Nigeria and Switzerland.[30] These rules are likely to be challenged through the GATT/WTO dispute resolution mechanism. Meanwhile, aid and comfort is given to advocates of these activities by academic writing that denies the claim that federal common law precludes such state activity.[31]

Finally, one comes to an aspect of U.S. practice as to treaties that is more symbolic than substantive, the gross neglect of the obligation to publish them. At this point in time, publication of *Treaties and Other International Acts* is five years behind schedule and *United States Treaties and Other International Agreements* is about ten years behind.[32] Although private sources have picked up the slack and publish electronic and microfiche versions, the neglect, for budgetary reasons, of the obligations of the Department of State is disturbing.[33] It suggests that the Government regards international agreements as second-rate legal sources.

Readers of the *Journal* have a special obligation to try to limit the damage resulting from this disdain of treaties. They need to point out to students and the public that the later-in-time rule is not the end of the matter, since an obligation to other countries continues to exist independently of the treaty's status in American law. They need to make clear to the public how much our policies abroad depend on our being able to negotiate treaties and to obtain compliance with them from our foreign counterparts. Some of these agreements require other countries to make drastic changes in their domestic legal systems. A striking example is the promise to provide effective relief for violations of intellectual property rights that is contained in the new Trade-Related Aspects of Intellectual Property Agreement. A reputation for playing fast and loose with treaty commitments can only do harm to our capacity to be a leader in the post–Cold War world.

DETLEV F. VAGTS

## WAR CRIMES LAW COMES OF AGE

The rapid and fundamental developments in the last few years on the establishment of individual criminal responsibility for serious violations of international humanitarian law have been such that it is now an appropriate time to assess their principal features.[1]

On the institutional plane, the establishment by the United Nations Security Council of the ad hoc tribunals for the former Yugoslavia and Rwanda under Chapter VII of the UN Charter was of cardinal importance. The International Tribunal for Former Yugoslavia is no longer in danger of running out of defendants. Under international pressure, Croatia arranged for the surrender of a number of indicted Croatian nationals and

[30] For examples, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1637–39 (1997).

[31] *Id.*

[32] CLAIRE M. GERMAIN, GERMAIN'S TRANSNATIONAL LAW RESEARCH: A GUIDE FOR ATTORNEYS §2.01.2 (1991). *See also* 84 ASIL PROC. 451 (1990).

[33] Publication is called for by 1 U.S.C. §112a (1994).

[1] I have written the following articles demonstrating these developments: Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122; *From Nuremberg to The Hague*, MIL. L. REV., Summer 1995, at 107; *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424 (1993); *The Normative Impact of the International Tribunal for Former Yugoslavia*, 1994 ISR. Y.B. HUM. RTS. 163; *International Criminalization of Internal Atrocities*, 89 AJIL 554 (1995); *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238 (1996); *Answering for War Crimes: Lessons from the Balkans*, FOREIGN AFF., Jan.–Feb. 1997, at 2.

Bosnian Croats to the Hague Tribunal. In addition, under the umbrella of the Stabilization Force and NATO, several indicted persons have been captured *manu militari* and brought to The Hague, and several others have surrendered. Most of the indicted Bosnian Serbs, however, have yet to be arrested. The principal leaders responsible for the atrocities are still free, but they are forced to hide from international justice and their arrest remains a distinct possibility. The Security Council has recently considered establishing yet another Chapter VII ad hoc tribunal, one that would have the power to prosecute senior members of the Khmer Rouge leadership who planned or directed the commission of serious violations of international humanitarian law in Cambodia during the period 1975–1979. One of the issues before the Council regarding this proposal will be whether its powers under that chapter encompass punishing members of a defunct regime for crimes committed two decades ago.

The Hague Tribunal has issued several important decisions that clarify and give a judicial imprimatur to some rules of international humanitarian law. The international Tribunal for the prosecution of genocide and other violations of international humanitarian law in Rwanda is also functioning, despite the problems that have plagued it during its first few years. Many of the principal indicted persons involved in the Rwandan genocide have been arrested and are in the Tribunal's custody. Like the Hague Tribunal,[2] the Arusha Tribunal has rendered an important decision concerning its jurisdiction and the Security Council's competence under Chapter VII of the UN Charter to establish it.[3] The Tribunal is currently trying several cases and should issue some judgments this year.

The work of both Tribunals demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible. No less, the rules of procedure and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court (ICC). Creating a positive environment for the establishment of a standing international criminal court, which—despite serious hurdles—may become a reality before the end of the twentieth century, these achievements have also injected new vigor into the concept of universal jurisdiction and sparked the readiness of states to prosecute persons accused of serious violations of international humanitarian law. There is some evidence, albeit anecdotal and uncertain, that the ad hoc tribunals and the prospects for the establishment of the ICC have had some deterrent effect on violations.

As groundbreaking as these institutional developments are, the rapid growth of the normative principles of international humanitarian law equals them in significance. International humanitarian law has developed faster since the beginning of the atrocities in the former Yugoslavia than in the four-and-a-half decades since the Nuremberg Tribunals and the adoption of the Geneva Conventions for the Protection of Victims of War of August 12, 1949. Appearing in 1964, Wolfgang Friedmann's important book, *The Changing Structures of International Law,* noted that international criminal law recognized as crimes only piracy *jure gentium* and war crimes.[4] Despite the potential for a more expansive vision even in 1964,[5] the criminal aspects of international humanitarian law

[2] Prosecutor v. Tadić, No. IT–94–1–AR72, Appeal on Jurisdiction, paras. 28–40 (Oct. 2, 1995), 35 ILM 32 (1996) [hereinafter Interlocutory Appeal].

[3] Prosecutor v. Kanyabashi, No. ICTR–96–15–T, Decision on Jurisdiction (June 18, 1997), *summarized* by Virginia Morris *in* 92 AJIL 66 (1998).

[4] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 168 (1964).

[5] *See generally* Theodor Meron, *Is International Law Moving towards Criminalization?* 9 EUR. J. INT'L L. 18 (1998).

remained limited and the prospects for its international enforcement poor, right up to the eve of the atrocities committed in Yugoslavia.

There is, of course, a synergistic relationship among the statutes of the international criminal tribunals, the jurisprudence of the Hague Tribunal, the growth of customary law, its acceptance by states, and their readiness to prosecute offenders under the principle of universality of jurisdiction. For example, the 1995 *Tadić* appeals decision of the Hague Tribunal, which confirmed the applicability of some principles of the Hague law to noninternational armed conflicts and the criminalization of violations of common Article 3 of the Geneva Conventions in such conflicts, clearly helped to create the environment for some of the developments in the Preparatory Committee on the Establishment of an International Criminal Court that I discuss below.

The Statute for Yugoslavia affirms that crimes against humanity do not require a nexus with international wars, while the Statute for Rwanda extends this conclusion to peacetime situations, as well as to the criminalization of serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II.

The Statutes of both ad hoc Tribunals criminalize rape as a crime against humanity. Clarifying crimes against humanity is one of the Hague Tribunal's most important contributions. In the *Tadić* appeal, the Tribunal asserted:

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 [of the Statute] comports with the principle of *nullum crimen sine lege*.[6]

Interpreting the Statute's requirement that crimes against humanity be "directed against any civilian population," the Tribunal held that the crimes must involve a course of conduct and not merely one particular act.[7] However, the Tribunal subsequently explained that, "as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity,"[8] and a person who commits a crime against a single victim or a small number of victims could be guilty of a crime against humanity.[9]

The *Tadić* judgment reaffirmed that a "single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable."[10] Although crimes against humanity can be committed only against a civilian population, the Tribunal construed the term "civilian population" broadly: "the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."[11] For example, civilians or resistance fighters who had laid down their arms were considered victims of crimes against humanity in the *Vukovar Hospital Decision*.[12]

[6] Interlocutory Appeal, *supra* note 2, para. 141.
[7] Prosecutor v. Tadić, No. IT-94-1-T, Decision on Form of the Indictment, para. 11 (Nov. 14, 1995).
[8] Prosecutor v. Mrksić, Radić & Šljivančanin, No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61, para. 30 (Apr. 3, 1996) [hereinafter *Vukovar Hospital Decision*].
[9] *Id.*
[10] Prosecutor v. Tadić, No. IT-94-1-T, para. 649 (May 7, 1997) [hereinafter *Tadić*].
[11] *Id.*, para. 643.
[12] *Id.* (citing *Vukovar Hospital Decision, supra* note 8, para. 32).

Finally, interpreting the UN Secretary-General's report on Article 5 of the Statute (crimes against humanity) disjunctively, the Tribunal held that the requirement that acts be directed against a civilian population can be fulfilled if the acts are *either* widespread or systematic.[13]

Significantly, the Tribunal found that a policy to commit crimes against humanity need not be formal, and can be inferred from the manner of the crime. Thus, evidence that "the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not,"[14] is sufficient. Even more important, the Tribunal held that this policy to commit crimes against humanity need not be a state policy. Although crimes against humanity, as crimes of a collective nature, could be committed only by states or individuals exercising state power during World War II, the Tribunal considered that customary international law has evolved "to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory,"[15] including terrorist groups or organizations.[16]

In its decisions, the Tribunal for the former Yugoslavia has already made a significant contribution to the elucidation of some general principles of criminal law, particularly duress and superior orders,[17] and will no doubt further clarify the concept of command responsibility.

The Tribunal has also contributed to an expansive reading of customary humanitarian law.[18] Even though its jurisprudence on grave breaches of the Geneva Conventions and on the classification of the conflict as international or internal has erred on the side of legal formalism, pending appeals still offer some hope for a change.[19]

An event with enormous institutional and normative implications is the UN Diplomatic Conference of plenipotentiaries in Rome (June 15–July 17) on the establishment of an international criminal court, which as of this writing has not yet been held. The Diplomatic Conference follows four years of intensive preparatory work by the United Nations, first by an ad hoc committee (1995) and then by the Preparatory Committee on the Establishment of an International Criminal Court (1996–1998). The starting point and an important focus for the ad hoc and preparatory committees was the draft statute drawn up by the International Law Commission in a remarkably short time and completed in 1994, under the leadership of Professor James Crawford as chairman of the Commission's working group.

[13] *Id.*, para. 646. *See* UN Doc. S/25704, para. 48 (1993) [hereinafter Report of the Secretary-General].

[14] *Tadić, supra* note 10, para. 653.

[15] *Id.*, para. 654.

[16] However, I find less persuasive the Tribunal's holding that all crimes against humanity, not only persecution, require discriminatory intent. *Id.*, paras. 650, 652. The Tribunal recognized that it was departing from customary law, which did not require such intent. There was no reason for the Tribunal to regard the more restrictive Report of the Secretary-General, *supra* note 13, para. 48, as gospel. This holding unnecessarily limits the scope of crimes against humanity; a decision to follow the Nuremberg jurisprudence would have been better. Note that in the U.S. proposal on the elements of offenses under the ICC statute that was presented to the Preparatory Committee, the requirement of discrimination is limited to those crimes against humanity that involve persecution. *See* UN Doc. A/AC.249/1998/DP.11, at 7 [hereinafter U.S. Offenses Proposal]. It would have been better, I believe, to regard inhumane acts against a civilian population, such as murder, extermination, enslavement and deportation, as crimes against humanity and to require discrimination only for persecution on political, racial and religious grounds, as at Nuremberg. I hasten to add that, although I criticize some decisions of the Hague Tribunal on this point and a few others, I believe that the Tribunal and its judges, prosecutors and registrars have been very successful overall. The solid foundation they have built will allow the international community to proceed toward the establishment of a standing international criminal court.

[17] *See* Prosecutor v. Erdemović, No. IT–96–22–A, Appeals Judgment (Oct. 7, 1997).

[18] *See* Interlocutory Appeal, *supra* note 2.

[19] *See* Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia:* Nicaragua's *Fallout,* 92 AJIL 236 (1998).

The Preparatory Committee[20] made significant contributions that confirm and further accelerate the radical changes taking place in international humanitarian law. It gave unprecedented attention to the clarification and drafting of general principles of criminal law, including nonretroactivity, age of responsibility, statute of limitations, *actus reus, mens rea,* mistake of fact or law, and various grounds for excluding criminal responsibility.

Although considerable uncertainty about the final definitions of the crimes within the court's jurisdiction remains, the evolving texts suggest that—leaving aside the controversial crime of aggression whose inclusion in the statute is still questionable—the court will have jurisdiction over genocide, crimes against humanity and war crimes, including grave breaches of the Geneva Conventions. The definition of the crime of genocide tracks the definitions in the Convention on the Prevention and Punishment of the Crime of Genocide. The section on war crimes will probably include a significant catalogue of Hague law–type provisions, as well as criminalize the use of a few kinds of weaponry, such as poison gas and chemical and bacteriological weapons. Rape will probably be criminalized as a serious violation of international humanitarian law or a grave breach of the Geneva Conventions, rather than only as a crime against humanity, which carries a higher burden of proof.[21]

For noninternational armed conflicts, there is an emerging understanding of the need to criminalize internal atrocities. The statute of the international criminal court will probably establish not only that norms stated in common Article 3 set standards for individual criminal responsibility in internal conflicts, but also that rape and some violations of Hague law–type provisions are subject to individual criminal responsibility.[22] However, a small number of states still oppose the applicability of such crimes and even of crimes against humanity in noninternational armed conflicts. Finally, crimes against humanity will encompass the pertinent crimes in the Nuremberg Charter and, according to some proposals, some forms of arbitrary detention. Another proposal would include among crimes against humanity the causing of disappearances.

Following a position already made known in 1996, the United States delegation to the Preparatory Committee issued a statement urging support for the no-nexus approach for crimes against humanity. In part, this statement declared: "Contemporary international law makes it clear that no war nexus for crimes against humanity is required. The United States believes that crimes against humanity must be deterred in times of peace as well as in times of war and that the ICC Statute should reflect that principle."[23]

The United States also announced robust positions—confirming its existing policy—on the criminalization of violations of common Article 3 in noninternational armed conflicts and on some principles concerning the conduct of hostilities in such conflicts. The U.S. statement of March 23, 1998, thus asserted:

> The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section . . . covering other rules

[20] See the following reports by Christopher Keith Hall: *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,* 91 AJIL 177 (1997); *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,* 92 AJIL 124 (1998); *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court, id.* at 331; *The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court, id.* at 548; *see also* Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/L.13.

[21] *See* Theodor Meron, *Rape as a Crime under International Humanitarian Law, supra* note 1.

[22] *See* Theodor Meron, *International Criminalization of Internal Atrocities, supra* note 1.

[23] U.S. statement submitted to the Preparatory Committee on the Establishment of an International Criminal Court (Mar. 23, 1998) (on file with author).

> regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC jurisdiction.[24]

Like the previously discussed *Tadić* opinion, the U.S. proposal on the elements of crimes, which was submitted to the Preparatory Committee on April 2, 1998, takes the disjunctive approach, i.e., that acts directed against a civilian population must be either widespread or systematic to be characterized as crimes against humanity.[25]

One is struck by three aspects of the scope of crimes under international humanitarian law as it has emerged from the work of the Preparatory Committee. First, many participating governments appear ready to accept an expansive conception of customary international law without much supporting practice. Second is an increasing readiness to recognize that some rules of international humanitarian law once considered to involve only the responsibility of states may also be a basis for individual criminal responsibility. There are lessons to be learned here about the impact of public opinion on the formation of *opinio juris* and customary law. The International Committee of the Red Cross's study of customary rules of international humanitarian law, now in progress, will further reinforce these developments. It remains to be seen, however, whether the greater openness to customary law apparent during the various meetings of the Preparatory Committee will

[24] *Id.*

[25] U.S. Offenses Proposal, *supra* note 16, at 3. The interpretive Report of the Secretary-General, *supra* note 13, para. 48, states that crimes against humanity are those "committed as part of a widespread *or* systematic attack against any civilian population" (emphasis added). The report was approved by Security Council Resolution 827 (May 25, 1993), 32 ILM 1203 (1993). In the Security Council discussion of Resolution 827, Ambassador Albright stated:

> Secondly, it is understood that Article 5 applies to all acts listed in that article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread *or* systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds.

UN Doc. S/PV.3217, at 16 (1993) (emphasis added).

The disjunctive formula ("or") was vigorously endorsed by the Hague Tribunal in both the *Vukovar Hospital Decision*, *supra* note 8, para. 30, and in *Tadić*, *supra* note 10, para. 646. *See also* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 79–80 (1995) (who write that crimes against humanity must be committed as part of a systematic plan or general policy, rather than as random acts of violence, without mentioning widespread acts). The Statute for the Rwanda Tribunal upgraded the word "or" to the black-letter law of Article 3 (crimes against humanity): "when committed as part of a widespread or systematic attack against any civilian population."

Neither the Nuremberg Charter nor Allied Control Council Law No. 10 referred to either widespread or systematic attacks. But the Nuremberg jurisprudence suggests that international law requires a systematic governmental organization and that more than isolated acts must be proved; they must be part of a policy. 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS 80 (United Nations War Crimes Commission, 1948); 15 *id.* at 136 (1949). In the *Justice* case decided under Control Council Law No. 10, the Tribunal stated:

> We hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecution on political, racial, or religious grounds.

3 TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG TRIBUNALS 982 (1951). *See also* the Altstötter case, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra*, at 40; and Egon Schwelb, *Crimes against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 191 (1946).

The summaries prepared by the staff of the UN War Crimes Commission, in pointing out that war crimes could overlap with crimes against humanity, stated that crimes committed in "a widespread, systematic manner" may also constitute crimes against humanity. 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 134. This expression, which does not clarify the relationship between "widespread" and "systematic," does not appear in the cases. This summary may have triggered the pertinent language in the 1993 Report of the UN Secretary-General, *supra* note 13.

also materialize when the treaty establishing the future international criminal court is opened for signature and, especially, ratification. Third, the probable inclusion in the ICC statute of common Article 3 and crimes against humanity, the latter divorced from a war nexus, connotes a certain blurring of international humanitarian law with human rights law and thus an incremental criminalization of serious violations of human rights. It goes without saying that the type of offenses encompassed by common Article 3 and crimes against humanity are virtually indistinguishable from ordinary human rights violations, except, as regards crimes against humanity, for their systematic or policy basis. Significantly, one of the drafts concerning the qualifications of ICC judges requires competence not only in international criminal law and international humanitarian law, but also in human rights law. Although important human rights conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, have established a system both of universal jurisdiction over certain crimes and of international cooperation and judicial assistance between states parties, we are now witnessing a process whereby some serious violations of human rights are being subjected, additionally, to the jurisdiction of international criminal courts.

Another important development is the growing recognition that the elevation of many principles of international humanitarian law from the rhetorical to the normative, and from the merely normative to the effectively criminalized, creates a real need for the crimes within the ICC's jurisdiction to be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*). The proposal on the elements of offenses submitted by the United States to the Preparatory Committee is a step in that direction.[26]

These developments could not have taken place without a powerful new coalition driving further criminalization of international humanitarian law. Much like the earlier coalition that stimulated the development of both a corpus of international human rights law and the mechanisms involved in its enforcement, this new coalition includes scholars that promote and develop legal concepts and give them theoretical credibility, NGOs that provide public and political support and means of pressure, and various governments that spearhead lawmaking efforts in the United Nations.

These institutional and normative developments will surely generate further growth of universal jurisdiction. Although the offenses subject to the jurisdiction of international criminal tribunals should not be conflated with those subject to national jurisdiction under the universality principle, there is a clear synergy between the two. The list of crimes that has emerged from the Preparatory Committee will inevitably influence national laws governing crimes subject to universal jurisdiction. For this reason, the broader significance of the international criminal court's statute exceeds its immediate goals. Although the ICC will never be able to try more than a small number of defendants, its institutional importance lies in denying impunity to those responsible for serious violations of international humanitarian law, in fostering real deterrence of major violations, and in providing an effective criminal jurisdiction when state prosecutorial or judicial systems fail to investigate and prosecute in conformity with standards to be stated in the statute. It is in the stimulation of national prosecutions under the relevant principles of jurisdiction, and in the development and clarification of the applicable law, that a standing international criminal court's contribution will be particularly valuable.

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[26] *See* U.S. Offenses Proposal, *supra* note 16.

* I have served as a member of the U.S. delegation to the Rome Diplomatic Conference on the establishment of an international criminal court. The views expressed in this Editorial Comment are only my own. I am grateful to Professors Benedict Kingsbury and Detlev Vagts for their suggestions and to my research assistant Laurie Rosensweig for her help.