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PART I

INTRODUCTION

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1

International War Crimes Tribunals and the Politics of State Cooperation

1.1 Prologue: Survivors and Suspects

On the morning of Friday, June 7, 2002, security officers working for the United Nations war crimes tribunal in Rwanda gathered several survivors of the 1994 genocide and brought them quietly to the airport on the outskirts of the capital, Kigali. The group of survivors – mostly poor Tutsi peasants – was set to board a UN plane for the two-hour flight that crosses the vast expanse of Lake Victoria en route to the tribunal's courtrooms in Arusha, Tanzania. The survivors had been chosen to testify for the prosecution in two trials of Hutu genocide suspects at the international court.

Moving witnesses from the green hills of Rwanda to the windowless courtrooms in Arusha some 400 miles to the east had become routine in the six and a half years since trials first began at the UN war crimes tribunal. But as the events of that day and the next few months would illustrate, the tribunal's existence depended on carrying out the seldom-noticed task of taking witnesses out of the country and, most importantly, on the willingness of the Rwandan government to permit it to do so.

When the tribunal's security officers escorted the survivors to the airport, the officers were stunned to learn that the Tutsi-led Rwandan government had just instituted travel restrictions that blocked the Tutsi prosecution witnesses from traveling to Arusha to testify against Hutu suspects on trial for genocide. Without witnesses to take the stand, tribunal judges were forced to adjourn two scheduled trials. The wheels of international justice ground to an abrupt halt until August, when the Rwandan government finally allowed witnesses to travel to the tribunal. The ease with which the government could jeopardize this new experiment in international law underscored the tribunal's lack of enforcement powers and the court's dependence on state cooperation for the functioning of its legal process.

While state cooperation with the ad hoc International Criminal Tribunal for Rwanda (ICTR) worsened during 2002, prospects for state cooperation steadily

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improved for its sister tribunal in The Hague, the International Criminal Tribunal for the Former Yugoslavia (ICTY). After years of showing no inclination to cooperate with an institution that targeted its political and military leaders as well as those of its Bosnian Serb allies, the Serbian government changed course and turned over some high-level suspects to the tribunal. The Croatian government, which had provided only limited assistance to the tribunal during the 1990s, also began to ease its resistance to the ICTY.

The start of the Slobodan Milošević trial in February 2002 was dramatic proof that the ICTY could induce cooperation from the once obstinate states of the Balkans. Milošević's refusal to recognize the tribunal's legitimacy notwithstanding, the former Serbian president was actually in the dock facing charges of war crimes, crimes against humanity, and genocide during the Balkan wars of the 1990s. Back home in Belgrade, top Milošević allies indicted by the court found it increasingly difficult to escape the widening reach of The Hague tribunal. Just a year before, indicted war crimes suspects went about their political or military business as usual, flaunting their visibility in Belgrade's finest restaurants. But by 2002, many of these suspects had gone underground, afraid that the once protective Serbian regime would arrest them. One top indicted war criminal, former minister of internal affairs Vlajko Stojilijković, made a defiant last stand against The Hague, preferring martyrdom to surrender. In April 2002, Stojilijković shot himself on the steps of the Federal parliament building in downtown Belgrade to protest the parliament's decision to pass a law designed to speed the arrest and transfer of Serbian war crimes suspects to the ICTY. Such suicidal protest was one more indication that the tribunal was gradually gaining the upper hand in its battle for state cooperation.

1.2 Key Questions and Central Issues

The rise of state cooperation in the Balkans and its decline in Rwanda indicate a surprising reversal of fortune for the two tribunals. What explains these shifts in state cooperation with the international courts? What accounts for the Rwandan government's initial support of the ICTR, and the Serbian and Croatian governments' previous opposition to the ICTY? The principal objective of this book is to address these questions by determining the conditions under which Rwanda and the states of the former Yugoslavia cooperate with the international war crimes tribunals. Specifically, this book examines the issue of state cooperation with the tribunals in its most difficult circumstance – when war crimes suspects belong to a government's own ethnic, national, or political group.

By many accounts, the turn of the twenty-first century ushered in a golden age for international human rights.[1] By the end of the twentieth century, the norm

[1] Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 1999); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998).

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of international justice had grown in remarkable ways, as seen in the establishment over the previous five decades of numerous international conventions and treaties outlawing human rights abuses.[2] In the 1990s, the creation of the UN International Criminal Tribunals for the Former Yugoslavia and Rwanda,[3] the passage of the Rome Statute that led to the creation of the International Criminal Court (ICC), and the use of universal jurisdiction to attempt to prosecute former Chilean dictator Augusto Pinochet and former Chadian dictator Hissène Habré signaled a sea change in the global expansion of the principle of accountability. More than codifying new elements of international humanitarian law, legal institutions have actually been created to hold suspects criminally accountable for their involvement in atrocities. To tribunal advocates, these new institutions represent the zenith of the international human rights movement. With such institutions in place, getting away with mass murder would no longer be the norm but the exception.

Whether these new judicial institutions will actually be effective depends ultimately on whether they can obtain and sustain the state cooperation needed to carry out investigations, locate witnesses, and bring suspects to trial. The striking scene on the airport tarmac in Kigali shows how much tribunals must look to the targeted states because it is these states that often control the most vital aspects of cooperation.

The framers of the ICTY and ICTR were well aware of the need for state cooperation and for safeguarding the courts against being manipulated to serve states' political agendas. Indeed, independence and insulation from external pressure lie at the core of the tribunals' mission to deliver justice fairly and impartially. It was believed that the tribunals' international makeup, their legal professionalism, and location far from the scene of conflict (The Hague for the ICTY and Arusha, Tanzania, for the ICTR) ensured their neutrality and protection from the lures of political expediency.[4] Nationals from the countries in which war crimes took place have so far been excluded from serving as judges, and usually also as prosecutors and administrators, at the ICTY and ICTR.[5]

[2] W. Michael Reisman and Chris T. Antoniou, *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict* (New York: Vintage Books, 1994).

[3] The Security Council established both the ICTY and ICTR by invoking its Chapter VII powers, granted under the UN Charter, to respond to threats to international peace and security. The Security Council voted to create the ICTY in May 1993 and the ICTR in November 1994. See Security Council Resolution 827, adopted May 25, 1993, and Security Council Resolution 955, adopted November 8, 1994.

[4] Nevertheless, as will be discussed, the tribunals have come under heavy fire in Rwanda and in the Balkans for being too remote and unaccountable to local communities. Such criticism has been a major factor in the ICTR and ICTY's decision to launch "outreach programs" designed to close the geographical gap between the tribunals and Rwanda and the former Yugoslavia as well as the decision to locate the Sierra Leone tribunal in the capital of that West African country.

[5] This stands in contrast to the more recently created "hybrid" tribunals in Sierra Leone, East Timor, and Cambodia that provide for domestic judges and prosecutors to work alongside their international counterparts.

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By acting outside the cauldron of domestic politics, the tribunals' international judges and prosecutors would uphold the law and not fall victim to the political forces that have characteristically undermined the legitimacy of domestic war crimes trials in deeply divided societies. Independence was also essential to realize other elements of the tribunals' mission, such as creating an accurate historical record of wartime atrocities and contributing to reconciliation and societal healing. Tribunals controlled by one or more states could not be counted on to deliver credible truth and lasting justice. To achieve these goals and protect the tribunals' autonomy, the UN Security Council granted the ICTY and ICTR legal primacy to trump state sovereignty and demand full and immediate cooperation from all UN member states, particularly targeted states.

The principle of neutrality stands in sharp contrast to the form of justice meted out by the victorious Allied powers in the Nuremberg and Tokyo military tribunals. Despite their jurisprudential precedents, the Nuremberg and Tokyo tribunals continue to be plagued by the criticism of "victor's justice" since only the vanquished Axis powers were punished for their atrocities. In contrast to these World War II-era tribunals, the ICTY and ICTR were given a mandate by the Security Council to prosecute serious violations of international humanitarian law regardless of whether the suspects came from the winning side or the losing side of an armed conflict. But withholding cooperation can give states power to turn the tribunals into vehicles for the political interests of the targeted state. These ad hoc tribunals can effectively become victor's courts insofar as the winners of a conflict may be able to control a tribunal's prosecutorial agenda. By the same token, the losers of a conflict may be able to control the courts by blocking investigations and prosecution of their nationals.

Rwanda and the states of the former Yugoslavia are not the only actors that seek to exert political control over these courts. In many circumstances, powerful international actors such as the United States, the European Union (EU), and NATO may effectively direct the tribunals. It is precisely this charge that was strategically leveled against the ICTY, most notably by Slobodan Milošević in his courtroom tirades. Under the broad cover of UN principles that created the tribunals – especially territorial and temporal jurisdiction and the type of human rights abuses to be prosecuted – international actors may take it as their prerogative to influence who is eligible for indictment and prosecution. Not unlike the targeted states, international actors may also hamper investigations and block indictments by withholding valuable evidence in their possession.

The courtroom has taken center stage in many scholarly analyses of international war crimes tribunals. But beyond the courtroom are political dramas largely hidden from both public view and scholarship that are crucial in determining the level of state cooperation and in shaping the dynamics and outcomes of the trials taking place in The Hague and in Arusha. This book focuses on two levels of such political activity beyond the courtroom: first, the political struggles and negotiations *between* tribunal, state, and powerful international community actors that occur prior to as well as during the courtroom trials; second, the political struggles and negotiations *within* states.

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Embedded in these two levels of analysis is the crucial but understudied question of the power of international tribunals to influence targeted states to cooperate with war crimes prosecutions. Although the tribunals are often constrained, indeed even undermined, by the greater power of the international community and targeted states, at key junctures the tribunals have successfully developed and utilized a range of strategies in their struggle for cooperation with these actors. The tribunals have no enforcement power of their own. But they do have "soft power" – the capacity to affect change in the behavior of external actors by a multiplicity of strategies that do not depend on actual enforcement. Joseph S. Nye, Jr., who coined the term, defines "soft power" as the capacity for a state or institution to get what it wants "through attraction rather than coercion or payments."[6] Tribunals do not have the luxury of choosing coercion and payment over attraction. They have only the soft power of attraction. This type of power takes its force from legitimacy and moral authority. At least in theory, the UN tribunals possess a great deal of soft power because of their moral claim to being the ultimate judicial guardians of universal standards of human rights.

In reality, tribunals cannot afford to take their moral authority for granted because the actual practice of international justice often falls short of its idealistic goals. The real and perceived failings of the tribunals leave them vulnerable to attack from targeted states seeking to thwart prosecutions. Thus the soft power of the tribunals is not unalterable, but fluctuates with their standing among different international and domestic actors. To a significant degree, a tribunal shapes its reputation and in turn its soft power by the efficacy of its policies and practices as well as by the skill with which it markets itself.[7]

A core argument of this book is that the ICTY has been able to exercise its soft power more effectively than the ICTR because of the ICTY's greater success in completing trials, maintaining professionalism in court operations, and obtaining frequent and favorable international press coverage. By contrast, the ICTR has been beleaguered by a series of administrative scandals, the slow pace of trials, and negative media coverage that have undermined its reputation as well as its capacity to persuade international actors to intervene on its behalf when the Rwandan government withholds cooperation. However, just because the ICTY has wielded more soft power than the ICTR does not guarantee that the former's power will not deteriorate or that the latter's power will not grow. Failure to produce results in the crucial dimension of completed trials can deal a

[6] Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004), p. x. In his book, Nye focuses on the need for U.S. leaders in the post-September 11 era to develop soft power strategies as a complement to traditional hard power strategies such as the use of military force. Although Nye does not consider the potential of international war crimes tribunals to develop and wield soft power, he briefly discusses the ways in which the UN can cultivate this resource. According to Nye, the UN has a reservoir of soft power because of its "universality" and "legal framework" (p. 14).

[7] This point about the role of marketing is drawn from Clifford Bob, *The Marketing of Rebellion: Insurgents, Media, and International Activism* (Cambridge: Cambridge University Press, 2005).

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blow to a tribunal's legitimacy and its diplomatic leverage. This may be particularly true when a tribunal fails to reach closure in the prosecution of its most important suspects. A case in point is the death of Slobodan Milošević in March 2006, just weeks away from the end of his more-than-four-year-long trial and amid revelations of lax tribunal procedures regarding his medical treatment while in custody.

This book's attention to the strategic actions of tribunals poses a challenge to realists who contend that international law and international legal institutions have no independent power to influence events, being merely creatures of their international creators. But by virtue of their capacity to craft strategies aimed at prodding targeted states to cooperate and international actors to intervene on the tribunals' behalf, tribunals matter more than realists have recognized. Still, that the tribunals can act in this way does not necessarily mean they will be free to do so or that each tribunal will do so in the same way or to the same extent. The comparative nature of this book highlights the variation in each tribunal's approach to the cooperation problem. The case-study chapters will demonstrate how and why the ICTY has been much more successful than the ICTR in developing effective strategies for state cooperation.

Just as it challenges realists, this book also challenges human rights champions of the tribunals. Their understanding of the tribunals as strategic actors is often skewed by an idealistic outlook that views the tribunals as engaged in a virtuous battle to save international justice and expand its global reach. This perspective is particularly evident in the Western media's portraits of the tribunal chief prosecutor as a dogged and courageous crime fighter who brooks no compromise in the pursuit of justice.[8] A major weakness of this analysis lies in its narrow conception of what it means for tribunals to struggle with targeted states and the international community for cooperation. To be sure, human rights advocates do not inhabit a dream world where law alone governs international affairs and where international tribunals easily overcome the resistance of defiant states. But they often contend that the tribunals' capacity to alter the behavior of such states stems from the moral force of the tribunal's mission and legal authority. Left unacknowledged, perhaps out of a reasonable fear that such acknowledgment will undermine the tribunals' moral authority, is the fact that the tribunals' fight for cooperation is frequently driven by a legal and political calculus that involves bargaining with and concessions to recalcitrant states. Largely absent in the human rights literature is a recognition that the tribunals' lack of enforcement powers often compels them to act politically by negotiating with states to secure promises of cooperation or to forestall threats to disrupt cooperation altogether.

Tribunal officials and advocates also argue that international war crimes tribunals can ameliorate the political climate in countries recovering from mass

[8] For example, see Ed Vulliamy, "Avenging Angel," *The Observer*, March 4, 2001; Helena Kennedy, "The Grand Inquisitor," *The Guardian*, March 6, 2002; Elizabeth Rubin, "If Not Peace, Then Justice," *New York Times Magazine*, April 2, 2006.

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atrocity by reconciling former enemies, deterring new rounds of violence, and contributing to the development of a legal culture in which courts, not guns or machetes, resolve disputes. Faith in the transformative power of international law has cast the ICTY and ICTR (and ad hoc tribunals in Sierra Leone and East Timor and the International Criminal Court) not only as instruments of justice and morality but as indispensable tools for conflict resolution and prevention as well as nation-building. The long-term effects of the contemporary war crimes tribunals are, of course, not yet known. But the tribunals' short-term effects on targeted states – particularly in the Balkans – are not as benign as the human rights camp claims. This book challenges the inspiring Kantian vision of international law associated with human rights advocacy by highlighting the ways in which international tribunals may generate domestic crisis and threaten political stability. The domestic crises following tribunal indictments of top-level Serbian and Croatian military and political leaders have bitterly split governing coalitions, and during certain periods undermined the democratic transitions in Belgrade and Zagreb. While the ICTY has scored increasing success in compelling states to cooperate, these have at times been Pyrrhic victories that have undercut the tribunal's objective of contributing to domestic stability.

Finally, the book also disputes the claim that a state's decision to cooperate by handing over suspects to an international war crimes tribunal is proof of the growing legitimacy of tribunals and the universal acceptance of human rights norms. Behind such apparent state cooperation are layers of conflict and compromise. Even when state cooperation is forthcoming, stalwarts at home in the targeted states are unlikely to be swayed either by the value of international justice or by the state's responsibility for war crimes. In fact, state cooperation is all too frequently castigated at home as a violation of state sovereignty and a betrayal of the nation's honor.

1.3 Conceptual Framework

A. Between Tribunal, State, and International Community

The political interactions between tribunal, state, and international community are virtual trials of their own that determine a state's response to tribunal demands for cooperation. These interactions proceed over such matters as whether and how many nationals or members of a particular ethnic group will be indicted; how far up the political and military hierarchy will such indictments reach; and how many nationals of enemy nations or opposing ethnic or political groups will face indictment and prosecution. These virtual trials, which will also be called "trials of cooperation," are essential in establishing the level of cooperation the tribunals will ultimately receive from states and, consequently, the nature and outcome of the actual courtroom trials of individuals.

The idea of a trial of cooperation offers a conceptual framework that helps illuminate the features of the power struggles that occur between the ad hoc tribunals, the states of the former Yugoslavia and Rwanda, and influential international actors. Whereas the actual courtroom trials pit the prosecution

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against the individual defendant over war crimes charges, the trials of cooperation pit the tribunals against the state and state leaders over charges of obstruction of the tribunals' legal process. And whereas international jurists sit in judgment of indicted war criminals in the actual courtroom trial, powerful international players – such as the European Union, the United States, and the Security Council – sit in unofficial but influential judgment of states in the virtual trial. Through these trials of cooperation, the tribunals' original mandate to focus solely on determining individual guilt for the commission of war crimes broadens, in effect, into determining state guilt for obstruction of the legal process.

In their official statements and speeches, tribunal officials are often reluctant to acknowledge that such virtual trials exist, primarily to discourage the perception that the tribunals have moved away from their original focus on the guilt of individuals to casting blame on states. The raison d'être of the tribunals is to determine individual guilt and thereby prevent the imposition of collective blame that often demonizes groups and nations and fuels new cycles of violence. While insisting on the tribunals' legal right to obtain full state cooperation, tribunal officials often mute their adversarial rhetoric in the hope that state assistance to the tribunals will become a matter of voluntary cooperation rather than imposed compliance. The tribunals' strong preference for the word "cooperation" over the word "compliance" speaks to their abiding hope of winning universal acceptance and legitimacy. Still, states can become so openly intransigent that the tribunals will make public – to international forums such as the Security Council and the international media – these virtual trials in which states stand accused of obstructing justice by sheltering war criminals, hiding evidence, or blocking witness testimony.

These trials of cooperation, if "prosecuted" effectively by the tribunals, may increase the prospects of state compliance by subjecting the state's violation of international law to public exposure and condemnation. Without enforcement powers of their own, tribunals will often resort to techniques of persuasion – namely, shaming a recalcitrant state in the court of international public opinion. In lacking enforcement powers, tribunals are comparable to human rights organizations[9] that even more so must rely on adversarial strategies that brandish shaming. The Yugoslavia and Rwanda tribunals are different from human rights organizations because, at least formally, these tribunals are arms of the Security Council and have the legal right – granted under Chapter VII of the UN Charter – to call on the Council for enforcement of a state's obligation to cooperate with the tribunals.[10]

[9] For a discussion of the role of shaming by non-governmental organizations and transnational advocacy networks, see Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

[10] Key tribunal actors such as the chief prosecutor have employed strategies used by non-governmental organizations. This borrowing has been facilitated in part by the close collaboration between the tribunals and prominent NGOs such as Human Rights Watch. These

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A non-cooperative state does not usually remain passive in the face of the tribunal's attempt to "prosecute" it by shaming. If the tribunal's aim is to put the non-compliant state on virtual trial, the state's aim is to wage a strong defense directed at instilling reasonable doubt as to whether it has actually failed to cooperate or whether its non-cooperation is justified by extenuating circumstances. Bold defiance of the tribunal is not necessarily in a state's best interest. Governments frequently seek to obstruct the tribunals by cloaking their actions in the language of compliance. States attempt this strategic obstruction in a number of ways. First, states can seek to justify their non-compliance on the basis of "good-faith" reasons, such as the specter of domestic backlash and instability if top-level suspects hailed as national heroes are turned over to the tribunal. Second, states can claim that they will take responsibility for prosecuting war crimes suspects in domestic courts rather than sending them to an international tribunal. This becomes a way to present a cooperative posture, despite the fact that refusal to hand over suspects indicted by the ICTY and ICTR is a clear violation of international law because these UN tribunals enjoy legal primacy over domestic jurisdictions.[11] Third, states can claim that they are willing to arrest fugitives but they lack the capacity (for example, adequate intelligence and police) to locate fugitives on their territories. In these situations, states react defensively against tribunal accusations of non-compliance. But states can also go on the offensive and change the terms of the debate. States will often attempt to fight back by employing "counter-shaming," a process in which states try to delegitimize the tribunal by magnifying its shortcomings and mistakes.

All non-cooperative states try such counter-shaming campaigns and, as will be shown, some succeed more than others. The extent to which a non-cooperative state can effectively put the tribunal on the defensive by counter-shaming depends on the substance and presentation of the state's criticism of the tribunal's shortcomings and on the state's international standing. Belgrade's counter-shaming campaign against the ICTY, while resonating loudly in Serbia, often falls on deaf ears internationally. Since Serbia was the major culprit in the Balkan wars, the international community has usually dismissed or simply ignored Serbia's complaints about being the victim of tribunal prosecution and persecution. Furthermore, the ICTY's international reputation as a credible institution making significant progress toward its goals has grown considerably in the West since its establishment.

The Rwanda case offers a very different story about what occurs when a state tries to counter-shame a war crimes tribunal. The Tutsi-led Rwandan

organizations also play a vital role in supporting the tribunals' efforts to expose state non-compliance and to pressure states to provide cooperation. While I document the role of such organizations at certain points in the case-study chapters, it is not the focus of this book.

[11] Under the principle of concurrent jurisdiction, the ICTY and ICTR permit domestic courts in the former Yugoslavia and Rwanda to conduct war crimes trials. However, these states must defer to the ICTY and ICTR if the tribunals request the handover of suspects.

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