Extreme Crises and the Institutionalization of International Criminal Law
[Crises extremes et institutionnalisation du droit penal international]

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Abstract
The end of the Cold War has brought an increased legalization of the international sphere, particularly through the field of international criminal law. We examine how law has enjoyed this dominance through an institutional biography of the International Criminal for the Former Yugoslavia (ICTY). We find that through its own survival strategies, the Tribunal's trajectory generated symbolic and material capital that is securing a broader institutionalization of international criminal law. We demonstrate how innovations within the ICTY produced new resources and legal tools, and formed a professional class of international civil servants who are going on to legitimate and extend these tools in other venues. As a result, the field is gaining a foothold despite a recent loss in momentum of the ICTY itself. Consonant with the broader valuation of symbolic goods, we conclude that the legalization of the international works through a logic of deferred accomplishments, in which short-term losses are part of a gamble for securing institutional longevity. As a result, efforts to have law dominate the international may be winning even when they appear to lose.

I. Introduction

Since the end of the Cold War, violent conflicts between ethnic groups have increased in incidence and intensity. The West has focused on some of these – those identified as *crises* by the media and politicians – as demanding humanitarian intervention. This emphasizes exceptional moments of conflict, masking quotidian state violence by focusing on short-term reforms (Engle 2006). This contrasts with an earlier twentieth century paradigm, which contemplated the international through a *mission civilatrice* of administrative stability (Levi & Hagan 2006).

The crisis model also comes with a change in the expertise valued for international governance, and is tied to a *legalization* of the international sphere. This includes a new consensus around international criminal law, with an emergence of tribunals, legal tools of investigation and prosecution, and an enlarged view of law's reach into matters of sovereignty. Through these, new schemas of the international are justified – with a quickening pace and investment in international legalization.

Our analysis examines how this field has established and retained a hold on the international, adapting to internal and external constraints to maintain this dominant position. Most other research adopts an evolutionary view of law after the Cold War, or an instrumental view of law as a blunt political

tool. Yet this fails to account for the competitions through which law has come to dominate the international, and through which legal institutions enjoy increased resources and credibility for defining international concerns and solutions.

This paper develops a biographical account of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as representative of this consensus around international criminal law – further evidenced by tribunals for Rwanda, Sierra Leone, East Timor and Cambodia, and the International Criminal Court (ICC). We trace its successes and failures as insights into the orthodoxies and transformations in the field generally – our account is not only of the ICTY, but the strategies and positions available to it at different times (Dezalay & Garth 2002). Over fifteen years the ICTY has hit institutional highs and lows, adapting itself as it competes on behalf of law as a strategy for responding to extreme crises.

Our research is based on a two wave panel survey, over 100 interviews, courtroom observations, and trial transcripts. The survey of ICTY employees was conducted in 2000–2001 and 2003–2004. The interviews were conducted in the Office of the Prosecutor (OTP) from 1999 to 2003, and are quoted with identification numbers. The goal is to explain, from the inside out, how the ICTY – initially endowed with scant material or normative resources – has forged a position for international criminal law. While this may run the risk of overstating the importance of jurists, the benefit is an empirical strategy that provides a *historicization of symbolic and material struggles*, juristic and otherwise, in shaping the field of international criminal law (Krunke 2006).

This institutional biography demonstrates that while the ICTY has been losing momentum, its *trajectory* and *survival strategies* have generated symbolic capital that is securing a broader institutionalization of international criminal law. This occurred in two ways. First, to solve organizational and legal problems innovators within the ICTY produced new resources, such as political techniques for funding international tribunals and legal tools for international policing. Second, the ICTY has developed a professional class of international civil servants who develop and legitimate these tools, and who are likely to broker their experiences and commitments in new international and domestic settings as they pursue their careers (Matthews 1999). The apparent result is that international criminal law is gaining a foothold even when it seems to lose momentum, so that short term losses may be a price to pay for institutional longevity.

This is not a Pollyannaish view of institutional resilience. Our approach emphasizes that international law is a heteronomous field that is closely linked to state power. Indeed the field's thin autonomy

renders it precarious: yet its durability to date stems from the adaptation processes it has taken to persist, so that the human and symbolic capital resulting from this struggle have ironically secured the field's foundations.

II. Institutional Transformation and International Criminal Law

This analysis draws together Bourdieuian accounts of fields with social policy research on institutions. The latter documents how institutions transform when facing new social problems, governmentalities, and political mandates. So while Bourdieuian work reveals *why* fields reproduce and shift, political sociology attends to *how* this occurs through institutional transformation.

We mobilize several concepts from this research. First, we emphasize how competing interests are negotiated within an institution – and how once these are aligned, a *path dependence* shapes future developments (Mahoney 2000). For example, NGOs lobbied for the ICTY's creation, but once it was established new politics and frames became dominant (Thelen 2004). In the ICTY, lawyers largely replaced activists (Hagan, Levi & Ferrales 2006). This attracted further support for the ICTY's legal mission, but distanced human rights activists from the Tribunal. This led to an unanticipated *policy feedback* (Weir 1992), so that when the US pressed for the Tribunal's closure, NGOs were no longer there for support.

We also identify processes to explain the resilience of international criminal law. The first is *institutional layering* (Thelen 2004), in which new elements are added to existing frameworks, as a *bricolage* of principles and practices. For example, the ICC built on the existing ICTY and Rwanda tribunals, while adding elements such as a Victims Unit, gender-based crimes, and a restricted enforcement jurisdiction (Sadat & Carden 2000). The second is *institutional conversion* (Thelen 2004), or shifting institutional goals to respond to new problems. For example as the ICTY faced closure, criminal investigations gave way to trials, plea bargains, and domestic trials in the Balkans. These preserved a foothold for law, even if sacrificing current institutional arrangements.

Through these insights this paper analyzes the rise and decline of the ICTY, to document how the Tribunal adapted to changing circumstances, and how international criminal law was institutionalized in the process. The proximity of this field to state politics means that an institutional need for change is built into the enterprise: and it is due to these adaptation strategies that fields such as international criminal law take unanticipated directions.

III. Law and Diplomacy as Mutual Engagement

At its inception, the ICTY faced three central tensions. The first was a struggle between legal liberalism which promotes rule of law, and liberal internationalism which promotes international agreements. The second was a tension between the temporary nature of the ICTY and a permanent system of international criminal law. The third was the Tribunal's mandate to police internationally without enjoying a coercive police power.

The struggle between law and political diplomacy was apparent in the wake of the Balkan wars in the early 1990s. While Britain and the US sought to broker peace plans, human rights groups worked with journalists to expose camp conditions, massacres and rapes. In October 1992, the UN Security Council chose Frits Kalshoven, a retired Dutch legal academic, as the first chair of a Commission of Experts instead of a Muslim-American law professor, Cherif Bassiouni, who had invested his career developing the doctrinal bases of international criminal law (Guest 1995:57). Kalshoven was given no resources to work with, and the British covertly stalled the Commission's efforts to seek a diplomatic solution in its place (Gutman 1993).

With pressure mounting from human rights groups and the media, the Security Council began considering an international tribunal for individual accountability (Power 2002:483). On his own, Bassiouni succeeded in raising a million dollars from the MacArthur and Soros foundations to collect evidence of atrocities. And in February 1993 the Commission, now under Bassiouni's leadership, submitted an interim report to the UN Secretary-General that articulated the ethnic cleansing occurring in the Balkans. That same month the Security Council established a temporary tribunal to investigate and prosecute Balkan war crimes. As Power (2002:484) notes, this "seemed a low-cost, low-risk way for Western states" to respond to the crisis.

The Security Council appointed Justice Richard Goldstone of South Africa as the first ICTY chief prosecutor. This accommodated political interests and brought impeccable symbolic capital to bear, since Goldstone was chair of a South African Commission that exposed state-instigated police violence. Unlike others vying for the position, Goldstone's advantage was his dexterity within the diplomatic rather than legal field (Horne 1995:7). He regarded his primary task as establishing the legitimacy of the ICTY, to acquire the resources necessary for investigations and prosecutions.

Soon the UN budget committee grew impatient with Goldstone's approach: "I was advised 'you have to have an indictment out, otherwise you're not going to get any money'…" (R#134a). Yet his diplomatic background led Goldstone to reach decisions that played differently within the legal terrain (Hagan &

Levi 2005). Instead of building cases against Balkan leaders, he first indicted Dusko Tadic: despite horrific accounts of Tadic's participation in camp killings and rapes (R#177), there was no specific evidence that he instigated or planned these crimes (R#165a). But Goldstone faced a Hobson's choice: "We had an empty prison ... The judges were frustrated ... I didn't mull it over. It seemed an obvious thing to go get him" (R#134b). Similarly, Goldstone proceeded with a controversial *in absentia* hearing that circumvented the ICTY's inability to apprehend two high profile indictees (R#114). Despite the prosecution staff's reservations that it violated proper criminal procedure (R#114), Goldstone emphasized the hearing's potential to pressure international authorities to arrest indictees (R#134b).

Goldstone also drew on his diplomatic background to expand the ICTY's investigative powers. Investigating the Srebrencica massacre, where some 7000 men were killed, involved gaining CIA aerial imagery to identify mass grave sites for exhumation (R#173a). In addition, while the Tribunal has authority to conduct on-site investigations, Bosnian Serb authorities were unwilling to facilitate exhumations. Goldstone and Graham Blewitt, the Deputy Prosecutor, took a diplomatic turn to the US State Department (R#156) and convinced Assistant Secretary of State Richard Holbrooke to pressure Milosevic to support State Department trips to the area around Srebrenica (R#179). This opened the door for the Tribunal's exhumation work, and once many victims' bodies were exhumed it lay the groundwork for claiming further search and seizure powers under the Dayton accords to collect evidence from Bosnian Serb military headquarters (R#130b). These investigatory powers established an evidentiary base for the Srebrenica case and were used by prosecutors and investigators going forward.

So even once political interests aligned to establish a Tribunal, the ICTY had to generate faith and cooperation with its legal approach. To negotiate competing interests, the Chief Prosecutor drew on his diplomatic experience and credentials to gain resources, implement legal procedures, and solidify the ICTY's investigatory powers. These initial years then shaped the Tribunal's trajectory and the challenges for later prosecutors.

IV. Making Law through Political Distance

When the Canadian judge and law professor Louise Arbour took over from Goldstone in 1996 the ICTY enjoyed a significant budget and staff, and a growing sense of legitimacy. Arbour's primary challenge was to produce arrests. Only six of Goldstone's 76 indictees were in custody (R#128). She explained, "I was absolutely determined, arrest was so clearly the key" (R#103a). Arbour's strategies drew on her training in criminal law rather than diplomacy, and her legal habits formed within Canada's

(1999) human security paradigm. These changed the course of the Tribunal, developing its legitimacy and creating new resources for the field of international criminal law.

Arbour's first strategy involved "sealed" indictments (R#103a). This secrecy would expose arresting authorities to a lower risk of reprisals and injuries (R#171). It also sought to detach international criminal law from political constraints: "we tried to take out all the rules that were limiting our flexibility in arrests, and we pushed these proposals through plenary sessions of the ICTY... to put the legal framework in place ... keep the local authorities out of it" (R#174b).

The first arrest plan was to trap the former mayor of Vukovar in Croatia, who was secretly indicted for a massacre of 200 hospital patients. Unaware of the indictment the mayor agreed to return to Vukovar for a meeting, where he was arrested by Polish soldiers under the command of a UN Administrator, and flown to the ICTY detention center on a Belgian plane (R#200). As the ICTY has no arrest authority, the arrest was implemented by US and UN authorities: yet media and political officials, including President Clinton (1997; Doyle 1997), credited the ICTY. This arrest allowed Arbour to urge the armed and authorized NATO troops to use sealed indictments for further arrests (R#200). Arbour thereby overcame the political hesitation threatening the Tribunal's relevance, with arrests then executed by the British-led Stabilization Force (ICTY 1997), followed by Dutch, U.S., and French led troops.

Arbour's second strategy was to persuade Western states to make financial assistance to Balkan states contingent on cooperation with the ICTY (R#103b), which does not have its own police. Because of this financial strategy, the Croatian government agreed to transfer indictees in conjunction with its acceptance into the Council of Europe and receipt of monetary aid (R#103b). Indeed the third Chief Prosecutor, Carla Del Ponte, later worked with the US to use financial incentives to compel Serbia to arrest Milosevic and transfer him to the ICTY for trial. This strategy thus became accepted political practice regarding international criminal law.

Arbour's third strategy was to deploy the media to generate public support for the ICTY as a criminal law institution. "It took me a while," Arbour observed, "but eventually I started appreciating that the fundamental premises of criminal law, traditionally, were that it's public and local ... When I applied that internationally it became apparent that the only way we could even remotely be public and local was through the use of the international media. We had to be out there" (R#103a). Arbour (1999) sought to emphasize three points about the ICTY: (1) its extraterritorial authority trumps claims of sovereign

immunity, (2) it is appropriately coercive rather than diplomatic, and (3) it is an agency of real-time law enforcement rather than an after-the-fact institution of historical record.

Accordingly, when 45 people were found dead near the Macedonian border in January 1999, Arbour was obliged to react (ICTY 1999a). She and her team went to the border but were turned back (R#103a), and three futile days of negotiating with Milosevic in Belgrade followed (Clark 2001:161). Despite this apparent defeat, the media closely covered the confrontation – and the *New York Times* featured the story, with a photo, on the front page above the fold (Perlez 1999). The image advanced Arbour's three themes: a prosecutor turned away from a real-time crime scene, by a head of state concealing evidence through claims to national sovereignty (R#171).

Arbour drew on similar strategies to indict Milosevic. Concerned that a legal approach would be displaced by peace negotiations, over ten days Arbour gathered intelligence by traveling to Bonn, London, Washington, Paris and Brussels. As part of this, the UK Foreign Secretary publicly completed what he named the biggest handover in history of British intelligence to an outside agency (Vulliamy & Wintour 1999). Arbour then developed the indictment secretly, saying she was protecting a humanitarian mission underway in Belgrade – but also making it difficult for others to interfere with her decision to indict. As an interviewee noted, "she didn't want to give them the chance to co-opt or slow down the indictment, because that would really get at the heart of her independence as a prosecutor. So she was very careful to have Judge Hunt confirm it and then hold it under wraps, under seal – as we say – for four days, and in that period she made phone calls to each of the foreign ministers" (R#171). Some in the Clinton Administration sought to manipulate Milosevic to strategic advantage through diplomatic rather than legal efforts: so by initiating the indictment, Arbour "called the bluff" of the US commitment to international criminal law.

The Milosevic indictment was an historic moment for the field, with political effects in Serbia and beyond (Akhavan 2001; Hagan & Levi 2004). It was the product of multiple instances of institutional layering by Arbour. While Goldstone's diplomatic orientation led him to resist sealed indictments, Arbour drew on her criminal law background to convince an international audience otherwise. Her use of financial incentives and the media solidified the character of the Tribunal to a coercive law enforcement agency. Institutional innovation is always a gamble: and here, these moves expanded the ICTY's capacities and strengthened the position of the field itself.

V. Negotiating an End

In 1999 a former Swiss Attorney General, Carla Del Ponte, was appointed as Arbour's successor – the first former prosecutor to serve in this role at the ICTY (ICTY 1999b). Del Ponte inherited an organization with a 90 million dollar budget, multiple trials underway, and a high level of staff morale (Hagan, Levi & Ferrales 2006). New state and military cooperation prompted more arrests; and new indictees arrived at the Tribunal every month. The new challenge for Del Ponte was to gain convictions, while also managing political pressure to end investigations and complete ICTY trials swiftly. Del Ponte's approach stemmed from her experience with organized crime cases – and her tenure at the ICTY turned on high-profile trials, jurisprudential innovation, and a reorganization of the OTP to manage the temporary nature of the Tribunal.

With Milosevic still at bay, the ICTY had two high profile trials unfolding. The Foca case prosecuted rape and sexual enslavement as crimes against humanity, and the Srebrenica case prosecuted the massacre of 7000 Muslims as genocide. Both set innovative precedents for international criminal law, and highlight the difficulty of producing convictions when jurisprudential tests are murky.

For example in the Foca trial, prosecutors sought to prove that rape and sexual enslavement were crimes against humanity, organized within a program of ethnic cleansing across Bosnia. However no court had yet convicted anyone for rape as a crime against humanity. It was only in the argument of the case itself – iterative interpretive analyses by the prosecutor and judge – that consensus was reached as to the constituent elements of this crime. In seeking to determine how much evidence is required to demonstrate the widespread nature of the crimes, the OTP was told by Judge Hunt that the statute "does not require you to prove that the rapes were widespread, it only requires you to prove that the *armed conflict against the civilian population* was widespread." The prosecution concurred that "Absolutely. Rape is *one* of the constituent ingredients in the widespread or systematic attack." Judge Hunt then reiterated, "We do have to be satisfied beyond a reasonable doubt that the *attacks* were widespread" (*Prosecutor* v. *Kunarac and Kovac* 2000:4179-80, emphasis added). In the end, the court convicted two defendants of rape as enslavement and a crime against humanity, rejecting any impunity historically granted to rape in wartime.

Similarly, Del Ponte sought to charge Milosevic with genocide. This demanding charge involves the intended destruction of a people in whole or in part, while a crime against humanity requires widespread or systematic attacks on civilians (Robertson 1999). Compounding the challenge was that the strongest case for genocide related to Bosnia; but the chain of command leading to Milosevic was clearer in Kosovo because it was still part of Yugoslavia and the events occurred more recently (R#165a).

The view in the OTP was that a Kosovo case of crimes against humanity would lead to a swifter and more predictable conviction.

Nearly four months after Milosevic appeared at the ICTY, Del Ponte announced in September 2001 an indictment for Croatia listing nearly 700 deaths and over 170,000 deportations (ICTY 2001), with a Bosnian indictment to follow (Simons 2001). Some speculated that Del Ponte was publicly pressuring her investigators to complete a Bosnian indictment (Klarin 2001) – which indeed arrived two months later. Successfully producing this indictment, however, required evidence of Milosevic's de facto command responsibility in Srebrenica, Foca and elsewhere (R#187). This was difficult to achieve under the investigatory model that Del Ponte inherited, with senior lawyers "detached from the investigative component and essentially the recipient of a brief ... as opposed to a federal prosecutor's model or public prosecutor's model ..." (R#176c). To secure the evidence, Del Ponte instituted an internal transformation that placed trial lawyers in charge of investigations (R#111c).

This office reorganization soon took a new dimension, with the Bush Administration pressing for the ICTY's closure. The UN (2002) was announcing that sixty countries ratified the Rome Treaty for a permanent ICC; and the US sought to reflect its support of the ICTY, as a transient institution, in contrast to the ICC. The US Ambassador for War Crimes Issues delivered a congressional statement criticizing the international criminal process and garnering wide media attention (Buncombe 2002). New investigations were already unlikely, given the office reorganization that placed lawyers in control rather than field investigators (R#111c) – combined with this political challenge, Del Ponte and ICTY President Claude Jorda were soon describing an "exit" or "completion strategy" for the Tribunal to end investigations by 2004, trials by 2008, and appeals by 2010 (Office of the Prosecutor 2002). In a press conference the US Ambassador now joined Del Ponte as "side by side with the tribunal" (Kelemen 2002).

If the exit strategy led to discontent among OTP staff, the pressure was difficult to resist: in gaining its legal autonomy over the decade, the OTP distanced itself from human rights groups that might protect it publicly, and Del Ponte did not enjoy a facility in advancing Tribunal goals through the media (Hagan, Levi & Ferrales 2006). In 2004, the Security Council cut the ICTY budget. This eliminated 61 positions, mostly investigators, with more investigators leaving. Thus new war crimes investigations cannot begin, and priorities must be established among ongoing cases. With the death of insider witness Milan Babic, the failure to arrest Serb leaders Karadzic and Mladic, and the premature end of the Milosevic trial, the ICTY is seen as at a low point in its history.

Yet within the Del Ponte tenure, law gained force through jurisprudential practice (Bourdieu 1987). The Foca case was "monumental jurisprudence" in responding to the war-time victimization of women (Hagan 2003:201). The internal reorganization of the OTP provided prosecutors with the capacity to collect evidence and complete languishing cases. Indeed, even the completion strategy allowed the Tribunal to shore up some political support by narrowing its focus to "the most senior leaders" and transferring others to "competent national jurisdictions" (United Nations 2003). And while adhering to the exit strategy, Del Ponte has emphasized that the ICTY cannot fulfil its mission without the arrest of Karadzic and Mladic (Office of the Prosecutor 2006).

VI. International justice spreads its wings

With the current ambiguous standing of the ICTY, talk has shifted to its legacy. As Tribunal President Pocar recently stated, "with all these firsts, the court has brought about an impressive amount of case law. And clarified a large number of aspects of humanitarian law. Other courts, both national and international are applying our precedent and prosecuting crimes under international humanitarian law following our example. And this will remain" (Anderson 2006). Our analysis demonstrates how these legal tools were linked to specific agents, adapting to institutional challenges within the field of international criminal law.

A proliferation of scholarly work now chronicles the ICTY's record, with wide agreement that it will steer future international prosecutions. Commentators emphasize the Tribunal's record of completed cases, and its doctrinal work in clarifying questions of jurisdiction, procedural matters such as subpoena powers, the elements of war crimes, and the validity of plea agreements (Askin 2003; Murphy 1999). In addition, the Tribunal's broad attention to international law means that criminal law is developing symbiotically with other international norms, and with political negotiations between states and the European Union (Kerr 2005). Even the completion strategy is giving the Tribunal a chance to innovate, with an ICTY chamber determining if states are "adequately prepared" to accept referred cases, criteria which may influence future trials in war-torn regions (Johnson 2005).

The ICTY has also produced experts who are taking their experience to new venues. At its high point over 1000 people worked at the Tribunal, and those departing are instrumental in staffing the ICC, in positions such as lead investigator, Registrar, Senior Trial Attorney, and head of the Investigations and Analysis Unit. ICTY staff have also gone on to the Commission of Inquiry on Darfur, the Coalition for International Justice, and the World Bank. And leading international figures, such as the High

Commissioner for Human Rights and the US Ambassador on War Crimes, were central innovators at the ICTY. These career narratives suggest that formative experiences at the ICTY are being brokered in new settings, so that the Tribunal is an important node in producing an emerging group of international civil servants (Matthews 1999).

Finally, ICTY decisions are also informing national systems of criminal law. Due to the completion strategy, cases are being transferred to the newly independent states of the former Yugoslavia. Bosnia has set up a Special War Crimes Chamber, with a former ICTY prosecutor as its Registrar (Ellis 2004). The completion strategy has thus obliquely allowed the ICTY to address complaints that the field is unresponsive to local needs. These prosecutions may chart a path that is more supple for responding to political demands – and remains on law's terrain.

VII. Conclusion

In analyzing cultural goods, Bourdieu distinguishes between investments for the "long-run" and the "short-run." While commercial production seeks short-term profits, cultural producers make precarious long-term investments – but if successful, cultural goods become "endowed with an economic value incommensurate with the value of the material components which go into producing them" (1993:97).

We conclude that as symbolic goods (Bourdieu 1987; Dezalay & Garth 1996), law and legal expertise are subject to similar forces as cultural goods, particularly in areas closer to state power than private enterprise. In the ICTY, the challenge for the producers of these symbolic goods was to gain initial traction and resources, to develop consensus over legal powers, and to produce cases to guide prosecutions and record the Tribunal's role in responding to crises.

These challenges demonstrate the uncertainty under which individual investments in this field are made. As the Milosevic prosecution suggests, even celebrated innovations can be undone by international law's precarious position. By trying to continually demonstrate its autonomy from the political field, the pace of the Milosevic trial languished, losing public confidence, media interest, and the prosecution itself (Judah 2002). And the Tribunal's personnel are now in a personal and professional slump: while investigators and prosecutors were highly committed to the ICTY when its momentum was brisk, they are now dissatisfied and seeking new opportunities (Hagan, Levi & Ferrales 2006).

Yet within the long-term production cycle for symbolic goods, it is not evident how to interpret these changes. If the ICTY's completion strategy is inducing individuals to seek new opportunities, these experts of the international are likely to carry with them their knowledge and networks to other

domestic and international forums. Similarly, academics are attributing jurisprudential innovations to the ICTY, and the cognitive landscape includes new legal powers of international criminal tribunals.

Taking these together, one sees a gamble being played out in this field. The legalization of the international works through a logic of *deferred* accomplishments (Bourdieu 1993:82). Engaging in institutional layering and conversion at the ICTY – changing the institution to preserve it – has required agents to sacrifice and disavow short-term interests, to bank on the symbolic returns gained through institutional longevity. And this consecration of law has gone beyond the Tribunal: for example, the 2006 Lebanon crisis was characterized by several groups in legal terms, including prosecution (eg. United Nations 2006). It is also being cynically invoked in other disputes, with Iran's President Ahmadinejad questioning the Security Council's legitimacy by asking if international criminal law might extend to the US or the UK (Rutenberg & Cooper 2006).

Of course, counter-approaches are also emerging. Under the *American Servicemembers' Protection Act*, over two dozen countries have agreed not to transfer US personnel to the ICC. The Act also authorizes "all means necessary and appropriate to bring about the release" of any US or allied detainee at the ICC. Of course, not all states are equally likely to be the subject of international tribunals. This political resistance is built into the very structure of the ICC, which prosecutes under a rule of complementarity – vigorously advocated for by the 1998 US negotiating team – so that powerful states, which are willing and able to conduct their own investigations, are effectively exempt from the Court's jurisdiction. These strategies circumvent law's claims on the international, while admitting of a potential legal authority that needs to be avoided. For some these counter-approaches are motivated by exceptionalism, while for others the ICTY exposed the dangers of naivete about international legal prosecutions.

The degree to which this legal internationalization is institutionalized will depend on how it is mobilized for future crises. To date, the ICC has had halting success regarding the Democratic Republic of Congo, Uganda, Darfur, and the Central African Republic (Office of the Prosecutor 2006). Yet as a process guided by the long-term, this biography of the ICTY reminds us of the field's adaptability (and continuous re-creation). Through institutional layering and conversion, efforts to have law dominate the international may be winning even when they appear to lose.

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