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opinion poll published in June 1999 by the newsmagazine *Nin,* almost two-thirds of Serbs do not believe that the atrocities alleged in the tribunal proceedings occurred; instead they "emphasize the high price that Serbs are now paying."[70] This sense of "reversal" was well articulated by a Serb lawyer: "I didn't kill anyone, but an Albanian neighbor told me I would never be safe in Kosovo. I am a victim of their ethnic cleansing."[71] Others considered tribunal reports as nothing less than anti-Serb propaganda. Ethnic Albanians seem particularly sensitive to what they perceive as a whitewashing by the Serbian government. Pajazit Nushi, member of the Council for Defense of Human Rights and Freedoms in Pristina, notes, "Still, now, there is no single Serbian political voice that has condemned the crimes."[72] Moreover, the withdrawal of Serbian troops from Kosovo has been accompanied by acts of violent retribution by ethnic Albanians. One news account noted, "In the early days of NATO occupation, many Serbs who stayed [in Kosovo] were optimistic that they could forge a future with their Albanian neighbors. But a wave of retaliatory killings of Serbs by Albanians enraged by wartime atrocities has calcified emotions."[73] Time is certainly not assisting efforts to create a peaceful, multiethnic Kosovo, as new justifications for animosity between ethnic groups are kindled and old hatreds reinforced.

Clearly, the deterrence value of the emergent regime has been, to this point, quite weak, owing largely to the reluctance of the international community to aggressively pursue high-level perpetrators; however, the arrest of Milosevic and the possibility of his extradition for trial at the Hague tribunal leaves considerable room for optimism that the regime's deterrence power may dramatically increase. The case of ICTY action in Kosovo also illustrates the limitations of the atrocities regime in promoting national reconciliation in ethnically torn states. It remains to be seen whether the arrest of Milosevic will serve to disclose the truth of events that occurred during the Balkan conflict and promote national healing, or whether his arrest and extradition in response to Western pressure will further calcify animosities between ethnic groups in the region. The ability of the ICTY to obtain Milosevic's extradition is a crucial point in the development of a more viable atrocities regime.

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

JUSTICE IN SOUTHEAST ASIA?

That the ICTY has not only survived but has served as a model for other ad hoc tribunals, including a permanent international criminal court, could indicate that war crimes adjudication is a successful policy tool. However, although the regime has overcome considerable procedural and structural obstacles in the Balkans and Rwanda, these obstacles remain formidable in other cases. In regions dominated by power politics, regime/norm development remains in the formative stage, especially in situations where powerful states have strong incentives *not* to become involved. Without the direct intervention by strong states and cooperation by governments in states where atrocities are alleged to have occurred, the atrocities regime lacks strength.

Cambodia

It has been estimated that more than a million Cambodians died from execution, torture, disease, or hunger from 1975 to 1979 under the Khmer Rouge regime; some estimates go as high as 2 million. Although it is unclear why a war crimes tribunal was not established earlier in the wake of such a profound human tragedy, the institutional momentum of the atrocities regime has prompted the UN to seek to establish a judicial mechanism for Cambodia. The failure to establish a tribunal earlier can be attributed to the interests of several Security Council member states and to the recalcitrance of the current Cambodian government.

At the time atrocities were committed a tribunal was not in the strategic interests of the United States; in the aftermath of the Vietnam War there was little incentive once again to become entangled in Southeast Asia's political quagmire. Moreover, in adjudicating charges of war crimes, information about U.S. secret bombings of Cambodia and other sensitive information could become part of the public record. William Dowell, UN correspondent for *Time,* suggests that many countries, including the United States, "have used the Khmer Rouge to pursue their own political interests in the region at one time or another, and all are reluctant to talk about their relationship with the Khmer Rouge."[74] This fear may be particularly acute for China, already dealing with image problems that complicate its bid for membership in the World Trade Organization. Given the current political climate, Beijing is understandably hesitant to have its role in supporting the Khmer Rouge regime exposed to the

[74] *Time,* 22 January 1999.

international community it wishes to engage.[75] While such reasons may discourage powerful governments from becoming involved, public demands for action in Cambodia have also been less acute than was the case for the Balkans or Rwanda. In the United States public desire for justice and accountability has been tempered by an equally compelling desire to "close the book" on the Vietnam era, reducing domestic demands for state action.

Domestic resistance is also an important factor in Cambodia. Initial UN attempts to establish a tribunal for Cambodia were met with little cooperation from the Cambodian government, especially Prime Minister Hun Sen. The UN has proposed several possible tribunal configurations, all of which display institutional adjustments stemming from the lessons learned in the Balkans and Rwanda. First, the UN wishes to try in a single trial only twelve former political and military leaders of the Khmer Rouge, thereby avoiding the protracted proceedings that plague other ad hoc tribunals currently in operation; however, the Cambodian government has expressed little interest. "We have no confidence in an international court of law," noted Hun Sen, showing concern that a trial may upset his fragile hold on power in Cambodia.[76] Hun Sen has been concerned that the scope of criminal culpability may make reconciliation through justice problematic in Cambodia. As one observer remarked, "justice itself seems a rusty chain that will only bloody anyone who tries to touch it. To try Khmer Rouge chieftains would be, in a sense, to prosecute the whole country."[77]

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The case of Cambodia also illustrates the problem time poses when relying on adjudication to promote peace and reconciliation. Although there is no statute of limitations on tribunal indictments, human rights groups argue that because of the advanced age and poor health of many suspects, quick action to create a tribunal is imperative lest Cambodia lose its chance to bring Khmer Rouge leaders to justice.[78]

Indonesia and East Timor

In response to a successful referendum in September 1999 declaring East Timor's independence from Indonesia, pro-Indonesia militias mounted

[75] *South China Morning Post,* 25 August 1999, 14.
[76] *Time,* 22 March 1999, 56.
[77] *Time,* 16 August 1999.
[78] *New York Times,* 12 August 1999, A8.

a campaign of violence and intimidation throughout East Timor. *** In light of evidence of human rights abuses, the UN Commission for Human Rights (UNCHR) opened a special session that resulted in a resolution calling for a preliminary investigation into war crimes in East Timor, seen by many as the first step toward establishing a war crimes tribunal.[79] The resolution specifically refers to Security Council Resolution 1264, in which the Council "demanded that those responsible for such acts be brought to justice."[80] However, the government of Indonesia quickly rejected the UNCHR resolution, a move that denied UN investigators access to Jakarta's military files. During the special session of the UNCHR, the Indonesian representative dismissed the need for international intervention: "The Government last night had established a fact-finding commission to compile information on human-rights violations and bring the perpetrators to justice. It was important to ensure that this august body not do anything that would open old wounds and exacerbate problems in the territory."[81] Indeed, the Indonesian government's lack of cooperation makes the creation of a tribunal quite unlikely.

That tribunals were not established in Cambodia and Indonesia reflects two weaknesses in relying on international law to provide peace and reconciliation in war-torn regions: the need for cooperation, both internationally and in war-torn regions, and the hesitancy of the international community to intervene militarily. While ad hoc tribunals may be formed by fiat of the Security Council, the difficulties encountered by the ICTY show how lack of cooperation may stifle institutional effectiveness and regime development. Proponents of an international criminal court point to Cambodia and East Timor, where the atrocities regime appears beholden to the interests of the powerful, as evidence that such a permanent institution is necessary if a truly effective regime is to be established.

THE INTERNATIONAL CRIMINAL COURT

*** While the ICC is not a specific case of the application of a legal regime to an instance of genocide or crimes against humanity, examining its development is crucial to understanding the political challenges of expanding the existing ad hoc tribunal system to a more universal

[79] UNCHR Res. 1999/S-4/1.

[80] S.C. Res. 1264, UN Doc. S/RES/1264 (1999). See also S.C. Res. 1272, Art. 16, UN Doc. S/RES/1272 (1999), available online at <http://www.un.org/Docs/scres/1999/99sc1272.htm>.

[81] UN press release, HR/CN/99/67, 23 September 1999, 6.

atrocities regime. This case illustrates the tension between the need for great power support and the desire to establish a hard law regime that transcends power and political interests (that is, holds strong and weak states equally accountable). *** The ad hoc system employed in the existing atrocities regime is appealing to powerful states because it facilitates adjudication, yet control over its application in a given case remains with the Security Council. *** While the statute to create the ICC is an established fact, its power as part of the atrocities regime remains contested and indefinite, and its development is marked by concessions made to great power interests. This case suggests that if the atrocities regime is to gain widespread acceptance, the process of legalization will likely undergo "softening" in order to mitigate the political contracting costs of the new regime. As noted by Kenneth W. Abbott and Duncan Snidal, hardening the legal foundations of the atrocities regime is a sensitive and protracted process that may involve initially taking softer positions.[82]

Although President Clinton signed the Rome Statute on 31 December 2000 that created the ICC, the United States has long opposed several key components of the Rome Statute, opposition still expressed by the Bush administration.[83] The first involves the universal jurisdiction provisions as articulated in the statute that subject any state, signatory to the statute or not, to the court's jurisdiction.[84] ***

The United States was also concerned that the scope of crimes covered under the court's jurisdiction was overly broad. "Crimes of aggression," for example, is included, though no precise definition of "aggression" was agreed on during the drafting of the statute. ***

Another concern was the prosecutor's authority to investigate crimes even in cases where no state party had issued a complaint. Under Articles 13 and 15, the prosecutor may investigate crimes *proprio motu* based on information provided by parties within the court's jurisdiction.[85] U.S. negotiators wanted to limit the power to bring cases to the court to the Security Council, consistent with the precedent set by the ad hoc tribunals. Without this limitation, U.S. negotiators argued, members of the U.S. armed forces "would be subject to frivolous, politically motivated charges" that may hinder crucial peacekeeping missions in the future if there was a possibility of "malicious prosecution."[86] ***

[82] Abbott and Snidal 2000.
[83] *Los Angeles Times,* 15 February 2001, A4.
[84] Rome Statute, Article 4(2).
[85] Rome Statute, Article 13(c); 15(1).
[86] David 1999, 357.

Finally, the Clinton administration insisted on an exception for personnel involved in official military action. David Scheffer, U.S. ambassador-at-large for war crimes issues, stated that the United States wanted "a clear recognition that states sometimes engage in very legitimate uses of military force to advance international peace and security."[87] *** Critics, however, argue that exceptions would render the ICC an empty vessel. Richard Dicker, associate counsel for Human Rights Watch, argued that the exceptions favored by the United States represent "a loophole the size of the Grand Canyon that any rogue state would drive right through."[88]

*** One U.S. official remarked, "We have shown that the only way to get war criminals to trial is for the U.S. to take a prominent role. If the U.S. is not a lead player in the creation of this court, it doesn't happen."[89] While Clinton's signing of the Rome Statute was lauded by ICC proponents and human rights organizations, it may be more symbolic than instrumental. Articulating the Bush administration's stance at the UN, Secretary of State Colin Powell declared, "As you know, the United States . . . does not support the International Criminal Court. President Clinton signed the treaty, but we have no plans to send it forward to our Senate for ratification."[90] As normative considerations press for harder legalization in the emergent atrocities regime,[91] negotiating the political dimensions necessary to building institutional strength seems predicated on softening some aspects to gain the necessary international consensus. The evidence suggests that such softening measures have already taken place.

EVALUATING THE ATROCITIES REGIME

Formation

The evidence suggests that expanding liberal norms of state conduct and protecting human rights certainly explain the existence of tribunals in locales with little strategic or material importance. The proliferation of human rights norms is evident in current legal trends in both the United States and Europe.[92]

[87] Quoted in *Associated Press,* 14 August 1999, PM Cycle.
[88] Quoted in *Associated Press,* 14 August 1999, PM Cycle.
[89] *Time,* 27 July 1998, 46.
[90] *Los Angeles Times,* 2 February 2001, A4.
[91] For example, holding perpetrators of genocide, war crimes, and crimes against humanity accountable independent of political power and interests involved.
[92] Henkin 1990.

In the United States the term *human rights* was articulated in only 19 federal court cases prior to 1900; this number grew to 34 from 1900 to 1944, 191 from 1945 to 1969, 803 in the 1970s, 2000 times in the 1980s, and over 4000 times in the 1990s. In Europe the case load of the European Court of Human Rights jumped from 11 cases during 1959–73 to 395 cases during 1974–92.[93] ***

Exponential growth in the articulation of human rights norms is not only a function of what Oran Young termed "spontaneous regime development"; it is also being cultivated by nongovernmental human rights organizations and aided by growing media coverage, often generated by such groups as Human Rights Watch and Amnesty International.[94] In addition the emergent atrocities regime itself may be seen as a norm entrepreneur.[95] Once established, the tribunal articulates and reinforces norms of state conduct and may also apply direct pressure to states through calls for investigations or by releasing information to the media. Such pressures may be manifest at the systemic level, through states' desiring to avoid being labeled "pariahs" or "rogues" or simply through emulation.[96] In a world of interdependence, reputation is a valuable asset in maintaining positive relations with key partners.[97] Pressures may also follow a "bottom-up" path, especially in liberal democracies where public exposure can generate policy demands. Certainly, additional research is necessary to trace such demand-side questions and to identify the role of the tribunals themselves in generating demands for political action.

However, though these developments signal the evolution of norms to protect civilians during armed conflict, they may also be building norms that preclude military intervention at early stages of crises. The danger of relying on mechanisms that only respond *ex post facto* to atrocities is clearly evident in both Bosnia and Rwanda. Though cognizant of atrocities in Bosnia, "the major powers . . . backed away from significant armed intervention. Facing domestic criticism for allowing the slaughter to continue unchecked, some governments seemed to feel obliged to show that they were doing *something*. It was in this vacuum that the proposal for a tribunal advanced."[98] *** Although human rights norms may be strengthening, norms of military intervention (often necessary for

[93] See Jacobson 1996; and Lutz and Sikkink 2000.
[94] Young 1983, 98–99.
[95] I thank an anonymous *IO* reviewer for this important observation.
[96] Rosecrance 1999.
[97] See Chayes and Chayes 1995, 230; and Keohane 1997, 501.
[98] Neier 1998, 112.

successful atrocities adjudication) make action increasingly difficult to initiate. The same groups that lobby for adjudication and accountability are often the most vocal opponents of military intervention. Moreover, norms of intervention increasingly require multilateral rather than unilateral action for both operational (cost-sharing) and political (legitimacy) reasons.[99] Clearly, this has troubling implications for enforcement, for as the evidence presented here suggests, military intervention may be necessary in many cases for successful adjudication.

Application

Realist variables of power and interest best explain why tribunals may be established in some cases but not in others. Power and interest strongly influence a state's reluctance to establish a given ad hoc tribunal or be signatory to a comprehensive international legal regime. In the cases of Cambodia, East Timor, Chechnya, and Korea, great power nations were obviously reluctant to expose sensitive issues in a public arena, especially past or present collusion with despotic regimes (in the Cambodian case). In addition, strategic interests figure prominently in the reluctance of strong states to ratify the Rome Statute. Modern warfare often necessitates destroying "civilian" targets for military victory, and in general "collateral damage" from bona fide military missions has rarely been considered a violation of human rights, even by critics.[100] These military actions may further the overall good, even when the human cost is high; in other words, the "just war" may sometimes involve regrettable human costs that should not be prosecutable offenses under international law. The evidence presented here suggests that powerful states are reluctant to engage any regime that may *significantly* impede measures deemed necessary to achieving security. The dominance of the Security Council in decisions to establish ad hoc tribunals has been, to date, driven by state interests. While it can be argued that the Balkans and Rwanda offer no particularly salient security incentives, establishing tribunals was certainly not seen as threatening or compromising to great power interests.

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[99] Finnemore 1986, 180–85.
[100] Donnelly 1998, 531. See also Morgenthau 1985, 253–60.

Expanded Goals and Institutional Adjustments

*** While evolving norms of human rights may initiate the construction of the atrocities regime in the first place, differentials in power and the interests of the most powerful states clearly shape the process of institutionalization. E. H. Carr suggested that, "The law is . . . the weapon of the stronger. . . . Law reflects not any fixed ethical standard, but the policy and interests of the dominant group in a given state at a given period." As such, "Politics and law are indissolubly intertwined."[101] This certainly applies to the case of war crimes adjudication. Iain Guest suggests that suspicions ran high, especially early in the tribunal's development, that the tribunal was serving as "a substitute, an alternative, to the kind of tough political action which would put an end to the ethnic cleansing that was taking place."[102] States find establishing a tribunal system appealing because it provides an economically and politically inexpensive means of responding to demands for international action; it enables states to commit at a level commensurate with their strategic interest in the region involved. From the standpoint of *realpolitik,* the regime is a success whether or not it succeeds in bringing justice or alleviating ethnic conflict. From the standpoint of *idealpolitik,* the measures of success – reducing human suffering, protecting human rights, and promoting regional stability – are certainly left wanting. Here we must assess the tribunal's success from another dimension – as a component of conflict management.

Theodor Meron offers the best articulation of the regime's more expansive and idealistic aims: "The great hope of tribunal advocates was that the individualization and decollectivization of guilt . . . would help bring about peace and reconciliation. . . . Another of the tribunal's objectives was deterrence of continued and future violations of the law."[103] For international lawyers the connection between a functioning legal regime and political order is clear: "There can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance."[104] If peace is a function of law and justice, is an atrocities regime the panacea for the problem of ethnonationalist violence? Here, the current evidence is certainly not compelling. Effective deterrence requires three

[101] Carr 1961, 176–77.
[102] Quoted in Commission on Security and Cooperation in Europe 1996, 12.
[103] Meron 1997, 6. See also Pejic 1998.
[104] Ferencz 1980, 1.

elements – commitment, capability, and credibility.[105] The existence of war crimes tribunals and the successful prosecution of initial cases did little to curb actions in any of the cases examined. The record of U.S. and NATO intervention in ethnic conflicts over the past thirty years has been marked by very limited commitments, especially in cases where threats to U.S. interests were limited.[106] Because of the rather spotty record of the West regarding intervention and the formidable institutional obstacles facing the fledgling tribunal system, perpetrators of brutality have had little reason to take UN commitment seriously. In terms of capability, the United States has certainly possessed the power to apprehend war criminals and political despots indicted by the tribunal. However, the difficulty of apprehending such people came at an unacceptably high logistical and political cost, considering that a large-scale military commitment would be necessary and that to ensure stability such forces would need to remain for prolonged periods.[107] ***

Preliminary evidence does not seem to support notions that decollectivization of guilt through war crimes adjudication is, on its own, an effective means to achieving national reconciliation – seen as essential in dealing with ethnic or religious violence (identity-based conflict). In the former Yugoslavia, ethnic tensions remain high and are accompanied by sporadic violence and acts of retaliation on both sides.[108] While instrumentalists may argue that ethnic tensions are manipulated by actors to further material or political interests, the ability to generate group solidarity and ethnic blood-lust is certainly facilitated by a historical cycle of violence.[109] In this sense, ethnic violence is congruent with other forms of identity conflict, including religious wars, and groups have long endured cycles of violence and reprisal.[110] Decollectivizing guilt is a

[105] See Morgan 1977; George and Smoke 1974; Lebow and Stein 1990; and Spiegel and Wheling 1999, 497–500.

[106] See Callahan 1997, 187–199; and Harvey 1998.

[107] Chaim Kaufmann remarked that "such peaces last only as long as the enforcers remain." Once peacekeepers are removed from the situation, the artificially established balance of power shifts, an "ethnic security dilemma" arises, and the credibility of majority commitment not to exploit minority ethnic groups falters, threatening to renew the cycle of violence. See Kaufmann 1996,137; Posen 1993; and Fearon 1998.

[108] See *Los Angeles Times,* 25 March 2000, A5; and *Los Angeles Times,* 4 March 2001, A1, A9.

[109] Instrumentalist accounts also do not explain why ethnic and religious conflict tend to be so much more barbaric than other forms of conflict. Targeting of women and children and organized programs created to terrorize a population certainly carry no specific advantages to conventional conflict in attaining material gains. See Lake and Rothchild 1998a, 5–7; and Brown et al. 1997.

[110] Girard 1977, 24.

curative measure taken by the state to break this historical cycle. However, the effectiveness of such a strategy is contingent on detaining high-level perpetrators and, presumably, giving amnesty to those at lower levels (perhaps in return for admitting guilt, fully disclosing events, and testifying at trials of political and military leaders, as has occurred in truth and reconciliation proceedings elsewhere). Yet early precedent set by the tribunals runs an opposite course.

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Decollectivizing guilt also does not provide a means of promoting tolerance by shaping ethnic and national identities. Social constructivists argue that ethnic identities are malleable and shaped by continually changing social contexts, yet none of the currently debated elements of ethnic conflict management incorporate a mechanism for "re-imagining" the sociopolitical community.[111] It would seem that some mechanism of social education should accompany decollectivization of guilt if the atrocities regime is to succeed within these more expansive agendas.

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CONCLUSION

What lessons can be drawn from these initial developments in the atrocities regime? Realist factors have dominated the politics of war crimes adjudication, but the atrocities regime is in its infancy. To dismiss the efficacy of the atrocities regime at this stage is premature, and the evidence here suggests that its development is proceeding rapidly. From an institutionalist perspective, we can ask how the regime can be strengthened, and what lessons can be learned from the existing ad hoc tribunal system. IL analysts suggest that the strength of legal regimes centers on consistency (precedent) and legitimacy, on hard law.[112] Conversely, regime analysts, most notably in the field of international political economy, suggest that flexibility, rather than rigidity, increases regime strength.[113] Robert Keohane argues that "Institutions based on substantive rules have proven to be fragile entities," adding "flexibility and openness . . . may increase the usefulness of an international institution."[114] Flexibility is also important when the long-term impacts of

[111] Anderson 1983.
[112] See Franck 1990; Jackson 1984; and Trimble 1990.
[113] Krasner 1983.
[114] Kahler 1995, 137. See also Goldstein et al. 2000, 392.