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Timing Justice: Lessons from the Tribunals in Yugoslavia, Rwanda, Sierra Leone, and Cambodia

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Timing Justice: 
Lessons from the Tribunals in Yugoslavia, Rwanda, Sierra Leone, and Cambodia

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Honors Thesis

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ABSTRACT

Scholarship on tribunals for mass human rights violations overlooks how the presence or absence of conflict influences its effectiveness. I argue that implementing a tribunal during conflict undermines its ability to effectively pursue justice—as I demonstrate with a case study of the Yugoslav Tribunal. Ongoing conflict makes challenges of transitional justice more acute. The absence of conflict eases a tribunal’s ability to carry out certain necessary activities such as collecting evidence. I demonstrate this using a case study of the Rwanda Tribunal. Examining tribunals in Sierra Leone and Cambodia suggests that hybrid structures influence the effectiveness of these accountability mechanisms.
INTRODUCTION

The 20th century was witness to the deaths of millions of civilians. The majority of these deaths were not a byproduct of war; they were a result of systematic targeting of civilian populations. In the aftermath of mass human rights violations in Rwanda, the former Yugoslavia, Cambodia, and elsewhere, the horrors of genocide and other crimes against humanity entered into mainstream consciousness. In the years after these tragedies, human rights organizations, scholars of international criminal law, and certain state governments have pressured the international community to focus on ending impunity for the perpetrators of such crimes. Accountability mechanisms such as ad hoc international criminal tribunals, national trials, newly developed ‘hybrid’ tribunals, and truth and reconciliation commissions, attempt to come to terms with the past by punishing those responsible for the pain and suffering of hundreds of thousands of people. Crimes against humanity, genocide, war crimes, and torture fall under the jurisdiction of the aforementioned trial-based courts. In the 1990s, ad hoc international criminal tribunals were established in Rwanda and the former Yugoslavia. Currently, there are also various types of accountability mechanisms operating in Sierra Leone, Liberia, East Timor, Cambodia, and elsewhere.

With the creation of the International Criminal Court (ICC), it is likely that prosecutorial accountability mechanisms will be more frequently implemented during ongoing conflict.1 If this does in fact turn out to be the case then scholars and advocates of human rights will be ill-prepared to determine what effect ongoing conflict has on an

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1 In July 2008, the ICC issued an indictment for the arrest of Omar Hassan al-Bashir, the President of Sudan. Al-Bashir is charged with genocide and his indictment is the first ever issued against an incumbent head of state. This indictment is also notable since Sudan is still in the throes of war and mass violations of human rights. It is too soon to tell whether or not the ICC will successfully apprehend and prosecute al-Bashir.
accountability mechanism’s ability to effectively pursue justice. This project is driven by a desire to seriously consider the influence of timing on prosecutorial accountability mechanisms. Two principal questions drive this research paper:

• How does implementing a tribunal during conflict influence its ability to achieve its objectives?

• How does implementing a tribunal after conflict has ended influence its ability to achieve its objectives?

An effective judicial organ must be able to conduct the following activities: collect evidence, gather witness testimony, apprehend suspects, carry out trials that are viewed as fair and efficient, retain close contact with the people for whom justice is rendered (i.e. those that suffered, witnessed, and/or participated in the atrocities), disable institutions responsible for supporting or perpetuating human rights violations, augment and support the domestic judicial system in the area where the relevant crimes were committed.

In order to answer my two research questions, I utilize case studies of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). My case studies indicate the following. The ICTY case shows that when a tribunal is established in the presence of conflict, timing is important in that it leads to the following conditions: inability for the tribunal to be located in the region in which the violations of human rights are taking place, lack of security for staff and tribunal personnel, difficulty apprehending suspects, and difficulty collecting evidence and gathering witness testimony. These conditions negatively influence the effectiveness of the ICTY. The ICTR case shows that when a tribunal is

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2 The ICC has only recently begun issuing indictments, and in consideration of the fact that this project examines circumstances of implementation, there are not enough cases of ICC action. Thus, I refrain from discussing the ICC and instead focus on the two existing ad hoc international criminal tribunals.
established after violence and in the absence of conflict, timing is important in that it allows for the following conditions to arise: greater security for staff and tribunal personnel, the consolidation of a stable government, increased likelihood of locating the tribunal in or close to the region where the relevant crimes took place, greater access to evidence and witnesses. My findings from the ICTR case indicate that when a tribunal operates in the absence of conflict, it is less likely to encounter conditions that hinder its ability to achieve its goals and be an effective judicial organ. However, despite the ICTR’s implementation in the aftermath of conflict, the Tribunal still struggled to achieve some of its objectives. In light of this, I suggest that factors outside of timing should be considered in the hopes that such an examination will strengthen future tribunals.

This project concludes by examining how hybrid structure influences tribunals’ ability to achieve the four objectives of prosecutorial accountability mechanisms. I use brief case studies of hybrid tribunals in Sierra Leone and Cambodia to assess this influence. The Special Court in Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) demonstrate that two elements of hybrid structure help determine the tribunals’ effectiveness: location of the tribunals, and the mixed composition (foreign and domestic judges) of the tribunals. An assessment of how hybrid structure influences the SCSL and ECCC’s ability to successfully pursue justice, may lead to future tribunals that are more efficient and effective.

Significance of Research

This project is motivated by what I see as a gap in the literature on prosecutorial accountability mechanisms for mass human rights violations. Although the extant scholarship evaluates the successes and failures of tribunals from many different angles,
no in-depth research has been conducted on the particular influence that timing may have on a tribunal. When the timing of a tribunal is discussed, it is only peripherally mentioned. Thus far, there has been little to no scholarship focusing on the potential influence that implementation during conflict and implementation after conflict have on a tribunal’s ability to achieve its goals. This project seeks to fill this gap. I employ case studies that allow me to analyze how the presence or absence of conflict impacts a tribunal’s effectiveness. There are many comparative case studies that have been conducted in this field. The most frequent of which compares the ICTY and the ICTR. This project lends a new angle to this scholarship. Instead of a broad comparison, this project focuses more narrowly on the influence that the presence or absence of conflict has on the two tribunals’ ability to succeed in attaining the central objectives of individual accountability, re-establishment of rule of law, creation and dissemination of an accurate historical record, and deterrence of future crimes.

This project also hopes to contribute to the advancement of prosecutorial accountability mechanisms. In the last part of this project, I examine the hybrid tribunals in Sierra Leone and Cambodia. Implementing a conflict after violence does not erase all the challenges of pursuing justice. This project suggests that the hybrid structure is worthy of further in-depth research. As a new development in prosecutorial accountability mechanisms, hybrid tribunals may provide some remedies to the problems that continued to plague the ICTR. This project will provide a base from which scholars and policy makers can begin to determine how to improve future prosecutorial accountability mechanisms.
Methodology

Tribunals have been established in two different circumstances: 1) during conflict and continued human rights violations; 2) in the aftermath of mass human rights violations. In this paper I examine how these two contexts influence a tribunal’s ability to achieve the four objectives elaborated on below. Comparative case studies are central to this project. In order to assess the influence that ongoing conflict and absence of conflict has on the effectiveness of tribunals, I compare four case studies. Conducting case studies of existing tribunals allows me to explore how a variable like timing, influences the effectiveness of a justice organ. Ultimately, this project will provide another lens through which to view the logic and mechanisms of tribunals for mass human rights violations. This project is less concerned with contributing to theories of transitional justice, and more with providing studies that will contribute to the future development of more effective and efficient accountability mechanisms. Case studies allow me to use real-world examples to draw conclusions about how the presence or absence of conflict influences the effectiveness of tribunals.

Determining whether or not a tribunal is effective is a difficult but necessary task. First, an effective tribunal must be able to achieve certain objectives. For the purposes of evaluation I identify and use four goals that are the most frequently articulated in the literature on prosecutorial accountability mechanism, and in the statutes of the tribunals examined. All four objectives are extremely complex, but this project does not set out to examine all aspects of each. The next paragraph will briefly set out the criteria upon which each objective will be assessed.
The first goal of prosecutorial mechanisms is *individual criminal responsibility*.

Central to this objective is the determination to prosecute those ‘most responsible’ for the atrocities committed. I evaluate this objective based on the number of people indicted, arrested, and convicted and based on the level of responsibility these perpetrators represent. The second goal is *re-establishing rule of law*. This objective has the potential to consist of numerous elements. For the purposes of this project I evaluate a tribunal’s ability to re-establish rule of law based on two factors. The first factor is a tribunal’s ability to dismantle institutions that perpetuated or facilitated mass human rights violations (i.e. government bureaus, media sources distributing propaganda). The second factor looks at a tribunal’s ability to support the domestic judicial system. This support can come in many forms, however this project will only assess if a tribunal can ease the prosecutorial burden placed on a domestic legal system in the wake of mass participation in human rights violations. The third objective is the *creation and distribution of an accurate historical record*. Prosecutorial accountability mechanisms seek to establish this record through individual accountability and legal redress for victims. The focus on individuals and criminal prosecutions necessarily leads to an historical record that provides a legal account of the conflict. Evaluating a tribunal’s success in this area varies on a case-to-case basis. As my cases will reveal, success usually has a correlation to a tribunals’ proximity to the most affected population and the successful use of outreach programs to educate this population about its activities. The final goal I examine is the desire to *deter mass human rights violations* from being committed in the future. There are two types of deterrence: specific deterrence and general deterrence. Specific

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3 See: Article 7 of the ICTY Statute, Article 6 of ICTR Statute, Article 6 of SCSL Statute, Article 1 of ECCC
deterrence seeks to prevent a specific individual or group, who may have already committed a crime, from doing so again. General deterrence seeks prevention on a society-wide level—to deter future atrocities from ever being committed by anyone or any group.⁴

The majority of this project draws from secondary sources such as scholarly journals and academic books. As the literature review will show, these secondary sources are not exclusive to the disciplines of Political Science, International Relations, and International Law. Instead, this project is based on research conducted in various fields and across multiple disciplines. I will also be utilizing official documents issued by the United Nations, the Statutes of the ad hoc tribunals in the former Yugoslavia and Rwanda, and the Statutes from the hybrid tribunals in Sierra Leone and Cambodia.

As is evidenced by the literature, accountability mechanisms demand constant research by scholars across multiple disciplines. Justice, as a principle and as an objective sought by accountability mechanisms, deserves study in and of itself. The complexity of these subjects makes it necessary for me to discuss the scope and limitations of this project.

This project only examines prosecutorial accountability mechanisms, and will not touch upon truth and reconciliation commissions or other forms of restorative justice. The main limitation to this project can be attributed to time constrains and limited resources. Although I was able to use a wide variety of secondary sources, I did not conduct field research. This project was conducted during an academic year and the scope of this project reflects this time constraint. Despite these limitations, the use of two

major case studies and two brief case studies allow me the opportunity to explore the depth of the subject matter—something that would have been impossible if this project simply provided a broad overview of all existing prosecutorial accountability mechanisms.

**Outline of argument**

The project consists of four parts. *Chapter I* provides a summary of the extant literature on accountability mechanisms and justice. This chapter will provide a brief chronology tracing the development of prosecutorial accountability mechanisms. Using the literature, it will introduce two major themes of justice—restorative justice and retributive justice. *Chapter I* will present some of the most important arguments and opinions on the enforcement of human rights. This chapter will explore one of these debates in detail. This debate is one that pits peace against justice. This subject is of the utmost important to this project because this debate arises when tribunals are implemented in ongoing conflict. Some scholars believe that pursuing justice during conflict will upset the possibilities for peace; others believe that lasting peace in unattainable without justice.

*Chapter II* consists of an in-depth case study of the International Criminal Tribunal for the Former Yugoslavia. This case study will advance my argument that the ongoing conflict in the former Yugoslavia negatively influenced the ICTY’s effectiveness. The presence of conflict obstructed the following activities: initiating investigations; accessing and collective evidence; gathering witness testimony; apprehending suspects; and engaging with the most affected population. The conflict had a particularly noticeable influence on the pre-trial phase of the Yugoslav Tribunal. The
case of the ICTY supports my argument that many of the activities necessary to an
effective tribunal are made considerably more difficult when conducted during conflict
and continued human rights violations.

Chapter III presents a case study of the International Criminal Tribunal for
Rwanda. In contradistinction to the ICTY, the Rwanda Tribunal was established in the
aftermath of mass violence. This section of the project demonstrates how the ICTR’s
delayed timing allowed time for certain conditions to arise that proved favorable to the
Tribunal’s operations. Chapter III concludes that in the case of Rwanda, the delayed
timing of the ICTR allowed for the following conditions to arise: the installation of a
stable, cooperative government, and increased security for ICTR staff and personnel. The
stable government in Rwanda facilitated the ICTR’s ability to conduct the following
activities: access and collect evidence; gather witness testimony; ensure the security of
witnesses; and apprehend suspects. However, the case study of the ICTR makes it clear
that implementing a tribunal in the aftermath of violence does not ease all problems. The
ICTR failed to adequately distribute a historical record to the most affected populations,
and it had no measurable deterrent effect. The failings of the ICTR indicate that the
timing of a tribunal does not cause all problems, nor does it solve them.

Chapter IV consists of two brief case studies of hybrid tribunals currently
operating in Sierra Leone and Cambodia. The Special Court for Sierra Leone (SCSL)
and the Extraordinary Chambers in the Courts of Cambodia (ECCC) are two examples of
prosecutorial mechanisms with a hybrid structure. These cases show that even in
tribunals established after conflict, structure is important in determining its ability to
achieve the four objectives of prosecutorial accountability mechanisms. This chapter
argues that in the case of hybrid tribunals, structure is more influential than timing in determining effectiveness. *Chapter IV* assesses how two aspects of hybrid structure influence effectiveness. These are: location of the tribunals and the mixed composition of the tribunals. These two factors offer possible solutions to the problems that continued to plague the ICTR, even in the absence of conflict. Hybrid tribunals will continue to be used in the future and thus, the strengths and weaknesses of these tribunals must be explored. This SCSL and ECCC are two such tribunals deserving of further research.
Chapter I

Justice and Enforcement:
Accountability Mechanisms and the Debates They Inspire

Introduction

This chapter surveys the literature in this field and reflects on the history, themes, goals, and debates surrounding accountability mechanisms for mass human rights violations. The existing literature bridges a multitude of disciplines including but not limited to Sociology, Political Science, International Relations, International Law, Philosophy, and Anthropology. In order to limit the scope of this essay and for purposes of argumentation, I focus on the literature that directly pertains to prosecutorial accountability mechanisms. Mechanisms in this category put primacy on legal prosecution through such measures as international and domestic trials. Prosecutorial accountability mechanisms emphasize individual criminal responsibility and seek an end to impunity for perpetrators of mass human rights violations. These mechanisms are at the center of this project. Non-prosecutorial measures such as truth and reconciliation commissions and national policies of lustration are also part of this broad literature, but will not be discussed in full.

The literature attributes the rise of accountability mechanisms to three developments or reactions. The first is the development of international law, specifically international humanitarian law (IHL). The second was a reaction to the nature and extent of the abuses perpetrated in places such as Rwanda and the former Yugoslavia. The third is the development of a global human rights movement and the rise of various civil society groups as the impetus behind accountability mechanisms. A review of the
chronology shows that the development of the literature often corresponds with the evolution of accountability mechanisms and changing attitudes, prompted in part by the United Nations, toward the global protection and advancement of human rights. I begin with the literature on the Nuremberg Trials, which were instated in 1945 in the wake of World War II. I then move to the ad hoc international criminal tribunals represented by the ICTY and ICTR, and follow this discussion with an introduction to the literature on internationalized domestic (also called ‘hybrid’) tribunals. I conclude with a brief introduction to the scholarship on the International Criminal Court (ICC), which entered into force in 2002. This chronology reveals a trend in the literature in which authors identify two broad themes of justice that are intertwined with the implementation of accountability mechanisms. These themes are retributive justice and restorative justice. Engaging with these two themes allows me to situate my extensive study of prosecutorial accountability mechanisms, within the larger framework of justice.

The final section of this essay introduces a debate within the literature, which juxtaposes justice and peace. This debate arises when justice mechanisms are employed during ongoing conflict. Some scholars express concern that the decision to pursue justice in the midst of conflict will have detrimental effects on peace efforts. Numerous questions are voiced in relation to this debate. What are the drawbacks of pursuing justice during ongoing conflict? Alternatively, what are the moral implications of waiting to pursue justice until after a conflict has ended—by which time many thousands of people may have been murdered, raped, and tortured? If justice is not pursued in the face of mass human rights violations, can a society ever recover enough to enjoy lasting peace? The questions prompted by the debate on the seeming incompatibility of peace
and justice, are important to the development of this project. I suggest that the existence of such a debate necessitates an in-depth analysis of how the timing of a tribunal influences its ability to achieve its objectives. In order to secure justice, accountability mechanisms require access to evidence and witness testimony. The safety of those participating in the accountability mechanism must be ensured. The indictees must be apprehended. Each of these issues and many more are influenced by the circumstance in which a tribunal is implemented.

**The rise of accountability mechanisms**

The proliferation of literature surrounding accountability for mass human rights violations is evidence of a developing, albeit at times uneven, trend in global governance. In the post Cold War era the ratification of numerous conventions and declarations signal that many states, influenced by supranational organizations such as the United Nations (UN), as well as by nongovernmental organizations (NGOs) and domestic advocacy groups, are increasingly receptive to the global promotion and protection of human rights.

The extant literature attributes the rise of accountability mechanisms to three key developments: the development of international law, and international humanitarian law\(^5\) (IHL) in particular, broader developments in global governance, and a reaction to the atrocities committed in places like Rwanda and the former Yugoslavia.

Scholars point out that IHL demands some form of legal remedy for those who

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\(^5\) The *International Committee of the Red Cross* provides a definition of IHL. “International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.” Available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/html/humanitarian-law-factsheet](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/humanitarian-law-factsheet) (accessed 23 October, 2008).
have suffered human rights violations. M. Cherif Bassiouni, a prominent scholar and practitioner in the field of human rights, argues that certain international conventions, covenants, and declarations that form the base of IHL, impose duties on states to provide these remedies. He cites the Hague Convention Regarding the Laws and Customs of Land Warfare, The Geneva Convention Relative to the Treatment of Prisoners of War, the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), and others for ensuring that states provide effective remedy in the wake of human rights abuses. Bassiouni writes that it is “well grounded in the conventional and customary law that a state is under a duty to provide reparations for its violations of human rights and international humanitarian laws”. Some of the existing literature looks upon treaties with a critical eye—how effective are they in preventing or promoting human rights, and why are states motivated to sign them? Further, why are these treaties gaining more legitimacy with states now, and not earlier? One author acknowledges, “the average state has ratified a steadily increasing percentage of available human rights treaties, creating a world space characterized by the rapid and nearly universal acceptance of international human rights law”. The United States

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8 Bassiouni, “Accountability for Violations” in Post-Conflict Justice, 49.


advocated for the creation of the ICTY and many European states are enthusiastic supporters of the ICC. However, the scholarship on human rights points to other factors that helped give rise to the human rights movement—the growth in civil society, the new technologies of media and communication, and supranational organizations such as the United Nations.

In the past fifteen years, a number of changes have taken place in the structures of global governance. Most scholars of International Relations now accept that states are not the sole actors on the international stage. Mary Kaldor defines civil society as

> the process through which individuals negotiate, argue, struggle against or agree with each other and with the centres of political and economic authority…global civil society is a platform inhabited by activists…NGOs and neoliberals, as well as national and religious groups, where they argue about, campaign for (or against), negotiate about, or lobby for the arrangements that shape global developments.\(^\text{11}\)

Many of the various actors that comprise civil society choose to focus their activities on issues pertaining to human rights. Various associations and organizations such as TRIAL (Track Impunity Always) Watch, the International Crisis Group, Global Policy Forum and others contribute to advancing international justice issues. These organizations publish reports on human rights practices in countries around the world, and monitor reported human rights abuses. Scholars who focus on the changing nature of global governance also cite the advent of media and technology systems that can instantaneously transmit news to people all over the world. The global media reports, albeit in varying degrees, on human rights abuses and opens the door for civil society groups to pressure

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state governments to take action.\textsuperscript{12} Similarly, bodies within broader supranational organizations such as the UN\textsuperscript{13} seek to enforce or advance the norms of international law that have helped lead to the development of accountability mechanisms. It is accepted in the literature that without the existence of the UN it is unlikely that the ICTY and ICTR would have been established. Accountability mechanisms, in all their manifestations, have benefited from this movement to advance the cause of human rights.

\textbf{Chronology of accountability mechanisms}

\textit{Nuremberg Trials}

Scholars of international law trace the origins of the present-day accountability mechanisms to the Nuremberg Trials established in 1945, after the conclusion of World War II. These trials sought to punish certain German individuals for inciting and waging a war of aggression, and for crimes against humanity. In the existing literature it is rare that Nuremberg is not at least mentioned in an examination of contemporary justice-seeking measures.\textsuperscript{14} Ruti Teitel argues that the Nuremberg Trials established a legacy that continues to influence prosecutorial accountability mechanisms. She calls attention to two crucial contributions: the introduction of the principle of individual accountability into international law, and the overarching ideal of criminal justice on an international level.\textsuperscript{15} The Nuremberg Trials’ indictment of Nazi leaders marked a shift from a legal paradigm that largely focused on collective accountability, toward a system that placed


\textsuperscript{13} Some of these UN bodies include the Human Rights Council, Committee Against Torture, Committee on the Rights of the Child, Committee on the Elimination of Discrimination Against Women, United Nations High Commissioner for Refugees, Office for the Coordination of Humanitarian Affairs.


guilt on individual perpetrators. Additionally, Nuremberg set a precedent for trials of
individuals on the international stage. Of central importance to future accountability
mechanisms was the designation of crimes against humanity—a new type of crime that
was created in the context of the Nuremberg Trials.\footnote{16} In an article written in 1949,
immediately after the conclusion of the Nuremberg Trials, Hans Ehard references the
final judgment. He states, “[t]he responsibility of individuals under international law is
affirmed by the court. In its opinion international law imposes duties and liabilities upon
individuals as well as upon states”.\footnote{17} Although it was not explicitly articulated at the
time, much of the existing literature argues that the Nuremberg Trials advanced the idea
that some crimes are so heinous that their perpetrators should be prosecuted regardless of
where the crime was committed or the nationality of the perpetrator or victim. Today, \textit{jus
cogens} crimes are those that “threaten the peace and security of humankind…[and] shock
the conscience of humanity”.\footnote{18} The norms of \textit{jus cogens} are non-derogable. Crimes of
\textit{jus cogens} include genocide, crimes against humanity, war crimes, torture, and others.
Unfortunately, although the Nuremberg Trials were heralded as a major step toward
accountability for these crimes, another trial of its kind would not take place until 1993,
fourty-four years after the end of Nuremberg.

\textit{Ad hoc international criminal trials}

International criminal tribunals were implemented in the 1990s in the aftermath of
massive human rights abuses in the former Yugoslavia and Rwanda. As the first of their
\footnote{16} Quincy Wright, “The Law of the Nuremberg Trial,” \textit{The American Journal of International Law} 41
\footnote{17} Hans Ehard, “The Nuremberg Trial Against the Major War Criminals and International Law,” \textit{The
\footnote{18} M. Cherif Bassiouni, “International Crimes: \textit{Jus Cogens} and \textit{Obligatio Erga Omnes},” \textit{Law &
kind they justifiably are given substantial attention in the literature. The ICTY and ICTR emerged from the tradition of the Nuremberg Trials but their objectives are specifically focused on enforcing human rights through legal punishment of perpetrators. The literature examining the creation and function of these trials runs the gamut from those scholars that praise the achievements of these trials, to those that condemn both as inefficient, expensive tools created to assuage the guilt of states that did nothing to prevent the atrocities the ICTY and ICTR seek to condemn.¹⁹ I provide a brief background of both the ICTY and ICTR and introduce major debates in the literature.

The ICTY was established in 1993, by the United Nations Security Council (UNSC) under powers granted it by Chapter VII of the UN Charter. As a result of the continued hostilities in the former Yugoslavia, the court was located in The Hague, in the Netherlands. The ICTR, established by the UNSC in 1994 in response to the genocide in Rwanda in which approximately 800,000 people were killed, was created as a result of the precedent set by the ICTY.²⁰ The literature abounds with critical evaluations of the these two ad hoc international criminal tribunals, but there is consensus that both were essential in creating and advancing legal precedents that continue to shape the use of prosecutorial accountability mechanisms.²¹ Rape as a war crime and the prosecution of incumbent heads of state are but two examples that continue to affect contemporary approaches to international criminal justice. However, the literature points out that

²¹ Kritz, “Progress and Humility,” 55-88.
despite certain important contributions, both the ICTY and ICTR are not without faults.\textsuperscript{22} Three issues are the most frequently discussed: the politicized nature of the ICTY and ICTR, their ability to fairly and efficiently execute justice, and their lack of engagement with the people most affected by the atrocities. The debates surrounding these three issues have been central to shaping the development of new types of accountability mechanisms.

Due to the Tribunals’ connections to the United Nations Security Council (UNSC), many scholars identify the ICTY and ICTR as political devices that were created first and foremost to relieve pressure to act (in the case of the ICTY), or guilt at inaction (ICTR).\textsuperscript{23} This assertion is fleshed out in the literature in various ways. Scholars focus on the often-contradictory role that Western powers took in dealing with conflict in the territories of the former Yugoslavia—there were public denunciations of the crimes committed but a strong resistance to any decisive action to stop such violence.\textsuperscript{24} In the case of Rwanda it is frequently argued that the creation of the ICTR was a largely empty concession in the aftermath of a genocide that the world did nothing to stop.\textsuperscript{25} Scholars’ criticisms of the ICTY cite its lack of enforcement capability as a major weakness to its potential effectiveness. Richard Goldstone, a former Chief Prosecutor for the ICTY refutes this argument. He writes that the issue of enforcement was not a failure of the ICTY itself. Rather, the general “lack of political will on the part


\textsuperscript{24} Akhavan, “Justice in The Hague,” 744.

\textsuperscript{25} Alvarez, “Crimes of States/Hate”.

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of leading Western nations to support and enforce the orders of the tribunal” severely curtailed its ability to successfully pursue justice. 

Scholars who study the ICTY and ICTR also grapple with the tribunals’ ability to execute justice. High operational costs and lack of efficiency have been raised as major concerns that existing tribunals continue to struggle with. The scholarship also laments the gap between the geographic location of the tribunals and the population that suffered the crimes being prosecuted. Scholars who debate the effectiveness of the ICTY raise concern that its physical distance from the scene and victims of the abuses has impeded the successful operation of the court. Global and local media have joined scholars in drawing attention to the perceived disengagement between the courts and the people that suffered the atrocities.

As evidenced by the debates mentioned above, both the ICTY and ICTR are complex structures with numerous shortcomings. Interestingly, it is likely that scholarship detailing the (in)effectiveness of these ad hoc tribunals has led those who advocate for accountability mechanisms to attempt to address some of these weaknesses. The shortcomings of the ICTY and ICTR helped pave the way for developments in the structure of prosecutorial mechanisms. The most recently established prosecutorial accountability mechanisms in Sierra Leone, East Timor, and Cambodia, attempt to address some of the failings of the ad hoc tribunals that preceded them.

27 Zacklin, “Failings of Ad Hoc Tribunals,” 543.
Hybrid tribunals

Hybrid tribunals are the most recent development in prosecutorial accountability mechanisms. The structure of such tribunals is evidence of a move to address the weaknesses of the ICTY and ICTR. Sierra Leone,30 East Timor,31 and Cambodia32 are three of the few places where hybrid courts have been implemented. The literature on hybrid courts continues to develop along with new indictments and charges issued by the existing hybrid tribunals. Scholars see potential for these courts to improve on some of the shortcomings that were evident in the ICTY and ICTR. Much of the literature on hybrid tribunals details their strengths and weaknesses in relation to the tribunals implemented before them.33 Proponents of hybrid courts argue that there are two main advantages to this structure: the ability for the hybrid court to better domestic legal and judicial systems that may have been destroyed during a conflict, and a hybrid court’s proximity to the affected population.34 Advocates of hybrid tribunals suggest that the mixed composition of local and international judges could potentially correct worries of


32 Similarly, in March 2003, the United Nations along with the Cambodian government approved plans to implement a Special Tribunal for Cambodia to try former Khmer Rouge leaders.

33 Rae, “War Crimes Accountability,” 158.

Western powers’ dominance over court proceedings, a concern which plagued the ICTY and ICTR.\textsuperscript{35}

In large part, scholars of transitional justice and human rights seem optimistic about the possible successes of these hybrid tribunals. Lower costs, proximity to affected population, and involvement of both local and international parties, are cited as positive steps in the creation of effective mechanisms for accountability.\textsuperscript{36} The literature that articulates concerns about the hybrid courts suggests that hybrid models based in the country where atrocities occurred could be too easily politicized and/or manipulated by domestic groups. It is also suggested that without reliable international funding support these courts may find themselves without the money needed to achieve full effectiveness.\textsuperscript{37} Importantly, scholars note that while hybrid courts may address some of the weaknesses revealed in the functioning of the ICTY and ICTR, problems of delayed implementation and general operational efficiency are still unsolved. The inability of the international community to quickly respond to human rights atrocities through implementation of accountability mechanisms is cited as a major impediment to ending a culture of impunity. This is in part why the International Criminal Court has been advocated for and supported by various human rights organizations, scholars, and states.

\textsuperscript{35} Ibid., 295.
\textsuperscript{37} Dickinson, “Promise of Hybrid Courts,” 307.
International Criminal Court

A wide swath of the literature on the enforcement of human rights argues that with the entry into force of the International Criminal Court on 1 July 2002, the dreams of a truly functional international criminal justice system were realized. Proponents argue that a permanent court solves issues of delayed implementation—it is an established court with the resources and expertise necessary to issue indictments of human rights violators as they occur. Of course, the opinions of those who oppose the ICC are also evident in the literature. Two articles best represent the most heated debate in the literature surrounding the ICC: Henry Kissinger’s “The Pitfalls of Universal Jurisdiction”, and Kenneth Roth’s response titled, “The Case for Universal Jurisdiction”. Henry Kissinger’s now-famous article outlines the dangers that the ICC holds. Kissinger cites the ICC’s universal jurisdiction over individuals and the ability for hostile states to use this breadth of jurisdiction for political maneuverings. He labels this as a threat to powerful nations (read, the United States) whose service-members are stationed all over the world and who are thus more likely to be prosecuted by the ICC. Kenneth Roth’s article refutes all of Kissinger’s main points but focuses specifically on the built-in checks-and-balances that the ICC includes. Roth asserts that nationals of powerful countries are not more susceptible to prosecution because the ICC statute allows domestic courts the first chance to prosecute perpetrators in lieu of a trial held by the

Kissinger and Roth are not the only two people to confront this debate. The literature abounds with variations on this discussion. Most notably, scholars focus on the US opposition to the ICC and the potentially devastating effect this has on its future.

According to much of the literature on the ICC, the court has been stymied in its efforts in large part because of the United States’ opposition and active attempt to undermine the ICC. The position taken by the US threatens the ability for the ICC to successfully carry out indictments against perpetrators of mass human rights violations. Scholars argue that crimes of this nature become more difficult to prosecute when powerful nations oppose mechanisms such as the ICC. This debate will continue to develop as the ICC pursues its first indictments and becomes a more established actor in the enforcement of human rights. Despite such setbacks in some circles enthusiasm for the ICC has not been dampened and its existence as the first and only permanent court of its time stands as a testimony to the efforts of various groups, individuals, and states. It remains to be seen how it will affect the progressive development of international criminal justice in the coming years.

The chronology of accountability mechanisms provided in the previous paragraphs is not exhaustive. Numerous countries, most notably in Latin America, have turned to accountability mechanisms in the wake of human rights abuses. However, the majority of mechanisms employed in Latin America are of a non-prosecutorial nature. Measures to end impunity and provide relief for victims come in many different forms.

41 This provision is known as the Rome Statute’s complementarity principle.
Most scholars categorize accountability mechanisms according to the form of justice to which they most closely follow. The Nuremberg Trials, ad hoc international criminal tribunals, hybrid tribunals, and the ICC are all most closely associated with retributive justice. Truth commissions, national lustration policies, and culturally specific approaches to reconciliation are categorized as examples of restorative justice. Retributive justice and restorative justice are not mutually exclusive, but they do differ somewhat in their emphasis and objectives.

**Restorative and retributive justice**

Accountability mechanisms come in many forms, but the ones most frequently identified in the literature are truth and reconciliation commissions and international trials such as those in Rwanda and the former Yugoslavia. There is a consensus in the literature that two broad types of justice encompass these different types of accountability mechanisms: retributive justice and restorative justice. Retributive justice refers to a type of justice that underscores legal proceedings and punishments. Retributive justice is concerned with placing guilt on individuals and taking the appropriate measures to prosecute them.\(^{43}\) This latter category of justice operates under the belief that in order to move forward the past must be recognized and properly addressed. Prosecutorial accountability mechanisms advance what Darryl Robinson calls a “climate of accountability”.\(^{44}\) In Martha Minow’s seminal book *Between Vengeance and Forgiveness*, she contends that retributive justice in its purest form “insists on punishment not necessarily in search of deterrence or any other future effects, but instead

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as a way of denouncing previous wrongs and giving persons their deserts”. Minow makes a valid point in this observation on pure retributive justice, yet it does not completely apply to the contemporary use of accountability mechanisms. Today, proponents of international criminal justice articulate specific objectives that the ideal accountability mechanism would accomplish. Deterrence, strengthening of weakened domestic legal systems, and acknowledgment of the past are but a few of these goals.

Although contemporary prosecutorial mechanisms are increasingly concerned with issues of societal reconciliation, it is restorative justice that is focused primarily on the needs of the victim and the restoration of society. Restorative justice measures acknowledge the past but ultimately seek to relieve some of the pain and suffering victims have endured. This category of justice emphasizes reconciliation and a desire to move forward after atrocities have been committed—these goals are privileged over the desire to punish perpetrators for crimes committed. Proponents of restorative justice mechanisms often urge their use in situations where internal conflict has occurred between two or more groups of people (ethnic, religious, or otherwise). It is argued that in such situations it is more important for societies to acknowledge the truth of what happened, and then move forward, than it is to focus on the past and punish perpetrators. The most prominent scholars who study human rights and international

45 Minow, *Vengeance and Forgiveness*, 12.
criminal justice identify truth and/or reconciliation commissions (TRCs) as the type of accountability mechanism that best fits the category of restorative justice. The restorative nature of TRCs resides in their ability to create an official record of the truth. In ideal circumstances these TRCs operate at the site of the atrocities and with the participation of local populations. TRCs have been used in South Africa in the years after apartheid, and in the aftermath of conflicts in El Salvador, Argentina, and now in Sierra Leone and Liberia.

It is important to note that when applied to accountability mechanisms these broad themes of justice rarely operate in exclusive realms. Rather, most accountability mechanisms, prosecutorial and non-prosecutorial alike, combine retributive justice with a desire for reconciliation and redress for victims. Neil J. Kritz, a prominent scholar of transitional justice states:

Societies shattered by the perpetration of atrocities need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations, as for individuals, the past will haunt and infect the present and future in unpredictable ways. The assumption that individuals or groups who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the seeds of future conflict.


51 Minow, Vengeance and Forgiveness, 91.


53 Kritz, “Coming to Terms,” 127.
Kritz’ scholarship notes the diverse range of goals that accountability mechanisms often seek. These goals include: the pursuit of individual criminal accountability, deterrence of future crimes, and a forum through which the past can be documented and acknowledged. In recent years however, a debate has arisen over whether the desire for justice and the subsequent use of prosecutorial accountability mechanisms, has come at the detriment of peace and lasting stability. The use of accountability mechanisms in cases of human rights abuses is being employed more frequently as human rights advocates, legal practitioners, and scholars argue for its legitimate and important contribution to ending impunity. This debate concerning peace, justice, and accountability mechanisms must be confronted if these mechanisms are to remain a respected tool in international criminal justice.

**Peace and Justice**

When a society has been torn apart by large-scale violence and death that is often perpetrated by one subset of society against another, an end to the conflict is crucially important and much desired. The literature on accountability mechanisms and transitional justice has reflected a normative dilemma that began to be raised in the context of the ICTY. This debate centers on the seeming tension between the need to establish peace and the desire to pursue justice. Two different viewpoints dominate this

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exchange: 1) sustainable peace cannot be achieved without the successful pursuit of justice; 2) the pursuit of justice will damage the possibilities for lasting peace.

In the existing literature certain scholars fiercely advocate for legal accountability for perpetrators of mass human rights violations. They argue that there can be no sustainable peace if justice is not sought. Bassiouni, a leading proponent of justice in all circumstances, argues “justice is far too often bartered away for political settlements…the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts”. The victims, he suggests, are the ones that suffer the consequences of this politically expedient exchange. Other scholars join Bassiouni in criticizing those that would forgo justice in order to obtain peace. They argue that prosecutions can provide an important account of past or ongoing events, and serve to strengthen the domestic judicial systems. Additionally, “[h]olding the violators accountable for their acts is a duty owed to the victims both living and dead”. Of foremost importance to these scholars, is their argument that in the long term, peace cannot be maintained if justice is not pursued.

On the other side of the debate are those that see justice as a possible impediment to the cessation of violence and the achievement of peace. This side is frequently identified as a pragmatist or realist conception of accountability for human rights abuses. Richard Goldstone, although he does not adhere to this side of the debate, provides a helpful summary of this position. He states that those who believe that justice could

55 See: Akhavan, Bassiouni, Schabas, Williams, Taft, Sriram
58 Scharf and Rodley, in Post-Conflict Justice, 90.
derail peace are concerned with “the political expediency and morality of pursuing such justice during the life span of an ongoing conflict at the apparent expense of a negotiated peace and the lives of further innocent victims.” A pragmatic examination of accountability mechanisms warns that such measures could undermine stability and/or incite retaliation by the groups who are most likely to face prosecution. In direct contrast to Bassiouni’s assertions mentioned above, pragmatists contend that “[p]reventing atrocities and enhancing respect for the law will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses”. Scholars that write from this position argue that indictments against existing heads of state could ignite increased hostilities in situations already fraught with tension, ill will, and mistrust. Much of the literature representative of this side of the debate advances the idea that limited amnesties for prosecutors of human rights violations are sometimes necessary for the establishment and preservation of peace. Of course, not all scholars who confront this debate choose a clear-cut side. Occasionally a scholar will resist the strict justice versus peace dichotomy. Considering the complexity of situations where mass human rights atrocities have been committed, this position seems wise.

Given the ever-changing nature of world politics, the literature on justice and the mechanisms used to achieve justice must be constantly updated. The literature must also

59 Goldstone, in Hard Choices. 197.
strive to explore these complicated judicial organs from every possible angle. This project contributes to the literature by providing analysis of how the timing of a tribunal influences its effectiveness. Thus far, scholarship on tribunals has not provided a comprehensive assessment of how the circumstances in which a tribunal is established may impact its ability to achieve its objectives. By conducting in-depth case studies of existing tribunals, this project hopes to provide analysis that will help in the future development of tribunals that operate more efficiently and effectively.

Conclusion

In this overview of the literature on prosecutorial accountability mechanisms, I have confronted the dominant themes and debates that are present in this area of study. However, I do not find the scholarship pertaining to the peace and justice debate fully satisfying. I argue that if a tribunal is established during conflict, the challenges of achieving justice become more acute. In turn, implementing a tribunal in the aftermath of mass violence allows certain favorable conditions to arise. The timing of tribunals is an important factor to consider, especially in light of the recent indictments issued by the ICC. The recent indictment issued for Omar Hassan al-Bashir, the President of Sudan, indicates that with the existence of the ICC accountability mechanisms will be more frequently implemented in situations of ongoing conflict. If this is indeed true, it is essential that scholars and actors in the field of human rights consider how pursuing justice in the midst of ongoing conflict can impact its effectiveness.
Chapter II: The International Criminal Tribunal for the former Yugoslavia

Complicating the Pursuit of Justice:

Ongoing Conflict and its Influence on the ICTY

Introduction

Nearly a half-century after the Nuremberg Trials of 1945-46, which riveted the world’s attention on war crimes and retributive justice, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created to bring to justice those responsible for the numerous atrocities committed during the conflicts that raged in the splintering Yugoslav Republic throughout the 1990s. It is estimated that over 200,000 lives were lost in the conflict. Created in 1993, the ICTY is scheduled to conclude proceedings in 2010. Many criticisms have been leveled at the ICTY, yet the tribunal has also garnered praise for taking steps to replace a “culture of impunity” with a “culture of accountability.” As a prosecutorial accountability mechanism, the ICTY has four objectives: to pursue individual criminal accountability; to create and disseminate an accurate historical record; to re-establish rule of law; to deter future atrocities. The ICTY was established in the midst of ongoing conflict. I argue that the decision to implement the Tribunal during conflict negatively affected the ability of the ICTY to achieve its four objectives. This case study suggests that the effectiveness of the ICTY suffered due to the fact that it was implemented and operated during active conflict.

The timing of the Tribunal made the already numerous challenges of pursuing justice even more acute. The presence of conflict hindered the ability for the ICTY to

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65 Kritz, “Coming to Terms,” 127.
achieve the following goals: the creation and distribution of an accurate historical record and the re-establishment of rule of law. Specifically, the ongoing conflict produced on-the-ground conditions, which negatively influence the Tribunal’s ability to do the following: ensure the physical security of staff, personnel, and witnesses; collect evidence; gather witness testimony; apprehend suspects; and access the most affected population (i.e. the people who suffered, witnessed, and participated in the atrocities). The ongoing conflict in the former Yugoslavia made the activities necessary for an effective tribunal, difficult to complete. The timing of the ICTY also dictated its physical location. Due to active conflict, the ICTY is based in The Hague, the Netherlands. The physical distance from the former Yugoslavia hindered the ICTY’s efforts to educate the local populations about the proceedings and developments of the Tribunal. Although the successes and failures of the ICTY are not entirely reducible to its having been established in the midst of the conflict, this case study indicates that there is a correlation between the two.

The decision to implement the ICTY while atrocities were ongoing led to a heated debate on the goals of peace and justice—goals that some viewed as being mutually exclusive. Two sides to the debate emerged. One side argued that only by pursuing justice would there be lasting peace. On the other side were those who worried that by pursuing justice in the context of ongoing conflict, the chances of a peace agreement would be diminished. A justice mechanism could de-rail the peace process and lead to more deaths. The conflict in the former Yugoslavia was one of the first situations where the apparent tensions between peace and justice were publicly recognized and discussed.
The ICTY is a significant development in the field of international criminal law, and has appropriately received much academic attention. Thus far however, scholars have not adequately addressed how the ongoing conflict in the former Yugoslavia influenced the effectiveness of the ICTY. Part of this chapter analyzes the difficulties of the ICTY in terms of the aforementioned debate on peace and justice. I begin this chapter with an overview of the conflict in the former Yugoslavia. Next, I examine the process that led to the creation of the ICTY, its basic structure, composition, and mandate. I engage with the debate that arose over the pursuit of justice in the midst of conflict. Before providing a complete analysis of the ongoing conflict’s influence on the ICTY ability to achieve its four goals, I present the judicial proceedings thus far. This will help establish the foundation upon which I will examine the Tribunal’s successes and failures in achieving individual criminal accountability, rule of law, an historical record, and a deterrent effect.

**History of the Conflict**

After World War II, Yugoslavia consisted of six republics established by leader Josip Tito: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. A number of ethnic groups were represented in—Albanians, Bosniacs (Bosnian Muslims), Croats, Hungarians, Roma, Jews, Serbs, Slovenes and more. After Tito’s death in 1980, the Republics of Croatia and Slovenia began to push for greater autonomy and possible independence. In response, Serbian leaders who opposed this goal began to consolidate Serbian power over Yugoslavia as a whole.

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66 The Republic of Serbia included two autonomous provinces, Kosovo and Vojvodina.
In 1986, the Serbian Academy of Arts and Sciences (SAAS) issued a memorandum that attacked the Yugoslavian constitution and suggested that Tito discriminated against Serbs during his time in power. The memorandum accused Tito of engaging in “physical, political, legal and cultural genocide against the Serb population in Kosovo”.\textsuperscript{67} The SAAS Memorandum argued that Serbian interests should be pursued by any means necessary. During this time Serb-nationalism reached a peak, due in large part to the Serbian elite who used a massive propaganda campaign to stoke the fires of ethnic hatred.\textsuperscript{68} Later the same year, Slobodan Milošević became the chief of the Serbian Communist Party. Tensions between the Serbian nationalist government and the Republics of Croatia and Slovenia reached a breaking point.

On 25 June 1991, Croatia and Slovenia declared their independence. Milošević, now the President of the Republic of Serbia, cited the importance of protecting the Serb populations in these regions. With the help of the Serb-dominated Yugoslav army (JNA), Milošević began a political and military campaign to stop the secession and consolidate Serb power. In November of 1991, Serbian forces occupying the Croatian town of Vukovar massacred 200 patients in a local hospital and deposited their bodies in a mass grave. Despite the threat of invasion by Serb forces and insurgents, the Bosniac and Croatian populations of Bosnia-Herzegovina voted for independence on 1 March 1992. Shortly after this declaration, the independent nation of Bosnia-Herzegovina was recognized by the European Community and the United States (US).\textsuperscript{69} The Serbian attack on Croatian and Bosniac populations that followed this recognition is now

\textsuperscript{69} Ibid., 121.
acknowledged to be a pre-planned campaign of ethnic cleansing against non-Serb peoples.

As the crisis in the former Yugoslavia continued members of the Security Council came under pressure to act. News stations around the world reported on the human rights violations being committed in the disintegrating Yugoslav state. Human rights organizations and advocacy groups monitored the situation and used the information to try to force a response from the international community. No UN member-state that was ignorant of the events that were occurring in the former Yugoslavia. Yet, in the early phases the international community did little to bring about an end to the conflict.

Michael Scharf and Paul Williams identify two phases in the international community’s response. The first lasted from the beginning of the conflict until early 1995. This phase was categorized by actions that amounted to accommodation. Scharf and Williams identify the second phase, which began in the spring of 1995 and helped pave the way for the Dayton Negotiations, as one in which accommodation was replaced with forceful intervention. UN resolutions meant to stem the fighting—and perhaps dilute international pressure to act forcefully—were adopted throughout the initial phase of accommodation. In the following sections I present the debates and decisions within the UN on the appropriate reaction to the Yugoslav conflict. Other scholarly work provides in-depth analysis of the discussions that led up to the creation of the ICTY. I

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70 Ibid., 124.
71 Williams and Patricia Taft also refer to this phase as one of coercive appeasement. See: Paul R. Williams and Patricia Taft, “The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement?”, Case Western Reserve Journal of International Law 35 (Spring, 2003): 219-255.
72 Williams and Scharf, Peace with Justice, 153.
73 Much scholarly attention is focuses on detailing how the UN member states responded to the Yugoslav Crisis. Much of the literature critiques the international community’s inaction. These are valuable critiques, but because they are not central to this project, I refrain from providing an exhaustive analysis of these events.
introduce them briefly. My intention is not to saddle the international community with blame for its inaction. Rather, I hope to demonstrate how the UN decisions made during this period, do not exist in isolation from the debate on balancing the need for peace with the desire for justice.

When fighting broke out in 1991, the United States had lost interest in Yugoslavia. After the end of the Cold War the country was no longer viewed as strategically important and so the United States was content to let European states handle the situation. Throughout the early stages, the U.S. excused their inaction as the appropriate response to a conflict that involved the equal participation of both sides. Scharf and Williams explain that this position allowed the United States to avoid direct action. This in spite of the fact that by mid 1995 it was well known that the majority of the ethnic cleansing was being carried out by nationalist Serbs.74

The US was not the only member of the international community to delay action. The United Kingdom (UK) and other European states also participated in this initial phase of accommodation. A series of joint UN and European Union (EU) peace processes were attempted from 1992 until late 1994, but by then it was clear that attempts at peace had failed.75 Paul Williams and Patricia Taft suggest that these failures resulted from several interacting factors. First, differences of opinion in the EU meant that coordination was difficult to achieve. Second, the administrations in the US and EU were not eager to pump mass amounts of money and resources into ending a conflict, which at least

74 Williams and Scharf, Peace with Justice?, 67.
initially did not provide a direct threat to Western nations. Deploying troops to the region and risking causalities was not viewed as a politically viable option.\textsuperscript{76} Instead, the EU and US relied on ad hoc decision making processes that stood-in for military action. Initial efforts to end the conflict also included a legitimization of key players in the conflict—most notably Slobodan Milošević and Radovan Karadžić.\textsuperscript{77} The willingness on the part of the international community to engage in peace talks with these men suggests that leaders in the US and UK thought that these negotiations would constitute a valid path to peace.\textsuperscript{78} Including Milošević and Karadžić in high-level diplomatic talks also indicate just how desperately the UK and US sought to avoid the use of force. Former George H.W. Bush Ambassador, Warren Zimmerman, argues that Western states were largely apathetic to the crisis in the former Yugoslavia. Zimmerman posits that Western-led negotiations led “to a kind of cynical theater, a pretence of useful activity, a way of disguising a lack of will. Diplomacy without force became an unloaded weapon, impotent and ridiculous.”\textsuperscript{79} As Western powers attempted to secure a political peace, the UN took action in the form of Security Council resolutions. These resolutions spanned the breadth of four years and culminated in the establishment of an ad hoc international tribunal—the ICTY.

\textsuperscript{77} Williams and Taft, “The Role of Justice,” 225.
\textsuperscript{78} Interestingly enough, Radovan Karadžić, who is now standing trial in The Hague, is claiming that Ambassador Richard C. Holbrooke guaranteed him immunity in exchange for leaving power after the conflict. Holbrooke was instrumental in brokering the Dayton Agreements but denies granting Karadžić immunity for his crimes. See: Marlise Simons, “Study Backs Bosnian Serb’s Claim of Immunity”, \textit{New York Times}, 21 March 2009.
On 20 May 1992 UNSC Resolution 757 was passed. This Resolution called for a trade embargo on the Federal Republic of Yugoslavia (FRY) in an attempt to force an end to Serbian interference in Bosnia. After this proved ineffective the UNSC issued Resolution 770 in August of 1992, which authorized governments to take “all measures necessary” to ensure that aid safely reached the Bosnian population. 80 This was followed by Resolution 781, which established a no-fly zone over Bosnia. After much political posturing, the UNSC adopted Resolution 808 on 22 February 1993. This resolution marked the decision to create an international tribunal—what would become the ICTY. 81

A little over a month later, UNSC Resolution 819 declared the city of Srebrenica a safe-area on 16 April 1993. The United Nations Protection Force (UNPROFOR), established earlier in February 1992, 82 was assigned the task of overseeing the demilitarized safe-areas, which had been expanded to include the cities of Sarajevo, Tuzla, Zepa, Gorazde, and Bihac. However, UNPROFOR was not permitted to use force and when Serb forces under the command of Ratko Mladić attacked the safe-areas in mid-July 1995, UNPROFOR retreated and thousands of civilians were massacred. It is estimated that over 8,000 Muslim boys and men were murdered in the twelve-day period when Serbian forces occupied Srebrenica. 83 Media attention increased in the wake of the massacre, and more and more people around the world were made aware of the reported abuses. These atrocities included “mass forced population transfers of Bosniacs, organized massacres and the physical destruction of whole towns, the systematic and

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81 Scharf and Williams, Peace with Justice?, 98.
83 Neier, War Crimes, 132.
repeated rape of thousands of Bosniac women and young girls, and the existence of over 400 Serb-run detention centers.”

The policy of accommodation had clearly failed to deter the Serbs from continuing their campaign of violence. The Srebrenica massacre and the continued Serb occupation of parts of Croatia, led to the use of force as a viable political option. Williams and Scharf explain that the US policy reversal was prompted by “the continuing atrocities and the intense public criticism of a failed policy.” On 30 August 1995, the North Atlantic Treaty Organization (NATO) launched air strikes against Serbian targets as part of Operation Deliberate Force. The NATO air strikes are generally regarded as the impetus for Serbian agreement to meet in Dayton, Ohio to discuss a peace accord. Unfortunately, the Dayton negotiations resulted in a peace that marginalized justice. Serbian interests, represented by Slobodan Milošević, were prioritized in an attempt to achieve a cease-fire. One of the major decisions resulting from the Dayton Accords was the division of Bosnia into two sections: Republika Srpska, a Serb stronghold, and the Bosniac-Croat Federation. The Dayton Accords and their poor implementation over the months following the negotiations resulted in a shaky peace. Three years after the Dayton Accords, Serbian forces entered Kosovo and began a campaign of ethnic cleansing against the non-Serb population. “Retaliatory and armed action, torture and ill-

84 Williams and Scharf, Peace with Justice?, 49.
85 Williams and Scharf, Peace with Justice?, 156.
86 NATO is a military alliance of 26 member nations in North America and Europe. For more information see: http://www.nato.int
88 Williams and Scharf, Peace with Justice?, 54. According to General Wesley Clark, Milošević admitted that the use of NATO had essentially ended the war. See: 158.
89 Zimmerman, Origins of a Catastrophe, 233.
90 Williams and Scharf, Peace with Justice?, 169.
treatment, arbitrary detention, forced disappearances, harassment and discriminatory treatment [were] widely reported.”

The International Tribunal for the former Yugoslavia

Resolution 808 stated the need for an international tribunal that “would contribute to the restoration and maintenance of peace”. This tribunal became a reality in May of 1993 when UN Security Council Resolution 827 established the International Tribunal for the former Yugoslavia (ICTY). This Resolution expressed concern over the reported atrocities and declared the UN’s intent to create an ad hoc international criminal tribunal to try those responsible for the commission of violations of human rights. The ICTY became the first tribunal since the Nuremberg Trials to prosecute individuals for violations of international humanitarian law. Many people in the human rights community regard the creation of the ICTY as a momentous occasion. There was hope that justice would be rendered and a respect for human rights enforced. The ICTY was created using Chapter VII provisions of the UN Charter. These powers allow the UN to call on member states to take the necessary measures “to maintain or restore international

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94 The Court itself is composed of three trial chambers, one appeals chamber, a Registry and the Office of the Prosecutor (OTP). Each of the three trial chambers includes three permanent judges and a maximum of six *ad litem* judges. The Appeals Chamber is composed of seven permanent judges, and each appeal is heard and decided on by five judges. The Registry is responsible for administrative and judicial support services, victims and witnesses and finances and budget. The Prosecutor is elected by the UNSC and is responsible for conducting investigations, presenting prosecutions, preparing indictments and more. The OTP includes people from many different areas—law enforcement, crime experts, analysts, lawyers, trial attorneys and others. See http://www.un.org/icty/.
peace and security.”

In theory, Chapter VII powers make it obligatory for states to fully cooperate with the Tribunal. States must provide any and all relevant evidence to facilitate investigations. Third party states also have a responsibility to apprehend Tribunal indictees and extradite them to The Hague for prosecution. In practice however, the ICTY has no enforcement power so this cooperation is requisite in theory only. The ICTY marked the first instance in which Chapter VII powers were invoked in the creation of an international tribunal. The Tribunal also enjoys primacy over national courts.

The ICTY Statute was adopted on 25 May 1993. The ongoing conflict in Yugoslavia was influential from the very beginning. The continuing violence prompted the UN to seat the ICTY in The Hague, the Netherlands. This decision is evidence that even before the ICTY began proceedings, the ongoing conflict was already influencing key decisions such as location of the Tribunal. The first four Articles in the Statute for the ICTY gives the court jurisdiction over four categories of crimes that violate international law. These include: 1) grave breaches of the Geneva Conventions of 1949, 2) violations of the laws or customs of war, 3) genocide, and 4) crimes against

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96 The UNSC declared the conflict in the former Yugoslavia to be a situation that “continues to constitute a threat to international peace and security”. Ostensibly, by recognizing the conflict occurring in the former Yugoslav territories as an international threat, the UN was opening the door for the implementation of armed forces and other measures deemed “necessary”. Most scholars agree however, that this was not its intention in invoking Chapter VII. It is much more likely that the UN had no initial intention of using force to bring the conflict to an end. Instead, by categorizing the conflict as an international threat, the UN bypassed traditional notions of state sovereignty and allowed for the creation of the first international tribunal since the Nuremberg Trials.

97 Article 2 of the ICTY Statute defines grave breaches as any of the following: willful killing, torture, causing great suffering or serious injury, extensive destruction of property that is not militarily justified, forcing a civilian or prisoner of war to serve in enemy forces, depriving a civilian or prisoner of war the right to a fair trial, unlawful deportation, and taking civilians as hostages.

98 Article 3 of the ICTY Statute includes such actions as: use of biological weapons that cause unnecessary suffering, unnecessary destruction of cities, towns, and villages, attack of undefended towns, buildings, etc., destruction and seizure of institutions committed to religion, charity, education, arts and sciences, and

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The prosecutorial power of the ICTY resides in its jurisdiction over individuals—specifically those “most responsible” for the aforementioned crimes. Article 7(2) establishes prosecutorial jurisdiction over incumbent heads of state. Article 7(3) establishes command responsibility and Article 7(4) states that the ‘obedience to orders’ defense will not relieve the individual of criminal responsibility. The ICTY’s temporal jurisdiction mandates it to investigate and prosecute those crimes committed in the former Yugoslavia since 1991. Article 32 of the Statute ensures that funding for the Court is provided through the General Assembly’s annual budget.

The Tribunal was created in 1993, but it was not until the 26 April 1995 that the first trial commenced. The early years of the ICTY were spent in preparation for the huge task that loomed before it. A Chief Prosecutor and judges had to be chosen, staff hired, materials prepared, statute drafted. This was made more complicated by the politics inherent to such a process. UN member-states campaigned for their own national historic monuments, plunder of public or private property. Article 3 makes note that violations of the laws or customs of war includes but is not limited to the aforementioned actions.

According to Article 4 of the ICTY Statute, Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) killing members of the group;
b) causing serious bodily or mental harm to members of a group;
c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) imposing measures intended to prevent births within the group;
e) forcibly transferring children of the group to another group;

The following acts shall be punishable:

a) genocide;
b) conspiracy to commit genocide;
c) direct and public incitement to commit genocide;
d) attempt to commit genocide;
e) complicity in genocide. (see http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf)

Article 5 of the ICTY Statute defines crimes against humanity as “murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts”. The ICTY has jurisdiction over such crimes “when committed in armed conflict, whether international or internal in character, and directed against any civilian population” (see http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf).

judges to be selected and they protested the nomination of others.\textsuperscript{102} It was not until 6 April 1994, that the War Crimes Commission, comprised of experts selected to gather information and provide documentation to the ICTY, submitted its full report. The report, along with all its annexes, totaled over 3,300 pages of detailed information on the crimes that occurred, suspected perpetrators, and more.\textsuperscript{103}

As a prosecutorial accountability mechanism, the ICTY’s objectives include: to pursue individual criminal responsibility; to re-establish rule of law; to create and distribute an accurate historical record; and to deter future crimes. However, before these objectives could be pursued, the ongoing conflict in the former Yugoslavia prompted a debate that pitted justice and peace against one another.

\textbf{Peace, Justice, and the ICTY}

The ICTY’s goals centered on the pursuit of justice, but it was also “set up as a mechanism for the restoration of peace while the conflict continued to rage in the former Yugoslavia.”\textsuperscript{104} Because the conflict was labeled a “threat to international peace and security” the Tribunal was expected to both pursue justice and contribute to the peace process.\textsuperscript{105} This enhanced mandate coupled with the ICTY’s status as an UN-created mechanism made it essential that it “strictly [adhere] to the requirements of impartiality and fairness”.\textsuperscript{106} The complex relationship between peace and justice emerged as a prominent debate amongst those who study transitional justice and accountability.

\textsuperscript{102} For a more detailed account of the political considerations surrounding the formation of the ICTY see: Williams and Scharf, \textit{Peace with Justice?}, 104-109.
\textsuperscript{103} Williams and Scharf, \textit{Peace with Justice?}, 95.
\textsuperscript{105} This expanded mandate made the ICTY different from the Nuremberg Trials, which were established in the aftermath of World War II by the Allied victors.
\textsuperscript{106} Williams and Scharf, \textit{Peace with Justice?}, 113.
mechanisms. Early in the process (before the Tribunal itself was created) it became apparent that not everyone agreed that peace and justice were complementary goals. In fact, many of those involved in initial negotiations to end the conflict, viewed the creation of an international tribunal as a serious threat to the peace-process.

In initial deliberations about the practicality of an international tribunal, two main opinions were expressed regarding the tenuous balance between peace and justice. Both opinions were inextricably linked to the timing of the proposed ICTY. On one side were those arguing that any tribunal established during conflict would face possibly insurmountable obstacles. Further, to pursue justice at such a time could lead to a collapse in the peace process or worse yet, an incitement to violence. Many of those involved with the ongoing peace processes were particularly concerned that any Security Council approved attempt at justice would signal the immediate end to negotiations.\textsuperscript{107} Richard Goldstone summarizes this argument,

How…could one expect that such leaders [Milošević and Karadžić] would negotiate a peace agreement when one of the consequences of that agreement would be their prosecution and possible life imprisonment for war crimes?\textsuperscript{108}

Those who feared the breakdown of negotiations were hesitant to establish an international tribunal at such a critical point in the conflict. This is not to say that those who were proponents of this position were against justice. Rather, this position held that justice should be temporarily delayed in order to ensure that a peace agreement was successfully reached.\textsuperscript{109}

\textsuperscript{107} Williams and Taft, \textit{The Role of Justice}, 225.
\textsuperscript{108} Richard Goldstone, in \textit{Hard Choices}, 197
\textsuperscript{109} Rodman, “Darfur and Legal Deterrence,” 549.
Those who represented the opposing opinion sought to impress upon the Security Council that without justice there would be no lasting peace. Proponents of this view argued for the immediate implementation of an international tribunal such as the ICTY. Those on this side of the debate argued that justice would help lead to and maintain peace for two main reasons: justice counters impunity and contributes to the deterrence of future atrocities. The initiation of a judicial process would signal to the perpetrators of mass atrocities that the international community was serious about enforcing human rights. Additionally, adherents of this position hoped that the pursuit of justice would have a lasting deterrent effect. Akhavan explains, “unchecked atrocities against civilians send the message to potential aggressors elsewhere that they can commit such crimes with impunity…thus encouraging or even providing an incentive to resort to large-scale violence as an instrument of attaining power.”

This side of the debate argued that without a serious attempt at justice, any peace that was achieved would be temporary and ultimately inconsequential. The debate prompted by the possibility of a tribunal indicates that the ongoing conflict prompted concern, even before the creation of the ICTY. Once the ICTY was established, its timing continued to impact its ability to achieve its four objectives.

**Judicial Proceedings**

Since its creation in 1993, the ICTY has indicted over 161 persons for committing serious violations of international humanitarian law. As of 11 February 2009, there are 45 ongoing proceedings. Goran Hadžić and Ratko Mladić both remain at large. Only six of the 161 accused remain at a pretrial stage. Excluding these five cases, all trials are set

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111 Updated 17 November 2008
to conclude by the end of 2009. To date, approximately 70 percent of all indictees are Bosnian Serbs, 20 percent Croats, and the rest a mix of Bosniacs, Albanians, and Macedonians. It follows that the majority of convictions have been issued for crimes committed against (in large part) Bosniacs by Bosnian Serbs.

This section provides an overview of the most important judicial proceedings of the ICTY. I begin by discussing the early years of the Tribunal, a time period that was mainly preparatory. I then discuss several key trials. I focus on Duško Tadić, Slobodan Milošević, Ratko Mladić and Radovan Karadžić. After an introduction to these notable cases I conclude by specifying issues that have affected the judicial proceedings of the ICTY. I mention several factors such as a delayed start to investigations and a lack of enforcement power, but I argue that the ongoing conflict in the region proved the greatest influence on the overall effectiveness of the Tribunal. I introduce this assertion at the end of this section and begin the next section with a full analysis of timing’s influence on the ICTY’s effectiveness.

The first indictment of the ICTY was issued for Dragan Nikolic on 4 November 1994. Nikolic was the first person to be indicted, but Duško Tadić, a low-level perpetrator, was the first to be tried. Tadić’s trial was significant not only because of its historic nature as the ICTY’s first, but also because the Tadić trial helped develop a

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113 Tadić was indicted with grave breaches of the 1949 Geneva Conventions, crimes against humanity and violations of the laws or customs of war. See: http://www.un.org/icty/cases-e/cis/tadic/cis-tadic.pdf, to learn more about Tadić visit http://www.un.org/icty/cases-e/index-e.htm (accessed on 1 January 2009).
context in which his and others’ crimes could be viewed. It also revealed two potential drawbacks to the ICTY, namely the cost of the trial, which totaled approximately $20 million and the lengthy proceedings, which concluded over a year after it had started.

Slobodan Milošević is without doubt the name that calls forth the bloodiest images of the conflict in Bosnia and Kosovo. Milošević was President of Serbia from 26 December 1990 and President of the Federal Republic of Yugoslavia from 15 July 1997 until 6 October 2000. He was implicated in horrific crimes committed in Kosovo, Bosnia Herzegovina and Croatia. Despite the overwhelming evidence linking Milošević to crimes committed against non-Serb populations, he was not indicted by the ICTY until 24 May 1999—nearly six years after the Tribunal was established. In spite of this delay, the indictment and corresponding arrest of Milošević on 1 April 2001, was viewed by many as a defining moment for the ICTY. Michael Scharf suggests that

[although the Yugoslavia Tribunal has tried…other indicted war criminals, Prosecutor v. Slobodan Milošević is clearly the trial for which the Ad Hoc Court was created. [Its results] may dictate the ultimate success or failure of the Tribunal itself as a mechanism for restoring peace in the Balkans.]

Unfortunately, Milošević died of poor health on 11 March 2006, before he could be charged.

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114 Tadić’s trial also revealed two potential issues that would affect the ICTY and the future use of ad hoc international tribunals: the cost of the trial, which totaled approximately $20 million, and the lengthy proceedings, which concluded over a year after they began. See: Scharf and Williams, Peace with Justice?, 115.
115 Scharf and Williams, Peace with Justice?, 115.
Indictments for Ratko Mladić, the commander of the Bosnian Serb Army, and Radovan Karadžić, the president of Republika Srpska and head of the Serbian Democratic Party, were issued on 25 July 1995. Both men were instrumental in carrying out the campaign of ethnic cleansing. The crimes for which they were indicted are similar in nature to those of Milošević. Radovan Karadžić was apprehended 21 July 2008 and is now facing trial in The Hague.\textsuperscript{119} Mladić is still at large. If Karadžić is found guilty it is likely that he will face over 30 years imprisonment. Karadžić’s arrest boosted hopes that the full scope of crimes committed in Bosnia would be publicly revealed and acknowledged. His trial would also help to establish the link between a high-level official and the mass violations of human rights that occurred.\textsuperscript{120}

The use of sexual violence and rape as a tool of warfare is an additional aspect of the conflict that deserves mention. Much is written about this subject and it is not within the scope of this paper to address it in detail. However, the ICTY’s June 2004 indictment of eight Bosnian Serb officers for rape and enslavement of Bosnian Muslim women was an important development in International Humanitarian Law. These indictments marked the first time that rape and sexual assault were included as distinct forms of war crimes.\textsuperscript{121}

\begin{footnotesize}
\textsuperscript{119} An amended indictment issued on 18 February 2009 charges Karadžić with genocide, crimes against humanity and violations of the laws and customs of war. See: http://www.icty.org/x/cases/karadzic/ind/en/090218.pdf
\textsuperscript{121} Bass, Staying the Hand of Vengeance, 258.
\end{footnotesize}
The proceedings of the ICTY are ongoing, but after over 15 years in operation the effectiveness of the Tribunal must be analyzed. The next section examines how the ongoing conflict influenced the Tribunal’s success in achieving its four objectives.

Analysis

The accomplishments of the ICTY are outnumbered by its failures. Overall, the ICTY was much more successful as a symbol of justice than it was as an effective judicial organ. Many factors impeded the ability of the ICTY to achieve success. Its ad hoc structure necessarily meant an extended process of planning and implementation. The search for a Chief Prosecutor, the need to draft a Statute, and collection of funds contributed to the delayed start to investigations and trials. However, the ICTY’s implementation conflict proved to have the most significant impact on its effectiveness. The following section analyzes the influence that the ongoing conflict had on the ICTY’s ability to fulfill its goals of individual criminal accountability, rule of law, creation and dissemination of an accurate historical record, and deterrence of future atrocities. Due to the ongoing conflict it was decided that the ICTY would be based out of The Hague, the Netherlands. The impact of this decision will be discussed in the assessment of the ICTY’s ability to achieve its four objectives. Although I argue that the timing greatly influenced the ICTY’s effectiveness, I acknowledge that not all of the failures of the Yugoslav Tribunal can be attributed to the ongoing conflict. When appropriate I also discuss how the ad hoc structure of the Tribunal contributed to its accomplishments and failures. I suggest that the influence of structure is most evident in the pre-trial stages of the ICTY. However, because structure is not the focus of my study, I do not seek to
provide a full analysis of its impact. Ultimately, I conclude that the ongoing conflict in the region negatively influenced the ICTY’s ability to achieve its four objectives.

**Individual Accountability**

The ICTY seeks to prosecute those most responsible for the mass violations of human rights committed in the territories of the former Yugoslavia. The timing of the ICTY presented three major hurdles to achieving this goal. First, the active conflict immensely complicated the processes that precede legal prosecution. Gathering witness testimony, collecting evidence, and apprehending suspects became a chaotic and hugely complex job. Second, and in direct relation to the aforementioned challenges, the ICTY spent its early years prosecuting low-level soldiers rather than the leaders who masterminded the campaign of ethnic cleansing. Thirdly, the ICTY faced accusations of bias due, in large part, to the violent tensions between ethnic groups—tensions that were stoked daily by murders, rapes, and other atrocities. Serbs in particular feel disproportionately targeted for arrest and prosecution.

The complexity of the conflict in Yugoslavia and the large number of crimes to be investigated added a heavy burden to the newly created tribunal. Due to the ongoing violence in the region, the Tribunal staff was hindered in its most important task—the steps involved in preparing for legal prosecution. In order to build a case against indictees, the Tribunal needed sufficient and accurate evidence. The on-the-ground situation in the region made this evidence difficult to obtain. The ongoing violence meant that important documents were nonexistent, destroyed, or withheld by hostile governments. Additionally, the conflict in the region and the political tensions inherent

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to such a conflict complicated the relationships between the Tribunal and neighboring states. Because the ICTY has no enforcement powers of its own, and because evidence could potentially implicate heads of state in the campaign of ethnic cleansing, the Tribunal frequently faced direct opposition from certain states when it tried to obtain documents. Jacob Cogan addresses this issue. He states,

[t]he difficulty of obtaining evidence...is nowhere more complicated than in the former Yugoslavia, where the alleged crimes were often conducted by (or under instructions from) state actors and where the evidence of these crimes remains within the jurisdiction of interested parties.\(^{123}\)

Lack of enforcement powers also had a negative influence on the Tribunal’s ability to gather witness testimony. Witnesses were not easily accessible due to the conflict, and the security of witnesses and those gathering and translating their testimonials was difficult to ensure. Apprehending indictees was also hindered by the active conflict. Croatia and the Federal Republic of Yugoslavia were highly reluctant (to the point of hostility) to cooperate with the ICTY by handing over suspects for prosecution in The Hague.\(^{124}\) The challenges the ICTY faced in its early years were clearly affected by the circumstances created by the ongoing conflict. The ICTY’s initial struggle in establishing the grounds upon which successful trials could be built, and especially the unwillingness of states to arrest and transfer indictees to The Hague, was evidenced by the low-level perpetrators that were tried in the Tribunal’s first years.

Even before the ICTY was created, UN member states knew who the ‘big fish’ were in the conflict raging in the former Yugoslavia. Slobodan Milošević, Ratko Mladić, and Radovan Karadžić were recognized as the masterminds and instigators of the


\(^{124}\) Tolbert, “Unforseen Successes,” 8.
atrocities. There was however, a significant delay between the establishment of the Tribunal and the announcement of the indictments issued for Milošević, Karadžić and Mladić. Mladić and Karadžić were not indicted until the end of 1995, when the Tribunal had been in operation for nearly two years.125

It is generally agreed upon within the literature that the ICTY has successfully indicted and charged a majority of those most responsible for the planning and implementation of the atrocities committed in Yugoslavia. Importantly, only two indictees remain at large. Despite these successes, due to the chaotic circumstances in which the ICTY collected evidence, these three men and other high-level perpetrators were difficult to locate and apprehend. The ICTY’s first Chief Prosecutor, Richard Goldstone, did not hesitate in voicing his intention to target high-level indictees. However, prosecution of senior commanders requires sufficient evidence to prove command responsibility. Gary J. Bass comments that gathering this evidence “was no small task. Because the Serbs were utterly uncooperative…[m]any of the early indictments aimed low, at figures too uninvolved in the chain of command to incriminate the major leaders.”126 Additionally, in the early years of the Tribunal, low-level perpetrators were much more likely to be apprehended and extradited to The Hague. It was only later that commanders began to be prosecuted. The indictment and arrest of Milošević was a major accomplishment for the ICTY. The fact that Milošević stood trial was significant for a number of reasons. He was the first head of state to be indicted and tried at an international criminal court.127 In addition, the crimes in which Milošević

participated were widespread and brutal: ethnic cleansing in Kosovo, deportation, murder, ethnic cleansing, torture, destruction and appropriation of property, plunder, forcible transfer, unlawful confinement, and more. Given the nature and extent of his crimes it is certainly noteworthy that the process of bringing him to justice was initiated, although due to his death, not completed.

The third obstacle, perhaps the most important to the preservation of lasting peace, is the widespread belief that the ICTY is a politically motivated institution that targets Serbs and Croats disproportionately.\(^{128}\) This belief is immensely complicated and warrants detailed analysis that cannot be provided here. Nevertheless, the perception of bias obstructs the ICTY’s ability to carry out prosecutions that are accepted as fair and legitimate by the affected population—victims and perpetrators alike. It is true that ethnic Serbs compose the majority of the indictments issued by the Tribunal. However, Akhavan points out that while there is a danger in over-prosecuting individuals belonging to only one group in a conflict, there is a parallel danger of misrepresenting who committed crimes.\(^{129}\)

Unfortunately, the view that the ICTY is a political tool used by the victors and the West to punish Serbia remains strong. Another criticism of the ICTY, unrelated to Serb nationalism, emphasizes the Tribunal’s refusal to investigate alleged war crimes committed by NATO, namely the indiscriminate bombing of civilian populations. This refusal led to protestations that the ICTY favors the Western nations that played the main role in its creating and the funding of its operations. Perceived lack of legitimacy has been the most persistent barrier to a favorable view of the ICTY. Perceptions of bias must


\(^{129}\) Akhavan, “Justice in the Hague”, 782.
continue to be monitored to ensure that all people view the Tribunal’s decisions as legitimate. Serbian dissatisfaction with the Tribunal however, cannot be countered unless the rule of law is re-established in the region. Most importantly, institutions responsible for supporting the military and spreading propaganda must be shut down. This is at the heart of the Tribunal’s third objective.

**Rule of Law**

To determine the success of the Tribunal in restoring rule of law to areas of conflict, I examine two elements: dismantling responsible institutions and supporting the national judicial system. The ongoing conflict was significant in that it complicated the processes necessary to re-establish rule of law. The geographically removed location of the Tribunal, a direct result of the ongoing conflict, also contributed to the ICTY’s failure to fully achieve this objective.

Propaganda was used extensively during the conflict in the former Yugoslav territories. Milošević and Serb nationalists relied heavily upon media outlets that fueled the fires of Serb nationalism. In 2004, The International Center for Transitional Justice reported, “widespread distrust of the Tribunal…is…fueled by state propaganda [which depicts the court] as anti-Serb.”\(^{130}\) The message of ethnic hatred that was encouraged by Milošević was part and parcel to many Yugoslav institutions, specifically the military. Law enforcement and the judicial system helped support Milošević’s campaign as well. Dan Saxon notes,

> The Milosevic era was…marked by the presence of criminal structures that permeated the police and other security institutions…in spite of the fact that Milosevic and many of his clique have been removed from formal

positions of power, these criminal structures reportedly still exist in Serbia today. These institutions must be disabled before the positive impacts of the ICTY can be measured in the region. Lustration policies are one of the most important steps in disabling structures that incite hatred. These policies are most frequently carried out by national governments and involve removing state officials and military leaders who were involved in perpetuating the campaign of ethnic cleansing. The ICTY cannot be, nor should it be, the primary tool for carrying out lustration policies. However, by indicting culpable individuals in state institutions, the Tribunal could help disrupt the cycle of violence and hatred that fueled the conflict. As discussed in the analysis of individual criminal responsibility, the ICTY did succeed in arresting and prosecuting a few of the key leaders of the mass violence in the former Yugoslavia. Yet, in 2000 the International Crisis Group (ICG) reported that over 75 people directly connected to the perpetuation of mass human rights violations, remained in positions of power in the Republika Srpska. This statistic is yet more evidence that the ongoing conflict negatively influenced the ICTY’s ability to locate and purge personnel who supported the violence.

The decision to locate the ICTY in The Hague, the Netherlands, was practical considering the active conflict and decimated judicial system in the territories of the former Yugoslavia. It is important to note that the location of the Tribunal was a direct result of the timing of the ICTY. Had the Tribunal been established in the aftermath of conflict, chances increase that it be located closer to the ‘scene of the crimes’. Neil Kritz states, “[i]t is axiomatic that the weaker the connection between the international operation and the local population, the easier it will be for its work to be ignored or

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dismissed as an alien effort irrelevant to the concerns of the country.”

Proximity to the affected population is essential for a number of reasons, one of which is the hope that an international tribunal will contribute to the rebuilding of the national judicial system. Many proponents of international criminal tribunals posit that tribunals play an important role in internalizing a respect for human rights in the judicial system of a state or region where mass human rights violations have occurred. In the case of the former Yugoslavia, members of the domestic judiciary were marginally involved in the justice process. The geographic distance of the Tribunal created a situation where the pursuit of justice was largely removed from the populations most affected by the violence. The task of re-establishing the rule of law in the context of mass human rights violations is a monumental task, which must involve international and domestic efforts originating from many different sources. The ICTY was crippled by the ongoing conflict and the many predicaments it presented. How do you re-establish law in a region that is in the midst of atrocities and armed violence? The ICTY’s failure to fully dismantle responsible institutions and impart norms of human rights to the national judiciary was directly related to the circumstances in which it was forced to operate.

Creation and distribution of historical record

The creation and dissemination of an accurate historical record is the third objective sought by the ICTY. As a judicial organ, the ICTY contributes to building an historical record in a number of ways. There are varying opinions about the ability of any

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132 Kritz, “Coming to Terms”, 131.
133 Ibid., 133.
134 Some of the extant scholarship on international tribunals also explores tribunals’ potential for capacity-building. I do not examine this aspect of tribunals. Instead, I assess this aspect of rule of law by examining how the ICTY supported the national judiciary by alleviating pressure through prosecution of those individuals most responsible, and whether interaction between international and domestic lawyers during the course of the ICTY contributed to the training of domestic lawyers, judges and prosecutors.
sort of legal institution to truly capture the horror of atrocities such as genocide. This argument has merit, but I believe that judicial organs do produce records that can contribute to acknowledging specific events that occur during mass violence. Legal prosecutions and the focus on personal criminal responsibility transfers guilt that may be placed on an entire group, to individuals. A successful trial depends on evidence and witness testimonies. The documents created by trials help to establish the overall context in which mass violence took place. Legal records also reveal truth about victims’ and perpetrators’ personal experiences during the violence. In the case of the former Yugoslavia, the creation and distribution of such a record is of the utmost importance. The Tribunal must be viewed as legitimate, if properly distributed an accurate account of events reinforces the validity of the ICTY in the eyes of affected populations. Similar to the difficulties encountered in the ICTY’s attempt to re-establish rule of law, the ongoing conflict and the resultant location of the Tribunal negatively impacted its ability to achieve this third objective. To the extent that legal prosecutions help create an historical record, the ICTY achieved its goal. Unfortunately, the ICTY has not been able to effectively distribute this record to those to whom it is most important—namely, the people residing in the region of the former Yugoslavia.

It is difficult to empirically measure the extent to which information on legal prosecutions in The Hague, have reached people in Serbia, Croatia, Bosnia-Herzegovina, etc. Ideally, outreach by an international court would utilize a number of different tools including television, radio, newspaper publications, and live broadcasts of trials. Each of these helps to establish a connection between a distant tribunal and the people who

suffered, witnesses, or participated in the violence. There is sufficient evidence to suggest that the ICTY has not done an adequate job of disseminating information that could offset perceptions of bias. Akhavan states,

[t]o the extent that peoples in the former Yugoslavia are denied access to proceedings of the ICTY, the truth exposed through the judicial process may have no appreciable impact on interethnic reconciliation...[a]s a result, the forces that fomented ethnic violence in the first place remain free to influence the way in which the work of the Tribunal is perceived.  

It is generally agreed upon that the conflict in the former Yugoslavia was not one based solely on long-standing ethnic hatred. Rather, Milošević and other leaders used the language of ethnic hatred to consolidate power in the hands of Serbian nationalists. The ICTY’s mandate includes the restoration and maintenance of peace. It is essential that the ethnic hatred that was so vigorously encouraged during the conflict be deconstructed. Trials, and the information they expose, can help counter those that deny the occurrence of events or their responsibility in perpetrating the crimes. In May 2002, the National Democratic Institute for International Affairs “found that eighty per cent of 1,300 Serbs believed the Tribunal prosecutes Serbs more vigorously than it does non-Serbs, while fifty-seven percent said they were convinced the trial was unjust.” These statistics, gathered almost a decade after the creation of the Tribunal, reveal that ICTY outreach attempts have not reached the necessary populations. Studies conducted in 2004 and 2005, by the Belgrade Centre for Human Rights and Strategic Marketing found that

approximately 72% of Serbs did not understand what the ICTY does.\textsuperscript{139} Part of this failure is due to the language barrier between the Tribunal proceedings (official languages are English and French) and the people in the region where the crimes were committed. In 1998-1999 the ICTY Outreach Program was created to address issues of accessibility. Currently, the official website provides videos for viewing trial proceedings.\textsuperscript{140} The Program also translates court documents into the region’s native languages. This is a major step toward alleviating the accusations of bias that continue to haunt the Tribunal. However, trials are hardly accessible to the average viewer—they are long, opaque, and conducted in legal jargon that few people outside of the legal profession are familiar with.\textsuperscript{141} 

The timing of the ICTY negatively influenced its ability to create and disseminate an historical record. The ongoing conflict made it necessary for the ICTY to be located outside of the region in which the atrocities took place. The Tribunal thus suffered lack of access to evidence and testimony. Ultimately, the physical distance between the trial proceedings and the target population resulted in perceptions of bias that threatens the legitimacy of the Tribunal’s pursuit of justice. Studies conducted in 2006, indicate that the Serb opinions of the Tribunal are beginning to improve.\textsuperscript{142} It remains to be seen whether the ICTY will be considered a legitimate instrument of justice in the years to come.

\textsuperscript{140} See: http://www.icty.org/sid/8936
\textsuperscript{141} Saxon, “Exporting Justice,” 563.


**Deterrence**

The ICTY’s ability to achieve deterrence—general and specific—was handicapped from the beginning. The decision to implement the ICTY during conflict resulted in the extended mandate of the Tribunal. As mentioned previously, the ICTY was charged with the restoration and maintenance of peace, as well as the pursuit of criminal justice. For a judicial organ with no real enforcement capabilities, operating in the midst of continued violence, this is a tall order. Ultimately, the ICTY did little to stop the continuation of atrocities. Lilian Barria and Steven Roper write, “The existence of the Tribunal and the possibility of being indicted did not seem to encourage an ending of hostilities and the examination of peaceful methods to solve the differences between the Bosnian Serbs, Croats and Muslims.” The ICTY was implemented approximately a year after the conflict in the former Yugoslavia began and thousands of people had already been killed. The July 1995 attack on Srebrenica is the most startling indication that the ICTY had no deterrent effect. This attack, led by Mladić’s forces, resulted in the massacre of approximately 8,000 Muslim civilians. The ICTY was established two years prior to the Srebrenica murders. It is evident that the threat of criminal prosecution did little to dissuade Serb forces from carrying out the massacre. The ICTY’s failure to achieve its fourth objective is due, in large part, to its lack of enforcement capabilities. Kenneth Rodman suggests that any potential deterrent effect was significantly reduced since large-scale atrocities had already been committed. He states, “by the time an international criminal tribunal asserts jurisdiction in an ongoing conflict, large-scale atrocities have already occurred and responsibility almost certainly resides in the top

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143 The ICTY’s mandate was laid out in UNSC Resolution 827, *supra* 93.

leadership of the governments and rebel groups”. By the time the Yugoslav Tribunal was fully operational there was little motivation for people such as General Ratko Mladić to stop committing atrocities.

It is important to note that the ICTY’s failure to achieve its final goal of deterrence is due, in large part, to its absolute lack of enforcement powers. There is no ICTY ‘police force’ to ensure that the threat of prosecution is carried out. Rodman posits, “The ICTY’s contribution to stigmatizing extremists, and deterring ethnic violence, in post-Dayton Bosnia only became possible because of the NATO air campaign”. As will be seen in the remaining case studies the ICTY was not alone in its lack of enforcement powers or in its failure to achieve a deterrent effect.

**Conclusion**

The ongoing conflict in the territories of the former Yugoslavia made it more difficult for the ICTY to achieve its four objectives. As the first ad hoc international criminal tribunal established by the UNSC, the ICTY confronted the multiple challenges of being the first of its kind. Yet, the challenges facing the ICTY were made more acute due to its implementation during ongoing conflict and continued atrocities. The case of the ICTY leads me to conclude that ongoing conflict negatively impacted the ability of the ICTY to achieve its four objectives. The timing of the Tribunal was significant because it complicated the ability for the ICTY to do the following: ensure the security of staff, personnel, and witnesses; collect evidence; gather witness testimony; apprehend suspects; and access the most affected population. The ongoing conflict in the former Yugoslavia made the activities necessary for an effective tribunal, difficult to complete.

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146 Ibid., 560.
Even before the ICTY was formally established, the conflict dictated the terms of the Tribunal. Due to the violence that continued unabated in the former Yugoslavia, the ICTY was forced to operate from The Hague. The distant location in turn, made it much more difficult for the ICTY to create and distribute an accurate historical record to the people who could benefit the most from the proceedings—the population who were witnessing, suffering, and participating in the atrocities. The case of the ICTY demonstrates just how important timing can be in influencing the conditions in which a tribunal operates. The failures of the ICTY cannot all be attributed to its having been implemented during conflict. The next case study examines the International Criminal Tribunal for Rwanda, a tribunal that was established in the aftermath of conflict. The case study of the ICTY demonstrates that ongoing conflict makes the challenges of pursuing justice more acute. However, the case of the ICTR shows that even in the absence of conflict, problems remain.
Chapter III: The International Criminal Tribunal for Rwanda

Pursuing Justice in the Absence of Conflict:
The Influence of Delayed Implementation

Introduction

On 6 April 1994 Hutu extremists in Rwanda began a violent campaign to exterminate all Tutsis and their supporters. For three months the massacre continued and resulted in more than 800,000 deaths—over ten percent of Rwanda’s total population. After a period of horror that defies description, the Tutsi-led Rwandan Patriotic Army (RPA) gained control of Kigali, Rwanda, on 17 July 1994. The genocide left Rwanda devastated. In September 1994, the Rwandese government requested that the UN create an ad-hoc international criminal tribunal to try those responsible for the genocide in Rwanda. At the time of the government’s request, the International Criminal Tribunal for the former Yugoslavia was operational. The ICTY served as a useful precedent; the United Nations Security Council heeded the Rwandese request and passed Resolution 955, thereby creating the International Criminal Tribunal for Rwanda (ICTR). The ICTR, located in Arusha, Tanzania, is currently in progress and is expected to complete all trials by the end of 2009.148

The establishment of the ICTR occurred in much different circumstances than that of its sister tribunal in the former Yugoslavia. In the former Yugoslavia, a tribunal was implemented in the midst of conflict and continued atrocities. In the case of Rwanda, it was only after the killings had ended that a tribunal was conceived of and implemented.

147 The Rwandan Patriotic Army (RPA) refers to the military arm of the Rwandan Patriotic Front (RPF), a Tutsi-dominated political party. I distinguish accordingly.
Serious consideration of creating a tribunal for Rwanda was only voiced in the wake of the massacres, by which time the RPF government was installed and in control of a relatively stable government in Rwanda. This difference in timing means that the Rwanda Tribunal provides an alternative lens through which to assess the effectiveness of prosecutorial accountability mechanisms. This chapter will focus on how implementation in the aftermath of conflict influences the ICTR’s ability to achieve the four objectives of accountability mechanisms.  

The delayed timing of the ICTR’s implementation was significant in that the absence of conflict allowed for certain conditions to arise that proved favorable to the ICTR’s operations. The absence of conflict allowed for the following: the installation of a new and stable government, a cessation of hostilities resulting in increased security for tribunal staff and personnel, and better access to evidence and witnesses. Due to the delayed timing, the RPF government was able to gain effective control of the political and military affairs of the nation. The infrastructure of Rwanda was destroyed after three months of killing, yet the Rwanda Tribunal (unlike its predecessor in the former Yugoslavia) was not faced with some of the obstacles presented by pursuing justice in ongoing conflict. The circumstances in which the ICTR was implemented clearly improved its chances of success. The ICTR’s implementation in the absence of conflict helped alleviate some of the problems that plagued the Yugoslav Tribunal’s operations.

However, establishing the Rwanda Tribunal in the aftermath of mass violence did not

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149 These objectives are: to pursue individual criminal responsibility; to establish the rule of law; to create and distribute an accurate historical record, and finally, to deter future atrocities in Rwanda and around the world.

150 The case study on the ICTY illustrated some of these challenges, most notably: difficulty obtaining evidence due to active conflict and destruction of material evidence, lack of security for witnesses, judges and prosecutors, struggles in creating a legal record that is properly disseminated to affected populations, and low levels of perceived legitimacy.
resolve all the challenges confronted by the ICTY. To this day, the ICTR must contend with certain difficulties caused by the existence of the RPF government. The ICTR’s main challenge in this regard stems from Hutus who believe the RPF government wants to use the Rwanda Tribunal to seek revenge for Hutu crimes during the genocide. This perception of ‘victor’s justice’ arises from the fact that the RPF government took power by disposing the previous regime. The Rwandan Patriotic Army, a rebel army composed mainly of Tutsis, successfully overthrew the extremist Hutu regime that had presided over the genocide. Two main components contribute to the threat that the ICTR will carry out a limited victor’s justice. First, after the RPF’s defeat of the extremist Hutu government, the RPF government’s subsequent request for the establishment of a tribunal proves to some (Hutu extremists) that the ICTR will be a cover for Tutsi-led vengeance. Its identity as a Tutsi-dominated party has major implications for the perceived fairness of the ICTR. Secondly, although the vast majority of genocide victims were Tutsi, targeted killing by the RPA is also well documented. In Alison Des Forge’s groundbreaking account of the Rwandan genocide, she reports that approximately 30,000 Hutu were murdered during the RPF’s struggle to regain control of Rwanda.\footnote{151 Alison Des Forges, \textit{Leave None to Tell the Story: Genocide in Rwanda}, \textit{Human Rights Watch} (March, 1999): 537-551.} The failure of the ICTR to investigate crimes committed by the Rwandan Patriotic Army continues to be a point of contention and concerns have been raised that the Tribunal is helping to carry out victor’s justice.

Despite the fact that the United Nations and the ICTR had no part in this victory, there is a danger that the justice rendered by the Tribunal will be negatively affected by this perceived bias. If Hutus believe the Tribunal is merely a tool for vengeance, it is
unlikely that the divisions between Tutsi and Hutu will be healed. As Mark Drumbl notes, the perceived legitimacy of the ICTR “is a key factor in determining whether the society remains postgenocidal or intergenocidal…societies are always over shadowed by the possibility that genocide may reoccur.”152 The ICTR case demonstrates that certain weaknesses of tribunals remain regardless of timing.

The absence of conflict facilitated the ICTR’s ability to achieve the objectives of individual criminal accountability and the re-establishment of rule of law. Article 1 of the Statute indicates that individual accountability is achieved by prosecuting most responsible for the crimes committed. Responsibility extends to those who planned and instigated the violence as well as those who carried it out.153 The main boon to the Tribunal was the existence of the RPF government. Individual accountability was easier to attain because many of those who helped plan and carry out the genocide were captured when the RPF entered Kigali in mid-July. Security of witnesses, prosecutors and judges was better ensured. To evaluate the ability of the ICTR to establish rule of law, I examine two factors: 1) the Tribunal’s ability to dismantle institutions that contributed to perpetuating the genocide, and 2) the extent to which the Tribunal succeeded in supporting and augmenting the national judicial system by providing an alternative means of prosecutorial justice. The RPF victory also ensured that institutions guilty of inciting hatred (such as various radio stations) were shut down. The national judiciary

benefited from the RPF’s willingness to work alongside the ICTR in holding individuals accountable.

The last two objectives of the tribunal: the creation and dissemination of an accurate historical record and the deterrence of future atrocities did not fare as well. To assess the ICTR’s success in the creation and distribution of a historical record, I analyze two factors: 1) the extent to which the ICTR was able to create a full and unbiased account of the genocide and, 2) its success in disseminating this record to the population most affected—in this case, Rwandan citizens. I conclude that the creation of an historical record was hindered due to the perceived bias of the RPF government that had requested the establishment of the ICTR. Additionally, the Tribunal was ineffective in disseminating information on the trials and activities of the Court. Two levels of deterrence are evaluated—specific and general. In the context of Rwanda, specific deterrence refers to the prevention of future atrocities committed in Rwanda by those affected by the violence. This violence could be in the form of retaliation and revenge, or further anti-Tutsi murders. General deterrence suggests the prevention of all future atrocities. The ICTR definitively failed in its attempt to deter future crimes, both general and specific. This failure demonstrates that problems continue to haunt international tribunals even without the complications presented by ongoing conflict.

Although my findings focus on how absence of conflict influenced the ICTR’s effectiveness, I would be remiss in not considering another influential factor: structure. that influenced the ICTR. I identify two additional factors that must be considered for a complete analysis of the ICTR’s effectiveness: the structure of the mechanism (ie: ad hoc
international tribunal) and the location of the mechanism\textsuperscript{154}. The influence of structure on the effectiveness of ad hoc international criminal tribunals warrants further in-depth research. This project does not spend considerable time analyzing its impact. Nevertheless, a brief overview will raise questions that should be considered and expanded upon in further research of international justice mechanisms.

**Genocide in Rwanda: Context and Events**

On 6 April 1994, a plane carrying Rwandan President Juvénal Habyarimana and President Ntaryamira of Burundi was shot down.\textsuperscript{155} Both men died and over the next three months an estimated 800,000 people were killed in Rwanda.\textsuperscript{156} The killings in Rwanda were brutal and torture and rape were rampant during the three months in which the violence took place. The genocide was planned, instigated and carried out by Hutu extremists against Tutsis and moderate Hutus, and a staggering number of ‘ordinary’ Hutu citizens also participated in the mass killings. The atrocities ended when the Rwandan Patriotic Army, composed primarily of Tutsis operating out of Uganda, invaded Rwanda and took control of the government in mid July 1994.\textsuperscript{157} I provide a summary of

\textsuperscript{154} A factor that I will not address but that deserves to be noted is the existence or non-existence of domestic justice efforts. There is a growing body of research on the relationship between ad hoc international tribunals and domestic efforts to pursue justice and reconciliation. Much of the literature focuses on the interaction between international tribunals and truth and reconciliation commissions (TRCs). I choose not to engage this factor because I believe that a brief summary would not do justice to the issue.

\textsuperscript{155} It remains unclear what group is responsible for shooting down the plane. There is some evidence that President Habyarimana was shot down by members of his own government. It is thought that these Hutu extremists used the death of the President as a catalyst for the begging of the mass violence that followed. See Mark A. Drumbl, “Sclerosis: Retributive Justice and the Rwandan Genocide,” *Punishment and Society* 2 (2000): 387-308.

\textsuperscript{156} Estimates of number killed range from 500,000 to over 1 million.

the relevant history of Rwanda\textsuperscript{158} and the important events of the genocide. I briefly examine the reaction of the United Nations before, during, and after the violence.

Like the majority of other countries in Africa, Rwanda was under colonial rule until independence in 1962. Prior to World War I, present-day Rwanda was under German control. In 1923, Rwanda was placed under Belgian rule as part of the League of Nations mandate system. During its time as a Belgian-controlled colony, the social classes were highly stratified along ethnic lines. The familiar refrain of long-standing ethnic hatred between the Tutsis and Hutus was, according to the majority of contemporary scholars, one based on ethnic identities that were solidified and manipulated during colonial rule. On this subject, scholar Filip Reyntjens states “[a] number of interventions by the Belgian administration streamlined, reinforced and exacerbated ethnic belonging, and eventually turned the ‘ethnic groups’ into politically relevant categories.”\textsuperscript{159} European notions of racial superiority, which deemed the Tutsi to be of European ancestry, granted the Tutsi population privilege in positions in the education, military and governmental spheres.\textsuperscript{160} As far back as the 17\textsuperscript{th} century, the minority Tutsi was estimated as 10\% of the population, the Hutus comprised the majority of the remaining 80\%.\textsuperscript{161} Tensions between the Hutu majority and the Tutsi minority continued to mount and in February 1957, Hutu elites issued the ‘Bahutu Manifesto’.

This document “expressed the Hutu elite’s desire to end Tutsi dominance once and for all.”

The proliferation of political parties prior to the Revolution was evidence of the massive strain between the Hutu and Tutsi populations. In 1959 a breaking point was reached. The Revolution of 1959 was initiated by the Hutus with the support of the Belgians, who in the late 1950s had ended its political alliance with the Tutsis. In 1962 Rwanda gained its independence but the Hutu-led Revolution claimed approximately 10,000 Tutsi lives. The violent Revolution caused a large number of Tutsis to flee Rwanda and seek refuge in neighboring countries. Some of those who fled Rwanda after the 1959 Revolution amassed in the neighboring countries of Uganda, Burundi, Tanzania and Zaire (now the Democratic Republic of the Congo). These refugees formed a number of armed groups, which then launched attacks on the Hutu-led government of Rwanda.

In 1973, Major General Juvenal Habyarimana seized power of the government in a coup. Habyarimana, a Hutu, formed the National Revolutionary Movement for Development (MRND), which operated as the sole political party in Rwanda. The policies adopted by the MRND and promoted by President Habyarimana sought to consolidate power in the hands of the Hutu. The Hutu elites also continued the Belgian-established practice of including ethnic origin on identity cards. Violence against the Tutsi minority was common during this period. Jose Alvarez notes, “[i]n 1990

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163 Prunier, *The Rwanda Crisis*, 47-54.
166 Ibid., 114.
167 Ibid., 114.
to 1991, amid continuing massacres of Tutsis, the Rwandan army began to train and arm
civilian militias known as the *interahamwe*.\(^{169}\) The *interahamwe*, translated as “those
who stand together” became a major player in the mass violence that enveloped Rwanda
in the early 1990s.

On 1 October 1990, the Rwandan Patriotic Front based out of northern Uganda,
invaded Northern Rwanda. The RPF was composed largely of Rwandan Tutsis who had
fled the country in the wake of the Revolution in 1959.\(^{170}\) The invasion started a conflict
between the RPF and the Hutu-led Rwandan government that did not quiet until 1992, at
which time negotiation processes began. The negotiations resulted in the short-lived
Arusha Peace Agreements, signed in August 1993.\(^{171}\) The Agreements were lauded as
the paradigm of conflict resolution, and contained provisions that required President
Habyarimana to cooperate with demands for a multi-party system in Rwanda. The
Accords also included provisions for integration of Tutsis into the Hutu-dominated
national armed forces, and addressed the issue of repatriation and resettlement of the
peoples (mostly Tutsi) that had been displaced during and after the 1959 Revolution.\(^{172}\)

Unfortunately, the implementation of the Arusha Accords was entirely
unsuccessful. The protocols set out by the Accords were immensely unpopular with the
majority of the Hutu elites in Rwanda. There was deep suspicion that the RPF would not

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\(^{169}\) Alvarez, “Crimes of States/Hate,” 389.

\(^{170}\) Stef Vandeginste, “Rwanda: Dealing with Genocide and Crimes against Humanity in the Context of

\(^{171}\) At different points in the negotiation process, the Arusha Accords involved numerous state parties.
Uganda, Tanzania, Zaire, France, Belgium and the United States played roles (some smaller than others) in
the successful negotiation of the Accords. For details on various states’ involvement with the Arusha
Accords see J. Stettenheim, “The Arusha Accords and the Failure of International Intervention in Rwanda,”
in *Words over War: Mediation and Arbitration to Prevent Deadly Conflict*, eds., Melanie C. Greenberg,

uphold the cease-fire. One of the most contentious issues of the Accords was the provision regarding the integration of the armed forces. Joel Stettenheim notes that President Habyarimana’s government was prepared to offer a 20 percent quota to the RPF, but the RPF demanded a fifty-fifty split. Stettenheim cites political infighting, an ineffective security force and extremists’ plans for violence as important factors in the collapse of the Arusha Accords. He particularly emphasizes that the “extremists’ plans was the development of a rural militia and the manipulation of ethnicity to create a climate of fear.” By the time President Habyarimana’s plane was shot down on 6 April 1994, a climate of fear was in place. Mass violence erupted the next day.

Militias such as the interahamwe, the Forces Armées Rwandaises (FAR) of the Presidential Guard, local ‘defense’ groups and individual citizens participated. Hundred of thousands of civilians who had never killed before, freely murdered their neighbors. In much of the literature, academic and personal accounts, the particularly personal nature of the genocide is noted. Alain Destexhe explains, “pupils were killed by their teachers, shop owners by their customers, neighbour killed neighbour and husbands killed wives”. The brutality of the genocide in Rwanda is well documented. In Mahmood Mamdani’s seminal work When Victims Become Killers he explains, “it required not one but many hacks of a machete to kill even one person. With a machete, killing was hard work, that is why there were often several killers for every single person”. Systematic planning was evident and the spread of anti-Tutsi propaganda helped spur the killing

174 Ibid., 232.
175 Destexhe, Rwanda and Genocide, 31.
The genocide continued until 19 July 1994, when the RPF successfully installed a new government in the capital of Kigali. The RPF government gained control of a country whose infrastructure was entirely destroyed by the killing. The Rwandan judicial system was in ruins and it is estimated that only sixteen lawyers were alive at the end of the killing.

High-level leaders of the genocide who had not been killed during the RPF capture of Kigali were removed from government posts. Those who were not arrested or killed fled the country. In the immediate aftermath of the genocide a large number of internally displaced peoples, refugees, and Hutus who feared retaliatory killings by the new government flooded into neighboring countries.

In the extant literature, the genocide in Rwanda is recognized as a result of one of three factors: ethnic hatred (either created or inherent), a Hutu-led struggle for consolidation of political power, and a series of failed economic policies. It is unlikely that any one factor can be identified as the catalyst for genocide, and an answer to this query is not of vital importance to this thesis. A combination of one or more of the above factors seems the most likely explanation for an event whose horror resists human logic.

The deliberate nature of the genocide is proven in part by the massive propaganda operation that preceded it and continued for the duration of the violence. The most widely recognized propaganda tool was the radio. José Alvarez notes that the genocide was “the product of a heavily orchestrated campaign…[w]ell before 1994, RTLM began broadcasting vitriolic appeals to private militias and individuals intended to incite killings of Tutsis” and moderate Hutus. In a study on the effects of media on the genocide Christine Kellows and Leslie Stieves assert that the radio broadcasts prior to the outbreak of violence contributed to a type of psychological conditioning that paved the way for mass participation in the genocide.


Many scholars have dedicated much time and importance to the study of causes of the genocide. For more information on this issue see: Eugenia Zorbas, “Reconciliation in Post-Genocide Rwanda,” African Journal of Legal Studies 1 (2004); Peter Uvin, “Reading the Rwandan Genocide,” International Studies Review 3 (Autumn 2001); J. Stettenheim, “The Arusha Accords and the Failure of International
As the genocide in Rwanda was perpetrated, the world looked on and the primary bodies of global governance, namely the United Nations, did nothing. Some scholars and human rights advocates blame the colossal death toll in Rwanda on the inaction of the United Nations Security Council (UNSC). For the purposes of examining the ICTR, pointing fingers is not a productive exercise. In the next section I will examine the role of the international community during the time period before, during, and after the genocide in Rwanda. I probe this matter not in an effort to place blame, but rather because the international community and specifically the UNSC is inextricably linked to the creation and operation of the ICTR.

Security Resolution 872 established the United Nations Assistance Mission For Rwanda (UNAMIR) in October 1993. Its primary responsibility was to oversee the implementation of the Arusha Accords. UNAMIR, initially composed of approximately 2,500 military personnel, was also responsible for monitoring the security during the time period in which the Accords would be carried out. UNAMIR was on the ground when the genocide began, and the United Nations’ decision to diminish its numbers in the midst of mass violence against Tutsis and Hutu moderates earned it much criticism. Central to this decision was a debate on the efficacy of an enlarged UNAMIR force. Would a larger force be able to halt current violence and prevent further death? Or, were the peacekeepers essentially impotent in their ability to stem the killing? The death of ten Belgian peacekeepers just one day into the violence, and Belgium’s

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subsequent withdrawal of all their forces involved in UNAMIR, seemed to convince other nations that there was too much danger in sending reinforcements. After deliberation by the UN Security Council, the decision was made to diminish UNAMIR’s presence to a mere 270 military personnel.\textsuperscript{182} Michael Barnett explains that by significantly reducing UNAMIR the remaining “UN troops were instantly confronted by two increasingly untenable tasks: protecting the lives of civilians and defending themselves.”\textsuperscript{183} It is widely acknowledged that the UNAMIR commander, General Roméo Dallaire, made a valiant effort to achieve both tasks. Ultimately, Dallaire and the rest of the UNAMIR personnel were thwarted by the mass violence overtaking the country and their skeleton crew of UN soldiers.

Throughout the UNSC deliberations, the word ‘genocide’ was notably absent. According to numerous scholars there was an extreme hesitancy to use genocide as a description of the atrocities being carried out in Rwanda.\textsuperscript{184} Barnett states, “the Security Council was reluctant to utter the word \textit{genocide}. Its very mention had the raw, discursive capacity to demand action…there appeared to be a tacit understanding to avoid such inflammatory language.”\textsuperscript{185} Other scholars are more pointed in their observations on this topic. Hintjens suggests that the avoidance was far from tacit. She states, “US government employees were reportedly ordered to refrain from using the term ‘genocide’ in any official pronouncements on Rwanda.”\textsuperscript{186} Even human rights organizations did not

\textsuperscript{182} In May this decision was reversed and it was determined that UNAMIR should receive an influx of 5,500 troops. However, due to UN member states’ reluctance to provide these reinforcements, they were never sent.


\textsuperscript{184} Destexhe, \textit{Rwanda and Genocide}, 32.

\textsuperscript{185} Barnett, “The UN Security Council”, 574.

\textsuperscript{186} Hintjens, “Explaining the Rwandan Genocide”, 275.
describe the events in Rwanda as genocide until well into the second week of mass killings. By the time of this public recognition approximately 100,000 people had already been killed in Rwanda with many more to follow.

**The International Criminal Tribunal for Rwanda**

The Rwandan government’s request for the creation of a tribunal resulted in five months of investigation into the atrocities committed during the Rwandan genocide. At the conclusion of the investigation, a commission of experts (established by the UNSC) recommended the immediate creation of a tribunal to try those responsible for the crimes. The report provided by the commission references the existence of “overwhelming evidence to prove that acts of genocide against the Tutsi group…constitute genocide.”

On 8 November 1994 the UNSC adopted Resolution 955, thereby establishing the International Criminal Tribunal for Rwanda. The decision was made to base the Tribunal in Arusha, Tanzania. This choice was dictated by the condition of Rwanda after months of mass violence. The Rwandan justice system was decimated and the infrastructure of the country was in disarray. Most of the citizens who had judicial or legal experience were either dead or had already left the country. In this section I introduce basic information on the Rwandan Tribunal. I conclude by presenting the goals of the Rwandan Tribunal.

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187 Kuperman, “Rwanda in Retrospect”, 103.
189 Formally named the *International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994.*
The founding of the Rwandan Tribunal was influenced by the Yugoslav Tribunal, which was operating out of The Hague, The Netherlands. Like the ICTY, the ICTR was established under the auspices of Chapter VII powers. The Security Council deemed the situation in Rwanda to “constitute a threat to international peace and security.” Early in the process of creating the Rwandan Tribunal, it was decided that it would be closely linked to the ICTY. Although the two tribunals would be separate, the Security Council determined that in order to preserve “a unity of legal approach, as well as economy and efficiency of resources” certain aspects of the tribunals, including the Appeals Chamber, would be shared between the two. Article 15(3) of the ICTR Statute asserts that the prosecutor of the ICTY will also serve as chief prosecutor for the Rwandan Tribunal, but may “have additional staff, including an additional Deputy Prosecutor to assist with prosecutions before the International Tribunal for Rwanda.” Proponents of this connection between the tribunals argued it would protect the continuity of international law and consistency of prosecution. This approach also sidestepped the protracted selection process involved with choosing a lead prosecutor and necessary judges. Critics contended that it handicapped the ability of the ICTR to fulfill its obligations. Madeline Morris points out that with such a gargantuan task facing the Rwandan Tribunal, it seemed ill-advised to provide the ICTR with a relatively small staff that is divided between two vitally important judicial organs. There were also concerns that a shared

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190 UNSC Resolution 955.
Prosecutor and Appeals Chamber would hinder the ability of the Tribunal to be duly relevant to the unique situation of Rwanda.\(^{193}\)

Although the two tribunals share a Prosecutor and an Appeals Chamber, the nature of the conflict in Rwanda demanded slightly different definitions of the crimes the ICTR would prosecute. Instead of defining crimes against humanity as those committed “in armed conflict, whether international or internal in character, and directed against any civilian population”\(^{194}\), the ICTR Statute designates crimes against humanity as those committed “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”.\(^{195}\) Prior to the Yugoslav Tribunal crimes against humanity were mainly recognized as applicable in international conflicts only. The Statute of the Yugoslav Tribunal expanded this customary interpretation to include those crimes committed in the midst of internal conflicts. The ICTR Statute follows this precedent. In addition to crimes against humanity, the ICTR’s subject-matter jurisdiction includes crimes of genocide. Due to the non-international nature of the conflict, the ICTR also has jurisdiction over violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.\(^{196}\)

Article 7 of the ICTR Statute limits its temporal jurisdiction to those crimes committed in Rwanda from the 1 January 1994 to 31 December 1994. 1 January 1994 was chosen by the Security Council in an attempt to include the planning and


\(^{194}\) UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993. Available at: [http://www.google.com/url?sa=U&start=2&q=http://www.unhcr.org/refworld/type,INTINSTRUMENT,UNSC,3dda28414,0.html&ei=VOTUSYisC8XinQeYy4z3Dg&usg=AFQjCNFBSnznLZ8iBjwpSH4gqq_WZR8Gg](http://www.google.com/url?sa=U&start=2&q=http://www.unhcr.org/refworld/type,INTINSTRUMENT,UNSC,3dda28414,0.html&ei=VOTUSYisC8XinQeYy4z3Dg&usg=AFQjCNFBSnznLZ8iBjwpSH4gqq_WZR8Gg) (accessed 18 August 2009), Art. 5. [Hereinafter ICTY Statute]

\(^{195}\) ICTR Statute, Art. 3.

\(^{196}\) ICTR Statute Arts. 2-4.
organizational stages of the genocide. The end date was chosen in an effort to ensure jurisdiction over crimes committed after the Hutu government was ousted in July 1994. Although seemingly specific, these dates are largely arbitrary and indicate compromise between the Rwandan Government and the Security Council. The aforementioned compromise on the dates however, necessitates a brief discussion of the Rwandan Government’s involvement in the establishment and operation of the Tribunal.

The Rwandan Government, as early as September 1994, requested a tribunal similar to that created for the former Yugoslavia. In a letter dated 28 September 1994 from the Representative of Rwanda to the President of the Security Council, the Rwandan government stated four justifications. First, the Rwandan government emphasized, “the genocide committed in Rwanda is a crime against humankind and should be suppressed by the international community as a whole.” Second, the Rwandan government desired a tribunal because it wanted to avoid “any suspicion of its wanting to organize speedy, vengeful justice.” Third, the government believed that a culture of impunity could not be allowed to prevail. Finally, the Rwandan Government requested an international tribunal in the hopes that it would be “easier to get at those criminals who have found refuge in foreign countries.” Payam Akhavan explains that their enthusiasm for supporting a tribunal “resulted in part from the military defeat of the party responsible for the genocide, so that the successor government [the Rwandan Patriotic

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198 Ibid., 506.
199 Letter from the Permanent Representative of Rwanda Addressed to the President of the Security Council (Sept. 28, 1994), UN Doc. S/1994/1115. [Hereinafter Letter from Rwanda Rep.]
200 Letter from Rwanda Rep
201 Ibid.
202 Ibid.
Front]…stood to benefit from the punishment and political isolation of its predecessors.”

In spite of their initial enthusiasm for a tribunal, the Rwandan Government was ultimately dissatisfied with certain aspects of the proposed ad-hoc tribunal. The government disagreed with the limited temporal jurisdiction of the court, believing it would not adequately cover the pre-planning and planning stages of the genocide. The Rwandan government hoped for a tribunal that would extend from 1990 through to July 1994. There was also a concern that the ICTR would be wholly ineffective if it were forced to share an Appeals Chamber and Prosecutor with the ICTY. The Rwandan Government voiced opposition to the location of the ICTR. To locate it in Arusha, Tanzania, was to separate it from the people most affected by the genocide. According to Ralph Zacklin and Daphna Shraga the Rwandan government’s decision to vote against the creation of a tribunal was largely due to “the realization that the International Tribunal...was not responsive to the wishes of the Government, in particular that capital punishment be imposed on the former leaders and principal planners of the crime of genocide.” The government was wary of the possible disparity between those who were prosecuted nationally versus those criminals who were tried by the ICTR. In national courts the death penalty could be imposed on the lesser criminals, yet those prosecuted by the ICTR, presumably those ‘most responsible’ for the crimes committed, would never face the death sentence. The Rwandan delegate suggested, “the establishment of so ineffective an international tribunal would only appease the

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204 Ibid., 505.
205 In 1999 an additional trial chamber was added. See: Boed, in Post-Conflict Justice, 491.
conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular.\textsuperscript{207} Although Resolution 955 passed without the vote of Rwanda, the Rwandan Government pledged to support the ICTR in accomplishing its objectives.

The timing of the ICTR meant that the Tribunal had little to do in way of stopping active violence; after the RPF took power the killing was largely halted. Unlike the ICTY, the Rwandan Tribunal did not have to contend with an ongoing conflict in which atrocities were being committed daily. Nevertheless, the ICTR was implemented after a genocide that was ostensibly based on the extermination of one ethnic group and those who supported them. It would be false to claim that because the killing had ended, peace was inevitable. The ICTR’s desire to contribute to the maintenance of peace required it to seek the solution to such long-term goals as national reconciliation. The ICTR also had to contend with a country whose infrastructure was completely devastated.

In contrast to the ICTY, no fierce debate on the seeming disconnect between peace and justice ensued. In Rwanda, the violence was over and so the pursuit of justice did not provoke as many concerns as it had during the creation of the ICTY. Due to its timing I argue that the ICTR’s challenges were less complex than those of the ICTY. From the outset the Rwandan Tribunal did not have to face the difficulties present when seeking justice during ongoing mass human rights violations. This is not to say that there were no challenges facing the ICTR. Rather, I believe that the challenges manifested themselves differently due to the timing of the ICTR. In particular, I conclude that the delayed timing allowed for the creation of certain conditions conducive to the

achievement of the first two goals of the tribunal, individual accountability and re-establishment of rule of law. In particular, the timing of the ICTR allowed the RPF government to gain effective control over the territory, thereby easing some of the processes necessary to the operation of the ICTR. It is important to note however, that although timing helped create certain favorable conditions the ICTR’s implementation in the aftermath of conflict cannot be directly linked to its failures.

Analysis

The ICTR faces four major challenges in rendering justice: the mass participation in the genocide, the decimation of Rwanda’s infrastructure—specifically the judicial system, the new government established by the victorious RPF, and the escape of perpetrators across the border into neighboring countries. These factors cannot be overlooked in an investigation of the effectiveness of the Tribunal. Akhavan helpfully summarizes the long list of challenges facing the Tribunal. He cites

the recruitment and placement of qualified international staff on short notice; making logistical and security arrangements for criminal investigations in an impoverished country devastated by war…gathering the testimony of witnesses and victims who are severely traumatized, fearful of reprisals, and often hard to find among a massive population of displaced persons and refugees.208

It was clear from the outset that it would be impossible for the ICTR to prosecute even a fraction of those who participated in the massacres in Rwanda. Mahmood Mamdani explains that the massacres “were carried out by hundred of thousands, perhaps even more, and witnessed by millions.”209 The reality of the situation meant that the ICTR, an organ created to pursue justice and end impunity, would be forced to concentrate on prosecuting those ‘most responsible’, in spite of the fact that this excluded hundreds of

209 Mamdani, When Victims Become Killers, 6.
thousands of citizens who participated in the genocide. The second major challenge that faced the ICTR is directly related to its establishment in the aftermath of mass violence. All wars cause destruction, but the targeted nature of the killing in Rwanda resulted in complete devastation of all institutions and infrastructure within the country. The decision to operate the Tribunal out of Arusha, Tanzania, was a result of this destruction.

In this section I provide analysis of the ICTR’s ability to achieve its four objectives. Some goals, such as individual accountability and establishment of rule of law, were more successful than others. The creation of an accurate historical record and deterrence of future crimes were two goals that proved more elusive. In the case of the ICTR the successes and failures of these objectives are largely due to the existence of the RPF government and the corresponding perception of victor’s justice. The ICTR was implemented after conflict and this timing allowed for the creation and consolidation of the RPF government. Due to the extent that the political situation in Rwanda impacted the ICTR, I frame my analysis in terms of the Rwandan government and its influence on the Tribunal’s effectiveness. I outline both the hurdles and the advantages presented by the timing of the ICTR. I conclude that the ICTR’s successes are due in large part to the timing of its implementation. It has been particularly effective in its ability to achieve individual criminal responsibility.

In the final part of my analysis I consider the impact of other factors that should not be overlooked. I suggest that the ad-hoc international structure of the ICTR, its location in Arusha, Tanzania, and the concurrent national efforts at justice are three factors the were also important in shaping the successes and failures of the ICTR.
Individual Criminal Accountability

The first indictment issued by the ICTR was confirmed in late November 1995. In 2003, the United Nations Security Council adopted Resolution 1503 urging a completion strategy for the Rwandan Tribunal.210 The Security Council called for a resolution of trials by the end of 2008 and of all work by 2010. It soon became clear that this time frame was unrealistic and the completion date for trials was revised. In a letter dated 21 November 2008, the President of the ICTR assured the Security Council that the Tribunal was on schedule to finish all trials by the end of 2009.211 Thus, the Rwanda Tribunal is in progress as I write. As of 2 February 2009, 41 cases are concluded and 48 are in progress.212 The majority of cases brought before the ICTR involve more than one accused. Currently, 11 indicted criminals are at large. In this section I present the facts and figures of the ICTR. I begin with a discussion of the early months of the Tribunal, a time when it struggled with lack of resources and subsequently the responsibility to take-on such an overwhelming task. I then introduce some of the most notable cases the ICTR has presided over. I focus on what is known as the “Military I” trial.213 Military I is a single case composed of four accused: Colonel Théoneste Bagosora, Anatole

211 Letter dated 21 November 2008 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, UN Doc. S/2008/726.
213 For further information about the Military I trial and for details on the Military II trial, see http://69.94.11.53/default.htm for indictment information, decisions and judgments and current status of appeals.
Nsengiyumva, Gratien Kabiligi and Aloys Ntabakuze. These men occupied positions of varying superiority during the time period in which the genocide took place. I also provide a summary of the trial of Jean Kambanda, former Prime Minister of the interim government in 1994. The conclusion of these trials helped contribute to the ICTR’s success in achieving its goal of individual criminal responsibility.

In the early years of the Tribunal’s operation, resources were scarce. The Security Council’s decision to link the ICTR with its predecessor in the former Yugoslavia meant that the human resources needed for such an undertaking were severely limited. The process of issuing indictments, calling witnesses and holding trials was impaired by the shortage of staff. The Rwandan genocide involved such a massive number of people and included such appalling destruction that careful investigations of cases was paramount to the Tribunals’ ability to ensure fair and efficient trials. ICTR operations in the first months were based in The Hague, while everything was prepared for the move to Arusha, Tanzania. In June 1995, the Tribunal judges held the first plenary session in The Hague. On 2 September 1998 Jean-Paul Akayesu became the first individual convicted by the ICTR. Akayesu’s conviction was the first ever in which rape was included as a form of genocide.

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214 Consolidating number of individual cases into one major trial allows the ICTR to tackle the workload in a more efficient manner. The majority of cases brought before the ICTR during the past 13 years have been organized as combined trials.

215 Boed, in Burying the Past, 491.

The Military I trial,\(^{217}\) which only recently concluded, is the best example of holding accountable those ‘most responsible’ for the events in Rwanda. The trial, commenced on 2 April 2002. Military I is significant not only in its success at rendering justice for crimes specific to Rwanda, but also as a much-needed signal that the ICTR could be an effective judicial organ. Bagosora was tried alongside three others, all of whom were accused of multiple counts of crimes against humanity, war crimes, and genocide.

Colonel Théoneste Bagosora was intimately involved in the planning and execution of the genocide.\(^{218}\) The formal indictment of Bagosora et al. explains, “The incitement to ethnic hatred and violence was a fundamental part of the plan…it was articulated, before and during the genocide”.\(^{219}\) Colonel Bagosora was an avid opponent of the Arusha Accords. In the days before the genocide Bagosora, Nsengiyumva, Ntabukuze, and other members of the extremist Hutu wing of the government voiced their belief that the complete elimination of the Tutsi was the only viable path to lasting peace.\(^{220}\) All four men included in Military I distributed arms to the *interhamwe* and other militias that carried out the brutal massacres from 7 April 1994 onwards. Starting in early 1993, Nsengiyumva and other members of the military helped train these same

\(^{217}\) Formally known as The Prosecutor v. Théoneste Bagosora et al.

\(^{218}\) On 4 December 1991, President Habyarimana established a commission whose objective was to oversee and plan a military victory of the ‘enemy’. Bagosora, a senior defense minister at the time, was chosen to preside over this commission whose members included Lieutenant Colonel Anatole Nsengiyumva and Major Aloys Ntabakuzie among others. In the months after the establishment of the commission, all three men frequently identified all Tutsi and any Hutu suspected of supporting them, as the enemy. These early declarations of hatred against the Tutsi population are yet more evidence of the careful planning that went into laying the groundwork for the genocide that would occur three years later.

\(^{219}\) Theoneste Bagosora, amended indictment, *Case No. ICTR-96-7-I*, at 5.4.

\(^{220}\) Ibid., at 5.12-5.13
militias. After President Habyarimana’s plane was shot down, Théoneste Bagosora was in effective command of military and political affairs at the time of the genocide. Thus, he was deemed responsible for the killings of Prime Minister Agathe Uwilingiyimana, numerous opposition leaders and the hundreds of thousands of civilians murdered in 100 days. The Military I trial lasted six years and on 18 December 2008 a judgment was handed down. Bagosora, Ntabakuze and Nsengiyumva were all found guilty of genocide, crimes against humanity and war crimes, and were subsequently sentenced to life imprisonment.

Eight years prior to the Military I convictions Jean Kambanda, the former Prime Minister of Rwanda’s interim government from 8 April 1994 to 17 July 1994, appeared before the ICTR. Kambanda’s trial, which began on 1 May 1998, was unique in that he admitted guilt immediately. Kambanda’s guilty plea ensured a quick trial and a sentence of life imprisonment was dictated on 4 September 1994. The decision of the ICTR was evidence that no one, not even an acting head of state, was immune to prosecution in the face of mass human rights atrocities.

The ICTR’s prosecution of those who bear the greatest responsibility for crimes committed in Rwanda is impressive considering the scale of the atrocities. Because it is

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221 Ibid., at 5.19
222 The Prosecutor v. Theoneste Bagosora et al., Case No. ICTR-98-41-T, 18 December 2008. Kabiligi was acquitted on all counts and released.
223 The ICTR confirmed six charges against Kambanda: Genocide, agreement to commit genocide, direct and public incitement to commit genocide, aiding and abetting genocide, crimes against humanity (two counts, assassination and extermination). Kambanda also submitted a plea agreement in which he acknowledged that genocide was committed in Rwanda and as interim Prime Minister he had the authority and duty to protect the citizens of the country, and failed to do so. The plea agreement included details on his participation in high-level meetings that charted the course of the genocide, his role in facilitating the distribution of weapons to militias and his support of Radio Télévision Libre des Mille Collines (a radio station that spewed incendiary statements against Tutsis). For details on these charges and the full history of the case see: The Prosecutor versus Jean Kambanda, Case No. 97-23-S.
literally impossible (and perhaps not advantageous\textsuperscript{224}) to prosecute all those who had a hand in the violence, the ICTR targets those who occupied high levels of command at the time of the genocide. The devastated infrastructure of post-genocide Rwanda presents the second greatest obstruction to the execution of individual accountability. The national justice system, recognized by many scholars as severely limited before the genocide of 1994,\textsuperscript{225} was completely destroyed during the violence. Lawyers, judges, college-educated citizens and active members of the human rights community were systematically killed. As a result the ICTR entered into a situation where Rwandan citizens qualified to be employed by the Tribunal, were scarce. Although the Rwanda Tribunal is international in structure, essential judicial activities such as conducting investigations, collecting evidence, and gathering witness testimonial are necessarily based out of Rwanda. The lack of trained personnel handicapped the ICTR’s ability to efficiently complete the pre-trial stage of its prosecutions.

Fortunately, the timing of the ICTR greatly eased the aforementioned challenges. Established in the aftermath of the killings, the Tribunal began its operations with the acquiescence and active cooperation of the RPF government. In the context of fulfilling the objective of individual accountability, the RPF’s control over military and political affairs in Rwanda was a great advantage to the ICTR. The willingness of the RPF government helped to mediate the hurdles presented by a collapsed infrastructure.\textsuperscript{226} Apprehending perpetrators was made considerably easier by the lack of active conflict, and the ability of the Tribunal to carry out its operations without the constant threat of

\textsuperscript{224} Not only would it be logistically impossible to find, indict and prosecute all those who participated in the genocide, but it would also be devastating to any possibility of long-term national reconciliation.


\textsuperscript{226} Akhavan, “Politics and Pragmatics”, 508.
armed conflict helped to ensure that individual criminal responsibility was effectively pursued. The ICTR’s most tangible accomplishment is its prosecution of high-level officials who participated in the planning of the genocide. Bringing such important suspects to trial helps to counter collective guilt that could be placed on the Hutu as a whole. By focusing on individual accountability, especially the prosecution of top leaders, single persons receive blame instead of entire sections of a population.\textsuperscript{227}

The RPA military victory and the subsequent installation of the RPF government effectively ended the genocide. However, it also prompted Hutu extremists who were not captured by the military to flee into neighboring countries to avoid retribution for their crimes. Mamdani estimates that over two million people crossed the Rwandan border within a week of the RPF seizure of Kigali.\textsuperscript{228} Although not all who left Rwanda are complicit in the genocide, many are and it is impossible for the ICTR to arrest these people unless the countries in which they are now residing choose to relinquish them. Even more troubling is the fact that many of these extremists entered refugee camps in Uganda and Burundi where they continue to harbor anti-Tutsi sentiments. Some of these Hutu extremists have formed armed militias and political alliances and proceeded to launch cross border attacks on Rwandan civilians and the RPF government in Kigali.\textsuperscript{229}

Jackson Nyamuya Maogoto notes the negative impact,

\begin{quote}
Thousands of unarmed civilians have been killed across the border…in an armed conflict involving several governments, including Rwanda, as well as various armed opposition groups, including Rwandese \textit{interahamwe} militia and soldiers of the former Rwandese armed forces.\textsuperscript{230}
\end{quote}

\textsuperscript{227} Maogoto, “International Justice for Rwanda,” 201.
\textsuperscript{228} Mamdani, \textit{When Victims Become Killers}, 234.
\textsuperscript{229} Johan Pottier. \textit{Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century} (Cambridge: Cambridge University Press, 2002) 51.
The political implications of this situation are immensely complicated. It is not within the scope of this chapter to delve into such issues. Yet it is important to note that the continued attacks against the RPF government and the government’s subsequent responses will likely have future consequences for the stability of the Rwandan state.

**Rule of Law**

Due to the timing of the Tribunal, the ICTR’s second objective, re-establishing the rule of law in Rwanda, has been the easiest to fulfill. The resolution of the violence in Rwanda was such that this goal was, for all intents and purposes, achieved before the Tribunal became active. The RPA’s military victory in Kigali led to the arrest and imprisonment of some of the people most responsible for the planning and implementation of the genocide. Akhavan explains, “the leading Rwandese perpetrators of genocide were defeated militarily, removed from state institutions and positions of leadership, and are either in refugee camps in neighboring countries or in exile elsewhere.”

Those who were placed in custody of the RPF were easily transferred for trial in Arusha. The timing of the ICTR allowed time for the RPF government to consolidate power and remove the guilty from public office. In stark contrast to the situation in the former Yugoslavia, the ICTR was not faced with the task of locating and investigating suspects in the midst of ongoing violence. The RPA’s seizure of Kigali in mid-July ensured that any high-level Hutu extremists were ousted from positions of power. Had violence been ongoing, the Tribunal’s responsibility to dismantle institutions such as the radio stations inciting anti-Tutsi fervor, would have been severely limited.

\[231\] Akhavan, “Politics and Pragmatics”, 509.
Enhancing and rebuilding the national judicial system is one of the most important steps in establishing the rule of law in the aftermath of mass violence. Without a functioning legal system it is unlikely that a new regime will retain credibility. A strong judicial system allows the new regime to prosecute persons while maintaining a high level of impartiality and legitimacy. The Rwandan judicial system is a topic that warrants (and has received) much attention. In the time period since the end of the genocide there have been serious failures on the part of the national judicial system. Due process has been violated repeatedly and there are thousands upon thousands of suspects in Rwandan prisons. The current state of the national judicial system is lamentable and steps need to be taken to address its many failings. In spite of this, it is undeniable that if the ICTR did not exist, the national judicial system would have collapsed under the sheer number of suspects. Schabas explains that in the months after the genocide there was danger that “the system will be at best distorted and at worst crushed by the demands of prosecuting some 87,000 people for genocide.”\textsuperscript{232} The ICTR cannot and should not serve as a tool to build the judicial system up from the ground. The Tribunal has however, greatly alleviated the pressure on the Rwandan national system.\textsuperscript{233} Due to the mass complicity in the genocide, thousands upon thousands of people face prosecution by the national courts. The poor quality of Rwandan prisons and the long periods of detention have already earned Rwanda criticism by human rights activists and international law


\textsuperscript{233} The existence of the ICTR may also contribute to strengthening respect for human rights within the Rwanda legal system. The Tribunal is evidence that crimes against humanity are utterly condemned by the international community and thus subject to prosecution. Unfortunately, the depth of internalization of human rights norms is difficult to measure and some scholars claim that the ICTR has had little influence in prompting the growth of a human rights culture.
experts. Although the ICTR is limited in the amount of people it can prosecute, its ability to prosecute leaders (whose trials are often the most complicated and intensive) serves as a pressure valve for the heavily overburdened national judicial system in Rwanda.\textsuperscript{234}

If the Tribunal had been implemented in the midst of the genocide, the establishment of rule of law would have been complicated exponentially. Mass violence such as that which occurred in Rwanda defies all that is commonly recognized as part of a lawful society. The mass participation in the genocide and the rate of killings was evidence that the act of committing atrocities became the ‘normal’ course of action\textsuperscript{235}. Journalist Philip Gourevitch raises the questions, “What if…murder and rape become the rule?” In the case of Rwanda, he concludes that “[d]uring the genocide, the work of the killers was not regarded as a crime in Rwanda; it was effectively the law of the land”.\textsuperscript{236} It is indisputable that if the ICTR attempted to pursue justice during such violence, it would have failed miserably in its goal of re-establishing the rule of law.

The relatively stable political situation in Rwanda allowed the ICTR the opportunity to achieve some measure of success in the pursuit of individual accountability and re-establishment of rule of law. However, although the RPF government was a boon to the Tribunal in some ways, the relationship between the national government and the ICTR proved detrimental in other respects. If the ICTR is to

\textsuperscript{234} Schabas, ‘Justice, Democracy, Impunity,’ 534.
\textsuperscript{235} Mark Drumbl notes that in order “[t]o capture the uniqueness of the Rwandan crime, one must imagine that nearly the entirety of the German population participated in the liquidation of the Jews, or that the Russian masses responded to Stalin’s war against the kulaks, armed themselves with picks and shovels and massacred the kulaks in village after villages, instead of merely watching them being herded off to their eventual extermination.” On the rate of killings, Philip Gourevitch writes, “It [the Rwandan genocide] was the most efficient mass killings since the atomic bombings of Hiroshima and Nagasaki.”
successfully advance the fight against impunity, the issue of victor’s justice must be carefully examined and adequately addressed.

It is essential that the justice the ICTR dispenses be perceived as legitimate. This will be determined by its ability to render justice that is fair, efficient and impartial. The post-genocidal government in Rwanda poses a major obstacle to this realization. Scholars, advocates and critics alike, frequently reference victor’s justice as a serious threat to the overall effectiveness of the ICTR. Zorbas notes that the concern is that, “the RPF, which won a decisive military victory on the one hand…[and] put an end to the genocide on the other, is erecting a veiled regime of victor’s justice and collective Hutu stigmatization.”

It is typical that a political transition follows a period of mass violence. In the aftermath of extended atrocities this transition between an oppressor regime and its successor is manifest in different ways. A smooth transition has much to do with what principles and objectives the successor regime seeks. Does the new regime want retaliation for past crimes? Is there a desire to prioritize national reconciliation over legal justice? Will the new regime make an effort to incorporate all political parties in justice efforts?

Jeremy Sarkin categorizes the RPF government’s transition to power as a one based on the “overthrow model”. In this paradigm, “the dominant forces [Hutu extremists] are staunchly opposed to reform and over time the opposition [RPF forces] gains significant political strength while the authoritarian regime loses strength.” The RPF government was not one based on the compromise and consent of warring factions.

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(in this case Hutu extremists versus Tutsis). In 2000, the United Nations High Commissioner for Refugees commented that the RPF government has done little to include Hutu in prominent positions within the administration and judicial system.\footnote{239}

The exclusion of Hutu from the RPF government reinforces a perception of victor’s justice. This predominant view of bias on the part of the RPF government is especially troubling given the nature of Rwanda’s post-genocidal society. Mark Drumbl terms Rwanda’s postgenocidal society as dualist in nature. He states,

Rwanda can be studied as a dualist postgenocidal society in which the Tutsi, the minoritarian victim group that historically has exerted significant economic influence, controls power. The fundamental paradox of a dualist postgenocidal society is that people who have suffered unimaginable horrors, in Kant’s phrase, “cannot avoid living side by side”.\footnote{240}

The necessity of coexistence between Hutu and Tutsi Rwandans underlie the threat that the RPF government poses to the successful pursuit of justice. Mamdani frames this dilemma as a question of “how to build a democracy that can incorporate a guilty majority alongside an aggrieved and fearful minority in a single political community.”\footnote{241}

The ICTR and the Rwandan government are closely linked in the minds of many Rwandans. Individual accountability and the re-establishment of the rule of law benefited from the RPF’s hold on power. Yet, the ICTR has also faced criticisms of partiality. The ICTR may be perceived as too closely entwined with the RPF government to render unbiased justice. On the surface, this view may be counter-intuitive since the RPF government specifically requested the creation of an international tribunal in order to avoid any accusations of victor’s justice. Yet, many Hutus believe that the RPF

\footnotesize{\begin{itemize}
\item \footnote{240} Drumbl, “Shame and Cives,” 1238.
\item \footnote{241} Mamdani, When Victims Become Killers, 266. (Italics are original to source)
\end{itemize}}
government was merely paying lip service to impartiality. Maogoto warns “that the ICTR is seen by Hutus, as international punishment by the victors, Tutsis with the blessing and support of the United Nations. Tutsis may themselves see the Tribunal and the genocide trials they are conducting in Rwanda as their opportunity for revenge.”

This is a deep concern since victims and perpetrators alike must view the ICTR as a legitimate instrument of justice. The ICTR’s failure to investigate and prosecute crimes committed by RPF forces both during and after the genocide perpetuates this perception of victor’s justice.

The ICTR’s temporal jurisdiction is restricted to 1 January 1994 through 31 December 1994. This limited time frame means that any war crimes committed by the RPF forces or acts of retaliation by Tutsi civilians before or after this time, are excluded from prosecution. This is troubling given the amount of evidence of such crimes. Jose Alvarez explains, “the new Rwandan government’s effort to limit the ICTR’s jurisdiction to offenses committed before July 1994, if intended to secure impunity for revenge crimes committed by Tutsis, represents an example of an attempt to impose one-sided ‘victor’s justice’.” In Alison Des Forge’s authoritative report, Leave None to Tell the Story: Genocide in Rwanda, she states, “The RPF killed thousands of civilians both during the course of combat…and in the more lengthy process of establishing its control throughout the country.” The crimes committed by the RPF, including the targeted murders of Hutus, will not be investigated by the ICTR. The narrowed temporal

244 Des Forges, Leave None to Tell the Story, 540.
jurisdiction impedes the ICTR’s ability to provide an official record that accurately reflects the history of the events.\textsuperscript{245}

\textit{Creation and distribution of historical record}

Without considering the full spectrum of crimes, the historical account of the genocide in Rwanda will only tell part of the story. The chances for reconciliation and lasting peace decrease if Hutus in Rwanda and abroad feel that the ICTR is a tool the RPF government is using to consolidate power. Ascertaining and acknowledging the truth in the wake of mass atrocities is an essential forerunner to national reconciliation. In recognition of this fact, the ICTR is responsible for the creation and dissemination of an official and accurate historical record. As a form of legal justice, the Rwanda Tribunal creates this record through public trials of perpetrators. Each trial involves the collection and presentation of evidence, witness testimony, and arguments by the defense. These factors each contribute to building a record of the genocide in Rwanda. The historical record produced by the ICTR is admittedly limited. Unlike a truth and reconciliation commission, prosecutorial accountability mechanisms cannot, nor do they seek to, create a record that provides a fully rounded analysis of the context of conflict.

The lack of active conflict in Rwanda at the time of the ICTR’s implementation, made fact-finding was made significantly easier. However, the existence of the victorious RPF government has hindered the perceived legitimacy of the Tribunal’s findings. If it is thought that one-sided justice is being pursued, there will be little chance that the legal record will be deemed factual and authentic. The timing of the ICTR

\textsuperscript{245} Vinjamuri and Snyder, “Advocacy and Scholarship,” 352.
helped ease certain aspects of the Tribunal’s operations, but the factor of location had a far greater impact on the outcome of this objective.

The geographic location of a tribunal such as the ICTR is a crucial aspect of the process of uncovering truths and acknowledging past horrors. In ideal circumstances all international tribunals would operate from the state in which the crimes took place. There is an advantage to remaining close to the so-called ‘site of the crimes’. Steven Ratner and Jason Abrams explain that when “trials take place in the country where the offenses occurred the entire process becomes more deeply connected with the society, providing it with the potential to create a strong psychological and deterrent effect on the population.” The ICTR has encountered difficulties in creating an official record that reaches a maximum number of people. That being said, in comparison to its sister tribunal in The Hague, the ICTR comes much closer to success.

Arusha, Tanzania, is in relatively close proximity to the population and region that experienced the 1994 atrocities. In light of the country’s shattered infrastructure after the genocide, it was necessary the Tribunal be located outside the country. Despite the necessity of its location, the ability of the ICTR to effectively access the citizens of Rwanda (arguably the most important segment of its audience) is diminished because of the Tribunal’s removal from the source location. Location is particularly important in distributing information on the trials and proceedings that the ICTR is involved in. The justice the ICTR renders must be open and accountable to the public. It is essential that Rwandan citizens, both victims and perpetrators, continue to be aware of the ICTR’s activities. In December 2008, the ICTR launched a new website including live

broadcasts of trial proceedings. There have been greater attempts to actively engage the Rwandan population through accessible written updates and radio transmissions. These efforts show a growing awareness that disseminating information about the justice procedures of the ICTR is essential to its effectiveness.

**Deterrence**

The ICTR has failed to have a deterrent effect. Measurements of deterrence usually focus on two types—general and specific. General deterrence is determined by a tribunal’s ability to deter future atrocities from occurring. These future atrocities are not particular to a location; rather it is hoped that the threat of punishment will prevent others from committing mass violations of human rights. Deterrence is an extremely elusive goal. It is difficult to ascertain and measure a direct correlation between the existence of a prosecutorial accountability mechanism and deterrence—both general and specific. Ostensibly, in the case of Rwanda, success in the area of specific deterrence would mean the prevention of crimes of revenge and/or continuation of killings by Hutu extremists. The Rwanda Tribunal has had little if any deterrent effect on the occurrence of atrocities in the world in general, and in Rwanda in specific. Two situations highlight this failure: continued killings by the RPF government and a continuation and expansion of the Rwandan conflict into neighboring states. Each of these situations, especially the regional violence which contains traces of the past tension and violence in Rwanda, are important topics in and of themselves. I focus primarily on how these two circumstances illuminate the ICTY’s failure to deter future crimes.
Scholars, journalists, and human rights groups have reported on politically motivated killings by the RPF government in Kigali. These killings occurred during the RPF take-over of Kigali and are reportedly continuing today. There is no evidence that the existence of the ICTR is linked to a decrease in these attacks. There were not huge numbers of retaliatory killings by civilians after the end of the genocide, but this has less to do with the Tribunal than it does with the control exerted by the RPF government. Hutu extremists across the border have not ceased armed attacks against Rwandan civilians and the RPF government forces. In the neighboring Democratic Republic of the Congo (DRC), civilians are frequently killed by Hutu-extremists who fled Rwanda after the end of the genocide.

Maogoto notes, “The Rwandese government continues to offer support to the rebel Congolese Rally for Democracy (RCD) part of the deal being permission to conduct military operations in the Congolese territory against Hutu extremists.” The ICTR was neither designed to nor is capable of ending regional instability. Yet, as an organ created in the spirit of advancing human rights and international criminal law, it was hoped that the justice rendered by the Rwanda Tribunal would, through legal prosecutions, ease the strife between Hutu and Tutsi. In light of the fact that Hutu extremists and the Rwandan government contribute to the escalating violence in the region, it seems reasonable to conclude that the ICTR has done little in the way of deterring future violence. Adam Roberts aptly notes that the “continuing bitter

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247 For the most extensive research of these killings see: Des Forges, Leave None to Tell the Story.
248 It is important to note that the conflict in the DRC cannot be traced back to the continued animosity of Hutus who fled Rwanda in July 1994. Numerous governments, militias, and armies are involved.
conflicts in the African Great Lakes region, including Hutu-Tutsi killings within Rwanda, do not suggest that the Tribunal has yet had a significant effect.”

Timing did not seem to influence the ICTR’s ability to achieve a deterrent effect. In fact, the case study prompts me to argue that timing cannot even be convincingly factored into the failure of the ICTR in this respect. Instead, I posit that the purely international structure of the Tribunal combined with its relatively distant location, proved to have a much more discernable affect on deterrence than timing did. The structure of the ICTR was such that there was very little involvement by Rwandan actors. By limiting participation in the judicial process to a foreign staff, the deterrent effect of legal prosecutions was muted by a sense of disengagement between Rwandan citizens and the ICTR’s search for justice. The location of the ICTR, Arusha, Tanzania, meant that Rwandan citizens were distanced not only psychologically, but also physically. Although Arusha is significantly closer to the site of the genocide than the ICTY’s base in The Hague, the physical removal of the Tribunal may have contributed to a feeling that the ICTR was not directly relevant to the Rwandan citizens. If the ICTR was perceived as a abstract justice mechanism instead of a tribunal that was present in the everyday lives of citizens, it seems that deterrence would be greatly hindered. If the RPF government and Tutsis seeking retaliation, as well as those Hutu extremists still residing in and around Rwanda, feel disengaged from the Tribunal’s justice processes, there will unlikely be a deterrent effect strong enough to provide the impetus to cease continued hostilities. Even before the ICTR was officially created, the Rwandan government protested the suggestion that it be based in Tanzania. The government warned that the

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“deterrent effect of the trial and punishment will be lost if the trials were to held hundreds of miles away from the scene of the crimes”\textsuperscript{251}. These are issues worth considering and the above paragraph serves merely as an introduction. Numerous scholars specialize on deterrence theory and I urge them to explore the influence that location and structure have on the deterrent effect of prosecutorial mechanisms.

Attempts to measure the ICTR’s deterrent effect raises fascinating questions about the moral implications of its timing. The ICTR was implemented after the genocide in Rwanda, regardless of the fact that the UNSC, the body with the power to create such a tribunal, was aware of the brutal killings from an early date. The question is raised: if UNSC member states had intervened (most likely through increased UNAMIR troops) at the first indication of ethnically motivated killing, would thousands of casualties been prevented? It is troubling to think about the paradox presented by the creation of a court to try individual perpetrators and deter future atrocities, implemented only after hundreds of thousands of innocent people have been butchered while the world watched. My case study of the ICTR leads me to conclude that the Tribunal’s establishment in the aftermath of mass violence helped bring about the conditions necessary to achieve individual criminal responsibility and rule of law. Creating a tribunal after mass violence may contribute to its successes, yet if accountability mechanisms are not implemented even when there is overwhelming evidence of mass human rights violations, and if they are only employed after thousands of people are killed, tortured, and raped, what effect does the decision to not employ accountability mechanisms have on the credibility of these mechanisms and the advancement of human rights worldwide? This is not a question that

this thesis attempts to answer. However, it is an important issue that must be considered by scholars, advocates, and policy-makers. A discussion of timing and the potential moral issues it raises warrants further research that would benefit from analysis by Political Scientists, Sociologists, Philosophers and others across academic disciplines.

**Conclusion**

As the second international criminal tribunal established by the UNSC, the ICTR provides a different context through which to examine how timing may have influenced the outcome of such a prosecutorial accountability mechanism. The ICTR achieved moderate success in realizing its objective to pursue individual criminal accountability and re-establish rule of law in the wake of mass violence. This is due in large part to its establishment in the aftermath of mass violence. This delayed timing helped alleviate some of the immense challenges faced by the ICTY, a tribunal instituted during conflict. The ICTR case indicates that implementing a tribunal in the aftermath of conflict allows for certain elements to arise that contribute to its successful operation. The ICTR benefited from a stable climate in which to pursue investigations, apprehend suspects, and re-establish the rule of law. By the time the ICTR began operations, a relatively secure government led by the RPF was installed. The cooperation of the government as well as the government’s control of political and military affairs, proved advantageous to the ICTR. The existence of the RPF government also created difficulties for the Tribunal. Many Hutus in Rwanda are concerned that the RPF government is using the ICTR to carry out retaliatory prosecutions that help them consolidate power and do not advance justice or national reconciliation. It is essential that the ICTR’s staff and independent groups (NGOs, IOs, and others) continue to monitor Rwandan citizens’ opinions on the
justice rendered by the Tribunal. Perceptions of victor’s justice could severely damage the ICTR’s ability to successfully pursue justice that is deemed legitimate and fair.

Despite the ICTR’s success in achieving the first two objectives, this case also demonstrates that problems remain even when justice is pursued in the absence of ongoing conflict. Like the ICTY, the Rwanda Tribunal struggled (and failed) to create and disseminate an accurate historical record and to serve as a deterrent effect. Some of the major problems plaguing the Yugoslav Tribunal, were due to the fact that it was forced to operate in the midst of ongoing conflict. Yet, the case of the Rwanda Tribunal indicates that the absence of conflict is not a cure-all. Due to this conclusion, I suggest that the recently developed hybrid tribunals must be examined. In the next chapter I present brief case studies of the Special Court in Sierra Leone and the Extraordinary Chambers for the Courts of Cambodia. These studies will allow me to examine whether or not hybrid structure has the potential to improve upon the Rwanda Tribunal.
Chapter IV: Hybrid Tribunals in Sierra Leone and Cambodia

Benefits and Drawbacks of Mixed Composition and Location

Introduction

The ICTY and ICTR represent the most widely recognized form of international criminal justice—the ad hoc international tribunal. The case studies of these two international tribunals revealed how the timing of a tribunal influences its ability to carry out its objectives. The ICTY’s implementation in the midst of ongoing conflict resulted in increased challenges to its effectiveness. The Yugoslav Tribunal struggled to perform basic activities such as collecting evidence, due to the presence of conflict in the region. The case of the ICTR demonstrated that in the absence of conflict, some of the challenges faced by the ICTY were alleviated. However, the ICTR case study also showed that despite some improvements, problems remain. The ICTY and ICTR are both set to conclude in 2010, and while they are still relevant and deserving of close scrutiny, a new generation of tribunals has emerged. Since it is clear that a change in timing cannot dispense with all challenges, proponents of international criminal justice must consider factors beyond timing that may help increase tribunals’ successes.

This chapter looks at the hybrid tribunals located in Sierra Leone and Cambodia. Similar to the ICTR, both of these tribunals were implemented in the aftermath of mass violence. The Special Court for Sierra Leone (SCSL) was established shortly after conflict ended, whereas the Extraordinary Chambers in the Courts of Cambodia (ECCC) was implemented nearly three decades after the end of conflict. These two hybrid tribunals offer an effective method of comparison to the ICTR. I argue that like the

252 I refer to the Special Court for Sierra Leone as the SCSL and the Special Court. I refer to the Extraordinary Chambers in the Courts of Cambodia as the ECCC and the Extraordinary Chambers.
ICTR, the hybrid tribunals benefit in certain ways from the absence of conflict. The brief case studies of the SCSL and ECCC allow me to examine other factors, especially structure, and their influence on the tribunals’ ability to achieve the four objectives of prosecutorial accountability mechanisms. Interestingly, the case of the ECCC lends an added element to the study of how timing influences a tribunal’s effectiveness. Although the absence of conflict is beneficial to the ECCC, the three-decade delay between the Khmer Rouge atrocities and the establishment of the Extraordinary Chambers, negatively influences its ability to collect evidence, gather witness testimony, and indict all individuals involved in the atrocities. The case of the ECCC suggests that establishing a tribunal in the aftermath of conflict is beneficial—up to a point. As the ECCC case demonstrates, when there is a significant gap in time between the relevant atrocities and the accountability mechanism, the advantages of operating in the absence of conflict, are somewhat tempered.

The ICTR case demonstrated that absence of conflict does not solve all problems. Hybrid tribunals have the potential to fix some of the challenges that implementation in the aftermath of conflict, could not. Specifically, the hybrid structure offers to potential improvements to a tribunal’s effectiveness. First, the mixed composition of hybrid tribunals allows for cooperation and collaboration between foreign and domestic judges. This interaction could potentially help augment national judicial systems that are often weakened after periods of mass violence (or never strong in the first place). Second, thus far hybrid tribunals have been located in the country where the relevant crimes took place. This proximity to the most affected population has the potential to increase the likelihood of achieving two objectives in particular: the creation and distribution of an
accurate historical record, and the deterrence of future atrocities. Before delving into an assessment of the SCSL and ECCC it is important to note that these case studies are brief and do not represent exhaustive research. Rather, the case studies of the SCSL and ECCC allow me to conclude this project by broadening the scope of study to a different, and more recent, form of tribunal. The emergence of this ‘second generation’ of tribunal necessitates my research be extended.253

Overview of Hybrid Tribunals

Currently, hybrid tribunals exist in Sierra Leone, Kosovo, East Timor, and Cambodia254. I focus on the tribunals in Sierra Leone and Cambodia for two reasons. First, The Special Court in Sierra Leone is the most widely studied hybrid tribunal in existence today. In comparison to the hybrid tribunals established in East Timor and Kosovo, there is an extensive amount of literature on the SCSL. Given the limited number of hybrid tribunals I felt it to be important to choose one that provided a substantial amount of research on which to base my conclusions. Second, I focus on the ECCC because it is the most recent hybrid tribunal to begin proceedings. The Extraordinary Chambers became fully operational at the beginning of 2009, and is thus a highly newsworthy topic.255 In the following pages I provide a brief overview of the

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254 A brief note regarding my case studies: the challenge of identifying and filtering out distinct factors is difficult due to the ‘new’ and undefined structure of hybrid tribunals. It is not yet clear what new factors the hybridized structure introduces, or what factors considered in the cases of the ICTY and ICTR (think timing, role of the UNSC, location, concurrent national efforts) remain relevant. One of the greatest challenges of studying hybrid tribunals is their lack of a coherent and set definition. All of the hybrids now in existence in Kosovo, East Timor, Sierra Leone, and Cambodia differ slightly in composition, procedural rules, applicable law, and enforcement powers.
255 A further note on my choice of the SCSL and ECCC: East Timor is an outlier because it was the creation of the United Nations Transitional Administration in East Timor (UNTAET). When the hybrid tribunals in East Timor were created, the UN was in effective control of all political and military affairs.
hybrid structure. I then present the two brief case studies on the Special Court and the Extraordinary Chambers. I frame my analysis in terms of the same four objectives used to conduct my studies of the ICTY and ICTR.²⁵⁶

I focus on three potential advantages that hybrid tribunals enjoy relative to purely international tribunals.²⁵⁷ First, all existing internationalized tribunals are located in the country in which the violations of human rights took place.²⁵⁸ Unlike the ICTY and ICTR, these courts are in close proximity to the population most affected by the mass violence. The case studies of the ICTY and ICTR, demonstrated the problems raised by the distance between legal prosecutions and the most affected population. Both the ICTY and ICTR suffer from legitimacy problems and both, particularly the Yugoslav Tribunal, have struggled to effectively educate the affected populations about the activities and new developments of the tribunals. Second, the structure of hybrid tribunals results in a prosecutorial body with mixed composition. By employing both international and domestic judges, there is an increased chance of contributing to the training of local judges—thereby augmenting the national judiciary, which is weak or virtually non-existent in the aftermath of mass violence. Unlike the purely international composition of

²⁵⁶ These objectives are: 1) to pursue individual criminal accountability; 2) to re-establish the rule of law; 3) to create and disseminate an accurate historical record; 4) to provide a deterrent effect.

²⁵⁷ Each scholar articulates the potential benefits in different ways. For my purposes I will examine location, cost and the mixed composition of the tribunals. Laura Dickinson, an expert on and proponent of hybrid tribunals ‘names’ these benefits in an alternative way. She identifies three potential benefits of internationalized tribunals, including: the potential to lend greater legitimacy to legal prosecutions, strengthen domestic institutions that support rule of law, and support the national legal system by training local judges and prosecutors who will internalize international human rights norms See: Dickinson, “The Promise of Hybrid Courts,” 296.

²⁵⁸ Certain scholars have resisted the notion of a single definition of what constitutes a ‘hybrid tribunal’. For a thorough analysis of this issue see: Nouwen, “Hybrid Courts”.

The UN essentially built the East Timorese judicial system. Although this is a fascinating case, I do not think it best exemplifies hybrid tribunals understood as a joint effort between a country and the UN. I do not examine Kosovo because in many respects, it is regarded as a failure. Scholars and human rights organizations have cited widespread bias, lack of trained personnel, and inconsistent trial standards.
the ICTY and ICTR, hybrid tribunals’ inclusion of foreign and domestic elements help connect the legal process to the people who suffered the atrocities. Finally, hybrid tribunals offer a chance to pursue justice “on the cheap”.

The 2008-2009 budget for the Yugoslav Tribunal is estimated at $342,332,300. In January 2008, the UNSC approved a budget of $267,356,200 for the Rwanda Tribunal. In contrast, the Special Court in Sierra Leone has an estimated cost of $40,684,600 for 2009-2010. The hybrid tribunal in Cambodia will cost approximately 20 million dollars, although that cost is expected to rise.

My brief case studies show that it is not yet clear if the three potential benefits of hybrid tribunals—location, mixed composition, and reduced cost—will, in fact, fulfill their potential. However, I believe this structure will remain a viable option for prosecuting perpetrators of mass atrocities.

The International Criminal Court (ICC) entered into force in 2002. Some scholars suggest that this development will lessen the need for other types of tribunals. I disagree. Despite the existence of the ICC, there are a number of reasons why I argue that hybrid tribunals will be implemented again. First, due to provisions set out in the Rome Statute, the ICC is unable to prosecute crimes committed before 2002. Additionally, until the ICC gains widespread support, especially from the United States, it may be hindered in its ability to carry out its objectives. The ICC enjoys support from

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many Western countries, but due to its lack of a self-contained enforcement mechanism it is dependent upon other states to help with apprehending and extraditing suspects. The ICC has great potential and may well be an effective and efficient judicial organ in the future. It will no doubt be studied extensively in the years to come, especially in light of the recent arrest warrant issued for President Hassan al-Bashir of Sudan. Nevertheless, scholars and experts must not be blinded to the potential contributions of hybrid tribunals. Extended study of hybrid tribunals is central to keeping abreast of new developments in international law. The desire to end impunity for perpetrators of mass human rights violations cannot be fulfilled with a ‘one size fits all’ solution. In order to advance justice through tribunals, a dialogue in the field of human rights and across academic disciplines must continue. Difficult questions must be asked. My brief examination of the hybrid tribunals in Sierra Leone and Cambodia seeks to start this discussion.

The Special Court for Sierra Leone

The conflict that led to the establishment of the Special Court for Sierra Leone (SCSL) lasted for over a decade, spanning from March 1991-2002. This extremely complex conflict began when a rebel group known as the Revolutionary United Front (RUF) entered Sierra Leone through Liberia. The Sierra Leonean government, headed at the time by Joseph Saidu Momoh of the All People’s Congress (APC) was quickly deposed, not by the RUF but by a group within the Sierra Leonean army led by Sergeant Valentine Strasser. Strasser pledged to fight against the RUF and established the

264 For a helpful, succinct background on the conflict in Sierra Leone as well as an overview of the SCSL, see: Nicole Fritz and Alison Smith, “Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone”, Fordham International Law Journal 25, (Dec., 2001): 391-430. There is disagreement over the ‘end-date’ of the conflict in Sierra Leone. I have chosen this date because most active violence had ended by mid-2002.
The war in Sierra Leone involved numerous actors including formal armies, private security firms, rebel groups, and citizen-led militias. On 25 May 1997, RUF forces entered the capital city of Freetown and formed the Armed Forces Ruling Council (AFRC). The AFRC immediately announced Operation No Living Thing, a campaign of violence whose intention was to kill civilians and destroy Freetown. The pro-government Civil Defense Force (CDF) also perpetrated numerous violations of human rights. By 2002, more than 50,000 people were dead. Due to widespread amputations, sexual violence, and forced conscription of child soldiers, the violence in Sierra Leone gained worldwide media coverage. After a few failed attempts to broker an end to the conflict, the RUF agreed to a ceasefire in November 2000. The resulting Abuja Agreement led to a fragile peace in Sierra Leone.

The brutality of the crimes committed in Sierra Leone prompted immediate discussion about the possibility of creating a tribunal to prosecute perpetrators.

The SCSL is a treaty-based tribunal, formed in a joint effort between the government of Sierra Leone and the United Nations. Its treaty-based status distinguishes it from the ICTY and ICTR, both of which were created under the Chapter

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266 Reno, “Political Networks,” 59.
VII powers of the United Nations.\textsuperscript{270} The SCSL is set to prosecute crimes committed after 30 November 1996. The end-date to the Court’s temporal jurisdiction has been left open ended. This limited temporal jurisdiction resulted in part from the minimal resources afforded to the SCSL. In contrast to the ICTY and ICTR, the Court in Sierra Leone is funded entirely by voluntary donations.\textsuperscript{271} As a hybrid tribunal, the SCSL combines aspects of domestic and international law. Despite the mixed elements of law, the Special Court is not part of the domestic legal system—it is its own entity. The combination of international judges appointed by the UN Secretary-General and judges appointed by the Sierra Leonean government results in a court of mixed composition. The Special Court is based in Freetown, Sierra Leone. As of 25 February 2009, the SCSL has convicted three senior leaders of the RUF, three senior leaders of the AFRC, two CDF leaders, and is in the midst of further trials.\textsuperscript{272}

Ostensibly, hybrid tribunals are the best of both worlds.\textsuperscript{273} The domestic element gives the affected population greater ownership of the pursuit of justice. The international component boosts perceived legitimacy, augments the national judicial system, and advances international humanitarian law. Chandra L. Sriram explains that hybrid courts represent “an attempt to address the limitations of domestic and of international models, ...

\textsuperscript{270} The lack of Chapter VII powers is significant because, unlike the ICTY and ICTR, the SCSL will operate without the obligatory cooperation of third party states, which Chapter VII powers demand. This could negatively affect its ability to apprehend perpetrators.

\textsuperscript{271} The UN Secretary-General at the time of this decision, Kofi Annan, vociferously objected to depending on voluntary donations to fund the SCSL. Instead, Annan proposed that the UN fund the Special Court. He submitted a proposed budget of $114 million budget for the first three years of the Special Court. The Security Council rejected this proposition. See: “Justice for Sierra Leone”, the New York Times, 17 April 2001. http://query.nytimes.com/gst/fullpage.html?res=9F06E0DA1F31F934A25757C0A9679C8B63&scp=6&slq=Sierra%20Leone&st=cse (accessed 5 March 2009).

\textsuperscript{272} For more information on these trials and the current activities of the Special Court, see its official website at http://www.sc-sl.org/HOME/tabid/53/Default.aspx.

\textsuperscript{273} Laura Dickinson is one of the foremost scholars and proponents of hybrid tribunals. See: Dickinson, “Promise of Hybrid Courts”.

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utilizing a complex mix (determined on a case-by-case basis) of domestic and international law and domestic and international judges and staff.” Unfortunately, it is highly debatable whether the mixed nature of the Court has added significantly to its effectiveness. This is in part why it deserves continued research. My case studies of the ICTY and ICTR revealed the timing’s influence on an international court. Like the ICTR, the SCSL was implemented in the aftermath of conflict, and thus enjoys some of the same benefits: access to evidence, witnesses, improved security for tribunal staff, greater interaction with the most affected population. However, I argue that the hybrid structure of the SCSL has an even greater influence on its effectiveness than the absence of conflict. This is due to two elements of hybridity: mixed composition, and location.275

Due to the brief nature of my studies I only examine certain aspects of the influences of structure and location on the four objectives sought by prosecutorial accountability mechanisms. I indicate what these elements are in each section.

**Individual criminal accountability**

Like the ICTR, the SCSL276 was created in the aftermath of mass violence. The basic operations of the SCSL were thus improved in much the same way as the ICTR.

Activities such as collecting evidence and gathering witness testimony, both essential to

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275 There are other factors that influence the operation of the Special Court for Sierra Leone, perhaps the most important being the SCSL’s relationship with the Truth and Reconciliation Commission for Sierra Leone. I choose to forgo discussion of this relationship for two main reasons. First, the TRC in Sierra Leone has different goals than the SCSL. Given the differences between the objectives of the two and my focus on prosecutorial accountability mechanisms, I do not think this thesis is the appropriate forum for examining the relationship. Second, the SCSL has had a far greater influence on the successes and failures of the TRC than the TRC has had on the Special Court. For an overview of the relationship between the two see: Schabas, “Between Truth Commissions and International Courts,” 1035-1066.

an effective tribunal were more easily conducted due to the absence of conflict. Two elements of hybrid structure—the mixed composition of the court and the location of the tribunal—have the potential to alleviate some of the challenges that the timing of the ICTR, could not.

All existing hybrid courts are located in the country where the mass violence took place. The SCSL’s base of operations in Freetown, allows it the benefit of closer proximity to evidence and witness testimony.\textsuperscript{277} Even more importantly, this information is easily accessible because of the mixed composition of the Special Court. The hybridized structure of the SCSL results in a staff composed of both foreign and domestic employees. The inclusion of local actors, who are familiar with the language, traditions, and history, makes the gathering of evidence and witness testimony more efficient. The mixed composition of the Special Court helps alleviate those challenges encountered by the ICTR in its early years. Unfortunately, the potential benefits of the structure of the SCSL have also proved to be drawbacks in other areas.

Perhaps the two greatest obstacles to the SCSL’s successful pursuit of individual criminal accountability arise due to its lack of Chapter VII powers and its voluntary funding mechanism. The ICTR and ICTY enjoyed Chapter VII powers, a provision that made obligatory cooperation by third-party states. Due to the lack of these powers, the SCSL’s ability to apprehend suspects that have fled the borders of Sierra Leone is severely diminished. The Special Court cannot depend upon the cooperation of third party states, “which would be bound to surrender persons within the court’s

\textsuperscript{277} Beth K. Dougherty, “Right-sizing International Criminal Justice: They Hybrid Experiment at the Special Court for Sierra Leone”, \textit{International Affairs} 80 (2004): 317.
jurisdiction.”278 This curtailment of power hinders the SCSL’s ability to achieve its objective of individual criminal responsibility. Equally as important as the lack of Chapter VII powers, is the lack of sufficient, reliable funding for the Special Court.

The decision to fund the SCSL based on voluntary contributions was made in large part because of massive cost incurred by the ICTY and ICTR.279 Relying on voluntary contributions by United Nations member states necessarily results in a reduced mandate for the SCSL.280 The Special Court will likely prosecute only fifteen to twenty individuals, thereby making any successes in pursuing individual criminal accountability, limited.281

**Rule of law**

Proponents of hybrid tribunals argue that one of their greatest benefits lies in their ability to strengthen the domestic judicial system, which is weakened or destroyed after a period of mass violence.282 Throughout this project I have evaluated two aspects of rule of law—the first is a tribunal’s ability to dismantle institutions implicated in the perpetration of the atrocities, the second is to augment and support the national judicial system. In the interest of keeping this case study brief I focus solely on the SCSL’s ability to enhance the Sierra Leonean judicial system. Similar to the evaluation of individual criminal responsibility, the SCSL’s success at achieving rule of law hinges on the two factors of location and structure.

279 Kofi Annan, the United Nations Secretary-General at the time of the SCSL’s establishment, warned that the effectiveness and efficiency of the Special Court would suffer if it were funded only through voluntary donations. Annan’s request for a more substantial and reliable budget was ultimately ignored.
282 See: Dickinson, “Promise of Hybrid Courts”.

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The Special Court’s location gives it an advantage over the purely international tribunals, which were geographically distant from the relevant region. Local outreach programs, which are meant to educate the general population about the proceedings of the Special Court, are much easier to carry out because of the proximity of the SCSL to the Sierra Leonean people. By facilitating local outreach, it is much easier for the SCSL to “build basic legal capacity, to explain the role of the prosecutions and the procedure, and to include the rationale for due process and the need for defense attorneys.”

One of the major failures of the ICTR, was its inability to effectively engage those working within the Rwandan domestic legal system. Although the existence of the ICTR helped lessen the workload faced by the national judiciary, it did little to train local judges, prosecutors, and lawyers in international humanitarian law. The mixed composition of the SCSL helps to counter this shortcoming. The involvement of international and domestic personnel raises the chances that the Sierra Leonean people involved with the domestic judicial system will benefit from the expertise that international judges bring to the hybrid structure. The ability for the SCSL to successfully pursue rule of law is, thus far, positively influenced by its hybrid structure. Capacity building efforts are enhanced when local and international necessarily consult one another during the course of investigations and trials. The mixed composition of the SCSL increases its potential to have a lasting positive effect on the Sierra Leonean judicial system.

284 Ibid., 499.
Creation and distribution of historical record

Location proves the most significant influence on the creation and dissemination of an accurate historical record. The SCSL bases its operation out of Freetown, the site of some of the most brutal violence of the conflict. Gathering witness testimony is one of the most important factors in the creation of an accurate historical record. The Court’s proximity allows for easier access to Sierra Leonean people who suffered from or participated in the atrocities. By locating the Court in Freetown, the SCSL avoids the costs and difficulties associated with transfer of witnesses to a distant location. Perhaps most importantly, the location of the Court makes the dissemination of information regarding the trials and proceedings considerably easier. The outreach program employed by the SCSL is more effective than its counterparts in the former Yugoslavia and Rwanda. Sierra Leoneans, especially those who reside in Freetown, are in constant proximity to the Court and its activities. Trials are open to the public and information is readily available. The activities of the SCSL are far more open and accessible to the Sierra Leonean people than the ICTR was to Rwandan citizens. In April 2008, the Office of Outreach and Public Affairs was established to increase interaction and understanding between Sierra Leoneans and the Special Court. To date, the outreach program for the Special Court has conducted surveys documenting Sierra Leonean perceptions of the SCSL, held video screenings, utilized radio and television programming to broadcast trials, and training of domestic legal personnel.285

The mixed composition of the SCSL boosts the Court’s ability to create and distribute an accurate legal record. Domestic and international judges, prosecutors, and other staff work side by side to gather information, hold trials, and publish their outcome. Domestic personnel, many of whom resided in Sierra Leone during the conflict, are familiar with Sierra Leonean history and culture and prove valuable in translating witness testimony and collecting evidence.

**Deterrence**

It is not yet clear whether the SCSL will have a deterrent effect. Trials are ongoing and thus far it is difficult to assess what factors play a role in determining this outcome. There is not enough concrete evidence to do anything other than offer informed conjectures. I suggest that the Special Court will, like the ICTR and ICTY before it, be unable to achieve a deterrent effect. This failure will be hastened due to its under-funding and lack of Chapter VII enforcement powers. Akhavan astutely observes, “Post-mortem justice without a corresponding commitment of…political and economic resources significantly dilutes the message of accountability and undermines the long-term viability of preventing crimes.”

It may be that in the search for a less expensive alternative to the ICTY and ICTR, the UN helped create a mechanism that will have little or no power to deter future crimes.

The influence of the hybrid structure of the SCSL is largely positive. Although difficult to measure quantitatively, by locating the Tribunal within the country where the atrocities took place, the likelihood of its activities reaching the affected population are increased. Partial ownership of the Tribunal on the part of the Sierra Leonean people,

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suggests a greater ability for the SCSL to effectively disseminate information on proceedings, indictments, and convictions. Alain Pellet expounds on the advantages of proximity. A hybrid tribunal such as the SCLS enjoys “proximity to the place where the crime has been committed, proximity to the evidence, proximity to the population more directly concerned.” The separation between the SCSL and the domestic judiciary lessens the likelihood that government and political influence will influence the Court’s decisions. The hybrid structure of the SCSL does not address all the shortcomings of the ICTR. As is evident even through my cursory case study of the SCSL, the hybrid structure brings problems of its own. Lack of funding and no enforcement powers may hobble its ability to effectively pursue justice. Despite these weaknesses however, the SCSL demonstrates that hybrid structure does address some of the major concerns raised by the ICTR.

**The Extraordinary Chambers in the Courts of Cambodia**

From 1975-1979, the Khmer Rouge regime led a campaign of starvation, forced labor, torture and killing, which resulted in approximately 1.7 million deaths—nearly a quarter of the entire population. The Khmer Rouge targeted political opponents and carried out frequent summary executions. Despite the widespread atrocities and brutal nature of the regime, no Khmer Rouge leader was ever prosecuted.

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289 Officially, the Khmer Rouge was part of the Communist Party of Kampuchea (CPK). During their time in power, Cambodia was known as Democratic Kampuchea.
for crimes. Finally, in 1997, the Cambodian government requested that the UN assist them in creating a tribunal to prosecute the perpetrators of these crimes. The ECCC has the jurisdiction to prosecute crimes committed from 17 April 1975 to 6 January 1979. A series of disagreements between the UN and the Cambodian government regarding the composition of the court led to protracted negotiations. It was not until 13 May 2003 that such a mechanism was created. Thirty years after the demise of the Khmer Rouge regime, the Extraordinary Chambers in the Courts of Cambodia (ECCC) is finally operational. The ECCC is located on the outskirts of Phnom Penh, the capital city of Cambodia.

Like the Special Court the ECCC is a hybrid tribunal that mixes international and domestic law. However, while the SCSL is neither fully nor part of the United Nations, the ECCC is considered a part of the Cambodian judicial system. Although the process of establishing the ECCC began in 1997, a settlement agreeable to both parties was difficult to reach due to the Cambodian government’s insistence that domestic judges retain a majority in the tribunal. In contrast, the UN desired a tribunal that would have a majority of international judges, a safeguard to potential political influence over the

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291 The Khmer Rouge Tribunal. Edited by John D. Ciorciari, Documentation Centre of Cambodia. 12.
293 For more information on the details of the ECCC, as well as updates on its progress, see the Court’s official website: http://www.eccc.gov.kh/english/default.aspx. (accessed on 2 March 2009).
decisions of the Court. The compromise that resulted in the creation of the ECCC allowed Cambodian judges to occupy a majority in the two chambers of the Court—the Trial Chamber and the Supreme Court Chamber. In turn, the UN was allowed to opt out of its role in the ECCC if corruption and government influence became apparent. The final agreement also mandated a ‘supermajority’ vote. Any decision made by the Chambers requires a majority of judges plus one. This provision ensures that at least one international judge supports Court decisions. Currently, the ECCC has five suspects in custody, all over the age of 66. The trial of the first defendant, Kiang Guek Eav (known as Duch), is in the pre-trial stage and is set to commence on the 30 March 2009.

Like the ICTR, the ECCC was implemented in the aftermath of conflict. However, the timing of the two (a month-long delay in the case of Rwanda and a decade-long delay in Cambodia), can hardly be equated. Like the ICTR and SCSL, the Extraordinary Chambers benefits from operating in the absence of conflict. However, the almost three-decade gap between the Khmer Rouge atrocities and the creation of the ECCC tempers these benefits. Thus, although I argue that structure of the ECCC proves

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297 The Trial Chamber is composed of three Cambodian judges and two international judges. The Supreme Court Chamber is composed of four Cambodian judges and three international judges. See the official website for further details on organization of the SCSL. Available at http://www.sc-sl.org/.


299 The supermajority vote is a preventative measure. It seeks to counter any political maneuverings on the part of the Cambodian judges (i.e.: purposeful delay of trials).

300 Not including Duch, those in custody include: Nuon Chea (82 yrs.) chief ideologue, Khieu Samphan (76 yrs.) head of state, Ieng Sary (82 yrs.) former foreign minister, Ieng Thirith (75 yrs.), member of the Khmer Rouge Central Committee.

most influential, timing also has influence on the Court’s effectiveness. Due to the time lag between the time when the atrocities were committed and the tribunal established, some of the most prominent members of the Khmer Rouge have died or are aged and suffering from health problems.\footnote{Extant literature on the ECCC raises the question of whether justice delivered three decades after mass violence can be productive. Is ‘late’ justice better than no justice? Most human rights organizations and many scholars believe that in the case of Cambodia, a tribunal, even one established so long after the atrocities occurred, is a necessary step toward societal reconciliation. For Cambodian attitudes toward the creation of a tribunal see the \textit{Human Rights Center Survey, supra} note 12.} Pol Pot, the leader of the Khmer Rouge regime, died in April 1999, and will not be facing posthumous prosecution.\footnote{Daphna Shraga, “The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions,” in \textit{Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia}, ed. Cesare P.R. Romano, Andre Nollkaemper, and Jann K. Kleffner (Oxford, UK: Oxford University Press, 2004) 17.} There are also concerns that important evidence in the three decades since the atrocities were committed. Despite these influences, the hybrid structure of the ECCC proves to be a greater influence on its effectiveness. The location of the Court, and its structure, in particular the provision ensuring that Cambodian judges maintain a majority in both the Trial Chamber and the Supreme Court Chamber, exercise the most influence on the effectiveness of the ECCC. In the next sections I assess the influences of location and structure on the ECCC’s ability to achieve its four objectives.

\textit{Individual criminal accountability}

The SCSL exists separate from the Sierra Leonean legal system. This does not hold true in the case of the ECCC, which is officially part of the domestic legal system of Cambodia. Ideally, this status would give Cambodians greater ownership over the Extraordinary Chambers’ proceedings. Thus far however, the decision to establish the ECCC as part of the domestic legal system may prove to be its greatest weakness. Undue political influence exerted by the Cambodian government is the primary concern in
bringing Khmer Rouge leaders to justice. The fact that Cambodian judges retain a
majority in the ECCC makes this concern even more powerful and valid. Evidence
gathered by human rights groups such as Human Rights Watch, as well as a report issued
by the Secretary-General indicate that corruption is widespread in the national judicial
system of Cambodian.304 The Cambodian judicial system, although officially independent
from government influence, continues to be under the control of executive powers.
Suzannah Linton observes, “the design [of the ECCC] is such that there is virtually
nothing that can be done…without the approval of the Royal Government of Cambodia,
directly or through those of its officials involved in the process.”305 This dangerous lack
of judicial independence seems likely to severely undermine the ECCC’s ability to
achieve its goal of individual accountability. If the Cambodian judges choose to exert
politically motivated influence on the Court proceedings, decisions handed down by the
ECCC will lose legitimacy.

Timing has different effects in the case of the ECCC than in the ICTR, but it is
clear that it continues to exert influence on the search for individual criminal
responsibility. The pursuit of individual accountability is hindered by the huge delay in
establishing the ECCC. The SCSL and ECCC were both established in the aftermath of
conflict. Yet, the timing of the ECCC may negatively influence its ability to achieve the
objective of individual criminal accountability. Abrams and Ratner explain the impact of
timing:

304 See: “Cambodia: Government Interferes in Khmer Rouge Tribunal,” Human Rights Watch, 5 December
tribunal, (accessed on 1 March 2009). See also: Report of the Secretary-General on Khmer Rouge Trials, at
305 Suzannah Linton, “Safeguarding the Independence and Impartiality of the Cambodian Extraordinary
the length of time since the events and the relative paucity of records maintained by the regime seriously hamper the development and credibility of evidence. Memories will have faded; appearances will have changed; much physical evidence will no longer be available; and many witnesses are likely to be dead, difficult to locate, or afraid to provide information.  

Due to the decades long gap between the Khmer Rouge regime and the creation of the ECCC, many of the most notorious perpetrators are dead or very old. The five perpetrators who have been charged are well into old-age, the foremost leader of the Khmer Rouge, Pol Pot, is deceased, and many thousands of participants in the killings will not be brought to trial.

**Rule of law**

Early in the process a United Nations Group of Experts, responsible for investigating the need for a tribunal, concluded that “the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for the process.” The hope that a hybridized judicial organ such as the ECCC can contribute to strengthening the future of the Cambodian judicial system has not yet been realized. The potential benefits of the ECCC’s location and mixed composition are overshadowed by the many challenges these factors present. If the ECCC is to achieve its objective of rule of law, it must first overcome a corrupt and inefficient national judicial system. Due to the fact that Cambodian judges retain the majority in both of the ECCC’s chambers, there is a danger that the structure of the Court will obstruct its ability to augment the national judicial system.

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In October 2005, the Special Representative of the Secretary-General for Human Rights in Cambodia reported that the “[t]he judiciary continued to be subject to executive interference and open to corruption.”

As in the case of the SCSL, there is hope that the ECCC will help alleviate some of the problems plaguing the national judiciary. Sarah Williams states,

The deployment of international judges and personnel may help to improve the population’s perception of the independence of the judiciary, while creating a small body of Cambodian judges and personnel that have had experience both in operating within an independent and impartial environment and in applying international legal standards.

Unfortunately, there is little chance of the ECCC contributing to capacity building and judicial training if corruption is rampant in the national legal system. The location of the ECCC means that the Cambodian government has easier access to judges involved in the process. Additionally, it is not yet apparent that Prime Minister Hun Sen, a former mid-level member of the Khmer Rouge, is truly committed to the success of the ECCC.

Government resistance to the Court could severely undermine its ability to achieve a justice that is deemed legitimate and impartial. The case of Cambodia exhibits the danger of establishing mixed composition tribunals when the domestic judiciary suffers from widespread corruption, inefficiency and/or training.

The ECCC is not yet far enough along in the process to know if the corruption within the judicial system will be solved by the interaction between national and

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310 Lieberman, “Salvaging the Remains”, 167-9. No evidence has been produced that implicates President Hun Sen as a direct participant in the atrocities carried out by the Khmer Rouge regime.
international judges or if the corruption will lead to trials that will be perceived as illegitimate and biased.

**Creation and distribution of historical record**

In light of the challenges presented by the structure of the Extraordinary Chambers, the ECCC’s greatest achievement may be its ability to reveal the violent history of Cambodia—a history that is rarely taught in schools, and that many young people are almost entirely unaware of.\(^{311}\) A recent publication by the Documentation Centre of Cambodia explains the potential benefits of the ECCC trials. The report states, “Hearing perpetrators, eyewitnesses, experts, and court officials elaborate upon the reasons for the atrocities will help Cambodian survivors achieve a greater degree of historical and personal closure”.\(^{312}\) The benefits of locating the ECCC in Cambodia mirror those experienced by the SCSL. Proximity to the affected population is important for the creation of an historical record that is accessible to a general audience. There are also hopes that locating the ECCC in Cambodia will confer some manner of legitimacy on the Court. Tara Urs notes however, that proximity does not necessarily lead to perceived legitimacy.\(^{313}\)

**Deterrence**

The ECCC has only recently started proceedings and thus it is too early to fully judge the deterrent effect of the tribunal. Interestingly, timing seems the most likely factor to influence the ECCC’s ability to achieve its objective of deterrence. The Documentation Centre of Cambodia notes that the significant time gap between the

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Khmer Rouge regime and the establishment of the ECCC may undermine any potential deterrent effect.

The ECCC is just beginning its proceedings and thus fully formed conclusions are difficult to make at this stage in the process. Yet, even before the Extraordinary Chambers became operational, concerns were raised about its structure and composition. The greatest impediment to the effectiveness of the ECCC is the possibility of government influence over the trials. Trials have only recently begun and there is already well-founded suspicion that the Cambodian government will attempt to intervene in the Court’s decisions. The composition of the court is such that Cambodian judges have the majority. This is concerning given reports that the domestic judicial system is weakened by corruption and inefficiency.

Conclusion

The brief case studies of the SCSL and ECCC do not fully engage with all the issues surrounding hybrid tribunals. Nevertheless, even a cursory case study reveals that the complexities of international criminal justice are far from resolved. There are high hopes within parts of the human rights community that hybrid tribunals will offer a new and improved approach to the prosecution of mass human rights violations. Whereas the distant locations of the ICTY and ICTR impeded their ability to adequately inform the affected population of ongoing proceedings and new developments, the hybrid tribunals’ proximity to the scene of the crime may help boost the legitimacy of the justice rendered.

Although structure certainly presented problems for the operations of the ICTY and ICTR, it was not the major factor that impacted its successes and failures. The brief study of the hybrid courts in Sierra Leone and Cambodia demonstrate that the structure of
prosecutorial accountability mechanisms, particularly its mixture of international and domestic judges, greatly influences the courts’ effectiveness. The SCSL and ECCC have the potential to represent a new type of tribunal that is more cost efficient, less bureaucratic, and more connected to the population most affected by the crimes the courts seek to prosecute, than the international tribunals that preceded them. It is clear however, that hybrid tribunals do not solve all the weaknesses associated with the ICTY and ICTR.
CONCLUSION

The 20th century witnessed multiple occurrences of mass human rights violations, most notably the Holocaust. As evidenced by the mass violence in Sudan and the Democratic Republic of the Congo, the 21st century has not ushered in an era in which human rights are universally protected. Nevertheless, restorative and retributive justice is being pursued through numerous types of accountability mechanisms. This project focuses on prosecutorial accountability mechanisms, and emerges from scholarly developments in the field of human rights, international criminal justice, and retributive justice. Pursuing justice for mass violations of human rights presents multiple challenges. Thus far, the ‘perfect’ justice mechanism does not exist. Due to the many weaknesses of the prosecutorial accountability mechanisms employed in the past, the search for an effective tribunal must continue.

A truly effective tribunal must achieve the four objectives of prosecutorial accountability mechanisms. These are: 1) to pursue individual criminal accountability; 2) to re-establish rule of law; 3) to create and distribute an accurate historical record; and 4) to deter future atrocities from being committed. These objectives are central to the pursuit of justice in the wake of mass human rights violations. Pursuing justice is not an easy task however. Tribunals confront numerous challenges, and in order to achieve the four objectives they must be able to do the following: initiate preliminary investigations, collect evidence, gather witness testimony, apprehend suspects, access the most affected population, disable institutions that contributed to the perpetration of atrocities, support or augment the domestic legal system, and hold fair and efficient trials. In order for a tribunal to effectively conduct these activities, it must employ judges, translators,
prosecutors, defense lawyers, others. This staff must be competent and well trained. Effective tribunals must also have sufficient funding and resources to conduct investigations, apprehend and extradite suspects, and pay staff and personnel. The demands on tribunals charged with prosecuting individuals for human rights violations are abundant, and the pursuit of justice is difficult in all circumstances.

Multiple factors influence the overall effectiveness of a tribunal. This project develops from the desire to fill a gap in the literature on human rights, justice mechanisms, and retributive justice. Scholarship in these fields tends to overlook the significant impact that active conflict has on a tribunal’s effectiveness. In this project, I conducted in-depth studies of the ICTY and ICTR and brief case studies of the hybrid tribunals in Sierra Leone and Cambodia. The case studies of the ICTY and ICTR demonstrate how the circumstance in which a tribunal is implemented influences its ability to achieve certain of the four objectives. The case studies of the Special Court in Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia are examples of a new type of tribunal, the structure of which offers a potential salve to some of the weaknesses of the ad hoc international tribunals that preceded them. My findings for each of the case studies are presented below.

**ICTY case study**

In the case of the ICTY, the ongoing conflict in the territories of the former Yugoslavia disrupted the Tribunal’s ability to achieve the four objectives. Even before the ICTY was officially created, the conflict raging in the former Yugoslavia prompted a debate on the seemingly incompatible goals of peace and justice. Specifically, the ongoing conflict and continuing atrocities negatively influenced the ICTY’s ability to
conduct the following activities: initiate investigations, locate and collect evidence, gather witness testimony, and effectively distribute information on the Tribunal. The ongoing conflict also dictated the location of the Tribunal. Due to the destruction wrought by the conflict and the lack of security, the UN Security Council decided to base the ICTY in The Hague. All of these complications significantly impacted the overall effectiveness of the ICTY. Ultimately, the case study of the ICTY helped illustrate how the presence of conflict influenced its ability to achieve its objectives and maximize its overall effectiveness.

ICTR case study

The ICTR was implemented in the aftermath of mass violence. Thus, the Rwanda Tribunal provides a case through which to determine how absence of conflict influenced the ICTR’s effectiveness. The delayed timing of the ICTR was significant in that it allowed for certain conditions to arise that proved favorable to the ICTR’s operations. The absence of conflict allowed for the following: the installation of a new and stable government, increased security for tribunal staff and personnel, and better access to evidence and witnesses. The case of the ICTR demonstrates that its establishment in the absence of conflict, allowed it to avoid some of the obstacles confronted by its sister tribunal in the former Yugoslavia. The conditions that arose due to the absence of conflict specifically facilitated the ICTR’s ability to pursue individual accountability and re-establish the rule of law.

The ICTR benefited greatly from the existence of the RPF government. The government’s control over the military and political affairs in the country eased the ICTR’s ability to conduct investigations, collect evidence, and apprehend perpetrators.
When the RPF successfully deposed the Hutu-extremist government, they also removed from office and arrested numerous high-level officials involved in the genocide. This was a boon to the ICTR, because the task of re-establishing rule of law was significantly diminished due to the RPF’s actions. The ICTR’s establishment in the absence of conflict helped it succeed in certain respects. However, the timing of the ICTR did not alleviate all the problems apparent in the ICTY.

Even in the absence of conflict, the Rwanda Tribunal was far from perfect. The main obstacle to the ICTR’s ability to create and distribute an historical record resulted from the decision to base the ICTR’s operations from Arusha, Tanzania. Although the distance between Rwandan citizens and the Tribunal was less than the distance between the population in the former Yugoslavia and The Hague, its removed proved to be a negative influence. Lack of engagement with the most affected population impeded the overall effectiveness of the Rwanda Tribunal. Additionally, like the Yugoslav Tribunal before it, the Rwanda Tribunal failed to have any discernable effect on deterring future crimes in the region and the world. The findings prompted by the ICTR indicate that although the timing of a tribunal is significant in some ways, it does not alleviate all the weaknesses of the ad hoc international criminal tribunals. Due to the many imperfections of the ICTR, I suggest that the newest form of tribunal, hybrid tribunals, provide the next best chance for improving the effectiveness of prosecutorial accountability mechanisms.

SCSL and ECCC case studies

The case studies of the ICTR and ICTY led me to conclude that the circumstances in which a tribunal operates influences its overall effectiveness. However, the ICTR demonstrated that even in the absence of conflict, the Tribunal was unable to fully
succeed in achieving its objectives. The ICTY and ICTR are the only ad hoc international criminal tribunals in existence, and thus my findings must be kept up-to-date on the newest developments in prosecutorial accountability mechanisms. Hybrid tribunals represent the newest development. Due to the fact that the timing of the ICTR did not solve all problems, it is beneficial to examine how a different factor, structure, affects a tribunal’s ability to achieve its four objectives. For this reason, this project concluded with brief case studies of the hybrid tribunals in Sierra Leone and Cambodia.

These two tribunals are similar to the ICTR in that they both were established in the aftermath of mass violence. This similarity allowed me to examine how the hybrid structure of the SCSL and ECCC influences effectiveness. Two elements of the hybrid structure were particularly influential on both tribunals’ ability to achieve their objectives. These are: the location of the tribunals, and the mixed composition of the tribunals. First, all existing hybrid tribunals are located in the country in which the crimes to be prosecuted, were committed. The case studies of the SCSL and ECCC indicate that this proximity to the most affected population may prove beneficial in their ability to achieve two objectives in particular—the creation and dissemination of an accurate historical record, and the deterrence of future atrocities. Second, the case studies show that the mixed composition of hybrid tribunals allows for interaction and cooperation between domestic and foreign judges. This could prove advantageous to augmenting the domestic judicial systems in Sierra Leone and Cambodia. The potential benefits of proximity and mixed composition may prove helpful in developing future tribunals that improve upon the ICTR.
The case study of The Special Court in Sierra Leone demonstrates that its hybrid structure positively influences its ability to conduct the following activities: collect evidence, gather witness testimony, and engage with and educate the Sierra Leonean people. Thus, the SCSL has had the most success in the creation and distribution of an accurate historical record. Unfortunately, the hybrid structure has also hindered the SCSL’s ability to fully achieve individual criminal accountability. As a hybrid tribunal, the SCSL does not enjoy Chapter VII powers, nor does it receive sufficient funding. The lack of Chapter VII powers has negatively affected its ability to apprehend perpetrators or demand that third party countries extradite suspects to be tried in the Special Court. Insufficient funding also restricts the resources available to the SCSL and damages the likelihood of prosecuting the maximum number of people. The SCSL’s staff, although ostensibly composed of a mixture of domestic and international personnel, is in actuality dominated by foreign staff members. There is a lack of well-trained Sierra Leonean judges and prosecutors.

The Extraordinary Chambers in the Courts of Cambodia was established over three decades after the crimes it seeks to prosecute. Similar to the SCSL and ICTR, the ECCC was established after conflict. However, whereas the cases of the ICTR and SCSL demonstrate that post-conflict tribunals enjoy certain benefits, the ECCC indicates that these benefits are tempered when there is a significant delay between when the relevant crimes occurred and when the tribunal was established. In the case of the Extraordinary Chambers, the delayed timing particularly influences its ability to achieve the objective of individual criminal accountability. With such a large passage of time between the crimes of the Khmer Rouge and the establishment of the ECCC, evidence is invariably
lost and witnesses and perpetrators have died. However, while timing did influence the ECCC’s ability to achieve the first objective, the remaining three objectives were more greatly influenced by its hybrid structure. The ECCC only recently commenced its first trial, but the case study demonstrates that the mixed composition of the tribunal and its location pose benefits and drawbacks to the effectiveness of the ECCC. First, the mixed composition of the ECCC is such that Cambodian judges retain a majority in both chambers. Concerns have been raised about the independence of the Cambodian judges—how much influence does the Cambodian government have on their decisions? Despite this worry however, certain provisions such as the ‘supermajority’ vote requirement may ease concerns. Second, the case study of the ECCC demonstrates that by locating the tribunal in Cambodia, the Cambodian people have greater ownership over the proceedings. I argue that its hybrid structure, particularly the element of location, may facilitate the ECCC’s ability to create and distribute an accurate historical record to the Cambodian people.

Implications of findings

This project is significant for two main reasons. First, this project explores the effectiveness of prosecutorial accountability mechanisms from a previously inadequately studied angle. In this project I asked two principal questions: 1) How does implementing a tribunal during conflict influence its ability to achieve its objectives? 2) How does implementing a tribunal after a conflict has ended influence its ability to achieve its objectives? My findings, summarized above, are based on deep case studies of the ICTY and the ICTR. These two tribunals were both established in the early 1990s, in response

to mass human rights violations, by the UN Security Council. Despite these similarities however, the ICTY was implemented in ongoing conflict and the ICTR was implemented in the aftermath of conflict. This project sought to explain the influence that these circumstances had on the tribunals’ effectiveness. Second, the case studies conducted in this paper contribute to the existing literature on tribunals and international criminal justice. The two major case studies of the Yugoslav Tribunal and the Rwanda Tribunal include in-depth analysis of its four objectives. These case studies will hopefully serve as a resource for other scholars interested in pursuing studies that examine the effectiveness of existing accountability mechanisms. My specific focus on timing provides an alternative lens through which to assess existing tribunals.

This project has practical implications for the development of future accountability mechanisms. With the entry into force of the ICC, it is likely that indictments will be more frequently issued during ongoing conflict. It is essential that scholars and policy-makers alike understand the implications that timing has on the effectiveness of the judicial organ. This project’s analysis of how presence and absence of conflict influence a tribunals’ ability to achieve its objectives, helps build the foundation upon which other studies can be conducted. Additionally, all four case studies revealed some of the strengths and weaknesses of each tribunal. In order to create more effective and efficient tribunals in the future, we must first understand the source of a tribunal’s shortcomings. This project suggests that the circumstance, in which a tribunal is implemented, is one such source.

This project does not merely contribute to existing scholarship; it also raises important moral questions about the implications of implementing accountability
mechanisms for mass human rights violations. My paper argues that ongoing conflict and continued atrocities hinders a tribunal’s ability to achieve its objectives. This raises a troubling dilemma: if there is sufficient evidence of mass human rights violations and there is the political will to implement a tribunal, must an accountability mechanisms be established even if it may achieve less due to the ongoing violence? If tribunals are not implemented until atrocities have ceased, by which time many thousands of people will have been murdered, raped, and tortured, then prosecutorial mechanisms and the fight to enforce human rights may be de-legitimized. This is a serious consideration that cannot be ignored. The factors that influence the effectiveness of tribunals must be examined and understood. But in the search for a more efficient and effective tribunal, we cannot lose sight of the human beings for whom justice is pursued.

International judicial organs such as the tribunals examined in this project, are immensely complicated and must contend with the interaction of numerous factors. The development and use of new forms of accountability mechanism depends upon our knowledge of those in existence today. None of the tribunals in Rwanda, the former Yugoslavia, Sierra Leone, and Cambodia are without faults. However, they are also not without promise. Understanding the influence of timing is one important step toward the establishment of a truly effective prosecutorial accountability mechanism for mass human rights violations.


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