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Atrocities, Deterrence, and the Limits of International Justice

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David Wippman

Abstract

Unfortunately, the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption. Actual experience with efforts at deterrence is not encouraging. Before placing too much reliance on deterrence as a basis for supporting international criminal prosecutions, especially over possible alternatives such as truth and reconciliation commissions, we ought at least to consider carefully the obstacles to achieving effective deterrence.

ATROCITIES, DETERRENCE, AND THE LIMITS OF INTERNATIONAL JUSTICE

*David Wippman**

INTRODUCTION

Enthusiasm for international criminal prosecutions is running high. For advocates of peace through justice, the last decade of the twentieth century marks a turning point in international legal history comparable only to the Nuremberg and Tokyo trials of the 1940s. Many internationalists view the increased use of international criminal law, reflected in the Yugoslavia and Rwanda tribunals, the Pinochet proceedings, and the Rome agreement on a statute for a permanent international criminal court (or "ICC"), as the last, best hope for stemming the tidal wave of atrocities that all too frequently have marked both international and internal armed conflicts.

One of the principal arguments made in favor of international criminal prosecutions is that they can serve to deter the commission of future atrocities. This argument was regularly advanced as one of the main justifications for the creation of the International Criminal Tribunal for the Former Yugoslavia ("ICTY" or "Tribunal"). Unwilling in 1993 to take strong military action to control the bitter conflict then tearing Bosnia apart, the U.N. Security Council expressed its hope that the ICTY would "contribute to ensuring" that violations of international humanitarian law "are halted and effectively addressed."[1] Supporters of the Rome Statute of the International Criminal Court (or "ICC Statute") routinely urge ratification on deterrence grounds.[2] Similarly, the international human rights community enthusiastically embraced the initiation of criminal proceedings against General Augusto Pinochet in substantial part

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1. UN SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

2. UNITED NATIONS, DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT'L CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/CONF.183/9 (1998) (adopted by the United Nations on July 17, 1998) <http://www.un.org/icc> (visited Feb. 3, 2000) (on file with the *Fordham International Law Journal*) [hereinafter ICC Statute]; Gerard E. O'Connor, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 972 (1999).

because it hoped that other dictators in the making would witness Pinochet's plight and themselves avoid the criminal acts that made Pinochet subject to extradition for torture and related crimes in the first place.[3] With this in mind, some human rights organizations, Human Rights Watch in particular, are working to identify and seek prosecution of other "traveling tyrants."[4]

Of course, supporters of the ICTY, the ICC, and Pinochet-style prosecutions have many reasons other than deterrence on which to base their advocacy of international criminal prosecutions, including considerations of justice, respect for international law, retribution, avoidance of personal vengeance, de-legitimation of indicted war criminals as political leaders, and national reconciliation. But for many, deterrence is the most important justification, and the most important goal.

Unfortunately, the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption. Actual experience with efforts at deterrence is not encouraging. During the course of World War II, the Allies made the prosecution of German and Japanese leaders a major war aim. Beginning in 1941, the United States and the United Kingdom issued a series of highly publicized warnings that violations of the laws of war would be punished, and that superior orders would not be accepted as a defense.[5] Allied radio and press explicitly warned the German population that there would be criminal trials for "the systematic murder of the Jews of Europe."[6] Similarly, in the former Yugoslavia, the Security Council and various individual states repeatedly warned combatants that those committing atrocities would eventually be prosecuted. But, as Professor Theodor Meron has observed, "there is no empirical evidence of effective deterrence in either case."[7]

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3. *The Pinochet Decision*, HUMAN RIGHTS WATCH (visited Nov. 17, 1999) <http://www.hrw.org/campaigns/chile98/index.htm> (on file with the *Fordham International Law Journal*).

4. *See* Reed Brody, *One Year Later, the "Pinochet Precedent" Puts Tyrants on Notice*, BOSTON GLOBE, Oct. 14, 1999, at A19.

5. *See* Benjamin Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203 (1998); Theodor Meron, *From Nuremberg to the Hague*, 149 MIL. L. REV. 107, 110 (1995).

6. *See* Ferencz, *supra* note 5, at 210.

7. Meron, *supra* note 5, at 110; Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 744 (1999) (stating that Payam Akhavan, Legal

There are several possible responses to the apparent ineffectiveness of past and present war crimes prosecutions as a mechanism for deterring ongoing atrocities. First, although atrocities have continued following warnings of prosecution and, in the case of Yugoslavia, following actual prosecutions, it does not follow that the prosecutions have had no deterrent effect. There is at least modest anecdotal evidence to suggest that some individual actors in the former Yugoslavia have adhered more closely to the requirements of international humanitarian law than they would have otherwise, for fear of prosecution.[8] The fact that atrocities nonetheless persisted at high levels in the former Yugoslavia, even after the work of the ICTY began, shows only that the Tribunal's efforts have not succeeded in deterring enough perpetrators to make a visible impact on the course of events. Second, even if the existing level of prosecutions is inadequate for large-scale deterrence, it may be that more consistent prosecutions, comparable in frequency and consistency to prosecutions for similarly grave offenses in effective national legal systems, would deter the future commission of such crimes. This conclusion is drawn by Professor Theodor Meron, who argues that "[i]nstead of despairing over the prospects of deterrence, the international community should enhance the probability of punishment by encouraging prosecutions before the national courts, especially of third states, by making *ad hoc* Tribunals effective, and by establishing a vigorous, standing international criminal court."[9] Third, prosecutions might also serve an important signaling and educational function. As Payam Akhavan, Legal Advisor to the ICTY has argued, even if prosecutions fail to deter culpable individuals from committing further offenses in the course of ongoing conflicts, prosecutions might nonetheless reinforce the applicable international norms and contribute to the eventual, if admittedly distant, establishment of a political culture that regards the commission of atrocities as unacceptable.[10]

Each of these possible responses is plausible, and may be correct. But before placing too much reliance on deterrence as

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Advisor to Office of Prosecutor of International Criminal Tribunal for the Former Yugoslavia ("ICTY"), similarly notes that "the evidence of the tribunal's contribution to the deterrence of ongoing humanitarian law violations remains equivocal . . . .").

8. Akhavan, *supra* note 7, at 750-51.

9. Meron, *supra* note 5, at 110-11.

10. Akhavan, *supra* note 7, at 743-51.

a basis for supporting international criminal prosecutions, especially over possible alternatives such as truth and reconciliation commissions, we ought at least to consider carefully the obstacles to achieving effective deterrence.

I. *THE PROBLEMS OF SPECIFIC DETERRENCE*

As Akhavan notes, "[d]eterrence broadly defined is the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expression of disapproval."[11] Deterrence takes two forms. Specific deterrence refers to the capacity of a legal system to induce individual perpetrators not to commit additional crimes. General deterrence discourages "potential criminal behavior in society at large . . . ."[12]

Arguments of specific deterrence generally take the form of rational actor calculations. In brief, the assumption is that perpetrators confronted with the prospect of being held criminally accountable for acts in violation of international humanitarian law will avoid committing such acts to escape prosecution. The difficulties with such arguments are many.

Even if we assume that those committing atrocities engage in rational cost-benefit calculations (weighing the risk of prosecution against the personal and political gain of continued participation in ethnic cleansing and similar acts), most probably view the risk of prosecution as slight. As Professor Meron points out, criminal prosecutions for genocide, war crimes, and crimes against humanity are rare.[13] Unfortunately, that is true even with respect to former Yugoslavia, despite the establishment of the ICTY. To date, the ICTY has issued ninety-one public indictments, but has tried and sentenced only six individuals in the course of its six-year existence.[14] Despite the ICTY's many impressive achievements, these numbers are minuscule relative to the numbers of persons actually responsible for criminal violations of international humanitarian law. Worse, many of the most senior leaders to be indicted, including Slobodan Milosevic, Radovan Karadžić, and Ratko Mladić, remain at large.

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11. *Id.* at 741.

12. *Id.* at 746.

13. Meron, *supra* note 5, at 110.

14. *See* Fact Sheet, International Criminal Court for the Former Yugoslavia, (visited Nov. 17, 1999) <http://www.un.org/icty/glance/fact.htm/> (on file with the *Fordham International Law Journal*). Several other indictees have pleaded guilty.

For most offenders, especially low-ranking offenders, the risk of prosecution must appear to be almost the equivalent of losing the war crimes prosecution lottery. Against that modest risk must be placed the potential gain. Unattractive as it may be to think in such terms, some understanding of the motivation of those who commit war crimes and related offenses is essential to any consideration of deterrence.

In this regard, the recent survey conducted by the International Committee of the Red Cross ("ICRC") is illuminating, if depressing. The ICRC interviewed a significant cross-section of the population in six war-torn countries, in an effort to ascertain, among other things, why combatants violate international humanitarian law.[15] Some of those responsible for committing atrocities may have been a pathological criminal fringe, given license by civilian authorities to commit mayhem. But the vast majority of combatants in Bosnia were probably more or less representative of the civilian population of the communities from which they came. They understood in general terms the limits imposed on warfare by international humanitarian law. They accepted the legitimacy of such norms, and they believed that such norms should generally be followed. But at the same time, most did not view their own actions—even when they involved attacks on civilians—to be wrongful.[16]

In general, the survey suggests that many, perhaps most, Bosnians viewed the conflict in "total war" terms. The conflict "mobilized the whole of society," with remarkably high percentages serving as combatants or civilian support. Losses on all sides were high, and ethnic antagonism was rampant. As a result of the high degree of societal involvement in the conflict and the way in which the conflict was fought, "many people in Bosnia-Herzegovina [were] ready to accept that the line between combatants and civilians was blurred during wartime: they [were] prepared to attack populated villages and towns; wage war on civilian areas to hurt the enemy; plant landmines even at risk to civilians; and, where necessary, torture prisoners."[17]

When asked to explain why civilians were attacked, most of

15. International Committee of the Red Cross ("ICRC") Country Report on Bosnia-Herzegovina, (visited Jan. 25, 2000) <http://nt.oneworld.org/cfdocs/icrc/pages/reports/pdfs/bosnia.pdf> (on file with the *Fordham International Law Journal*).

16. *Id.* at 13.

17. *Id.* at 14.

those interviewed focused on "hatred of the other side . . . exacerbated by the belief that the other side [was] doing the same thing."[18] In addition, each side "viewed the conflict as a desperate struggle to defend its own community from attack," which "required suspending the limits" on warfare.[19] For many Bosnians, "[t]he perception that soldiers [were] defending the community from attack change[d] everything with regard to the rules of war."[20] For one's own soldiers (the "defenders"), as opposed to the other side's soldiers (the "aggressors"), "the rules would often have to be suspended."[21]

Conversely, because whole communities mobilized to fight this conflict, bringing "civilians and soldiers together in defense of their community," the conflict was viewed in a way that did not "permit a clear distinction" between civilians and soldiers.[22] Instead, it was easy for combatants to assimilate the two and treat both as legitimate targets.

In addition, foot soldiers in Bosnia had to factor their orders into their decision-making calculus. Many explained attacks on civilians as "mainly a reaction to someone else's design for the war."[23] In the context of the war, and particularly in the heat of battle, many soldiers did not feel that they could question their orders. Although superior orders do not constitute a defense to criminal charges under international law, they may be considered in mitigation of punishment. This notion reflects a societal understanding that those subject to orders are not free actors in the fullest sense. As social psychologist Stanley Milgram has observed, "[a]n act carried out under command is, psychologically, of a profoundly different character than action that is spontaneous. The person who, with inner conviction, loathes stealing, killing, and assault may find himself performing these acts with relative ease when commanded by authority."[24] Milgram explained this unfortunate response to authority as the result of "the fact that a person comes to view himself as the instrument for carrying out another person's wishes, and he therefore

18. *Id.*
19. *Id.*
20. *Id.* at 15.
21. *Id.*
22. *Id.* at 18.
23. *Id.* at 13.
24. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY xi (1974).

no longer regards himself as responsible for his actions."[25] The natural human tendency to obey authority is compounded by military training, propaganda vilifying members of the opposite community, a belief in the justice of one's cause, and the threat of penalties, including execution, for failure to comply with orders.[26]

When the various motivations for attacks on civilians are combined—the desire to defend one's community, hatred of the other side, a belief that civilians are essentially indistinguishable from combatants and therefore a threat, and directions from political and military leaders encouraging such attacks—it is not surprising that a slight risk of future prosecution will not have a major deterrent effect. Indeed, in a war of this type, it may be that even a significant risk of future prosecution will have relatively little impact.

The ICRC survey focuses on ordinary combatants and civilians. Accordingly, it does not shed any direct light on the motivations of the political leaders most responsible both for the outbreak of war in Bosnia and for the manner in which it was conducted. But most observers believe that indicted leaders such as Milosevic deliberately fostered inter-communal hostility and conflict as a means to secure and maintain political power and personal wealth. The extent to which such leaders believed in the ethnic stereotypes and communal goals they promoted is a subject of debate, but either way, it is clear that political leaders who utilized ethnic cleansing as state policy had strong incentives to do so.

Moreover, it appears that the leaders at issue viewed the risks of prosecution as relatively slim. While the issuance of indictments does seem to have undercut the political standing of some leaders in the aftermath of the Bosnian conflict, Karadžić and Mladić in particular, it is hard to discern any clear evidence that ICTY prosecutions or indictments deterred political leaders from continuing to pursue policies of ethnic cleansing. As noted above, atrocities continued apace in Bosnia well after the ICTY began its work. Similarly, even after Milosevic was indicted, forces under his control committed numerous atrocities in Kosovo despite frequent warnings by the ICTY, the Security

25. *Id.* at xii.
26. *Id.* at 181-82.

Council, and individual states that perpetrators would be held accountable.

It does not follow that the threat of prosecutions had no effect on military and political actors in the former Yugoslavia. Serb forces in Kosovo routinely wore black ski masks when engaged in ethnic cleansing;[27] as the prospect of NATO control over Kosovo loomed larger, Serb forces intensified efforts to conceal mass graves and hide evidence of criminal conduct.[28] But while this suggests some concern over the possibility of prosecutions, it is hard to conclude that this concern translated into actual deterrence except, perhaps, on a small-scale, sporadic, and idiosyncratic basis.

II. *ENHANCING SPECIFIC DETERRENCE THROUGH INCREASED PROSECUTIONS*

Some, including Professor Meron, conclude that the failure of deterrence in Bosnia and elsewhere stems from the lack of credibility associated with the warnings of punishment. In this view, deterrence has failed not because of any inherent difficulty associated with deterring atrocities in war but rather "because prosecutions for war crimes on both national and international planes are so exceptional that criminals do not believe that they are likely to be prosecuted and punished."[29] Thus, Professor Meron and others argue that the best approach to deterring future atrocities is to increase sharply the probability of prosecution through more frequent national and international trials. But this approach is fraught with difficulties.

It will rarely be possible to prosecute more than a representative sampling of those responsible for genocide, crimes against humanity, and war crimes. Even in the wake of the Holocaust, the Allies' enthusiasm for criminal prosecutions waned rapidly. Many senior German war criminals were considered too valuable to the Allies to prosecute; many others either escaped or were not pursued. Low-ranking offenders had even less to fear. As Adam Roberts notes, "[i]n the end, an implicit principle of Nu-

27. Raymond Whitaker & Andrew Marshall, *Massacre Ordered at Top Level in Belgrade, Says US*, INDEPENDENT, Jan. 29, 1999, at Title Page.

28. Ellen Knickmeyer, *Mass Graves Appear Endless in Kosovo. War Crimes Inspectors Move From Site to Site Gathering Evidence and Tallying Tales of Death*, INDIANAPOLIS STAR, June 23, 1999, at A4.

29. Meron, *supra* note 5, at 110.

remberg and Tokyo was to hold highly publicized trials of a few leaders primarily responsible for a process of criminality in which hundreds of thousands had in fact been culpable in one way or another."[30]

In Bosnia, as noted earlier, only a tiny percentage of those responsible for ethnic cleansing and other crimes are ever likely to face prosecution. The ICTY lacks the resources, the international political support, and the cooperation of key states and entities—Croatia, the Federal Republic of Yugoslavia, and the Republika Srpska—that would be needed for large-scale prosecutions. Recognizing this, the ICTY has concluded that it must make "difficult choices" about which of the "many culpable individuals in the former Yugoslavia should be brought to justice in The Hague."[31] The Tribunal has decided to focus its efforts on bringing to justice the political leaders who instigated the conflicts in the former Yugoslavia and who continue to impede the restoration of peace to the region.[32]

Unfortunately, the ICTY has made only limited progress in its efforts to prosecute senior indictees. In part, this stems from the lack of cooperation noted above; in part, it stems from western reluctance to disrupt implementation of the Dayton Accords by vigorously pursuing the arrest of Serb war criminals.[33] As a result, thirty-five publicly indicted war criminals remain at large, including the most senior leaders sought by the Tribunal.[34] The Tribunal's inability to prosecute either substantial numbers of lower-level war crimes suspects or any of the most senior figures responsible for ethnic cleansing sends at best a mixed message to those who might be inclined to engage in ethnic cleansing in the future.

The International Criminal Tribunal for Rwanda ("ICTR") faces even greater difficulties. Since its inception in 1994, the

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30. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 26-27 (1995).

31. Statement of ICTY President Gabrielle Kirk McDonald, Nov. 9, 1999 (on file with the author and the *Fordham International Law Journal*).

32. *Id.*

33. Walter Gary Sharp, Sr., *International Obligations To Search for and Arrest War Criminals: Government's Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411, 450-52 (1997).

34. Carol J. Williams, *Wheels of Justice Turn Slowly at Tribunal War Crimes: U.N. Panel's Record on Bringing Suspects to Trial Suggests 5 Latest Indictees May Remain Free*, L.A. TIMES, May 28, 1999, at A20.

ICTR has indicted forty-eight individuals, but has tried and sentenced only four.[35] The Rwandan government, noting the ICTR's paltry record of prosecutions, felt compelled to "register a vote of no confidence in the Tribunal," and openly questioned the deterrent effect of its work. In addition, the Rwandan Government has suggested that if the international community ultimately deemed the two existing war crimes tribunals ineffectual, it should reconsider its commitment to a permanent International Criminal Court, which might only amount to "a permanent version of a temporary failure . . . ."[36]

By contrast, as Rwanda's representative to the U.N. General Assembly has pointed out, Rwandan national courts have issued more than 20,000 indictments, held 1989 trials, and accepted 17,847 guilty pleas.[37] While this might seem to constitute the kind of effective national prosecutions necessary for deterrence, some of the *genocidaires* responsible for mass murder in 1994 nonetheless continue to perpetrate atrocities in Rwanda from staging areas in the Congo. Moreover, it's not at all clear that Rwanda's response to mass atrocities—the large-scale prosecutions generally sought by human rights advocates—is appealing from a human rights standpoint. Rwanda's legal system was shattered by the 1994 genocide. Its current efforts to prosecute tens of thousands of suspects—some 100,000 Rwandans are in custody in overcrowded, makeshift facilities[38]—clearly strain the legal system's capacity to treat prisoners decently and to provide even the minimum requisites of due process. But Rwanda wishes to go further. It is currently working to revive a traditional system of local ("gacaca") courts, which would be given authority to prosecute low-level offenders.[39] To staff such courts, Rwanda hopes to select enough judges to conduct public trials before local communities.[40] Such a system, if implemented, raises obvious due process concerns.

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35. *The Tribunal at a Glance,* (visited Nov. 17, 1999) <http://www.ictr.org/ENGLISH/factsheets/factshee.htm> (on file with the *Fordham International Law Journal*). One other indictee has pleaded guilty.

36. Statement of Joseph Mutaboba to the U.N. General Assembly, Nov. 9, 1999 (on file with the author and the *Fordham International Law Journal*).

37. *Id.*

38. Ann M. Simmons, *Rwanda Mass Execution Set; Critics Decry Penalty in Genocide Case,* CHICAGO SUN-TIMES, Apr. 23, 1998, at 27.

39. *Id.*

40. *Id.*

Even if successful, the contribution of such mass prosecutions to deterrence is uncertain at best. Members of the Hutu community may well view such prosecutions as illegitimate, a case of "victor's justice." If so, prosecutions may do more to fuel inter-ethnic tensions than to promote national reconciliation, and a shift in the political fortunes of the ethnic communities in Rwanda might lead to a catastrophic renewal of hostilities.

The problems encountered in pursuing war crimes prosecutions in Bosnia and Rwanda highlight some of the difficulties that must be overcome to achieve deterrence by enhancing the frequency and consistency of criminal prosecutions. Mustering the support needed to make international criminal tribunals effective is extremely difficult. The existing tribunals have continuously struggled, with only partial success, to obtain the funding, personnel, and political support necessary to function even with relatively modest caseloads. Moreover, Bosnia and Rwanda represent the success stories. Efforts to create *ad hoc* criminal tribunals to prosecute atrocities in other conflicts have either foundered or not been attempted at all. In Sierra Leone, some of the political leaders most responsible for the appalling atrocities committed by the Revolutionary United Front have been given amnesty and rewarded with positions in a new government, as the price for terminating that country's civil war.[41] In Cambodia, a group of experts appointed by the U.N. Secretary General recommended that the Security Council create an international criminal tribunal to prosecute senior Khmer Rouge leaders for crimes committed during the Pol Pot era. But China, among others, has consistently refused to contemplate the creation of such a tribunal without the consent of the current Cambodian government.[42] Although negotiations on the establishment of a mixed Cambodian-international tribunal continue, it will likely not be the fully independent body envisioned by the U.N. experts, and it will have a limited mandate at best.[43] Similarly, efforts to establish an international tribunal to prosecute crimes committed during the course of East Timor's recent move towards independence have stumbled over Chinese insistence on

41. *Sierra Leone Ends 8 Years of Civil War; President, Rebels To Share Power in W. Africa Nation; Fighters To Get Amnesty*, BALTIMORE SUN, July 8, 1999, at 10A.

42. *UN Sending Legal Experts to Cambodia Later This Month*, DOW JONES INT'L NEWS, Aug. 9, 1999.

43. *Id.*

obtaining Indonesian government consent.[44] Worse, there is little likelihood of any prosecutions, international or domestic, for crimes committed in a host of recent brutal conflicts, ranging from Chechnya to Sudan.

Supporters of the Rome Statute on the International Criminal Court often suggest that the ICC will provide a forum for the prosecution of future cases of genocide, crimes against humanity, and war crimes, and make it possible to avoid the selectivity inherent in the creation of ad hoc tribunals. But the lofty expectations many hold for the ICC resemble the unrealistic expectations once held for the International Court of Justice. Like the International Court of Justice, the ICC may well make important contributions to the clarification and development of international law; it may even contribute modestly to general deterrence, as discussed below. But it is unlikely, in the reasonably foreseeable future, to have any greater impact on the incidence of international humanitarian law violations than have the existing *ad hoc* tribunals.

For one thing, in the absence of a Security Council referral, the ICC can only claim jurisdiction when the state, in which the crimes take place or the state of which the accused is a national, consents.[45] In internal conflicts, nationality and territoriality ordinarily coincide. As a result, in many cases the ICC cannot prosecute crimes committed in the course of an internal conflict unless the government responsible accepts the jurisdiction of the court, either in advance or *ad hoc.* Since most crimes are now committed in internal conflicts, and since the states in which such crimes are most likely are also the states least likely to ratify the ICC Statute, many internal conflicts will escape the Court's purview altogether, unless the Security Council can be induced to act. In addition, to function effectively, the ICC will need much greater resources than those to which the existing tribunals have access, as well as broader political support. To date, the United States has provided the lion's share of the political, financial, technical, and intelligence assistance for the two existing tribunals. But the United States has already made clear that it will not support the proposed ICC or sign the ICC Statute

44. *Cf. Asian Nations Reject Timor War Crimes Trial,* INDEPENDENT (London), Sept. 25, 1999, at 15.

45. ICC Statute, *supra* note 2, at art. 12.

in its present form.[46] Perhaps European and other states will fill the gap and provide the necessary resources, but current levels of support for the existing tribunals does not bode well for the ICC. Thus, whatever contribution the ICC may make to the deterrence of future atrocities is likely to be modest at best.

Attempts to bolster the deterrent effect of international prosecutions through increased national prosecutions is also likely to prove more difficult than many in the human rights community seem to appreciate. Pinochet-style prosecutions are likely to increase in number, but to remain sporadic. Austria, for example, recently refused to initiate proceedings against a high-level Iraqi official accused of war crimes.[47] And while many assume that dictators will heed Pinochet's fate, there is little evidence yet to that effect. Serving heads of state may still enjoy immunity for at least some crimes, and continue to travel abroad, even in the United Kingdom, with little evident concern for their future.[48]

Large-scale trials, of the sort conducted by Rwanda, depend in significant part on battlefield outcome; rather than deterring future atrocities, they may simply heighten the stakes for victory in the next conflict. And in many countries, where the principal offenders retain substantial political and military power, amnesties may preclude most if not all criminal prosecutions. In short, significantly enhancing the probability of punishment is a far greater challenge than is often acknowledged.

III. *PROCECUTIONS AS A CONTRIBUTION TO GENERAL DETERRENCE*

Payam Akhavan makes the case for general deterrence along the following lines:

> [F]rom the criminal justice system emanates a flow of moral propaganda such that punishment of the individual offender is transformed into a means of expressing social disapproval. In addition to the fear and conscious moral influence of punishment, it is also possible to create "unconscious inhibitions

46. David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999).

47. Colum Lynch, *U.S. Aids Hunters of Iraqi War Criminals; Private Groups Suffer Setbacks*, WASH. POST, Sept. 4, 1999, at A23.

48. *See Dictators Are Choosing London To Shop Till They Drop*, SUNDAY TELEGRAPH (London), Dec. 20, 1998, at 22.

> against crime, and perhaps to establish a condition of habitual lawfulness" such that "illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught."[49]

Akhavan argues that "it is not necessary . . . to punish a large number of perpetrators in order to achieve deterrence."[50] Instead, "[t]he punishment of particular individuals—whether star villains such as Karadžić or Mladić or ordinary perpetrators such as Tadić and Erdemović—becomes an instrument through which respect for the rule of law is instilled into the popular consciousness."[51] In Akhavan's view, international criminal prosecutions can stigmatize ethnic cleansing and similar acts, and thus contribute "to bringing about a culture of habitual lawfulness such that persecutions and atrocities do not present themselves as a real alternative to peaceful multiethnic coexistence."[52]

Akhavan may be right that prosecutions can contribute to replacing a culture of impunity with a culture of compliance, but a transformation of that magnitude would seem to require far more than the occasional punishment of a particular offender. First, the signaling effect of such punishments is not always clear. Serbs, for example, view the ICTY as biased, and might therefore refuse to accept its judgments as confirming important social norms.[53]

Second, and more important, the ICRC survey suggests that the internalization of norms is not sufficient to prevent atrocities. A substantial majority of Bosnians are aware of the Geneva Conventions, believe that there are limits on what soldiers should be allowed to do when fighting the enemy, and think that violations of those limits are morally wrong. While knowledge of the Geneva Conventions declined with respect to the core issue—attacks on civilians—the ICRC survey nonetheless con-

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49. Akhavan, *supra* note 7, at 746 (quoting JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 36 (1974)).

50. *Id.* at 747.

51. *Id.* at 749.

52. *Id.*

53. Justin Brown, *World, Facing up to Atrocities?*, CHRISTIAN SCI. MONITOR, Feb. 16, 1999, at 6 (quoting Yugoslav Justice Minister Zoran Knezevic, who accused ICTY of being biased against Serbs because "as a rule, these kinds of institutions [like the war-crimes tribunal] are political, not legal").

cludes that understanding and acceptance of the applicable norms was not the issue in Bosnia:

> The high-profile breakdown of the rules of war in Bosnia-Herzegovina is all the more striking because both combatants and civilians are highly aware of the Geneva Conventions and fully supportive of norms that protect civilians in war. The limits did not give way because the Conventions or the norms were unknown or foreign to the participants. They broke down under the pressure of nationalist passions and hatred. They also broke down because a range of other wartime considerations diminished and superceded them. The rules of war have not been repudiated in the minds of those who have experienced this conflict. They were overwhelmed in large part by the rules on the ground, which created powerful exceptions, amendments or suspensions whereby millions of civilians joined the front lines.[54]

The ICRC's conclusion should not be surprising. Even well-trained soldiers from states with strong rule of law cultures commit atrocities during wartime. Canadians were dismayed to learn that some of their soldiers tortured Somali prisoners while on U.N. peacekeeping duties.[55] U.S. citizens felt dismay when recent news reports recounted the massacre of civilians by U.S. soldiers during the Korean War.[56] These incidents, and countless others like them, took place despite the general culture of lawfulness that existed in the offenders' home countries.

The problem is again compounded by obedience to authority. As Milgram notes, even a democratic society

> cannot be counted on to insulate its citizens from brutality and inhumane treatment at the direction of malevolent authority. A substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority.[57]

Of course, not everyone, or even a majority, commits atrocities despite exposure to the strains of war. For some, strongly

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54. ICRC Country Report on Bosnia-Herzegovina, *supra* note 15, at iv.

55. Hugh Winsor, *The "Trophies" That Shamed Canada*, INDEPENDENT (London), Nov. 13, 1994, at 15.

56. Mark Thompson, *The Bridge at No Gun Ri; Did Panicky American G.I.s Massacre Korean Civilians at the Beginning of the Korean War?*, TIME, Oct. 11, 1999, at 42.

57. Milgram, *supra* note 24, at 189.

held religious or ethical beliefs, fear of punishment or retaliation, respect for the law, or habitual obedience enables them to resist whatever impels others to commit crimes. Ultimately, Akhavan may be right that international criminal prosecutions will help strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.

CONCLUSION

Uncertainties about deterrence should not detract from the many other reasons noted earlier for supporting the prosecution of those who violate international humanitarian law. But such uncertainties should make us wary of exaggerated claims concerning the benefits of such prosecutions.

Moreover, present uncertainties suggest the importance of additional empirical research. The ICRC survey is an extremely useful step in this direction. Further research might suggest answers to questions such as: what kinds of training should soldiers receive regarding compliance with the laws of war and, more generally, how can information on the content of the laws of war, especially as they pertain to attacks on civilians, be disseminated more effectively? How can the attitudes and incentives of both leaders and followers be better influenced in conflict situations? Ultimately, a better understanding of the answers to these and numerous similar questions might do more to avert atrocities than the single-minded pursuit of criminal prosecutions.