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Internationalised justice and democratisation: how international tribunals can empower non-reformists

Izabela Steflja

International Development Studies, Tulane University, New Orleans, LA, USA

ABSTRACT

This article examines the relationship between international criminal justice and democratisation processes in post-conflict settings, illustrating that international tribunals did not contribute to democratisation in the cases of Serbia, Kosovo and Rwanda. The argument that tribunals have willingly or inadvertently empowered local non-reformist factions is rooted in the agency of local elites. The findings suggest prioritisation of international over localised knowledge, political over victim interests and stability over judicial independence. This article makes a contribution to the emerging, critical literature on the dynamics between institutions of international criminal law and their socio-political environments, drawing attention to volatile effects of internationalised justice.

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Introduction

There is a prevailing expectation among liberal institutionalists that transitional justice supports democratisation.[1] Pablo de Greiff argues that promoting and strengthening democracy is one of the ultimate goals of transitional justice attained by strengthening the impartiality and regularity of the rule of law and the commitment to political participation. According to de Greiff, 'democracy is both a condition and a consequence of legally institutionalised efforts to establish justice'.[2] This reasoning conflates promotion of the rule of law with promotion of *democratic* rule of law, meaning that democratic governance is a fundamental element of the rule of law. In a similar vein, Makau W. Mutua critically assesses how transitional justice 'has come to represent the midwife for a democratic, rule-of-law state',[3] questioning the underlying assumption that the retributive and internationalised form of transitional justice administered by international criminal tribunals facilitates democratisation.

I analyse the links between the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and democratisation in Serbia, Kosovo and Rwanda. Using evidence from these three case studies, I demonstrate how and why the tribunals, by and large, did not facilitate democratisation. Instead, regrettably, in each case the tribunal played an important part in empowering non-reformist elites. By *non-reformists* I mean extremely nationalist or authoritarian elites who actively limit

CONTACT Izabela Steflja isteflja@tulane.edu

political opposition, dialogue and diversification of the political scene, hindering democratisation processes. I document how the various effects of these two tribunals have empowered local non-reformist factions in comparable ways rooted in the agency of educated elites.

I carried out my research from 2011 to 2014, conducting nine consecutive months of fieldwork in Rwanda and six consecutive months of fieldwork in Serbia, followed by two additional trips to each country. I chose to interview relatively educated respondents[4] because (1) they were better informed on the topic of my inquiry, (2) their professional roles empowered them to shape local attitudes and responses to the internationalisation of justice and most importantly (3) I was interested in how the legal process gives agency to these actors. By building networks and adopting an ethnographic sensibility,[5] I conducted more than 140 in-depth interviews. Interviewees included, among others, university professors and students, community leaders, top echelon and lower ranking staff in international organisations and institutions, civil society members (local and international), clergy, government officials (bureaucrats, ministers and senators), military leaders, members of the opposition and political prisoners. I complement these data with academic literature and expert comments. Although I did not conduct interviews in Kosovo, I briefly review the situation there in the ICTY section, relying on secondary literature. I include Kosovo because it has interesting similarities to Rwanda – in both cases international forces empowered non-reformist 'winners' on the ground – offering interesting comparisons of pathways to elite empowerment in the three cases.

Powerful discourses at the domestic level focused on perceptions of a lack of judicial independence, as well as prioritisation of political goals over victims' interests and international technical knowledge over localised knowledge. These real grievances can discredit and divide reformist coalitions, thereby creating political space that nationalist and authoritarian factions can seize in order to impede democratic transitions. A critical impediment that emerged in Serbia, Kosovo and Rwanda was domestic backlash against the political and moral lessons international actors sought to convey through international trials.

My argument, largely based on interview findings, is threefold. First, there was widespread scepticism in Serbia, Kosovo and Rwanda about whether the ICTY and ICTR judiciaries remained independent from political goals and interests of international and domestic actors. This is problematic because confidence in judicial independence is crucial in democratisation processes. Second, the tribunals failed to establish legitimacy in the eyes of domestic actors because justice and debates over judicial processes ignored the local context. Third, the perception that external actors were imposing democratic norms antagonised political coalitions and instigated nationalist and authoritarian backlashes. This lessened support for domestic reforms to strengthen human rights and democratic institutions.

The stated mandates of ICTY and ICTR boil down to justice in the service of lasting peace and reconciliation. According to the tribunals' websites: 'By bringing perpetrators to trial, the ICTY aims to deter future crimes and render justice to thousands of victims and their families, thus contributing to a lasting peace in the former Yugoslavia' and 'The purpose of this measure [ICTR] is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region'.[6] Scholars such as Gary J. Bass have interpreted this mandate to mean that 'success will be measured by how much the [international justice] enterprise helps sideline dangerous leaders, shame perpetrators and bystanders, and soothe victims'.[7] If indeed a key contribution of the tribunals is to sideline dangerous leaders – that

is, remove 'bad apples' from political influence[8] – this implies that political space will be made for more moderate and reformist political actors. If we also accept that another key contribution is to 'soothe' the victims and 'demonstrate that administrating justice can contribute to reconciliation and moderation',[9] this logic suggests that the groups who were most victimised and those who were politically sidelined by the accused war criminals would be important beneficiaries of the tribunals. Yet I found that victimised groups – Tutsi factions in Rwanda, Kosovars in Kosovo and the left, reformist political opposition in Serbia – did not perceive that the trials benefited them. They emphasised that justice was administered selectively and did not facilitate democratic values such as participation and engagement, or universal norms about the rule of law and respect for human rights. These perceptions imply that the tribunals failed to contribute to goals of lasting peace and reconciliation. My findings raise important questions and have crucial policy implications regarding the need to ensure local involvement and ownership in internationalised justice processes.

One way in which tribunals are supposed to support democratisation processes is through the impact of judicial actions on domestic politics and the diffusion of democratic norms, or what some scholars have called legal expressivism. Applying legal expressivism to international criminal justice, Mark Drumbl, Diane Amann and, recently, in a more critical vein, Tim Meijers and Marlies Glasius, have examined trials as tools for 'expressing' educational messages; that is, disseminating democratic norms and values to audiences.[10] The argument that the courtroom can serve as a classroom or 'theatre'[11] dates back to Nuremberg trials in the post-World War II transformation of Germany.[12]

Another prevalent view among supporters of tribunals is that the diffusion of democratic norms through legal processes takes time.[13] Victor Peskin, for example, emphasises that, even in advanced industrial societies with a robust tradition of the rule of law, it takes time for courts to alter public attitudes.[14] However, an important distinction is in advanced industrial societies the public may disagree with the court's decision but still perceive their country's legal system as impartial and legitimate, an assumption that does not automatically extend to internationalised justice. As many of my interviewees noted, the local audience not only disagrees with the tribunals' specific findings but often sees the international criminal law itself as an illegitimate external imposition.

Therefore, I question not how long it may take for tribunals to diffuse democratic norms and values, but their ability to do so at all. Several critical scholars highlight important caveats to the norm-diffusion assumption. Donald Bloxham and Mark Wolfgram each illustrate that trials on their own do not advance the diffusion of democratic norms. As Bloxham argues 'the [Nuremberg] legal event did not shape the cultural change; to argue otherwise is to confuse cause and effect'.[15] Other scholars, like Marlies Glasius and Francesco Colona as well as Maria Koinova, argue that the ICTY is a 'theatre' that has the potential to educate but can also cause audiences to respond in very different ways.[16] The political messages of trials are contingent on a variety of factors, such as disruptions by defendants, who wish to teach their own 'lessons' to the local population and to utilise victims for their own political goals.[17]

Additionally, several works emphasise the need for local knowledge and ownership in attempts to strengthen the rule of law. John Hagan and Sanja Kutnjak Ivković argue that '[f]undamentally, to be seen as legitimate, legal justice must ultimately also be seen as local justice'.[18] It is important that members of the public who identify as victims and those accused of being war criminals broadly perceive that the tribunal not only meets procedural and due process standards but also involves a localised democratic norm[19] and engages in local-level

judicial independence.[20] Yet Martti Koskenniemi argues that when justice is internationalised, 'no moral community is being affirmed beyond the self-congratulatory "international community"'.[21] Consequently, domestic audiences do not perceive tribunals as composed of disinterested, external technocrats but as another set of political actors on the stage, seeking to impose the norms and political aims of the international community. As I will show, considerable deficits in local participation, engagement and perception of legal events played determining roles in the tribunals' empowerment of non-reformists.

ICTY inadvertently empowered non-reformists in Serbia while consciously empowering non-reformists in Kosovo

In the Serbian case, my interviewees overwhelmingly perceived the tribunal as an international imposition. Moreover, the ICTY inadvertently provided a propaganda platform for extremists on trial at The Hague while simultaneously failing to publicise its objectives through an effective outreach campaign. Because international forces linked justice to foreign aid and European Union membership the ICTY became a political, rather than purely judicial, institution, resulting in local concerns over judicial independence from political goals and reviving questions of norm-enforcement and imperialism. Finally, the judicial processes contributed to a breakdown in political coalitions between moderate factions and endangered reformists.

Victimhood narratives and ethno-nationalist influences in Yugoslav politics pre-existed the ICTY and manifested in the 1980s after the death of Yugoslav leader Josip Broz Tito. A defensive form of nationalism oriented against the West and against other political and national groups in the former Yugoslavia burgeoned during the Yugoslav wars and several events that were perceived as international impositions: the UN Security Council's arms embargo of Serbia and Montenegro in September 1991 and economic sanctions in May 1992, the 1993 Security Council resolution establishing the ICTY, the Dayton Peace Agreement, brokered in 1995 under significant US pressure and the NATO bombing of Serbia over the conflict in Kosovo in 1999. The ICTY was the most official means of and involved the greatest international participation in projecting guilt, blame and shame on the Serbs before and after the NATO bombing.[22]

ICTY thus faced a hostile audience in Serbia from the beginning. Analysing several studies, Robert Hayden finds the attitudes of almost all the major national groups in the former Yugoslavia toward the ICTY were 'generally hostile', with the strongest consistently negative sentiment in Serbia.[23] A February 2002 public opinion poll found that the ICTY had the trust of 8% of people in Serbia.[24] My interviews strongly confirmed overwhelmingly negative views of the ICTY. Reflecting on the efforts of the ICTY to amend the unfavourable context, the director of the Belgrade Centre for Human Rights stated 'the presence of the ICTY is miserable',[25] citing his centre's findings that 15% of participants 'hated' the ICTY and about 70% disliked it and preferred not to deal with it. Srbobran Branković (whose company, Media Gallup, regularly conducts polls on the ICTY) described overall public opinion of the tribunal as 'very negative' and 'constantly negative' with 70–80% of those surveyed opposing it.[26] A number of my interviewees explained that locals tended to simplify the reasoning behind judgments by assuming they depended on whether the judge was a national of a country that was an ally or an enemy of Serbia, even though in some cases judges from countries considered allies proposed 'draconian sentences'.[27] These comments evince my interviewees' lack of trust in the independence of the court.

I found inconsistent attitudes among interviewees who expressed concerns about Serbia's economic and political future. While they believed the ICTY was unjust, they supported the transfer of accused war criminals to The Hague because they understood the grave political and economic consequences of non-cooperation.[28] I also spoke to a few individuals who disavowed the prevalent negative attitude toward the tribunal, arguing that it offered opportunities for leaders to redefine their communities and invent a new identity.[29] Yet, as Borka Pavičević, supporter of the ICTY and director of the Centre for Cultural Decontamination in Belgrade, acknowledged, this reinvention would have required an atypical amount of courage and 'leaders who are willing to stand up in parliament and say that the reason why the ICTY exists is because we did not prevent a genocide'.[30]

Another reason ICTY fuelled defensive nationalism was because the legal process itself provided an opportunity and a perceived necessity for local elites to reinterpret past events, including the war, and to promulgate conspiracy theories against Western nations. The decision of the US Agency for International Development (USAID) to finance the broadcasting of Slobodan Milošević's trial throughout the region, without offering any interpretation of this event, was particularly problematic. USAID spent US$24,000 a month to broadcast the trial proceedings throughout Serbia, believing that 'exposure to the Milošević trial would have a cathartic effect on the Serb population'.[31] Paradoxically, the broadcasts led to a doubling of Miloševićs approval ratings.[32] Throughout his trial, Milošević denounced the tribunal as a tool of NATO and the US since it was completely dependent on their financial and military assistance. For the first few weeks of the trial, which began in 2002, five channels carried the proceedings live and proceedings continued to air on Serbian Station B92 for up to five hours each day until Milošević's death in 2006.[33]

Although intended to encourage reflection about the events of the 1990s, the television coverage became 'a place to cheer for your own', argued Slobodan Samardžić, professor of international relations and vice-president of the Democratic Party of Serbia.[34] The audience perceived the leaders on trial as victims of a plot that pitted a single Serb against the world and, regardless of their opinions of that leader's domestic and wartime agenda, they preferred maintaining solidarity with a fellow countryman over supporting the international community. Milošević initiated this interpretation of events during his trial, and his strategy was emulated by other high-profile defendants, such as Radovan Karadžić and Vojislav Šešelj, in later trials. In the eyes of the Serbian audience, the accused war criminals outperformed the prosecution during the trials, undermining the tribunal's authority and transforming it from an instrument of the rule of law into a political tool for defensive nationalism and ridicule.[35] One supporter of ICTY, the president of the Helsinki Committee for Human Rights in Belgrade, told me that the ICTY outreach campaign was 'too neutral and too objective' and needed to be much more aggressive about publishing and publicising the ICTY findings.[36]

The Serbian public was acutely aware that cooperation with the ICTY was a precondition for foreign aid and EU membership. For example, Milošević was transferred one day before an international donor conference where Serbia hoped to secure US$1 billion in aid crucial to its economic recovery[37] and the other accused war criminals were transferred in similar circumstances.[38] Many elite interviewees expressed resentment over this conditionality, arguing that, whereas the EU historically had imposed technical requirements for integration on new members, it imposed political requirements on the former Yugoslav states, amounting to blackmail by the West.[39] In the resulting public narrative, elites in power framed the

ICTY not as a means of addressing the crimes that took place in the 1990s but as a political obligation undertaken in order for Serbia to gain EU membership and international aid.[40] Promoting this sense of extortion and persecution among the local population enabled extremists to gain further ground.

My most troubling finding was that reformists supporting liberal democracy and closer ties to the West and extreme nationalists shared an overwhelming consensus that the ICTY justice was selective and political. Both camps perceived the ICTY as a political tool of powerful nations, rather than an independent investigator and administrator of justice.[41] Several interviewees made explicit connections to colonialism, the most interesting being made by political moderates and liberals. Staša Zajović, a life-long activist and founder of Women in Black, an NGO that has consistently been highly critical of Serbian nationalist regimes, stated '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?'[42] Former journalist and critic Zoran Ćirjaković bluntly summarised this argument:

> The tribunal is like the International Criminal Court. It is black people or enemies of the US on trial. 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.[43]

The majority of interviewees, including those in favour of political change, sought to distance themselves from reformists or 'transition elites' whom they accused of betraying the interests of ordinary and impoverished people in Serbia in favour of self-interest and resources from Western donors. In this context, liberal democracy itself was seen as benefiting only certain kinds of people, and the public tendency to associate the tribunals with promoters of democratisation only diminished the tribunal's potential impact. In this situation, pro-reform politicians in Serbia were more concerned with reducing backlash from the electorate while avoiding marginalisation from donors and the international community than with implementing democratic reforms required for the political transition.

The demands of the ICTY threatened not only the political success but also the safety of certain reformists and antagonised reformist coalitions contributing to their break-up. Specifically, the ICTY undermined the Democratic Opposition of Serbia (DOS), a reformist coalition between Serbian Prime Minister Zoran Djindjić and Yugoslavian President Vojislav Koštunica which ousted Slobodan Milošević and supported a liberal-democratic trajectory for the future. Under international pressure, Zoran Djindjić secretly transferred Milošević to The Hague as soon as he became prime minister of Serbia in 2001, thereby fulfilling the key commitment for the path to a 'European Serbia' and to Western aid, despite numerous objections from not only radical nationalists but also most politicians, including his ally Koštunica.[44]

Djindjić's bold action was also one of the reasons he was assassinated in March 2003 by the Unit for Special Operations, whose commander was Milorad Ulemek Luković and whose official task was to act as Milošević's Pretorian guard.[45] By 2003, Djindjić was working to remove the influence of organised crime from the new government, including Luković and the Zemun gang with which he was associated, by supporting criminal investigations in Belgrade as well as those at The Hague. In response, Luković allied with Koštunica in a campaign called 'Stop the Hague' which aimed to undermine Djindjić's government and show 'who was really in charge in Serbia'.[46] Shortly before the assassination, a Belgrade newspaper reported that the ICTY was going to indict Luković and that Djindjić's cabinet was planning to sign arrest warrants for Luković and the Zemun gang.[47]

After Djindjić's death in 2003, long-term modernisation plans and political reforms came to a halt and years of stagnation followed.[48] Djindjić's assassination intimidated all domestic actors who hoped for a rapid democratic transition from the previous regime. Public opposition to extraditions of accused war criminals were common and a real threat to the electoral ambitions of the leaders who carried them out.[49] Vesna Pešić, a leader of the opposition 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',[50] a view that the overwhelming majority of my interviewees confirmed.[51] While the ICTY was not directly responsible for the breakdown of the DOS coalition and Djindjić's death, it did exert tremendous pressure on these politicians to cooperate.[52] It is unfortunate that in order for the tribunal to gain its most wanted war criminal – Milošević – Serbia had to lose its most valuable reformer – Djindjić.

In Serbia, the tribunal and the Western powers behind it certainly did not intend to disempower Djindjić and the reformists while empowering Milošević and the extremists; in Kosovo, outside forces – mainly NATO led by General Wesley Clark and the United Nations Mission in Kosovo (UNMIK) – assisted the Kosovo Liberation Army (KLA) to gain legitimacy and fortify its political control over the territory. Iain King and Whit Mason, who worked for UNMIK for several years, explain that UNMIK and its supporter states failed to challenge Albanian nationalist factions, such as the KLA, when they decided to employ intimidation and murder, tactics previously exercised by the Serbs, to force out of Kosovo the remaining Serbs, Roma and other minorities.[53] Wolfgram explains that Western actors shielded KLA members from the ICTY, protecting them from prosecution or treating with leniency when they did face the tribunal. Crimes committed after June 1999 were excluded from the ICTY mandate, denying justice to Kosovo's non-Albanian minorities and Albanian moderates who were victims of KLA revenge crimes.[54]

Chief prosecutor Carla Del Ponte illustrated her commitment to addressing all sides of the conflict when she requested that the ICTY jurisdiction be extended to Kosovo and to abuses against minorities after June 1999. Decrying ICTY's 'forced inaction' over events in Kosovo since June 1999 and potential damage to its 'historical credibility', she warned that the institution would be perceived as 'biased in favour of one ethnic group against another'.[55] The proposal was rejected, William O'Neill argues, because the US was particularly interested in working with the KLA, which legitimised the KLA and prevented any possibility of more moderate factions gaining political power.[56] Laura Dickinson confirms that the ICTY was not prepared to deal with the Kosovo cases, which is why hybrid Kosovo courts were initiated.[57] The EU established the Special Investigative Task Force in 2011 and subsequently set up Kosovo Specialist Chambers, but they have yet to try their first case.[58] It is therefore impossible to predict the Specialist Chambers' effect on democratisation in Kosovo at this point. What is evident is that up until now extremist Albanian nationalists have been empowered through extensive omission of their crimes from the ICTY mandate.

Cases of KLA crimes that took place prior to 1999 received leniency from international actors. Wolfgram cites the case of Ramush Haradinaj, 'the political darling of UNMIK and the United States'.[59] He was indicted by the ICTY on 37 counts of rape, torture and murder but was eventually acquitted amidst accusations of intimidation and disappearance of witnesses. Western political support for the KLA in Kosovo was motivated by desire for stability and guilt over having failed to prevent or end the human rights abuses carried out by Slobodan Milošević's regime against Kosovar Albanians. Without denying the importance of these

reasons, we must recognise that they are ultimately political rather than legal aims. Denisa Kostovicova argues that ICTY's prioritisation of political interests over victims' interests in Milošević's trial ultimately left the victims feeling marginalised rather than redeemed. Victims felt that they were tools in a national project, collectively appropriated for the goal of Kosovo statehood and independence from Serbia. 'In such a hotly-disputed political context, transitional justice becomes another site where national struggle unfolds, rather than primarily serving the victims,' concludes Kostovicova.[60] The trial thus empowered Kosovar elites in their political struggle against Serbia, while leaving the biggest victims feeling sidelined and used. Unfortunately, this outcome also precluded any possibility of local engagement and cross-ethnic debate on human rights violations and past crimes. By polarising the two sides, Milošević's trial closed off any space for reformists who might have been willing to negotiate a more moderate and more inclusive stance. However, it is difficult to draw strong conclusions about the effect of international justice on democratisation in Kosovo because Kosovo only declared itself a state in 2008 and because other factors such as organised crime and corruption are also impeding democratisation.[61]

ICTR willingly empowered non-reformists in Rwanda

The Rwandan case interestingly has important similarities with the case of Kosovo. In Rwanda, internationalised justice gave support and legitimacy to the authoritarian regime, consequently deterring and impairing attempts at democratisation by other political actors. The tribunal's failure to indict members of the ruling party for war crimes or to engage with and capitalise on varied local knowledge reaffirmed the Rwandan government's rigid narrative of the past. Interviewees across the political spectrum believed that the ICTR was influenced by Western guilt over failing to stop the genocide, which consequently empowered the non-reformist government.

When the ICTR was established the Rwandan government sought unsuccessfully to limit the tribunal's mandate to genocide and to exclude war crimes or crimes against humanity, including criminal acts committed by the Rwandan Patriotic Front (RPF) after July 1994, but it was rebuffed when Resolution 955 included all these crimes.[62] Still, the ICTR only arrested suspects who served in the Juvénal Habyarimana regime through July 1994, resulting in 93 indictments and 62 convictions.[63] Not one RPF member was indicted,[64] 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.[65] RPF forces massacred from 25,000 to well over 100,000 civilians as they took over Rwanda between April and September 1994 – a scale not comparable to the systematic genocide of between 507,000 and 850,000 Rwandans carried out by the hardliners in Juvénal Habyarimana's government.[66] Numerous sources confirm that the RPF committed war crimes in the period covered by the ICTR mandate that should have been brought before the tribunal.[67]

Despite efforts by a few committed prosecutors, including Louise Arbour and Carla Del Ponte, the ICTR did not detain any RPF members accused of war crimes or crimes against humanity. Carla Del Ponte's commitment to RPF indictments is rumoured to have caused the UN Security Council to remove her as chief prosecutor of the ICTR[68] and replace her with Hassan Jallow, who announced in 2008 that no RPF soldiers would be indicted by the ICTR and that this matter would be left up to the Rwandan government and military courts.[69] Del Ponte's removal as chief prosecutor and Jallow's public statement illustrated the ICTR's lack

of political will to pursue RPF crimes. In its 2015 report on the closing of the ICTR, Human Rights Watch argued that ICTR's 'unwillingness' to prosecute the RPF was its 'most significant failure'.[70] Trine Eide and Astri Suhrke similarly suggest, 'To avoid the stigma of dispensing "victor's justice" and to fully realise the tribunal's potential, the ICTR needed to prosecute RPF-related war crimes as well as the crime of genocide'.[71]

The extent of the ICTR's ability to pursue alleged RPF criminals is not clear. When Del Ponte publicly criticised the Rwandan government for resisting RPF indictments, she hoped it would result in international backing for the ICTR in the same way that her public criticism of the Bosnian, Serbian and Croatian governments gained support for the ICTY. However, the Rwandan government continued to retaliate vigorously, shaming the tribunal, refusing to cooperate with it, imposing burdensome travel requirements on witnesses travelling to Arusha to testify and pressuring the UN to remove Del Ponte from her post. The persistent lobbying from Kigali and the backing for the regime from Washington and London seem to be the reasons why the Security Council did not renew Del Ponte's appointment as ICTR prosecutor.[72] The strong resistance from the Rwandan government certainly limited ICTR's ability to perform its role and contributed significantly to its selectivity.

That the tribunal did not address alleged RPF crimes led some interviewees to argue that Western forces were shielding the RPF from prosecution, thereby using the tribunal as a political tool rather than an independent legal institution that represented all victims. [73] This argument was voiced not only by families and friends of Hutu victims of RPF crimes but also Tutsi interviewees who were the main victims of the genocide. A Tutsi 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, 'Justice is not for a category of people, justice is for everyone. You cannot just deal with one side'.[74]

Another factor fuelling the perception that the tribunal facilitated political goals is that information on the ICTR barely reached victims' circles and the general public. While ICTR information offices and libraries were set up around the country, they were visited only by specific groups of people, such as legal specialists, law students and foreign researchers, and were dependent on insecure short-term grants.[75] Consequently, very few Rwandans, even educated elites, knew who had been arrested, found guilty or sentenced, and for what. That does not mean that people were not interested. Frustration was obvious in the tone of many interviewees; a teacher who spent his entire life in Rwanda believed that the tribunal did not contribute to the much-needed grassroots dialogue, leaving the RPF regime in control of the narrative. He demanded answers: 'Why can't people volunteer to go to the ICTR? Who chooses the witnesses? Is it the government? Why do others get to go, and why not me?'[76]

Interviewees suggested that the tribunal was supposed to serve as a supranational check on the government's pursuit of justice and should have used its supranational powers to address any domestic loopholes and biases. A professor of media law described what he believed should have been ICTR'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'.[77] The interviewee implies that by failing to try alleged criminals in the RPF the ICTR failed to send a message of rule of law to President Kagame and instead gave amnesty to his party. 'The ICTR thus leaves the population to the fate of warlords', concluded another interviewee, referring to well-known realities:[78] Rwanda has a closed political climate and a culture of fear and self-censorship, compounded by skilful propaganda by the RPF and its effort to marginalise and suppress political activity, such as

banning opposition political parties and arresting their founders and members. 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.[79] The RPF-led government is strikingly similar to 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.

By accepting the ruling clique's refusal to allow members of the RPF to be tried, international actors dampened party pluralism and popular participation in Rwandan politics. As a top government official admitted to me, the tribunal 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 organise attacks and invasions'.[80] The tribunal took into custody political and military leaders, senior government administrators, as well as some media and religious actors; researchers estimate that approximately 75% of those indicted were subsequently arrested.[81] The ICTR thus secured RPF's monopoly on power, significantly damaging, or at least stalling, any potential transition to democracy.

Checks on the Rwandan regime, such as international pressure to cooperate with the ICTR, especially on alleged RPF crimes, and donor monitoring of the regime's human rights violations at home and in neighbouring countries have been minimal. Rachel Hayman argues that donors 'get caught up in the development success story that Rwanda represents (at least, on the surface)'; she 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 Habyarimana regime prior to the genocide.[82] One reason for the leniency of Western donors towards the RPF regime is what some scholars have referred to as 'genocide credit'; namely, the favouritism the RPF regime enjoys because the American and British governments seek to atone for international inaction in 1994.[83] The Rwandan government seized the opportunity to control the genocide narrative early on and has successfully deployed it against international criticism over the years.[84] 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'.[85] 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.[86] Many interviewees mentioned that the tribunal had a political incentive – to minimise the UN failure to prevent the atrocities in 1994 – that interfered with judicial independence. Thus, similar to the situation in Serbia, Rwandan interviewees did not perceive the tribunal to be an independent institution grounded in judicial independence and the rule of law, which precluded the tribunal from serving as a foundational pillar in Rwanda's attempt to democratise.

Conclusion

Relying on evidence from Serbia, Kosovo and Rwanda, I argued that internationalised justice can have serious, unintended effects on liberal democratic reforms on the ground. Simply put, internationalised justice may not support democratic transitions, at least not in the short term. If opportunities for meaningful and accessible local engagement are missing and if international actors end up inadvertently or willingly empowering non-reformist elites, then democratisation may be hindered. In Serbia, manipulation by local actors and a domestic backlash to international norm-enforcement weakened popular support for pro-reform

politicians and strengthened popular support for ultranationalists. In both Rwanda and Kosovo, the international tribunal was perceived as siding with the national government, stifling the plurality of local actors and debates, and overlooking the government's human rights abuses. It is fascinating that desire for stability and international guilt drove international support for both the RPF in Rwanda and the KLA in Kosovo. These political goals clearly influenced justice processes because powerful outside forces were willing to 'side' with certain local factions and influence the work of the tribunals. This highlights the imperial or colonial nature of the judicial processes, as the interviewees themselves brought up. By supporting the well-armed factions already in power – the RPF and the KLA – the outside forces further empowered and legitimised these factions rather than facilitating a dynamic political space for local moderates and reformists. Both the RPF and the KLA targeted not only members of rival groups but also, respectively, Tutsi and Albanian moderates. Under these conditions, detriments to democratisation in terms of a lack of inclusiveness and participation are clear. Moreover, popular scepticism about judicial independence from political goals of local and international actors is warranted.

While the ICTY and ICTR were distinctive in that they were created by the UN Security Council as UN subsidiary organs, they carry important lessons for the two existing models with international backing – hybrid courts and the International Criminal Court (ICC). For the ICC we might discover dynamics similar to those in Rwanda and Kosovo for cases referred by states, and very different dynamics, similar to those in Serbia, for cases referred by the UN Security Council. The weighting of localised versus internationalised knowledge is a key debate international courts face at a more general level and striking the appropriate balance for a particular society has proven to be a momentous challenge. The important element to take into account is precisely which local actors and factions in each case are bargaining with international policymakers, and consequently to distinguish between political benefits and victims' pleas. A generic 'one size fits all' approach that privileges political aims in an international context that is obviously selective will not have legitimacy and may prove to be extremely damaging. For this reason, the future opportunities for research lie in empirical evaluations of current and emerging mechanisms of transitional justice, and openness to alternative and context-specific methodologies and solutions, including community-based approaches.

Research ethics board approval

Procedures were followed in accordance with ethical standards of the Research Ethics Board at the Office of Research Ethics, University of Toronto, and with the spirit of the Helsinki Declaration of 1975, as revised in 2000 (5). Date of Approval: 13 July 2011 (Ref: 25,462).

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Note on Contributor

Izabela Steflja is a Professor of Practice in International Development at Tulane University. Her research interests revolve around transitional justice, post-conflict development and identity politics. Her current book manuscript examines local perceptions of international criminal tribunals in Rwanda, Bosnia and Serbia, and she is simultaneously working on a project that investigates female perpetrators of crimes against humanity.

Notes

1. De Greiff, "Theorizing Transitional Justice"; McAdams, *Transitional Justice*; Wierzynska, "Consolidating Democracy"; Call, "Is Transitional Justice."
2. De Greiff, "Theorizing Transitional Justice," 57.
3. Mutua, "Transformation of Africa," 91.
4. In Rwanda, 'educated' meant at least completion of high school; in Serbia it meant having at least some university education.
5. Schatz, *Political Ethnography*.
6. International Criminal Tribunal for Former Yugoslavia, "About" ; International Criminal Tribunal for Rwanda, "About."
7. Bass, "Milošević," 84.
8. Bass, "Milošević," 85; Lu, "International"; May, *Crimes*.
9. Bass, "Milošević," 84.
10. Drumbl, *Atrocity*; Amann, "Assessing International Criminal Adjudication"; Meijers and Glasius, "Expression of Justice."
11. Glasius and Colona, "Yugoslavia Tribunal."
12. Bass, *Stay the Hand*; Nettelfield, *Courting Democracy;* Douglas, *Memory of Judgment;* Osiel, *Mass Atrocity*; Ratner and Abrams, *Accountability*; Ehrenfreud, *Nuremberg Legacy*.
13. Nettelfield, *Courting Democracy*; Scharf, "Legacy of the Milosevic Trial."
14. Peskin, *International Justice,* 244.
15. Bloxham, "Milestones and Mythologies," 267; see also Wolfgram, "Didactic War Crimes Trials."
16. Glasius and Colona, "Yugoslavia Tribunal"; Koinova, "Conclusions."
17. In *Hijacked Justic*e, Subotić speaks of this phenomenon as tribunals being 'hijacked' by nationalist actors. I argue that tribunals are meant to serve local actors, and therefore refrain from using 'hijacked', which inappropriately suggests that certain local factions are illegitimately using international law while foreign actors are acting legitimately.
18. Hagan and Kutnjak Ivković, "War Crimes," 146.
19. O'Neill and Hymel, *All Politics is Local.*
20. Hagan and Kutnjak Ivković, "War Crimes," 133.
21. Koskenniemi, "Between Impunity and Show Trials," 11.
22. Steflja, "Identity Crisis."
23. Hayden, "What's Reconciliation," 316.
24. Institute for Democracy and Electoral Assistance, "New Regional Opinion Survey."
25. Personal interview, Vojin Dimitrijević, Belgrade, Serbia, 20 August 2010.
26. Personal interview, Srbobran Branković, Belgrade, Serbia, 11 August 2011.

27. Personal interviews: Djordje Vuković, 28 July 2011; Srbobran Branković, 11 August 2011; Žarko Korač, 8 July 2011; all in Belgrade, Serbia.
28. Personal interview, Djordje Vukadinović, Belgrade, Serbia, 9 August 2011). In *Hijacked Justice*, Subotić also found evidence of support for the ICTY on pragmatic not moral grounds.
29. Personal interview, Miloš Milić, Belgrade, Serbia, 26 August 2010.
30. Personal interview, Borka Pavičević, Belgrade, Serbia, 8 July 2011.
31. Scharf, "Slobodan Milošević," 302.
32. Lelyveld, "Defendant," 82; Doder, Review of *Slobodan Milosevic*, 25.
33. Scharf, "Slobodan Milošević," 302.
34. Personal interview, Slobodan Samardžić, Belgrade, Serbia, 1 September 2011.
35. For in-depth analyses of how ICTY provided a platform for Karadžić and Šešelj and of what the defendants' courtroom narratives were designed to accomplish in terms of national solidarity and myth-making see Steflja, "The Production of the War Criminal Cult."
36. Personal interview, Sonja Biserko, Belgrade, Serbia, 24 June 2012.
37. Centre for Peace in the Balkans, "Belgrade Awaits Donors Money."
38. Personal interview, Čedomir Antić, Belgrade, Serbia, 26 August 2010. Another concrete example of the threat of international isolation was that the EU signed Serbia's Stabilisation and Association Agreement but put it on hold in 2008 to ensure that Serbia would transfer all the remaining defendants to the ICTY. Similarly, in 2005 the US withdrew its Support for East European Democracy (SEED) grants and other funds when it judged Serbia to be uncooperative with the ICTY. See Spoerri and Freyberg-Inan, "From Prosecution to Persecution," 366.
39. Personal interview, Slobodan Samardžić, Belgrade, Serbia, 1 September 2011.
40. Personal interviews: Djordje Popović, 23 June 2011; Dragoljub Žarković, 31 August 2011; both in Belgrade, Serbia.
41. Personal interviews: Staša Zajović, 28 July 2011; Zoran Ćirjaković, 24 June 2011; both in Belgrade, Serbia.
42. Personal interview, Staša Zajović, Belgrade, Serbia, 28 July 2011.
43. Personal interview, Zoran Ćirjaković, Belgrade, Serbia, 24 June 2011.
44. Saxon, "Exporting Justice," 566–567; Pešić, "Nationalism of an Impossible State," 76.
45. Pešić, *Divlje Društvo*, 120.
46. Pešić, "Nationalism of an Impossible State," 76.
47. Orentlicher, *Shrinking the Space for Denial,* 31.
48. Glenny, *Balkans,* 683.
49. Spoerri and Freyberg-Inan, "From Prosecution to Persecution," 364–365.
50. Pešić, *Divlje Društvo*, 114 (my translation).
51. Personal interview, Latinka Perović, Belgrade, Serbia, 8 August 2011.
52. Glenny, *Balkans.*
53. King and Mason*, Peace at Any Price*.
54. Wolfgram, "When the Men with Guns Rule"; see also Flottau, Malzahn, and Schleicher, "Taeuschen und Vertuschen."
55. Del Ponte in O'Neill, *Kosovo*, 53.
56. Ibid. See also Loquai, *Der Kosovo-Konflikt*, 45–51, 101; Wolfgram, "Democracy and Propaganda."
57. Dickinson, "Relationship Between Hybrid and International Courts," 1061.
58. Kosovo Specialist Chambers, "Background."
59. Wolfgram, "When the Men with Guns Rule," 483.
60. Kostovicova, "Airing Crimes."
61. I thank an anonymous reviewer for raising this important point.
62. Barria and Roper, "How Effective Are International Tribunals?"
63. International Criminal Tribunal for Rwanda, "About the ICTR."
64. Kamatali, "Challenge of Linking," 127; Eide and Suhrke, "Rwanda," 135; Human Rights Watch, "Rwanda."
65. Africa Watch, "Rwanda"; UN High Commissioner for Refugees, "Summary of UNHCR Presentation."
66. Des Forges, *Leave None to Tell the Story*, 15–16; Prunier, *Rwanda 1959–1996*, 265.

67. Prunier, *Rwanda 1959–1996,* 427; Des Forges, *Leave None to Tell*, 734; Waldorf, "Mere Pretense of Justice," 1222; Chakravarty, *Investing in Authoritarian Rule*, 71.
68. Chakravarty, *Investing in Authoritarian Rule*, 72; Del Ponte, *Madame Prosecutor*.
69. The overwhelming majority of interviewees believed that the RPF military courts were neither capable nor willing to try their own and therefore viewed this decision as a mockery of justice. Rwandan officials tried one alleged RPF crime – the murder of 13 clergy in 1994 – resulting in a disappointing acquittal of the accused commanding officer and guilty pleas by two lower-ranking solders. Waldorf, "Mere Pretense of Justice," 1222; Eide and Suhrke, "Rwanda," 135.
70. Human Rights Watch, "Rwanda."
71. Eide and Suhrke, "Rwanda," 135.
72. Reyntjens, "Constructing the Truth," 18; Del Ponte, *Madame Prosecutor*.
73. Personal interview, Anonymous, Kigali, Rwanda, 4 November 2011.
74. Personal interview, Anonymous, Kigali, Rwanda, 23 November 2011.
75. Personal interview, Anonymous, Kigali, Rwanda, 8 November 2011.
76. Personal interview, Anonymous, Kigali, Rwanda, 15 November 2011.
77. Personal interview, Anonymous, Kigali, Rwanda, 14 December 2011.
78. Personal interview, Anonymous, Kigali, Rwanda, 14 December 2011.
79. Longman, "Limitations to Political Reform"; Reyntjens, "Post-1994 Politics in Rwanda."
80. Personal interview, Anonymous, Kigali, Rwanda, 14 November 2011.
81. Barria and Roper, "How Effective Are International Tribunals?" 360.
82. Hayman, "Funding Fraud?" 127.
83. Reyntjens, "Post-1994 Politics in Rwanda."
84. "Statement by the Government of Rwanda"; UN Report, "Part of West Conspiracy."
85. Reyntjens, "Post-1994 Politics in Rwanda," 192.
86. Personal interview, Anonymous, Kigali, Rwanda, 14 December 2011.

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