, May 6, 2000, available in LEXIS, News Group File, Most Recent Two Years.

ment, which is shown by his increasingly desperate repression of the opposition, including the closing of independent media.³⁵

There is evidence that leaders of the opposition fully appreciated the linkage between the prosecution of Milošević and future chances for European reintegration but were afraid of alienating portions of the Serb public that perceived the ICTY as an instrument for demonizing their nation. During the protests leading to Milošević's overthrow, a Belgrade commentary noted that the opposition, "exposed to harsh accusations of treason continuously launched by state propaganda, is . . . intent on convincing European leaders that, because of the overall political climate in Serbia, it is wrong to immediately insist on extraditing any war crimes suspects."³⁶ To deflect responsibility for this difficult issue, "[t]he opposition leaders said that the cooperation with the Hague Tribunal should exist, but that this is the matter state bodies should deal with, not political parties."³⁷ Instead of dwelling on sending Milošević to The Hague, the opposition asked for Europe's help in "replac[ing] the regime and democratiz[ing] the country, while intimating that punishing war criminals would be a logical consequence of such changes. The fear arising at the very mention of the tribunal in Serbia is a result of a widespread state propaganda against this institution, which has been intensified."³⁸ This fear was further heightened after the 1999 indictment of Milošević and his inner circle for war crimes and crimes against humanity against Kosovar Albanians, and after the NATO air campaign against Yugoslavia. "The Hague tribunal in Serbia remains an issue no one is willing to publicly tackle," one commentator noted, "and many opposition leaders say that war crimes suspects 'should be tried at home, not at The Hague.'"³⁹ This attitude may explain the view of then-opposition figure Vojislav Koštunica, who replaced Milošević as FRY president. He indicated his disagreement both with the prospect of an amnesty for Milošević and with the work of the ICTY: "As a democrat I could not easily justify this kind of trade-off behind the people's back [i.e., an amnesty]. As a democrat I also cannot tolerate the existence of such a monstrous institution as the Hague Tribunal."⁴⁰ It remains to be seen whether Kostunica's hostility to the ICTY was genuine, or merely a strategic consideration that may change with the gradual transformation of politics in post-Milošević Yugoslavia.

But opposition to the ICTY does not equate to opposing prosecution. Among many Serbs, it is no longer a secret that Milošević used ethnic demagoguery as an instrument for his own political supremacy. It has been acknowledged that the Belgrade leaders indicted by the ICTY were "dragging Serbia into the worst dictatorship and a long-lasting dark age."⁴¹ As Milorad Dodik stated after pledging that Republika Srpska would cooperate with the ICTY, Milošević's regime in Serbia "has inflicted huge damage on its people, destroyed the future of Serbs wherever they are for decades to come, . . . only its departure will allow the Serb people to regain its place in the international community."⁴² The victims of the Serb-dominated ethnic war in the former Yugoslavia included not only Muslims, Croats, and Albanians, but also the Serb people, who had been deceived into destroying their country for the preservation of Milošević's ambitions. This realization explains the growing eagerness for his prosecution at home. In the words of Vladan Batić, coordinator of the opposition Alliance for Change, "Milosevic should be tried before a court of the Serbia[n] people and the Serbian state, because he has brought the

³⁵ See Paul Watson, *Milosevic Clamps down on Opposition Media; Yugoslavia: Elite Police Storm TV and Radio Stations, Shutter Leading Independent Paper*, L.A. TIMES, May 18, 2000, at 6.

³⁶ BETA Views Serbian Protest Rallies, FBIS Doc. FTS19991014000473 (Oct. 14, 1999) (quoting Beta, Belgrade, Oct. 13, 1999).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Kostunica Views Opposition, Elections, Milosevic*, FBIS Doc. EUP20000417000289 (Apr. 17, 2000) (trans. of NIN (Belgrade), Apr. 13, 2000).

⁴¹ *Bosnian Serb Premier Says Serbia Entering Prolonged Dark Age*, BBC, May 29, 2000 (quoting Radio B2-92, Belgrade), available in LEXIS, News Group File, Most Recent Two Years.

⁴² *Id.*

greatest evil to those people.”⁴³ As with the SDS and Karadžić, even Serbia’s Socialist Party is increasingly distancing itself from Milošević to avoid political extinction: “There are increasing rumblings among disaffected members of the party that the key to its salvation is ditching Mr. Milosevic.”⁴⁴ Rejecting the strident nationalism of the past, the Socialist Party’s general secretary, Zoran Anđelković, emphasized that a newly moderate party “should turn back to its original principles and become a democratic party of the left.”⁴⁵

Prior to his assumption of power in October 2000, Koštunica explained that holding Milošević accountable was

necessary to send messages saying that we are against any kind of vengeance . . . and that Serbia needs national reconciliation between those in power and those not in power. First the living Serbs have to reconcile their differences so that the dead Serbs could reconcile theirs . . . so that we can finally reach a historic national reconciliation.⁴⁶

One is reminded that, as with the siege of Sarajevo, the real struggle in Yugoslavia’s internal wars was over values, and not between nations. Koštunica’s remarks point out that the benefits of accountability for postconflict reconciliation extend to the Serb people as well. These benefits accrue not merely from the prosecution of crimes committed against Serb civilians, or from individualizing guilt in Serb perpetrators and absolving the nation of collective guilt, but also from reconciliation within Serb society and the democratic transformation of its political culture.

Assuming that Milošević does not find a suitable haven outside Yugoslavia, the ICTY indictment will pose difficulties for a new government with democratic pretensions, eager to gain political acceptability in Europe. Prosecution of Milošević before Yugoslav courts may eventually result from both internal and external pressures to hold him accountable for his acts. Depending on prevailing political circumstances, the ICTY may hold trials in the former Yugoslavia as a compromise solution. Justice delivered close to the affected societies may encourage postconflict reconciliation and emerging democratic forces far more effectively than justice delivered in the remote confines of The Hague. Irrespective of which option is eventually adopted, without the ICTY indictment, an amnesty deal between the vulnerable opposition and Milošević would clearly have been far likelier. With the added weight of the international community acting through the ICTY, the opposition to Milošević during the postelection transition to Koštunica’s rule was greatly strengthened.

Milošević’s indictment did not prove a significant impediment to the surrender of power. To be sure, in the midst of the contest the coordinator of the Alliance for Change argued that the indictment was “counterproductive” because it forced Milošević into “a total isolation in which he is prepared to do anything to achieve his goals. Milosevic will do anything to stay in power because in this way he will delay his extradition to The Hague. He will, therefore, be fighting for his sheer survival.”⁴⁷ Nonetheless, an amnesty was not necessary; widespread opposition to his rule forced Milošević out of office. Similar arguments in favor of amnesty were made during the Dayton peace negotiations concerning indictments against Karadžić and Mladić. In that case, too, military and political realities on the ground dictated the terms of the peace agreement, and neither of the two leaders was in a position to demand a guarantee that he would not face eventual prosecution. The experience of the ICTY suggests that with sustained international pressure, indicted leaders have limited room to insist on an amnesty deal as a precondition to surrendering power.

With respect to postconflict peace building, even the UN Human Rights Commission’s special rapporteur for the former Yugoslavia, Jiri Dientsbier, suggested that “the only possible deal, and

⁴³ *SZP’s Batic Wants Serbian People, State to Try Milosevic*, FBIS Doc. EUP20000402000094 (Apr. 2, 2000) (trans. of Beta, Belgrade, Apr. 2, 2000).

⁴⁴ *Milosevic’s Party Moderates Its Tone: Born-Again Socialists Stress Democracy and Founding Ideals*, INT’L HERALD TRIB., Oct. 27, 2000, at 5.

⁴⁵ *Id.*

⁴⁶ *Kostunica Views Opposition, Elections, Milosevic*, *supra* note 40.

⁴⁷ *SZP’s Batic Wants Serbian People, State to Try Milosevic*, *supra* note 43.

the most important thing for Mr. Milosevic is to have guarantees that if he leaves power he will not be prosecuted and will not spend the rest of his life in prison."⁴⁸ But his views may be contrasted with the argument of Bernard Kouchner, the then UN special envoy in Kosovo, that "there could be no peace and reconciliation in Kosovo until those indicted with human rights violations are brought to justice."⁴⁹ Beyond the implications of Milošević's prosecution for Serbian national reconciliation and democratization, Kouchner's comments reflect the prevailing view that, if there is any hope for Kosovo to become a viable multiethnic autonomous entity, accountability for past crimes must remain an important part of the equation. It is also increasingly accepted that the attainment of this objective largely depends on deterring the violent campaign against ethnic Serbs by the supposedly disbanded Kosovo Liberation Army. The ICTY's announcement in June 2000 that it is investigating alleged KLA atrocities against Serbs has strained NATO-Kosovar relations, not least because some of the movement's senior leaders may be implicated and arrested by the NATO forces that were once regarded as saviors of the Kosovars from Serb atrocities. This course of action appears to be the best option in undoing a reverse ethnic-cleansing campaign by those whose political ambitions are served by fomenting hatred and violence under the guise of avenging past wrongs. The ICTY may have increased the cost of organized anti-Serb vengeance by Kosovar political elements.

The entanglement of NATO in the Kosovo war has dramatically transformed the context in which the ICTY operates. Although it has reinforced the prestige of accountability in policy-making circles, the air campaign has also put the independence and impartiality of the ICTY to the test. The indictment of Milošević in the midst of the NATO campaign and the accompanying propaganda war inadvertently allowed the ICTY to be perceived as a political instrument of the Western powers. In reality, the expulsion of almost one million Kosovar Albanians by FRY armed forces, together with fears of a possible amnesty for Milošević in a peace settlement, prompted then-Prosecutor Louise Arbour to hastily prepare an indictment in "real time." The egregious scale of the expulsions facilitated the gathering of evidence required for an indictment. A more relevant question is why Milošević was not indicted earlier for his extensive involvement in the "Greater Serbia" campaign in Croatia and Bosnia-Herzegovina between 1991 and 1995. An international organized-crime investigation on such a grand scale is time-consuming and resource intensive, and individual criminal liability cannot be based on newspaper clippings and human rights reports. More important, the ICTY initially could not grasp the complex legal and evidentiary contours of organized crime at the highest echelons of state authority. This inability is manifest in the disproportionate allocation of scarce resources to investigating low-ranking perpetrators for the direct commission of crimes such as murder—i.e., crimes familiar to prosecutors and investigators in the context of domestic law enforcement—during the first years of the ICTY's operations. A similar explanation may apply to the ICTY's failure to indict Croatian president Franjo Tuđman, his defense minister Gojko Šušak, and former Bosnian Croat leader Mate Boban prior to their respective deaths. While some would argue that these departures may have been coincidences that favored the peace process, the inaction probably moderated the ICTY's impact on postconflict peace building and long-term prevention of elite-induced ethnic conflict.

The Case of Croatia

The impact of the ICTY on Croatian politics indicates a positive interrelationship between accountability, the moderation of chauvinist ethnic politics, and the consolidation of multiethnic democratic forces. Croatian judicial cooperation with the ICTY became possible

⁴⁸ *Kouchner: Milosevic Must Be Brought to Justice*, Press Release UNMIK/PR/381, Oct. 5, 2000, obtainable from <<http://www.un.org/peace/kosovo/press/>>.

⁴⁹ *Id.* Kouchner pointed out that the "families of these victims are still suffering today as are the families of thousands of missing persons from Kosovo" and that "it was his duty as the highest ranking UN official in Kosovo to directly reassure the people of Kosovo of the UN's commitment to bring to justice all suspected perpetrators of violations of international humanitarian law."

following the landslide victory of more liberal political forces in February 2000. Stjepan Mesić was elected president of Croatia after serving as the last president of the prewar Socialist Federal Republic of Yugoslavia (SFRY). His election has brought dramatic changes in favor of multiethnic reconciliation, and the ICTY has become an inextricable aspect of the struggle against nationalist recidivism. The Croatian Democratic Union (HDZ) under President Franjo Tuđman wielded complete control over Croatian politics and the HDZ nationalist platform of “Greater Croatia” prevailed. Discouraging the return of Serb refugees from Krajina and supporting the forcible annexation of Herzegovina into Croatia, the HDZ took a contemptuous view of the limited ICTY inquiries into Croatian wartime behavior. A few Bosnian Croats indicted by the ICTY for crimes against Muslims “voluntarily” surrendered in response to international pressure on Croatia. But the HDZ’s policy was to obstruct ICTY investigations and prosecutions—especially in regard to Croatia’s alleged military involvement in the ethnic cleansing of Muslim areas of Herzegovina in 1993 and the events of the 1995 “Operation Storm” in the Krajina region of Croatia, during which three hundred thousand ethnic Serbs were displaced.

The mystique of Tuđman as the visionary father of the newly independent Croatian state, hailed as the leader of the “Homeland War” and exponent of “Greater Croatia” in the incessant flow of pro-HDZ propaganda by the state-controlled media, made him a formidable political figure. His death in December 1999 ended the unchallengeable supremacy of Croatia’s nationalist wartime politics and ushered in a new civic political space in which the opposition thrived. The increasingly stale and empty nationalist rhetoric of the ruling forces, the extensive graft and corruption in HDZ circles, and the mounting costs of international isolation opened the way for the extraordinary triumph of Mesić. Mesić prevailed against the HDZ in part because he was nominated by a broad coalition of opposition parties: the Croatian National Party, the Croatian Peasant Party, the Liberal Party, and the Istrian Democratic Alliance. His election was extraordinary not only because of his past association with the SFRY and the Yugoslav multiethnic ideal, but also because of his willingness to testify before the ICTY against both Milošević and Tuđman to expose their agreement for the ethnic partition of Bosnia-Herzegovina into Serb and Croatian spheres. Mesić showed few compunctions in challenging ideas that the Croatian public had come to favor through years of indoctrination and misinformation. Denouncing Croatian intervention in Bosnia and proclaiming the desirability of repatriating Krajina Serb refugees, Mesić’s heretical political platform also called for unconditional cooperation with the ICTY. While Tuđman had dismissed ICTY investigations of Croat generals as “unprincipled” pressure on Croatia,⁵⁰ Mesić as the opposition leader had audaciously countered that

the extradition of generals and state officials is not a topic we should dwell on. We are not dealing with generals or officials here, because a person whom the Hague Tribunal wants becomes a war crime suspect—not a general, a minister, a captain, or a shoemaker, but a war crime suspect. Besides, the individualization of responsibility is a good thing for the Croatian nation, as it would be less than civilized to talk about the collective responsibility of us all.⁵¹

Despite having initially trailed the HDZ candidates, Mesić demonstrated confidence throughout the elections. When asked to name the determining factor in his victory, he asserted that “the opening of Croatia towards Europe was crucial. In fact, people have come to a conclusion that Croatia’s isolation damages Croatia only, and that there will be no steps forward if it stays this way.”⁵² His gamble on international cooperation and transparent government, including support of the ICTY, paid off.

⁵⁰ See, e.g., *Tuđman Rejects ‘Unprincipled’ Pressures on Country*, FBIS Doc. FTS19970923000130 (Sept. 23, 1997) (quoting HINA, Zagreb, Sept. 22, 1997).

⁵¹ *Croatian Party Leaders View Possible Hague Extraditions*, FBIS Doc. FTS19990127000523 (Jan. 27, 1999) (trans. of VECERNJI LIST (Zagreb), Jan. 20, 1999, at 5).

⁵² *ONASA Interviews New Croatian President*, FBIS Doc. EUP20000208000342 (Feb. 8, 2000) (quoting ONASA, Sarajevo, Internet version, Feb. 8, 2000).

In another unusual demonstration of enlightened politics, Mesić has indicated that Croatia should renounce all territorial claims and ambitions in Bosnia: “Croatia cannot finance the army in the territory of another country, Croatia cannot pay for the remaining of a quasi-state [i.e., the Bosnian Croatian entity of Herceg-Bosna], because all of that is nothing else but interfering into [Bosnian] internal affairs.”⁵³ Closer to home, he has also insisted that Croatia should “encourage our former Serb fellow citizens who fled during the confusing developments in the Serbian-Croatian war . . . to return to their native towns, grant them their minority rights, the right to use their language and give them their share in our country’s economic prosperity.”⁵⁴ He has tied this policy of interstate and multiethnic reconciliation and respect for the rule of law to accountability for past crimes, including both cooperation with the ICTY and national trials. Cooperation with the ICTY serves Croatia’s national interest, he says, as a means of distancing the Croatian nation, and indeed other Balkan peoples, from collective demonization because of the criminal deeds of their self-proclaimed nationalist saviors: “The Hague tribunal is an institution that individualized war crimes and does not condemn an entire people as such. Modern Europe, to which the Croats, Albanians, Bosnians and Serbs belong, does not approve of collective guilt.”⁵⁵ Serb leaders in Croatia such as Milorad Pupovac have responded to this new political culture with delight and disbelief, saying that they feel they can breathe once again.⁵⁶

Mesić’s political initiative did not come without costs. Remnants of the HDZ nationalists and other more extreme groups strongly oppose cooperation with the ICTY, which they portrayed as “the general criminalisation and satanisation” of the “Homeland War” against the Serbs.⁵⁷ The volatility of this issue was demonstrated in the Croatian House of Representatives when HDZ members interrupted a session, apparently insulted by a government minister’s suggestion that “during the Homeland War crimes had been committed by the Croat side as well.”⁵⁸ At a veterans’ rally in the city of Split, demonstrators combined Ustaša fascist salutes with insults of President Mesić, warning that “if our wartime generals are removed, the ruin of Croatia becomes inevitable.”⁵⁹ Cooperation with the ICTY has thus become an important issue in the power struggle between nationalist forces and democratic elements committed to multiethnic reconciliation. Cooperation with the ICTY serves to undermine the legitimacy and power of forces in Croatian politics wedded to ethnic chauvinism, which explains their strong reaction.

Mesić has gone to great lengths to expose the link between supposedly patriotic concerns about Croatian war heroes and the self-preservation of political forces that exploited the conflict for their own ends. For example, after the ICTY convicted Bosnian Croat General Blaškić for the ethnic cleansing of Muslims in the Lašva Valley region of Bosnia in execution of Tuđman’s vision of a “Greater Croatia,” nationalist forces organized protests in front of the U.S. Embassy in Zagreb. Mesić denounced these demonstrations. Failure to cooperate with the ICTY, he said, would mean that “one would have to once again isolate Croatia and continue plundering what is left in it.”⁶⁰ The organizers of the protests “are not interested in Blaskic,” he said, “they are interested in continuing the plundering of Croatia, and some of them protect themselves.”⁶¹

⁵³ *Id.*

⁵⁴ *Croatian President Calls for Rapprochement with Serbs and End to Sanctions*, BBC, Apr. 5, 2000 (quoting DER SPIEGEL, Apr. 3, 2000, at 180).

⁵⁵ *Id.*

⁵⁶ Danica Kirka, *Serb Refugees Hope Croatian Elections Will Mean a Return Home*, AP, Feb. 14, 2000, available in WL, Allnewsplus.

⁵⁷ *Croatian Defense Forces Associations Announce Rally for 30 May*, Doc. FBIS–EEU–2000–0517 (May 17, 2000).

⁵⁸ *Former Ruling Party Demands Minister Quit over War Crimes Comments*, BBC, May 18, 2000, available in LEXIS, News Group File, Most Recent Two Years. These were described as “blatant lies and libels . . . bordering on an attempt to criminalize the HDZ.” *Id.*

⁵⁹ Goran Vezic, *Croatian Extremists on the March: Croatia’s Social and Economic Crisis Is Fueling an Ultra-Nationalist Revival*, IWPR’s [Institute on War and Peace Reporting] BALKAN CRISIS REPORT, May 16, 2000.

⁶⁰ *Mesić on Blaskic, SZUP, New Government*, FBIS Doc. EUP20000315000458 (Mar. 15, 2000) (trans. of JUTARNJI LIST (Zagreb), Mar. 11, 2000, at 28).

⁶¹ *Id.*

Despite the efforts of the Mesić government to transform public perceptions, cooperation with the ICTY was not necessarily popular among the Croatian public in the immediate aftermath of the Tudman era. In August 2000, six months after his election, a survey reported that over 78 percent of Croatian citizens “think that Croatia must not extradite its citizens if the Hague Tribunal requests it.”⁶² Only about 13 percent of the respondents supported extradition, while more than 8 percent were undecided. Over 52 percent believed that “The Hague wants to criminalize the Homeland War,” while almost 32 percent did not think so, and more than 15 percent were undecided. Over 60 percent of those polled believed that the ICTY was “unfair,” in contrast to 15 percent who believed it was fair. Somewhat more than 61 percent said that “Croatia should change its policy [of cooperation] toward the Hague Tribunal if the tribunal requests extradition of a general.” The pollsters concluded that there is “an express anti-Hague atmosphere in the country.”⁶³ Nonetheless, the popular discontent with the ICTY has not significantly affected the ruling coalition’s standing. The same survey indicated that, although cooperation with the ICTY signalizes “a decrease in confidence in the Prime Minister and the President of the state,” other surveys demonstrate that this is “primarily a consequence of the social situation in the country and the slow pace of reforms.”⁶⁴

As with the case of the FRY, in Croatia opposition to the ICTY is not necessarily tantamount to opposing prosecutions as such. Some Croats support trials before national courts, possibly as a means of preempting the ICTY. The Mesić government has also framed national trials as a method of cooperation with the ICTY. The Croatian deputy minister of justice, Ranko Marjan, announced that “[t]he ICTY does not have enough judges and facilities to put war criminals on trial. It is in Croatia’s interest to initiate and carry out proceedings against suspected war criminals.”⁶⁵ Further, to the extent that Zagreb wishes to depend on the ICTY to vindicate its claim that Belgrade committed the greater share of crimes in the conflict, it must concede the Tribunal’s underlying authority.

In the best of all worlds, the willingness of states in the former Yugoslavia to pursue national prosecutions vigorously would obviate the need for international criminal jurisdiction. Despite the broader interest of the international community in the enforcement of humanitarian law, it is the peoples of the former Yugoslavia who must ultimately assume responsibility for their past. Concurrent national trials before Croatian courts, and possibly before Serbian courts, can complement and reinforce the ICTY’s capacity to contribute to reconciliation and the prevention of future atrocities. The legitimacy of international justice, combined with the greater accessibility of domestic justice, can facilitate the internalization of accountability in the political culture and strengthen inhibitions against ideologies centered on ethnic hatred and violence.

III. RESURRECTION IN RWANDA: REPAIRING THE IRREPARABLE

An examination of the ICTR’s contribution to postconflict peace building and the prevention of future atrocities in Rwanda must take into account the extraordinary magnitude of the 1994 genocide that provoked the Tribunal’s establishment. The extermination of the Tutsi population in Rwanda was more extreme in its proportions and impact than the events in the former Yugoslavia. About 1 million people out of a total population of 7.5 million were slaughtered between April and June 1994.⁶⁶ As the Rwandese representative to the Security Council stated, “On the same scale, in a country the size of the United States this would be equivalent to the loss of over 37 million Americans in under three months.”⁶⁷ This scale severely circum-

⁶² *Survey Shows ‘Anti-Hague Atmosphere’ Increasing in Croatia*, FBIS Doc. EUP20000823000244 (Aug. 19, 2000) (trans. of JUTARNJI LIST (Zagreb), Aug. 19, 2000, at 31).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *The Media in Yugoslavia on the ICTY May 15–21*, Beta, May 22, 2000 (citing BLIC, May 18, 2000).

⁶⁶ See, e.g., UN Doc. S/PV.3453, at 14 (1994).

⁶⁷ *Id.*

scribes the potential impact of the ICTR on postconflict peace building. In some respects, Rwanda is a society beyond repair, at least for the foreseeable future. Despite the more favorable prospects for arrests there as compared to the former Yugoslavia—because of the military defeat of the *génocidaire* government by the Rwandese Patriotic Front (RPF)—it would also be misleading to suppose that a “postconflict” situation has obtained in Rwanda for the past several years. Unlike Bosnia-Herzegovina and Kosovo, Rwanda has not been the recipient of international peacekeepers or significant economic assistance. The instability and the debilitating struggle for daily survival remove the consideration of prosecutions and reconciliation from people’s immediate concerns. And unlike the former Yugoslavia, Rwanda has suffered a continuation of armed conflict between government forces and Hutu insurgents that has involved widespread atrocities against civilians. Indeed, the multiparty armed conflict has engulfed the Democratic Republic of the Congo (DRC) and virtually the whole of central Africa, killing tens of thousands of civilians more. Hundreds of thousands may have perished from war-related famine and disease. While the ICTY can exercise jurisdiction over all crimes committed after January 1, 1991 (when the dismemberment of the SFRY began), the ICTR exercises jurisdiction only over crimes committed in 1994, with no competence regarding events before or after that calendar year.

Despite all these qualifications and limitations, some evidence suggests that the ICTR has contributed to discrediting and incapacitating the remnants of the former *génocidaire* government. In contrast to the origin of the ICTY, the initial proposal for the establishment of the ICTR came from the Rwandese government, and not the international community.⁶⁸ The government supported such an institution, inter alia, because of its desire to avoid “any suspicion of its wanting to organize speedy, vengeful justice.”⁶⁹ The support also reflected a policy of removing any doubt as to the veracity of the genocide by internationalizing accountability. Furthermore, the government believed that “it is impossible to build a state of law and arrive at true national reconciliation” without eradicating the culture of impunity that had prevailed in Rwanda.⁷⁰ Notwithstanding the various conflicts between the ICTR and the Rwandese government as to the speed and control of proceedings and the division of labor between the Tribunal and national courts, this policy of accountability, aimed at discrediting the Hutu extremists, has also restrained the extent of anti-Hutu vengeance killings. Under the shadow of ICTR proceedings against leadership figures, the diversion of popular fury at the *génocidaires* through the national criminal justice system, however inadequate and rudimentary, appears to have exercised a moderating influence in the postconflict peace-building process. The detention and trial of tens of thousands of *génocidaires* before Rwandese courts may be viewed as an alternative to mass expulsions or widespread extrajudicial executions and private revenge killings.

The ICTR has made its most obvious contribution by politically incapacitating the remnants of the Hutu extremist leadership responsible for the 1994 genocide. By internationalizing the justice process under Security Council authority, countries as diverse as Belgium, Cameroon, France, Kenya, the United Kingdom, the United States, and Zambia have been called upon to apprehend the genocidal leaders indicted by the ICTR. Hutu insurgents continued to launch military attacks against the RPF government from northwestern Rwanda and the DRC at least until 1999, but the decapitation of the *génocidaire* leadership has thwarted any political rehabilitation and military reorganization of Hutu extremism. This is the result of the arrests as well as the stigmatization of those associated with the previous government. Without the ICTR, it would have been much easier for the defunct Interahamwe to find political sympathizers, and to launch a more vigorous campaign against the successor government. Of course, the defeat of the Hutu insurgency is primarily because of the RPF’s military onslaught in the DRC, which forced hundreds of thousands of Rwandans to move into government-controlled “villages” in

⁶⁸ See, e.g., Letter from the Permanent Representative of Rwanda Addressed to the President of the Security Council (Sept. 28, 1994), UN Doc. S/1994/1115.

⁶⁹ UN Doc. S/PV.3453, *supra* note 66, at 14.

⁷⁰ *Id.* It recognized that those “who were taught that it was acceptable to kill as long as the victim was from a different ethnic group or from an opposition party, cannot arrive at national reconciliation unless they learn new values.” *Id.*

the northwest. Nonetheless, had foreign governments provided continued political and financial support for the Hutu insurgents, the Tutsi government's military victory against the *génocidaires* would have encountered more resistance, and long-term stability in Rwanda would have become more elusive.

The ICTR's other key role in postconflict peace building is in moderating Tutsi revenge killings against Hutu. Although the fighting in the DRC has claimed many more civilian lives, international accountability has made the Tutsi government more cautious about violent anti-Hutu reprisals. In effect, the international recognition of the Tutsi's status as victims of genocide has made moral credibility a valuable political asset for the present regime and increased the costs of anti-Hutu revanchism. The interests of the Tutsi government are clearly served by distinguishing itself from the previous rulers of Rwanda and avoiding any suggestion of moral parity. This objective has been pursued through the prosecution of *génocidaires* and, to a lesser extent, through a certain measure of accountability for atrocities against the Hutu. In this latter respect, the integration of accountability as an important ingredient in the political process has increased the government's responsiveness to allegations of human rights abuses. Although the ICTR's impact can be exaggerated against a backdrop of considerable violence, the Tutsi-led government views the erosion of its privileged moral status and international legitimacy with concern. The practical impact of this attitude is seen in the occasional punishment of crimes perpetrated by government forces against Hutu civilians. "An increasingly active military justice system [has] tried soldiers for indiscipline and common crimes, sentencing several to prison and even to death . . . for charges such as theft and [individual] murder," Human Rights Watch has noted.⁷¹ With respect to massacres against civilians, the record is less impressive. Despite several arrests, "few of the accused were brought to trial or seriously punished for human rights abuses in the course of military operations."⁷² A few exceptional cases can be found, such as a "noteworthy trial" in which "a major was sentenced to life in prison and a subordinate to a term of forty-five months for having massacred more than thirty civilians in July 1994."⁷³ These modest measures should be considered in the context of a militant postgenocide "survivalism." "The lesson of the genocide," according to RPF leader Paul Kagame's spokesman Emmanuel Ndahiro, "is that either we are able to organize ourselves and look after ourselves or [we] perish."⁷⁴

It is no secret that the national trials in Rwanda have been far from ideal. The Human Rights Watch report for 2000 notes that "[t]rials of persons accused of genocide moved at a snail's pace during 1999 . . . Prosecutors, judges, and investigators were poorly paid and subject to pressure and sometimes to threats from all sides." Out of 135,000 persons accused of genocide, "[f]ewer than 2,000 . . . had been tried since the trials began nearly three years ago."⁷⁵ Furthermore, the report points to the politicization of the delivery of justice: persons from the top to the bottom of society were accused of genocide, anti-Tutsi activities, or links to the insurgents "whenever personal or political enemies wanted to threaten them."⁷⁶ To this grim situation may be added "inhumane conditions of overcrowding and lack of sanitary facilities" in Rwandese prisons, which held some 150,000 prisoners.⁷⁷ Nonetheless, the situation could have been far worse without any resort to the criminal justice system in the aftermath of the 1994 genocide. Although the top leadership was apprehended by the ICTR, countless victims have to live next to neighbors who participated in the killings. Channeling the desire for vengeance into legal process, even with the imprisonment of thousands, bought

⁷¹ *Rwanda: Human Rights Developments*, in HUMAN RIGHTS WATCH, WORLD REPORT 1999, obtainable from <http://www.hrw.org/hrw/pubweb/Webcat-84.htm#P1339_175409> [hereinafter HRW 1999 REPORT].

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Philip Gourevitch, *Forsaken, Congo Seems Less a Nation Than a Battlefield for Countless African Armies*, NEW YORKER, Sept. 25, 2000, at 53, 60.

⁷⁵ *Rwanda: Human Rights Developments*, in HUMAN RIGHTS WATCH, WORLD REPORT 2000, obtainable from <http://www.hrw.org/hrw/pubweb/Webcat-84.htm#P1339_175409> [hereinafter HRW 2000 REPORT].

⁷⁶ *Id.*

⁷⁷ *Id.*

time until circumstances improved and mitigated the severity of retaliatory abuses. For example, as of October 1999, 3,500 detainees had been released, including elderly, infirm, and young prisoners, because their files were determined not to contain substantial proof of guilt. The Rwandese authorities are currently considering a form of popular justice based on *gacaca*, a customary procedure for conflict resolution. With the gradual stabilization of Rwanda, this emerging leniency is likely to increase, allowing improvements in the criminal justice system and better prospects for national reconciliation.

The relationship between the ICTR and national trials manifests considerable complexity, even in achieving national reconciliation. The ICTR has often been faulted for its remoteness from the Rwandese people. Its geographical location in Arusha, Tanzania, makes it visibly distant, even though it has tried increasingly to inform the public about its activities through the Rwandese media. Professor José Alvarez points out that prosecutions before Rwandese courts are preferable to ICTR adjudication because “local justice is more accessible, more compatible with community expectations, and . . . may present greater opportunities for control over both criminal and civil proceedings.”⁷⁸ In 1999 former ICTR prosecutor Louise Arbour recognized the possibility of “an enhanced visibility for the Arusha Tribunal through periodic sessions in Kigali, where certain testimony or depositions could be received by judges of the international tribunal who would move to Kigali to hear certain witnesses.”⁷⁹ But an enhanced presence in Rwanda, and increasing Rwandese participation and control of the judicial process, must be considered against the realities of a ravaged judicial system operating with serious security problems in a volatile political situation.

Despite Professor Alvarez’s observation that “each dollar spent . . . on the ICTR is one less dollar available for assistance to Rwandan courts,”⁸⁰ it takes more than money to transform a fledgling group of hastily trained magistrates and lawyers into a viable judicial system capable of complying with minimal guarantees of a fair trial. Contrary to popular perceptions, the Rwandese judiciary has received considerable funds. By March 1998, “donors had provided more than U.S. \$17 million for the administration of justice and were in the process of disbursing grants amounting to another \$13 million,” yet the Rwandese judicial system still “functioned poorly.”⁸¹ Time, training, and experience, and a favorable political and social climate are needed before a judicial system can function impartially and effectively. The ambassador of Rwanda to the United States, Theogene Rudasingwa, has pointed out that “there are just over one hundred prosecutors in the country and most of these prosecutors are high school graduates. . . . [T]here are probably only about sixty private lawyers in the entire country.”⁸² This grave situation has obviously affected the administration of justice before Rwandese courts. According to Human Rights Watch, “More than one hundred persons were condemned to death for genocide” in local trials in 1997, despite concerns that “some of the trials had failed to meet international standards of due process. In several, the accused had no access to counsel and presented no witnesses in their defense.” In the case of Silas Mynyagishari, a former Hutu prosecutor, “political considerations may have influenced the verdict. The executions were carried out in several towns before large and often festive crowds.”⁸³ Therefore, even considerable material resources do not necessarily produce an impartial justice system in a short time, and local involvement must be weighed against the ever-present danger of vengeance—especially in the visible cases of former leaders of the genocide.

Security problems and the politicization of the judiciary also impede the holding of international trials in Rwanda. Human Rights Watch reported that in 1999 the government sus-

⁷⁸ See José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 462 (1999).

⁷⁹ Louise Arbour *Propose l’Organisation de Procès à Kigali*, Hironnelle news agency, Aug. 7, 1999 (trans. by author), obtainable from <<http://www.hironnelle.org>>.

⁸⁰ Alvarez, *supra* note 78, at 466.

⁸¹ HRW 1999 REPORT, *supra* note 71.

⁸² Theogene Rudasingwa, *The Rwanda Tribunal and Its Relationship to National Trials in Rwanda*, 13 AM. U. INT’L L. REV. 1469, 1489–90 (1998).

⁸³ HRW 1999 REPORT, *supra* note 71.

pended the president of the court of cassation, and he later resigned “under pressure.” The government also suspended or removed five other leading magistrates or counselors, including “the highest ranking magistrates in place before 1994.” Their removal left the judiciary “largely in the hands of Tutsi.”⁸⁴ In July 1999, “the entire Supreme Court was replaced, after the judges were removed or pressured to resign.”⁸⁵ In yet other cases that indicate “the risks of attempting to deliver justice,” the prosecutor in Gisenyi prefecture “disappeared,” a lawyer was “murdered just after agreeing to defend persons accused of genocide,” and “the president of the tribunal of first instance in Kigali, a Tutsi survivor of genocide, chose exile in Canada.”⁸⁶

Professor Alvarez has suggested that,

[s]ince the post-genocide courts of Rwanda have acquitted a number of Hutu defendants, one might have thought that ICTR proceedings would take precedence only as needed, as when a country refuses to extradite to Rwanda a particular perpetrator or after a particularized finding that Rwandan courts would not grant a defendant a fair trial.⁸⁷

One can only commend the impulse underlying this approach and bemoan an elitist international justice far removed from victims and survivors, and oblivious to the idiosyncratic context of Rwanda. However, in view of regular threats and violence against magistrates, prosecutors, and defenders by both Hutu and Tutsi—in relation to proceedings regarding lower ranking accused as well as the emotionally charged prosecution of high-ranking leaders—and political interference in the judicial process, the view that national trials in Rwanda lack serious problems does not correspond to reality. This is not to say that concurrent national trials are undesirable. That conditions in Rwanda do not entirely favor national trials does not mean such prosecutions should be abandoned. If anything, these efforts should be supported so as to give the judiciary over time the experience necessary for long-term self-sufficiency, and to avoid the much worse alternative of revenge killings against the countless Hutu suspects that the ICTR cannot prosecute because of its limited capacity. The ICTR is not intended to substitute for the Rwandese judicial system, but to serve as a jurisdiction with limited resources focusing on the arrest and prosecution of the most senior accused. Furthermore, far from being mutually exclusive, concurrent trials before the ICTR and national courts are mutually reinforcing. As noted by Ambassador Rudasingwa, “we should get in the habit of thinking about the ICTR and the Rwandan process as complementary rather than competing. I think we have the same objectives and the same goals.”⁸⁸ The initial distrust and tensions between the ICTR and Rwanda have been replaced by increasing cooperation and understanding. The ICTR Office of the Prosecutor has had greater contact with Rwandese magistrates in various communes and cooperated in investigations. More and more Rwandese officials—including lawyers from the court of appeals and the Supreme Court—have been attending ICTR proceedings in Arusha. The Rwandese government has appointed an official representative to the ICTR to expedite the investigative access needed for effective prosecutions. Thus, the symbiosis between international and national trials has become increasingly apparent.

Against the backdrop of the 1994 genocide, and the killing and mass expulsion of tens of thousands in its aftermath, the ICTR has made a modest contribution to postconflict peace building. But it has palpably improved the postconflict situation by impeding the resurrection of the former government and enhancing the political attraction of criminal justice as an alternative to anti-Hutu violence. The internationalization of accountability and its gradual internalization in the African continent may be an equally significant legacy of the ICTR. According to observers, the indictment before Senegalese courts of the former head of state of

⁸⁴ *Id.*

⁸⁵ HRW 2000 REPORT, *supra* note 75.

⁸⁶ HRW 1999 REPORT, *supra* note 71.

⁸⁷ Alvarez, *supra* note 78, at 365.

⁸⁸ Rudasingwa, *supra* note 82, at 1488.

Chad, Hissein Habré, though later dismissed, was one of the fruits of the ICTR's Africanization of accountability.

IV. MAKING ACCOUNTABILITY FASHIONABLE: CHANGING THE RULES OF LEGITIMACY

Beyond the former Yugoslavia and Rwanda, the broader impact of the ICTY and the ICTR on transforming a culture of impunity should not be overlooked. These institutions have "mainstreamed" accountability in international relations and thus instilled long-term inhibitions against international crimes in the global community. The establishment of the ICTY and the ICTR helped to revive the process of adopting a statute for an international criminal court. Despite its limited jurisdictional reach, the ICC will make it increasingly difficult for states to avoid their obligations to impose individual accountability for international crimes. Pending the entry into force of the ICC statute, the relative success of the two international criminal tribunals has brought calls for ad hoc judicial intervention in response to other large-scale atrocities. The increased national prestige associated with accountability and the stigma attached to the failure to prosecute international crimes have also encouraged third-party states to use their courts to assert universal jurisdiction over accused war criminals. Several states have prosecuted Yugoslav or Rwandese perpetrators, even when no international indictments had been issued.⁸⁹ In the *Pinochet* national case, proceedings before English and Spanish courts gave impetus to renewed proceedings before the Chilean courts, despite once insurmountable political obstacles.

The impact of the ICC on the prevention of international crimes can only be surmised since its statute has not yet entered into force. The states most likely to commit themselves to scrutiny are those least likely to violate human rights. But even states with a good human rights record may backslide during a change of regimes. Indeed, that is what happened in the former Yugoslavia, which ratified major human rights treaties before the outbreak of ethnic war in the 1990s. The *Application of the Genocide Convention* case,⁹⁰ initiated by Bosnia-Herzegovina against the Federal Republic of Yugoslavia before the International Court of Justice, was made possible because of Yugoslavia's acceptance of international jurisdiction at a time when such a case could not have been envisaged. Members of the international community may also exert pressure on reluctant states to ratify the ICC statute as a rite of passage to international respectability and credibility. This tactic could be applied not only to so-called pariah states, but also to more influential states with leadership aspirations. One can safely assume, however, that selective Security Council enforcement action under Chapter VII of the Charter—whether in the form of further ad hoc tribunals like the ICTY and the ICTR or referrals to the ICC—will continue to be the mainstay of international criminal prosecutions for the foreseeable future. As Louise Arbour and Morten Bergsmo have observed, "It may be a more accurate proposition that the restrictive jurisdictional regime of the ICC Statute will make effective investigation and prosecution by the Court very difficult as long as a situation has not been referred by the Security Council under Chapter VII of the UN Charter"⁹¹

The process leading to the adoption of the ICC statute constituted an important exercise in acculturation engaging thousands of diplomats, advisers, academics, and activists who represented states, international organizations, and NGOs. This process has resulted in greater exposure to and familiarity with the basic principles and procedures of international criminal

⁸⁹ See Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS* 393, 401 (G. Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Rafaëlle Maison, *Les Premiers Cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes*, 6 *EUR. J. INT'L L.* 260, 270 (1995); Brigitte Stern, *La Compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda*, 40 *GER. Y.B. INT'L L.* 280 (1997); Rüdiger Wolfrum, *The Decentralized Prosecution of International Offenses Through National Courts*, in *WAR CRIMES IN INTERNATIONAL LAW* 124 (Yoram Dinstein & Mala Tabory eds., 1996).

⁹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.)*, Preliminary Objections, 1996 ICJ REP. 595 (July 11).

⁹¹ Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT* 129, 139 (Herman A. M. von Hebel, Johan G. Lammers, & Jolien Schukings eds., 1999).

law, strengthening the idea of accountability in a system of sovereign states. The negotiations leading to the adoption of the ICC statute have made an important contribution to the internalization of relevant human rights and humanitarian law norms, instilling inhibitions against international crimes and making them less acceptable in the community of nations. A significant number of the “like-minded” states that supported a strong and effective ICC have felt impelled to assert national-court jurisdiction over crimes of universal significance.

The international community increasingly views impunity for large-scale atrocities as an impediment to postconflict peace building and stability. A stark example is the “absolute and free pardon and reprieve” granted to the insurgent RUF under the 1999 Lomé Agreement in Sierra Leone, concluded by the democratically elected government under international pressure.⁹² In a ruthless campaign aimed at profiting from Sierra Leone’s vast gold and diamond reserves, the RUF attempted to win the “allegiance” of people through the exhaustive employment of terror. RUF tactics included the abduction and forced recruitment of children and the use of narcotics to turn them into effective killers, often against their own family members. Widespread killing, rape, and torture were common, and those suspected of supporting the government—as well as their children and infants—had limbs amputated in a form of “rule by terror.” As part of an internationally sponsored “solution” to the horrific war of atrocities plaguing Sierra Leone, the RUF leader, Foday Sankoh, was appointed vice president and chairman of the Commission for Strategic Mineral Resources and Development, in a power-sharing agreement with the democratically elected government of President Ahmad Tejan Kabbah. Thus, Sankoh was allowed to maintain control over the natural resources that had financed his war of terror against the civilian population since 1991. Predictably, Sankoh was not a reliable partner. He continued his ruthless quest for absolute power and supremacy, as if the Lomé Peace Agreement had changed nothing. The atrocities continued unabated, as did the pillage of the diamonds and gold. The RUF also took hostage several hundred peacekeepers from the UN Assistance Mission in Sierra Leone. Sankoh attempted to escape from the capital city of Freetown but was eventually arrested by government forces and now faces prosecution. Thereafter, the government asked the Security Council to establish a special court for Sierra Leone “in order to bring and maintain peace and security in Sierra Leone and the West African subregion.”⁹³ The Security Council endorsed this request on the understanding that “the amnesty provisions of the [Lomé] Agreement shall not apply to international crimes.”⁹⁴ In retrospect, the Sankoh affair offers additional evidence that impunity is not an effective instrument for peace and stability.

The mainstreaming of criminal justice in international relations has created an incentive in some instances for “preemptive” national proceedings, strengthening moderate political forces committed to reconciliation. For example, despite considerable resistance, President Abdurrahman Wahid of Indonesia has shown an unprecedented willingness to investigate the atrocities committed by military and paramilitary forces in East Timor before and after the population voted in favor of independence on August 30, 1999. The UN Commission on Human Rights established an International Commission of Inquiry on East Timor,⁹⁵ which found “patterns of gross violations of human rights and breaches of humanitarian law”⁹⁶ and recommended the establishment of an “international human rights tribunal . . . to try and sentence those accused.”⁹⁷ In response to these demands, President Wahid indicated his preference for trials “to take place at home.” UN Secretary-General Kofi Annan supported Wahid

⁹² See, e.g., Sean D. Murphy, *Contemporary Practice of the United States*, 94 AJIL 369 (2000).

⁹³ Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of the Security Council, UN Doc. S/2000/786, annex (Aug. 10, 2000).

⁹⁴ SC Res. 1315, preambular para. 5 (Aug. 14, 2000), *obtainable from* <<http://www.un.org/documents>>.

⁹⁵ For the Report of the International Commission of Inquiry on East Timor to the Secretary-General, see Identical Letters Dated 31 January 2000 from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, UN Doc. A/54/726-S/2000/59, annex (Jan. 31, 2000).

⁹⁶ *Id.* at 29, para. 123.

⁹⁷ *Id.* at 35–36, para. 153.

and emphasized that an international tribunal would not be established if the legal proceedings in Indonesia were “fair and transparent.”⁹⁸

In January 2000, an Indonesian commission of inquiry advised that Attorney General Marzuki Darusman should investigate six generals, including General Wiranto, who had served as chief of staff of the armed forces and was currently coordinating minister of policy and security in the cabinet. The Hasibuan commission found “‘convincing evidence’ that the six men [were] jointly responsible for murders and arson in East Timor after the referendum” and that “Wiranto is guilty of negligence because as chief of staff he did not take timely action to curb the violence in East Timor.”⁹⁹ President Wahid subsequently dismissed General Wiranto, although the Indonesian Parliament later voted a general bill of amnesty. Observers point out that the Indonesian armed forces did not attack the findings of the commission because it had been established “as a fortress to preempt a plan to set up an international tribunal on the mayhem in East Timor.”¹⁰⁰ According to Air Vice Marshall Graitto Usodo, “The last thing we want is for outsiders to interfere in our internal matters.”¹⁰¹ Despite fears of a military coup, Wahid prevailed in a contest of strength with General Wiranto and, with the support of the military, ordered Wiranto’s resignation pending completion of a formal investigation by the attorney general. In September 2000, the attorney general indicted nineteen officials for crimes in East Timor, including three lower level generals and a former provincial governor. Although Wiranto was not included among the accused, Indonesian prosecutors indicated that other suspects were not ruled out and said publicly that they were “planning to take an incremental approach, using information gleaned from lower-level officials to assemble cases against the senior ones.”¹⁰² Calling the indictments “an encouraging and very positive first step,” the special representative of the UN Secretary-General in East Timor, Sergio Vieira de Mello, suggested that “[w]e shouldn’t be disappointed if the glass is only half full now.”¹⁰³

President Wahid embraced accountability not just to appease the international community, but also to check the power of the military, strengthen democracy, and promote national reconciliation. Changes in the military command, including Wahid’s order for the resignation of General Wiranto, were partially linked with international pressures but clearly served his democratic and reformist agenda. One commentator observed that, from the time of his election in October 1999, Wahid had “set about loosening the Indonesian military’s well-fortified power base, brick by cautious brick,”¹⁰⁴ including through prosecutions for abuses. “It will help him . . . that unless Indonesia proceeds with its own trials, the UN is ready to create an international criminal tribunal on East Timor.”¹⁰⁵ Accountability for atrocities and corruption, it was noted, “is the key to obtaining the international investment and aid Indonesia desperately needs. Mr. Wahid is playing his aces—democratic legitimacy and international support—to break with the past.”¹⁰⁶

Wahid has been especially concerned with interethnic reconciliation and national unity. Aware that military abuses have weakened support for Jakarta’s rule in outlying provinces, he has prosecuted human rights abuses to moderate the centrifugal forces tearing apart the heterogeneous archipelago, particularly in the province of Aceh in northwestern Sumatra. Ac-

⁹⁸ *Wahid Reaffirms Commitment to East Timor Prosecution*, FBIS Doc. SEP20000216000033 (Feb. 16, 2000) (trans. of JAKARTA DETIK, Internet version, Feb. 16, 2000).

⁹⁹ *Indonesia Finds Generals Involved in Timor Violence*, FBIS Doc. FTS20000201000387 (Feb. 1, 2000) (trans. of NRC HANDELSBLAD (Rotterdam), Jan. 31, 2000, at 1).

¹⁰⁰ *Indonesian Military ‘ET Findings Must be Proven in Court,’* FBIS Doc. FTS20000201000054 (Feb. 1, 2000) (quoting JAKARTA POST, Internet version, Feb. 1, 2000).

¹⁰¹ *Id.*

¹⁰² Rajiv Chandrasekaran, *19 Accused of East Timor Atrocities: But Top Generals Are Missing from Indonesia’s List of Suspects*, INT’L HERALD TRIB., Sept. 2–3, 2000, at 4.

¹⁰³ *Id.*

¹⁰⁴ *UK Daily Views Indonesian President’s Risky Business*, FBIS Doc. FTS20000201000753 (Feb. 1, 2000) (quoting editorial, TIMES (London), Internet version, Feb. 1, 2000).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

ording to a member of the Indonesian Commission of Inquiry into Human Rights Violations in East Timor, "The killings in Aceh are far more horrible than those that occurred in East Timor [in 1999]."¹⁰⁷ On May 17, 2000, an Indonesian court convicted twenty-four members of the armed forces and one civilian for the murder of students in the Free Aceh Movement. These prosecutions were linked with the first cease-fire and peace negotiations with the separatist insurgents in a twenty-five-year-old conflict that has claimed thousands of lives.¹⁰⁸ Indeed, such is the importance of accountability to reconciliation in the newly democratic Indonesia that President Wahid has even initiated a judicial inquiry into the killing of some five hundred thousand "communists" in the 1965–1966 coup that brought President Suharto to power.¹⁰⁹ (The political ambition of Suharto's children may also explain this measure.) Despite political limitations, Wahid's efforts suggest that international demands for criminal justice can inspire action by national courts, and that such pressures can be used to weaken the grip of militarist elements with a view to strengthening democratic forces and promoting national reconciliation.

V. ACCOUNTABILITY AND THE "NEW REALISM": TOWARD "PRAGMATIC IDEALISM"

The current prominence of accountability, and its emergence as a significant element of international relations, is a reflection of a desire for justice, as well as utilitarian objectives of postconflict peace building and the long-term prevention of mass violence. Impunity is often a recipe for continued violence and instability. The examples of the former Yugoslavia, Rwanda, Sierra Leone, and other transitional situations demonstrate how hard it is becoming even for *realpolitik* observers and diehard cynics to deny the preventive effects of prosecuting murderous rulers. Indeed, the rules of legitimacy in international relations have so dramatically changed since the inception of the ICTY, the ICTR, and the ICC during the 1990s that accountability is arguably a reflection of a new "realism." A past view of policy based on principles of justice as naive and unrealistic has been seriously challenged by the convergence of realities and ideals in postconflict peace building and reconciliation.

Accountability is ultimately effective when it conforms with the broader policy context within which it operates. In contrast to the prevention of ongoing atrocities through military intervention or peacekeeping, and substantial postconflict economic assistance and social rehabilitation, resort to international tribunals incurs a rather modest financial and political cost. However, the attractive spectacle of courtroom drama, which pits darkness against the forces of light and reduces the world to a manageable narrative, could lead international criminal justice to become an exercise in moral self-affirmation and a substitute for genuine commitment and resolve. Postmortem justice without a corresponding commitment of military, political, and economic resources significantly dilutes the message of accountability and undermines its long-term viability in preventing crimes.

International criminal justice also cannot enjoy long-term credibility if it becomes an instrument of hegemony for powerful states. Understandably, in a slightly primitive international order built on the anarchy of power and state sovereignty, the early glimmerings of international criminal justice manifest themselves in selective ad hoc accountability. It is reasonable to assume that the progressive internalization of international criminal justice will gradually spread from the periphery to the center and give rise to a more inclusive universal framework, possibly through a widely ratified ICC statute together with vigilant and invigorated national or foreign courts. If the international community is to move beyond the currently fragmented assortment of jurisdictions to a coherent system of justice, a great burden falls on the shoulders of influential states to set a fitting moral example.

¹⁰⁷ *President Wahid: Security Situation in Aceh Improving*, FBIS Doc. SEP20000317000003 (Mar. 17, 2000) (quoting JAKARTA POST, Internet version, Mar. 17, 2000).

¹⁰⁸ See Rajiv Chandrasekaran & Aryanti Rianom, *24 Soldiers Are Convicted of Killing Aceh Villagers*, INT'L HERALD TRIB., May 18, 2000, at 1.

¹⁰⁹ See Michael Richardson, *Wahid Seeks Inquiry into 1960s Killings in Indonesia*, INT'L HERALD TRIB., Mar. 30, 2000, at 1.

No one should entertain the illusion that the relative success of the ICTY, the ICTR, and the ICC process, or the engagement of national and foreign courts, has somehow exorcised the specter of genocide and other massive crimes from our midst. The reality of widespread atrocities in Africa and elsewhere leaves little room for judicial romanticism and even less for moral triumphalism. Achieving effective prevention against an entrenched culture of impunity, and fostering inhibitions against widespread rape, pillage, and murder in a context of habitual violence, cannot be realized through the efforts of a few ad hoc tribunals and national trials here and there. As Professor David Wippman has observed, international criminal prosecutions may “strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.”¹¹⁰ Yet, in contrast with the gloom that encircled those seeking justice in the not-so-remote past, even these modest and early glimmerings of international criminal justice may be dramatic and transformative.

¹¹⁰David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 488 (1999).

