

WHEN COURTS MAKE LAW:  
HOW THE INTERNATIONAL CRIMINAL TRIBUNALS  
RECAST THE LAWS OF WAR

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*Although the laws of war are frequently altered after major conflicts, the post-Cold War revision of these rules has not occurred as a result of treaty negotiations. It has, instead, resulted from the United Nations Security Council's decision to create two temporary, ad hoc tribunals and from these courts' ensuing judicial decisions. The tribunals' transformation of the laws of war provides an opportunity to assess one of the most striking phenomena of international politics in the past ten years: the judicialization of international relations. Through the history of the tribunals, this Article provides a critical evaluation of the role, character, and normative desirability of international judicial lawmaking. It argues that international judicial lawmaking is most appropriate when the relevant underlying treaties are old, where underlying conditions have changed, and where there is little prospect for the treaties' revision. The story also highlights the limitations of rational design, a dominant theoretical paradigm used to analyze international institutions. As the history of international criminal law demonstrates, international legal development is far more contingent and complex than the relatively simple model used by most rational design theorists. It thus calls into question the utility of theoretical models that do not include an account of institutional development and transformation, particularly over time. Finally, the Article argues that temporary international courts can serve a critical, if underappreciated, role in the development of new areas of international law.*

INTRODUCTION

The end of a great war frequently brings a revision of the laws of war in its wake. The close of World War One saw the drafting of the 1929 Geneva Conventions to protect wounded soldiers and prisoners of war. A more elaborate set of treaties, the Geneva Conventions of 1949, which granted further protections to soldiers, sailors, prisoners of war, and civilians, followed the conclusion of World War Two.

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The aftermath of the Cold War saw its own revolution in the laws of war. This revision, however, did not occur in the context of a formal treaty negotiation. The post-1989 development was more complex and subtle than earlier efforts, and its full contours remain unclear. This latest phase in the life of the laws of war is a consequence of the interaction between two formally separate legal regimes: the law of armed conflict and international criminal law.

This Article tells the story of international criminal law's transformation of the laws of war from 1945 through 2005. It recounts how nation-states fought bitterly in the negotiations over the 1949 Geneva Conventions, and during their subsequent revision in 1977, over whether the laws of war should apply to civil wars. In those negotiations, states opposing the application of the rules to civil wars won the day. By contrast, the possibility of enforcing the laws of war in an international court was unanimously rejected by the delegates. These decisions, however, were both erased in the 1990s by the United Nations Security Council's decision to create two temporary ad hoc tribunals—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (collectively the Tribunals)—and by these courts' ensuing judicial decisions. Their jurisprudence on the law of war was subsequently codified into the treaty creating a permanent court devoted to international criminal law, the International Criminal Court (ICC), which began operating in 2002. Although the United States traditionally has served as the principal proponent of the development of international criminal institutions since 1945, it has seen the regime that it created transformed into the ICC, an institution it currently finds deeply inimical.

This story is of more than historical interest. It sheds light on questions critical to contemporary international relations and to the study of international institutions. It provides an opportunity to assess the judicialization of international relations, one of the most striking phenomena of international politics in the past ten years. The interaction between international criminal law and the laws of war provides an opportunity to evaluate the role, character, and normative desirability of international judicial lawmaking. Study of these questions outside of the European context is only in its infancy, and the work of the criminal tribunals has been ignored in the emerging literature. Because the principal institutions in this story were intended to be temporary courts with discrete mandates, this story suggests the utility of temporary judicial organizations, a topic that has heretofore been unexamined.

The story also highlights the limitations of a dominant theoretical paradigm used to analyze international institutions. This approach, often labeled rational choice or rational design theory, describes

international institutions as products of states acting rationally and instrumentally.<sup>1</sup> Scholars using this methodology often take a time-slice view of the functions that a particular institution or set of institutions perform and, working backwards, describe why states would have created these institutions to accomplish these ends.<sup>2</sup> In the interest of generating broad conclusions, rational choice scholarship typically assumes both that states' interests remain constant, as do the functions that international institutions perform.<sup>3</sup> The transformation of the laws of war by the Yugoslav and Rwandan Tribunals and the subsequent establishment of the International Criminal Court, however, illustrate that international legal development is far more contingent and complex than the relatively simple model used by rational design theorists. In this story, the interests of key states change, and the institutions themselves play an important transformative role.

The principal issues addressed in this Article, international judicial lawmaking and institutional transformation, center on one pivotal moment, the decision by the U.N. Security Council to vest enforcement of the laws of war in two international courts of limited temporal and geographical jurisdiction. This decision created an international judiciary to adjudicate war crimes and, in so doing, to interpret the principal treaties on the laws of war. The judges on these courts have significantly revised the meaning of the Geneva Conventions—particularly with regard to civil war and ethnic conflict. Through judicial lawmaking, these judges effectively embraced the negotiating positions taken by the Great Powers, especially the United States, in 1949 and 1977 and erased the victories garnered by developing countries in the negotiations. The tribunals' law-of-war jurisprudence, therefore, undercuts the view voiced prominently by some U.S. officials and scholars that international courts, particularly courts with a human rights focus, demonstrate an anti-American bias.<sup>4</sup> Instead, the tribunals have endorsed views advanced by the United States and declared them to be customary international law, binding on all other states.

Conventional accounts of international law and politics challenge the legitimacy of the tribunals' lawmaking. As a matter of formal

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<sup>1</sup> E.g., Duncan Snidal, *Rational Choice and International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS, 73, 73-74 (Walter Carlesnaes et al eds. 2002).

<sup>2</sup> Alexander Wendt, *Driving with a Rearview Mirror: On the Rational Science of Institutional Design*, 55 INT'L ORG. 1019, 1024 (2001).

<sup>3</sup> Barbara Koremenos, Charles Lipson, and Duncan Snidal, *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1072 (2001) [hereinafter Koremenos et al., *Looking Back*]; Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 64 POLIT. STUD. 936, 945 (1996).

<sup>4</sup> E.g., Robert H. Bork, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 10-11 (2003).

international law, only nation-states possess the authority to make law.<sup>5</sup> When the Security Council created the tribunals, members of the Council emphatically declared that the tribunals would not and should not make new law. Despite the weak doctrinal and political bases for the tribunals' lawmaking, the historical record suggests that states appear to have accepted, even embraced, it. States have codified the tribunals' revision of the laws of war into the treaty governing the International Criminal Court. Furthermore, states have not sanctioned the tribunals' judges for their lawmaking, although they have disciplined the tribunals' prosecutor on several occasions.

International judicial decision-making has increased dramatically in the past decade.<sup>6</sup> Understanding its role in international criminal law provides an opportunity to evaluate the normative implications of the judicialization of international relations. This Article argues that states often tacitly delegate lawmaking authority, and that the Security Council did so in the case of the tribunals. Although the historical record cannot definitely prove its validity, this hypothesis is supported by evidence from other international courts that lawmaking by international judiciaries is widespread and accepted by states, even if formally proscribed.<sup>7</sup> The Article suggests that states do not acknowledge this delegation, however, in order both to perpetuate the fiction of state hegemony over international norm generation and to provide a shield behind which international courts can make law without suffering paralyzing political pressure that would negate their ability to do so.

As a normative matter, this Article argues that international judicial lawmaking is most appropriate when the relevant underlying treaties are old, where underlying conditions have changed, and where there is little prospect for the treaties' revision. International judicial lawmaking can usefully respond to a central challenge for all international institutions: modulating the contradictory demands of rule stability and flexibility in the face of changing conditions.<sup>8</sup>

The history of the international criminal regime also suggests the benefits of temporary international courts for those who seek to further the development of a particular body of law. The trend among

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<sup>5</sup> Anne-Marie Slaughter, *International Law and International Relations*, 285 *Recueil des Cours* 34 (2000).

<sup>6</sup> Karen Alter, for example, estimates that 63% of international judicial activity has occurred in the last 12 years. Karen Alter, *Do International Courts Enhance Compliance with International Law?*, 25 *REV. ASIAN & PAC. STUD.* 51, 52 (2003).

<sup>7</sup> E.g., Tomer Brode, *INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION* (2004) (examining the World Trade Organization); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *INT'L ORG.* 41 (1993) (discussing the European Court of Justice).

<sup>8</sup> Koremenos et al., *Looking Back*, *supra* note xx, at 1076.

international institutions, exemplified by the creation of the World Trade Organization, is toward permanent organizations. The promise of temporary international courts has largely been overlooked. The international criminal tribunals demonstrate that temporally and geographically limited courts can serve as important sources of norm generation, which interested states and NGOs can then leverage to push for the creation of a more comprehensive institutional solution.

Turning from the question of judicial lawmaking to that of institutional development, the Article considers changes in the international criminal regime writ large. As with the development of the laws of war, the key moment was the Security Council's creation of the International Criminal Tribunal in Yugoslavia—an entity championed, and then rescued from near-death, by the United States. The history from 1945-1997 portrays the United States as the dominant—indeed, the critical—force in international criminal enforcement. In 1997, however, the United States lost a key battle on the jurisdiction of the International Criminal Court. The United States was outvoted in the treaty negotiations and now acts as the ICC's most determined opponent.

This history poses significant problems for theories of institutional design that assume that nation-states' interests do not change, and that states, like actors in other markets, can pursue alternative solutions or modify existing ones if unwanted developments occur.<sup>9</sup> The story told here includes significant shifts in various states' approaches to international criminal law. Although the United States' *volte face* is well known, Great Britain's change of stance is equally important. When Britain was a colonial power, it sought to quash the application of the laws of war to civil wars and to preclude the possibility of their enforcement of the laws of war. Britain similarly opposed the fledgling Yugoslav Tribunal. The election of Tony Blair as prime minister, however, heralded a shift in Britain's attitude towards international criminal enforcement. Britain's later defection from the negotiating position taken by the other members of the Security Council in the ICC negotiations doomed the U.S. vision of a court whose jurisdiction would be subject to the Council's control. More broadly, the international criminal regime illustrates how the creation of one institution, even if carefully designed, can lead to unintended and unwanted consequences later in time. The ICTY and ICTR led directly to the ICC and strongly influenced its jurisdictional scheme. These temporary courts proved that international criminal punishment was possible, and they highlighted the injustice of the selective prosecution model of international criminal law they embodied. The creation of the ICC, and its ambitious jurisdictional scope, demonstrate

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<sup>9</sup> *Id.* at 1078.

that unpalatable later consequences cannot always be obverted—even by a hegemon.

This Article is not a broadside against rational design theory. On the contrary, portions of the story told here affirm key insights of the methodology. Moreover, rational choice has made important contributions to our understanding of international institutions, particularly in elucidating why states choose to create formal institutions at all. Rational design theorists, however, often deliberately ignore institutional change in the interest of theoretical breadth. This Article presses the proposition that this simplification fundamentally distorts our understanding of how international institutions, and states' attitudes toward them, can alter over time.

The fifty-year saga of the interaction between the laws of war and the development of international criminal law has not yet been told in a single account. Parts I and II of this Article, therefore, tackle a wide range of political and legal developments. Although reduced to their essentials, these stories remain quite complex. Part I examines these histories from 1945 through the end of the Cold War in 1989. It pays particular attention to the Nuremberg and Tokyo Tribunals and to the negotiation of the 1949 Geneva Conventions and their subsequent amendment in 1974-77. Relying on the official records from the Diplomatic Conferences, it concentrates on the positions taken by the permanent members of the United Nations Security Council, namely the United States, the Soviet Union, France, Great Britain, and China (otherwise known as the P-5). Part II describes the establishment of the ICTY and ICTR by the Security Council, again highlighting the positions taken by the P-5. Part II then sets out the key features of the ICTY's and ICTR's war crimes jurisprudence, focusing on the cases and the issues that were the subject of particular controversy at the earlier Diplomatic Conferences. Part II also describes the negotiations of the treaty governing the International Criminal Court, concentrating on the provisions related to war crimes and jurisdiction.

Part III considers the legal and political implications of the international judicial lawmaking undertaken by the tribunals. Through the prism of principal-agent theory, it asks whether the tribunals should be considered faithful agents or ones that have departed from the wishes of the Security Council. The principal claim in Part III is that states often deliberately delegate international judicial lawmaking and that, even absent specific delegation, judicial lawmaking is normatively justifiable under certain conditions. Part IV argues that the history of the development of international criminal law exposes weaknesses in the rational design literature by demonstrating that institutional development can occur in ways that are unintended and prove difficult, perhaps impossible, to reverse. This history also suggest the benefits of temporary international institutions—

particularly courts—for developing an area of international law where the usual treaty-making process is stalled. The Conclusion considers the future of international criminal law, the potential impact of the War on Terrorism on the laws of war, and the theoretical implications for future research suggested by the Article’s findings.

#### PART I. DEFINING AND ENFORCING THE LAWS OF WAR

The major treaties on the laws of war address three distinct aspects of this legal regime: the scope of the rules (particularly the kinds of conflicts governed by the law), the content of the rules, and their enforcement mechanisms. The provisions of the Fourth Hague Convention of 1907 on the Laws and Customs of War provide an illustration. The Fourth Hague Convention has a limited scope; it applies only to wars in which all belligerents are parties to the treaty.<sup>10</sup> With regard to content, the Fourth Hague Convention includes rules governing the treatment of prisoners of war but does not address the treatment of civilians.<sup>11</sup> The Fourth Hague Convention also lacks an enforcement mechanism, although it requires all signatories to instruct their armies to obey the rules of the treaty,<sup>12</sup> and it declares that a belligerent party that violates the treaty “shall, if the case demands, be liable to pay compensation.”<sup>13</sup> The other treaties on the law of war drafted before the end of World War Two share the structure, and modest ambition, of the Fourth Hague Convention. Significantly, none of these treaties applies to civil wars. This limitation on the conventions’ scope means that, under these treaties, states are not restricted by international law in crafting a military response to internal rebellions.<sup>14</sup> Captured fighters do not have to be accorded prisoner of war status, for example, and can be treated as traitors or common criminals, as the country sees fit.

The end of World War Two marked an important shift in the laws of war. For a short time, the laws of war and international criminal law were joined in the Nuremberg and Tokyo Tribunals established to adjudicate the war-related crimes of the German and Japanese leaders. While plans for these tribunals were underway, the International Committee of the Red Cross began the process of convening a diplomatic conference for the purpose of rewriting the Geneva

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<sup>10</sup> Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, art. 2 [hereinafter Hague Convention IV].

<sup>11</sup> It does contain rules for dealing with the population of a territory under occupation. Hague Convention IV, *supra* note xx, arts. 42-56.

<sup>12</sup> Hague Convention IV, *supra* note xx, art. 1.

<sup>13</sup> Hague Convention IV, *supra* note xx, art. 3.

<sup>14</sup> Countries may voluntarily decide to apply the laws of war to internal conflicts but are not obligated to do so.

Conventions. The 1949 Conference saw significant debate over the proper scope of the Geneva Conventions, as well as the introduction of a novel enforcement mechanism.

#### A. *The Nuremberg and Tokyo Tribunals*

With the end of World War Two in sight, the victorious Allies considered how to punish the German officers and political leaders that led Germany on its murderous drive to dominate Europe. The existing treaties on the laws of war, including the Hague Conventions of 1907 and the Geneva Conventions of 1929, made no mention of criminal punishment. The British and influential members of the U.S. cabinet argued that the German leaders should be executed without trial. President Roosevelt initially subscribed to this position, and it almost prevailed.<sup>15</sup> In the end, however, Roosevelt (and later President Truman) was convinced that a trial—rather than extra-judicial execution—would better secure the restoration of the rule of law to Germany. The Americans persuaded the other Allies to convene a trial instead of a firing squad. Major architects of the Nuremberg Tribunal, particularly U.S. Supreme Court Justice Robert Jackson, hoped to use the tribunal to prove the illegality of the German decision to go to war and, by so doing, help construct a legal regime that would discourage future leaders from turning to war instead of diplomacy to resolve political conflicts.<sup>16</sup>

As the chief proponent of the Nuremberg proceedings, the United States dominated the subsequent trial, contributing vast sums of money, logistical support, and intellectual firepower to the enterprise. U.S. officials also lead the effort to establish a similar proceeding for the Japanese leaders, and they directed the proceeding that would become known as the Tokyo Tribunal.<sup>17</sup>

The Nuremberg and Tokyo Tribunals largely followed the plans of their U.S. architects. The trials saw the conviction of many of the defendants on charges of war crimes arising out of violations of the Geneva and Hague Conventions. Although these treaties made no mention of criminal punishment, the judges had little difficulty finding that there was individual criminal responsibility under customary international law. Jackson's broader ideological point also found a receptive audience in the tribunals' judges. They convicted several of the defendants at Nuremberg and Tokyo of the crime of aggressive war. The U.S. judge from the Nuremberg Tribunal, former U.S.

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<sup>15</sup> Gary Bass, *STAY THE HAND OF VENGEANCE* 154 (2000).

<sup>16</sup> Judith Shklar, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* 174-78 (1986).

<sup>17</sup> Yves Beigbeder, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 61 (1999).

Attorney General Francis Biddle, triumphantly declared, “aggressive war was once romantic; now it is criminal.”<sup>18</sup>

### *B. The 1949 Geneva Conventions*

The horrors of World War Two led not only to the Nuremberg and Tokyo Tribunals, but also to a drive to rewrite the laws of war. This process culminated in the four Geneva Conventions of 1949. These treaties were negotiated in the spring and summer of 1949 by representatives from fifty-nine states.<sup>19</sup> The delegates worked from draft texts that have been authored by the International Committee of the Red Cross (ICRC) in consultation with states.

At the Diplomatic Conference, the debates centered on how to balance the needs of state security with the humanitarian desire to mitigate the harms of war. The records of the Conference reveal that many of the delegates were concerned about the possibility of future conflicts, both at home and abroad. As one of the reports authored by a key committee at the Diplomatic Conference notes, “[T]he Draft prepared by the International Committee of the Red Cross . . . aimed as one might expect at humanitarian guarantees on the broadest possible scale.”<sup>20</sup> From the perspective of the governments assembled in Geneva, however, “it was to be foreseen that . . . questions would not always appear in the same light, and aspirations towards the safeguarding of humanity in the stress of war would be mingled with preoccupations concerning collective defence, war necessities and the needs of security.”<sup>21</sup> The preoccupation with state security appeared most forcefully in the debate over whether the new treaties should apply to civil wars.

#### *1. Scope of the 1949 Conventions*

The pre-1949 treaties governing the laws of war apply only to conflicts occurring between states—in other words, to international conflicts. The draft texts of the Geneva Conventions submitted by the ICRC to the 1949 Diplomatic Conference similarly provided that the new treaties would apply to any armed conflict between two or more

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<sup>18</sup> 15 Dep’t of State Bulletin 956 (Nov. 24, 1946), *quoted in* Quincy Wright, *The Law of the Nuremberg Trial*, 41 AMER. J. INT’L L. 39, 72 (1947).

<sup>19</sup> Jean de Preux et al., COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONS OF WAR 6 (Jean S. Pictet, ed. 1960).

<sup>20</sup> Draft Report of Committee III to Plenary Assembly, Annex 402, *in* 3 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, 183 (1949) [hereinafter 1949 DIPLOMATIC CONFERENCE]. This Report was not actually adopted by the Committee, but the discussion of the report by the committee suggests that the reasons for its non-adoption was that delegates were concerned with its frankness. 2A 1949 DIPLOMATIC CONFERENCE, *supra* note xx, at 807.

<sup>21</sup> Draft Report of Committee III to Plenary Assembly, Annex 402, *in* 3 1949 DIPLOMATIC CONFERENCE, *supra* note xx, at 183.

of the states that had ratified the treaties.<sup>22</sup> The ICRC, however, had a more ambitious agenda. The drafts included a provision that would have revolutionized the laws of war by extending the treaties to civil wars.<sup>23</sup> By limiting how states could treat rebel fighters and hostile civilians in civil wars, this change would have had a significant impact on how countries could address domestic rebellions. In 1949, the human rights revolution was in its infancy. No other body of law at the time placed such limits on states' conduct of their internal affairs. Even the ICRC recognized that this provision was more than states were willing to swallow. During the Conference a delegate from the ICRC acknowledged that this provision "had no chance whatever of being adopted by Governments."<sup>24</sup>

The question of whether to apply the Geneva Conventions to civil wars divided the victorious Allies. The coalitions of those supporting and opposed to this development were a study in irony. Overcoming the looming chill of the Cold War, both the United States and the Soviet Union supported extending the laws of war to civil wars.<sup>25</sup> The United States had little concern that it would face a repetition of its own civil war. At the Diplomatic Conference the Soviet Union took a forcefully humanitarian line on virtually all of the issues discussed—a strategy, one suspects, designed to put its erstwhile allies in the uncomfortable position of having to argue the anti-humanitarian, pro-security position.

Those opposed to the extension of the draft rules to civil wars included the colonial powers, particularly the British and French, as well as newly-liberated former colonies.<sup>26</sup> The United Kingdom, for example, stated in the negotiations that the application of the treaties to civil war "would strike at the root of national sovereignty and endanger national security."<sup>27</sup> The newly-independent states were also concerned about their authority to quash rebellions. Of all the delegates, the Burmese representative was most emphatic on the issue of internal security. He warned that "the Eastern countries he represented . . . could not agree to an extension of the Conventions to civil war, and if such a provision were included, they would not be able to sign the Conventions."<sup>28</sup> He later asserted that "internal matters cannot be ruled by international law."<sup>29</sup>

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<sup>22</sup> Draft Convention for the Relief of the Wounded and Sick in Armed Forces in the Field, art. 2, in 1 1949 DIPLOMATIC CONFERENCE, *supra* note xx, at 47.

<sup>23</sup> de Preux, *supra* note xx, at 31.

<sup>24</sup> 2b 1949 DIPLOMATIC CONFERENCE, *supra* note xx, at 337.

<sup>25</sup> *Id.* at 12-14; Best, *supra* note xx, at 177.

<sup>26</sup> Best, *supra* note xx, at 173-74.

<sup>27</sup> 2b 1949 DIPLOMATIC CONFERENCE, *supra* note xx, at 10.

<sup>28</sup> *Id.* at 102.

<sup>29</sup> *Id.* at 330.

The delegates debated various solutions to the problem of civil wars. Some delegates advocated that the rules governing international conflicts apply only to civil wars of particular intensity or duration.<sup>30</sup> In the end, the Conference agreed upon a single provision on civil wars that would appear in all four treaties. In the final texts, the article on civil wars appears as the third provision in each treaty and is usually referred to as common Article 3. It states that “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party shall be bound to apply, as a minimum, the following provisions . . . .”<sup>31</sup> The ensuing provisions prohibit a number of activities, including murder and torture.<sup>32</sup> Apart from common Article 3, the rest of the four Geneva Conventions of 1949 apply only to wars between signatories of the Geneva Conventions and to occupations of any signatory state.<sup>33</sup>

While the humanitarian purpose of common Article 3 is clear, its text is couched in the language of “affectionate generalities.”<sup>34</sup> What, exactly, is an “armed conflict not of an international character”? Does any use of military force trigger the provision’s application, or does it require hostilities of a certain scale or duration? The treaty does not address these critical questions.

## 2. *Enforcement*

With common Article 3, the delegates in 1949 placed some restrictions on civil wars, although only in a vaguely worded provision with no enforcement mechanism. States were willing to go further with regard to the enforcement of the rules governing *international* conflicts. One of the most important innovations of the 1949 Conventions was the development of the so-called “grave breach” system. Unlike the earlier treaties, which make no mention of individual criminal responsibility, the 1949 Geneva Conventions require states to incorporate penal provisions for certain violations, described in the treaties as “grave breaches,” into their domestic criminal codes. The grave breach regime was based on the far-reaching theory of universal jurisdiction. It requires signatories either to prosecute any individuals suspected of committing grave breaches

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<sup>30</sup> The United States, for example, made such a suggestion. *Id.* at 12. The various proposals are described in Frédéric Siordet, *The Geneva Conventions and Civil War*, III REVUE INTERNATIONALE DE LA CROIX ROUGE, supp. 9 at 201-202 (Oct. 1950).

<sup>31</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 3 [hereinafter 1949 Geneva Convention I].

<sup>32</sup> *Id.*

<sup>33</sup> *E.g.*, 1949 Geneva Convention I, *supra* note xx, art 2.

<sup>34</sup> David P. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT’L L. 272, 273 (1978).

or extradite them to a state that wishes to prosecute them, no matter where in the world the grave breach is committed.<sup>35</sup>

Although the innovative grave-breach provisions were developed by the ICRC with the assistance of individual experts without state involvement,<sup>36</sup> they were generally embraced with enthusiasm at the Diplomatic Conference. This support, however, extended only to the possibility of domestic prosecutions of grave breach violations. The delegates at the Conference went to great lengths to ensure that the new enforcement scheme would not form part of any broader effort to develop international criminal law.

The initial proposal made by the ICRC for the grave breach provisions provided that the grave breaches “shall be punished . . . by the tribunals of any of the High Contracting Parties or by any *international jurisdiction*, the competence of which has been recognised by them.”<sup>37</sup> The accompanying commentary stated that an international tribunal “would doubtless be the instrument best qualified” to judge whether grave breaches had been committed.<sup>38</sup> Given the success of the recent Nuremberg and Tokyo Tribunals, the ICRC appeared to assume that the delegates would support an international court for war crimes. Indeed, the Genocide Convention, drafted in 1948, states that the crime of genocide can be punished in the country where the crime was committed or “by such international penal tribunal as may have jurisdiction.”<sup>39</sup>

States, however, were unenthusiastic about an international court for war crimes. They stripped all references to it from the draft text early in the Diplomatic Conference. The British, who were dubious about the Nuremberg proceedings from their inception, took the lead in ensuring the speedy demise of a permanent war crimes tribunal.<sup>40</sup> In the final text of the treaty, the grave breach provisions provide only for domestic prosecution of the acts prohibited by the 1949 Geneva Conventions. While the ICRC’s commentary on the treaties optimistically observed that “there is nothing in the paragraph to exclude the handing over of the accused to an international penal tribunal,”<sup>41</sup> the Diplomatic Conference was clearly opposed to vesting such powers in an international institution. There is no record in the debates of any state advocating such a position.

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<sup>35</sup> *E.g.*, 1949 Geneva Convention I, *supra* note xx, arts. 49-50.

<sup>36</sup> International Committee of the Red Cross, Remarks and Proposals Submitted by the International Committee of the Red Cross 5-6 (Feb. 1949) [hereinafter ICRC, Remarks and Proposals].

<sup>37</sup> ICRC Remarks and Proposals, *supra* note xx, at 18 (emphasis supplied).

<sup>38</sup> *Id.* at 21.

<sup>39</sup> Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, art. 6.

<sup>40</sup> Best, *supra* note xx, at 163.

<sup>41</sup> Pictet, Commentary on Geneva Convention I, *supra* note xx, at 366.

### C. *The 1977 Additional Protocols*

The phrase “human rights” was rarely mentioned in the 1949 Diplomatic Conference.<sup>42</sup> The post-World War Two period, however, saw great development in the human rights movement and the drafting of many new treaties that address states’ treatment of their citizens. In 1968, the International Conference on Human Rights at Tehran called for the revision of the Geneva and Hague Conventions “to assure the better protection of civilians, prisoners and combatants in *all* armed conflicts.”<sup>43</sup> The latter phrase was a clear reference to the failure of the existing treaties to address civil wars.

In response, the International Committee for the Red Cross (ICRC), in consultation with experts and government representatives, drafted two treaties for the purpose of enhancing the 1949 Geneva Conventions and extending some of their provisions to civil wars. These treaties were the subject of a Diplomatic Conference convened by the Swiss Federal Council in February 1974.<sup>44</sup> Although the 1949 Conventions were drafted in a single year, the 1974 conference included many more states and was far more divisive. It convened for three yearly sessions, concluding only in 1977. The 155 states that meet in Geneva included many newly independent former colonies, and the conference was split by North-South tensions.<sup>45</sup> This cleavage was reflected in the reprise of the debates that occurred in 1949 and resurfaced in the negotiation of the Additional Protocols.

#### 1. *Scope*

In the 1974 Diplomatic Conference, the ICRC sought to update, clarify, and extend the rules governing both international and non-international armed conflicts. It proposed two different treaties: a fairly elaborate set of rules that would apply to international armed conflicts (called Additional Protocol I), and a shorter draft that would apply to non-international armed conflicts (called Additional Protocol II). The first article of Additional Protocol I incorporated the principal jurisdictional provision of the 1949 Conventions (known as common Article 2),<sup>46</sup> which limits the application of the treaties to international

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<sup>42</sup> Best, *supra* note xx, at 145.

<sup>43</sup> Michael Bothe et al., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 39 (1982) (emphasis supplied).

<sup>44</sup> Bothe et al., *supra* note xx, at 4; Claude Pilloud et al., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 xxxiii (Yves Sandoz et al. eds., Tony Lanham et al. trans. 1987).

<sup>45</sup> Bothe, *supra* note xx, at 7-8; Best, *supra* note xx, at 343-44.

<sup>46</sup> Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1, *in* 1 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED

conflicts and territorial occupations.<sup>47</sup> The first article of the draft of Additional Protocol II stated that this new treaty will apply to all *other* armed conflicts as long as they “take place between armed forces and other organized armed groups under responsible command.”<sup>48</sup>

This scheme was the subject of heated debate in the early sessions of the Diplomatic Conference. The 1974 meeting took place at the height of developing countries’ legal activism surrounding the New World Economic Order and associated anti-colonial developments. Developing countries insisted that “wars of national liberation” (which are generally treated under the 1949 conventions as civil wars) be described as international armed conflicts and subject to the more elaborate rules entailed by this body of law. By describing these conflicts as “international,” fighters for the rebel groups would be entitled to prisoner of war status, afforded protections granted to combatants and civilians under the 1949 Conventions, and guaranteed any other securities contained in the revised treaties.

Referring to the draft text of Additional Protocol I prepared by the ICRC (which did not classify wars of national liberation as international conflicts), the delegate from Tanzania declared that “his delegation was not prepared to accept a humanitarian law drawn up solely in the interest of imperialist Powers.”<sup>49</sup> Many developing countries echoed this sentiment, as did all of the socialist countries. Most of the Western powers, including the United Kingdom, France, the United States, and Italy, argued that wars of national liberation should fall under Additional Protocol II.<sup>50</sup>

In the key committee that examined the question of the scope of Additional Protocol I, the developing countries were victorious, ensuring that the Protocol governing international conflicts would also apply to wars of national liberation.<sup>51</sup> Those voting in favor were all developing countries, including China, India, and Egypt, as well as the socialist block countries and the Soviet Union.<sup>52</sup> Those voting against included the United Kingdom, the United States, France, Israel, Italy and Japan.<sup>53</sup> The final text of Additional Protocol I states that it

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CONFLICTS GENEVA (1974-1977) Part 3 at 3 (1978) [hereinafter 1974-77 DIPLOMATIC CONFERENCE].

<sup>47</sup> *E.g.*, 1949 Geneva Convention I, *supra* note xx, arts. 49-50.

<sup>48</sup> Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, *in* 1 1974-77 DIPLOMATIC CONFERENCE, *supra* note xx, at Part 3 at 33.

<sup>49</sup> VIII 1974-77 DIPLOMATIC CONFERENCE, *supra* note xx, at 20.

<sup>50</sup> VIII 1974-77 DIPLOMATIC CONFERENCE, *supra* note xx, at 13-22.

<sup>51</sup> VIII 1974-77 DIPLOMATIC CONFERENCE, *supra* note xx, at 102.

<sup>52</sup> Norway was the only developed country not part of the socialist block to vote in favor of the proposal. *Id.*

<sup>53</sup> A disparate collection of countries, including Ireland, Australia, Burma, and Colombia, abstained. *Id.*

applies to all conflicts covered by the earlier 1949 Conventions and “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”<sup>54</sup>

The developing countries that voted to expand Additional Protocol I were largely hostile to Additional Protocol II, the proposed treaty on civil wars. Having won the political battle to elevate the status of anti-colonial and liberation struggles, they were adamantly opposed to the possibility of threatening their own power at home by granting international rights—and international legal legitimacy—to potential rebels and their supporters. These states emphatically did not want to tie their hands in cases of domestic rebellions. Most developing countries propose either rejecting the treaty on civil wars altogether<sup>55</sup> or inserting a high jurisdictional threshold to ensure its infrequent application.

Despite the tensions of the Cold War, the Western and socialist powers largely supported a broad scope for Additional Protocol II. Having lost control of their colonial empires, the United Kingdom and France were no longer adverse to extending the protection of the laws of war to civil wars. The United States, the Soviet Union, and the United Kingdom, among others, advocated retaining the broad language of the ICRC’s draft.<sup>56</sup>

The Diplomatic Conference finally settled upon language that imposed a threshold for the application of Additional Protocol II that was more demanding than both the ICRC draft text and the vague language of common Article 3 of the 1949 Conventions. The drafting committee chairman noted that this provision “represented a very fragile consensus reached only after lengthy consideration.”<sup>57</sup> In the end, the vote in the committee was fifty-eight in favor of the provision, four against, and twenty-nine abstaining. All of the countries opposing the treaty on civil wars were from the developing world.<sup>58</sup> Although powerful countries like the United States, Britain, and the Soviet Union supported the treaty on civil wars, they were not interested enough in the issue to press it vigorously. Indeed, Additional Protocol II was almost abandoned altogether at the conference, but it was

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<sup>54</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, art. 1 [hereinafter Additional Protocol I].

<sup>55</sup> This, for example, was the position of India. VII 1974-77 DIPLOMATIC CONFERENCE, *supra* note xx, at 72.

<sup>56</sup> Some countries, like Canada, expressed support for an even more expanded scope of coverage. VIII 1974-77 DIPLOMATIC CONFERENCE, *supra* note xx, at 205-06.

<sup>57</sup> VII 1974-77 DIPLOMATIC CONFERENCE, *supra* note xx, at 66.

<sup>58</sup> Norway also voted with the developing countries.

rescued by a last-minute proposal from Pakistan that saved the Protocol by stripping out most of its provisions.<sup>59</sup>

## 2. *Enforcement*

No state, and not even the ICRC, proposed inserting the enforcement system provided by the grave breach regime into the rules for civil wars. In fact, the final text of Additional Protocol II contained no enforcement mechanism at all, other than the vapid suggestion that the Protocol “should be disseminated as widely as possible.”<sup>60</sup>

The draft text of Additional Protocol I, governing international armed conflicts, did reaffirm the grave breach system of the 1949 Conventions.<sup>61</sup> Although the grave breach system had been an almost complete failure since its inception in 1949 due to lack of state will to prosecute violations, no state suggested making substantive changes to it. As had been the case in 1949, there was near consensus that the Geneva Conventions should not be subject to enforcement in an international court.<sup>62</sup> Even the ICRC did not advocate such a step, although it was recommended to them by several experts.<sup>63</sup> Some states, including the United States, focused on improving the “protecting power” component of the Geneva Conventions, which grant third states or organizations the authority to oversee compliance with the Geneva Conventions in international conflicts.<sup>64</sup> The protecting power provisions, however, make no mention of criminal punishment.

The Geneva Conventions have not been renegotiated since 1977. Furthermore, because they were not subject to judicial elaboration through caselaw, the laws of war have remained in the abstract, vague, and sometimes contradictory language negotiated by the delegates in 1949 and 1977.<sup>65</sup> Although the grave breach regime on paper appeared to be a robust enforcement mechanism, in fact “this noble innovation has achieved nothing.”<sup>66</sup> States have demonstrated that they rarely possess the political will to conduct prosecutions for violations of the laws of war, particularly for large-scale violations. This state of affairs changed dramatically after the bloody breakup of Yugoslavia in the 1990s.

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<sup>59</sup> Bothe, *supra* note xx, at 606.

<sup>60</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, art. 19 [hereinafter Additional Protocol II].

<sup>61</sup> Additional Protocol I, *supra* note xx, art. 74.

<sup>62</sup> Bothe, *supra* note xx, at 512.

<sup>63</sup> Bothe, *supra* note xx, at 507.

<sup>64</sup> LC. Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 244-462 (2d ed. 2000).

<sup>65</sup> Eric A. Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297, 308 (2003).

<sup>66</sup> Best, *supra* note xx, at 396.

PART II. THE TRANSFORMATION OF THE LAWS OF WAR BY  
ESTABLISHMENT OF THE YUGOSLAV TRIBUNAL, THE RWANDAN  
TRIBUNAL, AND THE INTERNATIONAL CRIMINAL COURT

A. *The Establishment of the ICTY*

When Yugoslavia began to spiral into civil war in 1991, the United Nations Security Council had emerged from the Cold War paralysis of the previous forty years. The reinvigorated Council, however, proved ineffectual at stopping the bloodshed in Yugoslavia or at halting the atrocities. In July 1992, reporters began filing stories chronicling death camps that revive memories of Nazi Germany. Numerous NGOs and international organizations reported mass rapes, killings, and torture committed in Bosnia.<sup>67</sup> The Security Council's attempts to fashion political solutions to the conflict and to discourage the commission of atrocities through economic and military sanctions fell flat.<sup>68</sup> Individuals from prominent NGOs, leading political figures, and organizations associated with the United Nations called for the establishment of an international tribunal, modeled on the Nuremberg Tribunal, to prosecute perpetrators of war crimes committed in Yugoslavia.<sup>69</sup>

In September 1992, the German foreign minister formally introduced the idea of an international war crimes tribunal to the United Nations General Assembly.<sup>70</sup> In January 1993, President Clinton took office in the United States. His U.N. Ambassador, Madeline Albright, was enthusiastic about the idea of a tribunal.<sup>71</sup> Heading off a rival U.S. proposal, France officially brought the idea of a tribunal to the Security Council early in 1993. Privately, however, key French officials were opposed to the idea, fearing that it would endanger French troops serving as peacekeepers in Bosnia and hamper the European-led peace negotiations.<sup>72</sup> The British opposed the tribunals on the same grounds.<sup>73</sup>

The United States, which refused to send troops but did want to respond to the Bosnian crisis in some way, pushed for a Tribunal. The

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<sup>67</sup> John Hagan, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* 33 (2003).

<sup>68</sup> Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L ORG. 655, 661-62 (2001).

<sup>69</sup> *Id.*; Michael P. Scharf, *BALKAN JUSTICE: THE STORY OF THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 44, 51 (1997).

<sup>70</sup> Pierre Hazan, *JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 23 (James Snyder trans. 2004).

<sup>71</sup> Hazan, *supra* note xx, at 36.

<sup>72</sup> *Id.*, at 35.

<sup>73</sup> Bass, *supra* note xx, at 211.

United States persuaded China and Russia to go along with the idea. Pakistan, then serving on the Security Council, pressed for the tribunal on behalf of other Muslim countries as a show of support to the beleaguered Bosnians.<sup>74</sup> When increasing publicity about ongoing atrocities highlighted the failure of the Security Council's political efforts,<sup>75</sup> members of the Security Council acquiesced to the proposals for a tribunal. On February 22, 1993, the Council passed a resolution declaring that it would establish an international tribunal for Yugoslavia, although it gave no details of how the new court would operate.<sup>76</sup>

The decision to create a tribunal, however, did nothing to clarify the details of the institution. The Security Council had never created a court using its authority over breaches of international peace (which gives it jurisdiction over the events in Yugoslavia). It delegated the politically sensitive task of creating the statute to United Nations Secretary-General Boutros Boutros-Ghali. Working under intense time pressure, the secretary-general drafted a statute on the basis of suggested texts provided by states and NGOs.<sup>77</sup>

The final text of the statute was appended to an explanatory report presented by the secretary-general to the Security Council. It gave the tribunal jurisdiction over genocide, crimes against humanity, and—of particular relevance here—grave breaches, as defined by the 1949 Geneva Conventions, and violations of the laws and customs of war. In light of the prior history of the development of the laws of war, this decision was revolutionary. For the first time since Nuremberg and Tokyo, an international court was endowed with the authority to punish violations of the laws of war. A step that had been steadfastly resisted by delegates at the Diplomatic Conferences in 1949 and 1974-77 was, in the press of events in 1993, embraced by the Security Council almost without comment.

On May 25, 1993, the Security Council officially discussed the secretary-general's report, as well as Resolution 827. The text of Resolution 827 set out the goals of the tribunal in its preamble and adopted the Statute proposed by the secretary-general. The Council approved the text of Resolution 827 as drafted, thus accepting the Report and the Statute without amendment.<sup>78</sup> The preamble to

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<sup>74</sup> Hazan, *supra* note xx, at 37.

<sup>75</sup> *Id.*, at 14.

<sup>76</sup> S.C. Res. 808 (1993).

<sup>77</sup> These are collected in 2 Virginia Morris & Michael P. Scharf, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 209-480 (1995) [hereinafter Morris & Scharf, YUGOSLAVIA].

<sup>78</sup> Mohamed Shahabuddeen, *Policy-Oriented Law in the International Criminal Tribunal for the Former Yugoslavia in MAN'S INHUMANITY TO MAN* 889, 890 (L.C. Vohrah et al. eds. 2003).

Resolution 827 and its discussion in the Security Council identified three principal goals for the tribunal: ending the commission of war crimes in the former Yugoslavia, punishing persons responsible for those crimes, and breaking the cycle of ethnic violence that had made the perpetration of those crimes possible.<sup>79</sup>

The discussion of Resolution 827 in the Security Council provided further evidence of the members' understanding of the ICTY. China, which was still privately opposed to the ICTY,<sup>80</sup> stated that the tribunal "shall not constitute any precedent."<sup>81</sup> Many delegates took a different tack, suggesting that the creation of the ICTY and ICTR confirmed the need for a permanent institution devoted to international criminal law. The Representatives of the United Kingdom, Spain, Russia, and France expressed this view.<sup>82</sup> Several representatives indicated that the tribunal must act, and be seen to act, independently of the Security Council.<sup>83</sup>

Many delegates asserted that the tribunals could not create new law. The representative of Venezuela, which at the time held the Presidency of the Security Council, underlined that the tribunal, "as a subsidiary organ of the Council, would not be empowered with—nor would the Council be assuming—the ability to set down norms of international law or to legislate with respect to those rights. It simply applies existing international humanitarian law."<sup>84</sup> In his Report, the secretary-general declared that the "principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law."<sup>85</sup> In fact, the statute as drafted by the secretary-

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<sup>79</sup> S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter S.C. Resolution 827]; Michael P. Scharf, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 215 (1997).

<sup>80</sup> David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. FORUM 401, 411 (1994).

<sup>81</sup> Scharf, *supra* note xx, at 215.

<sup>82</sup> *Id.* at 190, 204. Russia and France made these comments in the context of the ICTR. Provisional Verbatim Record of the Security Council, forty-ninth year, 3453rd meeting, Tuesday, 8 November 1994, S/PV3453, & 19 November [hereinafter ICTR Debate], reprinted in 2 Virginia Morris & Michael P. Scharf, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 299, 300 (1998) [hereinafter Morris & Scharf, RWANDA].

<sup>83</sup> ICTY Debate, *supra* note xx, at 194 (statement of Japan), 203 (statement of Spain). These assertions of independence most likely sprang from concerns about the charge of victors' justice that had shadowed the legacy of the International Military Tribunals at Nuremberg and Tokyo.

<sup>84</sup> ICTY Debate, *supra* note xx, at 182. The United Kingdom, Brazil, and Spain made similar statements. *Id.* at 190, 202, 204.

<sup>85</sup> The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, U.N. Doc. S/2004/616, Aug. 23, 2004, ¶ 34 [hereinafter Secretary-General Report].

general was more conservative than some states on the Security Council advocated. The United States, for example, had proposed that the Statute specifically reference the Additional Protocols to the Geneva Conventions; the secretary-general did not include them, presumably because of their uncertain customary law status.<sup>86</sup>

Although the ICTY Statute left many of the details of crimes vague, representatives on the Council made few comments on issues of substantive law. This silence partially reflected an unwillingness to reopen sensitive questions resolved by the secretary-general's proposed draft. Prior to the discussion of Resolution 827, the United States lobbied for the Council to approve the statute without amendment and encouraged states to offer "interpretive" comments during the discussion.<sup>87</sup> A few states—all permanent members of the Council—took advantage of this opportunity. Their comments, however, did not tackle the details of the statute.

Only Canada, who was not a member of the Security Council but did submit a proposal to the secretary-general for the statute of the tribunal, argued for more specifics. Canada urged that the Security Council set out the exact offenses under the laws of war that would fall within the jurisdiction of the ICTY as well as the mental states that the prosecutor would have to prove.<sup>88</sup> No other state took this approach, and it is not reflected in the final statute. With the exception of Canada's proposal, none of the public records relating to the ICTY Statute reveal any qualms with investing such discretion in an international court. Instead, members of the Security Council emphasized the tribunal's independence. The contrast between the Security Council's discussion of the content of the ICTY Statute and the painstaking negotiations over the Geneva Conventions at the Diplomatic Conferences of 1949 and 1974-77 could not be more stark.

The reason for what was, in retrospect, a remarkable amount of insouciance with respect to the tribunal's law creation function, is readily apparent. Because of the court's limited jurisdiction, no state sitting on the Council expected any of its nationals to be tried before the ICTY.<sup>89</sup> In addition, in 1993 and 1994, the establishment of a permanent international criminal court was far from assured. Although members of the Council were aware of the potential

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<sup>86</sup> Scharf, *BALKAN JUSTICE*, *supra* note xx, at 58.

<sup>87</sup> Morris & Scharf, *supra* note xx, at 33-34.

<sup>88</sup> Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General, ¶ 8 S/25594, 14 April 1993, *in* 2 Morris & Scharf, *YUGOSLAVIA*, *supra* note xx, at 459, 460.

<sup>89</sup> The ICTY has jurisdiction only over acts of genocide, crimes against humanity, and war crimes committed in the territory of the former Yugoslavia since 1991. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 1, *available at* <http://www.un.org/icty/legaldoc/index.htm> [hereinafter ICTY Statute].

precedential value of the ICTY, they did not treat it as a full dress rehearsal for an International Criminal Court.

### B. *The Decision to Establish the ICTR*

Atrocities soon flared up thousands of miles from Yugoslavia. In April 1994, civil war broke out in Rwanda, and, by the end of June, 800,000 Rwandan citizens were dead.<sup>90</sup> Again, the Security Council did nothing to stop the bloodshed. The new Rwandan government called for the establishment of an ICTY-like institution for Rwanda.<sup>91</sup> The Security Council was anxious not to be seen as more concerned about events in Europe than in Africa and quickly agreed to the establishment of another tribunal.<sup>92</sup>

The ICTR statute was modeled closely on that of the ICTY.<sup>93</sup> It granted the tribunal jurisdiction over the events occurring in 1994 in Rwanda and in “neighbouring States.”<sup>94</sup> The ICTY Statute does not clarify whether the fighting in Yugoslavia constituted international conflict or a civil war, a question pivotal to the application of the laws of war. Unlike the ICTY statute, the war crimes provision for the ICTR statute applied explicitly to civil wars by referencing both common Article 3 of the 1949 Geneva Conventions and Additional Protocol II of 1977.<sup>95</sup> There is little legislative history for the ICTR statute, so it is not clear on what basis the Security Council made the determination that customary international law provides for individual criminal responsibility in civil wars.

When considered in light of the negotiations of the Geneva Conventions, the war crimes provision of the ICTR statute was revolutionary. During the Diplomatic Conferences in 1949 and 1974-77, no state suggested that the articles on civil war should include individual criminal responsibility. Indeed, these treaties established no enforcement mechanisms at all for civil wars. Even the Nuremberg and Tokyo Tribunals, which both adjudicated crimes committed in international conflicts, provided no precedent for this step.

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<sup>90</sup> Philip Gourevitch, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 133 (1998).

<sup>91</sup> Rwanda Wants Trial of Genocide Suspects, UPI, Aug. 9, 1994; UN Should Extend Mandate of Crimes Tribunal to Rwanda, CIJ, Agence Fr. Press, July 2, 1994.

<sup>92</sup> Antonio Cassese, *From Nuremberg to Rome: International Military Tribunal to the International Criminal Court*, in 2 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 3, 14 (Antonio Cassese et al eds., 2002).

<sup>93</sup> Unlike the case with the ICTY, the Secretary-General did not draft the ICTR Statute. It was drafted principally by representatives of the United States and New Zealand. 1 Morris and Scharf, *RWANDA*, *supra* note xx, at 101 n.466.

<sup>94</sup> Statute of the International Criminal Tribunal for Rwanda, art. 1, *available at* <http://www.ictr.org/ENGLISH/basicdocs/statute.html> [hereinafter ICTR Statute].

<sup>95</sup> ICTR Statute, *supra* note xx, art. 4.

The discussion of the ICTR in the Security Council, however, made little reference to the novelty of the ICTR's work. The French representative blandly noted that the ad hoc tribunals can "provide international penal experience which will be useful for the establishment of a future permanent court."<sup>96</sup> Argentina highlighted that the tribunal was "not authorized to establish rules of international law or to legislate as regards such law but, rather, it is to apply existing international law."<sup>97</sup> In light of the ground-breaking nature of the idea of the international prosecution of crimes committed in civil wars, this statement was either breathtakingly disingenuous or profoundly ill-informed.

### C. *The Early Years of the ICTY and ICTR*

The Security Council's establishment of the tribunals, however, did not ensure the courts' success. Indeed, several members of the P-5 were privately hostile to their existence. Although these states could not directly attack their new creation, they could vanquish the tribunal in a war of attrition. The ICTY's first president observed that the states on the Council could "paralyze" the court by refusing to make arrests. He remarked that "a tribunal without defendants, without trials, would cost a fortune and produce nothing of value."<sup>98</sup>

The ICTY's early years were particularly rocky. In July 1993, an article appeared in the Washington Post, entitled *Where's the War Crimes Court?* It noted that no prosecutor has been chosen, no judge nominated, and no defendant named.<sup>99</sup> In fact, it took eighteen months to select a prosecutor in a process that was "a protracted, politicized fiasco."<sup>100</sup> The tribunal had insufficient funds and personnel. Arrest of indicted suspects was an acute problem. France and Britain each had peacekeepers in Bosnia and worried that its troops could be subject to retaliation if they apprehend indicted individuals.<sup>101</sup> Serbia and Croatia, where many of the suspects were living, refused to cooperate with the tribunal. By 1996, the peacekeepers on the ground in Yugoslavia had not made a single arrest.<sup>102</sup> By 1997, only seven people were in custody, and most of those had surrendered voluntarily to the tribunal.<sup>103</sup> The judges threatened to resign. Although it had introduced the resolution establishing the ICTY, France stonewalled

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<sup>96</sup> ICTR Debate, *supra* note xx, at 300.

<sup>97</sup> ICTR Debate, *supra* note xx, at 303.

<sup>98</sup> Hazan, *supra* note xx, at 69.

<sup>99</sup> S.S. Rosenfeld, *Where's the War Crimes Court?*, WASH. POST, July 30, 1993, at A21.

<sup>100</sup> Bass, *supra* note xx, at 217.

<sup>101</sup> *Id.*, at 216.

<sup>102</sup> *Id.*, at 245.

<sup>103</sup> Theodor Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 FOREIGN AFFAIRS 2, 5 (1997).

the tribunal and provided no support to the institution.<sup>104</sup> In 1997, the French defense minister labeled the ICTY a “circus.”<sup>105</sup> At the urging of Madeline Albright, the United States stepped in to support the tribunal, providing twenty-two prosecutors and investigators to the understaffed prosecutor’s office.<sup>106</sup> The United States also lent financial support, giving \$3 million to develop a computer system.<sup>107</sup>

The appointment in 1996 of the Canadian judge Louise Arbour as the tribunal’s second prosecutor marked the beginning of a shift in the tribunal’s political fortunes. Arbour began issuing secret arrest warrants,<sup>108</sup> and held a press conference at which she publicly disclosed that France was failing to cooperate with the tribunal—a charge that France heatedly denied.<sup>109</sup> Tony Blair was elected prime minister of the United Kingdom in 1997. Blair’s foreign secretary, Robin Cook, championed an “ethical foreign policy,”<sup>110</sup> and Blair instructed his government to begin cooperating with the tribunal. In 1999, Secretary Cook provided the ICTY with what he describes as “the biggest handover of British intelligence to an outside agency in its history.”<sup>111</sup> The ICTY gradually gained in strength and resources. By 2004, the tribunals’ annual expenditures constituted 15 percent of the entire U.N. budget.<sup>112</sup>

Compared with the ICTY, the ICTR’s early years were less contentious. By the time of the tribunal’s establishment, the conflict in Rwanda was largely over. The permanent members of the Security Council had little at stake in the country and many of the ICTR’s suspects were easily apprehended. The ICTR was plagued by corruption scandals and charges of incompetence. Nevertheless, it—unlike the ICTY—did not expose the ambivalence among the members of the Council about the wisdom of international criminal accountability.

#### D. *The Tribunals’ Transformation of the Laws of War*

During the period of the ICTY’s greatest political weakness, its judges issued a surprising series of decisions that effected a fundamental transformation in the laws of war. This early burst of activity belies the conventional wisdom about international courts that their decisions exhibit caution at the beginning of the courts’ life and

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<sup>104</sup> Bass, *supra* note xx, at 222.

<sup>105</sup> Hazan, *supra* note xx, at 100.

<sup>106</sup> *Id.*, at 52.

<sup>107</sup> Hagan, *supra* note xx, at 70.

<sup>108</sup> Louise Arbour, *The Crucial Years*, 2 J. INT’L CRIM. JUST. 396, 397 (2004); Hazan, *supra* note xx, at 95; Hagan, *supra* note xx, at 14.

<sup>109</sup> Hagan, *supra* note xx, at 120.

<sup>110</sup> *E.g.*, *Tackling World Poverty*, THE GUARDIAN, May 29, 1997, at 18 (describing Cook’s “ethical foreign policy”).

<sup>111</sup> Hagan, *supra* note xx, at 121.

<sup>112</sup> Secretary-General Report, *supra* note xx, ¶ 14.

then get progressively bolder.<sup>113</sup> In the case of the tribunals, the most far-reaching decisions on the laws of war were taken in the earliest cases.

Writing in 1990, one scholar lamented that the laws of war were regarded by many as “esoteric” and “irrelevant.”<sup>114</sup> In a 1998 article entitled *War Crimes Law Comes of Age*, Theodor Meron asserted that the laws of war developed faster between 1991 and 1998 than in the forty-five years after the Nuremberg Tribunals.<sup>115</sup> He credited this revolution in significant part to the jurisprudence of the tribunals.<sup>116</sup>

The tribunals’ most revolutionary decisions addressed the fundamental issues that divided the delegates at the Diplomatic Conferences in 1949 and 1974-77 on the scope of the laws of war—namely, whether the rules should address civil wars and how to distinguish between international conflicts and civil wars. The ICTY judiciary had the difficult task of applying, and refining, the key phrases from the Geneva Conventions relating to the scope of the treaties. In light of the chaotic conditions surrounding the dissolution of Yugoslavia in the 1990s, it was not obvious whether to describe the violence as a single or multiple wars and, if multiple, whether the conflicts had been “internationalized” such that the rules governing international conflicts would apply. Furthermore, it was not clear whether customary international law included individual criminal responsibility for violations committed during non-international armed conflicts at all. The provisions in the Geneva Conventions and the Additional Protocols that addressed non-international armed conflicts deliberately made no mention of criminal punishment.

The most important law-of-war decision by the ICTY was issued in its first full case, *Prosecutor v. Tadic*. In *Tadic*, the court considered whether the Security Council had limited the ICTY’s jurisdiction to international armed conflicts or whether its jurisdiction extended to civil wars. In an amicus brief filed in *Tadic*, the United States argued that the conflict in Yugoslavia was clearly an international one, and that the members on the Security Council

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<sup>113</sup> The European Court of Human Rights and the quasi-judicial European Commission of Human Rights, for example, behaved cautiously in their early cases. J.G. Merrills, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 71-81 (2d ed. 1993); J.G. Merrills, *HUMAN RIGHTS IN EUROPE* 264 (3d ed. 1993); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 *HARV. INT’L L.J.* 357, 408-09 (1998).

<sup>114</sup> Hilaire McCoubrey, *INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS* vii (1990).

<sup>115</sup> Theodor Meron, *War Crimes Law Comes of Age*, 92 *AM. J. INT’L L.* 462, 463 (1998).

<sup>116</sup> *Id.* at 464.

viewed it as such when they established the tribunal.<sup>117</sup> The ICTY, however, rejected the blanket classification of the wars in Yugoslavia as international, stating that some may instead be civil wars. The ICTY nevertheless concluded that the Security Council has endowed it with jurisdiction over both international and non-international armed conflicts.<sup>118</sup>

The Court's conclusion that the Council had vested the ICTY with jurisdiction over civil wars ran into a textual problem. The ICTY Statute does not refer to any of the provisions or treaties governing civil wars (namely common Article 3 and Additional Protocol II). Indeed, there was clear evidence that the secretary-general deliberately excluded any reference to them in the statute.<sup>119</sup> As enacted by the Security Council, the tribunal's statute contains two provisions related to war crimes: Article 2 covers grave breaches of the 1949 Geneva Conventions, and Article 3 refers to "violations of the laws and customs of war." In a decision that will be discussed further below, the *Tadic* court first decided that, because of its references to the grave breach regime, Article 2 applied only to offenses committed in international conflicts. The Court then turned its attention to the statute's other provision on the violations of the laws of war, Article 3.

The introductory language (often referred to as the "chapeau") of Article 3 of the ICTY Statute provides that "[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war." It further states that "[s]uch violations shall include, but not be limited to" a series of acts taken from the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.<sup>120</sup> These acts include, for example, the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity."<sup>121</sup> Hague Law, as exemplified by this provision, regulates the means and methods of conducting military operations in armed conflict.<sup>122</sup> The Hague Convention makes no reference to criminal responsibility.

The defense in *Tadic* made a strong case that Article 3 of the ICTY Statute was limited to violations of Hague law. The language of the

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<sup>117</sup> Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, at 33 (July 17, 1995) [hereinafter U.S. Amicus Brief in *Tadic*].

<sup>118</sup> Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber ¶ 72 (Oct. 2, 1995) [hereinafter *Tadic II*].

<sup>119</sup> Larry D. Johnson, *Ten Years Later: Reflections on the Drafting*, 2 J. INT'L CRIM. JUST. 368, 370 (2004).

<sup>120</sup> Secretary-General Report, *supra* note xx, ¶ 41.

<sup>121</sup> ICTY Statute, *supra* note xx, art. 3(b).

<sup>122</sup> L.C. Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 29 (1993).

secretary-general's report referred only to violations of Hague law in its discussion of this provision.<sup>123</sup> The report did not reference the Geneva Conventions with regard to this provision, and the secretary-general pointedly excluded a reference to Additional Protocol II from the text of the ICTY Statute. Writing soon after the Security Council enacted the ICTY Statute, a lawyer from the United Nations Office of Legal Counsel involved in the drafting of the statute argued that the ICTY's war crimes jurisdiction was "limited to the Geneva Conventions of 1949 and the fourth Hague Convention."<sup>124</sup>

Despite this evidence of the limited nature of Article 3, the Appeals Chamber determined that the provision extended beyond Hague law to include "all violations of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions."<sup>125</sup> The Appeals Chamber stated that Article 3 "functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article Three aims to make such jurisdiction watertight and inescapable."<sup>126</sup> In so doing, the Appeals Chamber effectively held that Article 3 of the ICTY Statute incorporated the laws of war that apply to civil wars, even though there is no mention of the relevant provisions in the statute.

In the *Tadic* decision, therefore, the court found that it had jurisdiction over offenses committed in civil wars under Article 3 of the ICTY statute, that the Security Council intended for the Tribunal to prosecute these offenses, and that there was individual criminal responsibility, as a matter of *customary* law, for violations of the laws of war committed in civil wars. This understanding represented a wholesale change from the limited enforcement scheme included in the texts of the 1949 Geneva Conventions and their Additional Protocols. William Schabas has written that, with the *Tadic* decision, the Appeals Chamber "stunned international lawyers by issuing a broad and innovative reading of the two war crimes of the ICTY Statute."<sup>127</sup> Later decisions by the ICTY found that certain crimes are

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<sup>123</sup> Secretary-General Report, *supra* note xx, ¶¶ 41-44.

<sup>124</sup> Ralph Zacklin, *Bosnia and Beyond*, 34 VA. J. INT'L L. 277, 280 (1993).

<sup>125</sup> *Tadic II*, *supra* note xx, ¶ 87. . The Appeals Chambers imposed four requirements for finding a particular act to be a violation of Article 3 of the ICTY Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious"; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. *Id.* ¶ 94.

<sup>126</sup> *Tadic II*, *supra* note xx, ¶ 91.

<sup>127</sup> William Schabas, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 42 (2001).

criminal under customary international law—even when committed in non-international armed conflict.<sup>128</sup>

The *Tadic* court stated that the application of the laws of war to civil wars was an outgrowth of the human rights movement of the past forty years. It observed that “[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.”<sup>129</sup> The Court rhetorically asked, “Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals . . . when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State?”<sup>130</sup>

The *Tadic* court need not have taken such an expansive view. All of the criminal acts for which Tadic stood accused were also charged as crimes against humanity. Dismissal of the war crimes charges, therefore, would not have acquitted Tadic of any conduct described as criminal by the prosecution. Nonetheless, the Appeals Chamber chose a much more aggressive approach, based both on the court’s perception that the Security Council intended to make its jurisdiction “water-tight” and on its understanding of the “human rights revolution” in international law.

The *Tadic* court, however, rendered a more conservative reading of Article 2 of its statute, which references the grave breach regime. In an amicus brief, the United States argued that the grave breach regime included common Article 3 of the 1949 Geneva Conventions<sup>131</sup>—a position that was a highly creative, and almost undoubtedly incorrect, interpretation of the 1949 treaties. The Appeals Chamber rejected the argument, although it was careful to credit the U.S. position. The Appeals Chamber concluded that Article 2 of the ICTY Statute applied only to offenses committed in international armed conflict.<sup>132</sup> The court placed particular weight on the decision by states in their negotiation of the 1949 Geneva Conventions to limit the grave breach system to international armed conflicts.<sup>133</sup> Although the *Tadic* court was clearly sympathetic to the idea that the rules governing international armed conflicts and civil wars should be the same, it would not fully harmonize the twin regimes governing armed conflicts

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<sup>128</sup> In a recent case, the ICTY has found that “destruction or willful damage of institutions dedicated to religion” in non-international armed conflict is a crime under customary international law. Prosecutor v. Hadžihasanović, Case No. IT-01-47-T Decision on Motions for Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence, ICTY Trial Chamber ¶ 147 (Sep. 27, 2004).

<sup>129</sup> *Tadic* II, *supra* note xx, ¶ 97.

<sup>130</sup> *Id.*

<sup>131</sup> U.S. Amicus Brief in *Tadic*, *supra* note xx, at 35.

<sup>132</sup> *Id.* ¶ 84.

<sup>133</sup> *Id.* ¶ 80.

on its own initiative. With this decision, the ICTY turned out to have a keen sense of how far states would be willing to go. During the later negotiations on the ICC treaty, states refused to merge the regimes governing international and non-international armed conflicts.<sup>134</sup>

Having established that the prosecution could charge Article 2 violations only if the acts occurred in international armed conflicts, the *Tadic* court resolved another key jurisdictional question: the definition of “armed conflict.” The text of the 1949 Conventions did not address this seminal issue at all, and it was only partially resolved by the Additional Protocols. The Appeals Chamber stated that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>135</sup> This definition, which implicitly applied both to international conflicts and civil wars, was broader than either of those provided in the Additional Protocols. It tacitly rejected the language painstakingly negotiated by states in the Diplomatic Conference. In fact, it closely resembled the ICRC’s original proposed language with regard to Additional Protocol II that had been rejected at the Conference in 1974.

The consequence of the *Tadic* decision is that the provisions of the 1949 Geneva Conventions, including Geneva Convention IV on the treatment of civilians (which was at issue in the case) apply to conflicts that would previously have been considered civil wars. In a later decision, the Appeals Chamber acknowledged that the *Tadic* test is “not as rigorous” as the test of the Trial Chamber, which the Appeals Chamber reviewed and reversed.<sup>136</sup> The court declared that “this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure ‘protection of civilians to the maximum extent possible.’”<sup>137</sup>

The use of “purpose” here refers not to the intention of the Security Council but instead to that of the authors of the Geneva Convention’s rules. The records of the 1949 Diplomatic Conference, however, reveal that most states did not, in fact, seek to protect civilians “to the maximum extent possible.” While the fourth Geneva Convention provides some protection to civilians, those guarantees are relatively weak.<sup>138</sup> Geneva Convention IV, like the other 1949 Conventions,

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<sup>134</sup> See Part III, *infra*.

<sup>135</sup> *Tadic* II, *supra* note xx, ¶ 70.

<sup>136</sup> Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, Appeals Chamber ¶ 145 (Mar. 24, 2000).

<sup>137</sup> *Id.* at 146.

<sup>138</sup> Judge George H. Aldrich, *Violations of the Laws or Customs of War*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL COURTS: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 99, 101 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds. 2000).

balances the needs of individual and state security. In its reinterpretation of the provision forty years later, the ICTY put its own thumb on the scale, coming down heavily in favor of the rights of individuals in wartime and thus limiting states authority to acts in ways that may harm civilians.

The early *Tadic* decisions represent the high-water mark of judicial expansiveness at the ICTY with regard to the laws of war. The tribunal's later decisions have been much more modest. The phenomenon of initial activism in the laws of war at the ICTY followed by increasing restraint has not been generally observed or discussed, so there is no commonly accepted explanation for the trend. One suspects that it may result from the changing nature of the ICTY bench. The judges on the Appeals Chamber in *Tadic*, who were largely judges on international courts, international diplomats, or professors of international law, may have been more comfortable with broadly interpreting international legal principles than the newer judges at the ICTY, whose professional background tends to include more experience in criminal law and domestic adjudication. Perhaps, too, the *Tadic* judges were concerned that, if they read the ICTY statute too narrowly, the court would terminate without having convicted any defendants of war crimes.

Whatever the reason for the ICTY's initial burst of judicial activism, one finds a much different picture at the Rwandan Tribunal. Because the ICTR Statute explicitly references common Article 3 and Additional Protocol II, one would expect its decisions to have been the most important component of the tribunals' exegesis of the laws governing civil wars. In fact, however, the ICTR's judges have routinely acquitted its defendants of war crimes, although the defendants have been convicted of genocide and crimes against humanity. As of this writing, only three defendants have been convicted of war crimes by the ICTR.<sup>139</sup> The ICTR's cases have focused much more on the crime of genocide, which is generally considered the "crime of crimes" of international criminal law. While the ICTR Statute provided an important indication that the permanent members of the Security Council would accept the extension of the laws of war to civil wars, it was the judges of the ICTY, not the ICTR, that fully elaborated upon this suggestion.

E. *The Codification of the Laws of War in the International Criminal Court Treaty*

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<sup>139</sup> See *Semanza v. Prosecutor*, Case No. ICTR-97-20, Judgement, Appeals Chamber (May 20, 2005); *Rutaganda v. Prosecutor*, Case No. ICTR-96-3, Judgement, Appeals Chamber (May 26, 2003); *Prosecutor v. Imanishimwe*, Case No. ICTR-97-36, Judgement and Sentence, Trial Chamber III (Feb. 25, 2004).

Calls to establish an international criminal court date from the end of World War One. Since that time, however, the idea of an international criminal court was largely viewed as a quixotic quest pursued only by the hardest of international idealists. The drive to establish an international criminal court paralleled, but did not form part of, the development of the laws of war. Indeed, as we have seen, the drafters of the laws of war consistently rejected proposals to provide for their enforcement in an international court.

Although the laws of war and international criminal law were briefly united in the Nuremberg and Tokyo Tribunals, they quickly diverged after the conclusion of those proceedings. At the same time that preparations for the 1949 Diplomatic Conference on the Geneva Conventions were underway, the United Nations General Assembly instructed its Committee on Codification of International Law to prepare a draft code of international criminal law.<sup>140</sup> A separate subcommittee of the Committee on Codification pursued a draft code for an international criminal court. In the heat of the Cold War, neither the United States nor the Soviet Union welcomed these developments, and they came to nothing.<sup>141</sup>

In 1989, Trinidad and Tobago introduced a suggestion in the General Assembly for the establishment of a specialized international court to combat drug trafficking. The General Assembly requested that the International Law Commission (the successor of the Committee on Codification of International Law) complete the draft statute.<sup>142</sup> This draft became the basis for the negotiating text for the treaty of the International Criminal Court (ICC) that would be approved by 120 nations in Rome in 1998 and subsequently known as the Rome Statute.

The ICC has jurisdiction over cases alleging the commission of crimes against humanity, war crimes, or genocide occurring after July 1, 2002. The negotiation of the war crimes provision in the statute reflects the continuing influence of the Great Powers, particularly the permanent members of the Security Council. The adoption of the Court's jurisdictional scheme, however, diverges sharply from the history of the development of the laws of war in the preceding fifty years because it represents a significant defeat of the U.S. position.

### 1. *Negotiation of the Rome Statute*

The unlikely success of the ICC negotiations was partly due to the end of the Cold War and the ensuing burst of international cooperation. The ICTY and ICTR also contributed to the birth of the

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<sup>140</sup> This took place in 1947. M. Cherif Bassiouni, *Historical Survey: 1919-1928*, in 3 INTERNATIONAL CRIMINAL LAW 597, 609 (M. Cherif Bassiouni, ed., 2d ed. 1999).

<sup>141</sup> *Id.* at 610.

<sup>142</sup> *Id.* at 614.

ICC in important ways. The Tribunals demonstrated that international criminal punishment can be successfully, if awkwardly, accomplished. Furthermore, the Tribunals' statutes and jurisprudence provided a key model for the negotiations of the ICC treaty.

a. *War Crimes in the Rome Statute*

Nowhere is the influence of the tribunals' jurisprudence more evident than in the Rome Statute's hotly-debated provision on war crimes.<sup>143</sup> Delegates at the Rome Conference demonstrated familiarity with the tribunals' cases, bringing copies of key decisions with their materials for the negotiations. As a technical matter, the negotiators of the ICC treaty were not bound by the law developed by the tribunals. *Stare decisis* does not formally operate in international law. Furthermore, international law provides that states are free to negotiate the terms of any treaty, as long as the provisions do not violate a *jus cogens* norm.

Despite the negotiators' authority to disregard the tribunals' jurisprudence, much of the Rome Statute follows the lines laid out by the ICTY in *Tadic*. The negotiators followed the *Tadic* Court's decision that the rules governing international and non-international conflicts are distinct.<sup>144</sup> Like the *Tadic* Appeals Chamber's decision on Article 2 of the ICTY Statute, the Rome Statute also provides that grave breaches of the Geneva Conventions can only be committed during international armed conflicts.<sup>145</sup>

Just as it had been in the negotiation of the Geneva Conventions and the Additional Protocols, the applicability of the laws of war to civil wars was "a major source of contention" during the ICC negotiations.<sup>146</sup> The United States, France, Japan, and the United Kingdom, among other states, supported the inclusion of civil wars in the Statute. China, India, Indonesia, Pakistan, Russia, and Turkey all opposed the application of war crimes to civil wars.<sup>147</sup> The controversy over the civil war provisions replicated the debate in the earlier Diplomatic Conferences over how to distinguish international conflicts from civil wars. The delegates found their solution in the tribunals' jurisprudence, particularly the *Tadic* decision.

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<sup>143</sup> Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 107, 122 (Roy S. Lee ed. 1999).

<sup>144</sup> Rome Statute of the International Criminal Court, July 17, 1998, art. 8 [hereinafter Rome Statute].

<sup>145</sup> Knut Dörmann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 18 (2002).

<sup>146</sup> von Hebel and Robinson, *supra* note xx, at 104.

<sup>147</sup> Andreas Zimmerman, *Preliminary Remarks on para. 2(c)-(f) and para. 3 in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE* 262, 269 (Otto Triffterer ed., 1999); von Hebel and Robinson, *supra* note xx, at 105.

For its provision on war crimes, the Rome Statute adopts the definition of “armed conflict” articulated by the Appeals Chamber in *Tadic*.<sup>148</sup> This definition is broader than the one that was painstakingly crafted in the 1974-1977 Diplomatic Conference.<sup>149</sup> With the adoption of this definition and the decision to cover acts committed in civil war, the transformation of the laws of war that began with the Security Council’s adoption of the provisions on civil war in the ICTR Statute and that was more fully developed in the ICTY jurisprudence is now codified in a permanent international criminal institution.

The final language of the Rome Statute also reflects concern on the part of many countries that the extension of the laws of war to civil wars would hamper their ability to maintain order at home. The final text of the treaty provides that the provisions on war crimes in civil war “shall [not] affect the responsibility of a Government to maintain or re-establish law and order in the State.”<sup>150</sup> The concern over the ability of states to suppress rebellions that has shadowed the application of the laws of war to civil wars since 1949, therefore, is also manifest in the Rome Statute. The list of war crimes that can be committed in civil wars is also more abbreviated than its international war cognate. The treaty does not, for example, prohibit the use of particular weapons in civil war, as it does for international conflicts.<sup>151</sup>

In fact, the text of the ICC treaty betrays ambivalence about the possibility of war crimes prosecution in a permanent international body. In some ways, the Rome Statute is quite conservative with regard to war crimes, particularly those related to prohibited weapons and the definition of proportionality. During the negotiation of the treaty there was significant debate over how to address weapons of mass destruction. The nuclear states wanted to include a provision making the use of chemical and biological weapons a crime. The non-nuclear states objected, stating that nuclear weapons should be proscribed as well. The result of this debate was the elimination of both provisions, to the dismay of NGO activists.<sup>152</sup>

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<sup>148</sup> The definition states that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Tadic* II, *supra* note xx, ¶ 70.

<sup>149</sup> Andreas Zimmermann, *Preliminary Remarks on para. 2 (c)-(f) and para. 3: War crimes committed in an armed conflict not of an international character*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 262, 285 (Otto Triffterer ed. 1999).

<sup>150</sup> Rome Statute, *supra* note xx, art. 8(3).

<sup>151</sup> Zimmerman, *supra* note xx, at 263.

<sup>152</sup> von Hebel and Robinson, *supra* note xx, at 116-17; Amber McNair, *The ICC: A Victory Despite US Resistance*, PEACE MAGAZINE, July-Sept. 2002, at 17 (arguing that the ICC Statute is watered down due in part to “the exclusion of the use of biological, chemical, and nuclear weapons”).

The history of the negotiation of the Rome Statute reveals that, like the jurisprudence of the ad hoc tribunals and the text of the Geneva Conventions, the war crimes provisions of the Rome Statute largely codify positions advocated by the permanent members of the Security Council—particularly the United States. With regard to the enforcement scheme, however, the United States was much less successful.

b. *The ICC Enforcement Regime*

One of the reasons that the members of the Security Council took a relatively relaxed approach to the specifics of the ICTY's and ICTR's statutes in 1993 was doubtless due to the fact that none of the states expected its nationals to face prosecution in these courts. Chinese support for the ICTY, for example, was reportedly gained by an assurance that the tribunal "had nothing to do with Tibet."<sup>153</sup> Although NATO members eventually came within the jurisdiction of the ICTY because of the bombing of Kosovo in 1999, this possibility was not on the minds of the representatives in 1993.

From the outset, states approached the International Criminal Court with more caution. The Court's jurisdictional scope was the single most controversial issue in the negotiation of the Rome Statute, the "question of questions of the entire project."<sup>154</sup> The initial draft produced by the International Law Commission was solicitous of state sovereignty concerns and set up an enforcement scheme that has been described as "jurisdiction à la carte."<sup>155</sup> Like the jurisdictional scheme of the International Court of Justice, it essentially required state consent for prosecutions on a case-by-case basis, even for states that had ratified the treaty.<sup>156</sup> It also provided that the Court would not have jurisdiction over crimes arising out of any situation being considered by the Security Council under its Chapter VII authority. These two issues—the relationship of the Court to the Security Council and the prerequisites for all cases not referred by the Security Council—were the central jurisdictional questions in the negotiation of the ICC treaty.

The debate over the Court's jurisdiction divided the delegates into three groups. Unsurprisingly, the P-5 supported a strong role for the Security Council. These countries advocated that the Security Council be able to refer cases to the Court and block the Court's investigation

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<sup>153</sup> Hazan, *supra* note xx, at 37.

<sup>154</sup> Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583, 584 (Antonio Cassese et al., eds. 2002).

<sup>155</sup> Sharon A. Williams, *Article 12: Preconditions to the Exercise of Jurisdiction*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 329, 330-31 (Otto Triffterer ed. 1999).

<sup>156</sup> *Id.*

or prosecution of cases under its consideration. Essentially, the Security Council members, particularly the United States, wanted the ICC to function as a “type of permanent ad hoc criminal tribunal.”<sup>157</sup> They were largely hostile to the possibility of the referral of cases to the court by other avenues, especially by an independent prosecutor.<sup>158</sup>

The so-called “Like-Minded Group” (LMG) was an influential group of states composed of approximately sixty members. Led by Canada, it also included most members of the European Union (but not France), Australia, Brazil, and South Africa. The LMG shared a “commitment to an independent and effective court.”<sup>159</sup> It generally accepted a role for the Security Council in referring cases to the Court but argued that the Court should have jurisdiction over other cases on the basis of universal jurisdiction.<sup>160</sup> Universal jurisdiction was the same far-reaching jurisdictional scheme used in the grave breach regime—it meant that the Court would have jurisdiction over genocide, crimes against humanity, or war crimes committed anywhere in the world by any individual as long as a state party to the ICC treaty has custody over the accused. The LMG also did not want the Security Council to be able to block the referral of cases to the Court. The remaining states took various positions between those of the P-5 and the LMG.

The U.S. objective with regard to the jurisdictional scheme was simple and inflexible: No U.S. national should be vulnerable to prosecution by the ICC. When it became clear that most states wanted the Court to have jurisdiction over cases even if some members of the Security Council objected, the permanent members of the Council put forth a proposal that would have allowed states to opt out of the Court’s jurisdiction over their nationals for crimes against humanity and war crimes (but not genocide) for a renewable ten-year period. The proposal would also have prevented the Court from exercising jurisdiction over cases involving nationals of non-state parties if the state publicly declared that the individual was acting according to official state policy.<sup>161</sup> The proposal did not garner significant support.

The Like-Minded Group eventually backed down on the question of universal jurisdiction, putting forth a series of more modest proposals. Among the P-5 members, both Britain and France indicated that they were amenable to compromise on the question of jurisdiction.

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<sup>157</sup> *Id.*, at 336.

<sup>158</sup> Kaul, *supra* note xx, at 585.

<sup>159</sup> Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 67, 70 (Antonio Cassese et al., eds. 2002).

<sup>160</sup> *Id.* at 71.

<sup>161</sup> Kaul, *supra* note xx, at 603.

Notably, Britain was the first of the Security Council's permanent members to demonstrate flexibility on the degree of control the Security Council would have over the Court's jurisdiction. Its decision to join the LMG was a key moment for the shape of the ICC treaty.<sup>162</sup> The final solution on the relationship between the Court and the Security Council was based on a British text.<sup>163</sup> This text provides that the Council may defer the investigation or prosecution by the Prosecutor of any case for twelve months by a resolution under its Chapter VII powers.<sup>164</sup> The treaty also allows the Court to exercise jurisdiction over cases referred to it by the Security Council, by a state party, or by the independent prosecutor. In the latter two categories, the ICC will not have jurisdiction over the case unless either the state where the crime occurred or the state whose national is accused of committing the crime has ratified the Rome Statute.<sup>165</sup>

France agreed to this jurisdictional scheme on the condition that the treaty include an opt-out for war crimes.<sup>166</sup> Accordingly, the final text allows states to opt out of the jurisdiction over war crimes for seven years, but it does not allow this possibility with regard to any of the other crimes in the treaty.<sup>167</sup> The jurisdictional scheme differs significantly from that of the ad hoc tribunals in one final respect: Domestic prosecutions will take priority. Should a state choose to prosecute or investigate a case itself, either action will divest the ICC of jurisdiction.

Substantive decisions at the Rome Conference, following general U.N. practice for treaty negotiations, were made "by consensus."<sup>168</sup> If a decision could not be reached by consensus, contested matters were settled by a three-fifths majority vote. Although the consensus procedure normally provides states in the minority with significant bargaining leverage, the activity of NGOs at the conference changed the dynamics of the negotiations. Two weeks before the end of the Rome Conference, the Canadian Chairman of the Conference issued a draft that narrowed the proposals on jurisdiction and set out various potential solutions. A prominent NGO at the Conference, the Coalition for the International Criminal Court, compiled the positions

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<sup>162</sup> Kirsch & Robinson, *supra* note xx, at 70.

<sup>163</sup> Morten Bergsmo & Jelena Pelić, *Article 16: Deferral of Investigation or Prosecution*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 373, 376 (Otto Triffterer ed. 1999).

<sup>164</sup> Rome Statute, *supra* note xx, art. 16. The Council can renew the request for deferral upon the expiration of the twelve-month period. *Id.*

<sup>165</sup> *Id.*, art. 12(2). A state may also accept the jurisdiction of the Court on an ad hoc basis with regard to that particular situation. *Id.*, Art. 12(3).

<sup>166</sup> Williams, *supra* note xx, at 338.

<sup>167</sup> Rome Statute, art. 124.

<sup>168</sup> Bartram Brown, *The Statute of the ICC: Past, Present, and Future*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 61, 64 (Sarah B. Sewall & Carl Kaysen eds., 2000).

of individual states on each proposal, providing a “virtual vote” on the document. This tally disclosed that the U.S. positions were distinctly in the minority.<sup>169</sup> The information revealed by the CICC “bypassed the diplomatic niceties of the consensus procedure,” significantly weakening the U.S. bargaining position.<sup>170</sup>

During the last week of the Rome Conference, Russia hosted a private dinner limited to senior delegates from the P-5.<sup>171</sup> The objective of the dinner was to pressure Britain into rejecting the Like-Minded Group’s jurisdictional proposal. NGOs learned of the meeting and engaged in a flurry of lobbying activity in London, arguing that Blair’s “ethical foreign policy” demanded a robust ICC. One observer wrote that, “[f]aced with such a massive upwelling of vigilance, the Brits in Rome appeared to stiffen their position once again”<sup>172</sup> against the U.S. and Russian lobbying.

The treaty’s final text was presented to the delegates in the waning hours of the conference as a package deal not subject to renegotiation. The United States again proposed the P-5’s jurisdictional compromise. Only Qatar and China spoke in favor of the motion, which was resoundingly defeated.<sup>173</sup> The treaty was adopted by a vote of 120 in favor, 7 against, and 21 abstentions.<sup>174</sup> Among those voting against the statute were the United States, China, and Israel.<sup>175</sup>

With the establishment of the ICC, the enforcement scheme of the Geneva Conventions was transformed. Although the grave breach system survives, and neither the tribunals’ jurisprudence nor the Rome Statute has formally amended the Geneva Conventions, the ICC has become a focal point for the prosecution of violations of the laws of war. The enforcement regime specifically rejected by the delegates in the earlier Diplomatic Conferences has been formally adopted in the guise of the ICC Treaty. Furthermore, this newest incarnation of the laws of war is the first step in the development of the Geneva Conventions where the United States strongly opposes the enforcement scheme.

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<sup>169</sup> *Id.*, at 64.

<sup>170</sup> *Id.*

<sup>171</sup> Lawrence Weschler, *Exceptional Cases in Rome, The United States and the Struggle for an ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 85, 105 (Sarah B. Sewall & Carl Kaysen eds., 2000).

<sup>172</sup> *Id.*

<sup>173</sup> Williams, *supra* note xx, at 338 n.67.

<sup>174</sup> Roy S. Lee, Introduction, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 1, 26 (Roy S. Lee ed. 1999).

<sup>175</sup> *Id.*

PART III: INTERNATIONAL JUDICIAL LAWMAKING: POLITICAL AND LEGAL PERSPECTIVES

The most recent transformation of the laws of war has proceeded in three distinct stages: (1) the Security Council's decision to establish the ICTY and ICTR, (2) the subsequent reorientation of the Geneva Conventions undertaken by the ICTY judiciary, and (3) the codification of those developments by states in the negotiations of the ICC treaty. Viewing this process over time, the ICTY judiciary's lawmaking emerges as the key transitional stage. It brought the Geneva Conventions to life through the adjudication of actual cases, it changed the definition of armed conflict in a way that lowered the threshold for applying laws that govern international conflicts and enhanced the regime governing civil wars. By so doing, it paved the way for the codification of these solutions in the ICC.

Nevertheless, the ICTY's lawmaking is problematic from both a legal and political perspective. Given the growing importance of international judicial decision-making more generally, understanding and evaluating its role in international criminal law has implications far beyond the question of whether war crimes can be committed in civil wars. Under traditional positivist understandings of international law, only states—and not courts—make law. When the Security Council established the tribunals, Council members, as well as the secretary-general, specifically stated that the tribunals could not and should not make new law. The legitimacy of the tribunal's lawmaking appears tenuous, at best.

Upon reflection, however, what appears problematic is, in fact, both politically reasonable and legally justifiable. For scholars of international politics, the dominant conceptual approach to international courts is to view their authority as stemming from a delegation of domestic sovereign authority.<sup>176</sup> This perspective is often articulated in a theory of rational design, which takes as its initial premise that “states use international institutions to further their own goals, and they design institutions accordingly.”<sup>177</sup> One common description of international courts rooted in a rational choice conception (synonymous, in this context, to rational design) is that states, as principals, delegate to courts, as agents, to do tasks that states themselves cannot do efficiently.<sup>178</sup> A principal-agent understanding of international courts, therefore, suggests that courts should act in accordance with the principals' wishes, in this case, the states that

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<sup>176</sup> Alter, *Compliance*, *supra* note xx, at 58-59.

<sup>177</sup> Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001).

<sup>178</sup> Mark Pollack, *THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU* 21 (2003).

established the court.<sup>179</sup> Failure of an agent to do so is often described pejoratively as agency slack, or slippage.<sup>180</sup> Although agency slack is perceived as a potential problem with domestic courts as well, the sovereignty costs inherent in the delegation to an international institution—and particularly to a court—are usually described as more acute.<sup>181</sup>

If one views the tribunals as agents of the principal—in this case, the Security Council—then the tribunals’ lawmaking appears to be a paradigmatic example of agency slack. Members of the Security Council clearly stated that the tribunals could not make law. The amicus brief filed by the United States in *Tadic* declares that, “[i]n creating the Tribunal, the Council was acting to deal with a specific urgent situation presenting a serious threat to the peace. It was not creating new standards for international humanitarian law.”<sup>182</sup>

A theory of rational design, however, posits that, when principals delegate to agents, they also structure the institution in order to retain control over the agents to discipline them if they run off the rails.<sup>183</sup> Indeed, the Security Council controls the tribunals’ budgets, has the authority to amend their statutes, and is actively involved in the selection of the tribunals’ judges. If the lawmaking undertaken by the tribunals’ ran contrary to the wishes of the Security Council we would, in theory, expect to see the members of the Council taking steps to rein in their wayward creation. The relationship of the Security Council to the tribunals, however, does not demonstrate this pattern. The Council has steadily increased the tribunals’ budgets since their inception.<sup>184</sup> There are no examples of states publicly attacking the tribunals’ war crimes jurisprudence. More subtle measures also indicate state acceptance of the jurisprudence. In private conversations, ICTY judges state that they have not received political pressure after making

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<sup>179</sup> Kathleen R. McNamara, *Rational Fictions: Central Bank Independence and the Social Logic of Delegation*, 25 WEST EUROPEAN POLITICS 47, 50, 55 (2002); Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 CHI. J. INT’L L. 333, 336 (2002).

<sup>180</sup> Pollack, *supra*, note xx, at 26.

<sup>181</sup> Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 34 INT’L ORG. 217, 227 (2000).

<sup>182</sup> U.S. Amicus Brief in *Tadic*, *supra* note xx, at 14.

<sup>183</sup> Stephan, *supra*, note xx, at 336.

<sup>184</sup> While the Security Council announced in 2003 that it would cease funding the Tribunals after 2010, this decision is widely understood as an expression of impatience with the slow work of the Tribunals rather than unhappiness with any specific aspect of their jurisprudence. U.N. Sec. Council Res. 1534 (2004); U.N. Sec. Council Res. 1503 (2003); Mirko Klarin, *Is the Tribunal Running Out of Time?* INST. FOR WAR AND PEACE REP., March 4, 2002, available at [http://www.iwpr.net/index.pl?archive/tri/tri\\_257\\_1\\_eng.txt](http://www.iwpr.net/index.pl?archive/tri/tri_257_1_eng.txt). The original timetable was proposed by the ICTY itself. Daryl A. Mundis, *The Judicial Effects of the ‘Completion Strategies’ on the Ad Hoc International Criminal Tribunals*, 99 Am. J. Int’l L. 142, 142 n.5 (2005).

controversial decisions. While there are several notable examples of individual states publicly attacking the work of the tribunals' prosecutor<sup>185</sup> (including, in the case of the ICTR, getting the prosecutor fired),<sup>186</sup> one cannot find similar examples with regard to the tribunals' jurisprudence on the laws of war. Because states went to great trouble to negotiate the exact texts of the Geneva Conventions, this muted response is especially puzzling.

This silence is susceptible to two, seemingly contradictory, explanations.<sup>187</sup> The ICTY judiciary may be an example of an agent that has contravened the instructions of the principal but has somehow escaped discipline. Or, the ICTY judges may have acted as a sophisticated agent that understood what the principals desired, even in the face of seemingly contradictory political rhetoric. The former description adds credence to those who describe the ICTY's lawmaking as illegitimate; the latter suggests that the activity is legitimate, even if it cannot be publicly acknowledged. Each of these scenarios is developed further below.

#### A. *The ICTY as Rogue Agent?*

One possibility is that states did not anticipate that the tribunals would engage in lawmaking. The best evidence for this understanding is the clear statements by members of the Security Council that the tribunals could not undertake this activity. Furthermore, U.S. officials stated that the conflict in Yugoslavia was an international one and, therefore, would have been unlikely to anticipate that the ICTY would rewrite the rules on civil wars.<sup>188</sup> Once the ICTY made clear its intention to address the legal regime on civil wars, however, the states with the capacity to discipline the courts seem to have embraced the ensuing rules. The silence may reflect agreement with the new rules. Strikingly, the decisions reached by the ICTY in *Tadic* largely reflect the positions taken by powerful countries—particularly the United States—in the negotiations of the 1949 and 1974-77 Geneva Conventions.

Further evidence that states have embraced the unanticipated lawmaking of the tribunals is that prominent states have incorporated the tribunal's jurisprudence into their military manuals and training on the laws of war. This incorporation constitutes one of the most

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<sup>185</sup> Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 538-40 (2003).

<sup>186</sup> *ICTR/Prosecution – Synthesis: Prosecutors at the ICTR*, Fondation Hironnelle, Oct. 29, 2003, available at <http://www.hironnelle.org/arusha.nsf>.

<sup>187</sup> This is the problem of observational equivalence. Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766 (1983).

<sup>188</sup> U.S. Amicus Brief in *Tadic*, *supra* note xx, at 17.

important indications of official state policy with regard to the laws of war. The Manual on the Law of Armed Conflict recently issued by the United Kingdom, for example, includes references to the caselaw of the tribunals. In particular, the Manual quotes decisions from the ICTY on the definition of the term *armed conflict*,<sup>189</sup> which was a central point of contention in the negotiations of the Geneva Conventions. Decisions from the tribunals are also included in law-of-war training for members of the U.S. Judge Advocate Generals' Corps.<sup>190</sup>

State acceptance of this unasked-for lawmaking may also be due to the fact that the tribunals have not thus far adjudicated the issues of most concern to powerful states. Very few cases, for example, have addressed the question of Hague law, that is, the law regulating tactical decisions made on the battlefield. The one decision that addresses Hague law thus far is carefully reasoned and quite detailed.<sup>191</sup> Furthermore, most of the conduct judged thus far, including the extrajudicial execution of prisoners, has long been proscribed by the laws of war.

In addition, the full import of some of the judicial decisions may not yet be apparent. Other scholars who have examined why states do not respond to far-reaching decisions by international courts that contradict states' interests argue that politicians and diplomats focus on short-term objectives and generally ignore the potential long-term effects of courts' rulings.<sup>192</sup> In consequence, states do not attempt to rewrite the rules, or force the court to do so, until it is too late. The tribunals' jurisprudence on "internationalized" armed conflicts may fall in this category. U.S. officials may simply not realize that the ICTY's decisions suggest that any intervention in a civil war that can be characterized as "overall control" over one of the parties to the conflict means that the conflict is an international one, subjecting all of its participants to the elaborate rules governing international wars.

Overall, however, the political losers from the ICTY's revision of the laws of war are developing countries. Their hostility to extending the rules to civil wars is manifest in the records from the 1949 and 1974-77 Diplomatic Conferences. The silence of these states in the face of the judicial decisions that have systematically undercut the bargains they secured in the earlier negotiations may be due to the fact

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<sup>189</sup> U.K. Ministry of Defence, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 29 (2004).

<sup>190</sup> INT'L & OPERATIONAL LAW DEP'T. THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, *LAW OF WAR HANDBOOK*, 82, 144, 209-12 (2004) (citing *Tadic*).

<sup>191</sup> Prosecutor v. Stanislav Galic, Case No. IT-98-29-T, Judgement and Opinion, Trial Chamber I (Dec. 5, 2003).

<sup>192</sup> Karen J. Alter, *Who are the 'Masters of the Treaty? European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 130-31 (1998).

that these countries lack the resources to monitor the work of the Tribunals. Even if aware of the decisions, these states may not wish to pick a fight with an institution established by the powerful Security Council.

Nevertheless, one should approach this conclusion with caution. Developing countries' perceptions about the importance of domestic application of the laws of war—and particularly criminal accountability for violation of these rules—may have changed in the thirty-odd years since the 1974-77 Diplomatic Conference. Since that time, many states have shifted to more democratic forms of governance, and there is increasing acceptance of the idea of criminal accountability for mass atrocity under international law.<sup>193</sup> That democratic developing countries would now push for the rules they secured in 1977 is not at all clear, but the opposition of China, India, Indonesia, Pakistan, Russia, and Turkey to the inclusion in the ICC treaty of crimes committed in civil wars suggests that many states retain similar concerns today.

The case that the ICTY has acted as a rogue agent but has escaped discipline by states, then, rests on the hypotheses that the states with the capacity to discipline the tribunals have chosen not to take this step, due either to a lack of interest or knowledge. The countries that disfavor the rules are either unaware of them or lack the capacity or political firepower to attack the tribunals.

#### B. *The ICTY as a Faithful Agent?*

On the other hand, one can argue that the tribunals' lawmaking function was understood and accepted by the members of the Security Council, even as they publicly denied its possibility. The Security Council had reason in 1993 to soft-peddle the ICTY's significance. In particular, the Council faced criticism by states not on the Council that a Chapter VII resolution was an insufficiently democratic way to establish an international court and that it should instead be established by treaty. Calling attention to the fact that the ICTY would also likely make far-reaching decisions related to the Geneva Conventions, crimes against humanity, and genocide would simply have fanned the flames of resentment against the Council's power.<sup>194</sup>

As Canada's submission to the Secretary-General made clear, in 1993 there was little existing jurisprudence upon which the ICTY could rely. None of the crimes within the tribunal's jurisdiction had been prosecuted in an international forum since the post-World War Two Nuremberg and Tokyo proceedings. They had been rarely, if

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<sup>193</sup> Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry into International Law*, 87 GEO. L.J. 707 (1999).

<sup>194</sup> Ralph Zacklin, *Some Major Problems in the Drafting of the ICTY Statute*, 2 J. INT'L CRIM. JUST. 361, 363 (2004).

ever, pursued in a domestic forum. Crimes against humanity had never been incorporated into a treaty and the scope of the violations included within the vaguely worded Article 3 was uncertain. As enacted by the Security Council, the ICTY Statute resembled the bold outlines of a coloring book: much remained for the judges to fill in.

More generally, international judicial lawmaking may be the truth of international politics that cannot be named. Because of concerns about accountability, states simply do not want to acknowledge that international courts make international law—even as the vague treaties they provide to these courts effectively act as a delegation of lawmaking authority. International judges, in turn, understand and reinforce the political slight-of-hand by denying that they make law.

International judicial lawmaking is often subtle. International judicial decisions frequently rely on the assertion that they are simply “declaring” customary international law. Indeed, the judges in *Tadic* described their conclusions on the laws of war as statements of pre-existing customary international law, despite little, if any, state practice to support their conclusions.<sup>195</sup> Academic commentators similarly obscure the lawmaking activities of international judges by describing the courts’ actions as articulation of custom, making the judges’ role seem more passive than it is. Although judicial identification of international custom may often reflect actual state practice, some of the tribunals’ law-of-war decisions demonstrate that this is not always the case.

The hypothesis of tacit delegated lawmaking finds support in the range of international courts that have engaged in this activity. The European Court of Justice, for example, has effectively transformed the relationship between the European Union and its member states.<sup>196</sup> The Appellate Body of the World Trade Organization has issued decisions that engage non-trade related subjects, such as health and the environment, in ways barely hinted at in the texts of the underlying treaties.<sup>197</sup> The International Court of Justice has reshaped the law on transboundary resources, including rivers and fish stocks.<sup>198</sup> The Iran-U.S. Claims Tribunal has clarified and shaped the international law of

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<sup>195</sup> Benvenisti, *supra* note xx, at 87.

<sup>196</sup> J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993); Karen J. Alter, *Who Are the ‘Masters of the Treaty’? European Governments and the European Court of Justice*, 52 Int’l Org. 121, 127 (1998).

<sup>197</sup> Joel P. Trachtman, *The Domain of WTO Dispute Resolution* 40 HARV. INT’L L.J. 333, 365 (1999); Richard H. Steinberg, *Judicial Lawmaking at the WTO*, 98 AM. J. INT’L L. 247 (2004); Broude, *supra* note xx.

<sup>198</sup> Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 85, 85, 95 (Eyal Benvenisti & Moshe Hirsch eds. 2004).

unlawful expropriation.<sup>199</sup> Most of these decisions have been subsequently accepted as valid by states, despite their often weak textual or customary law bases.<sup>200</sup>

That international courts engage in lawmaking is unsurprising to those who study principal-agent relationships. Principals often delegate the task of “completing contracts” (or lawmaking, in the context of a court) to agents.<sup>201</sup> In fact, the ICTY-as-rogue-agent and ICTY-as-faithful-agent stories are not incompatible. The members of the Security Council were surely aware that the tribunal would have to fill in the details of the vague ICTY Statute. The ICTY Statute itself specifically instructs the judges, for example, to write the rules of procedure and evidence. It is also probable that the states on the Council would not have anticipated that the ICTY would significantly rewrite the rules on civil wars, although they did expect (or should have expected) the ICTR to do so.

When the ICTY did undertake its revision of the laws of war, it both furthered the Council’s immediate purpose of punishing those involved in the atrocities in Yugoslavia and largely accorded with the views expressed by the most powerful states on the Council during the negotiations of the original treaties. The ICTY, therefore, can also be seen as a quite sophisticated agent—one that understood the tacit message of the Security Council and stayed within the boundaries desired by the principal’s key members.

### *C. A Legal Justification for International Judicial Lawmaking*

Even assuming that the Security Council anticipated that the tribunals would engage in lawmaking, such a delegation is not necessarily normatively desirable. It could be argued that international judges are unsuited for international lawmaking because they are relatively unaccountable, subject to opaque selection procedures, and may not have expertise in the relevant subject matter.<sup>202</sup>

Despite these potential drawbacks, the experience of the tribunals demonstrates the important—even unique—role that international courts can serve in the international system. Most importantly, international courts can keep international rules relevant to changing conditions. The ICTY’s decisions transformed the laws of war by recharacterizing the thresholds needed to trigger the rules on international conflicts and civil wars, by declaring that there is individual criminal responsibility for acts committed in internal armed

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<sup>199</sup> Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, xx VA. J. INT’L L. text at n. 99 (forthcoming 2005) (on file with author).

<sup>200</sup> Benvenisti, *supra* note xx, at 98.

<sup>201</sup> Pollack, *supra* note xx, at 21.

<sup>202</sup> These issues are explored in Karen J. Alter, *Resolving or Exacerbating Disputes? The WTO’s New Dispute Resolution System*, 79 INT’L AFFAIRS 783, 794 (2003).

conflict, and by altering the rules on international conflicts to accommodate internationalized wars rooted in ethnic conflict. With these decisions, the tribunals effectively updated the rules negotiated in 1949 and 1977 to make them more relevant to contemporary conflicts, the majority of which are civil wars rooted in ethnic tension. In their focus on the protection of individual victims, the tribunal's decisions also reflect the strength of the international human rights movement, which was only in its infancy when the treaties were negotiated in 1949.

William Eskridge has argued that this dynamic statutory interpretation, by which he means precisely this kind of judicial updating, is most appropriate when the relevant texts are old, where a single legislative purpose is not obvious, and where underlying conditions have changed.<sup>203</sup> These conditions describe the context surrounding the *Tadic* decision. This “evolutionary”<sup>204</sup> theory of interpretation, therefore, provides a normative justification for the ICTY's jurisprudence. Eskridge's formula suggests that the Tribunals correctly adopted a dynamic vision when interpreting the primary rules of the laws of war.

One of the principal failings of the codified laws of war in the past fifty years has been their inapplicability to internal conflicts, despite the reality that “many of the actual battles of the Cold War took place in civil wars.”<sup>205</sup> The *Tadic* decisions, holding that the ICTY would have jurisdiction over non-international armed conflicts and finding that there was individual criminal responsibility for crimes committed in internal armed conflicts under international law, wrought a “small revolution” in the law of war.<sup>206</sup> Although many had believed such a development was necessary, it had failed to materialize in the negotiations over the Additional Protocols in the 1970s. The ICTY pushed the law of war over this sticky spot, and the delegates to the ICC treaty accepted and codified this development.

The experience of the Tribunals suggests that international courts can provide significant benefits for states as part of a broader system of law creation, particularly in interpreting treaties in light of changed conditions. Within a broader institutional and legal framework, international courts have the ability and expertise to take principles negotiated and developed by states and increase their precision and

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<sup>203</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1484 (1987).

<sup>204</sup> *Id.*, at 1548.

<sup>205</sup> Robert Cooper, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY* 13 (2003).

<sup>206</sup> Claus Kress, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISRAEL Y.B. HUMAN RIGHTS 103, 105 (2001).

applicability to contemporary circumstances. Case-by-case adjudication may also produce rules more attuned to the reality of the subject than the abstract formulas worked out in diplomatic conferences.<sup>207</sup>

If not responsive to the current state of the world, law becomes increasingly irrational and arbitrary.<sup>208</sup> The problem of treaty obsolescence (or at least anachronism) is pervasive in international law because of the difficulty of renegotiating treaties and the uncertain contours of customary international law. Indeed, “one of the greatest challenges in institutional design is to find the optimal trade-off between stickiness and flexibility.”<sup>209</sup> Because they are inherently dynamic, international courts are an important source of flexibility in international norms. They can help assure the relevance of international law.

The utility of international courts as a source of norm generation, however, depends on their relationship to states. It is precisely the lack of strong political influence on their work that allows courts to be more agile sources of law than state-centered fora. Diplomatic conferences, for example, can derail quite easily under the pressure of international politics. The difficulties faced in the 1974-77 diplomatic conference on the Additional Protocols to the Geneva Conventions demonstrate how a seemingly minor issue—the status of a handful of countries under colonial rule—can upend the primary purpose of the meeting, which, in that case, was to protect the rights of individuals in wartime. The relative apolitical nature of international courts, however, depends both on states’ willingness to leave courts alone and on international judges to act in ways that do not upset the apple cart.<sup>210</sup> Lawmaking by international judges can go too far. If decisions by international judges push far beyond what states are willing to tolerate and states begin to reject the newly-created rules, then an international court’s usefulness as lawmaking device evaporates.<sup>211</sup> In a criminal court, the principle of legality is clearly imperiled by judicial lawmaking, which can undermine the legitimacy of international criminal punishment altogether.<sup>212</sup>

As a general matter, the problem posed by old and uncertain law may simultaneously justify the utility of international courts, which can update rules in a dynamic way that states cannot, and predict the

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<sup>207</sup> Patricia M. Wald, *Punishment of War Crimes by International Tribunals*, 69 SOC. RES. 1119, 1127 (Winter 2002).

<sup>208</sup> Timothy A.O. Endicott, VAGUENESS IN LAW 193 (2000).

<sup>209</sup> Barbara Koremenos, Charles Lipson, and Duncan Snidal, *Rational Design: Looking Back to Move Forward*, 55 INT’L ORG. 1051, 1076 (2001).

<sup>210</sup> Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41, 44 (1993).

<sup>211</sup> Helfer & Slaughter, *supra*, note xx.

<sup>212</sup> This issue is explored in Danner & Martinez, *supra* note xx.

conditions under which states are less likely to attack their decisions. This suggests that aggressive international judicial lawmaking is more appropriate in some cases than others. It is difficult to describe the need for judicial lawmaking in the newly created WTO, for example, as a result of changing or unanticipated conditions.<sup>213</sup> While this Article has argued that judicial lawmaking in the context of international criminal law is normatively preferable (since there existed no other body that realistically would have performed a similar function), whether that same observation holds for institutions with the stronger possibility of state-created law is much less certain. Furthermore, lawmaking by international courts—just like lawmaking through international treaties—does not guarantee that states will, in practice, observe the resulting rules. Nowhere is this more evident than in the laws of war, where state compliance with treaty commitments is often tenuous, at best.

#### PART IV: THE INTERNATIONAL CRIMINAL REGIME: A FAILURE OF DESIGN?

Like the rational design literature discussed in Part III, much of the recent international relations scholarship on international institutions approaches them from the perspective of rational choice.<sup>214</sup> Rational choice explains why people, and collections of people, make the choices they do. In more formal terms, rational choice is a label for a variety of approaches that explain outcomes in terms of goal-directed behavior under conditions of scarcity.<sup>215</sup> When applied to international law, rational choice generally describes the relevant actors as individual nation-states, views international agreements as contracts that resolve problems of coordination or collaboration among states, and understands these contracts as changing the incentives of states' interactions.<sup>216</sup>

In a rational choice conception, the reasons for which states establish international courts closely track the functions that states expect the courts to perform.<sup>217</sup> In this understanding, the function that the international entity is expected to serve dictates its design. As a conceptual and empirical matter, the rational choice model is most

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<sup>213</sup> See generally Broude, *supra* note xx.

<sup>214</sup> The approach was pioneered in Robert O. Keohane, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984). For more recent examples, see particularly the essays collected in *THE RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS* (Koremenos et al. eds. 2001) and *Rational Choice and International Law*, 31 *J. LEG. STUD.* (2002).

<sup>215</sup> Duncan Snidal, *Rational Choice and International Relations*, in *HANDBOOK OF INTERNATIONAL RELATIONS*, 73, 73 (Walter Carlesnaes et al eds. 2002).

<sup>216</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L ORG.* 1, 37 (2000).

<sup>217</sup> Paul Pierson, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 14 (2004).

strongly challenged by international regimes that develop in ways or perform functions not intended by the creating states.<sup>218</sup>

Viewing the tribunals and the ICC in isolation, their history supports the broad claim of rational choice that states vary their design choices according to the function of international institutions. In the case of the ICTY and ICTR, the members of the Security Council primarily sought to solve a political problem—their inability to halt the bloodshed in Yugoslavia and Rwanda—through judicial means. The members of the Council created two temporary courts that would punish the perpetrators of those atrocities. Because they were in a hurry to create the courts and because they knew the courts would be limited in their temporal and geographical jurisdiction, the Security Council was not overly concerned with the vagueness of the tribunals’ statutes. In addition, states retained important levers with which to influence the courts. They had control over the tribunals’ budgets, picked their judges and prosecutors, and did not furnish them with any independent ability to arrest suspects.<sup>219</sup>

By contrast, participating states took a much more careful approach to negotiations over the ICC. Its treaty was subject to years of preparatory work and was hammered out in intensely-fought bargaining sessions. Unlike the tribunals’ statutes, the delegates carefully crafted the substantive definitions of crimes. This effort, too, may have been one of *Tadic*’s legacies. William Schabas suggests that “the *Tadic* Appeal Chamber may well have frightened States with its bold judicial lawmaking, who then resolved that they would leave far less room for such developments in any statute of an international criminal court.”<sup>220</sup> Although the delegates consciously left some questions open, the legal net surrounding the ICC is much tighter than that of the ad hoc tribunals. The state parties of the ICC also possess mechanisms to call the Court’s prosecutor and judges to account should they act in undesirable ways.<sup>221</sup>

Viewing the tribunals and the ICC as sequences in the development of the international criminal regime, however, reveals the limits of institutional design. One can trace clearly the trajectory of international criminal law from the Nuremberg and Tokyo proceedings, to the ad hoc tribunals, to the ICC. While Trinidad and Tobago’s initial proposal in 1989 for an international criminal court antedates the ICTY, once the ad hoc tribunals were established, the

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<sup>218</sup> Pierson, *supra* note xx, at 115.

<sup>219</sup> Danner, *Prosecutorial Discretion at the International Criminal Court*, *supra* note xx, at 522-26.

<sup>220</sup> William Schabas, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 42 (2001).

<sup>221</sup> Danner, *Prosecutorial Discretion at the International Criminal Court*, *supra* note xx, at 522-26.

ICC began to resemble these courts more closely. The ICC, for example, does not include transnational crimes like drug trafficking in its jurisdiction (although this was the impetus for Trinidad and Tobago's suggestion) and instead only references those crimes also within the tribunals' jurisdiction. Neither Trinidad and Tobago, nor the United States, could have predicted in 1993 how the ICC would be shaped by the ICTY, and how the ICTY would bring the possibility of an ICC to life.

Four of the five major international criminal courts in this story were heavily dependent on the United States. Indeed, it is hard to imagine that they would have existed, or could have functioned, without U.S. support. These tribunals were also a source of substantive law that the United States either sought, as in the jurisprudence on aggressive war from the Nuremberg Tribunal, or seems to have welcomed, as is the case with the ICTY's law-of-war decisions. Even the substantive legal rules on war crimes in the ICC Statute largely reflect the views propounded by U.S. officials in the negotiations. Yet, ironically, the United States is undoubtedly the most vigorous critic of the new ICC. Pierre Hazan notes that the geography of The Hague, the location of both the ICTY and ICC, graphically illustrates this duality. "On one side of town is the ICTY, kept afloat by the United States, on the other side are the ICC provisional offices, whose most formidable enemy is the same American superpower."<sup>222</sup>

The U.S. defeat at the ICC negotiations was not due to the lawmaking undertaken by the ICTY and ICTR. Indeed, from the perspective of substantive law, the United States was largely in agreement with the tribunals' jurisprudence and its codification at Rome. Nevertheless, the tribunals' success in prosecuting war criminals made the more ambitious ICC possible. The tribunals demonstrated that international criminal punishment was a plausible response to mass atrocity, even as they highlighted the injustice of selective prosecution of international criminal law dictated solely by the Security Council. All observers agree that Yugoslavia and Rwanda were not the only countries after 1947 to experience war crimes on a vast scale, but, because of the Security Council's internal political dynamics, they were the only ones for which international tribunals were established.

The delegates at Rome embraced the idea of international criminal prosecution embodied in the Tribunals, but they rejected their ad hoc jurisdictional scheme. Equality before the law was a rallying cry of the delegations that made up the Like-Minded Group. While this principle is central to contemporary liberalism, it was not an idea that

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<sup>222</sup> Hazan, *supra* note xx, at 150.

attracted the United States in the context of international criminal law. The emphasis by the United States on the importance of international criminal justice in the contexts of Yugoslavia and Rwanda made U.S. resistance to its potential application to its own nationals difficult to swallow, even for its traditional allies. In the end, the United States voted against the Rome Statute accompanied only by China, Libya, Iraq, Yemen, Qatar, and Israel.<sup>223</sup>

It is hard to describe the evolution of the international criminal regime as the product of rational design—as least from the perspective of the states that have been instrumental in its establishment. The Nuremberg and Tokyo Tribunals occurred because the United States desired them; the British and French acquiesced reluctantly to the proceedings. The French originally proposed the establishment of the ICTY but soon became a key opponent of the tribunal, refusing to arrest suspects or to provide additional money or intelligence information. The British were initially among the primary opponents of the ICTY, but upon his election to prime minister, Tony Blair’s government proved a stronger source of support.

President Clinton, backed by an enthusiastic team from the State Department, participated in the ICC negotiations but evinced a limited appetite for a court of broad jurisdiction. Although the Bush administration is undoubtedly more hostile to the ICC than its predecessor, Clinton also sought opt-outs for U.S. troops from the ICC<sup>224</sup> and indicated that he had no intention of submitting the ICC treaty to the Senate for ratification.<sup>225</sup>

Britain was initially the most hostile of the liberal powers toward both Nuremberg and to the ICTY. However, the British defection from the negotiating position of the Security Council’s permanent members, in pursuit of the Labour government’s “ethical foreign policy,” doomed the U.S. proposals on ICC jurisdiction. The chief negotiators at Rome were also able to entice the French, who significantly undermined the ICTY in its early years, into the ICC through the seven-year opt-out for war crimes. The activity of NGOs also served to weaken the power of the consensus procedure. Due to defections of its Allies and the activity of non-state actors at Rome, the United States was outnegotiated, outnumbered and, ultimately, outvoted.

The development of the international criminal regime does not support the faith that rational design scholars have in the ability of states to predict, shape, and control the function of institutions—at

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<sup>223</sup> Weschler, *supra* note xx, at 108.

<sup>224</sup> Robert Kagan, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 45 (2003).

<sup>225</sup> Associated Press, *Clinton’s Words: “The Right Action,”* N.Y. TIMES, Jan. 1, 2001, at A6.

least not over time. Instead, it accords much more strongly with the insight of scholars who argue that “actors may be in a strong initial position, seek to maximize their interests, and nevertheless carry out institutional and policy reforms that fundamentally transform their own positions (or those of their successors) in ways that are unanticipated and/or undesired.”<sup>226</sup> The United States supported, guided, and shaped the development of the international criminal regime until the ICC treaty vote in July 1998. The United States has since become one of the system’s most determined opponents.

As the U.S. experience with international criminal law demonstrates, controlling the course of international legal development, particularly of an international court, is quite difficult. Decisions by international courts can become focal points, which states then adopt as authoritative, even if they would have preferred an alternative rule.<sup>227</sup> Scholars of the ECJ have demonstrated that decisions from international courts may also be adopted by domestic courts and incorporated into domestic legal systems in a manner not subject to the executive’s control.<sup>228</sup> Although this process has not yet developed fully in international criminal law, one can find citations to the tribunals’ cases in a variety of courts, including the U.S. Supreme Court,<sup>229</sup> other U.S. federal courts,<sup>230</sup> Spain’s *Audiencia Nacional*,<sup>231</sup> the German Federal Constitutional Court,<sup>232</sup> the Canadian Supreme Court,<sup>233</sup> the Federal Court of Australia,<sup>234</sup> and the U.K. House of Lords.<sup>235</sup> Once a court’s decisions become diffused into other international and domestic courts, as a practical matter it can be quite

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<sup>226</sup> Paul Pierson, *The Path to European Integration: A Historical-Institutionalist Analysis*, in *EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE* 27, 30 (Wayne Sandholtz & Alec Stone Sweet, eds. 1998).

<sup>227</sup> Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *WILLIAM & MARY L. REV.* 1229, 1269 (2004).

<sup>228</sup> Burley & Mattli, *supra* note xx, at 62-63.

<sup>229</sup> *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2783 (2004).

<sup>230</sup> *Doe v. Unocal Corp.*, 395 F.3d 932, 949-51 (9th Cir. 2002); *Doe v. Qi*, 349 F. Supp.2d 1258, 1307-08 (N.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 322-24 (S.D.N.Y. 2003).

<sup>231</sup> Case of Adolfo Scilingo, *Audencia Nacional, Sentencia Num. 16/2005* (April 19, 2005), *available at* <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html>.

<sup>232</sup> In the Proceedings on the Constitutional Complaint of Mr. Al-M, and His Motion for a Temporary Injunction, German Constitutional Court, 2 BVR 1506/-3 (Nov. 5, 2003).

<sup>233</sup> *Suresh v. Canada* (Minister of Citizenship & Immigration), Supreme Court of Canada, 2002 SCC 1 (Jan. 11, 2002).

<sup>234</sup> *Nulyarimma v. Thompson*, Federal Court of Australia, [1999] FCA 1192 (Sept. 1, 1999).

<sup>235</sup> *Regina v. Bartle ex parte Pinochet*, United Kingdom House of Lords (Mar. 24, 1999).

difficult for a state to contest the subsequent rules, even for states that are not party to the treaty creating the Court.

An international court also becomes a focal point around which NGOs, individuals, academics, and even other international courts, can further disseminate the court's cases. The restatement on customary international law of the laws of war released by the International Committee of the Red Cross in 2005 makes frequent reference to the tribunals' cases.<sup>236</sup> A commissioner on the Inter-American Commission on Human Rights stated that the commission has profited from the tribunal's jurisprudence and that "it has weighed heavily in our deliberations" in cases related to armed conflict.<sup>237</sup> These factors can make it difficult for a state—even a hegemon—to control the development of a political and legal regime, in spite of careful and sophisticated design choices.

The staff of international courts may themselves act as transnational norm entrepreneurs. The ICTY had an official representative at the ICC negotiations. ICTY and ICTR judges, prosecutors, and administrative officials have conducted training sessions for the staff of other international and domestic courts adjudicating international crimes. Prosecutors at the ICC have provided assistance, for example, to the Iraqi special court established to try Saddam Hussein and other members of his regime.

Nevertheless, the history of international criminal law suggests the utility of a particular kind of institutional design that has not been explored in the literature on international institutions: the temporary international court. Both the ICTY and ICTR were established with relatively little controversy, which was undoubtedly due in large part to their limited temporal and geographic jurisdiction. Yet, in many ways, they have acted as twin Petri dishes for the international criminal project writ large, helping spawn the newer generation of special courts of various types in Sierra Leone, Kosovo, East Timor, Cambodia, and Iraq, as well as the ICC.

Legal and political scholars have increasingly explored the benefits of international law that is formally non-binding, often referred to as "soft law." Soft law allows governments to manage "political uncertainty in the early stages of cooperation. Governments can introduce rules on a tentative basis, test political reactions to them and

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<sup>236</sup> I INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 7-8, 10, 15, 317, 430 (Jean-Marie Henckaerts & Louise Doswald-Beck eds. 2005)

<sup>237</sup> Robert K. Goldman, *Remarks, The Contributions of the Ad Hoc Tribunals to International Humanitarian Law*, 13 AM. U. INT'L L. REV. 1534 (1998).

preserve deniability if the responses are adverse.”<sup>238</sup> Soft law also creates “a setting for normative entrepreneurs to persuade skeptics.”<sup>239</sup> A temporary court may provide benefits similar to soft law, particularly in an area where the norms are relatively sparse and political negotiation is deadlocked. A temporary court may generate a focal point for negotiations and for the organization of supportive NGO activity. It may allow governments to test the political feasibility of a greater legalization of a particular area in cases where the negotiating costs of developing a permanent court are prohibitive.<sup>240</sup>

To some degree, temporary courts also allow states to limit the time for which they will be exposed to the effects of a legalized regime. Institutional solutions (although not temporary international courts) for managing long-term uncertainty have been explored by a number of scholars.<sup>241</sup> Paradoxically, the promise of temporary courts lies precisely in leveraging their long-range consequences. Governments that are truly reluctant about developing an area of international law will likely be suspicious of a temporary court, as well as a permanent one. Governments that are ambivalent, however, may be open to persuasion.

Temporary courts are likely to be a limited solution to international institutional design. Many international problems are not well-suited to judicial decision-making, and courts—even temporary ones—are more expensive and logistically demanding than a simple soft law instrument. If one can extrapolate from the limited sample provided by the ICTY and ICTR, temporary courts are likely to be established in the wake of dramatic or catastrophic events, such as armed conflict or, conceivably, environmental disasters. Activists who seek to use this solution would be well advised, therefore, to have a template of a court ready to brandish at an opportune moment. For the ICTY and ICTR, Nuremberg provided a ready-made model. The first call for the establishment of the ICTY came in an article entitled “Nuremberg Now” that ran in a Belgrade newspaper in 1991.<sup>242</sup> Temporary courts may also be more likely to occur in issue areas in which the media can

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<sup>238</sup> Kenneth W. Abbott and Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 50, 70 (Eyal Benvenisti & Moshe Hirsch eds. 2004).

<sup>239</sup> *Id.*

<sup>240</sup> For a discussion of negotiating costs and legalization, see Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 *INT’L ORG.* 1, 14 (2000).

<sup>241</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT’L ORG.* 37, 39 (2000); Barbara Koremenos, *Can Cooperation Survive Changes in Bargaining Power? The Case of Coffee*, 31 *J. LEG. STUD.* 259, 282 (2002).

<sup>242</sup> Hazan, *supra* note xx, at 16.

demonstrate the problem in a vivid way, which NGOs or sympathetic states can then use to marshal public opinion.

The limited applicability of temporary courts, however, should not undercut their potential power. There are other recent examples of temporary dispute-settlement mechanisms, including the Iran-U.S. Claims Tribunal, that are widely considered successful international institutions.<sup>243</sup> The U.N. Claims Commission, the Holocaust Claims Commission, and a variety of older commissions have also been well received. Although it is not a court, the General Agreement on Tariffs and Trade was also a temporary institution (albeit a long-lived one) that paved the way for the permanent and much more comprehensive World Trade Organization.<sup>244</sup> The benefits of temporary international courts or quasi-courts clearly demand closer scrutiny.

#### CONCLUSION

This Article has traced the development of the laws of war, and its interaction with international criminal law, from the Nuremberg Tribunals through the establishment of the International Criminal Court. Throughout this period, the scope and enforcement mechanisms of the laws of war have been the subject of particular debate. The Nuremberg and Tokyo Tribunals saw the prosecution of individuals for war crimes committed in the European and Pacific theatres. The trials did not, however, result in a permanent body to enforce the laws of war. On the contrary, the diplomatic records from the 1949 and 1974-77 conferences reveal that most states preferred to enforce the Geneva Conventions through the mechanism of domestic prosecutions based on a theory of universal jurisdiction. They were decidedly hostile to the idea of an international court for war crimes.

The records from the conferences on the Geneva Conventions expose a battle between states that sought to extend the laws of war to civil wars and those that fiercely resisted such a move. In 1949, the opponents were colonialist powers and their newly-liberated colonies. By 1977, the colonialists had lost their empires. The Great Powers preferred more extensive rules on civil wars, but they did not care enough to overcome the resistance of developing countries.

The legal regime governing civil wars remained skeletal and largely ineffectual until the establishment of the ICTY and the ICTR by the United Nations Security Council in 1993 and 1994. Although the Council declared that the tribunals would not create new law, the ICTY has substantially broadened the rules governing civil wars, and it has lowered the thresholds for the triggering of the rules on

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<sup>243</sup> Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 33-34 (2005).

<sup>244</sup> Abbott & Snidal, *Hard and Soft Law in International Governance*, *supra* note xx, at 52.

international conflicts. States codified these developments in the treaty governing the International Criminal Court. As long as the ICC is a functioning institution, it will serve as a de facto enforcement scheme for the Geneva Conventions, parallel to the grave breach regime set up by the original treaties.

The history of the Tribunals suggests that delegated lawmaking may be an important component of the creation of an international court, even if the creating states and courts' judges deny such a role. This Article has argued that international judicial lawmaking is particularly appropriate when the underlying treaties are anachronistic, and there is little possibility for their revision in a diplomatic setting. The history of the international criminal regime also illustrates the powerful force of temporary international courts. Although the tribunals have a limited temporal and geographical jurisdiction, they have constituted a critical step toward the establishment of a permanent international criminal court not subject to the direct control of the Security Council.

From the U.S. perspective, the development of international criminal law is a story of both success and setback. The United States was the primary proponent and supporter of most of the international courts in this story. The courts' design and subsequent lawmaking substantially reflected the legal positions taken by the United States. The recent development of the ICC, however, has been one that the United States finds unwelcome. The U.S. defeat in the ICC negotiations appears due to the skillful negotiations undertaken by the group of Like-Minded-States, which included Canada and members of the European Union. The critical moment was Britain's defection, when it became the first member of the P-5 to break away from the U.S.-sponsored proposal for Security Council control over the Court's jurisdiction.

#### *A. Theoretical Implications*

The history of the criminal tribunals suggests several avenues for future research. With regard to judicial lawmaking, the relationship between judicial articulation of international law and state observance of the resulting rules bears closer scrutiny. If states routinely ignore the norms pronounced by international courts, then their source as a generator of international rules becomes much less promising. It would be particularly useful to isolate factors that make states more likely to obey decisions by international courts. Do the conditions advocated in this Article—namely, treaty obsolescence, changed conditions, and little likelihood for state revision—make states more amenable to judicial norm creation? Extended across a number of issue areas, such information would be extremely useful for policy makers, academics, and international judges alike.

Another important question is whether international courts systematically disadvantage developing countries. Conventional wisdom holds that developing countries prefer international courts over diplomacy, because courts level the playing field between the powerful and the weak. The limited sample provided by the tribunals' law-of-war jurisprudence, however, demonstrates that the tribunals embraced the positions taken by powerful states at the negotiating table and undercut the gains made by newly-independent former colonies. Ironically, U.S. officials often exhibit a deep distrust for the decisions of international courts. The tribunals demonstrate that such skepticism may well be misplaced. Better understanding the political implications of international judicial lawmaking would help clarify the terms—and stakes—of the debate over the function played by international courts in power politics.

The fifty-year history of international criminal law and the laws of war also highlight the need for rational choice scholars to ensure that their simplifying assumptions do not distort the accuracy of their conclusions. Although rational choice scholars assert that they can account for institutional transformation, they rarely do so. International relations scholars should take seriously the possibility of institutional change over time, and should assess the likelihood that institutions do not function as intended—particularly when analyzed as part of a broader regime. Moreover, the tribunals' history suggests that international institutions can themselves transform, or at least alter, the political environment. Building a more nuanced and theoretically rich understanding of the dynamic role played by international institutions constitutes a fruitful area of future inquiry. A particularly interesting question is whether international courts exhibit more autonomy or transformative potential than other forms of international institutions. Finally, as described more fully above, the promise of temporary institutions—including, but not limited to, courts—is an important area of future research.

#### B. *The Future of International Criminal Law*

The ICC has become a central symbol of the trans-Atlantic battle between Europe and the United States. The outcome of the conflict for international criminal law is far from assured. The United States is currently waging a strong rear-guard action against the ICC. It is seeking special exemptions from prosecution, known as Article 98 agreements, from countries all over the world.<sup>245</sup> As one U.S. official has said, “if you find a rock with a flag on it, we’ll negotiate an agreement.”<sup>246</sup> The United States has enacted domestic legislation

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<sup>245</sup> See Judith Kelley, *Do States Care about Normative Consistency? The ICC and Bilateral Non-Surrender Agreements as a Quasi-Experiment* (on file with author).

<sup>246</sup> Betsy Pisik, *Amnesty for U.S. Citizens Boosted*, WASH. TIMES, Oct. 9, 2003, at A1.

forbidding its cooperation with the Court that includes military authorization to rescue U.S. nationals detained by the Court—leading critics of the measure to dub it the “Hague Invasion Act.”<sup>247</sup> In lieu of the ICC, the United States endorses alternative models for addressing international crimes, such as the temporary courts that have been established in Sierra Leone and Cambodia.<sup>248</sup>

Until recently, the United States successfully used the Security Council’s authority under the Rome Statute to defer investigations to ensure that its peacekeepers would not be subject to the Court’s jurisdiction.<sup>249</sup> In the wake of the Abu Ghraib prison scandal, however, the United States was unable to secure a renewal of the relevant resolution.<sup>250</sup> On March 31, 2005, the U.N. Security Council formally referred the Darfur situation in Sudan to the International Criminal Court. The Council’s European members were strong proponents of the resolution, and the United States did not veto it. The Sudan referral is the most visible symbol that the United States is either unable or unwilling to control the course of international criminal law. Whether the Europeans and other states can sustain the ICC without U.S. support is an open question. It is certainly unprecedented.

Since the establishment of the ICC, another war—the War on Terrorism—has begun. Interpreting the laws of war has also been central to this conflict. Whether this war will result in a further modification of the rules is, as yet, unknown. The tribunals’ cases have thus far had little to say that is directly relevant to the War on Terrorism, although the ICTR Appeals Chamber has recently issued a decision condemning pretrial detention without charge. This decision may have implications for the U.S. prisoners at Guantánamo Bay.<sup>251</sup> Furthermore, the conflict in Iraq is largely<sup>252</sup> not subject to the ICC’s jurisdiction, because neither the United States nor Iraq has ratified the Statute.

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<sup>247</sup> Steven Mufson & Alan Sipress, *U.N. Funds in Crossfire Over Court; Exemption Sought for U.S. Troops*, WASH. POST, Aug. 16, 2001, at A1.

<sup>248</sup> Statement of Pierre Prosper, U.S. Ambassador-at-large for War Crimes Issues, State Department Foreign Press Center Briefing, Fed. News Service (May 6, 2002). These courts are described in Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003).

<sup>249</sup> *E.g.* S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg., U.N. Doc. S/RES/1422 (2002).

<sup>250</sup> Warren Hoge, *U.S. Drops Plans to Exempt G.I.’s from U.N. Court*, N.Y. TIMES, June 24, 2004, at A1.

<sup>251</sup> *Kajelijeli v. Prosecutor*, Case No. ICTR 98-44A-A, ICTR Appeals Chamber ¶ 224 (May 23, 2005).

<sup>252</sup> Britain has ratified the ICC Statute and some British groups have filed communications with the ICC prosecutor requesting investigation of potential crimes committed by British officials. Richard Norton-Taylor, *International court hears anti-war claims*, GUARDIAN (LONDON), May 6, 2005, at 2.

Whatever the impact of the War on Terrorism on the laws of war, in the International Criminal Court the twin stories of the laws of war and international criminal law have once again joined. Whether their union will produce a legal regime that is better capable of deterring large-scale war crimes than prior efforts represents the triumph of hope over experience. While this second marriage may well prove more enduring, it is likely to continue to evolve in ways both predictable and unexpected.