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Should We Press the Victims: The Uneven Support for International Criminal Tribunals

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SHOULD WE PRESS THE VICTIMS: THE UNEVEN SUPPORT FOR
INTERNATIONAL CRIMINAL TRIBUNALS

by

MICHAEL D. THURSTON

Under the Direction of Jelena Subotic

ABSTRACT

International criminal tribunals rely on international support. However, in the case of the ICTY and the ICTR, international support has been uneven. I argue that this uneven support is related to the post-atrocity status of the domestic governing authority. In cases where the governing authority retains the status of victim, as in Rwanda following the 1994 Tutsi genocide, the international community has been reluctant to back the ICTR in its attempts to prosecute all participants of the 1994 genocide. In cases where the governing authority retains the status of perpetrator, as in Serbia following the Bosnian genocide of the 1990s, the international community has been more supportive of the ICTY. In cases where the post-atrocity status is mixed, as in Croatia, the backing of the international community of the ICTY has been similarly mixed.

INDEX WORDS: International criminal tribunals, ICTR, ICTY, Rwandan genocide, Bosnian genocide

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INTERNATIONAL CRIMINAL TRIBUNALS

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I. Introduction

In the spring and summer of 2002, the former Chief Prosecutor of the International Criminal Tribunal for Rwanda (the ICTR) pressured the Rwandan government to disclose files relating to internal investigations of RPF atrocities that were committed in 1994 (Del Ponte 2009, 224-225). The former Chief Prosecutor, Carla Del Ponte, had devoted significant time and resources in creating a Special Investigations Unit to look into whether the RPF had in fact committed atrocities in the aftermath of the 1994 genocide. This investigative controversy reached a climax in the summer of 2002.

On June 28, 2002, former Prosecutor Carla Del Ponte met with Rwanda President Paul Kagame to discuss this special investigation. At that meeting, she reiterated the government's responsibility to officially disclose its internal files relating to RPF activities in 1994. Her request was met with a flat refusal (Del Ponte 2009, 224-225). Fourteen months later, on August 28, 2003, the UN Security Council passed Resolution 1503, officially stripping Madame Del Ponte of her authority as Chief Prosecutor of the ICTR, and unofficially ending this special RPF investigation (Del Ponte 2009, 239).

This period, from the spring of 2002 until the summer of 2003, marks an incredibly unique moment in the lifespan of the International Criminal Tribunals in the Former Yugoslavia (ICTY) and in Rwanda (ICTR). Until Resolution 1503, the Office of the Prosecutor was responsible for the effective prosecutions of war crimes that were committed in both the Yugoslav and the Rwandan theaters. Resolution 1503 severed the Office of the Prosecutor into two, thereby dividing the Office's authority over the successful prosecution of the two conflicts.

UN Security Council Resolution 1503 is the most powerful example of the tension between international justice and politics. The tribunals have a primary responsibility for

securing international justice – seeing that war criminals are efficiently and fairly prosecuted. But the tribunals must also be cognizant of the domestic and international political arenas in which they operate. President Paul Kagame’s refusal to cooperate with the ICTR in the summer of 2002, with the international community’s (referring collectively to the efforts of the UN Security Council, the European Union, the United States, and its western European allies) unwillingness to support the ICTR in its efforts to investigate RPF atrocities, highlights the fragility of international justice in this particular instance.

But, the international community has shown surprising resolve in other instances. The ICTY, coupled with international pressure, has often been effective at overcoming Serbian political resistance. For instance, the ICTY (along with pressure from Europe and the United States) convinced Serbian authorities to turn over former Serbian President Slobodan Milosevic in the spring of 2002. In another dramatic example, the ICTY, again with the backing of the international community, coerced Serbian authorities into arresting and turning over the popular former President of the Republika Sprska, Rodovan Karadzic, in the summer of 2009.

The willingness of the international community to back a tribunal in one instance, but to abandon and in fact remove the chief prosecutor in a second instance, is the puzzle that is at the heart of this paper. Why is the international community willing to support unfettered prosecutorial discretion in one conflict (Yugoslavia) but not in another (Rwanda)? Is the difference one of geography? Certainly membership in the European Union is leverage that is available to the ICTY, and not the ICTR. In fact, a more subtle rationale exists.

This proposal is organized into five main sections. The second and third sections (the first section is this introduction) summarize my central arguments and the methodology I will employ. Following the argument and methodology sections, I explore four different dimensions

of my argument in the literature review. Within the literature review, I examine two ways in which international criminal tribunals are viewed in the international justice literature. I describe these two views as idealistic and pragmatic perspectives. Next, I briefly describe the concept of prosecutorial discretion. Both nationally and internationally, a prosecutor's discretion is her most important tool. My central argument is that the type (weak or strong) of international pressure on uncooperative governments will affect the amount of prosecutorial discretion available to an international criminal tribunal.

In a third part of the literature review, I confront an alternate explanation about why international pressure varies across different conflicts. This alternate explanation involves the concepts of conditionality and issue linkage, and how the ICTY was available to leverage Croatia and Serbia's desire to join the EU. This alternate explanation highlights how the ICTR had no comparable institution in which to secure RPF cooperation.

In a fourth and final portion of the literature review, I briefly explore the implications of my argument – that occasionally political considerations (like the status of post-conflict governments) do trump legal considerations. This comprehensive literature review outlines all of the following four issues that I will discuss at the conclusion of the paper: the transitional justice scholarship divide concerning international criminal courts, the importance of prosecutorial discretion, the importance of conditionality and issue linkage, and the implications of international political interference with this prosecutorial discretion.

II. Argument

Fundamentally, I attempt to answer the following question: why has the ICTR had considerably less success at coercing recalcitrant domestic elites in Rwanda than the ICTY has

had in Serbia and Croatia? In a related fashion, why has the international community been less willing to exert pressure on governing authorities in Rwanda than in Serbia and Croatia? Both the ICTR and the ICTY have virtually identical statutes, for a time shared the same Prosecutor and Appeals Chamber, and both were created for the same express purpose of holding people responsible for crimes against humanity, war crimes, and genocide (Sands 2003, 159).

I argue that the ability of the ICTY and the ICTR to exercise unbridled prosecutorial discretion is largely dependent on the international community's willingness to apply pressure (coercive or incentive laden) on uncooperative domestic authorities. Prosecutorial discretion, after all, is a key source of authority that allows international criminal tribunals to base prosecutorial decisions on legal and not political grounds.

However, I argue that the international community has been less willing to apply coercive or incentive laden pressure on uncooperative RPF leaders in Rwanda because of that party's victim status. Specifically, I argue that the international community does not have the political desire to coerce President Kagame into cooperating with an investigation of Tutsi orchestrated atrocities in 1994. In cases where post-conflict authorities remain cloaked in the status of victimhood, then, the prosecutorial discretion of international criminal tribunals is significantly reduced. This argument is illustrated in Table One.

Table One

Victimhood Status →	Weak International Pressure on Uncooperative Domestic Governments →	Significant Constraints on International Prosecutorial Discretion
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In contrast, I argue that the international community is much more willing to apply coercive and incentive laden pressure to uncooperative Serbian leaders. This is because of Serbia's status as the initial aggressor of the two Yugoslav wars of the 1990s. Because of the international community's much more aggressive stance, or opposition to Serbian resistance, the ICTY was able to exercise broad and unhindered discretion in deciding which criminals to investigate and to prosecute. This argument is illustrated in Table Two.

Table Two

Aggressor Status→	Strong International Pressure on Uncooperative Domestic Governments →	Unbridled International Prosecutorial Discretion
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Finally, I argue that the international community's approach to post-atrocity governments that are characterized as both initial aggressors and victims will be similarly mixed. In other words, I argue that the international community will in some instances refuse to apply coercive or incentive laden pressures to these uncooperative post-atrocity authorities. In other instances, the international community will be much more aggressive in applying pressure. Croatia is the best example of a country that embodies the victim and initial aggressor stigmas following the two Yugoslav wars. This argument is illustrated in Table Three.

Table Three

Mixed Status →	Mixed International Pressure on Uncooperative Domestic Governments →	Minimal Constraints on International Prosecutorial Discretion
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A comprehensive illustration of the interaction of these three arguments is illustrated in Table Four.

Table Four

	Weak Int. Pressure	Strong Int. Pressure
Victim Status	Rwanda –ICTR’s discretion is constrained	Croatia – ICTY’s discretion is minimally constrained
Aggressor Status	Croatia – ICTY’s discretion is minimally constrained	Serbia – ICTY’s discretion is unconstrained

III. Methodology

I employ a qualitative methodology to test the three arguments listed above, including historical process tracing and comparative case study methods. This qualitative approach is appropriate here, as my arguments will require significant historical and comparative analyses.

I have selected three countries as my case studies – Serbia, Rwanda, and Croatia. I selected these cases based on the varying stigmas of each (initial aggressor, victim, and mixed). Each of these cases represents a different configuration of a post-conflict regime type. Serbia is

the quintessential post-conflict perpetrator regime. Evidence produced during the Milosevic trial, for example, demonstrated that Serbian authorities actively and aggressively instigated the two Yugoslav wars.¹ During much of the 2000s, most Serbian political parties have either openly or privately resisted the ICTY. In contrast, ethnic Tutsis were originally the targets of the 1994 Rwandan genocide. The post-conflict Rwandan regime (the RPF) can be safely characterized as victims of the 1994 genocide. Finally, Croatia can be considered a mixed regime. There is some evidence that Croatia was actively involved in the partition of Bosnia-Herzegovina. On the other hand, Croatia was also the victim of overt Serbian aggression.

My paper explores three levels of analysis, at a macro level (the EU, the United States, NATO, and the UN), at a domestic level (the domestic political landscape of Serbia, Croatia and Rwanda), and at an individual level (how key decision makers influenced the types of international pressure, and thereby influenced the effectiveness of international criminal tribunals). These three levels will allow me to effectively explore the soundness of my arguments.

As far as examining prosecutorial discretion, I rely on historical, biographical, and autobiographical accounts of individuals who were actually involved in or directly observed the proceedings of the ICTY and the ICTR.

But my argument would certainly be incomplete if I failed to include other possible explanations for the disparate treatment of governing authorities in Rwanda versus Serbia versus Croatia. One environmental factor that must be considered is the possibility that the location of Croatia and Serbia in south-east Europe exposes those two countries to a set of incentives that does not exist in sub-Saharan Africa. More specifically, European Union membership is a strong

¹ See the December 2006 Human Rights article titled, "Weighing the Evidence, Lessons from the Slobodan Milosevic Trial" (Darehshori 2006). This article chronicles the complicity of the Milosevic regime, from planning, to arming and funding the separatist Serb movements in Croatia and Bosnia-Herzegovina.

positive incentive that the international community uses to entice Croatia and Serbia into cooperating with the ICTY. Former spokeswoman for a Chief Prosecutor, Florence Hartman describes how powerful this EU enticement is. She writes, “EU conditionality and international pressure have proved to be the only effective means of overcoming their [Serbian and Croatian] reluctance and eliciting the cooperation without which the tribunal would not have been able to fulfil [sic] its mandate” (Dimitrijevic et al. 2009, 67).

No comparable incentive is available for Rwanda. However, other positive incentives are available that the international community could use to encourage Rwanda’s cooperation. European Union membership and other positive incentives will be examined in an attempt to explore how much this issue of conditionality impacts varying degrees of effectiveness of the ICTY and the ICTR.

Another competing explanation that I address is domestic leadership. In a 2005 article, Victor Peskin makes an observation about the importance of domestic leadership. He writes, “whether societies come to value tribunals as an equitable and effective way to confront their violent pasts may ultimately depend more on the approval of a nation’s leaders than in anything an outreach programme alone may say or do” (Peskin 2005, 953). Leadership styles vary considerably among my three case studies. A closer examination of each of these styles may reveal whether leadership itself contributed to the different levels of effectiveness of the ICTY and the ICTR. These two competing explanations provide a fuller glimpse into the dynamic relationship between domestic elites, the international community, and international criminal tribunals.

IV. Literature Review – Progression of the Research Question

Transitional justice scholars view the interaction between international criminal tribunals and the societies in which they operate in at least two fundamentally different ways. From one perspective, some scholars tend to have an idealistic view of international criminal tribunals. Scholars in this camp, for example, tend to argue that criminal tribunals have a lasting effect on the domestic societies in which they operate. They argue that tribunals hold criminal leaders accountable, strengthen the domestic rule of law, assist in the preservation of the historical record, and contribute to social reconciliation (see (Orentlicher 2008).

From a different perspective, some scholars view the relationship between criminal tribunals and domestic societies in a more complex and pragmatic manner. For example, these scholars tend to focus less on the normative or the desired long-term impact of tribunals, and more on the political dynamics between domestic and international elites and international criminal tribunals. This second group tends to emphasize tribunal limitations, revealing how tribunals must rely on hostile local elites for documentary evidence and access to witnesses. This second group also examines the role of the international community in pressuring uncooperative local elites. I explore both perspectives in this literature review.

IV. A. 1. *Idealistic Views of International Criminal Tribunals*

Because the ICTY and the ICTR are relatively new institutions, the promise that these tribunals inspire is evident in one strand of transitional justice scholarship. For example, one common refrain from transitional justice scholars is that the ICTY and ICTR effectively hold war criminals accountable.² In a world where such accountability did not exist previously, these

² In one article, the scholar C. Sriram writes, “One fundamental goal of law, whether international or domestic, is to ensure that individuals responsible for serious crimes are duly punished, or at the very least constrained from

tribunals are modern institutions that can effectively address the impunity that some criminals long enjoyed.

In a 2001 article, Payam Akhavan explains how well the ICTY has done at confronting impunity in Serbia. He writes, “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 post-conflict political configuration has thus been greatly facilitated” (Akhavan 2001, 14). According to Akhavan, the ICTR has led to similar domestic benefits in Rwanda. He writes, “The internationalization of accountability and its gradual internalization in the African continent may be an equally significant legacy of the ICTR” (Akhavan 2001, 26). Scholars like Akahvan imagine the ICTY and the ICTR as having a transformative effect on the culture of violence and domestic criminal impunity

Idealistic scholars also emphasize how tribunals have contributed to the growing recognition that states now have to confront war crimes. One scholar, Juan Méndez, argues that states now have at least four obligations following mass atrocities: to investigate and punish perpetrators, to disclose to victims’ families an accurate account of what happened, to provide victims with reparations, and to remove perpetrators from law enforcement bodies and from positions of authority (Méndez 1997, 261). The creation of the ICTY and the ICTR, then, is illustrative of the responsibilities that states themselves should embrace.

Another trait of this idealistic transitional justice scholarship is its emphasis on the impact that international criminal tribunals have on international norms. This impact, for example, is evident in a 2004 article by Charles Call. Call optimistically declared that the work of the ICTY and the ICTR “has not only brought satisfaction to some victims, but also transformed world

repeating them. Here progress made in the externalization of justice has allowed a great many individuals responsible for war crimes, torture, crimes against humanity, and genocide to be brought to book where they otherwise might never have been” (Sriram 2003, 429).

politics and notions of righteousness” (Call 2004, 102). These scholars tend to emphasize the impact of international criminal tribunals on the domestic and international environments in which they operate, while under-emphasizing the impact of these environments on tribunals.

IV. A. 2. *Pragmatic Views of International Criminal Tribunals*

A second strand of scholars focus on the pragmatic realities that tribunals face. These scholars have a tendency to be less concerned about how states should act, and more concerned with how states do act. For example, Jamal Benomar points out that “there are no hard and fast rules or easy answers about how to resolve the dilemma of bringing violators to justice” (Benomar 1993, 13). He is cognizant of the limitations of international criminal tribunals (and other transitional justice mechanisms), and his scholarship examines the effect of these limitations (Benomar 1993).

Bronwyn Leebaw is critical of the rosy view that the idealists have of tribunals. Instead of assuming that criminal tribunals will inevitably have a transformative impact on domestic environments, Leebaw points out that these mechanisms must be responsive to local realities. She writes, “if transitional justice institutions are to advance political reconciliation, they must be responsive to local contexts, traditions, and political dynamics” (Leebaw 2008, 117).

Victor Peskin presents a robust discussion of how international criminal tribunals are reliant on international and domestic support in his book, International Justice in Rwanda and the Balkans (Peskin 2008). Peskin develops a theory about how international tribunals operate. He argues that that international tribunals must engage in two forms of trials – actual criminal trials and virtual or political trials. The criminal trial is the public legal proceeding that the tribunal was originally designed for. The virtual trial is where the tribunal competes for domestic and

international support. Regarding these virtual trials, Peskin writes, “This book focuses on two levels of such political activity beyond the courtroom: first, the political struggles and negotiations between tribunal, state and powerful international community actors that occur prior to as well as during the courtroom trials; second, the political struggles and negotiations within states” (Peskin 2008, 6). He envisions the ICTY and the ICTR engaged in two parallel struggles, convicting criminal defendants in a court of law, while convincing domestic and international actors of the legitimacy of their work and the importance of cooperating at the international and domestic levels.

Underlying Peskin’s conceptualization is the notion that the ICTR and the ICTY are not just legal institutions. They are also political institutions in the sense that they both rely heavily on domestic cooperation to secure arrests, documents, and access to crime scenes and witnesses. Also, the ICTR and the ICTY are political institutions in that they have no institutional methods for holding resistant domestic elites accountable. Tribunals have to be sensitive to political dynamics. The notion of virtual trials is a powerful way to think about the political responsibilities of international criminal tribunals.

Ellen Lutz and Kathryn Sikkink propose an even more complex way of viewing the dynamic interactions between criminal tribunals, international norms, and domestic non-state actors. In a famous 2001 article, they present the theory of the “Justice Cascade”. This theory describes how “states change their behavior not only because of the economic costs of sanctions, but because of changing models of appropriate and legitimate statehood, and because the political pressures of other states and non-state actors affect their understanding of their identity and their standing in an international community of states” (Lutz and Sikkink 2001, 5).

For purposes of this paper, the “Justice Cascade” is mentioned here to illustrate how some transitional justice scholars have developed increasingly dynamic and sophisticated models to illustrate how criminal tribunals interact with, and are limited by domestic actors. This “justice cascade” theory relies on the premise that states do care about their identity within the international community. This identity can be challenged by other state or non-state actors within the international community.

A state’s international identity is also affected by domestic politics. Some states engage in a manipulative process whereby they attempt to project one identity internationally, while maintaining a totally different identity domestically. The scholar Jelena Subotic describes this manipulative process as “norm-hijacking.” She uses the interactions of Croatia, Serbia, and Bosnia and the international community to illustrate this concept. She defines norm-hijacking as the institutional misuse of international norms in a dual effort to appease international audiences while subverting the transformative elements of the international norms themselves (Subotic 2009). Subotic illustrates how domestic elites in Serbia, Croatia, and Bosnia-Herzegovina make a show of publicly submitting to the ICTY’s requests for arrests, documents, and access to witnesses and crime scenes, while these same elites privately foment resistance to the ICTY. The hollow, public compliance is a domestic strategy for appeasing international actors like the European Union and the UN Security Council. In this way, domestic elites make a show of appeasing international actors whose support they desperately seek, while simultaneously creating domestic resistance to international intervention (Subotic 2009).

IV. A. 3. *Practical Reflections on these Idealistic and Pragmatic Views*

In an attempt to provide a thorough examination of how international criminal tribunals operate, this section provides a glimpse into criminal tribunal relations through the eyes of actual practitioners. Mark B. Harmon was a Senior Trial Attorney in the Office of the Prosecutor at the ICTY. Fergal Gaynor was a Legal Officer in that same office. Harmon and Gaynor coauthored a 2004 article describing major difficulties that the Office of the Prosecutor faces. One major difficulty is the absence of a police force. The ICTY is forced to depend on the cooperation of other states in order to secure arrests. Harmon and Gaynor point out that “In a perfect world, with states sharing common ideals and objectives, the mechanism of state cooperation should enable a system of international justice to function effectively” (Harmon and Gaynor 2004, 409). Unfortunately, such state cooperation is often lacking, and has “seriously impacted on the ICTY’s ability to prosecute persons responsible for serious violations of international humanitarian law...” (Harmon and Gaynor 2004, 409). According to Harmon and Gaynor, the formal accountability mechanism whereby the ICTY reports instances of resistance or willful state refusal to the UN Security Council is time-consuming and often ineffective.

Former ICTY President Gabrielle Kirk McDonald emphasized this same point. The inability of the ICTY to enforce its own warrants and orders means that judicial figures must devote time to lobbying international actors for their support. President McDonald writes, “During my presidency, it seemed to me that my duties as a Judge were subjugated by the political demands of the office. I was required to spend an inordinate amount of time seeking international political support to overcome the effect of state non-cooperation...” (McDonald 2004, 568). Harmon and Gaynor, and McDonald all seem to support the dynamic model.

Finally, former Prosecutor Carla Del Ponte chronicles the ongoing political struggles that her Office experienced when trying to cajole uncooperative domestic elites in Croatia, Serbia, and Rwanda. She recounts the frequent struggles she experienced as she attempted to convince various international actors to apply pressure to these resistant governments. In her memoir – Madame Prosecutor – she recounts many of the struggles she had with the President of Rwanda, Paul Kagame, or the former President of Serbia, Vojislav Kostunica (Del Ponte 2009). Her memoirs confirm the dynamic relationship between international tribunals, and the domestic and international actors that tribunals must rely on.

Together, these three accounts demonstrate that the Prosecutor’s Office of an international tribunal must be extraordinarily sensitive to the political dynamics of both domestic and international audiences. Without the cooperation of the former or the coercive pressure of the latter, international criminal tribunals are practically helpless. President McDonald summarizes this dilemma when she writes, “Despite all of these efforts by the Tribunal, in the end, as we knew in the beginning, states, individually, and the international community, collectively, would determine whether the Tribunal realized its full potential” (McDonald 2004, 566).

IV. B. Prosecutorial Discretion

As I illustrated at the start of this paper, in the summer of 2003 the international community curtailed the ICTR’s discretion when it effectively prevented the ICTR from continuing with its investigation of RPF atrocities. This dramatic episode in 2002 illustrates how important the function of prosecutorial discretion is – as this function in its purest form is what confers legitimacy on the institution itself. This dramatic episode also illustrates how fragile a

prosecutor's discretion is – a prosecutor's autonomy (especially the Chief Prosecutor of an international criminal tribunal) is beholden to the community that created and supports it. In this section, I explore the important function of prosecutorial discretion in general (by looking at examples from the American criminal justice system) and in particular (at the international level).

Prosecutorial discretion is the process by which a prosecutor selects who to prosecute, and what crimes to charge. This process involves subjectivity, where a prosecutor must apply the black letter of the law to a given set of facts. The prosecutor will consider a number of different criteria when deciding who and what to prosecute, including limited resources, fairness, and the likelihood of securing a conviction.

In the American criminal justice system, prosecutors have tremendous discretion. In a book largely critical of the American prosecutor, Angela Davis comments on the importance of prosecutorial discretion. She writes, "It is difficult to imagine a fair and workable system that does not include some level of measured discretion in the prosecutorial process. As a part of the executive branch of government, it is the prosecutor's duty to enforce the laws, and it would be virtually impossible for her to perform this essential function without exercising discretion" (Davis 2007, 13). In describing the autonomy of the American prosecutorial discretion, Bennett Gershman writes, "In carrying out the charging function, a prosecutor enjoys considerable independence from the judiciary, his administrative superiors, and the public. A prosecutor cannot be compelled to bring charges, or to terminate them" (Gershman 2009, 155). The process by which a prosecutor decides who and what to charge must be free from external pressures.

Similar to the broad discretion that American prosecutors enjoy, the office of the Chief Prosecutor of the ICTY and the ICTR also enjoy (at least on paper) broad prosecutorial

discretion. A Chief Prosecutor of the ICTR, Hassan Jallow writes, “The Office of the Prosecutor (OTP) is clearly set out by the Statute as an independent organ of the Tribunal, with responsibility for the investigation and prosecution of offenders. Implicit in this independence of the OTP is the recognition that in the exercise of its functions, it is not to be subject to control by any other person or entity, save the law” (Jallow 2005, 147). This discretion is crucially important at the international level for a number of reasons. One reason is that prosecutorial discretion is synonymous with independence and impartiality. In the eyes of ICTR Chief Prosecutor Jallow, “the notion of independence is tied up with the concepts of fairness, incorruptibility, freedom from outside influences, decision-making based on evidence objectively assessed, and sound public interest principles” (Jallow 2005, 154). The perception of impartiality is especially important for the highly visible tribunals.

A second reason prosecutorial discretion is crucially important is because of the scarcity of resources. Just like the national criminal justice systems, this lack of resources at the international level is also pronounced. The gravity and sheer number of the crimes committed in Bosnia-Herzegovina or Rwanda, for example, are far greater in scale than any crimes that a local, state, or federal prosecutor might handle in the United States. Therefore, the process by which an international prosecutor decides which defendants to devote limited resources to has great consequences. The Chief Prosecutor for the Special Court for Sierra Leone, Luc Cote, writes, “International criminal justice remains largely symbolic and has limited resources that require exemplary selective prosecutions” (Côté 2005, 175). Because of the impossibility of trying hundreds of thousands of defendants, the international prosecutor must decide which cases will have the most symbolic effect.

A third reason prosecutorial discretion is so crucially important is the unavoidable mix of political and legal considerations that must go into charging decisions at the international level. Although on paper the ICTY and the ICTR were designed to have broad prosecutorial discretion, Prosecutor Carla Del Ponte notes that in practice, “the tribunal lacks the authority to impose penalties if a state fails to cooperate. This lack of authority ineluctably forces the tribunal into the realm of politics” (Del Ponte 2009, 41-41). The ICTY and the ICTR rely on the domestic audiences that they prosecute for witnesses, documents, and access. Both tribunals also rely on international actors for coercive, symbolic, and bureaucratic support. The survival of these new international criminal tribunals, especially during the first few years of their existence, depended on the sensitivity of the Office of the Prosecutor to the international and domestic dynamics in which the Office operated.

IV. C. Conditionality, Issue Linkage and Compliance

This third section briefly introduces the scholarship on EU conditionality and issue linkage, and the ways in which these two concepts relate to international criminal tribunals. The role of the EU in promoting Serbian and Croatian cooperation with the ICTY is central, and in fact is a major explanation as to why the ICTY has enjoyed more international support than the ICTR.

EU conditionality is the method by which the European Union attempts to shape the behavior of third-party states. Most commonly, conditionality refers to the obligations and restrictions that third-party states must abide by in order to join the Union. However, “EU conditionality is not limited to enlargement,” and can additionally include positive and negative conditions relating to “trade concessions, aid, cooperation agreements, and political contracts”

(Grabbe 2002, 250). Also, over the last 20 years, the EU has shifted its emphasis from encouraging regional democratic and economic development, to bilateral reform (see (Anastasakis and Bechev 2003).

In fact, the EU's "Regional Approach" was formally developed in 1997. The EU identified the Western Balkans as a region in need of political and economic reform. The EU encouraged this reform through a set of conditions, emphasizing a respect for democratic principles, human rights, the rule of law, and principles of a free market economy (Anastasakis and Bechev 2003, 6). Countries meeting these conditions were rewarded with trade concessions, and other financial and economic incentives.

This concern for the entire Western Balkans region changed, however, when the EU introduced the Stabilisation and Association Process (SAP) as a replacement for the "Regional Approach". The SAP was "intended to act as a mechanism for upgrading EU relations with the individual [western Balkan] countries" (Anastasakis and Bechev 2003, 7). The premise behind the SAP was that the EU could have a greater impact by positively inducing Western Balkan states to cooperate. For these countries, the SAP included the "commitment to democratic and market reforms and respect for human rights, to work for the return of refugees and cooperate with the Hague-based International Criminal Tribunal for Yugoslavia (ICTY)" (Anastasakis and Bechev 2003, 7). In exchange for meeting these SAP conditions, the EU offered financial assistance, budgetary support, assistance for democratization and civil society efforts, humanitarian aid, and assistance with judicial reform efforts (Anastasakis and Bechev 2003, 7). Regarding Croatia and Serbia, concern for economic market reform and democratization, gave way to a more singular concern. From 1998 to the present (the US began encouraging this type of conditionality in 1998, the EU in 2005), many western countries only became interested in

whether Croatia and Serbia were fully cooperating with the ICTY. In an EU Diplomacy Paper, Mathias Dobbels describes how the US House of Representatives imposed an annual certification procedure before it issued aid to Serbia (Dobbels 2009, 9). The US House would not certify that Serbia was worthy of financial assistance unless it received positive reviews from the ICTY. In effect, this meant that continued US assistance was directly linked to Serbian cooperation with the ICTY.

Similarly, the EU followed suit in 2005 when the EU Commissioner “explicitly linked the start of SAA negotiations to Serbia’s cooperation with the ICTY” (Dobbels 2009, 10). Until this point in 2005, “there was a general reluctance in the EU to make the relations with Serbia dependent on cooperation with the ICTY” (Dobbels 2009, 9). A major condition that the EU imposed on Croatia was also cooperation with the ICTY. Croatia was unable to progress in the accession process without first receiving positive reviews by the ICTY Chief Prosecutor (Dobbels 2009, 15-16).

EU membership is important not just for the immediate financial benefits that target states receive, but also for the symbolic benefits of joining a multi-national organization. In her book Hijacked Justice, Jelena Subotic describes the value of joining an entity like the EU. She writes,

Membership in exclusive clubs such as the EU constitutes what candidate states want to be or what they think they already are – European, liberal, democratic. Joining a prestigious international institution or engaging in other types of multilateral behavior may seem contrary to the immediate national interests of states, but it embodies larger global values that shape strategic choices states make (Subotic 2009, 32).

EU membership is crucially important for maintaining the long-term identity of Croatia and Serbia as members of the European community.

EU conditionality and issue linkage is one alternative explanation for why the ICTY has had more success coercing reluctant Serbian and Croatian governments than the ICTR has had in coercing a reluctant Rwandan government. The ICTR has no financial or membership leverage that it can hold over Kagame's government. This absence of leverage is an alternative explanation for why the ICTR has had no success in coaxing Rwanda to disclose witnesses and documents relating to RPF atrocities in 1994. However, this alternative explanation is not altogether satisfying.

IV. D. *Illegitimate or legitimate institutions?*

The implications of my argument – that international support of international tribunals is contingent on political considerations – are briefly explored here. If political considerations trump legal considerations, then the legitimacy of the entire process of international criminal justice is questionable. Further, in order to be legitimate, judicial outcomes must be determined by the political and not the political process.

IV. D. 1. *Realist Perspective*

Theoretically, the concept of international tribunals as illegitimate institutions is a derivation of a basic school of international relations – realism. To summarize, realists believe that states are motivated only by their self-interest. Unlike in the domestic realm, states operate in an environment of anarchy, where no single sovereign exists. Because of this anarchy, states seek to maximize their own self-interested aims. Realists argue that international criminal tribunals are not designed to try the culpability of war criminals, but rather are institutions that

are designed to disguise a stronger state's attempt to impose its will on a weaker state. In this section, I briefly introduce a few proponents of this school of realism.

On a fundamental level, most realists are contemptuous of the very nature of international law. To realists, the idea that legal restraints bind what states can do at the international level is absurd. States are bound only by the fear of how other states might retaliate. Stanley Hoffman criticizes the notion of international law when he writes,

The problem of international law, which is *sui generis*, is therefore not the inevitable tension with political reality, but the nature and scope of this tension. The plight of international law does not stem from a temporary divorce between what the group does and what the law says it ought to do, it stems from the fact that the group permanently behaves in such a way that the divorce can be reduced to 'ordinary...' (Hoffman 1971, 22).

Very rarely, for example, have states abided by the use of force restrictions set out in the UN Charter, according to Hoffman. The repetitive violation of these rules is strong evidence for the failings of international law.

The father of American realism, Henry Morgenthau, is similarly contemptuous of the notion that states act according to anything other than their own self-interest. He writes, "whether or not an attempt will be made to enforce international law and whether or not the attempt will be successful do not depend primarily upon legal considerations and the disinterested operation of law-enforcing mechanisms. Both attempt and success depend upon political considerations and the actual distribution of power in a particular case" (Morgenthau 1993, 266). The distribution of power is at the heart of what motivates states to act and to refrain from acting. This view of power politics clearly flies in the face of international criminal justice, a system built on the premise that no individual, no matter how powerful, can commit crimes against humanity, war crimes, or genocide.

Traditional realist theorists like Hoffman and Morgenthau would certainly agree with images from Balkan prison camps recalled memories of the Holocaust and engendered public calls for action, powerful states used the ICTY as a means to respond to such calls in a politically inexpensive way” (Rudolph 2001, 665). In the same way these tribunals were created out of a sense of political expediency, these tribunals (according to realists) are also expendable when states’ interests conflict with a tribunal’s activities.

From a realist perspective, tribunals are ultimately dictated by behind-the-scenes international actors, whose financial and political support the tribunals desperately rely. Without this support, the tribunals are helpless in coercing uncooperative domestic elites. Realists would likely argue that international tribunals are unable to exercise complete and autonomous prosecutorial discretion because tribunal autonomy will always be secondary to state self-interest.

IV. D. 2. *Responses to Realism*

An immediate and direct response to the claim that international criminal tribunals are merely extensions of self-interested states is that tribunals guarantee criminal defendants a fair process. If victorious states were interested only in asserting their will over the defeated, these states would do so in a summary and expedient manner. Instead, the ICTY and the ICTR afford an array of due process rights to defendants. The modern UN ad hoc tribunals have incorporated protections from many national legal systems and from major human rights treaties (Zappala 2003, 246). The fact that these international criminal tribunals incorporate such robust due process requirements is evidence that the UN Security Council was more concerned with the

creation of legitimate institutions, than the creation of hollow artifices that could be manipulated by western powers.³

Instead of being the product of self-interested aims, tribunals were the product of collective frustrations of the international community for the massive human rights atrocities being committed. The creation of the ICTY and the ICTR, then, are more accurately viewed as moral responses by an international community that was shocked by the depravity of the conflicts in the former Yugoslavia and Rwanda. The scholar Catherine Lu succinctly writes, “In other words, far from undermining international order, it could be argued that an institution such as the ICC is a necessary component of any legitimate and stable international order of sovereign states” (Lu 2006, 197).

The most cogent response to the realist critique of international criminal justice is a book written by Gary Bass, Stay the Hand of Vengeance (Bass 2002). In his book, Bass surveys a wide variety of war crimes tribunals over approximately a three-hundred year period and arrives at a number of interesting conclusions. Contrary to realists’ claims that war crimes tribunals are created by self-interested states, he points out that only liberal states have supported the creation of such tribunals (Bass 2002, 19). Further, he notes that it is liberal leaders who are generally “shocked by overseas atrocities,” motivating them to create such war crimes tribunals (Bass 2002, 21).

Bass also points out that the war crimes tribunals created by liberal states are legitimate legal institutions. Contrary to show trials that a realist might expect (where a defendant has no legitimate method of contesting the charges against him), Bass points out that liberal war crimes

³ See William Schabas’ book, The UN International Criminal Tribunals (Schabas 2006). In this book, he describes in great detail the rules of evidence and procedure of each court. The UN Security Council authorized the Judges of the ICTY and the ICTR to create their own rules of evidence and procedure. The intention was to insulate the tribunals from criticisms that the international community was dictating how the courts would operate.

tribunals incorporate clear procedures for introducing and challenging evidence, and have occasionally resulted in the acquittal of an accused. Bass writes,

But liberal governments, even if they might otherwise prefer to either ignore war criminals or summarily execute them, tend to be bound by their own liberalism. Ironically, this legalism can interfere with war crimes prosecutions. The recourse to law brings in a series of standards that make it difficult to prosecute (Bass 2002, 29).

A recurring distinction between show trials and legitimate war crimes tribunals, according to Bass, is the presence of an independent judiciary.⁴

International tribunals have shown a considerable amount of independence. The ICTY, for example, indicted Serb leaders Radovan Karadzic and General Mladic on the eve of the Dayton Peace Accords in 1996. The ICTY also engaged in an unpopular investigation of NATO's 1999 Belgrade bombings. The ICTR did initiate preliminary investigations of high-ranking Tutsi officials. All of these examples suggest that contrary to realists' beliefs, the ICTY and the ICTR are legitimate legal institutions with considerable autonomy and independence. The fact that the international community has on occasion withdrawn its support, or failed to apply consistent and aggressive pressure to domestic elites is more of a sign of the hesitancy of western states than a sign of the dependence and irrelevance of these international criminal tribunals.

A former Ambassador at Large for War Crimes Issues, David Scheffer, provides an insider's response to realists' claims that the ICTY and the ICTR were created more as a political diversion than as a legitimate effort to address Yugoslav and Rwandan atrocities. Scheffer explains that the ICTY was one of many options that the Clinton Administration was exploring

⁴ Gary Bass writes, "But such illiberal trials reached their apotheosis in modern totalitarian states. These regimes show the opposite of liberal legalism: the complete subversion of legal norms. The judiciary has no independence. Predictable bureaucratic authority is replaced with arbitrary terror" (Bass 2002, 26).

during the spring of 1993 (Scheffer 2004, 354). He explains that he never remembers the ICTY being offered as a substitute for military intervention or economic sanctions (Scheffer 2004, 355). Rather, Scheffer does vividly remember that the Clinton Administration had to “struggle every step of the way to sustain the ICTY’s relevance and importance in deliberations over US and UN policy in the Balkans” (Scheffer 2004, 354).

V. Rwanda – Historical Background and the Genocide of 1994

Over the past 150 years, the three ethnic groups – the Hutu, the Tutsi, and the Twa – have certainly coexisted in a tumultuous relationship. But one prominent Rwandan scholar, Linda Melvern, notes that “neither historians nor anthropologists can agree on the origins of the divisions that were so crucial to Rwanda’s terrible history” (Melvern 2006, 3). Ethnic divisions were maintained by Belgian colonizers (Melvern 2006, 5-6). Ethnicity led to intense fighting during a violent thirty-plus year period from the late 1950s until the early 1990s (Melvern 2006, 6-7). In fact, Melvern notes that “in the years between 1959 and 1994 the idea of genocide, although never officially recognized, became a part of life” (Melvern 2006, 8).

By 1990, the ethnic violence of the past thirty years had resulted in a massive influx of refugees living in neighboring countries. By one estimate, about 900,000 Rwandans lived in neighboring Uganda, Burundi, Zaire and Tanzania in 1990 (Melvern 2006, 14). An armed resistance group – the Rwandan Resistance Front (or RPF) – claimed to represent these refugees. This RPF political body worked in conjunction with a military body - the Rwandan Patriotic Army (or RPA). The RPA launched an invasion against Rwandan military forces in the fall of 1990. The RPA was led by Paul Kagame, a Tutsi who at one point was trained by the US Army Command and General Staff College in Fort Leavenworth, Kansas (Melvern 2006, 16).

Kagame's RPA guerilla attacks heightened tensions between the two ethnic groups to such an extent that Hutu elites began laying the groundwork for the complete annihilation of ethnic Tutsis. In the early part of 1991, Hutu President Habyarimana formed a militarized youth group known as the Interahamwe (Melvern 2006, 26). The Interahamwe were instrumental in the 1994 genocide. In fact, the Interahamwe worked in conjunction with a national army consisting of local militias that was also created by Hutu leadership in the fall of 1991 (Melvern 2006, 21).

Despite attacks and counterattacks between the RPA and President Habyarimana's forces during the spring of 1993, both sides reached a tentative peace agreement in Arusha, Tanzania on August 4, 1993. This agreement, known as the Arusha Accord, provided for a power-sharing agreement between the different ethnic groups, including a parliamentary system of government and the intermingling of the Hutu government and RPA troops (Melvern 2006, 59).

The Arusha Accords could not douse the ethnic tension. On October 21, 1993, the democratically elected and moderate Hutu President of neighboring Burundi was assassinated in an attempted coup. His assassination was immediately blamed on Tutsi extremists (Melvern 2006, 72). Revenge killings were carried out by Hutus and Tutsis, resulting in about 50,000 deaths and approximately 375,000 refugees. This disastrous situation in neighboring Burundi quickly spilled over to Rwanda in the final months of 1993.

Ironically, this violence was flaring up at precisely the same time that UN peacekeepers were first being deployed in Kigali, Rwanda. The military official in charge of the UN peacekeeping operation, Major-General Dallaire, landed one day after the Burundi President was assassinated (on October 22, 1993). His troops and equipment were not even in place for another

90 days (Melvern 2006, 73). The UN peacekeeping was woefully underequipped and underprepared. Malvern writes,

The force structure given to the peacekeepers, and in particular the equipment, bore no relationship to what was really needed. There were to be twenty-two armoured personnel carriers (APCs) and eight military helicopters to allow for a quick reaction ability. No helicopters arrived and only eight APCs were provided, of which five were serviceable. They did not arrive until March 1994 and they came direct from the UN mission in Mozambique without tools, spare parts or manuals. Most of the troops, some 942 soldiers, came from Bangladesh, but they had hardly any training (Melvern 2006, 74).

The UN peacekeeping force was completely unmatched to stop the ethnic hatred that was soon to explode in March of 1994.

Following the Burundi President's assassination in October of 1993, planning for the March 1994 genocide began. A newspaper article in a French Rwandan publication in December, for example, referred to one government official who denounced Hutu plans for the "final solution" of the Tutsi problem (Melvern 2006, 78). In January mob violence broke out in the capital city of Kigali. Rumors circulated that President Habyarimana's allies were storing weapons caches around the capital in preparation for a big event (Melvern 2006, 96-99). A prominent radio station blared its opposition to the Arusha Accords, and accused Tutsis of fomenting political discord (Melvern 2006, 103-104). In an internal memo at the end of February, 1994, the Major-General of the UN peacekeeping force wrote, "Time seems to be running out as any spark on the security side could have catastrophic consequences" (Melvern 2006, 115). This spark occurred when President Habyarimana's plane was shot down on April 6, 1994.

Within twenty four hours of his death, the Hutu-dominated government mobilized. Sensing the violence that was to come, "a vast majority of Tutsi fled their homes and sought

refuge in central gathering places – churches, schools, hospitals, athletic fields, stadiums, and other accessible places” (Kuperman 2000, 96). These groups ranged in size from the hundreds to the tens of thousands. However, the Hutu militias, along with the Interahamwe, had already prepared for the mass killing of Tutsi. Lists of potential Tutsi victims were in existence long before the April 6 plane crash. In fact, Hutu forces were so organized for this massive outpouring of violence, that “by late April, only three weeks after the president’s plane crash, almost all the large massacres were finished” (Kuperman 2000, 100). And the fighting occurred in waves. One Human Rights Watch report described the waves of attacks in this way:

Many killers used machetes or homemade weapons, but soldiers, national police and thousands of militia used firearms in launching attacks on churches, schools, hospitals, and other sites where thousands of Tutsi had gathered. A first wave of assailants, relatively few in number, killed thousands of civilians by using small arms, grenades and mortars. They left the survivors of such attacks terrorized and vulnerable to assault by a second wave of killers wielding machetes and homemade weapons (*Rwanda: Lessons Learned, Ten Years After the Genocide* 2004, 4).

The fighting continued until June, as RPF forces responded with their own counterattacks. The violence affected the entire nation, and resulted in a large exodus of refugees. The exact number of Tutsi deaths is unknown, but scholars estimate anywhere from 800,000 to 1,000,000 Tutsi were slaughtered during the three month period (Kuperman 2000, 95). By one account, only 150,000 Tutsi survivors could be identified by aid organizations (Kuperman 2000, 101).

V. A. *Creation of the ICTR*

With the passage of UN Security Council Resolution 955 on November 8, 1994, the UN created the ICTR. The Tribunal was given authority over all war crimes that occurred in and

around Rwanda from January 1, 1994 until December 31, 1994 (Ponte and Sudetic 2009, 69). In the words of the former Chief Prosecutor Del Ponte, the ICTR was intended to not only confront the atrocities that had been committed during spring and summer of 1994. The ICTR was also “a diplomatic mea culpa, an act of contrition by the world’s major powers to make amends for their gross failure to prevent or halt the massacres” (Ponte and Sudetic 2009, 69).

Foreshadowing the tension between the ICTR and RPF authorities, Rwanda was in fact the only member (although only a temporary member in 1994) to veto Security Council Resolution 955 (Akhavan 1996, 504-505). While the RPF-led authorities believed that an international criminal tribunal was necessary, they disagreed with the scope and the strength of the tribunal. They believed that the tribunal should have authority over the entire pre-war conflict, from October 1, 1990 until July 17, 1994 (Akhavan 1996, 505). They believed that the international tribunal should have the authority to sentence defendants to death (Akhavan 1996, 506-508). Finally, the RPF-led government believed that the tribunal should not be based in Arusha, Tanzania, but rather should be located within Rwanda (Akhavan 1996, 508). Over time, this RPF resistance to the ICTR continued to grow.

The ICTR was initially criticized because of its slow pace in indicting and bringing to trial suspected war criminals (Del Ponte 2009, 132-138). Also, the RPF government has criticized some of the ICTR’s legal outcomes. For example, in November of 1999, the RPF government formally suspended its cooperation with the Tribunal in protest of the acquittal of one of the former owners of a radio station broadcasting anti-Tutsi rhetoric in 1994 (Vokes 2002, 2). In a separate incident, the Rwandan public reacted negatively to poor treatment of two female victims who testified during an ICTR trial (Vokes 2002, 2). Another scholar argues that “the credibility and effectiveness of the ICTR have been seriously undermined by the nepotism

and corruption rampant within the institution...” (Ngoga 2009, 331). These structural problems have only exacerbated the tensions between the ICTR and the RPF-led authorities.

But perhaps the boldest challenge to a functioning relationship, the ICTR began investigating allegations of atrocities that RPF and RPA members committed in the aftermath of the 1994 genocide. These investigations had the potential to expose members of the RPF ruling class. When former Chief Prosecutor Del Ponte pushed the RPF government to grant the Tribunal access to witnesses and documents, the RPF government resisted. In fact, in her memoirs from the period, Del Ponte writes, “The Tutsi-dominated Rwandan government was effectively blackmailing the tribunal, sabotaging its trials of accused Hutu *genocidaires* in order to halt the Office of the Prosecutor’s Special Investigation of crimes allegedly committed by the Tutsi-dominated Rwandan Patriotic Front (RPF) in 1994” (Ponte and Sudetic 2009, 224). Despite her insistence that President Kagame’s administration cooperate, the international community refused to back her special investigation. On August 28, 2003, the UN Security Council passed UN Resolution 1503, officially stripping Prosecutor Carla Del Ponte of her authority over both the ICTY and the ICTR. This Resolution stymied any future attempts by the ICTR to ever again investigate or prosecute crimes committed by RPF members in 1994.

This enormously risky move by Prosecutor Del Ponte – the investigation of sitting members of the RPF – had the potential to destabilize the entire RPF government. In fact, the scholar Martin Ngoga made the following criticism: “Del Ponte’s initiative represented a misguided ICTR prosecutorial strategy and a lack of clarity in its mandate, diverting the ICTR from its primary objective of trying the leaders of genocide” (Ngoga 2009, 331). Although she was trying to determine the extent of RPF atrocities, the international community refused to support this politically risky move.

V. B. Domestic political dynamics in Rwanda

The RPF inherited a decimated country in July of 1994. One author describes the figures, “In human terms, the toll was horrendous: about 1.1 million dead, 2 million refugees abroad, over 1 million internally displaced, tens of thousands of deeply traumatized genocide survivors, and over half a million ‘old caseload’ (i.e. Tutsi) refugees returned in a chaotic fashion” (Reyntjens 2004, 178). The institutional destruction was equally problematic, as almost the entire public infrastructure (including the judiciary, the banking system, and the health care and education systems) needed to be rebuilt (Reyntjens 2004).

During this same period that the RPF was supposed to be putting the country back together, the RPF was also engaging in large-scale reprisal killings. Between April and September, 1994, the RPF murdered between 20,000 to 100,000 innocent Hutu civilians (Reyntjens 2004, 194). But many of these reprisal killings occurred during a period of immense chaos. Academic scholars, human rights workers, and in fact investigators from the ICTR have all had trouble documenting the precise scope of these reprisal killings.

Since the RPF reclaimed Kigali in the summer of 1994, the RPF has steadily consolidated its political power. As early as 1995, for example, the RPA harassed, intimidated, and even murdered Hutu elites (Reyntjens 2004, 180). These Hutu leaders that were removed or eliminated included teachers, clerics, judges, regional governors and local mayors (Reyntjens 2004, 180). Other prominent Hutu leaders – like the Prime Minister, the Interior Minister, and the Justice Minister – simply resigned.

Political consolidation occurred not outside of the Tutsi ranks (excluding those who were not ethnic Tutsis) but also within the RPF party itself. In 2000 and 2001, for instance, a large

number of RPF and RPA leaders who were critical of Kagame's insurgency in the Democratic Republic of Congo also resigned. These leaders included prominent members of parliament, bankers and financial leaders, the RPA Chief of Staff, and prominent members within the RPF political party. One human rights report describes the political consolidation in 2003 in the following way:

The Rwandan leadership argues, in effect, that the transformation of existing states of mind is the prerequisite for the restoration of full civil and political rights. Thus, for the past three years, the political parties have either been dismantled or forced to accept the consensus imposed by the RPF, the independent press has been silenced, and civil society forced to exist between repression and coercion. The RPF wields almost exclusive military, political and economic control and tolerates no criticism or challenge to its authority. The opposition has been forced into exile, and anti-establishment speeches relegated to secrecy. In the name of unity and national reconciliation, the various segments of Rwandan society are subjected to a paternalistic and authoritarian doctrine and cannot express themselves freely. (*Rwanda at the End of the Transition: A Necessary Political Liberalisation* 2002, 3)

In 2003, the RPF's consolidation of political authority was nearly complete. The Rwandan Parliament voted to ban the main opposition party, and Paul Kagame was elected President by a "massive 95 percent of the vote after a campaign marred by arrests, 'disappearances' and intimidation" (Reyntjens 2004, 186). Also in 2003, the RPF managed to pass without opposition a constitutional amendment limiting the freedoms of expression and association (Reyntjens 2006, 1108).

From 1994 until 2003, multi-ethnic leaders at the local and regional levels of government underwent a "Tutsification" transformation. For example, by 1996, "the majority of MPs, four of the six Supreme Court presiding judges, over 80 percent of mayors, most permanent secretaries and university teachers and students, almost the entire army command structure and intelligence services were Tutsi" (Reyntjens 2004, 188). By the mid 2000s, about 80 percent of

all local mayors and university staff and students were Tutsi, a remarkable figure considering about 85 percent of the total population was ethnic Hutu (Reyntjens 2004, 188).

The period of political transformation under Kagame has not just been marked by personal loyalty and ethnic homogeneity. This period of transformation has also been marked by intense violence. In 1997, for example, the RPA responded to a small insurgency in the northwest region of Rwanda by killing roughly six thousand Hutu civilians and returning refugees (*Rwanda: Ending the Silence* 1997, 3). The RPA has also been implicated in widespread violence in the eastern portion of the Democratic Republic of Congo (the RPA was implicated in 1998, for example, in the disappearance of about 200,000 Hutu refugees in the DRC - (Reyntjens 2006, 1111).

This systemic violence both inside and outside Rwanda has been conducted with near impunity. The RPF has received almost no international condemnation for its actions, enjoying and exploiting the “genocide credit.” Filip Reyntjens describes the RPF’s political strategy in this way: “the 1994 genocide has become an ideological weapon allowing the RPF to acquire and maintain victim status and, as a perceived form of compensation, to enjoy complete immunity” (Reyntjens 2004, 199). Reyntjens notes the similarity between the pre-genocide and post-genocide regimes in Rwanda. He writes, “Both manipulated ethnicity... [and] Both used large-scale violence to eliminate their opponents...” (Reyntjens 2006, 1113).

V. C. International political dynamics in Rwanda

The overwhelming response of the international community has been one of sympathy and complicity with the RPF. Collectively, the international community has been unwilling to

confront the RPF regime about its use of violence and intimidation against its political opponents.

The same UN Security Council that passed UN Resolution 955 (authorizing the creation of the ICTR) failed to prevent or even mitigate the first four weeks of the genocide in April, 1994. A prominent scholar on the Rwandan genocide, Linda Melvern, describes her review of UN Security Council minutes during the four-week period in April. Although the UN Security Council minutes are usual confidential, she gained access to some of the documents from the April meetings. Melvern points out that not once during that four week period in April did the Secretary General ever recommend a course of action for dealing with the crisis that was unfolding in Rwanda (Melvern 2004, 262). The Secretary General was in the best place to make such recommendations, as he had access to UN officials who were receiving cables from UN force commanders on the ground in Rwanda.

Melvorn speculates that the UN Security Council was embracing an assumption held by other members (Belgium, Britain and the US), “that only a massive and dramatic intervention would succeed in Rwanda – and this was out of the question” (Melvern 2004, 262). In fact, on April 29, 1994, when the New Zealand ambassador to the UN tried to persuade the Council to characterize the violence as genocide, the British, the Americans, and the Chinese were deeply opposed to using the word. Characterizing the conflict as genocide would automatically trigger UN member states to intervene. The UN Security Council members were adamantly opposed to any form of intervention.

In fact, the UN Security Council was so opposed to intervention that it actually recoiled from the idea. When UN Major-General Romeo Dallaire requested reinforcements for force of about 2500 troops, the Council voted on April 21, 1994 to withdraw ninety percent of the

peacekeeping force “for its own safety” (Campbell 2001, 78). Further, the peacekeeping force was only instructed to use deadly force to protect itself, but not Rwandans (Campbell 2001, 78). The UN Security Council was so paralyzed, in fact, that it allowed the representative (ambassador Jean-Damascene Bizimana) of the genocidal Hutu regime to participate in Security Council meetings (Waugh 2004, 96). At a defining moment, the UN Security Council failed to stop the genocide in Rwanda.

When the genocide erupted in early April, the United States was reeling from its own exploits overseas. In the summer of 1993, eighteen US soldiers were killed in intense fighting in Mogadishu, Somalia. The fallout from this Somalia mission contributed to a Presidential directive that was issued in May of 1994 (in the midst of the Rwandan genocide) where President Clinton required that a strict set of criteria be met before the United States would employ peacekeeping forces abroad (Waugh 2004, 90-91).

The US became one of Kagame’s first, and most lasting international partners. On July 15, 1994, for example, the Clinton Administration publicly declared that it no longer recognized the genocidal Hutu interim government (Waugh 2004, 97). The US was one of the first to recognize the new Government of National Unity (the transitional RPF government) on July 18, 1994 (Waugh 2004, 97). The US sent about 200 peacekeeping troops in the summer of 1994, provided military training to Rwandan troops at the end of 1995, and deployed special forces units to assist the RPF in stopping insurgents in September of 1997 (Waugh 2004, 97).

In January of 1995, the US pledged \$600 million in bilateral and multilateral aid to Rwanda (Reyntjens 2004, 179). This aid was unconditional, and did nothing to put any pressure on the RPF regime to stop the violence and intimidation against Hutus still remaining in Rwanda. International aid was provided to the new Rwanda leadership almost without conditions. Filip

Reyntjens describes the motivation behind this aid, “the RPF was squarely supported by ‘Friends of the New Rwanda’, in particular the US, the UK and the Netherlands. These countries were not burdened by much knowledge of Rwanda or the region, and, driven by acute guilt syndrome after the genocide, they reasoned in terms of ‘good guys’ and ‘bad guys’, the RPF naturally being the ‘good guys’” (Reyntjens 2004, 179).

Publicly, the US has also acknowledged its failure to recognize that genocide was occurring in Rwanda in April of 1994. In Addis Ababa in December of 1997, the US Ambassador to the UN (Madeleine Albright) apologized for the US’s failure to recognize that genocide was occurring (Waugh 2004, 117). Later, on March 25, 1998, at a layover in Kigali, President Clinton also issued a formal apology for the US’s failure “to recognize the events of 1994 for what they were, as acts of genocide” (Waugh 2004, 118).

France’s involvement in Rwanda is much more complicated. Without going into too much of the colonial history, France was actively supportive of Hutu President Habyarimana’s regime. For example, in October, 1990, when RPF forces attacked Hutu government forces, the French dropped 600 elite paratroopers into Kigali in order to fortify government forces (Wallis 2007, 25). To further consolidate its hold on the country from 1990 through 1994, “the French equipped the Rwandan government army with some of most modern weaponry available,” including attack helicopters, fighter planes, rocket-propelled grenades, assault rifles, landmines, and heavy artillery (Wallis 2007, 29-30).

During and immediately after the 1994 genocide, the French actively supported the interim Hutu government. For example, in the summer of 1994 the French launched the infamous Operation Turquoise whereby elite French forces were deployed in and around Kigali under the auspices of providing humanitarian relief. Some scholars, including Andrew Wallis in

his book Silent Accomplice, criticize the French Operation as intentionally providing safe zones to fleeing members of the interim government, Hutu troops, and members of the Interahamwe (Wallis 2007, 211). During this whole Operation, Wallis notes that “no arrests were made, no information on the killers handed over to the UN, no attempt to radio RTLM off the airwaves” (Wallis 2007, 211).

A Human Rights Watch report describes how the French shipped weapons to a Goma airport (in the DRC) in May, 1994. French forces claimed that they were disarming fleeing Hutu forces in July of 1994 only to return these weapons to DRC authorities (who in turn would pass these weapons back to the Hutus). French troops also flew key Hutu commanders to unidentified locations between July and September, 1994 (*Rearming With Impunity* 1995, 5). To date, France still insists that Kagame orchestrated the attacks that brought down Habyarimana’s plane in April of 1994, and therefore by implication insists that the Tutsi minority was responsible for the massive violence that resulted (Grunfeld and Huijboom 2007, 233-236).

But despite different individual approaches by prominent members of the international community, overwhelmingly the international community has been reluctant to press the RPF on suspected atrocities in 1994. Rwanda has been the recipient of major international aid. Concerning the promotion of justice projects, for example, donors contributed more than \$100 million for the training of judges, lawyers, and law enforcement (Uvin 2001, 182). Another \$500 million in aid has been spent on the ICTR. But international donors have been wary about pressing for political change. The scholar Peter Uvin describes this rationale by the international donor community’s rationale in the following way: “many donors accept the GoR’s [the RPF government] argument that the time is not ripe for democracy and elections, as it would be a recipe for violence and ethnic divisions. Hence there is little donor pressure on the GoR to

organize elections” (Uvin 2001, 179-180). And the contributions that are made by the international community are largely unconditional.

V. D. Implications of victim status

At the heart of this paper is the issue of why the international community has been reluctant to press the Rwandan government to cooperate with the ICTR. Certainly the “genocide credit” is a major reason. Public apologies by Ambassador Albright and President Clinton are evidence of the US’s conscientiousness about failing to stop the genocide.

The timing of this victim label is difficult to establish. For a three year period, from July of 1994 until well into 1997, there was still doubt about whether the RPF could govern the war-torn nation. During that period, as described above, the RPF ruled Rwanda with a coalition of other Hutu leaders. It was not until 1997 that large numbers of ethnic Hutus began withdrawing from government posts. This was the first wave of the RPF’s consolidation of power. This year – 1997 – probably also coincides with the period when the international community openly began applying that victim status to the RPF. In fact, it is 1997 and 1998 when Ambassador Albright and President Clinton formally and publicly apologize for the US’s unwillingness to intervene.

This “genocide credit” was not inevitable. In fact, the Tutsi leadership deliberately and repeatedly broadcast this victim status to the world. The Rwandan scholar Filip Reyntjens noted above that the RPF’s method of governing is hauntingly similar to Habyarimana’s method of exploiting ethnicity. Both Hutu and Tutsi governments exploited ethnicity, publicly claiming that their administrations were multiethnic and inclusive, while privately intimidating and physically threatening opposition leaders who resisted their ethnic agendas. This victim status,

then, is as much generated by Rwandan authorities as it is reinforced and perceived by the international community.

Certainly the international community has been reluctant to press the uncooperative RPF regime for reasons other than their victim status. One main reason is the fragility of the political system in Rwanda. This hesitancy was a product of the very legitimate possibility that the country could quickly descend into chaos and violence.

Also, the international community had very little leverage with which to encourage or promote changes. No comparable institution like the EU exists in Africa. The international community had no membership incentives to offer to the RPF. According to Filip Reyntjens, the international community was banking on the “transition paradigm” – the theory by Samuel Huntington where autocratic regimes eventually give way to democratic institutions (Reyntjens 2006, 1103).

Finally, there is one more dimension to the international community’s unwillingness to press an autocratic and repressive RPF government. From the start, the international community (with the exception of France) was reluctant to get involved in Rwanda’s internal affairs. In April of 1994, the Security Council refused to even discuss alternatives for intervening in the genocide that was quickly escalating. The United States, still stung by the events of the previous summer in Mogadishu, argued that only a massive intervention could bring the bloodshed to a halt. In fact, Under Secretary of Defense for Policy Walt Slocombe was blunter. He stated in an interview,

Nobody had any doubt as to what was going on in Rwanda, how awful the crisis was, the degree of the horror, and there certainly was not anybody saying that this is not happening, but there was the very legitimate issue of we cannot intervene and no matter how nice the idea may have sounded, we believed we could not run

around the world knocking off lousy governments (Cohen 2007, 145).

In other words, the United States had no vital interest at stake in Rwanda. This still remains the case, and helps to explain why the US has not kept peacekeeping troops in Rwanda (as the US currently still has troops in Bosnia), why the US has not pushed for electoral changes there, and why the US had no interest in coercing the RPF regime to cooperate with the ICTR.

This vital interest, argument, is weakened considerably by the existence of the largest peacekeeping force in the world, currently operating in neighboring Democratic Republic of Congo. The United Nations views the humanitarian crisis in the DRC with enough seriousness that it has committed a large number of troops and financial assistance to bringing peace to that war torn area. Also mentioned above, the RPF is very much involved in that ongoing conflict in the DRC.

John Rawls, in A Theory of Justice, once famously wrote, “Justice is the first virtue of social institutions” (Rawls 1999, 3). The international community pursued this “first virtue” when it devoted more than half a billion dollars towards the ICTR. But this attempt by the international community to achieve justice in Rwanda is only partly successful. The atrocities that took the lives of tens of thousands of civilian Hutus remains beyond the ICTR’s ability to investigate or to prosecute. Partly because of the genocidal credit, partly because of the absence of vital interests in the region, the international community (led by the US) has been unwilling to press an uncooperative Kagame administration. As a result, the ICTR’s discretion has been significantly constrained.

VI. Historical background and the Balkan wars of 1991-1995

The violence in the Balkans escalated as former member states of Yugoslavia declared independence. In the summer of 1991, Slovenia and Croatia declared independence, and a year later Bosnia-Herzegovina also declared its desire for national sovereignty. The events that led to the dissolution of Yugoslavia are beyond the scope of this paper. The violence that occurred in Kosovo in 1998 and 1999 is also beyond the scope this paper. Instead, I hope to illustrate how the historical events of the period of 1991-1995 shaped the international community's perception of Serbia as an initial aggressor and of Croatia as both a victim and an aggressor.

For many reasons, the Socialist Federal Republic of Yugoslavia (hereinafter SFRY) was falling apart in the late 1980s and early 1990s. Slovenia and Croatia desired independence, and in the fall of 1990 and spring of 1991 Croat Serbs and Croat police forces clashed in a number of minor skirmishes (Calic 2009, 121). Some of this ethnic tension was due to creation of an autonomous region called Krajina, established in the spring of 1991, and made up predominantly of ethnic Serbs. On June 25, 1991 Croatia (along with Slovenia) declared independence from SFRY.

The following month, massive fighting broke out. On July 26, 1991, "the first mass killing of Croatian civilians and soldiers by local Serb units happened in Kozibrod" (Calic 2009, 121). Fighting continued in other areas, including Slavonia, Banija, and Dalmatia. In September, the Yugoslav People's Army (hereinafter the JNA) launched a full scale attack in different portions of Croatia (Bjelajac and Zunec 2009, 244). Some of the fights that occurred during this "War of Croatia" became notorious symbols of Serbian aggression. The three month siege of Vukovar, beginning in August of 1991, involved gruesome attacks on wounded

prisoners at a farmhouse in Ovarca. Seven Serbian guards were charged and later convicted of killing 260 unarmed wounded soldiers there (Bjelajac and Zunec 2009, 249).

In another public debacle, JNA forces surrounded and attacked the city of Dubrovnik in October of 1991. The city had no real military value. Bjelajac and Zunec argue that the “the consequence of this attack was a public relations catastrophe and the loss of all credibility that the JNA might still have had” (Bjelajac and Zunec 2009, 249). Further, they assert that, “In the West, the JNA’s siege of Dubrovnik was one of the war’s most visible and inexplicable events. Why the JNA undertook the operation in the first place was difficult to discern, and the destruction of architecture and art in the historic city was impossible to justify” (Bjelajac and Zunec 2009, 250). Vukovar and Dubrovnik are just two examples of the violent excesses of the JNA Army during the War in Croatia.

In January of 1992, the UN negotiated a truce between Croatia and the remnants of SFRY. A United Nations Protection Force was deployed in Croatia to ensure that the hostilities did not reoccur. The fighting in Croatia in the summer and fall of 1991 resulted in a large displacement of refugees (about 550,000 by one count) which contributed to the instability of the region as a whole (Calic 2009, 121).

The dissolution of SFRY was not limited to the withdrawals by Slovenia and Croatia. In October of 1991, a great political rift occurred in Bosnia Herzegovina. Bosnian and Croat leaders voted for independence, while Bosnian Serbs voted to remain within SFRY. In early January, the Bosnian Serb contingency switched gears, and instead proclaimed their intention to create a new and autonomous Serbian enclave within Bosnia (which later was named Republika Srpska, or RS) (Calic 2009, 123). This internal political turmoil led to Bosnia-Herzegovina’s

independence (when it was formally recognized as a sovereign state by the European Community and the US) on April 6 and 7, 1992.

Widespread violence quickly ensued. Violence occurred throughout the summer and fall of 1992, in such diverse places as Prijedor, the Drivna Valley, Banja Luka, and Visegrad. Serbian armed forces moved quickly, and “within a couple of months [of April 1992], hundreds of thousands of people were on the move, and several tens of thousands were killed; a clear majority of the dead and displaced were Bosniaks” (Calic 2009, 125). Serbian backed forces separated the men from the women to ease the process of ethnic cleansing. Detention camps were set up across the country to house civilians and combatants alike. Entire villages were either destroyed or “cleansed” of their ethnic Bosnian or Croat populations (Calic 2009, 126-127).

Following Bosnia’s independence in the spring of 1992, Croat-backed forces also went on the offensive. In April of 1993, for example, Croatian forces “systematically destroyed the village of Ahmici” in a premeditated manner (Calic 2009, 127). Croatian forces attacked small villages and towns throughout Bosnia, on such a scale that Croatian forces “significantly reduced the Bosnia civilian population from those areas of the municipalities of Vitez, Busovaca, and Kiseljak...”(Calic 2009, 128).

The attempt to partition Bosnia was not accidental. In fact, the Serbian leadership had set its sights on Bosnia for years prior to the spring of 1992. Evidence presented during Slobodan Milosevic’s trial (before the ICTY) revealed that Belgrade financially supported the renegade regions of Republika Sprska (RS) and the Republic of the Serbian Krajina (RSK). Testimony during the trial of the former Krajina president revealed that the RSK could not exist without financial support from Belgrade (*Weighing the Evidence* 2006, 17). In fact, the RSK interior

minister estimated that about 90% of the RSK budget came from Belgrade (*Weighing the Evidence* 2006, 17). Similarly, a UN official who was familiar with the RS financial situation reported that the RS had virtually no functioning economy and that 99.6% of the RS budget came from Belgrade credits (*Weighing the Evidence* 2006, 18). Almost 95.6% of that budget was used to fund the military and the police (*Weighing the Evidence* 2006, 18).

Evidence from the trial also demonstrated that Belgrade effectively armed the RS and RKS territories. As early as 1991, the Yugoslav Army (JNA) was given instructions to transfer federal weapons to local militias (*Weighing the Evidence* 2006, 26). In fact, members of the JNA would actually deliver caches of weapons and ammunition to Serbs in Croatia and Bosnia (*Weighing the Evidence* 2006, 26). Military documents revealed that the JNA had distributed almost 52,000 weapons to the Bosnian Serbs by March, 1992 (*Weighing the Evidence* 2006, 26).

All of this reveals the clarity of Serbia's intentions. One author explains, "In the early stages of the conflict, Serb aims were threefold: to establish the borders of a new entity (whether a mini-Yugoslavia, a Great Serbia, or a Union of Serbian States); to establish territorial contiguity of Serb areas; and to make those areas ethnically pure" (Gow 1997, 308). The premeditation with which Serbia acted certainly became apparent to the international community by the time Slobodan Milosevic was defending himself before the ICTY in The Hague.

I argue throughout this paper that the international community perceives Croatia in a mixed manner. Croatia's status as a victim of overt Serbian aggression in the summer and fall of 1991 is balanced with Croatia's aggression in Bosnia in 1992 and 1993, and in Krajina in 1995. One author describes the ambiguity of the Croatian situation. He writes, "Like the Bosnian Government, their [the Croats] aim was to preserve the territorial integrity of Croatia; however,

in similar vein to the Serbs, there was also an inclination to seek new borders by seizing parts of Bosnia” (Gow 1997, 308).

This desire to benefit at the expense of a weaker and vulnerable Bosnian government is apparent from the events of 1992 and 1993. The intensification of Croatian violence in Bosnia is well documented by the historian Elizabeth Pond. She writes,

By the spring of 1993 the Croats, by now in tacit alliance with the Serbs, were battling openly with Bosniaks and, in areas they controlled, conducting the same kind of systematic ethnic cleansing as Serbs had perfected in Croat and Bosniak villages. They herded Bosniaks into concentration camps where they were beaten and starved. They shelled and destroyed the graceful sixteenth-century Mostar bridge built by Suleiman the Magnificent, just because it was a Bosniak symbol. Zagreb’s original ‘Homeland War’ of defense of Croatian territory against Serb attacks in 1991 thus became a war of conquest in Bosnia in 1993...” (Pond 2006, 128-129).

Croatia’s role as an aggressor was not limited to the bloodshed in Bosnia.

In May of 1995 and again in August of 1995, Croatia launched two massive counter-offensives (Operation Flash and Operation Storm) against Serbian civilians and military forces still remaining within Croatian boundaries. The principal aim of these two offensives was to eliminate, either permanently or through intimidation, the Serbian population residing in Krajina. By one estimate, between 150,000 and 300,000 Serbians were forced from their Krajina homes in 1995 (Calic 2009, 129).

In the summer of 1995 in Bosnia-Herzegovina, Bosnian Serbs were ruthlessly attacking civilian locations. In early July, for example, Bosnian Serbs overran a UN “safe haven” in Srebrenica, resulting in the murders of approximately 8,000 unarmed Muslim boys and men. Srebrenica was accurately described by one scholar as “a scene from hell, written on the darkest pages of human history,” and became the only instance where the ICTY declared that genocide

had occurred (Gow 1997, 273). If the reputation of Serbian leadership had not yet been sealed, Srebrenica firmly cemented Serbia's reputation as initial aggressor in the Yugoslav Wars of 1991-1995.

The terrible fighting in Bosnia and Croatia culminated in peace negotiations at an airbase in Dayton, Ohio. The Dayton Peace talks began on November 1, 1995, and lasted for about three weeks. Three parties were directly involved in the talks (Serbia, Bosnia-Herzegovina, and Croatia), while other actors were present (including the US and the ICTY). The Dayton Accords resulted in the creation of a single Bosnia state known as Bosnia and Herzegovina. Within this new state, which was to be governed by UN appointed officials (and run by an office called the Office of High Representative), two new entities would be forced to interact politically. These entities were the Federation of Bosnia-Herzegovina (comprising primarily Bosnian Muslims and Bosnian Croats) and the Republika Sprska (comprising primarily Bosnian Serbs). The political maneuvering at Dayton between the international community, the parties involved, and the ICTY will be discussed in more detail in the following sections.

VI. A. *Creation of the ICTY, and its operation in Serbia*

When the UN Security Council created the ICTY on May 25, 1993, the international community was in complete confusion about how to respond to the crisis unfolding in the Balkans. The United State had been reluctant to provide ground troops. NATO was still trying to find its post-cold war identity. The collapse of the Soviet Union only made Russia more difficult to predict.

The refusal of the international community to confront Serbian aggression in the early part of the 1991-1995 Yugoslav wars was an ominous prelude to the creation of the ICTY. An

international community that was unwilling to intervene with force would also be unlikely to press an uncooperative state to comply with Tribunal investigations. Michael Scharf and Paul Williams describe the UN's motives behind the creation of the ICTY as a "public relations device" in that the ICTY gave "breathing room for the other approaches of peace-building to succeed" (Scharf and Williams 2002, 91-92). Christopher Rudolph argued that the ICTY was "an economically and politically inexpensive means of responding to demands for international action..." (Rudolph 2001, 683). From Rudolph's perspective, "the regime is a success whether or not it succeeds in bringing justice or alleviating ethnic conflict" (Rudolph 2001, 683). This distrust behind the motivations of the international community continued during the Dayton Peace negotiations in the fall of 1995.

At Dayton, the ICTY was sidelined during the negotiations between the previously warring parties. Later to be indicted for genocide and other crimes against humanity, Serbian President Slobodan Milosevic in the fall of 1995 was free to negotiate the terms of the Serbian ceasefire. In fact, Milosevic himself claimed during his trial before the ICTY that the US negotiator Richard Holbrooke had promised him immunity from ICTY prosecution if he agreed to steer his country away from any further bloodshed.

In contrast to Milosevic's status, two other notorious war criminals – RS President Radovan Karadzic and General Ratko Mladic – had in fact been indicted by the ICTY on July 24, 1995 and again on November 16, 1995. Their indicted status prevented them from participating in the Dayton Accords. Negotiator Holbrooke, though, did secure promises (in person) from Karadzic and Mladic in September of 1995 that they would honor any future ceasefire agreement negotiated on their behalf. According to Scharf and Williams, this dual diplomacy "suited the short-term interests of the negotiators as they could exclude the two

individuals most likely to have a destabilizing impact on their efforts to achieve a negotiated settlement, while opening the opportunity to work with Milosevic as a legitimate partner in peace” (Scharf and Williams 2002, 159). A strong perception, then, was that the ICTY was just one of a number of politically expedient tools that diplomats could use to bring peace to the region.

It is no surprise, then, that the ICTY had difficulty surviving its first few years. For example, very little money was actually set aside for personnel or equipment. By one account, “The General Assembly had approved a bar-bones \$32 million budget that would cover only the cost of renting office space, rental and contracting of equipment and services, and salaries and expenses for a staff of 108” (Scharf and Williams 2002, 110). Once a Chief Prosecutor was selected (Richard Goldstone), and the Tribunal had a space in The Hague, Netherlands, the ICTY struggled with the proper strategy for investigating and prosecuting suspected war criminals. Under Goldstone’s direction, the Tribunal initially (for the first five years) focused on low-level perpetrators like foot soldiers, prison camp guards, and paramilitary soldiers (Scharf and Williams 2002, 114-115). Also frustrating, the ICTY had trouble gaining access to incriminating documentary evidence, especially with respect to Milosevic’s role in the Balkan conflicts (Scharf and Williams 2002, 116). For the first few years of its existence, the ICTY struggled to establish itself.

The power and the legitimacy of the ICTY has grown considerably since its inception. The Tribunal operates on an annual budget of roughly \$100 million, and has a staff of about 1,000 employees (Hagan and Levi 2005, 1500). Further, the Tribunal has evolved from a war crimes commission (precursor to the Tribunal) that was housed in Depaul Law School in

Chicago (operated by 50 part-time and volunteer attorneys and law students) to a historic institution that has contributed substantially to the development of international criminal law.

The Tribunal has in fact developed into a viable international institution. John Hagan and Richard Levi describe how the first three Chief Prosecutors (Goldstone, Arbour, and Del Ponte), built an institution that was able to strategically negotiate the political currents that it operated within. They describe how through the leadership of these Chief Prosecutors, the institution itself has become more autonomous (Hagan and Levi 2005, 1525).

One theme prevails. From its creation through its establishment, the ICTY is integrally tied to the international and domestic political circles in which it operates. The scholar Rachel Kerr points out that the ICTY should not be criticized for its political calculations (like not indicting Milosevic before the Dayton Peace negotiations), as the “ICTY could not stand wholly apart from politics” (Kerr 2004, 176) Throughout its tenure, the Tribunal has been forced to perform a delicate balancing act between administering international justice and being sensitive to international and domestic political realities.

VI. B. *Domestic political dynamics in Serbia*

Slobodan Milosevic and his SPS political party dominated domestic Serbian politics from 1987 until his removal from office in the fall of 2000 (Lamont 2010, 64). This domination drove Serbia’s strategy of opposition to international organizations in general, and the ICTY in particular. Milosevic’s obstinacy, combined with evidence presented during his trial before the ICTY for genocide, further cemented his country’s reputation as the initial aggressor in the Yugoslav wars of 1991 to 1995.

Milosevic gained prominence in the late 1980s by exploiting ethnic tensions. He used ethnic symbols and divisions to exacerbate regional tensions, as the Yugoslav Federation crumbled. He was able to stoke ethnic tensions through his tight control and manipulation of all major media outlets in Serbia. A Serbian journalist working in Belgrade at the time, Kemal Kurpasic, described how Milosevic allies were successful in forcing Belgrade TV to fire “all leading news editors” (Kurpasic 2003, 41). Other media executives critical of Milosevic’s authority were also forced from their jobs, including the director of the *Politika* publishing housing (Kurpasic 2003, 41). Milosevic’s crony media executives were nicknamed the “Gang of Four,” and through them Milosevic was able to control about 90 percent of all information available to Serbs (Kurpasic 2003, 42).

In this way, Milosevic was able to distort domestic opinion, creating a national narrative that cast Serbia as a victim of ethnic conflict in Croatia, Slovenia, and western powers like the US, NATO, and the EU. The Scholars Ramet and Matic describe the xenophobic environment when they write, “the entire popular culture, including folk concerts, popular fiction, sporting events, mass rallies, and of course the media, became obsessed with the idea that the Serbs had been wronged by the other peoples of Yugoslavia...” (Ramet and Matic 2007). Considering this domestic hostility to international institutions, it is no surprise that Serbia and Montenegro were the only two former Yugoslva Republics to oppose the creation of the ICTY in 1993 (Lamont 2010, 63).

President Kostunica, who succeeded Milosevic in 2000 continued with this posturing of victimhood. According to her memoirs of the time, former Chief Prosecutor Carla Del Ponte stated the following about the new Serbian President: “From Kostunica, there is little admission

that Serbs ever did anything untoward during the wars, and much insistence that Serbs were, and always will be victims and only victims” (Del Ponte 2009, 94-95).

Because Serbians were victims of international interference, President Kostunica saw nothing wrong with aligning himself with Milosevic’s inner circle. One example was his protection of two top Milosevic security officers, Chief of the General Staff Nebojsa Pavkovic, and the head of State Security, Rade Markovic (*Serbia's New Government: Turning from Europe* 2007). Liberal Serbian parties called for their removal. One report describes Kostunica’s response:

Since 2004 Kostunica has appointed a number of Milosevic-era figures to senior positions. These include Aleksandar Tijanic, minister of information under Milosevic, now director of State Television (RTS); Aleksandar Vucic of the SRS, also minister of information under Milosevic, now on the board that oversees RTS programming; Vida Petrovic-Skero, noted for her vocal opposition to the late Premier Djindjic’s lustration of Milosevic-era judges, now president of the Supreme Court; Milovan Bozovic, subject of two criminal proceedings and suspended as a municipal prosecutor for a year, now Belgrade district prosecutor; Ratko Zecevic, SPS party functionary and former municipal prosecutor, now on the High Judicial Council (*Serbia's New Government: Turning from Europe* 2007, 3-4).

These appointments are blatant signs that the Serbian leadership during the early years of the 2000s that Serbia had no intention of moving beyond the policies of the Milosevic years.

A culture of criminality also pervaded Serbian politics. Milosevic’s wife, Mirjana Markovic, established her own political party (the Yugoslav United Left) which was “essentially a vehicle for the facilitation of criminal activities that ranged from embezzlement to murder (Lamont 2010, 71). An infamous paramilitary figure, Zeljko Raznjatovic, established the Party of Serbian Unity. This party was also connected to organized crime. In fact, organized crime became so deeply embedded in the social fabric of Serbia that the country witnessed the

assassinations of leading politicians like former Serbian President Ivan Stambolic, western-leaning Prime Minister Zoran Dindic, and opposition leader Vuk Draskovic became commonplace (Lamont 2010, 71).

Serbian politicians promoted more than just violence and denial. They also actively obstructed ongoing criminal prosecutions. During the first few months of 2005, for example, human rights groups announced that Serb police and State Security forces conducted mass cremations of Kosovo Albanians in a factory furnace in Surdulica in 1999 (*Serbia: Spinning its Wheels, Crisis Group Briefing* 2005). Government officials attempted to cover up the affair by intimidating witnesses. Even worse, the Justice Minister tried to distract public attention by commenting on war crimes committed against Serbs in Croatia (*Serbia: Spinning its Wheels, Crisis Group Briefing* 2005, 3).

Another example is the poor Serbian investigation regarding the mass graves in Batajnica. In this suburb of Belgrade, 710 bodies were discovered buried in a mass grave at a police training facility (*Serbia: Spinning its Wheels, Crisis Group Briefing* 2005, 3). Years later, no suspects have been developed. Worse, a Serbian war crimes prosecutor stated that the “there is resistance in the MUP (Ministry of Internal Affairs) to policemen going out on their own and finding perpetrators” (*Serbia: Spinning its Wheels, Crisis Group Briefing* 2005).

The Milosevic trial cemented in the eyes of the international community Serbia’s role as initial aggressor of the Yugoslav wars. An important piece of evidence during the Milosevic trial was the former US Secretary of State’s careful notes of his meetings with Milosevic and his staff in the early 1990s. The notes were introduced during the trial to demonstrate Milosevic’s leading role in the violence that was erupting in Croatia and Bosnia-Herzegovina (Armatta 2010, 194-195). This and a trove of other evidence “dispelled the uncertainty surrounding a decade of

crimes to reveal the pivotal role played by Milosevic and Serbia in fomenting and supporting war in Yugoslavia” (Armatta 2010, 433).

Concerning civil society and the ICTY, there has been almost no public support for war crimes investigations in Serbia. Part of this is due to the manipulation of the media, and manipulation for political gain. For example, as late as 2005 almost 81 percent of respondents of a poll believed that Serbs were the most victimized ethnic group of the Yugoslav wars (Lamont 2010, 73). Massive resistance to the ICTY was also due to the wide scope of ICTY indictments in Serbia. As opposed to the indictments of a small number of military officials in Croatia, Serbians who were indicted included a former president, government ministers, military elite, opposition leaders, and other members of the political elite (Lamont 2010, 69).

Despite the political volatility, the European Union did make some progress in coercing reluctant Serbian leaders to cooperate with the ICTY. The strategy was to expressly link EU membership to cooperation with the ICTY. This issue linkage strategy, however, was less successful in Serbia than it was in Croatia. Serbian politicians were divided over the benefits of integrating with the European Union. Over time, though, the EU and the US had some success in promoting pro-western political parties. By 2005, Serbia was cooperating on a basic level with the ICTY (Lamont 2010, 83). On July 21, 2008, the international community witnessed the most recent and dramatic act of cooperation with the ICTY when Serbia arrested and extradited the fugitive Radovan Karadzic.

This method of issue linkage proved to be the only moderately successful method of coercing Serbia cooperation with the ICTY. The international community’s support of the ICTY was therefore absolutely critical. In fact, as a result of this issue linkage of EU membership with ICTY cooperation, only two indicted ICTY suspects remained at large as of January 1, 2009

(Goran Hadzic and Ratko Mladic) (Lamont 2010, xi). Without international pressure, the ICTY would likely have been unable to gain custody over any of their leading Serbian war criminals. Certainly Serbia's resistance combined with its firm reputation as the orchestrator of the Yugoslav conflicts of the early 1990s motivated the international community to coerce Serbian cooperation with the ICTY.

VI. C. *International political dynamics in Serbia*

The European Union's response to the unfolding crisis in the Balkans in the early 1990s was emblematic of the international community as a whole. According to Paul Williams and Michael Scharf, the EU's approach was "characterized by deep internal rivalries, a general lack of competence necessary to handle the Yugoslav crisis, and a pull toward moral equivalence" (Scharf and Williams 2002, 80). In the summer of 1991, the EU was attempting to adopt a more uniform continental approach concerning foreign policy and security matters. In fact, around this time, the EU was particularly sensitive to any interference by the United States into European affairs (Scharf and Williams 2002, 80).

Specifically, the EU strategy was to support the partition of Croatia and Bosnia, but to refrain from militarily becoming engaged in the region (beyond traditional peacekeeping operations) (Scharf and Williams 2002, 80). Further, the EU hoped that it could induce the three major parties (Croatia, Bosnia-Herzegovina, and Serbia) through financial incentives. In fact, at one point the EU offered a one billion dollar aid package to the region (Scharf and Williams 2002, 81). However, the EU itself remained divided internally about how to respond to the growing crisis. Germany broke ranks with the rest of the EU, and was the first to publicly recognize Croatia as a sovereign state.

As the European Union failed to address the pressing humanitarian crisis, the United Nations was forced into taking a more active role in the region. In fact, it was the UN that created the ICTY, that deployed a large number of UN peacekeepers, and that also put together financial packages with the hope of curbing Serbian aggression (Scharf and Williams 2002, 82). The UN Secretary General during this crisis, Boutros Boutros-Ghali, had a significant influence on UN policy in the Balkans.

Regarding the ICTY, Boutros-Ghali favored peace over justice, preferring that some resolution be reached at Dayton, even if the resolution was not equitable. Scharf and Williams reprint a conversation that the Secretary General had with the *Washington Times* war correspondent, Georgie Anne Geyer. According to the Geyer, Boutros-Ghali described his views on Dayton in the following way: “the result of the negotiations may not be equity, but it may be peace. Then you have a problem: what is more important, peace or peace at the expense of certain principles of equity? My theory is that what happens in a war is so terrible that peace is better, even if it is not a just peace” (Scharf and Williams 2002, 82).

Finally, Boutros-Ghali was averse to the use of force. Even after the UN Security Council approved the use of force in Bosnia-Herzegovina, the UN Secretary General attempted to limit the circumstances under which international troops (UNPROFOR) could use force (Scharf and Williams 2002, 82-83). As a result, the UN did very little to check Serbian aggression during the 1991-1995 period. One of the most notorious events of the Balkan wars was the UN’s failure to protect innocent Bosnian civilians at Srebrenica.

The United States was equally unwilling to militarily confront Serbian aggression. In fact, during the early stages of the violence, the US was unwilling to even devote basic resources to determine what was happening in the Balkans. Scharf and Williams again explain, “Despite a

number of public statements condemning the atrocities in the former Yugoslavia [in the summer of 1991], the State Department devoted almost no resources to the actual investigation of crimes and no resources to determining whether the atrocities were part of an attempted genocide” (Scharf and Williams 2002, 65).

In the summer and fall of 1992, following the US’s massive invasion of Iraq in Desert Storm, the Bush administration was reluctant to become militarily engaged in other conflicts. The killing of Army Rangers in Mogadishu, Somalia in the summer of 1993 only added to the Clinton Administration’s reluctance to be pulled into conflicts abroad. The Clinton Administration therefore tried to publicly downplay the violence that was erupting in Yugoslavia. As late as May of 1993, Secretary of State Warren Christopher publicly claimed that the Yugoslav violence was not orchestrated by Serbian aggression, but was the result of self-interested pursuits by all parties in the region. The Secretary also claimed that genocide was not occurring in the region. This was in spite of internal State Department memorandums describing how Bosnian Muslims were the victims of attempted genocide (Scharf and Williams 2002, 66).

During an interview with scholars, Secretary of State Christopher also shared his acceptance of the ancient hatred propaganda that Milosevic was peddling. Christopher stated during that interview, “the hatred between all three groups, the Bosnians and the Serbs and the Croats, is almost unbelievable. It’s almost terrifying, and it’s centuries old...” (Zupanov, Sekulic, and Sporer 1995, 401).⁵ Only slowly did the US accept that Serbia was in fact the instigator, and only reluctantly did the US accept a central role in resolving the conflict. This central role included providing financial and logistical support to the newly created ICTY. The US also organized and participated in the Dayton Peace accords in the fall of 1995.

⁵ This statement was recorded during an interview that Secretary State participated in on March 28, 1993, with the authors.

VI. D. *Implications of Serbia's aggressor status*

Time and again, political considerations trumped moral or legal considerations in the Balkans. For example, the international community was originally reluctant to militarily confront Serbian forces. In fact, the US State Department publicly obscured what was happening there. The US was reluctant to be dragged into the conflict. Even after the international community became convinced (in 1995) that air strikes and ground troops were necessary in Bosnia, the international community favored peace over justice. The position is understandable, as the international community hoped that the Dayton Peace Accords would stop the fighting in the Balkans. However, the violence in Kosovo in 1998 and 1999 proved that only direct confrontation with Serbian leadership would result in lasting peace.

Serbia's status as initial aggressor was probably firmly set in 1998 and 1999 when Serbia violently interfered in Kosovo. During this same time-frame of 1998 and 1999, the international community became much more supportive of the ICTY. For example, the new Labor Party in the United Kingdom in 1996 (led by Prime Minister Tony Blair) "took seriously the role and value of the Yugoslav Tribunal", and encouraged the ICTY to be more active with its prosecutions (Scharf and Williams 2002, 73). Because of Serbia's repeatedly failures to abide by its international agreements, the international community gave the ICTY free reign to investigate and prosecute Serbian leaders. The ICTY's discretion was practically unrestrained.

Serbia's domestic strategy of denying that it instigated the fighting in Bosnia and Croatia probably further eroded international support. While scoring political points at home, the argument that Serbia was the victim of Croatian and Bosnia-Muslim aggression was distasteful

abroad. This strategy made the ICTY's work easier, as the trials publicly revealed Serbia's leading role in the events of 1991 to 1995.

Another point here is the essential role that conditionality played in securing Serbian cooperation with the ICTY. The NATO airstrikes in 1999 left Serbia, and in particular Belgrade, in shambles. By 1999, Serbia had also isolated itself diplomatically. The leverage that EU and US financial support provided to the ICTY was invaluable. The ICTY could rely on the threat of withholding this financial support if Serbia continued with its policy of resistance. This linkage of financial support with ICTY cooperation proved decisive. Without this international support, the ICTY would certainly have failed to secure the arrests and transfers of Serbian war criminals.

VII. A. *Operation of the ICTY in Croatia*

The struggle between law and politics is also evident in the ICTY's interactions with Croatian authorities. The Croatian authorities who were generally supportive of the Tribunal during its initial investigations of Serbian aggression became, over time, more resistant to the ICTY's investigation into Croatian wrongdoing. This section briefly explores the evolution of ICTY Croatian prosecutions, while the latter two sections focus more deeply on the interactions between the Tribunal and the domestic and international audiences in which the Tribunal relied on for support.

Just like in Serbia, the ICTY faced stiff political resistance in Croatia during a period from 1996-1999. This period was marked by the subversion of domestic law, and the exercise of power concentrated in the hands of President Franjo Tudjman and his close advisers. The scholar Christopher Lamont describes the transferring of indicted war criminals to the ICTY (during this period) as "arbitrary" and on an "ad hoc basis" (Lamont 2010, 36). Although the

Tudjman administration did transfer 17 indicted Bosnian Croats to the ICTY, these were low-level officials “who lacked close political connections with the governing party or the president” (Lamont 2010, 36).

With Tudjman’s death in December of 1999, followed by his party’s (the HDZ) defeat in parliamentary elections in January of 2000 and presidential elections in February, 2000, the success of ICTY investigations and prosecutions in Croatia changed. Ivica Racan was selected as prime minister of a coalition majority in the Croatian parliament in January. Stjepan Mesic was elected president in February of 2000. Both Racan and Mesic successfully campaigned on developing closer ties with Europe and the United States. This desire to integrate and to partner with the west, over time resulted in greater cooperation with the ICTY.

But this increased cooperation was hard fought. For instance, in February of 2001 a domestic Croatian court indicted the popular General Norac. The court alleged that he killed approximately 40 civilian Serbs in October of 1991 (Peskin and Boduszynski 2003, 1126). The domestic indictment caused a massive public stir, resulting in a protest of about 150,000 people. General Norac, however, refused to submit to the domestic court’s jurisdiction unless he received assurances that he would not be turned over to the ICTY. In a sign of the ICTY’s political acuity, Prosecutor Carla Del Ponte agreed to defer to the Croatian judiciary, thereby avoiding a public confrontation with a popular wartime hero (Peskin and Boduszynski 2003, 1127).

In July of 2001, Chief Prosecutor Del Ponte was again engaging in political gamesmanship when she met privately with Croatian leaders. She discussed the sealed indictments and transfers of two high-ranking Croatian generals – General Rahim Ademi and General Ante Gotovina. The day after her visit, Prime Minister Racan publicly agreed to arrest

the two generals, and issued a strongly worded statement in support of his administration's decision to cooperate with the ICTY (Peskin and Boduszynski 2003, 1129). Racan received international (including the EU and the US) praise for his cooperation. The turbulence of his announcement, however, was reflected by the fact that four members of cabinet immediately resigned. Further, Racan failed to move quickly enough to secure the arrests of these two generals (Peskin and Boduszynski 2003, 1130).

Turbulence with the ICTY continued into the fall months of 2002. In late September, 2002, the ICTY unsealed an indictment charging an 83 year old former army chief of staff, Janko Bobetko. The ICTY charged Bobetko with atrocities that were committed against Serbs in 1993. The Prime Minister reacted much differently to the Bobetko indictment than he did to the Ademi and Gotovina indictments. His administration opposed the ICTY's efforts to have Bobetko arrested and transferred, and instead pursued a policy of delay (Peskin and Boduszynski 2003, 1132). The ICTY found itself in the awkward position of securing the arrest of an infirm and celebrated war hero. Just like it did during the Norac controversy, the ICTY was sensitive to the political environment, and relented. Early in 2003, the Tribunal announced that General Bobetko was medically unfit to stand trial (Peskin and Boduszynski 2003, 1132).

Relations between the ICTY and Croatian authorities improved significantly in November of 2003 with the election of Prime Minister Ivo Sanander. He favored a dramatic improvement in his country's interaction with the European Union and the United States. Cooperation with the ICTY was one substantial way in which he could he improve these relationships. Immediately after taking office, he contacted Chief Prosecutor Carla Del Ponte to explore ways in which his administration could better cooperate with the ICTY (Lamont 2010, 41). Following this conversation, he enlisted foreign intelligence services to help his

administration in locating and arresting the fugitive former general, Ante Gotovina. In 2004, he also facilitated the smooth surrenders of Croatian Generals Cermak and Markac. General Gotovina was arrested in Spain in December of 2005 (Lamont 2010, 41).

General Gotovina is on trial along with two other Croatian Generals, and is accused of planning and carrying out the removal of Serbs from Croatian controlled Krajina (Sadovic and Barbir-Mladinovic 2008). The start of the trial (in March of 2008) was broadcast live on Croatian television, and was covered in a Croatian leading newspaper (Sadovic and Barbir-Mladinovic 2008). Although General Gotovina still remains a popular figure, Croatia's cooperation with the ICTY is undeniable. In fact, Lamont notes that "by December of 2005, the ICTY secured the transfer of all Croatian citizens indicted by the Tribunal for serious violations of International Humanitarian Law with the exception of Janko Bobetko, who died shortly after ICTY doctors confirmed the defendant's ill health in 2003" (Lamont 2010, 31). The extent to which Croatian leadership contributed to this cooperation, and the methods by which the international community successfully coerced Croatia into compliance, are explored in the next two sections.

VII. B. *Domestic political dynamics in Croatia*

During and after the Yugoslav Wars of 1991-1995, Croatian politicians adeptly managed the views of international and domestic audiences. As described above, certainly Croatia was a victim of Serbia aggression in 1991, when Serbian forces committed atrocities in Vukovar and Dubrovnik, for example. Further, unrestrained Serbian aggression was on display when indiscriminate artillery poured over Sarajevo in 1993, or when innocent men and boys were executed in Srebrenica in July of 1995.

The scholar Larence Freedman argues that Croatian leaders exploited these atrocities. Freedman writes, “Croatia sought international intervention. To do this it depended greatly on its victim status. In this it was helped by the presence of the international media, who soon picked up on images of distressed people being shelled out of their homes (Freedman 2000, 343). Freedman argues that Serbia’s siege of an undefended Vukovar benefited Croatia’s image as a victim. Further, the international press was reluctant to present the Bosnian conflict as anything different than a continuation of Serbian aggression. In other words, Freedman argues that the international press was reluctant to criticize Bosnian Croats’ destruction of Mostar. Rather than viewing the violence in a nuanced manner, “the net effect of the Croatian and Bosnian wars was to leave the Serbs stigmatized” (Freedman 2000, 344). From this perspective, Croatian leadership benefited from favorable international press.

Throughout the 1990s, Croatian leaders also manufactured positive domestic press. Similar to the control that Milosevic exercised over the Serbian media, Croatian President Franjo Tudjman exercised strict control over media outlets. The journalist Kemal Kurspahic notes the following: “Using the Serbian threat, Tudjman made all major Croatian media – above all radio, television, and the Vjesnik publishing company – a disciplined ‘frontline of the country’s defense’ in which there was no place for questioning party or presidential wisdom” (Kurspahic 2003, 68). In the early 1990s, working through the HDZ Party, Tudjman and his loyalists reintroduced stigmatizing symbols like the currency of the pro-Nazi Croatian regime (the Kuna) and the traditional Croatian flag used by the Ustaha (Kurspahic 2003, 68). In this way, Tudjman successfully manufactured a national perception of Croats versus Serbs. This victimhood stereotype was converted in the late 1990s and beyond into a perception of Croatians versus all

outsiders (including the ICTY). Overcoming this stereotype became a major challenge for the ICTY.

Franjo Tudjman and his HDZ party dominated Croatian politics in the 1990s. The HDZ gained a parliamentary majority in the election of 1990, and quickly consolidated its power. After Croatia declared independence in 1991, HDZ rule over Croatian politics became increasingly authoritarian (Lamont 2010, 33). Tudjman and the HDZ party wielded authority over most of the major Croatian institutions, including the judiciary. By the mid 1990s, the Office of the Presidency had stripped the judiciary of most of its judicial autonomy (Lamont 2010, 35).

This concentration of power had dramatic effects on the way in which Croatia interacted with the ICTY. The ICTY's extradition requests for indicted Croatian war criminals became a process by which Croatian officials bargained with the ICTY and the international community for incentives in exchange for cooperation (Lamont 2010, 37). Some indicted war criminals would be extradited; other extradition requests would be ignored or delayed. Lamont argues that this ad hoc process of cooperating with the ICTY had long term effects in that "the transfer of individuals indicted by the ICTY had become increasingly perceived as a political rather than judicial process" (Lamont 2010, 37).

A parallel HDZ strategy during the 1990s was to gain greater assistance and acceptance by the international community. Evidence of this is the scores of human rights covenants that the HDZ incorporated into domestic law, including the codification of many crimes that the ICTY prosecuted internationally (Lamont 2010, 34). Further, "in 1998 the Croatian government began to voluntarily harmonize new legislation with existing EU law (Lamont 2010, 34). Because of a general consensus for joining the west, growing international acceptance translated

into domestic legitimacy. This pursuit of international acceptance became a political strategy pursued by the HDZ and others since Croatia gained its independence.

After Tudjman's death in December of 1999 and the election of a six party coalition government in January of 2000, the governing coalition aggressively pursued European Union integration. The EU's conditioning of integration with cooperation (with the ICTY) was ambiguous for roughly a four year period from 2001-2005, but became crystallized in 2005 following the international community's frustration over General Ante Gotovina's prolonged disappearance (Lamont 2010, 52).

During this four-year period, Croatian radicals attempted to appeal to the broader public's feeling of victimization. Croatian radicals referred to the 1991-1995 conflict as the "Homeland War" and attempted to glorify Croatian generals who defended the Croatian motherland. Civil society scorned the idea of cooperating with the ICTY. But Croatian leaders like Prime Minister Racan, President Mesic, and later Prime Minister Sanader successfully tempered these attempts to glorify and nationalize the conflicts of 1991-1995 period.

One example of this successful tempering of local fury was the arrest on February 11, 2001 of General Norac. About 150,000 civilians marched in protest of his arrest in the city of Split. The government responded swiftly. Prime Minister Racan announced to the Croatian Parliament that his administration was not going to give in to right-wing extremism, and that the crisis risked isolating Croatia internationally (Subotic 2009, 92-93).

Another example of this cooperation with the ICTY was when the Tribunal indicted Croatian Generals Rahmi Ademi and Ante Gotovina in July of 2001. These Generals were widely popular, primarily because of their roles in Operation Storm in 1995 when Croatian military forced Serbs from the country. Prime Minister Racan's coalition government was

unraveling, and one of the coalition partners, the HSLS, disintegrated when half of the party's members resigned in protest over Racan's decision to arrest the Generals. However, Racan held his tenuous coalition together, and continued in his resolve to arrest the Generals. In a show of solidarity for Prime Minister Racan, President Mesic issued the following statement, "The Croatian nation should not and will not be a hostage to those who bloodied their hands, bringing shame upon Croatia's name..." (Subotic 2009, 95).

In fact, President Mesic is recognized as a central figure in Croatia's transformation from a country of extreme nationalism to a country of increased tolerance and development. Two scholars describe Mesic's role in this way, "Under Mesic, the Croatian presidency has undergone a major transformation, and the Constitution has been changed to shift power away from the president to the Parliament. During his term, Mesic has evolved from being a popular politician into serving as a crucial balancing figure in Croatian politics...."(Ramet and Matic 2007, 50). Mesic is just one of a handful of Croatian politicians who have successfully balanced the difficult tensions between nationalism and ICTY cooperation.

Another leader, Prime Minister Ivo Sanader, who was elected in November, 2003, defied many people's expectations. Sanader was a member of the HDZ, and himself was considered one of the most vocalist nationalists in the HDZ Party. Surprisingly, he proved to be very adept at sidestepping nationalist support for indicted Croatian Generals. His public strategy was to show support for the indicted Croatians generals. On January 10, 2006, for example, Sanader met with defense lawyers of recently indicted Croatian generals to discuss a "joint strategy" for their defense before the ICTY (Subotic 2009, 99). Subotic explains, "The government also hired respected Croatian lawyers and historians to work together on the defense project, which main purpose was to refute ICTY prosecution's claim that 1995 Operation Storm was a 'joint state

criminal enterprise...” (Subotic 2009, 99). Sanader’s private strategy, though, was to continue working with the ICTY to bring war criminals to justice.

Despite the extraordinary politicization of the “Homeland War” during the 1990s and the early part of the 2000s, Croatia has quietly and consistently cooperated with the ICTY. As mentioned in an earlier section, Croatia has extradited every Croatian war criminal that the ICTY has indicted (with the exception of General Bobetko who died under house arrest). This cooperation has also assisted in Croatia’s ability to shape its image as part-victim of the wars of 1991-1995.

VII. C. *International political dynamics in Croatia*

Just as in Rwanda, the United States reluctance to get involved in the deteriorating Yugoslav crisis in 1990 and 1991 only worsened the crisis. Without exploring US foreign policy in depth here, there was a generally reluctance on the part of the international community in general, and the US in particular to commit ground troops to the region (Gow 1997, 303-304). The Serbian-backed forces in Croatia and in Bosnia acted with growing impunity. The peacekeeping troops that were deployed in the region were spread too thin. The 15,000 UN peacekeeping force, for example, that was deployed in Croatia in February, 1992 (with the task of preventing the outbreak of further violence there) failed to prevent further bloodshed. Operations Flash and Storm (described above) resulted in widespread killing and exodus of Croat-Serbs previously living in Krajina. A separate UN peacekeeping contingency, this one deployed in and around Srebrenica, resulted in international shame when the force failed to protect Bosnian Muslims who had sought refuge in Srebrenica “safe havens”. In fact, Srebrenica became the scene of the worst atrocities of the entire war.

Rather than commit its own troops, the US demonstrated a willingness to support one side over another. The US heavily favored Croatia. In fact, the US viewed Croatia as a proxy for which to strike back at Serbian aggression. When Croatia first launched its offensive military operations in the spring of 1995, a US Foreign Service Officer described Croatia as “our junkyard dog” and of the need to “control them” (Holbrooke 1999, 73). Military professionals working for a private firm based in Washington, D.C. trained special Croatian forces under a US State Department license (Campbell 2001, 67). According to Christopher Lamont, this “US assistance proved vital in altering the balance of power on the ground between Croatian and Serb forces in the months immediately preceding the Dayton Peace Agreement” (Lamont 2010, 49).

The United States’ assistance came at a cost, though. As early as February, 1996 the US Assistant Secretary of State quietly informed the Tudjman government that future support was conditioned on cooperation with the ICTY (Lamont 2010, 50). The Croatian foreign Minister at the time, Mate Granic, described this relationship with the US (and its condition of cooperating with the ICTY) as a “coercive model” (Lamont 2010, 50). This conditioning of economic or political support on cooperation with the ICTY is a clear example of why international support is so important. Without this coercion, Croatia would likely have been much less receptive to arresting and extraditing even low-level Bosnia-Croats in 1996 and 1997.

The European Union was also generally ambivalent about how actively it should intervene in the Balkans. The EU also provided economic aid and peacekeeping troops to the region, but it was not unified on how to stop the fighting. In fact, as a result of Croatia’s Operation Storm in 1995, the European Union froze an EU Cooperation Agreement that it was attempting to entice Croatia with as early as 1994. The EU’s priority during much of the 1990s was the stabilization of the Balkans, not the development of the ICTY (Lamont 2010, 52). The

US was the dominant actor in promoting the development of the ICTY, and the EU for much of the 1990s viewed the US's intentions regarding the ICTY with suspicion⁶ (Lamont 2010, 51).

The EU, though, benefited from the Croatian public's widespread desire to integrate. By one estimate in 2003, approximately 80 percent of Croats favored EU membership (Pond 2006, 133). The EU used this desire to its advantage. During the General Bobetko crisis, for example, when Croatia was refusing to extradite the 83 year old retired general, Prime Minister Racan was generally dismissive of his administration's requirement to cooperate with the ICTY at all.

“Absent the clear threat of sanction, which compelled Croatian cooperation with the ICTY in 1996 and 1997, Croatian elites began to rhetorically defend Croats indicted for war crimes for domestic political gain” (Lamont 2010, 53). Following General Bobetko's death in April, 2003, the EU, led by the United Kingdom, became much more explicit in its demands for Croatian cooperation with the ICTY. In fact, April of 2003 is the rough point at which the EU began expressly conditioning economic aid and EU integration with ICTY cooperation (Lamont 2010, 53).

Conditioning economic aid and EU membership benefits on cooperation with the ICTY proved pivotal. This was not available to the ICTR in Rwanda. It was largely this conditional arrangement that supported the ICTY's broad investigative and prosecutorial mandate of confronting all war criminals who committed gross violations of international humanitarian law. The ICTR was limited in its ability to investigate only the political and military losers – the Hutus.

⁶ According to Christopher Lamont, EU member states were “highly skeptical” of the Tribunal; and this skepticism only increased when the US donated 22 investigative specialists to the investigative arm of the ICTY. European Union members viewed this as an attempt to infiltrate the ICTY with CIA specialists (Lamont 2010, 51-52).

Also important here, the international community viewed Croatia's role in the violence of 1991-1995 ambiguously. Victor Peskin and Mieczyslaw Boduszynski vividly described the issue of Croatian identity. They write,

In contrast to Serbia, which was the target of NATO intervention and is widely regarded as the main culprit in the Balkan wars, there is far less global awareness of the crimes committed by Croatia's armed forces. World headlines have made the plight of Bosnian Muslims and the crimes of Bosnian Serbs an indelible part of the late twentieth century. Had they lived, former president Tudjman and his defence minister Gojko Susak would probably have faced indictments, and Croatia's role both in Bosnia and in the Homeland War would have received far greater international attention than it has. The relative lack of awareness of Croatia's role in the war appears to go hand in hand with diminished international pressure on Zagreb to meet its legal obligation to cooperate with the Tribunal (Peskin and Boduszynski 2003, 1134).

As far as its reputation is concerned, Croatia benefits both from the timely deaths of its leaders (Tudjman and Susak) and from the sheer gravity of Serb atrocities.

VII. D. *Implications of Croatia's mixed status*

Croatia has benefited from its mixed status as both victim and aggressor. In fact, Serbia's strategy of portraying itself as a victim of Croatian and Bosnian aggression backfired. Not only has the international community had little sympathy for Serbia, but it has also provided its complete support for rigorous investigations and thorough prosecutions of Serbian atrocities. Peskin and Boduszynski explain, "Croatia's role in the Balkan wars of the 1990s has been largely overshadowed in world headlines and in academic inquiries by the attention paid to the atrocities and ethnic cleansing campaigns committed by Serb forces first in Croatia, then in Bosnia, and finally in Kosovo" (Peskin and Boduszynski 2003, 1118).

But Croatian leaders like Mesic and Sanander were adept at manufacturing international support. When General Bobteko was indicted, for example, Prime Minister Racan publicly

denounced the indictment. Privately, Racan worked closely enough with the ICTY to convince the Tribunal to evaluate the General's ability to stand trial. The Tribunal's declaration that the General was physically unfit to stand trial was emblematic of Racan's political effectiveness.

The ICTY also demonstrated political astuteness. After major protests over the domestic indictment of General Norac, the ICTY wisely withdrew its interest in having him stand trial in the Hague. The extradition of the popular 83 year old General Bobetko could have been a public relations disaster; the ICTY wisely allowed Bobetko to remain in Croatia. In another instance, the ICTY patiently pursued General Gotovina. Although also popular, the Tribunal allowed the Croatian leadership to generate political separation from this indicted war criminal. The ICTY's patience paid off, with Croatian President Sanander locating and turning over Gotovina to the Hague in 2005.

The ICTY had two major advantages in Croatia that did not exist in either Serbia or Rwanda. First, the great majority of Croatians favored integration with the European Union. Only radical elements affiliated with Tudjman's regime favored outright resistance with the ICTY. Second, Croatia strategically benefited from closer relations with the west. In fact, the US military assistance in the spring of 1995 is what allowed Croatians to launch Operations Flash and Storm. Integration with the west provided Croatia with security in the event of future Serbian aggression.

As Croatian leaders were successfully able to cast Croatia as a victim of Serbian leadership, the international community demonstrated some reluctance to press Croatian leaders to cooperate with the ICTY. As the above sections indicate, the ICTY was forced to be selective with the pressure that it applied in Croatia. In some instances, the ICTY exercised restraint. In other instances, the ICTY continued to apply constant pressure to cooperate. The ICTY was at

least partly constrained in its ability to fully pursue war criminals in Croatia. This partial restraint of ICTY discretion is attributable to Croatia's status as both a victim and perpetrator of the Yugoslav wars.

But this partial restraint of ICTY discretion is also attributable to Croatia's compliance – the realization that Croatian leaders were genuinely interested in cooperating. In other words, genuine cooperation by Croatian authorities was never in doubt like it was in Serbia. Simply by being patient, the ICTY could afford Croatian politicians the breathing room necessary to arrest and extradite popular war criminals.

VIII. Conclusion

In the previous pages, I have outlined my argument about how varying degrees of international pressure affect the discretion and autonomy of international criminal tribunals. I argue that the status of post-conflict regimes will affect the amount of pressure that the international community is willing to apply. Because international tribunals are reliant on the international's community's coercive and incentive-laden pressure, a tribunal's discretion and autonomy is either constrained or preserved based on the stigma of a post-conflict government. I also explore two main alternative explanations – EU conditionality / issue linkage and domestic leadership.

Certainly EU conditionality and issue-linkage was vital to securing Serbian and Croatian cooperation. Especially in Serbia, there was little public or elite support for cooperating with the ICTY. After years of cronyism and warfare, the Serbia infrastructure was badly in need of financial assistance. Foreign aid was only available if Serbia could in fact demonstrate that it was cooperating with the Tribunal.

In Croatia, there was much more public and elite support for cooperating with the ICTY. By one estimate (mentioned earlier), almost 80% of Croatians favored integrating with the European Union. Croatian integration also resulted in a greater sense of security from future Serbian aggression. Because of its desire to be perceived as a cooperative and contributing member of the international community, Croatian cooperation with the ICTY was more forthcoming.

But these incentives did not exist in Rwanda. Although large blocks of financial support were provided, this support was often unconditional. International donors rarely asked for anything in return. Rarely, then, did Kagame cooperate with the ICTR when it attempted to explore RPA and RPF atrocities that were committed in 1994. Without the coercive or incentive laden pressure of the international community, the ICTR had to ultimately abandon these RPA and RPF investigations.

Concerning domestic leadership, this explanation was helpful to the extent that it contributed to the formation of international perceptions of post-atrocity status. In other words, Kagame and his inner circle successfully exploited the victim status. Scholars even referred to this strategy as the “genocide credit.” This constant reminder that Tutsi were in fact the original victims contributed to the international community’s weariness when it came to supporting investigations of RPF and RPA atrocities.

Similarly, Croatian leaders were able to temper the radical and nationalist elements within Croatia. Croatian leaders quickly became adept at the international game of quid-pro-quo, receiving international incentives in exchange for cooperating with the ICTY. Domestic leadership in Croatia, then, helped to solidify Croatia’s reputation as both a victim and to a small extent an aggressor.

But to the extent that Croatia was considered an aggressor by the international community, this aggressor status was certainly overshadowed by Serbia's obstinacy. Serbian leaders were vocal about Serbia's opposition to the ICTY. In some instances, Serbian authorities obstructed efforts by ICTY investigators. This strategy of active resistance only cemented Serbia's reputation as the initial aggressor, and strengthened international resolve to see that Serbian leaders were properly punished.

One further explanation about the international community's varying support must be considered here. In the eyes of some members of the international community, Rwanda is of little strategic value. To repeat the words of US Under Secretary of Defense Walt Slocombe, "there was the very legitimate issue of we cannot intervene and no matter how nice the idea may have sounded, we believed we could not run around knocking off lousy governments" (Cohen 2007, 145). The United States was slow to intervene in Rwanda, and was similarly unwilling to press an uncooperative RPF government because the US did not have the political will to become immersed in the region. The US had no vital interests at stake.

A similar calculation occurred in the Balkans in the early 1990s. The United States at first did not believe that it "had a dog in that fight," but then slowly became pulled into the conflict. As the Balkans are of significant interest to its European allies, the United States eventually became committed to providing air support and ground troops. The difference between Rwanda and Croatia and Serbia, then, is also a difference of American national interests.

My thesis about a country's post-atrocity status has some important implications. From a realist perspective, international criminal tribunals are sham institutions that have no real impact on actual outcomes. In other words, powerful states will make self-interested calculations, and

in turn impose these calculations on weaker states. From a liberal perspective, international criminal tribunals are legitimate institutions designed to confront war criminals. Judicial outcomes are decided not by states, but by the international tribunals themselves.

This tension between realists and liberalists is not so much about victor's justice (as this concerns the justice that an occupying force imposes on a conquered force), but is about just outcomes. This tension is more about how legitimate the processes are, and how pre-determined the outcomes are. In all three case studies, the processes by which the ICTR and the ICTY have administered justice are fair. In both tribunals, defendants have the opportunity to contest evidence. In some cases, defendants have even been acquitted.

The more provocative issue is whether outcomes are preordained. In the case of the ICTR, certainly the international community's refusal to support the investigation of potential RPF war criminals is problematic. The international community's unwillingness to back the ICTR in this regard prevents even the consideration of potential RPF war crimes.

In the case of the ICTY, the international community has largely refrained from intervening in Tribunal investigations and prosecutions. In fact, the ICTY has shown surprising aggressiveness in pursuing popular wartime figures like Slobodan Milosevic, Ante Gotovina, and General Bobetko. In some instances, this aggressiveness may have even interfered with diplomatic attempts to bring Serbia and Croatia closer to the west.

But the issue of preordained outcomes must be examined in a different way. Judith Shklar reminds us that "law is a form of political action, among others, which occasionally is applicable and effective and often is not. It is not an answer to politics, neither is it isolated from political purposes and struggles..." (Shklar 1986, 143) The tension between realists and liberals ignores the reality that justice is a product of the political process. The fact that ICTR

prosecutions were cut short is disconcerting. However, this should not cast doubt on the whole tribunal experience.

Certainly the Tribunals' reliance on international and domestic audiences for support and cooperation is problematic. But from an institutional perspective, both Tribunals have certainly exceeded most scholars' expectations. The ICTY has developed from a nascent collection of attorneys (working out of a room in Depaul Law School in Chicago) to an institutional juggernaut, contributing to the development of international criminal law, and removing malignant war criminals from the Balkans. The ICTR similarly evolved from an institution beset by nepotism and corruption to an institution that has fairly and effectively prosecuted the architects of quite possibly the worst atrocities of the twentieth century. This occasional political interference with tribunal discretion is evidence not of the subservient role of law to politics, but rather is illustrative of how far international criminal law has come.

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