International Criminal Tribunals as Actors of Domestic Change

STUDIES IN POLITICAL TRANSITION

VOLUME 9

PETER LANG

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The Impact on Institutional Reform

VOL 1

PETER LANG

Bibliographic Information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the internet at http://dnb.d-nb.de.

Library of Congress Cataloging-in-Publication Data
A CIP catalog record for this book has been applied for at the Library of Congress.

This publication was financially supported by the Polish National Research Center (Narodowe Centrum Nauki) through the grant nr. 2012/06/A/HS5/00249 and a grant awarded by the Polish Ministry of Science and Higher Education based on decision nr 215443/E-560/S/2013-1. Klaus Bachmann and Gerhard Kemp also extend their gratitude to the Robert Bosch Foundation, where they were able to work on the final version of both volumes during their fellowship at the Robert Bosch Academy in Berlin in 2017 and to STIAS, the Stellenbosch Institute for Advanced Study, Wallenberg Research Center at Stellenbosch University, Stellenbosch 7600, South Africa. The views expressed in this book are those of the authors and should not be attributed to the staff, officers or trustees of the Robert Bosch Foundation.

Printed by CPI books GmbH, Leck

ISSN 2191-3307
ISBN 978-3-631-77093-1 (Print)
E-ISBN 978-3-631-77094-8 (E-PDF)
E-ISBN 978-3-631-77095-5 (EPUB)
E-ISBN 978-3-631-77096-2 (MOBI)
DOI 10.3726/b14796

This publication has been peer reviewed.

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Introduction

International Criminal Tribunals (ICTs) as actors in International Relations are a relatively recent field of research, which is predominantly occupied by legal, historical and, to a smaller extent, sociological research that mostly focuses on their internal functions, mechanisms, legal innovation and the judicial behaviour of prosecutors and judges. Former ICTs, like the Nuremberg Tribunal and the International Military Tribunal for the Far East, were never analyzed as actors in International Relations, since their existence was too short-lived, their legal acquis too limited, and their ability to influence other actors of International Relations too constrained. In the post-cold war era, the emergence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and finally the first permanent international criminal tribunal, the International Criminal Court (ICC), and their interference in domestic politics of states, their interaction with powerful non-state actors (Human Rights organizations, non-governmental organizations, international corporations and regional organizations) have given rise to a growing literature in IR, which now deals with ICTs' role in the international sphere, their ability to coerce states into compliance with their rules, their ability to engage in politics, in "games of cooperation" and "conditionality games", as well as their exposure to "hijacking" by defiant states.[1]

In order to fulfil the tasks given to them by their founders – the UN Security Council (UNSC) and the Assembly of States Parties (ASP) to the Rome Treaty – both tribunals have engaged in politics, making political decisions and political choices (for example, whom to prosecute, when and why, and whom not to prosecute), and their chief prosecutors – and to a lesser extent their judges – have become embroiled in the domestic politics of some of their tribunal's

1 A. Wendt, 'On constitution and causation in International Relations', *Review of International Studies* (1998), 24, 101–118; Y. Lapid, 'The Third Debate. On the Prospects of International Theory in a Post-Positivist Era.' *International Studies Quarterly* 1989, vol. 33, 235–254. D. A. Baldwin, *Neorealizm and Neoliberalizm. The Contemporary Debate*, New York 1993; J. Bendor, A. Glazer and T. Hammond, 'Theories of Delegation', *Annual Review of Political Science*. Vol. 4 (2001), 235–269. R. Waterman and K. Meier, 'Principal-Agent Models: An Expansion?' *Journal of Public Administration Research and Theory*. 8,2,1998, 173–202.

countries of reference. This alone would hardly make them full-fledged actors of International Relations. However, as several authors have shown, by using a specific "conditionality game" in interacting with the European Union (EU), the ICTY has managed to obtain agenda-setting power in the EU enlargement process, and certain features which had previously been specific to supranational institutions.[2] Nevertheless, it would be exaggerated to regard the ICTY, ICC or the ICTR as supranational institutions per se, as they were not created in order to solve delegation and compliance problems of their founders, but, instead, in order to extend the influence of the international community to countries, which were reluctant to comply with its norms.

From this perspective, ICTs are actors of International Relations sui generis – they enjoy a considerable amount of independence and autonomy from their creators as well as from their countries of reference, but at the same time lack certain features, which are constitutive for traditional actors of International Relations (like international organizations) and supranational entrepreneurs. In recent years, the question whether a polity can be regarded as an actor of International Relations was raised only with respect to the European Union and its foreign policy. It is unsurprising that most definitions of actorness were therefore tailored in a way that makes them applicable to the EU, but not necessarily to other entities. The older literature about International Relations, which is dominated by realist and neorealist approaches, attributes actorness only to states and defines it in a way, which again makes the definition applicable to a state-centric environment, but does not allow us to identify whether a polity is an international actor or not. Institutionalist, liberal and constructivist research focuses on the mediating and preference-changing mechanisms of international institutions, treating them de facto as actors, but also leaves the question unanswered whether an organ created by an international organization can acquire enough attributes of actorness to be regarded as a fully fledged actor on the international scene.[3]

As Andrew Moravcsik has pointed out, states may agree to sign and ratify treaties and adhere to institutions without exactly knowing how these institutions will affect their preferences at a later stage.[4] Governments may sign Human

2 A. De Vasconcelos, 'Preface', in J. Batt, J. Obradović-Wochnik (eds):, *War Crimes, Conditionality and EU Integration in the Western Balkans*. Paris 2009, 1–23.

3 A. Moravcsik, 'A New Statecraft? Supranational Entrepreneurs and International Cooperation', *International Organization* 53 (2), 1999, 267–306.

4 A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization*, Vol. 54, No. 2 (Spring, 2000), 217–252.

Rights treaties and ratify court statutes, and in the long run, this can force them into compliance with these statutes' provisions. This can be perfectly rational, since it reduces the likelihood of "free riding" by other contracting states and, by imposing legal regimes onto these governments, increases the credibility of these governments' Human Rights commitments toward their own constituencies. Even more: by signing and ratifying treaties, which constrain government action, a government may seek to limit the scope for retaliation by a future government with respect to its predecessor. The latter aspect is the more relevant, the more likely violent regime change is in a country. By adopting binding and enforceable Human Rights provisions which involve independent external actors, governments may accept a trade-off between their own autonomy (which will be restricted by these provisions) and the future security of their members and supporters. From this perspective, binding and enforceable Human Rights regimes with supranational features provide a solution for overcoming the "hostage dilemma" in (actual or expected) transitions of power.[5] Introducing "third party enforcement" as such is always a rational way of reducing transaction costs, irrespective of whether such an agreement involves commodities between traders or rights between political actors. The basic requirement for "third party enforcement" is the independence of such an institution from those who refer to it. This is true for Human Rights regimes and international courts, whose jurisdiction reaches out to the contracting states. But is this the case with ICTs?

1. The ICC as a Case of "Third Party Enforcement"

The ICC was created during the late 1990s and became operational in July 2002, from when it has wielded temporal jurisdiction over more than a hundred signatory states, which accepted the so-called Rome Statute. According to it, the member states agreed to grant the ICC complementarity, or in other words, the right to take over investigation, prosecution and trial from a member state, if the latter is either unable or unwilling to pursue it and if the crime in question fulfils the criteria of an international crime as enshrined in the Rome Statute. With regard to crimes other than genocide, crimes against humanity and war

5 The hostage dilemma (sometimes also named kidnapper's dilemma) is a game-theoretical approach to political transition, which describes the the opposition's problem during a negotiated transition to offer the leadership of the old regime a credible exit with security guaranties, which will protect them after they quit. M. Nalepa, *Skeletons in the Closet. Transitional Justice in Post-Communist Europe*, Cambridge 2010, 42–44.

crimes, and – with specific additional conditions – the crime of aggression, the respective signatory state still retains jurisdiction. If the ICC decided to take over a case under the above mentioned premises, the respective state can challenge its admissibility, but it will still be the ICC which decides whether the case should be investigated, prosecuted and judged at the ICC or by the state. In other words: the ICC is a court of last resort, and it is tailored for situations, in which a state's judiciary is either too weak and overburdened to deal with international crimes, or it is prevented by the government or other important stakeholders to address international crimes. If we define the public good, which the ICC delivers to member states as "justice for international crimes", it becomes clear that the ICC does not solve any free rider issue. Rather than trying to get the public good for free, states will try to pay for the good, but not use it. They may be expected to bolster their Human Rights commitment by paying their contribution to the ICC and by formally accepting its jurisdiction, but at the same time may refuse to have the Court involved in high-level criminal cases. Kenya is a good example of state party reluctance and obstructionism that could by some be viewed as de facto refusal to cooperate effectively with the ICC. Gerhard Kemp describes this in detail in his chapter on Kenya.

But the picture changes if the ICC gets involved in a case against opponents of a government that accepted ICC jurisdiction – either as a signatory or under art. 12 of the Rome Statute, lodging a self-referral. In these particular cases, the ICC constitutes a form of "third party enforcement" and even to some extent prevents free riding. This becomes obvious if we look at the picture from a counter-factual perspective: which other options does a government have when it wants to investigate, prosecute and judge crimes committed by people, over whom it does not wield effective control? It could issue an international arrest warrant and, once the suspects are arrested, demand their extradition. If the government is able and willing to judge them, it could do so after their surrender. However, armed opposition groups which commit crimes often enjoy the open or secret assistance of foreign governments, and what appears to be an illegitimate rebel movement in the eyes of one government may be seen as a legitimate freedom fighter army by another one. In many cases foreign governments committed to Human Rights may find it difficult to extradite even violent rebels to countries where they are likely to be tried with bias and face inhumane treatment and capital punishment. In such cases, constitutional constraints may even prevent them from extradition. All these obstacles disappear if a suspect is sought not for extradition by a government he or she opposes, but is sought for transfer by the ICC. In the latter case, institutional constraints against extradition are either weaker than in bilateral extradition cases or non-existent, because the ICC

does not apply any punishment that would violate Human Rights requirements and usually transfers convicts to countries other than were they come from and where they may be persecuted. In other words: ICC involvement deprives a government of control over the suspect and the case, but it increases the likelihood of having him arrested by other countries. Invoking the ICC may therefore be a viable option to weaken an armed domestic opposition at the price of losing control over the investigation, prosecution and trial against members of this opposition. By doing so, states confer a part of their sovereign rights to a supranational body, whose actions they cannot control, but at the same time solve a problem none of them would be able to solve on their own. Subsequently, the ICC enforces its jurisdiction over the signatory states even in cases when some of their governments might not like it and therefore curtails free riding: the public good of justice for international crimes (or, as Human Rights activists would say: the fight against impunity) is delivered even against the will of the receiver. He can no longer have the reward of a Human Rights reputation and defy its obligations. Here lies the difference between the consequences of Human Rights commitments and the institutional development of International Criminal Law (ICL) – the humanitarian obligations have become enforceable and they are being enforced by a supranational body.

2. The ICC as an Actor of Domestic Change

The ICC may be perceived as a supranational body for third party enforcement, by which member states reduce transaction costs (which they would incur if only traditional extradition were available) and prevent free riding, but they are more than just that. The Rome Statute also contains a specific provision, through which the UN Security Council may interfere with the judiciary of countries which have neither ratified the Rome Statute nor lodged a self-referral. According to art. 13, the UNSC can refer the case of a non-member state to the ICC and the ICC then enjoys jurisdiction over this case, sidelining the domestic judiciary. The only immediate remedy for such a country is an inadmissibility claim, which again can only be decided by the ICC. Another option – but a far more complex, time-consuming and less predictable one – would be to lobby for a UNSC deferral.[6]

6 According to art. 16 of the Rome Statute, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by

In such cases, the ICC can hardly be seen as providing third party enforcement for an agreement to which different actors made a commitment, because the country most affected by ICC jurisdiction under a UNSC referral never committed to the Rome Statute. The prevention of free riding is not an issue either, although the ICC may support the provision of justice for international crimes beyond the scope of ICC member states by reducing their transaction costs for spreading this public good beyond their own reach. But UNSC referral cases bear another element, which is absent (or likely to be absent) when governments invoke the ICC in order to investigate crimes committed on their territory by the opposition. In such cases the ICC is more likely to change domestic politics than in cases of self-referrals or full accession to the Rome Statute. Since ICC involvement under a UNSC referral is not – or much less – foreseeable for a government, it can neither tailor the referral to the design of its own laws and institutions, nor can it adopt institutions and domestic legal provisions to meet (or circumvent) the referral. This is therefore likely to happen after the referral. In such cases, we are able to observe whether judicial intervention by the ICC triggers domestic change – and if yes, what kind of change.

3. Ad Hoc ICTs as Actors of Domestic Change

The same mechanism was active with regard to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both were created by the UNSC, but they are even much more likely to trigger domestic change than the ICC, because they worked under the primacy principle, which obliged the countries under their jurisdiction to transfer any case, suspect and evidence that the ICTY and the ICTR demanded. The ICTY statute does not allow for any admissibility test, but Vjeran Pavlaković's chapter on Croatia shows how politicians sometimes tried to create conditions for an inadmissibility challenge as if there were such a possibility. They supported domestic investigations in order to demonstrate the redundancy of ICTY interference. But under the ICTY (and the ICTR's) statute, every case of an international crime was per se regarded as admissible, and the ICTY and the ICTR were the only instances that could rule on this.

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the Council under the same conditions." In the case against Sudanese president Omar Al-Bashir, the African Union tried to obtain such a deferral (some AU countries feared retaliation from Sudan-backed rebels against their peacekeeping troops in Darfur), but to no avail.

This put the countries affected by ICTY and ICTR jurisdiction under a much severer pressure than the countries under ICC jurisdiction. Both tribunals could go much deeper into crimes than the ICC, whose limited resources and worldwide reach force it to focus on top suspects and the gravest crimes only. As cases of Serbia, Croatia, and BiH show, the ICTY actually did go very deep – indicting not only top-level commanders and politicians, but also soldiers and decision makers down the chain of command. The ICTY's early indictments often were directed against commanders and even guards of prison camps.[7] Indictments at the ICTR also sometimes targeted mayors of towns and priests, who were accused of surrendering victims to their perpetrators. There also was one additional aspect at the ICTY, which did not play a role at the ICTR: the support of the European Union and – in some specific cases, of which the transfer of Slobodan Milošević was the most prominent one – of the US, which gave the ICTY a leverage over the countries of the former Yugoslavia of which the ICTR could only dream. Time and again, the ICTY prosecutor's requests were bolstered by EU decisions, which sometimes went so far as to stall trade and accession negotiations with Serbia and Croatia as long as their governments did not deliver the requested documents or transfer the suspects the ICTY wanted to prosecute.[8]

Unlike the ICC, neither ad hoc tribunal exercised jurisdiction over the countries that founded them. Both tribunals were founded by the UNSC in order to judge, prosecute and try suspects from the conflict region for crimes committed there. As Bachmann and Fatić have shown, both tribunals had the necessary jurisdiction to investigate crimes and prosecute perpetrators from outside, but, with one exception, they never did.[9] It would therefore be difficult to argue that the ICTR and the ICTY helped their creators overcome a free riding problem or to overcome a collective action dilemma through third party enforcement.

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7 During the early days of the ICTY, this focus on low-level perpetrators was the result of the ICTY's lack of capabilities to apprehend high-ranking suspects.

8 K. Bachmann, T. Sparrow-Botero and P. Lambertz, *When Justice Meets Politics. Independence and Autonomy of Ad Hoc International Criminal Tribunals*, Peter Lang 2013, 23–96.

9 The ICTR tried a Belgian journalist for his collaboration with Rwandan hate media in the prosecutor vs. Ruggiu, but although its jurisdiction included the countries neighbouring Rwanda, the ICTR never indicted any suspect from a country other than Rwanda, neither did the ICTY try anyone from outside the former Yugoslavia. K. Bachmann, A. Fatić, *The UN International Criminal Tribunals, Transition Without Justice?* Abingdon, New York 2015, 116–133.

The tribunals might have only reduced transaction costs for its founders in so far as they helped them provide justice for international crimes and spread the rule of law, bolster accountability and fight impunity beyond the founders' own boundaries. This is what the huge bulk of literature on European Integration labels "Europeanization" – the proliferation of norms and values from the European centre to the periphery (and from the supranational level to the member states).

The notion does not fit well with Rwanda, where the EU only played a marginal role[10] and there was no political agenda for "Europeanization" on the table. Using instead "regionalization" as an African substitute for Europeanization would be even more misleading. "Europeanization" describes the impact of a regional block on its members states (and to some extent also beyond them) and – in the specific context of the ICTY – the coordinated efforts of the EU and the ICTY to link economic, financial and political concessions to compliance with ICTY demands. But there was no such coordinated effort between the ICTR, and the only organization that can be seen as an African counterpart of the EU – the Organization for African Unity (AOU) and its successor, the African Union (AU), respectively.[11] The OAU and later the AU supported the ICTR, but they did not launch any conditionality policy that could be compared to the one the EU and the ICTY introduced during the trade liberalization and EU membership negotiations with Serbia and Croatia.[12] The OAU and the AU's impact on member states was anyway much weaker than EU conditionality in the former Yugoslavia, because of the lower degree of inter-state integration and the weaker leverage of supranational bodies over member states in the African Union.[13]

The picture is even more complex with regard to the ICC, which came into being at the same time as the AU in 2002. Initially the ICC's basic commitment

10 The ICTR's outreach program, which started late, was partly financed by EU funds and support from some EU member states.

11 The time during which the ICTR operated (1994–) overlaps with the transformation from the OAU to the AU in 2002.

12 In some cases, there also was another third party conditionality policy in force – pressure by the US Congress (for example regarding the transfer of Slobodan Milošević to the ICTY. We do not regard the influence of the (Dayton) Peace Implementation Council and the Organization for Security and Cooperation in Europe as actors of domestic change, because these institutions lacked (opposite to the US) the means to apply coercion on reluctant states.

13 The African Union has called upon its member states to not cooperate with the ICC in apprehending Sudanese president Omar Al-Bashir. E. Keppler, 'Managing Setbacks for the International Criminal Court in Africa', *Journal of African Law* 2011, 1–14.

to the fight against impunity for international crimes was shared by many African states which had also signed and ratified the Rome Statute. Until the time of writing this book, more than half of the states in Africa were signatories to the Rome Statute. The attitude of many changed after the indictments against Omar al-Bashir and other high-ranking Sudanese political and military leaders. Since then the African Union's influence was mostly directed against rather than in favour of compliance with international criminal justice. The ICC could not count on such support for its requests for cooperation. During an extraordinary AU summit in October 2013 in Addis Ababa, the AU stated that no sitting head of state should appear before the ICC. In June 2014, the Assembly of the African Union approved an amendment to the protocol on the statute of the African Court of Justice and Human Rights, which is to become an AU organ entrusted with jurisdiction over international crimes. The amendment grants immunity to sitting African leaders accused of committing serious Human Rights violations. There have also been discussions in the AU and its member states about a total withdrawal of African states from the Rome Statute.[14]

Against this background, it would hardly be comprehensible for readers if we tried to invoke a notion similar to "Europeanization" to the cases on the African continent, with which we deal with in this book. Therefore, we decided to apply an overarching notion, which measures the impact of the different kinds of external influence an ICT applies directly or indirectly on the legal system and related institutions of a country. We ask whether external influence linked to an ICT led to "domestic change" in a country under the respective ICT's jurisdiction. It is this impact this book focuses on: the transformation of internal politics as a result of pressure that was applied by an ICT or on behalf of it.

4. Domestic Change

Contrary to notions, which are closely linked to statehood and are often state-centric (like internal politics, home affairs and judicial policies etc), "domestic change" can also be applied to federal units or entities, which lack some features of statehood, independence and sovereignty because, for example, they are not (yet) fully internationally recognized, they do not control their entire territory, or struggle to impose the monopoly of the legitimate use of force on their citizens. And last but not least, the choice for "change", rather than reform,

14 N. J. Udumbana (ed), 'Who blinks first? The International Criminal Court, the Arican Union and the Problematic of International Criminal Justice', in T. Maluwa (ed), *Law, Politics and Rights: Essays in Memory of Kader Asmal*, Leiden, Boston 2013, 113–114.

internationalization or compliance (which are notions frequently adopted in the the literature about so-called Europeanization) leaves it open whether changes were made in order to comply with the respective ICT pressure, or to evade or defy it.

The case studies in this publication illustrate the whole range of these categories. In her chapter about Sudan and the ICC, Amani Ejami demonstrates how the Sudanese government reformed the judiciary in order to defy the ICC's judicial intervention; Klaus Bachmann and Amani Ejami show how the Libyan post-revolutionary government(s) blatantly defied the ICC. Sudan neither ratified the Rome Statute, nor did it ever lodge a self-referral. The ICC investigation and the arrest warrants against Sudanese leaders were based on a referral from the United Nations Security Council. Subsequently, the Sudanese government created a number of institutions, whose aim was to demonstrate the inadmissibility of the ICC's interference, but Sudan – contrary to Libya – never lodged an admissibility challenge. Kenya did the same – it attempted to circumvent the ICC investigation by embarking on institutional reforms that remained inefficient. Kenya neither claimed inadmissibility, nor did it openly defy the ICC.[15] It acted similarly to the government of Kosovo: formally complying and even appearing in court, both countries' indicted leaders first showed respect for the proceedings. But behind the smokescreen of formal compliance, their supporters staged intimidation campaigns against prosecution witnesses. In both countries crucial witnesses suddenly changed their testimonies in court, disappeared without a trace, or died under suspicious circumstances.

There is no example of full compliance with an ICT's requirements in this book. Governments of successor states of Yugoslavia, pressured by the combined intervention of the EU and the ICTY, sometimes acquiesced in the surrender of key suspects, delivered documents and information to the prosecution, and initiated own investigations and prosecutions against minor perpetrators, but usually they did so after extensive negotiations and with endless reservations. Not always was this the result of ICT-related pressure. As Christian Garuka shows

15 It would have been very difficult for Kenya to lodge an inadmissibility challenge, because almost all of the domestic change, that took place subsequent to the ICC investigation, was non-retroactive, because the Rome Statute had been signed and ratified before the post-election violence, which gave rise to the ICC's judicial intervention, but had been enacted and entered into force afterwards, so that crimes as elements of a crime against humanity could only be prosecuted as ordinary crimes (f.e. murder) according to the laws of Keny, but not according to the Rome Statute. See Gerhard Kemp's chapter in this publication.

in his chapter about Rwanda, the reluctance of foreign countries to extradite suspects to the Rwandan judiciary (rather than judge them on their own) played an important role in the Rwandan government's (and its legislators') decision to abolish cruel punishment and reform the penal code. At both the ICTY and the ICT the Completion Strategy's impact was another important trigger of domestic change. If a government wanted to prosecute an accused under the Completion Strategy, it had to meet the criteria set out by the respective ICT. These included, among others, fair trial provisions, access to duty counsel, and the impartiality of judges. Christian Garuka demonstrates how these requirements and the influence of foreign countries, from which the Rwandan government wanted to have suspects extradited, led to the emergence of a two-tier system for genocide suspects in the Rwandan judiciary and the penitentiary system. But there were also cases of relatively strong formal compliance with ICT influence, as Jovana Mihajlović Trbovc describes in her chapter on Serbia. Especially under the rule of Prime Minister Zoran Đinđić, the Serbian government extradited high-ranking suspects and delivered evidence to the ICTY. But Serbia also created institutions in order to evade or even sabotage the cooperation with the ICTY, like the Truth and Reconciliation Commission, established by the president Vojislav Koštunica, who also supported the creation of the National Council for Cooperation with the ICTY, which later denied the ICTY direct access to some of the state archives. A similar evolution took place after the death of Croatian president Franjo Tuđman and the loss of power of his party, the Croatian Democratic Union (Hrvatska Demokratska Zajednicea, HDZ), when suspects were surrendered and evidence was released that could be used to incriminate high-ranking politicians and military leaders for crimes committed under Tuđman's rule.

This publication also includes some special cases, which make it clear why the choice for a more state-centric notion of domestic change would have been flawed: One of the countries that withstood ICTY pressure was Kosovo, which, for a part of the time during which it is analyzed here, was not yet independent. As Vjollca Krasniqi shows, the ICTY's judicial interventions were unsuccessful not only because of resistance by the self-governing institutions and political and military organizations in Kosovo, which defied the tribunal, but also because of the resistance of one UN branch (the UN administration for Kosovo) to the actions of another UN branch (the ICTY). Another specific case is Bosnia and Herzegovina, where – at a first glance – the ICTY triggered a lot of institutional change. But these changes were carried out by the international administration for BiH, which until today maintains veto power over the decisions of the country's legislative and executive authorities. As Jagoda Gregulska's, Aleksandra

Nędzi-Marek's and Irena Ristić's chapters[16] show, there was much less "domestic change" on the level of the entities of the Federation of BiH and Republika Srpska, where international leverage was weaker, and the resources committed by international actors were smaller.[17]

5. Measuring the Impact of ICTs on Domestic Change

In order to find out whether an ICT exercised influence upon a country of reference and drove domestic change, we apply a multifaceted and interdisciplinary model, which consists of sociological, historical, and legal methods. It combines a simple process-tracing model, which assumes influence, if the change which can be observed in a country can be attributed to a decision of the ICT or one of its organs (the Prosecutor, the Registrar, the President, a trial or appeals chamber) and if, at the same time, the impact follows the decision in time and if influence by other actors can be excluded.

We defined impact as a policy shift in the country of reference[18] in a field where the ICT explicitly declared a change to be intended and desired. As a policy shift we see any change in the relevant field (law enforcement, the judiciary, the

16 Within the chapter on Bosnia and Herzegovina, Irena Ristić was responsible for the introduction, the part about state-level institutions and the Federation of Bosnia and Herzegovina was written by Jagoda Gregulska, and the part on Republika Srpska (together with a part of the state-level section) was elaborated by Aleksandra Nędzi-Marek.

17 After the conclusion of the Dayton Peace Agreement, BiH became an extremely decentralized federal state, whose construction aimed at reflecting the balance of power among the three constitutuent groups named by the Constitution: Bosnian Serbs, Bosniaks (Bosnian Muslims) and Bosnian Croats. The Federation consists of the "Republika Srpska", an autonomous entity, with a Serb majority and the "Federation of Bosnia and Herzegovina", also an autonomous entity, with a Croat and Bosniak majority. Each entity has its own parliament and government, which are overarched by a state-level parliament and a three-member presidency, whose composition reflects the balance between state's major ethnic groups. Additionally, there is an autonomous Brčko district, with a special status, not belonging to any of the two entities.

18 We use the notions "country of reference" in order to distinguish the countries under an ICT's jurisdiction from those, which were actually affected by it. For example, all EU and NATO countries were obliged to cooperate with the ICTY (with respect to the delivery of documents and witnesses), but only Serbia, Croatia, Kosovo, BiH and Macedonia were actually affected (and therefore a "country of reference") in the sense that the ICTY demanded them to surrender their nationals as suspects for trials.

penitentiary system) of a country of reference, which includes at least one of the following elements:

- A reallocation of resources within the national budget (or similar financial schemes);
- A change in law (a new bill, a new regulation on the federal / national level), including by-laws and other administrative decisions;
- Institutional change (the creation of a new ministry, government agency or other public body, the abolition of an existing one or entrusting an existing body with new tasks and duties).

The tracing back of such shifts (e.g. in the legislation) and the comparison between the justification of a bill, an institutional change or a budget reallocation and the respective documents, speeches and other sources from the respective ICT allow to conclude whether a shift was triggered by the ICT or should rather be attributed to another source of influence. In order to be able to eliminate factors other than ICT decisions, we will examine whether the respective policy shift coincided with other changes, for example with the ratification of an international agreement, external pressure beyond the scope of ICT influence, changes in the party system or the political system of the respective country.

We are aware of the non-normative basis of this methodology, which bears the risk of detecting reform which was not only not intended by the respective ICT, but even contrary to its aims and preferences. In order to grasp phenomena such as institutional reform, undertaken by a government in order to counter, challenge, circumvent or defy judicial intervention by an ICT, we introduce the notion of "adaptation", which, for the purpose of this publication, shall mean any kind of the above mentioned reforms conducted by an ICT-hostile government in order to achieve objectives which are not in line with the ICT's aims. When, for example, the Croatian government designated considerable amounts of money in order to support a Croatian accused before the ICTY, hiring external lawyers, and, for that purpose, reassigned a part of its budget to getting them free, we regard it as an institutional reform and as an element of adaptation. A similar type of adaptation is the mechanism of voluntary surrender, by which the Serbian government stimulated the transfer of the accused to The Hague by offering generous financial support to the accused and their families. The same kind of adaptation could be observed in Sudan, when the government created a whole plethora of facade institutions, whose sole aim was to prove the inadmissibility of the cases, which had come under ICC jurisdiction as the result of the UNSC referral. The introduction of adaptation into our analysis proved necessary for two reasons: in order to be able to distinguish between domestic

institutional change, which was consistent with an ICT intervention, and change, which was inconsistent or even contrary to it, and because it turned out in some cases (Sudan is one of them) that sometimes even adaptation to ICC decisions can lead to legal changes triggering unintended consequences. As Sikkink and Risse have shown, legal change in Human Rights regulations sometimes occurs because a hostile government pays lip service to certain rights, trying to accommodate pressure from international organizations, but then this lip service is taken seriously by Human Rights actors on the ground and endorsed by the judiciary. Later on norms, which were initially contested by the government, become part of the legislation.[19] One would assume that this mechanism is only at play in pluralistic democracies, where the rule of law is cherished and the judiciary independent, but Amani M. Ejami's chapter shows that such changes can also occur in non-democratic regimes.

6. Case Selection Criteria

Throughout the project on which this publication is based, we assumed that in cases where crimes had been referred to the ICC by the respective government (either due to the country's full adherence to the Rome Statute or due to a self-referral), domestic change as a result of ICC intervention would be unlikely, as governments tend to anticipate the consequences or their decisions and shape them in a way that reduces costs and risks, and prevents backlashes on their preferences in the future. There is some controversy in the International Relations literature about whether governments are actually fully capable of predicting and controlling the consequences of their decisions. We do not intend to give an authoritative answer to this controversy, all we do is assume that even if they don't, they are better prepared for collateral repercussions when they invite the ICC than in cases where international judicial intervention comes unexpected and against their will.

Such situations occurred in all countries and entities of the former Yugoslavia that were affected by ICTY decisions (Serbia, BiH, Croatia, Kosovo and Macedonia)[20], in Rwanda (with regard to the ICTR) and in Kenya (a proprio motu case), Libya and Sudan (both UNSC referrals). Since South Sudan was still

19 K. Sikkink, *The Justice Cascade. How Human Rights Prosecutions are Changing World Politics*. London, New York 2011; T. Risse, K. Sikkink, S. C. Ropp (eds), *The Power of Human Rights. International Norms and Domestic Change*, New York 1999.

20 We leave aside Macedonia, which only had one trial before the ICTY (which ended with one conviction and one acquittal).

part of Sudan when the UNSC referral to the ICC took place, we also included South Sudan in our analysis.

In several cases, where institutional reform was almost non-existent or could not be connected to ICT decisions, our authors decided to include "soft" reforms, like schemes for knowledge transfer (training of lawyers, ICT outreach programs, acting as norm entrepreneurs) under a general umbrella of domestic institutional change. In the chapter about Serbia, Jovana Mihajlović Trbovc describes a case during the ICTY prosecutor's conduct during a trial inclined Serbian institutions to prosecute war crime suspects and to apply legislation, which they had hesitated to employ on their own. We tried our best to streamline all chapters according to the project's methodology. Every chapter has a short introduction into the underlying conflict, the relations between the country and the respective ICT and the kind of domestic change, which our authors observed in consequence of this ICT's judicial intervention. In some cases, where too many factors intervened in the relation between the country and the ICT, we deviated from this model and applied a chronological order to avoid confusion. Therefore, the reader will find a slightly different (more chronological than analytical) structure of the chapters on the case of Sudan, where peace negotiations and the partition of the country overlapped with UNSC and ICC decisions, the case of Kosovo (which during the ICTY's activities became independent) and the case of Libya, which fell apart into different regions under rivalling governments and parliaments (but keeping a unified judiciary under the same transitional constitution), while negotiating with the ICC. The cases dealt with in the subsequent chapters are grouped into four different categories. We start with countries in which our authors observed considerable domestic change that was triggered by ICTs and at least partly consistent with the aims and interests of international criminal justice. These chapters form part of the first volume of this publication and are followed in a second volume by cases in which governments formally adapted their policies and politics to the requirements of the respective ICT, but often in order to achieve aims that were contrary to the interest of justice and the aims the ICT wanted to achieve. Next, we study cases in which judicial intervention by an ICT was openly defied and no or almost no domestic change occurred. Finally, we identify two cases in which no change occurred (but could have been expected and actually was hypothesized by us): South Sudan, which could have taken over some of the legislative and institutional reforms Sudan undertook in order to challenge the ICC before South Sudan became independent, and the interconnected case of Ukraine and Russia, which is also a very special case for additional reasons.

Ukraine is the only case in this publication in which the ICC only has jurisdiction subsequent to self-referrals under art. 12.3 of the Rome Statute. Similarly to other self-referral cases, such as Georgia and Cote d'Ivoire, we would not have expected this to trigger domestic reform. Nevertheless, we included it in the project, because it appeared during our discussions that the Ukrainian self-referrals were unlikely to trigger domestic change in Ukraine, but they were likely to do so in Russia – due to the strong involvement of the latter in the events that triggered the Ukrainian self-referral, and resulting from the self-referral's possible collateral repercussions for Russian citizens. The specificity of the Ukrainian case is thus that it may trigger domestic change in a country that is not a party of the Rome Statute, did not lodge a self-referral, and is even a permanent member of the UNSC with veto power.[21] Igor Lyubashenko's chapter shows how this specific domestic change took place, albeit in a rather unusual way – it consisted in the creation of a new body and a counter-blaming campaign against international criminal law and against the government of Ukraine. Despite the emergence of (very moderate) domestic change there, we treated Russia as a case separate from the others, because the change that took place was neither the result of a propriu motu investigation of the ICC prosecutor (as in the case of Kenya), nor the consequence of a UNSC referral, and there is no evidence that the ICC ever wanted to trigger any reform in Russia, which never even ratified the Rome Statute.

For editorial reasons, this publication is divided into two volumes. The second volume will have a short foreword explaining the relation between the two volumes and it will contain an index of names at the end, which comprises the names mentioned in both volumes. The first volume includes only those cases, in which we were able to identify considerable domestic change in countries affected by an ICT's jurisdiction and where this change was more or less in line with the respective ICT's mission. The second volume contains all other cases, those where institutional reform did not take place at all, those, where domestic change happened, but in a way, that contradicted the ICT mission. The reader should also know about another result of the above mentioned NCN-project, a publication which is underway and which will show, in which cases and countries ICT-decisions affected the way, media interpreted and framed the conflict, which gave rise to the creation of the respective ICT.

21 The events which triggered the Ukrainian self-referrals (the sniper massacre on the Maidan Square in Kiev and the armed insurgence in Donbas) took place during our research project, between 2014 and 2015.

Table 1: The selection of countries and entities for research into domestic change

Country / entity	Relevant international criminal tribunal	Status according to the respective ICT
Rwanda	ICTR	Country / entity under primacy principle
Serbia	ICTY	Country / entity under primacy principle
Croatia	ICTY	Country / entity under primacy principle
Bosnia and Herzegovina	ICTY	Country / entity under primacy principle
Kosovo	ICTY	Country / entity under primacy principle
Ukraine / Russia	ICC	Self-referral according to art. 12.3 ICCSt
Kenya	ICC	Signatory state of the Rome Statute (ICC proprio motu investigation and trial)
Libya	ICC	UNSC referral to ICC
Sudan	ICC	UNSC referral to ICC (concerning Darfur)
South Sudan (at the time still part of Sudan)	ICC	UNSC referral to ICC (concerning Darfur)

7. Acknowledgements

This publication is part of a large research project entitled "International Criminal Tribunals as actors of domestic change" that was supported by the Polish National Science Centre (*Narodowe Centrum Nauki*) and carried out at SWPS University of Social Sciences and Humanities in Warsaw.[22] Partners (who acted as team leaders of the research teams) of this project were Dr Irena Ristić from the Institute of Social Sciences in Belgrade (Serbia) and Prof. Gerhard Kemp from the Law Faculty of Stellenbosch University in South Africa. The field research was carried out by a team of researchers from Croatia, Kosovo, Serbia, Slovenia, Poland, South Africa, Kenya, Sudan, and Rwanda. They are also

22 NCN grant no. UMO-2012/06/A/HS5/00249, *International Criminal Tribunals as Actors of Domestic Change, National Research Center 2013–2018.*

responsible for the different chapters of this publication, in some cases jointly with the respective team leader.

Besides the Polish National Science Center, we would also like to thank some people and institutions, which assisted us during field research and team workshops and gave us feedback on draft versions of the chapters. We are grateful to the staff of the Law Faculty at Stellenbosch University, which helped us twice to organize a team meeting, and to our external reviewers Ireneusz Kamiński, Jelena Subotić, Katarina Ristić, Jovanka Matić, and Vjeran Pavlaković.

Klaus Bachmann is grateful to Karolina Bieniek in Wrocław and Anastase Shyaka in Kigali, who inclined him to look beyond the ICTY and include the ICTR in his academic interest. These first meetings in Krzyżowa/Kreisau in Lower Silesia are the roots of this project and later triggered the decision to go to Arusha and apply for the funding of this project. He is also grateful for the information and exchange of views with Diogène Bideri, the head of the Commission for the fight against genocide in Rwanda, to Innocence Kamenzi from the ICTR outreach program, and to the many lawyers, prosecutors, judges, tribunal staff at the ICC, the ICTY and the ICTR, who were ready to share their views, give insights and information. Special thanks go to former Libyan Minister of Justice Salah El-Marghani, to ambassador of Libya in The Hague, Breik A. Swessi, to Thomas Verfuss, the president of the Association of Journalists at the International Criminal Court (AJICC), and to Aleksandar Fatić in Belgrade. Special thanks also go to the Robert Bosch Academy in Berlin.[23]

Igor Lyubashenko extends his gratitude to Volodymyr Vasylenko, International Law Chair at the National University of "Kyiv-Mohyla Academy"; Stanislav Batryn, Kyiv-based Human Rights activist and expert of the NGO Public Commission for the Investigation and Prevention of Human Rights Violations in Ukraine; Sergey Utkin, Head of Department of Strategic Assessment at the Russian Academy of Sciences – for devoting their time and sharing their knowledge and analysis of Ukrainian and Russian authorities' attitudes towards the ICC. He would also like to thank Yuriy Doroshenko, Ukrainian lawyer and journalist, currently working at the General Prosecutor's Office of Ukraine – for his general consultations about post-Euromaidan Ukraine's problems at the intersection of law and politics, as well as for the logistical help during his field research in Kyiv. Jovana Mihajlović Trbovc is indebted to Vladimir Petrović for

23 One of the most advanced versions of this book's drafts was elaborated during Klaus Bachmann's Research Fellowship at the Robert Bosch Academy, an institution of the Robert Bosch Stiftung. The views expressed in this piece are those of the authors and should not be attributed to the staff, officers or trustees of the Robert Bosch Stiftung.

providing his insider knowledge and suggestions in the process of research, and to Jelena Subotić and Mladen Ostojić for their comments on an earlier version of her chapter.

Aleksandra Nędzi-Marek would especially like to thank: Jasmina Pušina and Amila Milanov of the Witness Support Office at the State Court of BiH, Olga Lola Ninković of the Witness Support Office at the District Court of Banja Luka, and Marija Pavlović of the Witness Support Office at the District Court of East Sarajevo for the kind introduction to their important daily work; Draga Miloševic and Branka Čurguz of the RS Police, involved in investigating war crimes, who kindly introduced her to the practical challenges they had faced in their work;

Judge Senaid Ibrahimefendić, President of the District Court of East Sarajevo, Judge Vesna Stojković-Tošović of the District Court of Banja Luka, Prosecutor Sanja Guzina of the District Prosecutor's Office of Banja Luka, Andrea Knežević, Margriet Prins, Zbigniew Wojdyła, Sara Rubert and Almir Alić of the ICTY, Saša Bojanić, Francesco Caruso, Francesco de Sanctis and Semir Horozović of the OSCE Mission to BiH, Maja Kapetanović of the USAID, Thomas Osorio of the UNDP, Nevenko Vranješ of the Center for the Investigation of War Crimes of the RS, Nina Kisić, and Goran Šimić of the Criminal Defence Section of the Sector for Legal Aid of the BiH Ministry of Justice, and many more people, who made her research and field trips possible and fruitful.

Klaus Bachmann and Gerhard Kemp are also grateful to STIAS, the Stellenbosch Institute for Advanced Study, Wallenberg Research Centre at Stellenbosch University, Stellenbosch 7600, South Africa, for giving them the opportunity to work on the last version of this publication (together with Dire Tladi from the University of Pretoria) during a fellowship in 2018.

8. Terminology and Political Disclaimer

This is an academic publication, but it touches upon many politically sensitive issues. It is the aim of the editors and authors of the different chapters to assess whether judicial intervention by an ICT triggered domestic change in a country that was affected by its jurisdiction (with the exception of Russia and South Sudan, where the ICC does not wield any jurisdiction) and if so, how this domestic change looked. It is neither our intention to judge the countries we are analyzing, nor do we want to judge the tribunal, which conducted its investigations and trials. The methodology and the way we proceed with our analysis were solely determined by scientific considerations and the intent to find an answer to our overarching research question. We subordinated the structure of this publication and the different chapters to this purpose, not to any

moral, political or ideological considerations. This is the reason why the editors decided to disentangle Republika Srpska from the Federation of BiH, why they analyzed domestic change with regard to the state level and the entity level. They did so because the institutional and legal order in these units are different and merit to be analyzed separately, not because they think they should be more or less different. For the same reason we do not deal with the issues of whether South Sudan should be a separate state from Sudan, or Kosovo was right or wrong to strive for independence from Serbia. We do analyze Kosovo separately from Serbia even before the declaration of independence because of the different ICTY policy towards Serbia and Kosovo and the different institutional and legal responses of the leaderships, public opinion and media to the ICTY's judicial intervention.

There are also some terminological issues, which may lead to confusion and should be explained at the beginning. The reader will frequently find the notion of "international crimes" in this publication. We use it in the same way as it has been firmly established in the literature about international criminal justice. It means the core crimes over which the ICTY, the ICTR and the ICC have jurisdiction: genocide, crimes against humanity, and war crimes (in international and internal armed conflicts). It does not mean any crimes of an international (that is transborder, transnational) character such as money laundering, human trafficking, terrorism, or tax fraud. Also the way, the notion of "situation" is used may confuse readers who are not international criminal lawyers. This is because of the legal meaning of a "situation", within the legal framework of the Rome Statute, where the prosecutor examines a situation as a first step and then proceeds (based on a pre-trial decision) to a formal investigation.

Readers not familiar with the history and constitutional structure of BiH may find our references concerning the different ethnic groups in this country confusing. In general, in this publication we use the term "Bosnian" as the adjective that stems from the country name "Bosnia and Herzegovina" (abbreviated BiH). In our understanding, BiH is inhabited by *Bosnians*, the citizens of BiH, independently of their ethnic background. Hence, to all three constituent people of BiH (Bosniaks, Croats, and Serbs) as well as members of the numerous smaller ethnic minorities and people who do not adhere to any of these groups we refer to as the *Bosnians*, if not indicated differently. Bosniaks representing the largest ethnic group are sometimes also called Bosnian Muslims, or just Muslims.[24]

24 They may or may not adhere to Islam, because the term "Muslim" was initially introduced in the Socialist Federation of Yugoslavia as a national rather than religious denomination.

Therefore, in the chapters about BiH, the terms "Bosnian Muslim" (when used so in sources) and "Bosniak" are terms referring to the same group.[25] The authors of this publication opt for using the latter unless referring to documents that employ the first term.[26] We use the terms "Serb" and "Serbian" synonymously and according to the wishes of the respective chapter author(s).

25 However, they should not be mixed up with the term *Bosnians*.

26 For a discussion of the replacement of the term Bosnian Muslim with the Bosniak, see for example B. Dimitrova, "Bosniak or Muslim? Dilemma of one Nation with two Names", *Southeast European Politics*, Vol. II, No. 2, October 2001, 94–108.