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International Criminal Justice and Regime Change: The Stunted Transition

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Abstract:

This paper interrogates the link between international criminal justice and democratization. In particular the paper examines the effect of International Criminal Tribunals (ICTs) on domestic politics and regime change in the countries to which these tribunals pertain. The transitology and democratization literature rarely speak to the liberal institutionalist literature on international justice yet these literatures are concerned with the same goal of political transition and significant insights can be gained from exploring the theoretical links. This paper focuses on the local perception of the International Criminal Tribunal for Former Yugoslavia (ICTY) in Bosnia and Herzegovina and Serbia, and the local perception of the International Criminal Tribunal for Rwanda (ICTR) in Rwanda. The empirical findings are based on 15 consecutive months of research, followed by two additional trips to each country. My data suggest that ICTs interact with domestic perceptions and domestic politics in counterintuitive ways to produce unintended outcomes, including harming local attempts to advance human rights and democratization and empowering ultranationalist and authoritarian anti-reform forces.

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International Criminal Justice and Regime Change: The Stunted Transition¹

Over the past several years we have seen a significant spike in resistance to the International Criminal Court (ICC) in states whose nationals are indicted by the institution. Headlines questioning the worth, purpose, and effectiveness of the ICC can be found across international media outlets.² The African Union has continuously accused the ICC of disproportionately targeting Africans and called for a continent-wide boycott.³ The current backlash against the ICC seems like a recent and temporary reaction to international justice. Yet, as this paper argues, in-depth empirical evidence on the domestic perceptions of the ad-hoc tribunals for former Yugoslavia and Rwanda suggests that this phenomenon has been present and has continued since the establishment of the first truly international projects of global justice. After two decades of international criminal trials at the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) domestic narratives on the two tribunals fit into the larger defensive discourse currently applied to the ICC, with serious consequences for democratization in the countries in question.

The first section of this paper highlights the links between key literatures, and interrogates the assumed positive relationship between international criminal trials and democratic consolidation via rule of law, judicial independence, and democratic norms, such as respect for human rights. The second section develops the argument of the paper, emphasizing the key role of domestic factors, mainly dominant domestic discourses and domestic politics, and its scope. The third and largest section of this paper consists of empirical evidence from the Balkans and Rwanda. For each case study the evidence is organized in two parts: the

¹ I am grateful to Jeffrey Checkel, Antoinette Handley, Lee Ann Fujii, and Victor Peskin for insightful comments and suggestions, as well as participants in International Criminal Justice: State of Play Conference and the School for International Studies Research Colloquium at Simon Fraser University, both of which took place in Vancouver in 2015. I would also like to express gratitude to the School for International Studies for hosting me while I wrote much of this paper. Without the generous funding from the Social Sciences and Humanities Research Council of Canada, the Centre for International Governance Innovation, and the University of Toronto the research for this paper would not have been possible.

² Wrong 2014; MacKinnon 2015; Ignatieff 2015; Zirulnick 2014; Sudan Tribune 2015.

³ AU 2014; Mbeki and Mamdani 2014; Mamdani 2013; Sriram 2010; HRW 2013.

interviewees' perception that ICTs had a direct negative impact on democratization and regime change, and the interviewees' perception that ICTs are part of a larger, problematic, international process of intervention. The fourth and last section of this paper draws insights from the comparison of the ICTY and the ICTR, and provides implications for current and future projects of international and transitional justice in post-conflict contexts.

Key concepts and debates in the literatures

ICTs are mechanisms of both transitional and international justice. I define transitional justice as a set of judicial and non-judicial measures, such as reparations, institutional reform, truth commissions, and criminal trials, implemented by various actors (state, non-state, local, and international) in order to address massive human rights abuses in societies attempting or undergoing transition from armed conflict and repression.⁴ This paper specifically concerns judicial measures implemented by international actors, such as the United Nations (UN) Security Council, to address massive human rights abuses in three countries undergoing transition from armed conflict. The existing literature in transitional justice has accomplished much in terms of hypothesizing about the relationship between international criminal trials and democracy, specifically the potential benefits of ICTs to democratization, including affirmation of the rule of law, judicial independence, respect for human rights, and democratic norms. There is however a significant gap in the current literature in terms of domestic politics and dynamics between international institutions and actors on the ground.

Transitional models of analysis have their roots in the democratization literature and transitional justice has replaced transitology as the new global project. Policy makers have substituted the significance that they used to assign to the first elections as the foundation and the generator of democratic reforms with criminal trials as the new turning point in a country's emergence from authoritarianism and conflict. In 2002, in his article "The End of the Transition Paradigm," Thomas Carothers masterfully pointed out that despite years of investment in the field of democratic assistance many countries were not transitioning to democracy and referring

⁴ See also Teitel 2000 and 2003; Minow 1998; Bell 2009; Elster 2004; UN 2004.

to them as “transitional” was our way of holding on to a romanticized model.⁵ Similarly, today, we entrust international justice as the new transition paradigm, despite little evidence that countries involved in such processes are transitioning to “justice” or “democracy.” Carothers also pointed out that when it came to evaluating the progress of a country’s democratic transition democracy activists and transitology scholars often argued that it was too early to reach judgments as “democracy is not built in a day.”⁶ Similarly, supporters of transitional justice argue that it is too early to evaluate ICTs and their ability to deliver the promised goals.⁷ Yet, after two decades of international trials, the political scene in Bosnia and Herzegovina (BiH), Serbia, and Rwanda is grim: complete political stagnation and a government structure that supports ethno-centric rule exists in BiH, right-wing nationalists returned to power in Serbia, and autocrats were replaced by new strongmen in Rwanda.

There is an underlying assumption and a normative expectation that ICTs are supportive of democratization.⁸ In their seminal work, *Problems of Democratic Transition and Consolidation*, Juan J. Linz and Alfred Stepan argue that legal guarantees for freedoms and independent associational life and independent judicial power are necessary elements for a democracy to be consolidated.⁹ Supporters of international criminal justice point to the ability of International Criminal Tribunals (ICTs) to establish or reestablish these elements in a society, thus contributing to institution-building, in addition to assisting norm diffusion, and thus forging the basis for a democratic political order that respects and protects human rights.¹⁰

Pablo de Greiff argues that promoting and strengthening democracy is one of two final goals of transitional justice, the other being reconciliation. In his exercise of normative theorizing Greiff finds that transitional justice can contribute to democratization through the strengthening of the rule of law, in terms of both a thin conception, which revolves around impartiality and regularity, and a thick conception involving a commitment to political

⁵ Carothers 2002.

⁶ Carothers 2002, 9.

⁷ Nettelfield 2010; Peskin 2008; Scharf 2006.

⁸ McAdams 1997; Wierzyńska 2004.

⁹ Linz and Stepan 1996.

¹⁰ Call 2004.

participation.¹¹ Following this reasoning, transitional justice's promotion of the rule of law is promotion of *democratic* rule of law because "democracy is both a condition and a consequence of legally institutionalized efforts to establish justice."¹² Greiff does not however address the empirical question of whether such objectives are obtainable. Similarly, Jens D. Ohlin argues that international criminal justice processes vindicate the rule of law by "adjudicating allegations of criminal violations that occurred during periods of anarchy characterized by the absence of domestic procedural law."¹³ It is however unclear why Ohlin believes that international justice mechanisms, the legitimacy of which is often debated by local populations, have the necessary authority to reinstate the intrinsic value of the legal process at the domestic level.

Lara Nettelfield, Victor Peskin and Michael Scharf suggest that local perceptions of war tribunals become more positive over time.¹⁴ Peskin explains that even in advanced industrial societies with a robust tradition of the rule of law, it takes time for courts to alter attitudes held by the general public.¹⁵ However, these scholars miss a key difference: in advanced industrial societies the general public, while disagreeing with the domestic court's decision, may still perceive their country's legal system as legitimate. My interviewees in the Balkans and Rwanda not only disagreed with the tribunals' specific findings but often saw international criminal law itself as an illegitimate external imposition.¹⁶ On this issue we gain some insight from John Hagan and Sanja Kutnjak Ivkovic who argue that the process of transitional justice must involve a localized democratic norm¹⁷ because "[f]undamentally, to be seen as legitimate, legal justice must ultimately also be seen as local justice."¹⁸ In regards to independent judicial power, which scholars have identified as a prerequisite for democratic consolidation in addition to the rule of law,¹⁹ Hagan and Kutnjak Ivkovic importantly point out that confidence in judicial independence at the local level is key. This means that in addition to meeting procedural and due process

¹¹ Greiff 2012.

¹² Greiff 2012, 57.

¹³ Ohlin 2009, 77.

¹⁴ Nettelfield 2010; Peskin 2008; Scharf 2006.

¹⁵ Peskin 2008, 244.

¹⁶ Peskin fails to consider that relations between former rivals in the Balkans and Rwanda might improve while their unfavourable attitudes to international tribunals may remain unchanged.

¹⁷ O'Neill and Hymel 1994.

¹⁸ Hagan and Kutnjak Ivkovic 2006, 146.

¹⁹ Linz and Stepan 1996.

standards it is important that members of the public who identify as victims and those accused of having participated in the crimes broadly perceive the tribunal as meeting these standards.²⁰

Another assumption that supporters of ICTs make is that the trial process assists in norm diffusion and contributes to the establishment of democratic values, including respect for human rights. Greiff ties transitional justice's goal of democracy to the protection of basic human rights, arguing that "While no type of regime offers iron-clad protection of basic human rights, democracies have a better record protecting the rights of their citizens than other kinds of regimes."²¹ The idea that the courtroom can serve as a human rights classroom has been propagated by those who argue the importance of Nuremberg in the post-World War II transformation of Germany. Norbert Ehrenfreund, for example, writes:

It was the record of the Nuremberg trial that eventually opened Germany's eyes to what the Nazis did, and thereby became a major factor in the country's rapid strides to democracy. By awakening the German people to the past, Nuremberg influenced their political conduct in the future.²²

Similarly, Susanna Karstedt writes about "the civilizing influence of the Nuremberg Trial"²³ and Gary Bass, Lara Nettelfield, Lawrence Douglas, Mark Osiel and Steven Ratner and Jason Abrams all to a lesser or greater degree suggest that the trials served a successful pedagogical purpose in German society.²⁴ Yet, Ehrenfreund and others provide little empirical evidence for their claims. Mark Wolfgram, who does look at the empirical evidence, disagrees, arguing instead that "it is difficult to detect any significant increase in the social discussion of the Nazi persecution of the Jews and the Holocaust until the very end of the 1970s, long after the conclusion of the Nuremberg trials."²⁵ Wolfgram argues that in order for trials to have a chance in shaping public attitudes towards facing the criminal past, the narratives of the courtroom need to be adopted by local actors and communicated through local newspapers and radio, as well as

²⁰ Hagan and Kutnjak Ivkovic 2006, 133.

²¹ Grieff 2012, 55; See also Davenport and Armstrong 2004.

²² Ehrenfreund 2007, 139-140.

²³ Karstedt qtd. in Wolfgram 2013, 4.

²⁴ Bass 2000; Nettelfield 2010; Douglas 2001; Osiel 1997; Ratner and Abrams 1997.

²⁵ Wolfgram 2013, 5. In 1953 Germans were asked in a poll "Do you think that the German soldiers of the last war can be reproached for their conduct in the occupied countries?" to which only 6 percent responded positively and a clear 55 percent responded negatively (Noelle and Neumann 1967, 202). Also, in a poll conducted in 1955 a clear majority of Germans said that Hitler had been one of Germany's greatest leaders (qtd. in Wolfgram 2013, 9).

popular culture, including theatre, television and film.²⁶ Donald Bloxham confirms Wolfgram's argument, suggesting that "The legal event did not shape the cultural change; to argue otherwise is to confuse cause and effect."²⁷

The understanding that law and norms (established through law) lead politics, or have a key role in the early stages of establishing a just and democratic political order, is problematic according to Jack Snyder and Leslie Vinjamuri. Snyder and Vinjamuri argue that the process begins with pragmatic political coalitions and bargains among different contending groups and administrative institutions, or "the logic of consequences" rather than rule following or "the logic of appropriateness" that some constructivist scholars of international relations emphasize.²⁸ If we apply this theoretical framework, ICTs can be interpreted as "coercive mechanisms of normative change" because they are externally imposed principled institutions.²⁹ In contexts of norm-forcing, "[t]rials do little to deter further violence and are not highly correlated with the consolidation of peaceful democracy."³⁰

Advocates of ICTs also build their arguments on the hypothesis that the international system is changing. In a 2006 piece entitled "The Future of International Law is Domestic" Anne-Marie Slaughter and William Burke-White hypothesize that "the very concept of sovereignty will have to adapt to embrace, rather than reject, the influence of international rules and institutions on domestic political processes."³¹ This hypothesis however begs the question: which states do Slaughter and Burke-White have in mind? Will powerful countries (including the United States) embrace the influence of international rules and institutions on domestic politics or will this adjustment, like transitional justice itself, be selective in terms of which states are targeted? Charles T. Call argues that in the interest of human rights, serious structural problems, including "virtual impunity for rich countries," have been overlooked, making transitional justice

²⁶ Wolfgram 2013, 3.

²⁷ Bloxham 2008, 267.

²⁸ Snyder and Vinjamuri 2003/4, 7. See March and Olsen 1989. On rule following and emphasis of legalism in world politics see also Shklar 1964 and Teitel 1990.

²⁹ Snyder and Vinjamuri 2003/4, 9, 13.

³⁰ Snyder and Vinjamuri 2003/4, 43.

³¹ Slaughter and Burke-White 2006, 350.

unjust.³² Some legal practitioners have also acknowledged the selectivity of international justice. For example, Chief Prosecutor Richard Goldstone, recognized that

A decent and rational person is offended that criminal laws should apply only to some people and not others in similar situations. I felt distinctly uncomfortable when, in October 1994, in Belgrade, I was asked by the Serb minister of justice why the United Nations had established a War Crimes Tribunal for the former Yugoslavia when it had not done so for Cambodia or Iraq.³³

My findings question many of the assumptions above regarding international justice's relationship to democratization in post-conflict societies. My data from the Balkans and Rwanda challenge the prevalent argument that "the international criminal procedure is valued for its intrinsic, not instrumental, functions"³⁴ and instead confirm Hagan and Kutnjak Ivkovic's claim that local participation and perception of legal events, play determining roles.³⁵ My findings are also supportive of Wolfgram and Bloxham's claims that legal events do not on their own necessarily contribute to the diffusion of democratic norms.³⁶ In opposition to most of the literature which is supportive of the human rights lessons that can be taught in the courtroom, I find that war tribunals can be utilized as speaking platforms by the accused criminals or dictators who have their own "lessons" that they wish to teach to the broader population.³⁷ I agree with Slaughter and Burke-White on the inherent connection between international law and domestic politics and the importance of examining this critical, yet understudied, link.³⁸ However, I do not find that states are adapting the concept of sovereignty to "embrace" the influence of international law – my data suggest that there is a strong backlash against international mechanisms and that the law is only embraced by those factions who can use the law for their own political (not necessarily democratic) empowerment. Slaughter and Burke-White acknowledge that international law may have detrimental effects on local politics and democratic

³² Call 2004, 102.

³³ Goldstone 2000, 122-3.

³⁴ Ohlin 2009, 82.

³⁵ Hagan and Kutnjak Ivkovic's 2006.

³⁶ Wolfgram 2013; Bloxham 2008.

³⁷ Subotić 2009 speaks of this phenomena in terms of ICTs being "hijacked" by nationalist actors. I argue that ICTs are meant to serve local actors, and therefore refrain from using the label "hijacked," which inappropriately suggests that certain local factions are illegitimately using international law while other foreign actors are acting legitimately in their use of ICTs.

³⁸ Slaughter and Burke-White 2006.

engagement but, like most analysts of ICTs,³⁹ do not offer empirical evidence of this.⁴⁰ My research mainly addresses these missing elements in the literature – unintended domestic consequences that arise during the interaction between domestic politics and international justice as well as the scarcity of empirical evidence on the subject.⁴¹

The Argument

The central argument of this paper is that if we look at the relationship between ICTs and key domestic factors, dominant domestic discourses and domestic politics, we find that ICTs can inadvertently empower anti-reform forces and discredit liberal democratic reformers. A comparison of the ICTY in the Balkans and the ICTR in Rwanda allows us to address the scope of this argument. Data from two very different cases indicate that the outcome was similar: The ICTs weakened the support for domestic pro-reform actors and strengthened nationalist and authoritarian actors when the ICT allied with opposition forces, the weaker faction (in terms of control of power and security forces), in the Balkans, as well as when the ICT allied with the ruling, stronger, faction in Rwanda.

The paper seeks to draw attention to powerful discourses at the domestic level, mainly perceptions of injustice and lack of judicial independence, foreign intervention and meddling in politics, and selective global justice. The paper argues that these real grievances discredit and divide reformist coalitions and create the political space that nationalist and authoritarian factions can seize, resulting in serious impediments to political transitions. First, my data suggest that skepticism about the independence of the ICTY and ICTR judiciaries was prevalent in the Balkans and Rwanda, which is problematic as confidence in judicial independence is key in democratization processes. The ICTs failed to establish legitimacy in the eyes of domestic actors because justice wasn't localized. Second, my data point to the fact that the perception of norm forcing by external forces can be counterproductive, lessening support for domestic reforms that strengthen human rights norms and democratization by antagonizing political coalitions and

³⁹ For some empirical evidence see Spoerri and Freyberg-Inan 2008 and Snyder and Vinjamuri 2003/4.

⁴⁰ Slaughter and Burke-White 2006.

⁴¹ See also Spoerri and Freyberg-Inan 2008 who make some insights regarding domestic perceptions in the Balkans.

instigating nationalist and authoritarian backlashes. Third, local populations argued that international trials were being carried out in a context where state sovereignty and state interest of the most powerful states, rather than universal liberal institutionalist norms about the rule of law and respect for human rights, are the dominant forces shaping international institutions. For this reason, interviewees across political spectrums in both cases emphasized that international justice is unequal and unfair, and its selective character makes it not supportive of democratic values and a more just world order.

In the case of the Balkans, the ICTY inspired resurgence in defensive nationalism in BiH and Serbia and a split in the liberal democratic coalition, therefore disrupting attempts at democratic consolidation. While donor aid freezes and selective funding in civil society and media, as well as foreign policies such as the 1999 NATO bombing of Serbia, set the stage for defensive, anti-reform, anti-democratization sentiment, over its twenty-year span the ICTY contributed to the elimination and marginalization of the most reformist actors. Instead of triggering a normative shift towards accountability and democratization, ICTY's push for fast deliverance of alleged war criminals and political transition, combined with threats of international isolation, and feelings of blackmail on the ground, meant that the narrative which identified the ICT as an imperialist institution of selective justice prevailed among right-wing nationalists, many moderates, and left-wing post-colonialists.

In the case of Rwanda, the belief that the ICT allied with Paul Kagame and his faction in the ruling party (via American and British administrations) was a result of the ICTR decision to try only one party to the conflict – extremists from the former regime – while failing to indict members of the ruling party for war crimes. Through such actions the ICTR inadvertently reaffirmed the Rwandan government's narrative of the civil war and genocide. Interviewees on different sides of the political spectrum perceived the ICTR as an institution that acted out of Western guilt for failing to prevent and stop the genocide, consequently giving international support and legitimacy to the authoritarian regime and deterring and impairing attempts at democratization by opposition forces on the ground.

Research Methodology

The empirical research that this paper is based on is part of a larger project concerning on the ground perceptions of ICTs. The Yugoslavia and Rwanda tribunals were the first truly international efforts in transitional justice, which were implemented solely by the United Nations Security Council. I chose BiH, Serbia, and Rwanda as case studies because key war criminals who are being prosecuted by the two tribunals are from these countries. The most important reason for my case selection is the variation my cases represent despite the apparent similarity of the international judicial institutions. In post-Yugoslav times, Bosnia and Herzegovina is a highly decentralized, fragile state, with a three-member presidency composed of a member of each ethnic group and two autonomous political entities – the Federation of Muslims and Croats, and Republika Srpska, which is effectively being held together by the international community. In post-Yugoslav times, Serbia, (like Croatia⁴²) has returned to a narrative of nationalist ideology and has been attempting to transition into a democracy. In post-genocide Rwanda, we see a different scene: extensive powers by the President and only limited oversight from the Parliament, and a regime-led process of attempting to eliminate Tutsi and Hutu “ethnicity” and replace it with a “Rwandan” national identity. Such variations in the post-conflict political trajectories provide the possibility of probing how the different domestic approaches interact with the workings of the relevant tribunal. Nonetheless, despite the very different paths that the three countries have taken, there is an important domestic convergence: a lack of support for criminal tribunals by local populations.

The fieldwork was carried out over the period 2010–2013 and involved nine consecutive months of fieldwork in Rwanda, and six consecutive months of fieldwork in BiH and Serbia, followed by two additional trips to each country. I applied Alexander L. George and Andrew Bennett’s logic of “structured, focused comparison”⁴³ using a range of methods, including conversational data collection techniques, mainly interviews but also a few focus groups and

⁴² While Croatia was a key player in the Yugoslav wars and the ICTY has indicted a number of Croats, I exclude Croatia as a case study because Croatia has taken a similar route to Serbia in post-conflict times and because Croats have responded to the ICTY in a similar manner to Serbs. Studies show that both Serbs and Croats have a very negative perception of the tribunal and for the same reasons. See Klarin 2009 and Saxon 2005; Author interview with Vojin Dimitrijević, Belgrade, Serbia, August 20, 2010.

⁴³ George and Bennett 2004, 67-89.

email exchanges, and non-conversational data collection techniques, including analysis of traditional sources of information such as newspapers, government-issued documents, and non-traditional sources such as popular culture material. This research design was “focused” because I was interested in a particular subgroup and specific aspects of transitional justice – international criminal tribunals. It was “structured” because I posed a set of general questions to the same, targeted groups of local actors in each case study in order to guide and standardize the collection of data and allow for a systematic comparison of findings.

My goal was to interview many different kinds of people (in age, sex, occupation, political inclination) with a variety of experiences, and I made a point to speak to both individuals who were in support of and in opposition to the accused on trial at the ICTY and the ICTR. I chose educated participants⁴⁴ because they were most informed on the subject matter of my inquiry, but also because they were often opinion makers in their local communities.⁴⁵ My main approach was to build up networks, adopting an ethnographic sensibility,⁴⁶ and I conducted over 140 successful in-depth interviews. Broadly speaking, my interviewees included university professors and students, community leaders, top echelon and lower rank staff in international organizations and institutions, civil society members (local and international), clergy, government officials (bureaucrats, ministers and senators), military leaders, members of the opposition, and political prisoners. Many of these interviewees self-disclosed to me that they were involved in the conflicts as survivors, combatants, perpetrators of war crimes and genocide, witnesses at the tribunals, and members of the defense and prosecutions teams. I managed to secure access to some high-level interviewees, including a former head of state, a current vice-president, heads of lower and upper houses of parliament, leaders of the opposition, and high-profile political prisoners.

⁴⁴ In Rwanda this meant people who had at least completed high school, and in the Balkans this meant people who had at least completed some university education.

⁴⁵ Public opinion polls in former Yugoslavia suggested that elites were more likely to support cooperation with the Yugoslav Tribunal and good relations with Western countries and I wanted to speak to the segment of society that was most sympathetic to the aims of the international community. See CESID study cited in Mihailović 2009, 131.

⁴⁶ Schatz 2009, 1-23.

Meta-data, such as silences, ambiguities, laughter, lies, and rumors, were an integral part of data collection and analysis.⁴⁷ I paid close attention to questions that my interviewees asked about my purpose in their community and noted moments of intended silence, nervous laughter, or instances when my interviewees used ambiguous statements and subtle clues in their answers, which were common in Rwanda. In Rwanda my interviews were anonymous because of the Rwandan government's infringements on rights and freedoms and my concern for the safety of my interviewees, whereas in the Balkans my interviewees were given a choice of anonymity.⁴⁸

The Balkans

The ICT and domestic support for reformists vs. extremists

The architects of the tribunal for former Yugoslavia underestimated the power of preexisting patriarchal and ethno-nationalist interpretations of history in Yugoslav politics. Victimhood narratives and ethno-nationalist influence in Yugoslav politics were already evident in the 1980s after the death of the Yugoslav leader Josip Broz Tito. A defensive form of nationalism, which was oriented against the West as well other political and national groups in former Yugoslavia, came to the forefront during the Yugoslav wars and several events that were perceived as international impositions: the UN Security Council's arms embargo on Serbia and Montenegro in September 1991 and economic sanctions in May 1992, the establishment of the ICTY through the 1993 Security Council resolution, the Dayton Peace Agreement in 1995, which was brokered under significant US pressure, and the NATO bombing of Serbia in 1999. The ICTY was the most official and internationally widespread means of projecting guilt, blame and shame on the Serbs before and after the NATO bombing.⁴⁹ The ICTY did not simply reflect the opinion of one media source or a single country; its actions and accusations carried international weight.

⁴⁷ Here I follow the approach of Fujii 2009 and Fujii 2010. See also Warren 1998, Malkki 1995, and Monroe 2001.

⁴⁸ The detailed methodology of my research, including individual instances of meta-data and questions of translation, researcher positionality and ethical conduct, is discussed in a more comprehensive and transparent manner in the forthcoming book (*In*)*Humanity of Trial: On the Ground Perceptions of International Criminal Tribunals*.

⁴⁹ Steflja 2010.

I argue that the ICTY did not recognize that it was capable of amplifying and activating destructive forms of nationalism, including the glorification of war criminals, and in the processes reviving anti-reformist attitudes. How did the ICTY do this? First, the tribunal inadvertently provided a propaganda platform for nationalist elites on trial at The Hague while at the same time failing to actively participate in its own narrative through an effective outreach campaign. Second, key international actors made cooperation with the ICTY a condition for foreign aid and European Union (EU) membership which local actors perceived as blackmail, resulting in further popular support for extreme nationalists and reduced support for reformists. Third, the ICTY instigated a breakdown in political coalitions and endangered reformists.

The ICTY gave force to attitudes of defensive nationalism by providing an opportunity and a perceived necessity to reinterpret past events, including the war, through a more corrosive form of nationalism, and furthered conspiracy theories against Western nations. Nationalism per se may not threaten democracy in the long run and may contribute to state-building.⁵⁰ However the reason this form of defensive nationalism was so problematic for democratic consolidation in the Balkans was that it took place in a context with a history of violent ethnic conflict.⁵¹ Snyder and Vinjamuri find that in such contexts, where institutions are weak and potential extremist spoilers are strong, trials of alleged war criminals increase the risk of violent conflict and human rights abuses therefore harming rather than strengthening the institutionalization of the rule of law.⁵²

Reflecting on the efforts of the ICTY to amend the unfavourable context, the Director of the Belgrade Center for Human Rights argued that “the presence of the ICTY is miserable.”⁵³ The majority of my interviewees in BiH and Serbia agreed with him. The President of the Helsinki Committee for Human Rights in Belgrade explained how the lack of understanding of international humanitarian law led to confusion when people watched the trials of Slobodan Milošević, Vojislav Šešelj, Radovan Karadžić and Ratko Mladić since the defenders seemed to

⁵⁰ Spoerri and Freyberg-Inan 2008, 354.

⁵¹ Spoerri and Freyberg-Inan 2008, 354.

⁵² Snyder and Vinjamuri 2003/4, 15.

⁵³ Author interview with Vojin Dimitrijević, Belgrade, Serbia, August 20, 2010. On the inadequate outreach in Bosnia specifically see Nettelfield 2010, 33.

be ‘winning’ by simply questioning the court, which was definitely not the case.⁵⁴ A number of my interviewees explained that locals tended to simplify the reasoning behind judgments by assuming that judgments depended on whether the judge was a national of a country that was an ally or an enemy of their country even though in some cases the judges that came from countries considered allies suggested “draconian sentences.”⁵⁵ This further supports the argument about the lack of trust in the independence of the court.

The problem was not only that ICTY outreach programs were gravely lacking but that one public awareness policy on the ICTY was highly unsuccessful and indeed resulted in effects opposite to those intended. The decision of the United States Agency for International Development (USAID) to finance the broadcasting of Slobodan Milošević’s trial throughout the region, without offering its own interpretation of this event, was particularly problematic. Throughout his trial, Milošević emphasized that the tribunal was a tool of NATO and the US since it was completely dependent on their financial and military assistance. The fact that Milošević was handed over to The Hague on St. Vitus Day, the day of the Battle of Kosovo Polje, which was fought against the Ottomans in 1389 and is the foremost symbol of Serb victimization in Serb nationalist accounts, only furthered Milošević’s cause.⁵⁶ One politician expressed his view that the trial only benefitted the extreme nationalist camp: “My genuine belief is that Mrs. Del Ponte [Chief Prosecutor of The Hague Tribunal] was the best head of an electoral campaign that the Radical Party ever had.”⁵⁷ Evidence confirmed this as, paradoxically, USAID broadcasts of the trial proceedings led to the doubling of Milošević’s approval ratings.⁵⁸ Television coverage of trials was supposed to encourage reflection about the events of the 1990s, yet it became “a place to cheer for your own,” argued my interviewee Slobodan Samardžić, professor of international relations and the vice-president of the Democratic Party of Serbia.⁵⁹ The audience perceived the leaders on trial as victims of a plot where a single Serb was being

⁵⁴ Author interview with Sonja Biserko, Belgrade, Serbia, June 24, 2011.

⁵⁵ Author interview with Djordje Vuković, Belgrade, Serbia, July 28, 2011; Author interview with Srbobran Branković, Belgrade, Serbia, August 11, 2011; Author interview with Žarko Korač, Belgrade, Serbia, July 8, 2011.

⁵⁶ Steflja 2010.

⁵⁷ Quoted in Moghalu 2006, 21.

⁵⁸ Lelyveld 2002, 82; Doder 2002, 25.

⁵⁹ Author interview with Slobodan Samardžić, Belgrade, Serbia, September 1, 2011; Author interview with Dragoljub Žarković, Belgrade, Serbia, August 31, 2011.

pitted against the world and, even if they did not support that particular leader's domestic and wartime agenda, they preferred to be in solidarity with a member of their nation over supporting the international community. This interpretation of events was established during the Milošević trial and recycled during the cases that followed.

For example, in a 1995 survey Bosnian Serb General Ratko Mladić, who is currently on trial for genocide in Srebrenica and the Siege of Sarajevo, polled as the second-most popular figure among Bosnian Serbs, who referred to him as “our savior.”⁶⁰ The former Prime Minister of Republika Srpska told me that the view among Bosnian Serbs has not changed, arguing that the great majority of people – “up to 100 percent” – believed that Mladić was a hero but they had learned not to share this opinion with foreigners.⁶¹ The glamour that communities assigned to these leaders was based on the idea that these leaders were defending the nation and should therefore be excused for any crimes that they committed in the process.⁶²

Realizing how well the ICTY trials could be manipulated for propaganda purposes, extreme nationalist factions in Serbia, and the supporters of the Radical Party of Serbia (SRS) in particular, insisted that the trial of Vojislav Šešelj, the leader of SRS who was charged with murder and persecution of Croats and Bosnian Muslims, also be broadcast. They threatened that if the government did not agree to broadcast Šešelj's trial they would urge their supporters to organize protest rallies and to refuse to pay the monthly license fee for the national television network.⁶³ While Šešelj and SRS do not officially oppose democracy, they oppose many reforms that are key to the consolidation of liberal democracy, including decentralization and autonomy for Serbia's minorities.⁶⁴ Moreover, SRS party MPs consistently make xenophobic statements and target pro-Western civil society and media, and only 15 percent of SRS supporters believe that democratic rule is the best form of government.⁶⁵ Šešelj voluntarily surrendered to the ICTY

⁶⁰ Block 1995, 7.

⁶¹ Author interview with Mladen Ivanić, Sarajevo, Bosnia, July 15, 2011. I found my Serbian interviewees in Bosnia to be significantly more extremist in their negative perceptions of the ICTY than my Serbian interviewees in Serbia. This finding is in opposition to Nettelfield's argument that attitudes towards the ICTY are more discouraging in Serbia than Bosnia. See Nettelfield 2010, 287.

⁶² Author interview with Slobodan Popović, Banja Luka, Bosnia, July 11, 2011.

⁶³ Author interview with Predrag Marković, Belgrade, Serbia, July 26, 2011.

⁶⁴ Spoerri and Freyberg-Inan 2008, 357. See also Dahl 1991 and Diamond 1999.

⁶⁵ Centre for Free Elections and Democracy 2007.

because he “relish[ed] the prospect of an international audience for his denunciations of Western policy in the Balkans.”⁶⁶ My nationalist and even moderate interviewees found Šešelj very entertaining; “watching Šešelj in court is like watching Big Brother,”⁶⁷ commented one of my interviewees in Banja Luka.⁶⁸ They agreed that in its attempt to ensure Šešelj’s right to defend himself, the ICTY failed to limit his freedom even in instances when he ridiculed judges, publicly exposed witnesses under protection, and “destroy[ed] the dignity of the court.”⁶⁹ The most problematic aspect was that in the eyes of the Serbian audience the accused war criminals outperformed the ICT during trial hearings. This diminished the authority of the international court and transformed it from an instrument of the rule of law into a tool for defensive nationalism and ridicule.

The second way in which the ICT instigated a rise in support for extreme nationalists in BiH and Serbia was by tying cooperation with the ICT with foreign aid and EU membership. This resulted in a sense of extortion and feelings of persecution among the local population, further distancing the local population from the reformists who were in support of democratization and closer ties to the West. The dialogue which surrounded the ICTY was not framed in terms of addressing the crimes that took place in the 1990s; instead, as my interviewees explained, the government evoked the sense that cooperation was an obligation undertaken in order for Serbia and BiH to be considered for EU membership and to secure donor aid.⁷⁰

The conditionality was a reality that the governments in the region faced. Milošević was transferred one day before the start of an international donor conference where Serbia hoped to secure one billion dollars in aid crucial to its economic recovery⁷¹ and the rest of the alleged war

⁶⁶ Simpson 2003, A6.

⁶⁷ The interviewee is referring to the popular television reality show *Big Brother*, rather than the character from George Orwell’s novel *Nineteen Eighty-Four*.

⁶⁸ Author interview with Ivan Šijaković, Banja Luka, Bosnia, July 12, 2011.

⁶⁹ Author interview with Djordje Popović, Belgrade, Serbia, June 23, 2011.

⁷⁰ Author interview with Djordje Popović, Belgrade, Serbia, June 23, 2011; Author interview with Dragoljub Žarković, Belgrade, Serbia, August 31, 2011.

⁷¹ The Centre for Peace in the Balkans 2001.

criminals were transferred in similar circumstances.⁷² Dragan Čavić, former President of Republika Srpska, told me that the ICTY was a political tool used to force parties to the former conflict to transfer accused war criminals and find solutions for the region.⁷³ The leader of the Party of Democratic Progress in BiH agreed with Čavić and openly argued that every political party in BiH, including his own, cooperated with the ICTY “only because of political pressure.”⁷⁴ This sense of extortion had over the years produced a degree of resentment among many of my interviewees, who argued that, while the EU was built through technical requirements for integration, political requirements had been imposed on the Balkan states that wished to join the Union.⁷⁵

The most troubling part of my findings is the consensus between reformists in support of liberal democracy on the one hand, and extreme nationalist actors on the other hand in their mutual opposition to the ICTY because both camps perceived it as a political tool of the powerful nations and a symbol of selective global justice.⁷⁶ A commentator in the Serbian magazine *Republika* summarized this unintended outcome well:

Pressures by the Euro-American political intelligentsia and corporate media have shown themselves to be counterproductive because they decrease the chances that the participants in the war in the former Yugoslavia engage with each other in any objective analysis of recent history. Such pressures produce politically calculated declarations and apologies by Balkan politicians and the recalcitrance of ordinary citizens.⁷⁷

This created a situation where pro-reform politicians in the Balkans were more concerned with avoiding marginalization from donors and the international community, as well as a backlash from the electorate, than focusing on reforms required for the political transition. The backlash from the electorate was documented by a variety of sources, such as Spoerri and Freyberg-Inan’s

⁷² Author interview with Čedomir Antić, Belgrade, Serbia, August 26, 2010. Another concrete example of threats of international isolation include the European Union signing Serbia’s Stabilization and Association Agreement but putting it on hold in 2008 in order to ensure that Serbia will transfer all of the remaining suspects to the ICT. Similarly, the US withdrew its Support for East European Democracy (SEED) grants in 2005 and other funds when the US judged Serbia to be uncooperative with the ICT (Spoerri and Freyberg-Inan 2008, 366).

⁷³ Author interview with Dragan Čavić, Banja Luka, Bosnia, July 13, 2011.

⁷⁴ Author interview with Mladen Ivanić, Sarajevo, Bosnia, July 15, 2011.

⁷⁵ Author interview with Slobodan Samardžić, Belgrade, Serbia, September 1, 2011.

⁷⁶ Author interview with Staša Zajović, Belgrade, Serbia, July 28, 2011; Author interview with Zoran Čirjaković, Belgrade, Serbia, June 24, 2011.

⁷⁷ Bogdanović 2010, 486-489.

extensive studies of “the Tribunal effect” – fluctuations in polling and electoral data, and public opinion data in regards to ICTY indictments and trials, and general public opinion on the ICTY.⁷⁸

The demands of the ICTY threatened not only the political success but also the safety of certain reformists, and antagonized reformist coalitions, leading to their break up. The ICTY had a negative impact on the reformist coalition between Serbia’s Prime Minister Zoran Djindjić and Yugoslavia’s President Vojislav Koštunica, the Democratic Opposition of Serbia (DOS) which ousted Slobodan Milošević and supported a liberal-democratic trajectory for the future of the country. Under international pressure Zoran Djindjić secretly transferred Milošević as soon as he became Prime Minister of Serbia in 2001, therefore fulfilling the key commitment for the path to a “European Serbia” and to Western aid, despite numerous objections not only from the radical nationalists, but from most politicians, including his coalition ally, Koštunica. While Koštunica accepted that the Hague is an inescapable obligation, he was a legalist and believed that the extradition was not legal or constitutional and thus referred to Djindjić’s transfer of Milošević as a “coup.”⁷⁹ Koštunica believed that amnesty and jobs for members of the old regime was the more appropriate way to approach the political transition, and left the DOS coalition within two months of Milošević’s extradition. In his party’s absence the coalition needed the support of opposition forces to pass proposals and the liberal democratic reforms were downscaled significantly.⁸⁰

Djindjić’s bold policy concerning the ICT was also one of the causes behind his assassination in March of 2003.⁸¹ Djindjić’s assassination was carried out by the Unit for Special Operations or the Red Berets, whose Commander was Milorad Ulemek Luković and whose official task was to act as Milošević’s Pretorian guard. By 2003 Djindjić moved towards removing the influence of organized criminals from the new government, including Luković and the organized crime gang with which he was associated, the Zemun gang, supporting criminal investigations in Belgrade as well as those in the Hague. In response, Luković allied with

⁷⁸ Spoerri and Freyberg-Inan 2008.

⁷⁹ Saxon 2005, 566-7; Pešić 2009, 76.

⁸⁰ Spoerri and Freyberg-Inan 2008, 363.

⁸¹ Pešić 2012, 120.

Koštunica in a campaign named “Stop The Hague” which aimed to undermine Djindjić’s government and show “who was really in charge in Serbia.”⁸² Serbian conservative and nationalist factions, including intellectual circles, media and church, united against Djindjić. Shortly before the assassination a Belgrade newspaper reported that the ICTY was going to indict Luković, and Djindjić’s cabinet was planning to sign arrest warrants for Luković and the Zemun gang.⁸³

After the death of the Prime Minister long term modernization plans and political reforms came to a halt, and years of stagnation followed.⁸⁴ Djindjić’s assassination intimidated all domestic actors who hoped for a rapid democratic transition from the previous regime. Public opinion backlashes against extraditions of accused war criminals were common and a real threat for the electoral ambitions of the leaders in question.⁸⁵ Vesna Pešić, one of the leaders of the opposition movement to Milošević, explained that Djindjić represented “Serbia’s hope, Serbia’s strongest card, he was *that* Europe towards which Serbs have striven for more than two centuries,”⁸⁶ a view that the overwhelming majority of my interviewees confirmed.⁸⁷

Koštunica became the new Serbian Prime Minister in March of 2004, and during the same month the Serbian National Assembly passed a law that gave the Serbian government the right to reimburse Serbian inductees at the Hague and their families’ costs and monthly allowances. This was a part of Koštunica plan of “voluntary surrenders” to the Hague, which was relatively well received by the Serbian public but not by the donors.⁸⁸ The day after the law was passed the US responded by suspending an economic aid package to Serbia.⁸⁹

While the ICTY was not directly responsible for the breakdown of the domestic coalition and Djindjić’s death, it is obvious that the pressure to cooperate, and especially the desire of politicians to secure aid and EU membership, were important factors in decisions of politicians.⁹⁰

⁸² Pešić 2009, 76.

⁸³ Orentlicher 2008, 31.

⁸⁴ Glenny 2012, 683.

⁸⁵ Spoerri and Freyberg-Inan 2008, 364-5.

⁸⁶ Pešić 2012, 114.

⁸⁷ Author interview with Latinka Perović, Belgrade, Serbia, August 8, 2011.

⁸⁸ Spoerri and Freyberg-Inan 2008, 364.

⁸⁹ Saxon 2005, 566-7.

⁹⁰ Glenny 2012.

Greiff theorizes that “regime change typically precedes the implementation of transitional justice measures.”⁹¹ Perhaps the problem in the case of the Balkans was that the international community established the ICT well before full regime change and used the institution as a pressure tool for the political transition. It is unfortunate that in order for the ICT to gain its most wanted war criminal – Milošević, Serbia had to lose its most valuable visionary – Djindjić.

The ICT perceived as linked to Western interests

My interviewees perceived the ICTY as one of many mechanisms in the matrix of Western influence and interest in the region and fear of external political influence significantly coloured interpretations of the ICT. A number of my interviewees made explicit connections to colonialism, the most interesting of which were made by my moderate and liberal participants. In Belgrade, Staša Zajović, a lifetime activist and founder of Women in Black, an NGO that has been highly critical of the nationalist regimes over the years, claimed that “the problem is that we see colonialism in these global institutions of justice. Why is the US not going to be tried for any crime, but every African dictator may be?!”⁹² Former journalist and critic Zoran Čirjaković bluntly summarized this argument:

Look at the ICC. It is black people or enemies of the US. Belgium never faced its past and its crimes. For example, the eleven million people that were killed under Belgian rule in Congo. Every Srebrenica is awful but they cannot tell me that one Srebrenica is more awful than one hundred Srebrenicas.⁹³

The fact that individuals in the Balkans who were in favour of political change and were highly critical of nationalist regimes felt so strongly about what they perceived as the imperialistic nature of the ICTY was most troubling for the legitimacy of the tribunal. This reflects a postcolonial critique that converged with nationalist narratives on the topic of selective global justice. My interviewees explicitly denied liberal institutionalism as the prevalent approach to world politics and instead often relied on the realist school in their interpretation of

⁹¹ Greiff 2012, 57.

⁹² Author interview with Staša Zajović, Belgrade, Serbia, July 28, 2011.

⁹³ Author interview with Zoran Čirjaković, Belgrade, Serbia, June 24, 2011.

events: “Global justice is impossible, it is not implementable in the world of *realpolitik*,” stated Ćirjaković.⁹⁴

For this reason, there was a tendency on the ground among the majority of my interviewees to try to distance themselves from “transition elites,” which they identified as pro-democracy, pro-Europe, anti-nationalist intellectuals and public figures, as well as urbanites employed by foreign-funded NGOs, including employees and members of the Centre for Cultural Decontamination, the Helsinki Committee for Human Rights, the Belgrade Center for Human Rights, the Humanitarian Law Center, the Democratic Party (DS), and the Liberal Democratic Party (LDP). Many of my interviewees accused this group of betraying “the people” in favour of self-interest and resources from Western donors, which were pitted against the interests of ordinary and impoverished people in Serbia.⁹⁵ This attitude was even more prevalent in BiH, where a professor of sociology told me that what appears to be civil society are “branches of George Soros Fund” which do not represent the interests of local communities.⁹⁶ This factor is often underestimated by scholars who argue that the ICTY had a positive impact on democratization by politically empowering civil society.⁹⁷

This attitude is largely a response to the fact that Western donors ally with certain civic actors on the ground, which has attracted accusations of favouritism and has consequently lowered the level of popular participation in politics and civil society in Serbia.⁹⁸ Stefanie Kappler and Oliver Richmond’s findings confirm that the EU has exclusionary tendencies when it comes to allocating funding to civil society groups and initiatives which do not fit into EU’s liberal-rights and market-economy framework or do not use conventional “Western” civil society channels.⁹⁹ Therefore, even though these scholars, civic activists, and politicians are proponents of democratic goals such as multiculturalism, respect for human rights, and tolerance, they were

⁹⁴ Author interview with Zoran Ćirjaković, Belgrade, Serbia, June 24, 2011.

⁹⁵ Author interview with Predrag Marković, Belgrade, Serbia, July 26, 2011. See also Greenberg 2006, 333-4.

⁹⁶ Author interview with Ivan Šijaković, Banja Luka, Serbia, July 12, 2011.

⁹⁷ For example Nettelfield 2010 emphasizes that the ICTY produced a political opening for civil society organizations in Bosnia but does not examine the consequent significant marginalization and backlash against such organizations or the political opening that the ICTY produced for extreme nationalists.

⁹⁸ Greenberg 2010, 54, 58; For foreign donor funding of civil society in Bosnia see also Nettelfield 2010, 146.

⁹⁹ Kappler and Richmond 2011, 265. See also Linnekin 1991, 447; Interview with Milan Dimić, Belgrade, Serbia, August 31, 2011.

seen not as as lobbyists for inclusive goals but for exclusionary ones. The programs that “transition elites” advocate were perceived as too progressive on the political spectrum, because of their emphasis on cooperation with the ICTY, as well as on gay and lesbian rights and gender sensitivity.¹⁰⁰ This attitude was prevalent not only among my ultra nationalist interviewees who charged the “transition elites” with rejecting and having an aversion to anything considered “Serbian.” Even moderate nationalists had harsh criticisms for the liberal factions, accusing the liberals of betrayal, building their credentials on “weekend schools,” being bought off by the West, and being “fashionably European.”¹⁰¹ In this sense, promoters of democratization were not perceived as neutral – liberal democracy itself was seen as benefiting only certain kinds of people, and the tendency of locals to associate the ICT with these actors only diminished the tribunal’s potential to make an impact.

Rwanda

The ICT’s failure to address RPF crimes perceived as support for the RPF regime

At the establishment of the ICTR the Rwandan government wanted to limit the scope of crimes to be considered at the tribunal to genocide and exclude war crimes and crimes against humanity, including criminal acts committed by the Rwandan Patriotic Front (RPF) after July of 1994. The government did not get its way: Resolution 955 included war crimes and crimes against humanity in addition to the crime of genocide.¹⁰² Still, the ICTR only arrested suspects who served in the Juvénal Habyarimana regime until July 1994, and not one individual from the RPF was indicted even though in 1992 Africa Watch found that the RPF committed serious human rights violations, and in 1993 an international commission of inquiry reported executions, pillaging and forced deportations by the RPF.¹⁰³ According to Africa Watch and other sources, the RPF forces massacred tens of thousands of civilians in Rwanda between April and September 1994. The number reported ranges from 25,000 to well over 100,000, with the higher number

¹⁰⁰ Greenberg 2010, 54, 58.

¹⁰¹ Author interview with Milan Dimić, Belgrade, Serbia, August 31, 2011.

¹⁰² Barria and Roper 2005, 355.

¹⁰³ Kamatali 2003, 127; Africa Watch 1992; Federation internationale des droits de l’homme (Paris), Human Rights Watch (New York), Union interafricaine des droits de l’homme et des peuples (Ouagadougou) & Centre international des droits de la personne et du developement democratique (Montréal) 1993, 66-75.

being accepted in more recent times.¹⁰⁴ A UNHCR report, the Gersony Report, the original of which was suppressed by key US officials, served as grounds for the Security Council to ask the ICTR to prosecute all crimes committed in Rwanda, not simply genocide crimes committed against the Tutsi.¹⁰⁵

The fact that the ICT did not address alleged RPF crimes resulted in arguments among my interviewees that the ICT sided with the Paul Kagame's authoritarian government, and inadvertently harmed the political potential of the pro-democracy opposition inside and outside of Rwanda. This perceived failure of the ICT did not only upset the families and friends of the Hutu who were the main victims of RPF crimes. My Tutsi interviewees who were in Rwanda before and during the 1990s, who were adults with established careers during the Habyarimana and the Kagame regimes, and who lived through the genocide and have therefore seen much of what took place, most often argued that the ICTR should have tried everyone accused of any war crime or crime against humanity.¹⁰⁶ Like many Rwandans inside and outside of Rwanda, as well as many foreigners, these interviewees accused the ICT of "selective justice" and bias against the Hutu. A professor who has lived in Rwanda his entire life, was 44 at the time of the genocide, and went to Arusha three times to testify against accused *génocidaires* argued that "[j]ustice is not for a category of people, justice is for everyone. You cannot just deal with one side."¹⁰⁷ Despite a few committed prosecutors, the ICTR did not detain any RPF members accused of war crimes and crimes against humanity, with the last prosecutor simply abandoning this goal and leaving such cases to the Rwandan military courts. The overwhelming majority of my interviewees believed that the disciplinary courts of the RPF military were in no way capable or willing to try their own and therefore viewed this decision as a mockery of justice.¹⁰⁸

My data suggest that the ICT was supposed to serve as a supranational check on the justice sought by the authoritarian government and use its supranational powers to address any loopholes and biases at the domestic level. A professor of media law described what he believed

¹⁰⁴ Africa Watch 1992; Des Forges 1999, 728; Prunier 1997, 427.

¹⁰⁵ UNHCR 1994.

¹⁰⁶ Author interview with Anonymous, Kigali, Rwanda, November 4, 2011.

¹⁰⁷ Author interview with Anonymous, Kigali, Rwanda, November 23, 2011; Author interview with Anonymous, Kigali, Rwanda, November 22, 2011.

¹⁰⁸ Author interview with Anonymous, Kigali, Rwanda, December 6, 2012.

should have been ICT's message: "The international community is watching and intervening by way of justice ... The ICTR should give us hope that our leaders will not lead us to another war or genocide."¹⁰⁹ The interviewee's statement implies that by failing to try alleged criminals in the RPF the ICTR failed to send a message to President Kagame and instead gave amnesty to his party. Selective amnesty was perceived as a dangerous route rather than a good foundation for justice and reconciliation: "[f]ull amnesty is not right if it is not given to both sides."¹¹⁰ In this sense my interviewees agreed with critics who argue that ICTs are victor's courts, rather than institutions establishing key elements of democracy – the rule of law and judicial independence.¹¹¹

One of my interviewees expressed the serious consequences that followed: "The ICTR thus leaves the population to the fate of warlords ... The tribe that was almost exterminated won the war but now that tribe is in power and will take revenge."¹¹² Observers of Rwandan politics have been disappointed to find that Rwanda's path from dictatorship to democracy has not been very successful or straightforward. Rwanda does not have a competitive political environment, it has a closed political climate and a culture of fear and self-censorship, compiled by skillful propaganda by the RPF and the RPF's great effort to marginalize and suppress political activity, such as banning political parties and arresting their founders and members.¹¹³ Political opposition hopefuls are aware that criticism against the regime can be interpreted as "promotion of divisionism," "genocidal ideology", or "denial of genocide" which are grounds for legal charges and imprisonment.¹¹⁴ A striking similarity exists between the RPF-led government and the previous Habyarimana regime: political power is concentrated in a small clientelistic network of leaders and the Rwandan population at large now feels as insecure and politically powerless as it did before the genocide. Greiff argues that "[a] minimum level of respect for democratic, participatory rights is a precondition of the successful implementation of [transitional justice]

¹⁰⁹ Author interview with Anonymous, Kigali, Rwanda, December 14, 2011.

¹¹⁰ Author interview with Anonymous, Kigali, Rwanda, December 14, 2011.

¹¹¹ See Damaska 2008, Mutua 1997, and Kittichaisaree 2000.

¹¹² Author interview with Anonymous, Kigali, Rwanda, December 14, 2011.

¹¹³ Reyntjens 2006, 1109; Author interview with Anonymous, Kigali, Rwanda, December 5, 2011; See also Fujii 2009, Grant 2010 and Longman 2011.

¹¹⁴ Longman 2011, 33-5; Grant 2010.

measures.”¹¹⁵ The evident lack of such conditions in Rwanda might provide a partial explanation for the problems that the ICTR faced.

By accepting the ruling clique’s unwillingness to allow members of the RPF to be put on trial, the ICT certainly did not encourage party pluralism or political opposition in Rwandan politics. In fact, as a top-level government official admitted to me, the ICT contributed significantly to the RPF regime in the form of “negative peace” because “the tribunal prevented those who are against the regime to run free and organize attacks and invasions.”¹¹⁶ The tribunal kept in its custody mainly political and military leaders, senior government administrators, as well as a few media and religious actors, and researches estimate that approximately 75 percent of those indicted were subsequently arrested.¹¹⁷ The ICTR thus secured RPF monopoly on power and while this outcome was undoubtedly unintended by the ICT, it significantly damaged, or at the least stalled, any potential political transition to democracy.

The ICT perceived as linked to the Western “Friends of the New Rwanda”

In addition to the specific ways in which according to my interviewees the ICT negatively affected the potential for a political transition in Rwanda, my interviewees also perceived the ICT as part of a larger Western coalition of “Friends of the New Rwanda,” meaning post-genocide Rwanda led by Paul Kagame’s government and the RPF party. Among other actors, Friends of the New Rwanda include Bill Clinton and Tony Blair (and the American and British administrations more generally), as well as Irish rock star Bono and American evangelical Pastor Rick Warren.¹¹⁸ Checks on the Rwandan regime, such as international pressure to cooperate with the ICTR, especially on alleged crimes of the RPF, and donor monitoring of the regime’s violations of human rights at home and in neighbouring countries, have been minimal. My findings confirm the arguments of scholars who argue that praise of Rwanda’s economic growth, bureaucratic governance, and good leadership by Friends of the New Rwanda ignores evidence of growing inequality, structural violence, and human rights

¹¹⁵ Greiff 2012, 58.

¹¹⁶ Author interview with Anonymous, Kigali, Rwanda, November 14, 2011.

¹¹⁷ Barria and Roper 2005, 360.

¹¹⁸ Reyntjens 2013, xiii.

abuses.¹¹⁹ While Rwanda deserves recognition of its economic performance, the country's economic growth owes a lot to foreign aid, which represents about 40-50 percent of Rwanda's budget, the regional role the country has acquired since the genocide, as well as the great amount of military and economic control, including illegal resource exploitation,¹²⁰ Rwanda has managed to exercise over the Democratic Republic of Congo (DRC).¹²¹ Estimates suggest that in 1999 Rwanda's revenue from diamonds, gold, and coltan from the DRC equaled about 6.4 percent of Rwanda's GDP and 146 percent of its official military expenses. In 2000 the revenue from coltan alone was about the equivalent of Rwanda's official defense expenditure.¹²²

Rachel Hayman argues that donors "get caught up in the development success story that Rwanda represents (at least, on the surface)" and warns against turning a blind eye to serious political problems and accepting Rwanda as a "good enough democracy" because such attitudes parallel the attitude the international community had towards the previous Habyarimana regime even leading up to the genocide.¹²³ "Rwanda's high growth rates are deceptive in that they hide large and growing inequalities between social classes, geographic regions and gender."¹²⁴ An Ansoms finds that Rwanda's Gini coefficient rose from 0.47 in 2001 to 0.51 in 2006 and it seems to be getting worse.¹²⁵ Economic power is primarily concentrated in the same hands as political power – an inner circle composed of mainly Anglophone Tutsi returnees from Uganda, RPF generals, and a select few. The composition of the inner circle is however not static as several individuals who were in the inner circle at one point have recently fled the country.¹²⁶

In addition to the development "success" story, another reason for the leniency of Western donors towards the RPF regime and the donors' support for a hands-off approach to the ICTR is what some scholars have referred to as "genocide credit," namely the favouritism the RPF regime allegedly enjoys because of feelings of guilt on the part of American and British

¹¹⁹ See for example Reyntjens 2013, Straus and Waldorf 2011, Zorbas 2011 and Uvin 2003.

¹²⁰ Reyntjens 2013; UN 2001; Nichols 2012; Lemarchand 2009; Prunier 2009.

¹²¹ Al Jazeera 2012.

¹²² Senat de Belgique 2003; Stefaan 2003.

¹²³ Hayman 2011, 127; See also Uvin 1998.

¹²⁴ UNDP 2007.

¹²⁵ Ansoms 2009. See also Terrill 2012.

¹²⁶ Daily Monitor 2010; Mukombozi 2013; Sebarenzi and Mullane 2009.

governments over international inaction in 1994.¹²⁷ The Rwandan government seized the opportunity to manipulate the genocide morality narrative early on and has employed it against international criticism over the years.¹²⁸ When criticism is pointed at Rwanda, the typical response of the Rwandan government is to reflect it back to the source. For example, when a UN report criticized Rwanda for supporting rebels in the Democratic Republic of Congo (DRC), Rwandan officials responded by accusing its authors of “outright lies,” the unwillingness of the UN and the international community to “confront their own failures and weaknesses”¹²⁹ and “a continuous ploy by powerful countries to disregard the truth when it comes to Rwanda [and] to hide their guilt after they abandoned Rwandans during the genocide.”¹³⁰ The regime has extended victimhood status to itself (even though it is composed mainly of returnees who did not experience the genocide but invaded or moved to Rwanda after the genocide) and in doing so labels all opposition to the RPF as morally and politically aligned with those guilty of genocide.¹³¹ This strategy has proven so successful that, as Reyntjens notes, “since 1994 [Rwanda] has tackled the rest of the world as if it were a global superpower.”¹³²

A slight shift took place in 2012 when Britain, the US, Sweden and the EU suspended a part of their aid to Rwanda because a UN report found that Rwanda helped create, arm and support M23 rebels who have caused the worst violence in years in the DRC.¹³³ However there is no doubt that for two decades Paul Kagame’s regime has faced a generous and permissive international community. Sentiments such as “the ICTR is being run by the invisible hand of the US and the UK who feel ashamed for not helping when they should have” were common among interviewees.¹³⁴ Some accused the ICTR of hiring employees from a particular ideological camp and with particular political incentives, and thus putting up selection barriers for those who wished to see the entire ICTR mandate fulfilled.¹³⁵ Many of my interviewees mentioned that the

¹²⁷ Reyntjens 2013.

¹²⁸ Grant 2010.

¹²⁹ “Statement” 2008.

¹³⁰ “UN Report” 2008; See also Reyntjens 2013, 134.

¹³¹ Reyntjens 2013, 192.

¹³² Reyntjens 2013, 192.

¹³³ Nichols and Charbonneau 2012.

¹³⁴ Author interview with Anonymous, Kigali, Rwanda, December 14, 2011.

¹³⁵ Author interview with Anonymous, Kigali, Rwanda, November 28, 2011; Author interview with Anonymous, Kigali, Rwanda, December 6, 2012.

tribunal had a political incentive that interfered with judicial independence: minimizing the failure of the UN to prevent the atrocities in 1994.¹³⁶ Thus, similar to my findings in the Balkans, my interviewees in Rwanda did not perceive the ICT to be an independent institution grounded in judicial independence and the rule of law, which diminished the tribunal's function as a foundational pillar in Rwanda's attempt to democratize.

Conclusion

The purpose of this paper has been to unpack the connections between two separate bodies of literatures, liberal institutionalism and international law on the one hand and transitology and democratization on the other hand, which rarely engage in dialogue despite the fact that, as I argue, they share the common end goal – political transition to democracy. This paper has interrogated key assumptions that supporters of international law make in relation to what they argue is a positive link between transitional justice and democracy. Relying on evidence from the Balkans and Rwanda, this paper has argued that ICTs had serious, unintended effects on liberal democratic reforms on the ground. A domestic backlash to these institutions and manipulation by local actors weakened popular support for domestic pro-reform actors and strengthened popular support for ultranationalist and authoritarian actors. The broader take home lesson is that how transitional and international justice affects the domestic balance of powers may contribute to peace and democratic consolidation but may also result in resurgence of interethnic grievances and authoritarianism and thus has serious implications for security and political transition in post-conflict societies. Simply put, transitional justice may not support the democratic transition, at least not in the short term.

The comparison of the empirical findings in the Balkans and Rwanda allowed us to examine cases where the relationship between international efforts and domestic actors was strikingly different, yet the effect on democratic transitions was negative in both cases. What we learn from the Balkans is that if the international tribunal is perceived as being hostile towards a relatively (or at least procedurally) democratic government and supportive of local (but also

¹³⁶ Author interview with Anonymous, Kigali, Rwanda, November 10, 2011; Author interview with Anonymous, Kigali, Rwanda, November 28, 2011.

regional and international) opposition forces, inevitable accusations leveled against the tribunal on grounds of imperialism and selective justice can increase popular support for non-reformist nationalist leaders. What we learn from Rwanda is that when the international tribunal is perceived as taking the side of the national government, its contribution to democratization is not necessarily more effective. While ICTR's relationship with the Rwandan regime contributed to the country's political stability (because the tribunal helped eliminate political opposition), this "alliance" did not significantly shape the human rights record of the authoritarian government, stifling plurality of actors and debates on the ground.

Given the problems reviewed here, we can caution the advocates of the ICC regarding further domestic backlash. Very specific circumstances in each of its cases, including the question of whether the means and freedoms to facilitate effective outreach and foster constructive public debate exist, are key and should be considered before a case is even taken up. The important element to take into account is precisely which local actors and factions in each case are bargaining with international policymakers, and to therefore distinguish between the benefits to governments, local actors, particular groups, and the larger population. A generic or "one size fits all" approach in an international context that is obviously selective will not suffice and may prove to be extremely damaging. ICC trials should be the very last resort and only pursued after all other domestic/internal (not necessarily legal) routes to post-conflict transitions are exhausted. Thorough empirical evaluations of available mechanisms of transitional justice, and an openness to alternative and context-specific methodologies and solutions, which do not simply assume a judicial approach but acknowledge that the interests of a particular affected society might be better served by other measures such as diplomacy, restorative and distributive justice, including conditional amnesties and community approaches, are where the future opportunities in the field lie.

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