

In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century

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Why do governments create international courts even though doing so requires a sacrifice of sovereignty? Current scholarship provides only partial insight into this question. It has focused almost exclusively on existing international courts, overlooking the vast number of failed attempts at international judicialization.

This Article offers one of the first systematic and historically-grounded analyses of attempts to create international courts throughout the 20th century, evaluating both successful and failed cases across a diverse set of issue areas. The analysis demonstrates that international legal crises are often of great importance in facilitating international judicialization. Crises unsettle the international legal order. Eager to restore it, governments become more willing to cooperate with one another and to overcome their prior reluctance about creating an international court. Crises also provide new opportunities for legal networks to advocate for the creation of international courts.

This analysis helps explain why specific international courts came into being while a large number of others that were proposed during the 20th century never saw the light of day. It provides guidance for those seeking to create new international courts. Finally, it sheds light on the efficacy of international courts, a subject of lively debate among international law scholars.

INTRODUCTION

International courts stand as testament to one of the deepest and most puzzling forms of cooperation in the international system.¹ In creating them, governments relinquish the autonomy and authority that they normally ardently protect, and empower third parties to be the final arbiters of issues that go to the heart of international political debate, such as accountability for territorial aggression,² treatment of alleged terrorists,³ liability for

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1. See generally Karen J. Alter, *The Evolving International Judiciary*, 7 ANN. REV. L. & SOC. SCI. 387 (2011) (describing how the number of existing international courts has more than tripled between 1985 and 2010).

2. See, e.g., Int'l Criminal Court [ICC], *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, ICC Doc. RC/Res.6 (June 11, 2010).

3. See, e.g., *Ahmad v. United Kingdom*, App. No. 24027/07, Eur. Ct. H.R. 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267>.

transnational pollution,⁴ determinations of maritime boundaries,⁵ legality of specific environmental regulations,⁶ and prosecution of heads of state for human rights crimes.⁷ In issuing their decisions, international courts shape fundamental norms about the sovereignty of states as well as the daily lives of countless individuals. A November 2012 ruling by the International Court of Justice (“ICJ”) stands as but one example. The court unanimously held that Colombia, rather than Nicaragua, has sovereignty over a number of islands in the Caribbean, a decision that affected villagers on the islands, whose livelihoods depend on access to the sea.⁸

Although scholars of international law have debated extensively the impact of international judicial decisions across a variety of domains,⁹ they rarely inquire into the origins of international courts. Instead, they generally assume that states turn to international courts as functional solutions to cooperation dilemmas among states.¹⁰ In this view governments create international courts to overcome collective action problems, signal their credibility, and reduce transaction costs.¹¹

Such functionalist explanations of international judicialization leave three important questions unanswered. First, when similar challenges arise in interstate cooperation, why do courts emerge in some issue areas but not in others? For instance, it is not clear why states should create a tribunal to resolve disputes about the laws of the sea but not the laws of the environ-

4. See, e.g., Press Release, Int’l Court of Justice, Ecuador Institutes Proceedings Against Colombia with Regard to a Dispute Concerning the Alleged Aerial Spraying by Colombia of Toxic Herbicides over Ecuadorian Territory, I.C.J. Press Release No. 2008/5 (Apr. 1, 2008).

5. See, e.g., Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), 2002 I.C.J. 303, 461–62 (Oct. 10) (declaration of Judge Oda).

6. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

7. See, e.g., Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-1, Warrant of Arrest (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

8. See Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, (Nov. 19, 2012), available at <http://www.icj-cij.org/doCKET/files/124/17164.pdf>.

9. See generally Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Karen J. Alter, Cesare Romano, & Yuval Shany eds., forthcoming 2013) (discussing recent review of various dimensions of this debate).

10. See, e.g., Firew Kebede Tiba, *What Caused the Multiplicity of International Courts and Tribunals?*, 10 GONZ. J. INT’L L. 202, 204 (2006) (stating that the “fundamental overarching explanation” for the rise of international courts is “globalization and increasing interdependence,” and that “an increasing number of state functions can no longer be performed in splendid isolation” (quoting Niels M. Blokker, *Proliferation of International Organizations: An Exploratory Introduction*, in 37 PROLIFERATION OF INTERNATIONAL ORGANIZATIONS, LEGAL ISSUES 1, 11 (Niels M. Blokker & Henry G. Schermers eds., 2001))).

11. See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 904 (2005). Functionalists also emphasize that states create international courts in response to the rapid expansion of international law into new domains that require increasingly specialized enforcement mechanisms. As one member of the International Law Commission put it, “[i]n the ultimate analysis, the functional needs and special features of the legal regime in question provide the main rationale for the establishment of new tribunals, thanks to the expanding role of the international legal system.” Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentations?*, 25 MICH. J. INT’L L. 929, 946 (2004).

ment; why they should create tribunals to adjudicate foreign investment disputes, but not disputes about taxation; and why they have created an international criminal court to prosecute war crimes, but have not established a world court for human rights. Second, analyses that adhere to a functionalist logic are hard-pressed to explain the timing of international judicialization. Why did states wait until the end of the 1990s to create the first criminal court, rather than do so earlier in the decade or in the 1950s, right after they had drafted the relevant treaty? Why did efforts to create the first world court fail in 1907 and succeed in 1920? Finally, functionalist accounts generally focus only on successful cases in which international courts were ultimately created. The 20th century, however, is replete with failed efforts to create other international courts, efforts that scholars have almost entirely overlooked.¹² Functionalism thus provides no more than a starting point for analysis. In addition to the crisis explanation, this Article therefore focuses on a power-based account.

A power-based account, which I refer to as the hegemonic power argument, holds that the most powerful state dictates the creation of institutions.¹³ It is well-suited for explaining variation in judicialization for economic issues, an area in which powerful states have unusual bargaining leverage. This leverage stems from the capacity of powerful states to impose high unilateral costs on other states simply by denying them market access. Yet, for the diverse array of non-economic issues that this Article considers, the hegemonic power argument is unable to account fully for patterns of judicialization: it provides insight into some successful and failed efforts to create international courts, but leaves many others unexplained. The cumulative effect of these two theoretical accounts is this: while international courts have become central sites of global governance, scholars have only a very limited understanding of why states succeed or fail in creating them.

This Article argues that outside of the international economy, international legal crisis has played an important though underappreciated role in influencing the creation of international courts. International legal crises are events that challenge an existing legal rule or rules that some states seek to protect. For crises to be legal, international legal rules must exist and be

12. A few scholars have recognized this tendency to focus on only the successful cases and have called for more attention to the failed attempts. See Cesare P.R. Romano, *The Shadow Zones of International Judicialization*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* (Cesare P.R. Romano, Karen Alter, & Yuval Shany eds., forthcoming 2013); Benedict Kingsbury, *International Courts: Uneven Judicialisation in Global Order*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 203, 211 (James Crawford & Martti Koskeniemi eds., 2012); see generally Alter, *supra* note 1; Osvaldo Saldías, *Networks, Courts and Regional Integration: Explaining the Establishment of the Andean Court of Justice* 11–21 (KFG Working Paper, No. 20, Nov. 2010), available at <http://ssrn.com/abstract=1708040>. See, e.g., *infra* section III.A for a description of the failed attempt to create an international court before World War I; *infra* note 155 and accompanying text for discussion of the failed 1948 Genocide Convention; *infra* section IV.

13. See generally Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006) (historical review of various strands of the power-based account in international law).

thrown into upheaval. It is the legal nature of the crisis that moves states to look specifically to a judicial, rather than a simply legal or political, solution.

Such crises increase the likelihood of international judicialization for two reasons. First, international legal crises unsettle the international legal order. States that seek to restore it become more willing to cooperate with one another to do so, overcoming their reluctance to yield sovereignty to a third party. Second, international legal crises motivate states to turn to international lawyers and broader legal networks.¹⁴ Lawyers and networks play a pivotal though varied role. They formulate and draft proposals, often before the legal crisis breaks out, and they act as interpreters, framing the meaning of crises as demonstrating the need for a judicial rather than only a political response.¹⁵ In search of strategies and solutions to present and potential future legal upheavals, states turn to international lawyers for guidance in the judicialization process.

This Article provides one of the first systematic, cross-issue, and historically-grounded analyses of the conditions that facilitate international judicialization.¹⁶ It examines both successful and failed cases, cuts across a diverse set of non-economic issue areas, and spans the 20th century. Crisis is an important factor that influences the creation of international courts. This analysis, however, also shows that not all international legal crises lead to international courts and not all international courts are the result of legal crises. History is too varied to make crisis, or any other condition, simply a necessary or a sufficient condition. Ultimately, this Article suggests, hegemonic power and international legal crisis, taken together, provide powerful insights into judicialization during the 20th century.

Even for cases they explain, both the crisis and power arguments are reductionist: to identify patterns across a spectrum of cases that occur over many decades, the argument abandons nuance. Most importantly, both explanations treat states as unitary actors and are silent about the origins of state interest.¹⁷ The hegemonic power argument does not explain why hegemonic states support judicialization in some cases and not in others. The

14. I use the term international lawyers and legal networks basically interchangeably. Whether international lawyers mobilized for international courts as part of networks or just on their own varies by issue area and over time, and whether those networks were national or transnational also varies.

15. See generally Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International Politics: An Introduction*, in *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 1 (1998); Richard Price, *Transnational Civil Society and Advocacy in World Politics*, 55 *WORLD POL.* 579 (2003).

16. For the most comprehensive cross-issue area, historical analysis of international judicialization to date, see generally Alter, *supra* note 1. Alter highlights World War II and the end of the Cold War as critical junctures that facilitated judicialization. The analysis, however, excludes failed attempts to create international courts and therefore is unable to answer the question of why some attempts to create international courts in the aftermath of critical junctures failed, while others succeeded.

17. This Article uses the terms "state" and "government" interchangeably, and both refer to the state/government's executive branch.

crisis argument does not explain why states want to protect specific legal rules from being upended by crises. *Such limitations are the price that parsimonious theories must pay.* Questions about the origins of state interests in judicialization and the construction of state perceptions of legal crisis are answerable, but only on a case-by-case basis.

Yet, simplification also has advantages. A historical analysis of crisis dynamics points to one broad conclusion: when born of legal crises, international courts are bridges that link fragile legal rules and norms of the past to their institutionalization and enforcement in the future. For this reason, international legal crises are more than sharp breaks with the past. They offer opportunities both for reaffirming existing political and legal orders.

Several important implications follow. The Article's historical analysis provides guidance to advocates of new international courts, including groups campaigning for an international environmental court, an international human rights court, and a sovereign debt tribunal.¹⁸ Understanding the creation of international courts also provides insight into contemporary debates about the efficacy of international courts and the enforcement of international law more broadly.

This Article proceeds in five parts. Part I introduces the international judicial landscape, presenting not only successful cases of judicialization but also a range of failed attempts that have been almost entirely overlooked by international law scholars. It then reviews briefly two important explanations of why states create international courts, which focus on functionalist incentives and hegemonic power respectively. Part II proposes an argument about the role of international legal crisis in facilitating the creation of international courts. Part III compares the failed attempt to create an international court before World War I with the successful creation of the Permanent Court of International Justice ("PCIJ") after the war had ended. Building on these two cases, Part IV illustrates further the dynamics of crisis by offering brief sketches of both well-known successful and overlooked unsuccessful attempts to create international courts during the 20th century. Finally, Part V reflects on the policy and theoretical implications of the international legal crisis argument.

18. See PEGGY KALAS, WORLD FEDERALIST MOVEMENT & THE INT'L NGO TASK GRP. ON LEGAL & INSTITUTIONAL MATTERS, INTERNATIONAL ENVIRONMENTAL DISPUTE RESOLUTION: WHY WE NEED A GLOBAL APPROACH 69 (2002); Manfred Nowak & Julia Kozma, *A World Court of Human Rights, in* PROTECTING DIGNITY: AN AGENDA FOR HUMAN RIGHTS (2009); Christoph G. Paulus, *A Resolvency Proceeding for Defaulting Sovereigns*, 3 INT'L INSOLVENCY L. REV. 1 (2012).

I. THE INTERNATIONAL JUDICIAL LANDSCAPE AND EXISTING LITERATURE

Over the course of the 20th century, states have attempted to create international courts or judicial bodies for a broad spectrum of issues.¹⁹ Only some of these efforts have been successful. This Part defines what is meant by the term “international court” and argues that the dynamics of court creation differ at international and regional levels. It then presents an overview of the international judicial landscape, including all 20th-century attempts to create such courts that reached the multilateral treaty-drafting or negotiation stage.²⁰ Finally, it elaborates on this Article’s central question of why governments create international courts and shows that conventional, functionalist accounts have trouble explaining variation across attempts at international judicialization.

I define an international court as any judicial or arbitral body that is part of a permanent framework and that any state has the option of joining. This definition includes permanent arbitral bodies, like the Permanent Court of Arbitration (“PCA”), even though they are not strictly judicial.²¹ The definition, however, excludes *ad hoc* international criminal tribunals, such as the Nuremberg Tribunal, because they are temporary, and more importantly, are invested with jurisdiction over only a single state. From a sovereignty perspective, their limited jurisdiction makes these tribunals fundamentally different from other international courts. *Ad hoc* tribunals do not require states to give up autonomy or power; their creation is therefore less puzzling. In defining international courts in this way, I have erred on the side of caution: excluding cases that the crisis argument seems to explain (such as the *ad hoc* criminal tribunals and the ICJ) and including cases that the crisis argument is unable to account for (the PCA).

19. A typical definition of international courts as articulated by Karen Alter is: “a permanent legal body, composed of independent judges, hearing legal cases in which one of the parties is a state actor or an International Organization (IO), deciding on the basis of predetermined rules and issuing binding legal rulings.” Karen J. Alter, *The New International Courts: A Bird’s Eye View* 1 (Buffet Ctr. for Int’l and Comparative Studies, Working Paper No. 09-001, 2009); see Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 712 (1999). I adopt a slightly broader definition to encompass two important arbitration bodies that are constituted on an *ad hoc* basis but are still part of a permanent institutional framework: PCA and the International Center for the Settlement of Investment Disputes (ICSID). The definition does not cover *ad hoc* criminal tribunals that are not permanent, such as the International Criminal Tribunal for Rwanda (ICTR). These tribunals are vested with jurisdiction over a single state, and do not impose restrictions on state sovereignty.

20. I focus exclusively on multilateral treaty negotiations in order to limit my analysis to proposals that had a plausible chance of being implemented by states. See generally James Mahoney & Gary Goertz, *The Possibility Principle: Choosing Negative Cases in Comparative Research*, 98 AM. POL. SCI. REV. 653 (2004).

21. The primary distinction between adjudication and arbitration is that parties appoint the dispute settlers in arbitration. In general “arbitration leaves more room for influence by the parties” THE SAGE HANDBOOK OF CONFLICT RESOLUTION 360 (Jacob Bercovitch et al. eds., 2009).

This definition excludes regional-level courts.²² Although conventional accounts treat international and regional courts as a single phenomenon, I distinguish between the two types of courts for three different reasons. First, the creation of international courts faces higher barriers than does the creation of regional courts. As a practical matter, more states are involved in negotiating international courts, which makes finding a consensus more difficult. Second, states are less likely to exert political influence over an international than a regional judicial body. For instance, states are less likely to have one of their own judges be on the panel of an international court. International courts thus impose greater sovereignty costs than regional ones.²³ Finally, recent scholarship demonstrates that state motives for creating regional courts are sometimes shaped by emulation and learning from other regions, and sometimes by dynamics that are specific to the region or regional organization with which the court is associated.²⁴ If the incentives for judicialization vary cross-regionally, the dynamics driving the establishment of international courts are also likely to differ from those at the regional level.

Table 1 reflects the range of efforts, both successful and failed, to create international courts for non-economic issues during the 20th century.²⁵ As I discuss later in this section, the dynamics of judicialization for economic issues are sufficiently distinct to warrant a separate analysis that falls beyond the scope of this paper. Table 1 shows that, outside of the international economy, states successfully established international courts four times and failed to do so seven times. Failed attempts can be the result of immediate rejections of a proposal (as in the 1920 criminal court); rejection after a brief debate (as in the 1948 Genocide Convention); implicit rejection, with states simply abandoning the effort (the 1950 criminal court treaty); or the failure

22. I thank Karen Alter for drawing these distinctions to my attention.

23. One important caveat to this claim is that some international judicial bodies, such as the PCA, PCIJ, and ICJ, are not invested with compulsory jurisdiction, but have an “opt-in” feature.

24. This is reflected partly in the concentration of tribunals established in Europe and Latin America and the dearth of such tribunals in Asia. Alter, *supra* note 19, at 2; Karen J. Alter & Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT’L ORG. 563 (2010); Erik Voeten, *Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?* 1 (Asian Dev. Bank, Working Paper No. 65, 2010).

25. The table does not include the ICJ as a separate case. Following the formal suspension of the PCIJ in 1946, states created in its place the ICJ that same year. Thus, the ICJ was simply a continuation of the PCIJ under a different name. Indeed, Manley Hudson, who for a number of decades wrote the annual reviews of the PCIJ’s activity for the *American Journal of Law*, did not distinguish between the two courts in the title of his annual reviews. He would refer, for instance, to the second year of the ICJ as the “Twenty-Fifth Year of the World Court.” See Manley O. Hudson, *The Twenty-Fifth Year of the World Court*, 41 AM. J. INT’L L. 1 (1947). Because changes to the court were minor, the ICJ is neither included as a distinct case in Table 1 nor analyzed further. For a useful volume containing official comments by states on various proposed changes to the original statute, the records of the meeting of the committee of jurists, and for easy comparisons of the texts of the PCIJ and ICJ Statutes, see U.S. DEP’T OF STATE, *THE INTERNATIONAL COURT OF JUSTICE: SELECTED DOCUMENTS RELATING TO THE DRAFTING OF THE STATUTE* (1946).

of parties to enter a treaty into force after adoption (the 1937 Terrorism Court and the 1907 International Prize Court).

The landscape depicted in Table 1 differs from the conventional portrayal of international judicialization in the 20th century in its inclusion of the seven failed attempts. Most, if not all, discussions of the creation of international courts focus only on successful attempts and exclude cases in which states have failed to do so.²⁶ There exists minimal contemporary scholarship on the 1907 failed Court of Arbitral Justice²⁷ and the three international courts for which the founding treaties stalled in mid-drafting or were adopted but did not enter into force: the 1907 International Prize Court,²⁸ the 1937 Terrorism Court,²⁹ and the 1950s international criminal court.³⁰ The exclusion of failed attempts creates a problem of selection bias that may create the mistaken impression that if states attempt to create international courts, they will inevitably succeed. This bias unintentionally prepares the ground for overstating the conditions that drive international judicialization. Without an analysis of failed attempts, scholars cannot accurately assess which factors lead to international judicialization. An analysis that only examines successful cases, for instance, may place too much weight on credible commitment incentives, which are also in place for failed cases.

26. See, e.g., Alter, *supra* note 19, at 1; Helfer & Slaughter, *supra* note 11, at 901; see generally Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005). A recent exception is *Uneven Judicialization* by Benedict Kingsbury, who states that “[t]his image of judicialisation and of a new paradigm can easily be exaggerated: international courts and tribunals are significant on some issues but not others, in some parts of the world much more than others.” Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, in CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203, 211 (James Crawford & Martti Koskenniemi eds., 2012). Kingsbury further notes that while certain issues may occasionally be adjudicated (such as the control of nuclear weapons, migration, or religion), these instances are rare. “[T]his absence is an important part of the picture.” *Id.* at 212.

27. For a discussion of the 1907 attempt to create a permanent international court, see Denys P. Myers, *The Origin of the Hague Arbitral Courts*, 8 AM. J. INT’L L. 769 (1914); Denys P. Myers, *The Origin of the Hague Arbitral Courts*, 10 AM. J. INT’L L. 270 (1916).

28. For analyses of the Prize Court, see for example Charles Noble Gregory, *The Proposed International Prize Court and Some of Its Difficulties*, 2 AM. J. INT’L L. 458 (1908); James L. Tryon, *The International Prize Court and Code*, 20 YALE L.J. 604 (1911).

29. For analysis of the Terrorism Court, see generally Manley O. Hudson, *The Proposed International Criminal Court*, 32 AM. J. INT’L L. 549 (1938).

30. For discussions of the 1950s attempt to establish an international criminal court, see generally George A. Finch, *Draft Statute for an International Criminal Court*, 46 AM. J. INT’L L. 89 (1952); Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT’L L. 60 (1952); Yuen-Li Liang, *The Establishment of an International Criminal Jurisdiction: The First Phase*, 46 AM. J. INT’L L. 73 (1952); Yuen-Li Liang, *The Establishment of an International Criminal Jurisdiction: The Second Phase*, 47 AM. J. INT’L L. 638 (1953).

TABLE 1: INTERNATIONAL JUDICIALIZATION DURING THE 20TH CENTURY³¹

Issue Area	Attempted Courts	Successful*	Unsuccessful
General	1899 - Permanent Court of Arbitration (<i>First Hague Conference</i>)	Yes	
	1907 - Court of Arbitral Justice (<i>Second Hague Conference</i>)	No	Proposed, never adopted
	1920 - Permanent Court of International Justice (became the International Court of Justice in 1946) (<i>League of Nations</i>)	Yes	
International Criminal Law	1920 - Criminal Court (<i>League of Nations</i>)	No	Proposed, never adopted
	1937 - Terrorism Court (<i>Geneva Conference</i>)	No	Adopted, never entered into force
	1948 - Genocide Tribunal (<i>Genocide Convention</i>)	No	Proposed, never adopted
	1950s - Criminal Court (<i>United Nations</i>)	No	Treaty negotiated, not adopted
	1998 - International Criminal Court (<i>Rome Conference</i>)	Yes	
Human Rights	1949 - Human Rights Court (<i>UN Human Rights Committee</i>)	No	Proposed, never adopted
Law of the Sea	1907 - International Prize Court (<i>Hague Conference II</i>)	No	Adopted, never entered into force
	1982 - International Tribunal for the Law of the Sea (<i>UN Conference on the Law of the Sea III</i>)	Yes	

* "Successful courts" are defined as courts that became operational.

Contemporary functionalist scholarship is hard-pressed to explain the variation shown in Table 1. This most recent wave of functionalism argues that states create and design international institutions to solve cooperation problems, such as the need to signal commitment about intent to adhere to legal obligations or to reduce uncertainty about other states' preferences.³²

31. Table 1 is limited to 20th century efforts and thus excludes more recent proposals to create a sovereign debt tribunal, a world human rights court, and an international environmental court. See *supra* note 25 for an explanation for treating the PCIJ and the ICJ as one case.

32. For a foundational work on this recent wave of functionalist scholarship, see Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). In a different paper, Koremenos states: "We cannot understand institutional design and compare across institutions without understanding the cooperation problem(s) the institutions are trying to solve." Barbara Koremenos, *International Institutions as Solutions to Underlying Games of Cooperation* 1–16, (Institut Barcelona d'Estudis Internacionals, Working Paper No. 2009/27); see also Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 60–61 (2012) (stating "Re-

This focus on cooperation problems distinguishes this recent version of functionalism³³ from classic functionalism³⁴ that advances the basic proposition that states create international institutions for efficacy reasons. Scholars have relied on this recent strand of functionalism to explain the existence of the International Criminal Court (“ICC”),³⁵ investment arbitration,³⁶ human rights courts,³⁷ and the WTO dispute-settlement body.³⁸

If cooperation problems are the key drivers of international judicialization, we would expect the international landscape to be saturated with international courts. As Table 1 illustrates, this is not the case. Thus the question remains: why do some efforts to create international courts succeed and others fail?

An explanation focusing on the role of hegemonic power provides partial insight into patterns of international judicialization.³⁹ This approach defines

search that emphasizes the underlying attributes of problems is usually functional in its orientation. It sees international cooperation stemming from the attributes of the problem that actors are trying to solve.”) Some scholars recognize that functionalism may not explain institutional creation. Karen Alter, for instance, is explicit about the scope of her claims: “[T]he functional argument does not really explain why [a given judicial] role was delegated in the first place.” She continues: “[W]e *** must look at the history of the specific institutions to understand how specific courts came to be given powers that increase the extent to which states are held accountable to the law.” Alter, *supra* note 19, at 41. That said, the creation and design of institutions are frequently entangled. For instance, Barbara Koremenos analyzes the inclusion of dispute settlement provisions in treaties as a design issue. See, e.g., Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189 (2007). Yet, the League of Nations Covenant, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and Bilateral Investment Treaties (BITs) provide for dispute settlement by *creating* new judicial forums—the Covenant through article 14, the UNCLOS through the option to accept one of the four dispute-settlement provisions, and BITs through the provision for *ad hoc* investor-state arbitration.

33. This recent wave of functionalism includes both the rational institutional design (RID) literature as well as scholarship that focuses on credible commitment. For an introduction to RID, see *supra* note 32; Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001). For an example of credible commitment explanations, see *supra* note 35.

34. ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES 1950-1957* (2004).

35. Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225 (2010).

36. Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 634 (2005). Although he does not use the language of rational design or functionalism, legal scholar Alan Sykes relies on a similar logic when he suggests that private standing has emerged in international investment but not in trade partly due to an asymmetric enforcement problem. In investment law, states need a way to signal commitment to foreign investors since there is little risk of retaliation in cases of violation. They do so by granting investors legal standing. In the trade context, however, states are less pressed to empower private actors since any violation they commit is likely to lead other states to deny them market access. This risk of retaliation helps deter trade violations.

37. See Helfer & Slaughter, *supra* note 11, at 906-09.

38. See MICHAEL J. TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 54, (4th ed. 2012) (arguing that judicial, not diplomatic, mechanisms were needed to sanction those that cheat, deter others from cheating, and sustain the multilateral trade regime).

39. See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369 (2005). Although his focus is not specifically on international courts, legal scholar Nico Krisch offers a nuanced account of the relationship between hegemonic power and international law. He proposes a typology of strategies that the hegemon turns to in its treatment of international law: using it instrumentally; shaping it hierarchically; replacing it with domestic legal

power in terms of military capabilities and market size.⁴⁰ It argues that hegemonic states dictate whether and when international institutions, including international courts, are created.⁴¹ A hegemon is typically defined as a state that has overwhelming military and economic power and is therefore “capable of dominating the course of international politics,”⁴² including the creation of legal institutions.⁴³ This Article focuses on the United Kingdom and United States as the relevant hegemon during the 20th century.⁴⁴ The United Kingdom is a clear hegemon before World War I and the United States is a clear hegemon after WWII. The interwar period lacked a hegemon.⁴⁵

The hegemonic explanation appears to be particularly compelling for economic courts, which are not analyzed in this Article. The decision to treat economic courts as fundamentally different from non-economic ones (and the decision not to examine them here) is premised on a well-established recognition by both international relations and international law scholars that power is conditioned by issue area. Legal scholar Nico Krisch, for instance, recognizes that “the power differential translates very differently into different areas of the law.”⁴⁶ In the economic realm, powerful states have more bargaining leverage than in other issue domains. This leverage stems from the capacity of powerful states to impose high unilateral costs on other states simply by denying access to their markets. As global economic powers, the United States and the United Kingdom are much less dependent on foreign markets than other states; this asymmetry translates into significant power differentials when treaties are negotiated. In contrast, the United States and the United Kingdom need other states to resolve, for example, environmental problems and thus are unable to dictate institutional outcomes in these arenas. International law and international relations scholars have written extensively about how the role and influence of power is conditioned by issue area and context, and about the different dimensions of

mechanisms; and withdrawing from it altogether. Krisch’s focus is on the hegemon’s strategies rather than the ultimate outcome for an international legal regime but, in this view, the two are closely linked.

40. ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 9 (1987); see KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 192–93 (1979).

41. See generally JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001). Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 *WORLD POL.* 317 (1976).

42. G. John Ikenberry & Charles A. Kupchan, *Socialization and Hegemonic Power*, 44 *INT’L ORG.* 283, 283 (1990).

43. ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 9 (1987).

44. Given its general position that international courts intruded on state sovereignty, the Article does not consider the hegemonic role of the Soviet Union after 1945.

45. CHARLES KINDLEBERGER, *THE WORLD IN DEPRESSION 1929–1939* (1986). For the one attempt to create a court that reached multilateral negotiations during this period, this Article focuses on the role of the United Kingdom only, since the United States did not participate.

46. Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 *EUR. J. INT’L L.* 369, 407 (2005).

power.⁴⁷ The point that warrants emphasis here is the relational nature of power. It explains why the United States and the United Kingdom are able to influence judicialization in some issue areas but not in others.

In summary, neither of these two theories fully explains the creation of international courts. The functionalist theory provides some insight into why states turn to judicialization to solve cooperation dilemmas, for example by signaling credibility to other states. But this need to signal credibility is far more pervasive than the number of international courts. Functionalists have trouble, therefore, explaining why, given the pervasive problem of establishing credible commitments, states create international courts in some cases and not others.

Hegemons also certainly matter for institutions outside the international economy, and hegemonic power is better able than functionalism to account for the observed variation in Table 1. But as the 11th hour U.S. opposition at the ICC and International Tribunal for the Law of the Sea (“ITLOS”) negotiations illustrates, hegemons do not simply dictate outcomes.⁴⁸ A hegemonic account leaves unexplained many attempts to set up non-economic courts. Attention to international legal crises can help bridge the gap.

II. CRISIS, LAWYERS, AND THE ORIGINS OF INTERNATIONAL COURTS

It takes a rare confluence of forces to facilitate international judicialization. Among these forces, international legal crises are important in opening the door to the creation of international courts. International legal crises are events that seriously violate an existing legal rule or rules that some important states want to protect. I define the crisis concept subjectively: what matters is whether states perceive an event as a legal crisis at the time it occurs, and not whether their perception is accurate. Such crises facilitate the creation of international courts in two ways. First, they make states more willing to cooperate with one another in creating an international judicial authority. Second, they make states more receptive to proposals of non-state actors, such as international lawyers. In this respect, international crises facilitate both inter-state cooperation and non-state actor participation in judicialization processes. Crises have this effect because they shift the priorities of states, making states more concerned with ensuring their own security and stability than guarding state sovereignty from third-party actors.

The next two sections elaborate on the concept of international legal crisis and on why and how crises increase the likelihood of international judicial-

47. David A. Baldwin, *Power and International Relations*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 273 (Walter Carlsnaes et al. eds., 2013); STEFANO GUZZINI, POWER, REALISM AND CONSTRUCTIVISM (2013).

48. See Christopher C. Joyner, *The United States and the New Law of the Sea*, 27 OCEAN DEV. & INT’L L. 41, 42 (1996).

ization. Although this argument is presented before the historical cases discussed in Parts III and IV, it is largely inductive.

A. *International Legal Crises and International Lawyers*

With concepts such as “formative events,”⁴⁹ “exogenous shocks,”⁵⁰ “turning points,”⁵¹ and “critical junctures,”⁵² scholars from a broad range of disciplines have long recognized the importance of crises for institutional development.⁵³ Although each of these terms has a distinct meaning, the general idea is the same: radical events often usher in waves of institutional innovation and transformation.

Scholars of international relations have focused on the role of international crises, although not on legal crises specifically, in fostering institutional change. Moreover, they have studied the creation of all types of international institutions, not specifically judicial ones. They have proposed four logics linking crises to institutionalization.⁵⁴ A hegemonic power explanation suggests that crises shift the distribution of capabilities among states. This catalyzes new alliances and opportunities for institution building and experimentation.⁵⁵ This explanation differs from hegemonic power theory introduced in Part I, which expects the most powerful states to dictate institutional outcomes regardless of the presence of crisis. A rational interest-based approach claims that crises change states’ cost-benefit calculations regarding various policy options and that this can trigger profound political and social change.⁵⁶ A hybrid of these arguments, referred to here as the hegemonic-institutionalist argument, holds that crises influence the cost-benefit calculations of the most powerful state; in order to lock in the status

49. See generally DANIEL REITER, *CRUCIBLE OF BELIEFS: LEARNING, ALLIANCES, AND WORLD WARS 184–89* (1996).

50. See generally Wesley W. Widmaier, et al., *Exogenous Shocks or Endogenous Constructions? The Meanings of Wars and Crises*, 51 INT’L STUD. Q. 747 (2007).

51. Andrew Abbott, *On the Concept of Turning Point*, 16 COMP. SOC. RES. 85 (1997); see also Widmaier, Blyth & Seabrooke, *supra* note 50, at 756.

52. See, e.g., Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341 (2007); John Hogan & David Doyle, *A Comparative Framework: How Broadly Applicable Is A ‘Rigorous’ Critical Junctures Framework?*, 44 ACTA POLITICA 211 (2009).

53. For a good summary and citations to this literature, see REITER, *supra* note 49, at 36–39; see also G. John Ikenberry, *Conclusion: An Institutional Approach to American Economic Foreign Policy*, in *THE STATE AND AMERICAN ECONOMIC FOREIGN POLICY* 219, 223–24 (G. John Ikenberry, David A. Lake & Michael Mastanduno eds., 1989).

54. Crises in these accounts tend to consist of two types of events: war (or military confrontations) and economic meltdowns. See Widmaier, Blyth & Seabrooke, *supra* note 50; cf. Miles Kahler & David A. Lake, *Introduction: Anatomy of Crisis: The Great Recession and Political Change*, in *POLITICS IN THE NEW HARD TIMES: THE GREAT RECESSION IN COMPARATIVE PERSPECTIVE* 1, 10 (Miles Kahler & David A. Lake eds., 2013).

55. See ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* 15 (1981) (hegemonic war has served as “the principal mechanism of change throughout history”); Scott Cooper et al., *Yielding Sovereignty to International Institutions: Bringing System Structure Back In*, 10 INT’L STUD. REV. 501, 503 (2008); Krasner, *supra* note 41, at 341.

56. See Kahler & Lake, *supra* note 54, at 16–18.

quo, the hegemon will create and join multilateral institutions even though it must yield substantial autonomy to do so.⁵⁷

Finally, sociologically-inclined scholars focus on international norms and argue that it is the interpretations of crises, not the crises themselves, which help explain institutional change.⁵⁸ As one set of norm-oriented scholars succinctly puts it, “World War II did not cause the Bretton Woods agreements. Rather, what agents thought *caused* World War II caused the Bretton Woods Agreements to take their particular form.”⁵⁹ During crises, through debates and negotiations, governments and non-state actors re-conceptualize their own interests and thus contribute to broader political and social transformations.⁶⁰ The crisis argument relies primarily on a sociological approach, but with a recognition that states needed some power to lead the way in judicialization.

Despite their differences, these crisis-based accounts confront a similar definitional critique: in retrospect, any historical event can qualify as a turning point or crisis. Explanations that refer vaguely to some “radical event” become unfalsifiable.⁶¹ The critique is a fair one. Rather than discard a good idea, the proper response is to clarify the concept in a way that allows for a clearer determination of whether an event qualifies as a legal crisis.⁶² This Article adopts a subjective approach to the concept and focuses on how the event was perceived by states at the time that it occurred. It is after all, the *perception* of a legal crisis, not the accuracy of that perception that explains why governments are drawn towards international judicialization.

This subjective approach raises two important questions. First, whose perception? This question is particularly important because governments often disagree over the binding character of an international legal rule; such disagreement is particularly likely during periods of crisis. In this subjective approach, legal crises exist in the eye of the beholder. Colonial occupation, for example, posed a crisis of self-determination for those under colonial rule, not the imperial powers. Decolonization, in contrast, posed a legal crisis to the territorial integrity principle for the colonial powers, not the colonies. The crisis argument advanced here focuses especially on the perceptions

57. See JOHN IKENBERRY, LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER 11–13, 28 (2012); G. John Ikenberry, *Constitutional Politics in International Relations*, 4 EUR. J. INT’L REL. 147, 150 (1998) (“[O]rder formation in international relations has tended to come at dramatic and episodic moments – typically after great wars.”).

58. See Widmaier, Blyth & Seabrooke, *supra* note 50, at 748 (“Neither state nor societal agents can react to material changes until they have interpreted them through diverse frameworks of understanding.”). Hence, the title of the article: “*Exogenous Shocks or Endogenous Constructions? The Meanings of Wars and Crises.*” For an example of a sociological interpretation of crisis, see Jutta Weldes, *The Cultural Production of Crises: U.S. Identity and Missiles in Cuba*, in CULTURES OF INSECURITY: STATES, COMMUNITIES, AND THE PRODUCTION OF DANGER 35 (Jutta Weldes et al. eds., 1999).

59. Widmaier, Blyth & Seabrooke, *supra* note 50, at 749 n.6.

60. See *id.* at 752.

61. See, e.g., Hogan & Doyle, *supra* note 52, at 211–12.

62. For a comprehensive effort at formulating an *ex ante* definition, see *id.* at 213–14.

of continental European states for understanding why governments turned specifically to judicialization in response.

Continental Europe played a central role for three different reasons. First, despite the conventional view that the United States (and the United Kingdom) were leaders in international institution building, the existing literature documents in considerable detail that continental European states have often played an even more pivotal role.⁶³ Second, from a crisis perspective, continental Europe's leadership in judicialization makes sense: with two World Wars it experienced more acutely the greatest legal crises of the 20th century than did the United Kingdom or the United States. European states were invaded, occupied, and lost tens of millions of lives. Relatedly, European countries began to form regional institutions, including judicial ones, earlier than other countries; thus they had a stronger norm supporting international and global judicial bodies than countries such as the United States or United Kingdom. This norm was embraced and promoted also by legal elite that became committed to the international and global judicial project.⁶⁴ Finally, a power perspective emphasizes that continental Europe was comprised of middle powers. Middle powers have both the incentive and capacity to create global judicial bodies, and are therefore more likely than hegemon or weaker powers to take the lead in doing so. In contrast to the hegemon, they cannot rely as easily on political and diplomatic strategies of persuasion and coercion. Hegemons, by contrast, lacked interest, and weaker states lacked capacity.

Second, who frames the perception of legal crises? Crises are constructed by a broad range of forces: power politics, domestic politics, the normative context, and state and non-state actors, including international lawyers.⁶⁵ International lawyers in some cases play a pivotal role in framing an event as a legal rather than merely a political crisis during or in the immediate aftermath of the event.⁶⁶ They are not always the main actors shaping perceptions of events as legal crises, however. This Article focuses primarily on the role of international lawyers in framing legal crises as requiring judicial solutions, and not in creating the perception of legal crises in the first place.

Acting as groups or in broader national and transnational networks comprised of epistemic communities and advocacy groups, international lawyers are indispensable in facilitating judicialization. As members of epistemic communities, such groups include not only practicing lawyers but also legal scholars, and judges, as well as legal professional associations (for example,

63. See generally Suzanne Katzenstein, *Why Surrender Sovereignty? Empowering Non-State Actors to Protect the Status Quo* (2013) (unpublished Ph.D. dissertation, Columbia University) (on file with author); Karen J. Alter et al., *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMP. L. 629 (2011).

64. KAREN ALTER, *THE EUROPEAN COURT'S POLITICAL POWER* 3, 67 (2009).

65. Cf., Weldes, *supra* note 58.

66. For instance, in the PCIJ case, U.S.-based international lawyers framed WWI as a legal crisis even as it was unfolding. See Part III.

the American Society of International Law ("ASIL")) that exert influence and authority based on their specialized knowledge.⁶⁷ As members of legal advocacy groups they include a more diverse set of principled or self-interested actors who share policy goals.⁶⁸ By this definition, legal advocates encompass, among others, lawyers, NGOs, and activists. Their influence and authority derive not so much from specialized knowledge as from their political leverage, financial resources, and moral authority.⁶⁹

International lawyers and legal networks facilitate judicialization primarily by mobilizing behind proposals for an international court. The timing of their mobilization can vary. It may occur before, sometimes long before, the international legal crisis does, and be driven by a different set of conditions and events. It is not until the onset of a crisis, however, that such proposals gain salience. International lawyers may also mobilize during or in reaction to a crisis. In that case, their role as interpreters of the meaning of crises is part and parcel of their broader mobilization efforts. Mobilization may include, among other activities, issuing policy statements and press releases that express support for an international court, producing scholarship on the idea, lobbying governments or organizations to place the idea on the international agenda, and circulating full-fledged proposals or draft treaties. In addition to advocating for a court, international lawyers may also act as treaty drafters, advising governments or directly participating in the treaty drafting process.⁷⁰

The mobilization strategies of international lawyers and the composition of legal networks vary over time and across issue areas. Legal networks both reflect changing legal norms and culture, as well as fuel such changes. Although discussed here in the abstract, the relationship between states, legal crises, and international lawyers in facilitating the creation of international courts is not static. It has evolved with the spread of international legal

67. For a more elaborate definition of an epistemic community, see generally Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992). For a foundational work on transnational advocacy groups, including legal groups, see MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

68. Although some scholars define advocacy groups as consisting of only principled advocates, others have made the persuasive case for the usefulness of a broader definition. See generally Susan Sell & Aseem Prakash, *Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights*, 48 INT'L STUD. Q. 143 (2004).

69. As some international lawyers belong to both groups, the line dividing epistemic communities and advocacy groups is not always a hard and fast one. Furthermore, epistemic communities and advocacy groups may form coalitions in promoting the idea of a court. It is worth noting as well that lawyers may also occupy dual roles as government officials and members of epistemic communities. State department lawyers in particular (including Secretaries of State) have historically been closely connected to epistemic communities.

70. For a foundational discussion of mobilization by general transnational advocacy networks, categorizing various strategies into information, symbolic, leverage and accountability politics, see generally Keck & Sikkink, *supra* note 15, at 16. For a discussion of lawyers mobilizing specifically for a regional court, see generally Saldías, *supra* note 12.

rules, the proliferation of international and regional courts, and ascendant transnational actors in world politics.

B. *International Legal Crises and the Turn to International Courts*

Except for international economic issues, international legal crises facilitate—but do not guarantee—international judicialization. They do so for two reasons: they foster cooperation between states, and they make states more receptive to the participation of international lawyers and legal networks that support judicialization. Whether states ultimately create an international court depends greatly on the latter—and on whether international lawyers and networks are present. In their absence, judicialization is highly unlikely; states, on their own, are unlikely to be moved to create an international court. International lawyers and legal networks therefore play a central role in fostering judicialization.

Why do crises make states more willing to cooperate with others states and to turn to international lawyers and legal networks in the establishment of international courts? In the aftermath of legal upheaval, states may become less concerned about safeguarding their sovereignty. The experience of legal crisis may shift priorities of leading states to care more about stabilizing the international legal and political order than protecting their own sovereignty. It is also possible that states have little sovereignty left to protect.⁷¹ In this view, the creation of an international court might actually be experienced as sovereignty-affirming rather than sovereignty-diluting.⁷²

States also turn to international lawyers and legal networks in the post-crisis period because they are in need of solutions and policy advice. They recognize the benefits of involving non-state actors, advocacy groups and especially epistemic communities in building international courts.⁷³ As one of the pioneering scholars on epistemic communities writes, “[d]ecision makers do not always recognize that their understanding of complex issues and linkages is limited, and it often takes a crisis or shock to overcome institutional inertia and habit and spur them to seek help from an epistemic community.”⁷⁴ International lawyers may also become influential during crises in less obvious ways: they may interpret the crisis as demonstrating

71. In the PCIJ case, for instance, states from continental Europe, which had experienced the war's devastation most acutely, were the strongest advocates of the court. See *infra* Part III.B.

72. Regardless of how much sovereignty is “left to protect,” some scholars recognize the participation in international institutions as an exercise rather than concession of sovereignty. See Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 *LAW AND CONTEMP. PROBS.* 115, 148–49 (2008). Whether state officials view such participation as sovereignty-diluting or sovereignty-enhancing will depend on the context, including the conditions providing the impetus for institution building, the nature of the institution, and state identity.

73. John G. Ikenberry, *A World Economy Restored: Expert Consensus and the Anglo-American Postwar Settlement*, 46 *INT'L ORG.* 289, 291–92 (1992) (noting that “policy specialists and economists” had a supporting role in the establishment of the post-World War II economic framework); see also Widmaier, Blyth & Seabrooke, *supra* note 50, at 752.

74. Haas, *supra* note 67, at 14.

the need for an international court, thus shaping the views of both the public and government officials.

In the aftermath of crisis, states and non-state actors are drawn specifically to international courts, as opposed to non-judicial institutions, for reasons of both efficacy and legitimacy. International legal crises expose the weakness of existing international rules and the need for more effective enforcement. At least some states recognize, in ways they did not prior to a legal crisis, the advantages of international courts in enforcing and buttressing existing rules.⁷⁵ International lawyers tend to appreciate the efficacy of courts even in normal times, but they tend to use crises to underscore the need for stronger enforcement mechanisms. States and non-state actors are also drawn to international courts for reasons of legitimacy and the capacity of courts to affirm the authority of legal norms, rules, and regimes.⁷⁶ I use the term legitimacy here in its sociological rather than normative or philosophical sense,⁷⁷ de-

75. In contrast, non-legal crises can expose gaps in the law, but not the need for stronger enforcement. A gap suggests the need for codification rather than the creation of new enforcement tools. Admittedly, in reality states will often respond to international legal crises not only by creating new enforcement tools but also by engaging in additional codification so as to make the law more comprehensive and precise. They will also respond to non-legal crises not only by codifying new rules, but also by considering different types of provisions for treaty enforcement. But—and this is the key claim—the inclusion of enforcement provisions in a treaty is distinct from the creation of an international court. It takes a crisis involving international legal rules for the establishment of international courts to become, at the very least, a possibility. See discussion of the 1948 Genocide Convention and 1949 Human Rights Courts, *infra* Part IV.B.3.

76. For international law-international relations scholarship that focuses on the legitimizing function of international institutions, if not courts specifically, see generally Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379 (1999) and IAN HURD, AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL (2007). For discussions specifically about courts, see Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority 2* (Amsterdam Ctr. for Int'l Law, Research Paper No. 2012–10, 2012). Many have argued, for example, that the ICC's primary function should be an expressive one, to reaffirm international norms prohibiting fundamental human rights violations, and not to serve deterrence and retribution. See, e.g., Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 50 (2007); MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 149-180 (2007). Discussions about the legitimizing function of international courts are distinct from but related to questions about the legitimacy of international courts themselves. On this latter point, see generally Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7 (2012). Scholarship on the U.S. judicial system, in contrast, has devoted attention to the legitimizing effect of U.S. courts, especially the Supreme Court. See Benjamin Woodson et al., *Judicial Symbols and the Link Between Institutional Legitimacy and Acquiescence*, paper delivered at the annual meeting of the Am. Political Sci. Ass'n (Sept. 2, 2011) (citing James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003) and James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187 (2005)); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

77. “[T]o say that an institution is legitimate in the normative sense is to assert that it has the *right to rule*.’ In contrast, ‘an institution is legitimate in the sociological sense when it is widely *believed* to have the right to rule.’” Marianne Beisheim & Klaus Dingwerth, *Procedural Legitimacy and Private Transnational Governance* 8 (DFG Research Center (SFB), Working Paper No. 14, 2008) (quoting Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 405 (2006)) (emphasis in original).

defined as the “perceived right to rule.”⁷⁸ Courts are not simply dispute settlers and rule enforcers. As long as they are perceived as fair and in some sense distinct from international power politics, they also serve as powerful symbols of legitimacy and thus are able to validate legal regimes that have been undermined by crises.⁷⁹

III. CRISIS AND THE 1907 AND 1920 ATTEMPTS AT JUDICIALIZATION

Between 1907 and 1911, the United States, with British support, labored hard—but with little success—to create an international court. However, less than a decade later states created the world’s first international court, the PCIJ. Although it is a truism to state that World War I provided the impetus for the PCIJ, why and how it did so has been less explored.

This Part offers accounts of the failed pre-war attempt to create an international court and the successful post-war establishment of the PCIJ, highlighting the role of international legal crisis. The pre-war case points to the limits of hegemonic power in promoting international judicialization. Specifically, a group of U.S. lawyers supported by both the United States and United Kingdom was unable to establish a court because sovereignty concerns proved too strong. The post-war PCIJ case illustrates the influence of legal crisis in motivating states to engage in judicialization, despite the lack of British support and at times outright opposition of the United States, and specifically President Woodrow Wilson. The case also shows, however, that although the United States and the United Kingdom could not prevent the creation of a court, they were still able to weaken its authority by blocking attempts to grant the court compulsory jurisdiction.

A. *The Pre-War Failed Attempt*

Despite the mobilization of a small but influential group of U.S. lawyers and the leading role of the executive branches in the United States and the United Kingdom, an attempt to create international courts failed prior to World War I. Continental European and Latin American states rejected such a proposal at the Second Hague Conference in 1907. The maneuvering

78. Buchanan & Keohane, *supra* note 77, at 405. For a brief discussion of other definitions and approaches to understanding legitimacy, see Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 115 (2009) (defining legitimate body as “one whose authority is perceived as justified,” and discussing legal and sociological legitimacy).

79. See James L. Gibson et al., *The Symbols of Judicial Authority: An Empirical and Theoretical Assault on an Ancient Hypothesis* 8 (2011) (unpublished research proposal) (on file with author) (“At least a portion of the answer to this question has to do with judicial symbolism. When citizens are exposed to judicial proceedings, they are bombarded with a host of specialized judicial symbols.”). Thomas Franck also points to, but does not focus on, symbolic validation as one of four factors influencing perceptions of legitimacy (the other three are fairness, underlying regime, and transparency of process). See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 91–110 (1990). See Gibson et al., *supra*, at 8 (“Judicial legitimacy relies upon the perception that judicial decision-making process differs quite significantly from the processes common to ordinary political institutions.”).

of the United States and the United Kingdom in support of a court in the following years remained unsuccessful; absent crisis conditions, traditional sovereignty concerns proved too high a barrier to judicialization. Influential U.S. lawyers, backed by the world's most powerful states, could not overcome them.

The first group of international lawyers to push for a permanent international court emerged in the United States during the first decade of the 20th century.⁸⁰ Its members were by and large lawyers who belonged to ASIL. Elihu Root⁸¹ and James Brown Scott,⁸² early leaders in ASIL,⁸³ were leading proponents of judicialization. Root also served as Secretary of State during this period.⁸⁴ Although small, the group was, therefore, politically powerful.⁸⁵

This group mobilized partly in reaction to the adoption, in 1899, of the PCA, the world's first international dispute settlement mechanism.⁸⁶ U.S. lawyers supported the creation of the PCA, but considered international arbitration to be inherently inadequate. In their view, arbitration was steeped too heavily in the world of diplomacy rather than law.⁸⁷ Arbitrators were usually politicians, not lawyers or judges, and arbitration tended to involve reaching decisions through political compromise rather than legal evalua-

80. To be sure, some lawyers and international peace societies had called for a world court even before the turn of the century. Peace societies had called for some form of judicial forum, particularly during the latter part of the 19th century. The New York Bar Association in 1896 appointed a committee of eleven lawyers to draft a plan for a world court. See David Patterson, *The United States and the Origins of the World Court*, 91 POL. SCI. Q. 279, 280–81 (1976). And there were certainly networks in Europe that began to promote the idea of a court as the war unfolded. See Stephen Wertheim, *The League of Nations: A Retreat from International Law?*, 7 J. GLOBAL HIST. 210, 218–25 (2012). However, U.S. lawyers were the main proponents during this period. Patterson, *supra*, at 280 (“[The Americans] had been zealous and persistent promoters of a permanent court of justice before 1914 . . .”).

81. Former Secretary of State from 1905–1909 and a leading lawyer behind the development of the PCIJ.

82. Former American law professor and Editor-in-Chief of the American Journal of International Law. He was the ASIL's former President and a “guiding force behind the formation of the Society.” Frederic L. Kirgis Jr., *The American Society of International Law: The First Hundred Years*, AM. SOC'Y INT'L LAW 1.

83. See Frederic L. Kirgis, *Elihu Root, James Brown Scott and the Early Years of the ASIL*, 90 PROC. AM. SOC. INT'L L. 139, 139–40 (1996); Monroe Leigh & Cristian DeFrancia, *International Law Societies and the Development of International Law*, 41 VA. J. INT'L L. 941, 944–45 (2001).

84. Leigh & DeFrancia, *supra* note 83, at 945.

85. See Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 NYU L. REV. 239, 304–14 (2002).

86. See, e.g., James Brown Scott, *The Evolution of a Permanent International Judiciary*, 6 AM. J. INT'L L. 316, 316–17 (1912).

87. *Id.* at 335.

tion.⁸⁸ For these reasons, U.S. lawyers considered the PCA to be no more than a stepping-stone toward a world court.⁸⁹

The Second Hague Conference in 1907 presented U.S. lawyers with an ideal opportunity to push for the creation of an international court. With Elihu Root as Secretary of State, they had unprecedented influence in the State Department and over the broad contours of U.S. foreign policy.⁹⁰ Other powerful states, moreover, supported the U.S. goal of creating an international court. Ultimately, Germany, the United Kingdom, and the United States presented a joint proposal for the Court of Arbitral Justice, which France endorsed.⁹¹

Yet, in what some describe as the Conference's most significant failure, states rejected the proposal.⁹² The Belgian delegate argued that the idea was superfluous given that the PCA was already operating.⁹³ Most states opposed the Court because they did not agree on the method for appointing judges.⁹⁴ Some smaller states were unyielding on this question, and their opposition ran deep. For instance, when it came to Plenary Conference adopting a resolution supporting the creation of a court in the future, states such as Belgium, Denmark, Greece, Romania, Switzerland, and Uruguay abstained.⁹⁵

In the years following the Second Hague Conference, U.S. government officials tried various strategies to prompt the creation of an international court, but with little success. At the 1909 International Naval Conference in

88. Frederic L. Kirgis, *The Formative Years of the American Society of International Law*, 90 AM. J. INT'L L. 559, 576 (1996). Lawyers also held that the *ad hoc* structure of the PCA would prevent the development of international law. DAVID S. PATTERSON, *TOWARD A WARLESS WORLD: THE TRAVAIL OF THE AMERICAN PEACE MOVEMENT 1887–1914* 159 n.17 (1977) (quoting James Brown Scott, one of the leading U.S. lawyers who supported a court at the time, as stating, “[i]t is common knowledge that international law is not developed by the awards of temporary tribunals.”).

89. Scott, *supra* note 86, at 318 (“Arbitration is, therefore, not an end in itself, it is but a means, and marks a stage from private lawlessness to public peace.”); *see also id.* at 336.

90. Root instructed the U.S. delegation to use the Second Hague Conference as an opportunity to create an international court. Myers, 10 AM. J. INT'L L., *supra* note 27, at 273. FRANCIS ANTHONY BOYLE, *FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS, 1898–1922* 18 (1999) (stating that between 1898 and 1920, “American international lawyers exercised a more profound influence on the formation of U.S. foreign policy than they had as a group at any time since the founding of the Republic.”).

91. NORMAN L. HILL, *BRITISH ARBITRATION POLICIES 96–97* (1930); MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920–1942* 80–84 (1943). For a comparison of the negotiations and proposals for courts at the 1899 and 1907 Conferences, see WILLIAM L. HULL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* (1908).

92. *See* David Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 22 (2000) (stating “[t]he defeat of the permanent court, an initiative championed by the U.S. delegation, was the conference's most conspicuous failure.”). For a contemporaneous account and analysis of the Conference that discusses its failures and successes, see 2 JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907: A SERIES OF LECTURES DELIVERED BEFORE THE JOHNS HOPKINS UNIVERSITY IN THE YEAR 1908* (1909).

93. HULL, *supra* note 91, at 418; Myers, 10 AM. J. INT'L L., *supra* note 27, at 292.

94. HUDSON, *supra* note 91, at 82. While powerful states expected to dominate the selection of judges on the court, weaker states insisted on equal representation. *Id.*

95. *Id.* at 81 n.3.

London, for instance,⁹⁶ the U.S. delegation proposed that the International Prize Court, which had been adopted successfully at the Second Hague Conference but not entered into force, be turned into a *de facto* general court.⁹⁷ States refused to consider the proposal. In March 1910, the United States organized informal negotiations between the United Kingdom, Germany, and France to draft a supplementary Convention that would have granted the Prize Court jurisdiction over more general issues.⁹⁸ States met a second time in July 1910 to finalize the supplementary Convention. Ultimately, however, the effort was unfruitful. Despite the support of the British executive branch, in December 1911, the House of Lords rejected the London Declaration, which would have established the substantive rules for the International Prize Court.⁹⁹

At first glance, the failure to create an international court during this period appears to have little to do with the absence of an international legal crisis. Disagreement over the method for judicial appointments (in 1907) and domestic resistance to the London Declaration in the United Kingdom (1910) seem to be the proximate causes of the failure of those two efforts.¹⁰⁰ At a deeper level, however, opposition by smaller states and the British Parliament stemmed from concerns about sovereignty.¹⁰¹ Weaker states refused to accept the proposed judicial appointment procedures because they did not want to yield sovereignty. During a period of relative stability, these concerns constituted an insurmountable barrier to judicialization. World War I proved, however, that the sovereignty barrier could be scaled. The war constituted not only a security and humanitarian crisis but also an international legal crisis that opened the door to judicialization.

96. For background on this Conference, see Tryon, *supra* note 28, at 613; see also CALVIN DAVIS, *THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE: AMERICAN DIPLOMACY AND INTERNATIONAL ORGANIZATION 1899–1914* 303–26 (1976); James Brown Scott, *The International Court of Prize*, 5 AM. J. INT'L L. 302 (1911).

97. See Editorial Comment, *Proposal to Modify the International Prize Court and to Invest It as Modified with the Jurisdiction and Functions of a Court of Arbitral Justice*, 4 AM. J. INT'L L. 163, 163–66 (1910).

98. See HUDSON, *supra* note 91, at 83. These efforts continued even though, by this point, Elihu Root was no longer Secretary of State. PATTERSON, *supra* note 88, at 161.

99. Patterson, *supra* note 80, at 285. For an account of the domestic opposition to the Declaration, see BERNARD SEMMEL, *LIBERALISM AND NAVAL STRATEGY: IDEOLOGY, INTEREST AND SEA POWER DURING THE PAX BRITANNICA 99–119* (1986).

100. Another arguable proximate cause for the failure was the rule of consensus used at the 1907 Conference (and the 1899 Conference). Some U.S. international lawyers saw this as the key barrier to judicialization. International lawyer David Hill noted at an ASIL meeting in 1917, "The weakness, the disappointment, the perfect disillusionment of the Hague Conferences consisted in the fact of the veto—the possibility that . . . one or two Powers could disappoint the issue and prevent anything being done along those lines." 11 AM. SOC'Y INT'L L. PROC. 82, 82 (1917). There was enough opposition to the 1907 proposal from smaller states, however, to prompt skepticism of this explanation for the failed attempt. For an account and documentation of some of the votes that occurred at the 1907 Conference, see Myers, 10 AM. J. INT'L L., *supra* note 27.

101. HUDSON, *supra* note 91, at 82; Kirgis, *supra* note 88.

B. *The Creation of the First World Court*

World War I created a profound legal crisis by exposing the existing body of international law as largely impotent. The war posed a crisis not only for legal international rules regulating wartime conduct, but also for the notion that international law could prevent war in the first place. Although prior concerns about judicial appointments or maritime security did not disappear, the upheaval of the war motivated states to overcome them and build an international court. The war also motivated states to turn to international lawyers who had previously advocated for an international court. They acted as interpreters of the lessons that had to be learned, framing the war experience as demonstrating the need for judicialization. In the end their interpretation prevailed over others, including Woodrow Wilson's view that the war exposed the need for less law and more diplomacy. Although the United States and the United Kingdom could not stop the strong momentum for a court, they remained politically relevant with their veto of attempts to invest the new court with compulsory jurisdiction.¹⁰²

For international lawyers and governments alike, the war had created a serious legal crisis. International lawyers from the United States noted at the time that the origins of the war, with Germany's invasion of Belgium, stemmed from a blatant violation of Germany's legal obligations to respect Belgian neutrality.¹⁰³ As the war unfolded, moreover, combatants on both sides engaged in sweeping violations of the 1899 and 1907 Hague Conventions regulating states' wartime conduct. As one legal historian writes, "For four years on end, the Hague Conventions, each and all of them, and whether taken to the letter or spirit, were trampled underfoot indiscriminately as a daily routine."¹⁰⁴ Violations included bombings of civilian areas, use of mustard gas, seizure of merchant ships and submarine warfare.¹⁰⁵

Beyond exposing the laws of war as ineffectual, the war had challenged the fundamental purpose of international law itself. For decades, peace advocates and lawyers alike had viewed international law as providing the means to render war obsolete. As legal scholar Frederic Kirgis writes, the war "shattered" this vision of international law. It exposed international law as

102. See sources cited in notes 137–42, *infra*.

103. Elihu Root, *The Outlook for International Law*, 10 AM. J. INT'L L. 1, 1–2 (1916); ANDRÉ WEISS, *THE VIOLATION BY GERMANY OF THE NEUTRALITY OF BELGIUM AND LUXEMBURG* 10–19 (Walter Thomas, trans., Librairie Armand Colin 1915). In his presidential address to the ASIL, Elihu Root explained the origins of the war in legal, not political or military, terms: "The war began by denial on the part of a very great Power that treaties are obligatory when it is no longer for the interest of either of the parties to observe them." *Id.* at 1. The denial of international law, Root elaborated, was not limited to the act of a single belligerent, but then spread across all of Europe and warring parties. Root elaborates, "Many of the rules of law which the world has regarded as most firmly established have been completely and continuously disregarded, in the conduct of war, in dealing with the property and lives of civilian non-combatants on land and sea and in the treatment of neutrals." *Id.* at 2.

104. Arthur Eyffinger, *A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference*, 54 NETH. INT'L L. REV. 197, 225 (2007).

105. *Id.* at 225–26.

unable to fulfill its fundamental role as protecting peace: “International law had failed of what they regarded as its real purpose—the prevention of armed conflict. It had even failed of its secondary purpose—the amelioration of the destructive effects of war if it did occur.”¹⁰⁶ A U.S. lawyer cautiously wrote at the time, “[i]t is disheartening to note the talk not only of the street, but of the bar and too many of the scholars, about the disappearance of International Law as rule of conduct.”¹⁰⁷ The founder of ASIL, Root, put it more bluntly, “God knows what the law is! None of us know.”¹⁰⁸

Even as they were disheartened by the demise of international law, U.S. lawyers recognized the potential for the war to transform conceptions of state interests so as to make them supportive of strengthening international law. In writing that, “[i]t often happens that small differences and petty controversies are swept away by a great disaster, deep feeling, and a sense of common danger,”¹⁰⁹ Root captured well the logic of the crisis argument with respect to inter-state cooperation. Specifically, he argued:

I think there is ground for hope that from the horrors of violated law a stronger law may come The development and extension of international law has been obstructed by a multitude of jealousies and supposed interests of nations each refusing to consent to any rule unless it be made most favorable to itself in all possible future contingencies. The desire to have a law has not been strong enough to overcome the determination of each nation to have the law suited to its own special circumstances; but when this war is over the desire to have some law in order to prevent so far as possible a recurrence of the same dreadful experience may sweep away all these reluctances and schemes for advantage and lead to agreement where agreement has never yet been possible.¹¹⁰

Root’s vision may have been wishful thinking, but it was also prescient: states that had opposed the 1907 proposal for an international court began to shift their positions even before World War I had ended. For instance, in 1918 the Danish, Norwegian, and Swedish governments jointly produced a detailed provision for an international court,¹¹¹ and individually submitted drafts to the Secretariat of the League of Nations between August and November 1919.¹¹² A weak supporter of efforts to create a court before 1914,

106. Frederic L. Kirgis, *The Formative Years of the American Society of International Law*, 90 AM. J. INT’L L. 559, 584 (1996).

107. Patterson, *supra* note 80, at 286 n.21 (citing Letter from Baldwin to Moore (June 16, 1919), in BALDWIN FAMILY PAPERS (Yale University Library, Box 117)).

108. Patterson, *supra* note 80, at 287 n.22 (citing Proceedings of the American Society of International Law, 1920, at 21).

109. Root, *supra* note 103, at 10.

110. *Id.*

111. HUDSON, *supra* note 91, at 94. It was published in 1919. *Id.*

112. *Id.* at 113.

the French government proposed just such a court in a 1918 report.¹¹³ Switzerland also offered a draft statute for a league of nations, containing a provision creating an international court, in 1918.¹¹⁴ The neutral states were still generally supportive of judicialization in March 1919, when they met with the Commission about the proposed draft Covenant.¹¹⁵ As Switzerland stated, “the time [wa]s right to realize a project of an international court of justice.”¹¹⁶

As a legal crisis, World War I also led international lawyers to acquire a new level of influence acting as both interpreters and as treaty drafters.¹¹⁷ In the face of numerous interpretations of the war and its consequences, international lawyers, through discussions in public forums, advanced their view of the war as a legal crisis that required a judicial, rather than only a political, response. These so-called “legalists”¹¹⁸ emphasized the benefits of judicialization in strengthening international rules that had been discredited by flagrant violations of international treaties, territorial boundaries and the laws of war.¹¹⁹ In his 1916 presidential address to the ASIL, Root posed the core question this way: “How can the restraints of law be made more effective upon nations?”¹²⁰ The answer, he held, was to create more international law, expand its scope, and provide for an international court: “Such a court of international justice, with a general obligation to submit all justiciable questions to its jurisdiction and to abide by its judgment, is a primary requisite to any real restraint of law.”¹²¹ Other legal scholars put the lesson even more starkly: a world court would be able to preempt future wars. If a court had been created earlier, they reasoned, World War I would not have

113. *Id.* at 94.

114. *Id.* at 113.

115. *Id.* at 98. See also 2 DAVID HUNTER MILLER, *THE DRAFTING OF THE COVENANT* 600 (1928); Hudson, *supra* note 91.

116. MILLER, *supra* note 115, at 600 (quotation translated by the Author). Support from the Scandinavian countries and continental Europe only intensified once the League of Nations had been established. Most importantly, in February 1920 the Netherlands invited the Scandinavian countries and Switzerland to a conference to discuss the various draft documents. This culminated in the adoption of a draft treaty, later referred to as the “five-power plan,” that contained fifty-five articles. The Dutch government submitted the plan to the League of Nations, and it proved to be influential in shaping the final treaty establishing the PCIJ. Crisis did more than simply make states amenable to the idea of an international court; it made them ardent champions of the idea. HUDSON, *supra* note 91, at 113–14.

117. In the United States, the pertinent network expanded beyond ASIL to include the World’s Court League (established in 1910), the American Society for the Judicial Settlement of International Disputes (established in 1910), the League to Enforce Peace (established in 1915), and members of the Carnegie Endowment for International Peace (established in 1910). See Martin David Dubin, *The Carnegie Endowment for International Peace and the Advocacy of a League of Nations, 1914–1918*, 123 *PROC. AM. PHIL. SOC.* 344, 344, 353, 363 (1973); Editorial Comment, *The American Society for the Judicial Settlement of International Disputes*, 4 *AM. J. INT’L L.* 930, 930 (1910). European networks also began to mobilize around this time, even though transnational links to U.S. groups remained weak during the conflict. See Wertheim, *supra* note 80, at 218–23.

118. Dubin, *Carnegie Endowment*, *supra* note 117, at 344; Patterson, *supra* note 80, at 280–83.

119. Root, *supra* note 103, at 4.

120. *Id.*

121. *Id.* at 5.

happened. Referring to a proposal to revive judicialization efforts right before the war, one legal scholar writing in 1916 speculated, “if such a proposal had been realized the newly existent court would probably have been the only present battlefield in Europe.”¹²² Samuel Dutton, the General Secretary of the World Court League, suggested that if the United States had prevailed at the 1907 Conference, “the history of . . . the past ten years might have been different”¹²³ For all their differences, the group of U.S. lawyers shared the fundamental view that the war had exposed the need for an international court.¹²⁴

This legalist view of the war prevailed over its political counterpart, which insisted that the war demonstrated the need for better diplomacy, not more law. Woodrow Wilson was the leading proponent of this position. He considered the legalists, with their call for more law and courts, plainly wrong. Wilson’s opposition to the legalist arguments was prompted by his view that pre-war legalism had proved futile. The world, Wilson argued, needed a “clean . . . break” from the past.¹²⁵ In the words of historian David Patterson, “Wilson viewed the law less as a series of positive decisions, rules, and precedents than as a loose system of moral principles, the application of which should be left to diplomacy.”¹²⁶ The “lawyer’s mind” was in Wilson’s opinion ill-equipped to recognize the political institutions that were needed to prevent future war.¹²⁷ Wilson was also motivated by political and personal factors. Since conservative Republicans embraced the legalist view, Wilson was prone to dismiss it.¹²⁸ On a personal level, Wilson’s distaste for

122. Myers, 10 AM. J. INT’L L., *supra* note 27, at 309.

123. Samuel T. Dutton, *World Organization: Discussion*, in 7 PROC. ACAD. POL. SCI. 60 (1917) (original page 252).

124. The central dividing line among legalists concerned whether a future world court should employ some form of automatic, punitive sanction for states that did not use it. The main U.S. advocacy group, the League to Enforce Peace, argued that a future court, if it were to have any power over states, would require the backing of coercive sanctions, including economic and military sanctions. A smaller group of influential lawyers, James Brown Scott being the most prominent, rejected the idea of automatic sanctions. In their view, the punitive legalist approach was impractical (it would be unclear which party had triggered a war), unrealistic (states would be unwilling to assume the costs of imposing sanctions or intervening in conflict), and unwise (sanction and intervention would lead to more, not less, conflict). In public, the smaller group of lawyers tried to downplay the critical differences and sought to present a united front in support of a world court. In private, they were strongly opposed and at points disparaging. Scott, in his private letters, referred to the League to Enforce Peace as the “League to Create War.” Kirgis, *supra* note 88, at 585. Elihu Root was apparently more discreet in his views of the League to Enforce Peace—both to the League and to others, although ultimately he agreed with Scott in his criticism of the League. See Martin David Dubin, *Elihu Root and the Advocacy of a League of Nations, 1914–1917*, 19 W. POL. Q. 439, 450–53 (1966). For more about the internal divide, see generally Stephen Wertheim, *The League that Wasn’t: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920*, 35 DIPLOMATIC HIST. 797 (2011).

125. Eyffinger, *supra* note 104, at 227 (“Wilson’s mind was firmly set on a clean slate and firm break with the past.”).

126. Patterson, *supra* note 80, at 293; see also Wertheim, *supra* note 124, at 801–02.

127. Patterson, *supra* note 80, at 293. When Wilson learned that lawyers had drafted the initial peace treaty, he apparently proclaimed, “Who authorized them to do this? I don’t want lawyers drafting this treaty.” *Id.* at 293 (citing an August 15, 1918 entry from Colonel House’s diary).

128. Patterson, *supra* note 80, at 291.

lawyers may have had its roots in his early days as a lawyer; he had found them far too motivated by logic and money.¹²⁹ As one legal historian put it, “Wilson hated lawyers with a vengeance.”¹³⁰

The political lessons that President Wilson took away from World War I explain his repeated attempts to exclude a provision for a world court in the League of Nations Covenant. In his first draft of the Covenant in 1918, for instance, he incorporated many of the suggestions of his advisor Colonel House but omitted House’s suggestions for including a provision for a court.¹³¹ In two subsequent drafts in 1919, Wilson excluded a provision for a court, although he did include provisions for some form of arbitration. In contrast, a 1919 British draft treaty called for the establishment of a permanent world court, even though it was “incidental” to the treaty procedures for resolving interstate disputes.¹³² Wilson disliked this draft and proposed a third draft, again omitting a court.¹³³ Ultimately, at the insistence of British foreign affairs official Robert Cecil, the final Covenant retained a provision calling for the creation of a court. Although there is no direct link between the lawyers’ understanding of the war and Cecil’s commitment to retaining a court provision, the central point remains: the legalist view prevailed over Wilson’s opposition.

Besides providing an authoritative interpretation of the war’s lessons, international lawyers that had pressed for a court were invited to help draft the treaty that created what eventually became the PCIJ. States appointed them to serve on the Committee of Jurists tasked with proposing a draft treaty.¹³⁴ Some of these lawyers had been involved in efforts to create a court as early as 1907.¹³⁵ In drafting the treaty they drew heavily on earlier proposals. They also shaped key provisions, including the system for appointing judges.¹³⁶

This is not to suggest, however, that the influence of international lawyers had no limits. Even though the United States and the United Kingdom were unable to prevent judicialization entirely, they retained formidable influence in drafting the PCIJ convention. Although smaller states supported the compulsory jurisdiction provision, the United States and the United

129. *Id.* at 293.

130. Eyffinger, *supra* note 104, at 225.

131. HUDSON, *supra* note 91, at 94.

132. *Id.* at 95.

133. Patterson, *supra* note 80, at 293–94.

134. *History*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (last visited Sept. 9, 2013).

135. These members included Mineichiro Adatci, Japan; Rafael Altamira, Spain; Clovis Bevilacqua, Brazil; Baron Descamps, Belgium; Francis Hagerup, Norway; Albert de Lapradelle, France; Dr. Loder, the Netherlands; Lord Phillimore, England; Arturo Ricci-Busatti, Italy; and Elihu Root, United States. *See Procés-Verbaux of the Proceedings of the Committee, June 16-July 24, 1920*, PERMANENT COURT OF INTERNATIONAL JUSTICE, Preface (The Hague, 1920), http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf; see also HUDSON, *supra* note 91, at 115.

136. HUDSON, *supra* note 91, at 143.

Kingdom opposed it.¹³⁷ Britain was the strongest opponent to the idea, to the point of exhibiting deep skepticism about creating a court at all (notwithstanding the push of its own official to include a judicialization provision in the League of Nations Covenant). When the British Foreign Secretary Lord Curzon learned of the jurists' proposal to grant the court compulsory jurisdiction, he proclaimed, "It would seem to me that the Lord Phillimore or whoever represented us in framing this scheme must have been singularly oblivious to British interests."¹³⁸ As legal scholar Lorna Lloyd notes further, "[t]he British documents relating to the draft Statute are markedly hostile to the Court,"¹³⁹ and reflected the view that a court was "not, at that time, desirable."¹⁴⁰ British delegates were instructed not only to oppose the proponents of compulsory jurisdiction, but to try to block the entire project by referring it back to the drafting Committee.¹⁴¹

Because of the strong support the Court enjoyed from many other states, the British delegates ultimately decided to weaken the Court quietly rather than to attempt to block it outright.¹⁴² At the Ministerial Conference in October 1920, with the support of states such as Italy and Japan, Britain, in what one government official praised at the time as a "policy of masterly inactivity," succeeded in diluting much of the Court's strength and eliminating altogether its compulsory jurisdiction.¹⁴³ International courts, this account suggests, can be created against the outright opposition of hegemonic states, although hegemonic states retain significant influence of the court's design and structure.

IV. LEGAL CRISIS AND HEGEMONIC POWER APPLIED: A BIRD'S EYE VIEW¹⁴⁴

This Part surveys briefly the history of international judicialization in the 20th century, with specific attention to the role of hegemons and interna-

137. The Committee of Jurists had granted the court automatic jurisdiction, but the Executive Council deleted the provision before passing the draft treaty onto the Third Committee of the Assembly for consideration (which sought a compromise by proposing a provision that made compulsory jurisdiction optional). Once at the Assembly, most of the smaller countries expressed disappointment at the Executive Council and Great Powers for diluting the treaty. See Lorna Lloyd, "A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, 79 AM. J. INT'L L. 28, 43 (1985) (citing statements by the Belgian, Dutch and Bolivian delegates, but also noting that "not all states expressed anger"); see also HUDSON, *supra* note 91, at 120.

138. Lloyd, *supra* note 137, at 35.

139. *Id.* at 36.

140. *Id.* Much of this resistance to the Court stemmed from concerns that it would put the British in the awkward position of having to defy it outright in highly political cases, like those involving naval warfare. British lawyers also felt that the common law states would be overwhelmed by the majority of civil law states in the operation of the Court. *Id.* at 35-37.

141. *Id.* at 38.

142. *Id.*

143. *Id.* at 45.

144. This concept phrase is taken from Alter, *supra* note 19, at 1.

tional legal crises. It focuses on general jurisdiction issues, international criminal law, international human rights, and the law of the sea, all areas of attempted judicialization at the international level. Of the eleven attempts, only four succeeded in creating international courts. Table 2 shows in summary form that: international legal crisis is the primary impetus facilitating or inhibiting judicialization in six cases, hegemonic power is the primary impetus in two cases, they both provide insight into two other cases, and neither offers an adequate explanation for the remaining case. Taken together, for non-economic issues, crisis and hegemonic power help explain ten of the eleven attempts at international judicialization during the 20th century.

Raw numbers, however, can mislead. This discussion is not interested in reducing complex historical cases to simple numbers and single causes. Rather, it seeks to recognize broad patterns covering many actors and issues over many years. The patterns are rendered here with blunt strokes, and these historical sketches lack nuance and specificity. Future scholarship hopefully will offer more fine-grained analyses and thus improve on my efforts here.

For now, these sketches make two contributions. They offer some of the first analyses of failed attempts. Six of the seven failed attempts have received little or no attention by contemporary scholars: the 1907 Court of Arbitral Justice (analyzed above in Part III), the 1907 International Prize Court, the 1920 proposal for a criminal court, the 1937 Terrorism Court Convention, the 1949 human rights court proposal, and the 1950s criminal court. Furthermore, combined with the discussion in Part II, the sketches illustrate one point: historical context matters. Neither hegemony nor crises have a formulaic, general effect on international judicialization. At the same time, both crisis and hegemonic power clearly matter for international judicialization, and in ways that current scholarship has yet to appreciate.

A. *General Jurisdiction Courts*

During the first half of the 20th century, when much of international law was still nascent and un-codified, there were three instances during which states focused on creating “general jurisdiction” courts—courts that are available to adjudicate a wide range of disputes. As discussed in Part II, the legal crisis associated with World War I helps explain the divergent outcomes in two of these cases, the failed attempt to create the 1907 Court of Arbitral Justice and the successful attempt to create the 1920 PCIJ. But not all international judicial bodies are created in response to crisis. A hegemonic power account best explains the successful creation in 1899 of the PCA, which falls under this Article’s broad definition of an international court even though it is an *ad hoc* arbitral body. Because Part III discussed the 1907 and 1920 episodes, this section only focuses on the PCA.

TABLE 2: INTERNATIONAL COURTS IN THE 20TH CENTURY:
CRISIS AND POWER

Issue Area	Attempted International Courts	Primary Explanatory Factors
General	1899 PCA 1907 Court of Arbitral Justice 1920 PCIJ	<ul style="list-style-type: none"> • Powerful states explains creation • Lack of crisis explains failure (U.K. supported court) • Crisis explains creation (U.K./U.S. not supportive)
International Criminal Law	1920 Criminal Court 1937 Terrorism Court 1948 Genocide Tribunal 1950s Criminal Court 1998 ICC	<ul style="list-style-type: none"> • Lack of crisis explains failure (U.K./U.S. not involved) Lack of crisis explains failure (U.K. support waned) • Lack of crisis and U.K. opposition explain failure • Lack of crisis and U.K. opposition explain failure • U.K. and U.S. opposition explain failure (crisis present) • Crisis explains creation (U.S. initially supported, ultimately opposed)
Human Rights	1949 Human Rights Court	<ul style="list-style-type: none"> • Lack of crisis and U.S. opposition explain failure
Law of the Sea	1907 International Prize Court 1982 ITLOS	<ul style="list-style-type: none"> • Lack of crisis explains failure (U.K. exec supported) • Neither explain (No crisis present at time of adoption, U.S. initially supported, ultimately opposed)

Cases in bold are successful attempts of international judicialization, with success defined as courts that become operational. Non-bolded cases are unsuccessful attempts.

The PCA was the first truly global judicial institution. States established it at the Hague Conference in 1899 through their adoption of the Convention for the Pacific Settlement of International Disputes.¹⁴⁵ The PCA is an *ad hoc* institution with a permanent secretariat (the International Bureau) that maintains a list of pre-appointed potential arbitrators. It provides for optional dispute settlement and supervises the creation of *ad hoc* tribunals when cases are referred to it. Although most peace activists, international lawyers, and delegates to the Hague Conference celebrated the establishment of the PCA,¹⁴⁶ some were disappointed that states did not create a more formal court. One Dutch scholar stated that, “[i]nstead of a permanent court, . . . the Convention of 1899 gave only the phantom of a court, an impalpa-

145. See PHILIPPE SANDS ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 23, 102 (1999).

146. See DAVIS, *supra* note 96, at 33–34 (pointing to peace leaders who were “exultant” as well as to William McKinley and John Hay, who “were pleased with the results.”).

ble specter or, to speak more precisely, it gave a secretariat and a list.”¹⁴⁷ At the Second Hague Conference in 1907, a Belgian delegate echoed, “[t]he court of 1899 is only an idea which sometimes takes body and soul and then disappears again.”¹⁴⁸

Powerful states were responsible for the initiative to create the PCA, its ephemeral organizational structure, and even the misnomer encapsulated in its title. Tsar Nicholas the Second of Russia first proposed the idea of the Hague Peace Conference in August 1898.¹⁴⁹ Six months later, in response to skepticism about his motives and the seriousness of his proposal, he circulated a list of eight items for further discussion, including the principles of mediation and arbitration.¹⁵⁰ Both the U.S. and U.K. governments considered the topic of arbitration to hold the most promise. Following Russia’s lead, their delegations each arrived at the 1907 Conference with a proposal for creating an international arbitration forum.¹⁵¹ This show of support immediately gave credibility to the idea of international judicialization. As the Belgian delegate to the Conference noted, “it is a fact of capital importance that three projects [proposals for arbitration tribunals] of this kind have been presented by three great Powers.”¹⁵²

The *ad hoc* and non-compulsory nature of the PCA reflected a compromise between the powerful states that supported judicialization, on one side, and Germany, which opposed it, on the other.¹⁵³ Even the misleading nature of the name—the PCA is *ad hoc* and not a court—resulted from a bargain between the two sides: Germany wanted the title to be “permanent list of arbitrators” whereas the other powers wanted to call it a court or tribunal. Eventually, diplomatic negotiations settled on the compromise language “Permanent Court of Arbitration.”¹⁵⁴ The world’s first judicial mechanism with truly global jurisdiction emerged not as a response to crisis, but as a bargain between powerful states.

147. Caron, *supra* note 92, at 18.

148. Myers, *supra* note 27, at 289.

149. Rescript of the Russian Emperor (Aug. 24, 1898), http://avalon.law.yale.edu/19th_century/hag99-01.asp.

150. See 2 SCOTT, *supra* note 92, at 3–5. The Tsar’s invitation was mainly strategic, as Russia was falling fast behind the other European powers in military development, and any attempt to stay competitive would require a vast amount of resources. See PATTERSON, *supra* note 88, at 97; 2 SCOTT, *supra* note 92, at 39–47. That said, the Russian proposal must be understood in light of the active international peace movement that had been the main proponent of international arbitration as a substitute for war. Caron, *supra* note 92, at 8–9 (“The significance of the peace movements to the 1899 Peace Conference could perhaps be overstated, but it cannot be overlooked.”).

151. HILL, *supra* note 91, at 97.

152. Myers, *supra* note 27, at 791.

153. Germany suspected that arbitration would allow its rivals to buy time for military mobilization. Much diplomatic attention was therefore devoted to securing German support. See ANDREW D. WHITE, *The First Hague Conference*, in 2 AUTOBIOGRAPHY OF ANDREW D. WHITE 19 (reprint Kessinger Publishing 2007) (1907).

154. Caron, *supra* note 92, at 17.

B. International Criminal Courts

At least five times during the twentieth century, states have considered creating or have attempted to create an international criminal court. The first attempt occurred in 1920 at the League of Nations, as members of the Advisory Committee of Jurists were drafting the statute creating the PCIJ. One of the jurists proposed the idea of attaching an *ad hoc* criminal chamber to the PCIJ. Other members of the committee summarily rejected the idea. Another attempt was made in 1937, when states adopted a convention creating an international terrorism court, which never entered into force. Following World War II, states briefly considered whether to attach to the Genocide Convention a statute creating a genocide tribunal and quickly dismissed the idea.¹⁵⁵ Beginning in 1950, they attempted to draft a criminal court statute, but suspended their efforts in 1954. Lastly, states adopted the Rome Statute creating the ICC in 1998.

1. The 1920 Criminal Court Proposal

During the drafting of the PCIJ Statute in 1920, Belgian lawyer Edouard Descamps submitted to the Advisory Committee of Jurists a proposal to attach an *ad hoc* criminal tribunal to the new court.¹⁵⁶ The tribunal would have had jurisdiction “to try crimes against international public order and the universal law of Nations”¹⁵⁷ and “[the] power to define the character of the offence, to fix the penalty and to decide the means by which the terms of the sentence are to be enforced.”¹⁵⁸ Several members of the Committee supported the proposal in principle; they also had many questions and were unprepared to implement the idea on short notice.¹⁵⁹ Instead, they adopted a resolution recommending that the League’s Council (comprising members from Britain, France, Italy, and Japan) consider Descamps’ proposal, but they did not formally endorse the idea.¹⁶⁰ The Council, in turn, essentially ignored the proposal.¹⁶¹ When the proposal reached the Third Committee of the League’s Assembly, members decided to reject it on the grounds that “[T]here is not yet any international penal law recognised by all nations.”¹⁶²

155. For the draft statute, see Draft Convention on Genocide, U.N. Doc. A/362 (Aug. 25, 1947) (secretariat’s version); 2 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 131–40 (1980).

156. For brief descriptions of the 1920 proposal, see Memorandum, General Assembly, Historical Survey of the Question of International Criminal Jurisdiction: Memorandum Submitted by the Secretary-General, 8-12, U.N. Doc. A/CN.4/7/Rev.1 (1949); HUDSON, *supra* note 91, at 85–86; 1 FERENCZ, *supra* note 155, at 36–46.

157. 1 FERENCZ, *supra* note 155, at 222.

158. *Id.*

159. For a discussion of specific reactions to Descamps’ proposal by various delegates, see Mark Alan Lewis, International Legal Movements Against War Crimes, Terrorism, and Genocide, 1919–1948 146–50 (2008) (Ph.D. dissertation, UCLA) (on file with UCLA Library).

160. *See id.* at 151, 151 n. 37.

161. *See id.* at 151.

162. *See id.*; 1 FERENCZ, *supra* note 155, at 38.

Although explaining non-events is difficult, in this case power politics was not a barrier preventing judicialization. British delegates, for instance, paid little attention to the proposal. They were focused instead on preventing the League from granting the PCIJ compulsory jurisdiction.¹⁶³ Rather it was a fellow representative from Belgium who “killed” the initiative.¹⁶⁴ At the Third Committee, Henri Lafontaine dismissed the idea of an international criminal court as “useless.”¹⁶⁵ Other members of the League were similarly critical, although less explicit.¹⁶⁶

Consistent with the crisis argument, the absence of both a legal rule and a group of international lawyers in support of criminal jurisdiction were major impediments to judicialization. Although World War I constituted a legal crisis for the laws of war and for basic sovereign obligations like *pacta sunt servanda*,¹⁶⁷ it did not pose a crisis for international penal law more broadly; as the League members put it, that body of law did not yet exist. League Members consequently dismissed the proposal as “premature;”¹⁶⁸ states needed to create and perhaps codify the law before it made sense to create judicial mechanisms to enforce it. The notion that the development of law precedes the creation of a mechanism to enforce it is consistent with the conventional views about the development of international law in the 20th century: first codification, then judicialization.¹⁶⁹ It is also consistent with the crisis narrative: first codification, then crisis, then judicialization.

The failure of the 1920 proposal can also be explained by the absence of support from international lawyers. Descamps seems to have come up with the idea of a criminal court on his own.¹⁷⁰ International lawyers and advocates were caught off guard. Had they been fully behind the proposal and with more time to mobilize, the creation of the criminal court would have been much more likely, although still not guaranteed.

The successful attempt in 1920 to create a permanent world court, the PCIJ, provides support for this interpretation. In that case, a group of international lawyers had previously mobilized for an international civil court through publishing academic articles, giving public speeches, and working

163. See *supra* Part III.B.

164. See Lewis, *supra* note 159, at 152.

165. See *id.*; 2 FERENCZ, *supra* note 155, at 243–44 (citing a statement by the Third Committee: “The Committee is of the opinion that it would be useless to establish side by side with the Court of International Justice another Criminal Court. . . . If crimes of this kind should in future [sic] be brought within the scope of international penal law, a criminal department might be set up in the Court of International Justice. In any case, consideration of this problem is, at the moment, premature.” (emphasis omitted)).

166. See Hudson, *supra* note 29, at 550.

167. Literally “the agreement must be kept[.]” *pacta sunt servanda* is a legal principle that demands “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” See Vienna Convention on the Law of Treaties art. 26, Mar. 21, 1986, 1155 U.N.T.S. 331.

168. See 2 FERENCZ, *supra* note 155, at 243–44.

169. See, e.g., RUTH MACKENZIE ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS*, at x-xi (2d ed. 2010).

170. See Lewis, *supra* note 159, at 143 (stating “[i]t does not appear that Descamps had worked behind the scenes to gain support[.]”).

with and within the U.S. government both during and outside of the 1907 Hague Conference negotiations. Even if it did not lead immediately to the creation of a permanent court, this mobilization helped to establish the institutional foundations for one once legal crisis set in. Even after the United States and the United Kingdom withdrew support for the court, international lawyers were able to see it to fruition. In contrast, no analogous group of international lawyers organized for the creation of a criminal court; the groundwork for the 1920 proposal had not been established.¹⁷¹

2. *The 1937 Terrorism Court*

After two years of drafting and negotiations, in 1937, members of the League of Nations adopted two international treaties: The Convention for the Prevention and Punishment of Terrorism (the “Anti-Terrorism Convention”) and the accompanying Convention for the Creation of an International Criminal Court (the “Terrorism Court Statute”).¹⁷² The Anti-Terrorism Convention provided for, but did not require, state use of the terrorism court to prosecute individuals accused of crimes outlined in the convention. These crimes included, among others: attempts or acts causing death or harm to heads of state or their spouses or to persons charged with public functions (if made victims in their public capacity); willful acts calculated to endanger life; and the manufacture, supply or possession of arms or explosives with a view to committing such offenses.¹⁷³ Twenty-three states signed the Anti-Terrorism Convention, and twelve of those states signed the Terrorism Court Statute.¹⁷⁴ India was the only country to ratify the Anti-Terrorism Convention, and no state ratified the Terrorism Court Statute.¹⁷⁵ The attempt to create a terrorism court failed even though it was championed by an active network of international lawyers, and had the backing—if lukewarm—of France and the United Kingdom.

In this instance, the urgency of an international legal crisis was missing. The assassination in 1934 of the King of Yugoslavia and the French Minister of Foreign Affairs by members of Ustasa, a fascist group of Croatian separatists, provided the initial impetus behind state decisions to draft the Anti-Terrorism Convention and Terrorism Court Statute.¹⁷⁶ In contrast to the 1920 proposal for a criminal tribunal, a well-established network of international lawyers was already in place when the assassinations occurred.¹⁷⁷

171. See *supra* Part III.B.

172. See Hudson, *supra* note 29, at 552. In addition to League members, the conference included ten non-member states. *Id.* at 552 n.15.

173. *Id.* at 552–53.

174. See Lewis, *supra* note 159, at 204 n.1 (listing countries that signed the Anti-Terrorism Convention and Terrorism Court Statute).

175. *Id.* at 206 (noting that only India ratified the Anti-Terrorism Convention).

176. See Martin David Dubin, *Great Britain and the Anti-Terrorist Conventions of 1937*, 5 TERRORISM & POL. VIOLENCE 1, 1 (1993).

177. See, e.g., Hudson, *supra* note 29, at 550–51.

Composed of international lawyers and legal scholars mainly from Continental Europe,¹⁷⁸ the legal network had mobilized after the rejection of the 1920 criminal court proposal.¹⁷⁹ Over the course of the 1920s it campaigned for the creation of an international criminal court, adopting resolutions and circulating three draft criminal court statutes.¹⁸⁰ States were not receptive, however, and the movement lost momentum.¹⁸¹

The 1934 assassinations presented a new opportunity to push for a court.¹⁸² Recognizing that the political conditions for establishing a general criminal court had not changed since 1927, the legal network abandoned its earlier core objective of making both states and state officials accountable to a judicial authority.¹⁸³ Members of the group, including Vespasien Pella,

178. Continental European lawyers were likely motivated to create a criminal court after having experienced the devastation of World War I firsthand. As they began to campaign for the court, they also witnessed the “sham” war crimes trials of German military officials in German Courts—what one Belgian official described as a “travesty of justice.” JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 135 (1982).

179. Hudson cites the extensive scholarship on the international criminal court during the 1920s for revealing “the spell which the idea of an international criminal court exercised on many minds” during this period. Hudson, *supra* note 29, at 551, 551 n.11; see also Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151, 166–69 (2010) (describing the mobilization of lawyers outside of the United States as a “ferment of activity” and claiming that the mobilization, while unsuccessful, “developed both a cadre of individuals with substantive expertise . . . as well as the development of *doctrine* ready to be employed once political opportunity arose”).

180. Under the leadership of Vespasien Pella, a Romanian Professor and Parliament member who became the leading advocate of the criminal court campaign, the Inter-Parliamentary Union (IPU) adopted a resolution calling for a court to prosecute aggressive wars in 1925. See Inter-Parliamentary Union, *Resolution of the Inter-Parliamentary Union on the Criminality of Wars of Aggression and the Organization of International Repressive Measures*, in UNION INTERPARLEMENTAIRE, COMPTE RENDU DE LA XX-IIIÈME CONFÉRENCE 46–50 (1925), reprinted in Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General, at 70–71, U.N. Doc. A/CN.4/7/Rev.1, U.N. Sales No.1949.V.8 (1949). In 1926, Hugh H.L. Bellot, a British lawyer working under the directions of the International Law Association (ILA), proposed a draft treaty that would attach a criminal court to the PCIJ and grant it jurisdiction over individuals, states, and state officials. Draft Statute of the International Penal Court as Amended by the Permanent International Criminal Court Committee of the International Law Association, in INTERNATIONAL LAW ASSOCIATION, 34TH REPORT 113–25 (1927), reprinted in INT’L L. COMM’N, Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General, at 13–14, U.N. Doc. A/CN.4/7/Rev.1, U.N. Sales No.1949.V.8 (1949). Finally, Pella, with French Professor Donnedieu de Vabres and a few others, drafted a convention in 1928 under the direction of the International Association for Penal Law, a group of about two thousand criminal lawyers and law professors. See Lewis, *supra* note 159, at 178–79; see also *Project de Statut pour la création d’une Chambre Criminelle au Sein de la Cour Permanente de Justice Internationale*, 5 REVUE INTERNATIONALE DE DROIT PÉNAL 293, 293–307 (1928).

181. In 1928, Carton de Wiart, the President of the International Penal Law Association and a former Belgian Minister of Justice, submitted a draft text of a procedural statute to the League Secretariat, which refused to pass it on to the Council. See Lewis, *supra* note 159, at 185 (detailing de Wiart’s 1928 submission). That same year, Pella, who had been appointed Romania’s Delegate to the League in 1927, resubmitted the proposal. It was dead on arrival, and with it, it seemed, the entire criminal court project. Lewis attributes the failure of the 1920 proposals to a range of factors: the plans were too radical, the proposals were not in the interests of powerful states, the lawyers lacked political connections, and the League was preoccupied with revising the PCIJ Statute in order to persuade the United States to join the court. See *id.* at 183–86.

182. See Hudson, *supra* note 29, at 551.

183. See Lewis, *supra* note 159, at 220. In 1927, eight years prior to the 1934 assassinations, Vespasien Pella had mentioned the possibility of establishing a court for terrorists.

one of the leaders of the 1920s criminal court movement, served on a state-appointed Committee for the International Repression of Terrorism and proposed draft texts for the Anti-Terrorism Convention and the Terrorism Court Statute.¹⁸⁴ Not surprisingly, states were more receptive to the idea of prosecuting alleged terrorists than to prosecuting states and state officials; they adopted the dual treaties. Yet, the treaties never entered into force.

The failure of the terrorism conventions can be explained in terms of the absence of an international legal crisis: first and foremost, there was no clear legal rule or regime prohibiting terrorism.¹⁸⁵ More importantly, even if such a rule or regime had existed, states viewed the assassination of the Yugoslavian King and French foreign affairs minister as a political and diplomatic crisis, not a legal one. France, which had initially proposed the idea of the Convention, did so as a political gesture—attempting to mollify Yugoslavia (as well as Romania and Czechoslovakia) without alienating Italy and Hungary.¹⁸⁶ It sought to protect tenuous diplomatic relationships across Continental Europe, with the ultimate goal of balancing against Germany. Britain initially expressed support for the idea and ultimately sponsored, together with France, the conventions in the League of Nations Council. Indeed, it had authored the main report that served as the basis for the conventions.¹⁸⁷ Yet, divisions soon emerged between the British foreign and home offices,¹⁸⁸ which led Britain to become much more muted over the course of the conventions' drafting. By the final round of negotiations, Britain had no intention of ratifying the conventions, but wanted other states to adopt them so as to protect the League's and its own reputation.¹⁸⁹ As political scientist Martin Dubin writes, "[a]n examination of the origins and negotiating record of the conventions reveals that they were the products of political theater, rather than of serious efforts to deter international terrorism by means of international law."¹⁹⁰

A focus on hegemonic power does not shed much light on the failed efforts; it would be difficult to argue that the lack of British support doomed the effort. Other states had been unenthusiastic from the start and remained so even during the final round of negotiations.¹⁹¹ When the draft Convention was initially presented to the League Assembly, for instance, it met

184. See Dubin, *supra* note 176, at 7–8.

185. See Elizabeth Chadwick, *A Tale of Two Courts: The 'Creation' of a Jurisdiction?*, 9 J. CONFLICT & SECURITY L. 71, 99–100 (2004).

186. See Dubin, *supra* note 176, at 3–5 (stating that France proposed that a committee be appointed to draft the conventions "as a sop to the Little Entente").

187. *Id.* at 2.

188. *Id.* at 9, 14.

189. *Id.* at 8 ("What kept the process moving were the French interest in propitiating the Little Entente, and the British interest in avoiding blame and any embarrassment that a failed negotiation might bring to the League of Nations.")

190. *Id.* at 2. For a more extensive study of the drafting of the Terrorism Convention, see generally MARTIN DAVID DUBIN, *INTERNATIONAL TERRORISM: TWO LEAGUE OF NATIONS CONVENTIONS, 1934–1937: GUIDE AND INDEX TO THE MICROFICHE* (1990).

191. See Dubin, *supra* note 176, at 11–15.

with a “hostile reception.”¹⁹² That forced the drafting committee to make extensive revisions in preparation for the diplomatic conference.¹⁹³ At the conference in November 1937, “criticism of both draft conventions remained strong.”¹⁹⁴ As Dubin states, “[t]he conference would likely never have occurred had not the British and French insisted upon it.”¹⁹⁵

The lack of clear support by Britain probably contributed to the stalling of the two conventions, but it was not the main force deterring other states from ratifying them. The absence of a legal crisis meant that the incentives for judicialization were simply too weak. As Dubin notes, Hitler had already violated the Versailles and Locarno treaties, and the League of Nations was on the brink of crumbling.¹⁹⁶ “[A]s Europe was caught up in a series of political crises leading to the Second World War, a convention on terrorism must have seemed increasingly irrelevant.”¹⁹⁷

3. *The 1948 Genocide Tribunal and 1950s International Criminal Court*

A decade and a half later, with World War II still a recent memory, states considered creating a genocide tribunal, but dismissed the idea. They also attempted to create a criminal court,¹⁹⁸ considering proposals in 1951 and 1953,¹⁹⁹ but abandoned the project. Both crisis and hegemonic power help

192. *Id.* at 11–15 (describing states’ criticism of the definition of terrorism as too expansive, as interfering with the rights of governments to grant asylum or refuse extradition requests, and as avoiding altogether the issue of state-sponsored terrorism).

193. For a discussion of the revisions, see *id.* at 16–18.

194. *Id.* at 21.

195. *Id.* at 18.

196. See *id.* at 14 (describing the League of Nations in “disarray”).

197. *Id.* at 8.

198. State efforts to create a criminal court proceeded along two distinct but connected paths: the drafting of a substantive statute, the Code of Offenses Against the Peace and Security of Mankind (hereinafter “Code of Offenses”), and the drafting of a procedural statute establishing a criminal court. As early as 1950, the majority of state representatives on the Sixth (Legal) Committee of the General Assembly assumed that the two projects were connected and urged that consideration of the criminal court follow the completion of the Code of Offenses, rather than proceed in the abstract. Rep. of the Sixth Comm. to the Gen. Assembly, U.N. Doc. A/1639; GAOR, 5th Sess., 37 (1950), reprinted in 2 FERENCZ, *supra* note 155, at 306–12. Members of the ILC also considered the two projects inextricably connected. For instance, in discussions of the first Code of Offenses, one of the two rapporteurs assigned to produce a report on the possibility of establishing a criminal court noted that the criminal court and Code of Offenses were “inseparable.” The rapporteur’s statement continues, “[t]he Code was indispensable in an international system for the suppression of crime . . . [T]here was no point in possessing a criminal code if persons guilty of the crimes defined therein were not tried by an international court.” *54th Meeting: Monday 26 June, 1950, at 3:00 p.m.*, 1 Y.B. Int’l L. Comm’n 98, 99 (1954), reprinted in 2 FERENCZ, *supra* note 155, at 208. Those working on the criminal court treaty decided to postpone their work once the drafting of the Code of Offenses was suspended. The committee stated that it planned to resume the drafting only once states revived the negotiations of the Code of Offenses. See G.A. Res. 898 (IX), U.N. GAOR, 9th Sess., Supp. No. 21, U.N. Doc. A/2890, at 50 (Dec. 14, 1954), reprinted in 2 FERENCZ, *supra* note 155, at 485; G.A. Res. 897 (IX), U.N. GAOR, 9th Sess., Supp. No. 21, U.N. Doc. A/2890, at 50 (Dec. 4, 1954), reprinted in 2 FERENCZ, *supra* note 155, at 467–71.

199. Under U.N. auspices, they appointed a special seventeen-member committee to draft an initial criminal court convention. 2 FERENCZ, *supra* note 155, at 29. See *33rd Meeting: Friday 3 June, 1949, at 10:30 a.m.*, [1949] 1 Y.B. Int’l L. Comm’n 236, 237, U.N. Doc. A/CN.4/SR.33, reprinted in 2 FERENCZ, *supra* note 155, at 178. In August 1951, and again in 1953, draft conventions were submitted to the

explain the quick dismissal of the genocide tribunal. Crisis helps explain why states attempted to create the first permanent criminal court in the 1950s, whereas hegemonic power explains why their effort failed: the onset of the Cold War led the United States and other states to abandon the project.

During the 1948 Genocide Convention negotiations, states considered and rejected an addendum with proposals for two types of genocide tribunals, one permanent and the other *ad hoc*.²⁰⁰ Although the United States was weakly supportive, most states opposed the proposals, with the United Kingdom being among the most vehement. From a hegemonic power perspective, it is no surprise that the proposal was so easily discarded. The United Kingdom even opposed U.S.-led efforts to include a simple reference to a “competent international penal tribunal” in Article VII of the Genocide Convention.²⁰¹ With some last minute maneuvering, the United States ultimately managed to ensure that the reference remained in the convention, but it did not try for including the original addendum. Instead, the United States proposed that that the issue be addressed by a separate convention.²⁰²

Although hegemonic power helps explain states’ discarding the proposed genocide tribunal, a focus on the role of legal crisis offers additional insight. From a crisis perspective, Germany’s genocide posed an unprecedented humanitarian crisis, but not a legal one. During the Holocaust, the specific crime of genocide did not yet exist.²⁰³ States and non-state actors alike viewed Hitler’s extermination policy as exposing a limitation of international law that was much more fundamental than a problem of enforcement: a failure to legally prohibit such conduct in the first place. They moved, therefore, to criminalize the act. Returning to the language of League of Nation officials,²⁰⁴ it probably seemed “premature” to create an interna-

Sixth Committee. See Rep. of the 1951 Comm. on Int’l Criminal Jurisdiction on its Sess., Aug. 1–Aug. 31, 1951, U.N. Doc. A/2136; GAOR, 7th Sess., Supp. No. 11 (1951), *reprinted in* 2 FERENCZ, *supra* note 155, at 337–64; Rep. of the 1953 Comm. on Int’l Criminal Jurisdiction on its Sess., July 27–Aug. 20, 1953, U.N. Doc. A/2645; GAOR, 9th Sess., Supp. No. 12, (1953), *reprinted in* 2 FERENCZ, *supra* note 155, at 429–59. Both versions invested the court with jurisdiction over individuals, including heads of state, and granted the UN General Assembly authority to either initiate (1951 draft statute) or block (1953 version) legal proceedings. See Rep. of the 1951 Comm. on Int’l Criminal Jurisdiction on its Sess., Aug. 1–Aug. 31, 1951, U.N. Doc. A/2136, *supra*; GAOR, 7th Sess., Supp. No. 11 at Art. 24, (1951), *supra*; Rep. of the 1953 Comm. on Int’l Criminal Jurisdiction on its Sess., July 27–Aug. 20, 1953, U.N. Doc. A/2645, *supra*; GAOR, 9th Sess., Supp. No. 12 at Art. 24, (1953), *supra*. Neither statute provided for an independent prosecutor.

200. The Ad Hoc Committee that was appointed to work on a second draft discarded both versions. *Historical Survey of the Question of International Criminal Jurisdiction*, at 33, U.N. Doc. A/CN.4/7/Rev.1, U.N. Sales No.1949.V.8 (1949); Leila Sadat Wexler, *Proposed International Criminal Court: An Appraisal*, 29 CORNELL INT’L L. J. 665, 696 (1996).

201. 2 FERENCZ, *supra* note 155, at 13–14.

202. 2 FERENCZ, *supra* note 155, at 8, 19.

203. Indeed Polish lawyer Raphael Lemkin introduced the concept of genocide in his 1944 book *AXIS RULE IN OCCUPIED EUROPE*. See Daniel Marc Segesser & Myriam Gessler, *Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919-1948)*, 7 J. GENOCIDE RES. 453, 460–61 (2005).

204. See 2 FERENCZ, *supra* note 155.

tional criminal tribunal while codifying such crimes for the first time. Instead, states provided for universal jurisdiction and granted jurisdiction to the existing world court, the ICJ.²⁰⁵

A crisis account also provides insight into why governments attempted to create a criminal court in the 1950s, while hegemonic power explains the ultimate failed outcome. In contrast to genocide, Germany's military conquest constituted an international legal crisis. It proved the League of Nations and the international legal principles on which it was based, including the rules prohibiting aggression and protecting territorial integrity, were illusory. States therefore were ready, for the first time ever, to draft a treaty establishing an international criminal court. The assumption by some scholars that states turned to the criminal court in the 1950s in response to the genocide and in an attempt to construct a new human rights regime is mistaken.²⁰⁶ The drafting documents show that state representatives were focused exclusively on protecting the principle of territorial integrity and preventing future war.²⁰⁷

A criminal court promised the benefits of both legitimacy and efficacy: it would reaffirm the persistence of state sovereignty and territorial integrity and would deter future aggression. For instance, the first rapporteur appointed by the International Law Commission to evaluate the feasibility and desirability of the court stated that a criminal court would "be received by the peoples of the earth as a new ray of hope in their quest for peace and security, as a pledge by the United Nations that it will not allow another catastrophe to befall humanity."²⁰⁸ Aware that readers of the report would be less optimistic about the court's potential efficacy, he elaborated:

The cynic and the skeptic will surely remark that wars are not stopped by means of international tribunals and penal codes. Perhaps that is true, up to a certain point. In the municipal organization it may be observed also that there are murderers and thieves despite the fact that there are criminal courts and penal codes, but only God knows how many murders and robberies are not committed precisely because there are judges and penalties.²⁰⁹

205. Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 78 U.N.T.S. 278.

206. For an example of this misconception, see *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 1-3* (Roy S. Lee ed., 1999).

207. For an elaboration of this argument, see Katzenstein, *supra* note 63.

208. Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, [1950] 2 Y.B. Int'l L. Comm'n 1, 15-16, U.N. Doc. A/CN.4/15, *reprinted in* 2 FERENCZ, *supra* note 155, at 256.

209. *Id.* at 16.

The second rapporteur, who opposed the court, cast his critique also in terms of its legitimacy and questionable efficacy in deterring war.²¹⁰ The drafting documents do not contain a single mention of human rights.²¹¹

In addition to facilitating negotiations, the crisis of World War II motivated states to turn to legal networks and the proposals they had previously dismissed. The draft treaties for a criminal court that were circulated in the 1920s and the terrorism court statute gained new salience. State delegates invited Pella, who had been a leading advocate for a criminal court before the war, to submit an updated convention. He served as an informal adviser until his death in 1952.²¹²

Yet, in this case, despite an influential legal network and well-established ground work, international legal crisis did not lead to international judicialization. As the Cold War set in, states—most prominently the United States—began to hesitate.²¹³ The United States feared that a criminal court with jurisdiction over aggression could be used as a political tool against it.²¹⁴ This fear was enough to halt the movement toward a criminal court. While crisis moved states to attempt judicialization, power politics ultimately stalled the effort.

4. *The 1998 International Criminal Court*

The end of the Cold War enabled the creation of the ICC in the 1990s. It was the mass atrocities committed in the former Yugoslavia and Rwanda, however, which precipitated an international legal crisis for the human rights regime and played an important, if indirect, role in making conditions conducive to judicialization.²¹⁵ Legal networks also played an indispen-

210. Cf. Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur, [1950] 2 Y.B. Int'l L. Comm'n 1, 22, U.N. Doc. A/CN.4/20, reprinted in 2 FERENCZ, *supra* note 155, at 262–63.

211. In further support for the proposition that the 1950s criminal court was not built with a view toward advancing human rights, the Code of Offenses is overwhelmingly concerned with territorial insecurity. See Draft Code of Offenses Against the Peace and Security of Mankind, [1950] 1 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/R.6. The majority of its provisions focused on territorial challenges that increased the risk of war. For instance, the 1950 Draft Code of Offenses contained ten substantive provisions, with five of the first seven directly addressing territorial violations and the other two addressing indirect triggers of war. See *id.* at 264–67.

212. See *In Memoriam: Vespasian V. Pella, 1897-1952*, 46 AM. J. INT'L L. 709 (1952).

213. See Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, 2 (1999).

214. See MICHAEL J. STRUETT, THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOs, DISCOURSE, AND AGENCY 59 (2008) (citing A.M. Rosenthal, *UN Seeking a World Code*, N.Y. TIMES, Oct. 4, 1953) (pointing to a 1953 New York Times article reporting that U.S. delegates were worried that the Soviet bloc would use the Code to accuse the United States of violating the treaty); BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 27 (2008) (citing WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 9 (2002)).

215. The human rights violations began in 1991 with Serbia's attacks on Slovenia and Croatia as they claimed independence from Yugoslavia. These attacks included the bombardment of Dubrovnik and the Vukovar massacre in which Serb militias murdered over 250 Croatian men. A year later, Serbia began a campaign of ethnic cleansing, targeting Bosnian Muslims and Croats, which by July 1992 had led to the displacement of 1.1 million refugees. During the summer of 1992, the violence in Yugoslavia began to

sable role, interpreting the crisis as exposing the need for individual criminal accountability and in influencing treaty negotiations. In contrast to a hegemonic power explanation, governments created the ICC over the ultimate opposition of the United States.²¹⁶ Hegemonic power surely mattered, but U.S. preferences had no simple effect on the treaty negotiations and eventual outcome. As in the case of the PCIJ, the argument advanced here is not new. But juxtaposed with multiple failed attempts earlier in the century to create an international criminal court, this analysis places the creation of the ICC in a broader context and offers a new vantage point for understanding the relationship between the 1990s violence, legal networks, and the establishment of the ICC.

The 1990s mass violence showed that basic human rights protections were illusory.²¹⁷ Particularly in the Rwanda case, where Western governments refused to recognize the violence as genocide likely for fear of triggering legal obligations or political pressure to intervene, the genocide exposed the inefficacy of the human rights regime and its lack of moral authority.²¹⁸

The 1990s crisis moved governments to create a strong independent court to both deter future atrocities and revalidate the human rights regime. But

gain global attention and continued even after the ad hoc tribunal, ICTY, was established. In early April 1994, following the assassination of Hutu leader Juvenal Habyarimana, the Hutu regime in Rwanda began systematically killing Tutsi civilians. In mid-April, Belgium withdrew its troops from Rwanda as unrestrained mass killings continued. In mid-May, the International Red Cross released an estimate that 500,000 Tutsi had been killed. Over the next two months, 300,000 more Tutsi reportedly were killed. The genocide ended when the Rwanda Patriotic Front, a Tutsi-based party established in Uganda, was able to assert control over the country. See generally James Blount Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405 (2001).

216. Nicole Deitelhoff, *Isolated Hegemon: The Creation of the International Criminal Court (ICC), in CO-OPERATING WITHOUT AMERICA: THEORIES AND CASE STUDIES OF NON-HEGEMONIC REGIMES* 147 (Stefan Brem & Kendall Styles eds., 2009); STRUETT, *supra* note 214, at 59.

217. To be sure, states began to draft a statute establishing a court before the violence in former Yugoslavia had broken out. Legal crisis did not, therefore, trigger the first move to create a criminal court. But there is no guarantee that such drafting efforts would have been carried to their conclusion in the absence of the intervening mass atrocities. Legal scholar Marlies Glasius, for instance, notes that the drafting of the criminal court treaty could have stalled "in the rarefied atmosphere of the ILC, far from the political limelight, where years were sometimes spent on the definition of a legal clause." MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* 11 (2006) (citing MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 16–17 (1997)). But, she states, "[t]he ethnic cleansing in Yugoslavia and the genocide in Rwanda, and the subsequent Security Council decisions to establish *ad hoc* tribunals for Yugoslavia and Rwanda, changed all this." *Id.* The 1990s mass atrocities and subsequent *ad hoc* tribunals not only lent new urgency to the idea of establishing a criminal court, but also strengthened the support for a court that would not prove beholden to Security Council control.

218. Both U.S. and U.N. officials refused to recognize the legal status of the violence as constituting genocide, with one official famously describing the violence as "acts of genocide" rather than simply "genocide." *Transcript | Ghosts of Rwanda*, PBS.ORG (Apr. 9, 2004), <http://www.pbs.org/wgbh/pages/front/shows/ghosts/etc/script.html>. In response to a reporter's question about whether the Rwanda violence constituted genocide, for example, State Department Spokeswoman Christine Shelly hedged:

"Well, as I think you know, the use of the term "genocide" has a very precise legal meaning, although it's not strictly a legal determination. There are other factors in there, as well. When—in looking at a situation to make a determination about that, before we begin to use that term, we have to know as much as possible about the facts of the situation."

it did so indirectly, leading first to the creation of the two *ad hoc* international criminal tribunals, the International Criminal Court for the former Yugoslavia (“ICTY”) and the International Criminal Court for Rwanda (“ICTR”). Without the example of these tribunals, governments would have been unwilling to create an independent criminal court.²¹⁹ As William Schabas writes, the tribunals did more than “simply set legal precedent to guide the drafters. They also provided a reassuring model of what an international criminal court might look like. This was particularly important in debates concerning the role of the Prosecutor.”²²⁰ The shortcomings of the tribunals also were important for motivating governments not only to create the ICC, but also to include the independent prosecutor provision. International human rights lawyers and officials from less influential states in particular were drawn to the ICC because it would weaken the grip of the Security Council on controlling prosecutions.²²¹

Legal networks played a key role, both in arguing that mass atrocities required a judicial response and in coordinating state positions during the negotiations. As early as 1993, Theodor Meron, then a legal scholar and future judge of the ICTY, proclaimed in the opening sentence of his *Foreign Affairs* article, “[t]he credibility of international humanitarian law demands a war crimes tribunal to hold accountable those responsible for gross violations in the former Yugoslavia.”²²² Groups such as Human Rights Watch echoed these claims, calling for the prosecutions of those most responsible for the mass atrocities. In 1994, human rights advocacy groups formed a coordinated coalition to campaign for a permanent international criminal court, which would become the Coalition for an International Criminal Court (“CICC”).²²³ At the heart of this legal network’s campaign was the notion of “no peace without justice;” countries that had endured sweeping human rights violence would be unable to move forward to peace without criminal trials and accountability.²²⁴ The CICC played numerous roles in

Id. This type of linguistic gymnastics severely weakened the credibility of the U.S. and U.N. commitment to respond to the violence. As one reporter put it, “how many acts of genocide does it take to make genocide?” *Id.*

219. Even though the tribunals had issued only one ruling by the onset of the Rome Statute negotiations, they served as powerful examples that a permanent court was feasible and in states’ interest.

220. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 14 (4th ed. 2011). They also exemplified the feasibility of the idea of an independent prosecutor and court more generally. Benedetti and Washburn explain that the tribunals “constituted a psychological, political, and legal breakthrough for the international criminal court proposal and for the concept of international accountability of individuals for gross and massive crimes.” Benedetti and Washburn, *supra* note 213, at 2–3.

221. I thank Jens Ohlin for bringing this point to my attention.

222. Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122, 122 (1993).

223. By the time of the Rome Conference, the CICC encompassed approximately 800 organizations, 236 of which sent at least one delegate to the negotiations. GLASIUS, *supra* note 217, at 27.

224. See, e.g., HUMAN RIGHTS WATCH, NO JUSTICE NO PEACE: THE UNITED NATIONS INTERNATIONAL POLICE TASK FORCE’S ROLE IN SCREENING LOCAL LAW ENFORCEMENT (Sept. 1996), available at <http://www.hrw.org/legacy/summaries/s.bosnia969.html>.

treaty negotiations.²²⁵ As Marlies Glasius writes, the group lobbied both domestic governments and conference delegates, produced “expert documents” with policy and position proposals, distributed information, and coordinated delegates’ negotiating positions, particularly those from weaker states.²²⁶

The ICC was established in the shadow of crisis and, in the end, over the opposition of the United States. To be sure, the United States played an important role, particularly early on. In the mid-1990s, under former president Bill Clinton, the U.S. government was a leading supporter of the creation of a criminal court. During the Rome Statute negotiations, the U.S. delegation was active in shaping the design of the court. Yet, in the late stages of negotiations, it came to oppose the court on grounds that it was not sufficiently under Security Council control and that the jurisdictional regime was too expansive.²²⁷ By that point, U.S. support for the court was no longer integral to its establishment. As with the creation of the PCIJ, the ICC case shows that simple hegemonic power does not determine institutional outcomes. This said, British and French support for the Court was critical to its successful creation. Britain shifted its position from opposition to support following the election of the Labor Party.²²⁸ France committed to the court once it became clear that there would be a seven-year opt-out for the war crimes provision.²²⁹ Hegemonic power played a role in facilitating the creation of the court, but not in a linear way.

C. 1949 *International Court of Human Rights*

In February 1947 an Australian representative to the U.N. Economic and Social Council (“ECOSOC”) submitted a draft resolution calling for the creation of an International Court of Human Rights.²³⁰ The resolution granted

225. GLASIUS, *supra* note 217, at 37–44. The CICC made the inclusion of a prosecutorial trigger a core focus of its campaign. Glasius writes that the prosecutor provision was “the single biggest issue on their agenda.” *Id.* at 50. In the 1994 ILC draft treaty, only states parties and the Security Council could initiate court proceedings. In a report released in 1994, Amnesty International issued the first call for the establishment of a provision that authorized the prosecutor to initiate investigations. *Id.* at 49. As Glasius notes, this was not a centerpiece of Amnesty’s proposal, but it nonetheless was important in putting the idea on the table. Other NGOs also began to issue expert reports calling for an independent court, and most of these supported the proposal for an independent prosecutor. *Id.* at 50.

226. *Id.* at 37–39, 41.

227. *Clinton Approach to the ICC*, AM. NON-GOV’T. ORGS COALITION FOR THE INT’L CRIM. CT. (last vis. Sept. 9, 2013), <http://www.amicc.org/usicc/clinton>.

228. Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 6 (2006).

229. LAWYERS COMM. FOR HUM. RIGHTS, THE ROME TREATY FOR AN INT’L CRIM. COURT: A BRIEF SUMMARY OF THE MAIN ISSUES 3 (1998) (stating that the opt-out provision was inserted to meet concerns of the French); Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825, 834 (1999) (“this provision was included during a late stage of the negotiations, apparently to ensure that France would support the statute”).

230. Draft Resolution for an International Court of Human Rights, Submitted by the Representative from Australia, ESCOR U.N. Doc. E/CN.4/15 (Feb. 5, 1947). An Australian representative had initially proposed the idea of a human rights court in 1946 at the Paris Peace Conference. States decided to

standing to individuals, groups, and states parties and gave the court jurisdiction over claims arising from the core human rights treaty that states were then drafting, as well from future treaties with human rights provisions.²³¹ In 1948, Australia submitted to the Human Rights Commission a detailed draft statute establishing an international human rights court, in which individuals would have standing to file claims against their own governments.²³² The Commission's working group on implementation voted for the Australian proposal.²³³ Yet, the draft statute stalled at the 3rd Session of the Human Rights Commission.²³⁴ One of the few legal scholars to write about the history of the proposal, Annemarie Devereaux, concludes that it "never came close to enjoying the support of the majority."²³⁵

Both hegemonic power and crisis accounts help explain why governments did not create an international human rights court. The working group proposal failed for the simple reason that powerful states—the United States and the United Kingdom—opposed it.²³⁶ The United States played a central role in discouraging the proposal, for instance, co-submitting (with China) a proposal opposing the working group's proposal. As some government and U.N. officials had argued in response to the proposals for a criminal court in 1920 and the 1950s, the two governments claimed that an International Court of Human Rights or a special chamber of the ICJ was

postpone discussing the idea until the convening of the ECOSOC. See Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, First Session: *Report of the Drafting Committee to the Commission on Human Rights*, ESCOR U.N. Doc. E/CN.4/21 (July 1, 1947), Annex H, *Report of the Drafting Committee on an International Bill of Human Rights: Memorandum on Implementation Prepared by the Division of Human Rights of the Secretariat at the Request of the Drafting Committee* ¶¶ 5–6, at 90–92.

231. Annemarie Devereux, *Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946–1966*, 22 AUSTL. YEAR BOOK INT'L LAW 57 (2002).

232. *Id.*, at 57 n. 55 (citing a draft Statute that can be found in NAA A 1838/1, Item 856/13/7 Pt 1). The Commission on Human Rights was established by ECOSOC in 1946. It continued to report to ECOSOC on both its annual and special meetings until Mar. 27, 2006.

233. The original working group consisted of Australia, Belgium, India, Iran, the Ukrainian Soviet Socialist Republic, and Uruguay (whose delegate did not participate in the meetings). The United Kingdom, United States, and Union of Soviet Socialist Republics were represented at the meetings by observers. See U.N. Economic and Social Council, *Report of the Commission on Human Rights, Second Session*, at 5, U.N. Doc. E/600 (Dec. 17, 1947). Australia, Belgium and Iran supported the Australian proposal, and India and the United Kingdom (there as an observer) supported granting jurisdiction to the ICJ. *Id.* at 58. For a summary of the implementation working group discussion of the Australian proposal see U.N. ESCOR, 6th Sess., Supplement No. 1 at 41–64, U.N. Doc. E/600 (Dec. 17, 1947).

234. U.N. Economic and Social Council, *Commission on Human Rights, Third Session: Summary Record of the Eighty-First Meeting*, U.N. Doc. E/CN.4/SR.81 (June 18, 1948).

235. Devereux, *supra* note 231, at 59, 59 n.66 (reporting that Australia faced significant opposition) (citing N. HARPER & D. SISSONS, AUSTRALIA AND THE UNITED NATIONS (1959)). For arguments supporting and opposing the proposal at the Second Session, but not identified by state, see U.N. ESCOR, 6th Sess., Supplement No. 1 at 49–51, U.N. Doc. E/600 (Dec. 17, 1947).

236. See Devereux, *supra* note 231, at 55, 59, 64, 70. For instance, the United Kingdom stated that the ICJ could be used for such disputes. U.N. ESCOR, 6th Sess., Supplement No. 1 at 48, U.N. Doc. E/600 (Dec. 17, 1947). The U.S. delegate argued that granting a court jurisdiction would likely deter states from ratifying future human rights conventions. *Cf. id.*; Devereux, *supra* note 231, at 59 (citing United States Delegation Handbook No. 1, U.N. Commission on Human Rights, Third Session, 1948, Box 4581, Eleanor Roosevelt Papers, Franklin D Roosevelt Library, Hyde Park).

premature. Such a proposal should be considered only after “some experience ha[d] been gained of the operation of the Covenant [which became the Universal Declaration of Human Rights].”²³⁷ While some states protested this intervention,²³⁸ others supported the United States and China.²³⁹ After it had received comments from other governments expressing their opposition to the Australian proposal, the Commission decided to postpone the project.²⁴⁰ Power calculations explain the opposition of the United States and China; by 1948 the United States was already beginning to hedge on constructing “a new world order”.²⁴¹ Hegemonic power, however, cannot explain the lack of support for the proposed human rights court among a much broader group of states.

The crisis argument helps fill this explanatory gap. As with genocide, for all its devastation, World War II did not pose a *legal* crisis for human rights as this Article defines the concept.²⁴² States did not view the Holocaust as invalidating an existing human rights rule or regime and thus exposing the need for more robust enforcement. Rather, they viewed the Holocaust as showing the necessity for the creation of such a regime and the need to codify rules that would protect individuals from their own governments. The Universal Declaration of Human Rights became the first step in that direction. Indeed, most of the human rights the court was expected to enforce had by that point not been codified in any treaty.

Along with the absence of a legal crisis, the proposal lacked the support of a legal network. Much like the case of the Belgian official who had proposed a criminal tribunal in 1920, the Australian government official who formulated the proposal did not reach out to other actors, inside or outside of Australia.²⁴³ He even failed to inform his own Labour party of his plans.²⁴⁴

237. U.N. Economic and Social Council, *Commission on Human Rights, Third Session: China and the United States: Proposal on Implementation for the Covenant on Human Rights*, ¶ 4, U.N. Doc. E/CN.4/145 (June 16, 1948). The full account of the debate from June 18, 1948 can be found in document E/CN.4/SR.81. However, E/CN.4/SR.81 is the summary of the entire eighty-first meeting of the Commission and contains additional information (such as the comments other states had on the China-U.S. proposal (e.g. on page fifteen, the summary states that the U.K. delegate acknowledged that the United Kingdom agreed with the proposal).

238. This included not only Australia, but also India. See *Third Session: Summary Record of the Eighty-First Meeting*, *supra* note 234, at 9–11.

239. These states included Chile, Egypt, the United Kingdom, and Uruguay. See *id.* at 15–16 (regarding United Kingdom); *id.* at 17–18 (regarding Egypt); *id.* at 18 (regarding the views of both Uruguay and Chile).

240. U.N. Economic and Social Council, *Report of the Third Session of the Commission on Human Rights*, ¶ 17, U.N. Doc. E/800 (June 28, 1948). The Commission determined that the question of implementation should be addressed alongside the Covenant and that the Commission should meet in early 1949 to complete work on both the issue of implementation and the Covenant.

241. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2002).

242. The same argument applies to the proposal for a genocide tribunal. See *supra* Part IV.

243. The official who had drafted the proposal was H.V. Evatt, Australia's External Affairs Minister from 1946 to 1949. Devereux, *supra* note 231, at 60; see *id.* at 60 n.75 (citing a memorandum from T.G. Glasheen, for the Secretary, DEA to the Secretary, Attorney-General's Department, 14/4/49, in NAA A

For him, this was a one-man project.²⁴⁵ Without a legal network backing it, an international human rights court—even if a legal crisis had been present—would probably have failed.

D. Law of the Sea

During the 20th century, governments considered proposals for creating an international court for maritime-related issues at two multilateral treaty negotiations: the Second Hague Conference in 1907 and the Third United Nations Conference on the Law of the Sea (“UNCLOS III”) in 1982. The proposed courts were fundamentally distinct. Proposed by Britain, the 1907 International Prize Court would have adjudicated claims during wartime about captured ships or cargo belonging to neutral parties.²⁴⁶ But the Prize Court failed to enter into force. The 1982 Convention establishing ITLOS, which entered into force only in 1994, provides for a much more sweeping jurisdiction. Deemed “a constitution for the oceans,”²⁴⁷ UNCLOS regulates issues ranging from environmental protection to exclusive economic zones. It has, in the words of one scholar, a “substantive range [that] is broader than that of any other lawmaking treaty.”²⁴⁸

1838/1, Item 856/13/7 Pt 2 (indicating that by the time NGOs began to support the proposal in 1949, the Australian government had already determined that it was a nonstarter)).

244. Devereux, *supra* note 231, at 62 (Devereux stated that the decision had been Evatt’s choice, “one seemingly made without much conferral with party colleagues.” Devereux’s contention was based on an interview she conducted with Dr. J. Burton, who had served as Evatt’s personal assistant.).

245. Evatt was both a committed internationalist and a former High Court judge, with the “strong personal belief that it was the state’s responsibility to represent the interests of the individual and [t]o seek ways of facilitating the individual’s access to the international realm.” Devereux, *supra* note 231, at 62 (citing HARPER & SISSONS, *supra* note 235, at 3). For more about Evatt’s personal commitment, see *id.* at 62 nn. 84–96.

246. Convention for the Establishment of an International Prize Court between the Argentine Republic, Austria-Hungary, . . . Turkey and Uruguay, Oct. 18, 1907, 205 Consol. T.S. 381. During war, belligerent parties have the right to search merchant ships of neutral parties on the high seas for contraband and to arrest or seize the ship if there is evidence of contraband or if there is an attempted or actual violation of a blockade. Before the British proposal for an International Prize Court, claims for compensation for belligerents’ seizure of neutral ships were adjudicated by domestic courts applying domestic prize law. The British proposal for an International Prize Court was meant to bring uniformity to such cases as well as reduce judicial bias toward the captor states (which were also the forums for adjudication). See Tryon, *supra* note 28, at 604–05. The British government was particularly interested in the creation of a court given that, with its large merchant fleet, it was the most vulnerable to capture in a naval war between two other states. See *id.* at 613. The Court was designed to hear claims filed by both states and individuals. Individual standing, however, was allowed only in suits brought against foreign states, and such suits could have been blocked by the individual’s own government. For a more detailed discussion of the precise standing and jurisdictional requirements, see HUDSON, *supra* note 91, at 73–75.

247. See Tommy T.B. Koh, President, Third United Nations Conference on the Law of the Sea, *A Constitution for the Oceans, Remarks at the UN Convention on the Law of the Sea* (Dec. 11, 1982); Joyner, *supra* note 48, at 42 (describing the Convention as a “revised constitution for the world’s oceans”). These negotiations were “extraordinarily complex,” involving 150 states and lasting nine years. See John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 109, 114 (1998).

248. Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT’L L. 277, 278 (2001).

The lack of an international legal crisis helps explain why the attempt to create the International Prize Court failed in spite of Britain's support. It also offers some insight into why states created a tribunal for the law of the sea in 1982. Hegemonic power helps explain why the UNCLOS Convention and the tribunal it established did not immediately enter into force. Neither argument, however, can explain why ITLOS entered into force in 1994. Ultimately both arguments fall short.

1. 1907 *The International Prize Court*

At the Second Hague Conference in 1907, both the United Kingdom and Germany proposed draft treaties establishing an International Prize Court.²⁴⁹

The Convention that was ultimately adopted established the Prize Court as both a court of first instance and an appeals court with jurisdiction to review the decisions of the captor state's national courts.²⁵⁰ The Convention granted each of the eight largest maritime states the right to appoint a judge and granted the other participating states the right to appoint judges on an undetermined rotating basis.²⁵¹ Twenty-seven states voted to adopt the Convention establishing the Prize Court, with two voting against and fifteen abstentions.²⁵² At the time, the establishment of the Court was considered an important achievement. The Chairman of the British delegation stated, "it is the first time in the history of the world that there has been organized a court truly international."²⁵³ James Brown Scott, one of the leading U.S. international lawyers and a representative to the Conference, echoed this enthusiasm: "the hope of the dreamer has been realized in large measure and the world is now possessed of its first international judiciary."²⁵⁴

However, states hesitated to ratify the Convention because it remained unclear which body of law the Court would apply.²⁵⁵ The United Kingdom took the lead in promoting ratification: it invited the main maritime powers to the International Naval Conference in London (1908–09) with the dual goals of clarifying the substantive law that would be applied and specifying the rules for appealing national decisions.²⁵⁶ The conference culminated in

249. See HUDSON, *supra* note 91, at 71.

250. The initial International Prize Court Convention only provided for appellate jurisdiction. At the London Naval Conference of 1909, however, the U.S. delegate proposed that states have the option of granting the Court jurisdiction in the first instance because of U.S. constitutional concerns about international court review of domestic judicial decisions. An additional protocol incorporating this proposal was opened for signature in September 1910. See HUDSON, *supra* note 91, at 77.

251. These largest maritime states included: Austria-Hungary, France, Germany, Great Britain, Italy, Japan, Russia, and the United States. See HUDSON, *supra* note 91, at 72–73.

252. See Caron, *supra* note 92, at 19–20.

253. Tryon, *supra* note 28, at 608.

254. Scott, *supra* note 96, at 304.

255. See Caron, *supra* note 92, at 19–20; HUDSON, *supra* note 91, at 76.

256. The following states were invited: Austria-Hungary, France, Germany, Italy, Japan, Russia, Spain, the United States and later the Netherlands. See HUDSON, *supra* note 91, at 76.

the 1909 Declaration of London, which both reaffirmed existing international substantive rules and created new ones.²⁵⁷ Although all states that had participated in the Conference signed the Declaration, none deposited its notice of ratification. To address constitutional concerns, the United States proposed granting the Prize Court jurisdiction to hear claims directly rather than on review.²⁵⁸ With the assistance of the British, French, and German governments, the United States drafted a Protocol granting the Court original jurisdiction. When the Protocol opened for signature in September 1910,²⁵⁹ however, the United States was the only state that ratified it.²⁶⁰ The International Prize Court failed to enter into force even though it was backed by the United Kingdom as well as the United States. Described as “the nation most interested in the decisions of the International Prize Court,”²⁶¹ the U.K. government worked hard to see the Court enter into force, but to no avail.

Both international legal crisis and a more nuanced version of hegemonic power explain this failed attempt. There was no precipitating event that suddenly undermined the legal regime regulating the capture of neutral states’ ships and cargo during wartime. Indeed, even after the London Declaration, it remained unclear which international legal rules constituted the regime in the first place. Manley Hudson, a prominent U.S. international lawyer, wrote later that the main reasons for the failed attempt were the lack of need for such a court and ambiguity about which rules the Court would enforce. In his words, “Despite the various efforts made . . . the prospect for the coming into force of the Convention creating the International Prize Court was never promising.”²⁶² Other issues surely posed barriers as well. Most prominently, states sharply disagreed about the method for appointing judges. As the PCIJ case illustrated, however, these types of barriers were not insurmountable. In the presence of legal crisis prompted by the First World War, states in that case became much more willing to cooperate.

How can hegemonic power explain the failed Prize Court? Despite support by the executive branch and the House of Commons, both the London Declaration and the proposed Prize Court faced formidable opposition in Britain. Many naval officers and commercial merchants were critical of the London Declaration, but for different reasons. Some naval officers deemed the Declaration too constraining, particularly with respect to naval blockades, while commercial merchants argued that the Declaration was not suffi-

257. See *id.* at 76–77. For a detailed discussion of the London Declaration, see Tryon, *supra* note 28, at 613 n.8.

258. Editorial Comment, *supra* note 97, at 163–64.

259. See HUDSON, *supra* note 91, at 77.

260. See *id.* at 78.

261. Tryon, *supra* note 28, at 613.

262. HUDSON, *supra* note 91, at 78.

ciently protective of neutral vessels and cargo.²⁶³ Ultimately, the House of Lords refused to ratify the London Declaration, which may have then deterred other governments from ratifying as well.²⁶⁴

A hegemonic power argument can thus point to the British executive to explain why the Court was attempted in the first place and to the British Parliament to explain why the attempt ultimately failed. Doing so reveals the limits, however, of this explanatory approach. By focusing exclusively on power politics, hegemonic power accounts have difficulty explaining origins of the hegemon's interests and cannot therefore fully explain institutional outcomes at the international level. In this case, the complementary insights of a domestic politics approach fills in the gap.

2. 1982 *International Tribunal for the Law of the Sea*

At the time it was adopted in 1982, the UNCLOS dispute settlement system, including ITLOS, was widely considered an unprecedented achievement for international law.²⁶⁵ UNCLOS not only established the ITLOS and the Sea Bed Disputes Chamber²⁶⁶ but provided also for an unprecedented form of compulsory jurisdiction. In a “cafeteria approach,”²⁶⁷ UNCLOS allows states parties to choose one or more of four options for dispute settlement: (1) ITLOS,²⁶⁸ (2) the ICJ, (3) arbitration (under Annex VII of the

263. See Arthur Cohen, *The Declaration of London delivered at University College 28–30 (1911)* (discussing worry that neutral vessels and cargo would be susceptible to capture or the payments of certain costs merely because of the port to which the vessels or goods were presently assigned or because the vessel made forcible resistance); DEBATES IN THE BRITISH PARLIAMENT 1911–12 ON THE DECLARATION OF LONDON AND THE NAVAL PRIZE BILL III–IV, 27–28 (noting that the chambers of commerce were alarmed and worried that the provisions designating “foodstuffs” as “articles of conditional contraband” would lead to the sinking of neutral vessels carrying foodstuffs).

264. The proposed bill to allow appeal to the Prize Court was passed in the House of Commons but rejected by the House of Lords. See HUDSON, *supra* note 91, at 76–77, 77 n.14.

265. While some commentators opposed the creation of ITLOS, most embraced the tribunal as helping to cement the overarching and complex substance and structure of UNCLOS. See Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, in 271 RECUEIL DES COURS 10, 347–48 (1998). However, some of the criticisms focused on the potential of ITLOS to contribute to the fragmentation and incoherence of international law. See NATALIE KLEIN, *DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA* 55 n.97 (2005); Charney *supra*, at 347–48. Judge Gilbert Guillaume, president of the International Court of Justice, decried the effects of the proliferation of standing tribunals before the U.N. General Assembly and its Sixth Committee. Judge Gilbert Guillaume, President, I.C.J., Speech by His Excellency Judge Gilbert Guillaume to the Sixth Committee of the General Assembly (Oct. 27, 2000), available at <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>.

266. UNCLOS grants the Dispute Chamber compulsory jurisdiction over all disputes relating to seabed mining. It is the first international (as opposed to regional) judicial body to grant private parties (companies and individuals) the ability to file claims against states, and also the first international judicial body to subject private parties to claims. United Nations Convention on the Law of the Sea art. 187, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982).

267. Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 39–41 (1997).

268. ITLOS is granted compulsory jurisdiction for certain issues, such as applications for prompt release of detained vessels and crews, requests for provisional measures, and disputes relating to the seabed. See Noyes, *supra* note 247, at 120 n.57, 138.

Convention), or (4) special arbitration before a panel of experts (under Annex VIII of the Convention).²⁶⁹ States that do not choose one of the four options accept by default compulsory arbitration under Annex VII. Even after the establishment of the WTO dispute-settlement body in 1994 and the ICC in 1998, legal scholars continue to point to the compulsory nature of the UNCLOS system as “one of the most significant developments in dispute settlement in international law.”²⁷⁰

Neither legal crisis nor hegemonic power adequately explains the adoption of ITLOS, although each offers partial insight. A focus on international legal crisis, for instance, arguably provides some insight into why states initiated the effort to create an international tribunal.²⁷¹ Although states had negotiated a set of four conventions at the 1958 U.N. Law of the Sea Conference, which had been thought to stabilize the three mile limit rule,²⁷² in the 1960s and 1970s coastal countries began to assert jurisdiction beyond three miles, with some Latin American countries claiming as much a 200-mile limit for the territorial sea.²⁷³ From the perspective of the maritime powers and other states that depended on maritime-based trade,²⁷⁴ the coastal states’ unilateral extension of their territorial seas (or threat of extending it) posed a legal crisis for the traditional (if contested) three-mile limit rule and was viewed as posing a threat to the freedom of navigation of the seas.²⁷⁵ In response, the maritime powers turned to the idea of negotiating a new convention with a robust dispute settlement regime. As Louis Sohn, who had helped to draft UNCLOS dispute settlement provisions, wrote at the time, “the major powers discovered . . . that the only way to prevent the further creeping appropriation of the ocean by coastal states would be to have an international conference that would establish some stability in the law in this area.”²⁷⁶ Ultimately UNCLOS codified the territorial seas extending twelve miles from national shorelines.

To be sure, states, particularly developing countries,²⁷⁷ were motivated by other factors as well—most saliently by the desire to protect recently discov-

269. See MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 41 (Ruth Mackenzie et al. eds., 2010).

270. KLEIN, *supra* note 265, at 2. As one of its most celebrated features at the time it was created, UNCLOS grants the Dispute Chamber compulsory jurisdiction over all disputes relating to seabed mining. It is the first international (as opposed to regional) judicial body to grant private parties (companies and individuals) the ability to file claims against states, and also the first international judicial body to subject private parties to claims. United Nations Convention on the Law of the Sea art. 187, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982).

271. I thank Lori Damrosch for bringing this to my attention.

272. Louis B. Sohn, *The Law of the Sea Crisis*, 58 ST. JOHN’S L. REV. 237, 240 n.13 (1984).

273. *Id.* at 245.

274. *Id.* at 241 (listing Indonesia, Pakistan, and India, for instance).

275. *Id.* U.S. support for compulsory dispute settlement stemmed primarily from the desire to deter broad unilateral claims by states over coastal zones and preserve its navigational freedom. Noyes, *supra* note 247, at 114–15. The United States also wanted to strengthen the legal norms codified by the Convention. *Id.* at 115 (citing *United States Policy for the Seabed*, 62 DEP’T ST. BULL. 737 (1970)).

276. Sohn, *supra* note 272, at 243.

277. *Id.*

ered seabed resources from exploitation by industrialized states.²⁷⁸ That discovery did not amount to a crisis for an existing legal rule, but rather exposed the need for legal regime regulating seabed mining. At a technological disadvantage, developing countries, in particular, supported the idea of turning to a new convention and court to protect their interests.²⁷⁹

Yet, the crisis explanation fails to account for why it took over a decade for UNCLOS III (and thus ITLOS) to enter into force. If maritime powers were committed to stabilizing the territorial seas rule, then they should have ratified the Convention immediately. But they refrained from doing so.

Although it, too, has limitations, a hegemonic power account offers some insight into the delay. The United States had been one of the leading early proponents of the convention and court,²⁸⁰ for the very reasons articulated by the legal crisis argument: it wanted to stem the creeping, and sometimes abrupt expansion in the jurisdiction of coastal states.²⁸¹ Yet after former President Reagan assumed office, towards the end of the UNCLOS III negotiations, the U.S. position shifted. The Reagan administration viewed the proposed Seabed Authority regime, including the provisions for collective exploitation and technology transfer, anathema to its deep commitment to free market principles.²⁸² Ultimately it thus voted against the adoption of UNCLOS in 1982.²⁸³ And the United States was not shy about expressing its hope that its opposition would derail the whole Convention.²⁸⁴ From a

278. Edward McWhinney, *The Codifying Conference as an Instrument of International Law-Making: From the "Old" Law of the Sea to the "New,"* 3 SYRACUSE J. INT'L L. & COM. 301, 314–15 (1975).

279. Sohn points to other motivations as well including, protecting fisheries and environmental disaster. Sohn, *supra* note 272, at 240–41.

280. United States was the first to propose both an international tribunal and the idea that states could choose their dispute-settlement provision from a menu of options. A.O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTE UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND COMMENTARY* 13 (1987). It did so at the end of the opening negotiation session (the Caracas session) in 1974. The U.S. delegation proposed that a group from thirty-five delegates meet in an informal consultation to discuss dispute settlement. *Id.*

281. See, e.g., Noyes *supra* note 247, at 133 (stating that the United States was "one of the chief proponents"); *U.S. Presents Proposals at Preparatory Session for Law of the Sea Conference*, 69 DEP'T ST. BULL. 397, 414 (1973) (statement by Ambassador Stevenson); Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9, 13 (1976); Memorandum by the President of the Conference on Document A/CONF.62/WP.9, U.N. Doc. A/CONF.62/WP.9/Add.1 (Mar. 1, 1976), reprinted in V THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, at 122, U.N. Doc. A/Conf.62/C.1/SR.40, U.N. Sales No. E.76.V.8 (1976).

282. The Reagan administration found itself "philosophically antagonistic" toward the concept of common heritage of mankind, which was a key principle of Part XI of the Convention, and also opposed the regulatory authority and structure of the International Seabed Authority. For example, the Reagan administration opposed the transfer of technology requirement with respect to seabed mining as well as the limits on production. Joyner, *supra* note 247, at 43. After announcing it was pulling out, the administration "hoped that . . . the whole enterprise would collapse." Sohn, *supra* note 272, at 259.

283. Joyner, *supra* note 247, at 42; see also Harry N. Scheiber, *Introduction: Perspectives on the History of U.S. Non-Ratification of the U.N. Convention on the Law of the Sea, and on Prospects for an Early Reversal*, 1 BERKELEY J. INT'L L. PUBLICIST 1, 2 (2009).

284. Sohn, *supra* note 272, at 259 (stating that the Reagan Administration "hoped . . . the whole enterprise would collapse.").

hegemonic power perspective, U.S. opposition may have deterred other states from ratifying the Convention as well.

The problem with this explanation, however, is twofold: it overstates the influence of the United States both in creating ITLOS and in preventing it from entry into force. Although early in the UNCLOS drafting the United States was committed to ensuring compulsory jurisdiction and was in fact the first to propose the creation of ITLOS and the *à la carte* method for dispute settlement, other states were also strong proponents of the idea. Developed states, for instance, embraced ITLOS because they expected that a specialized tribunal would benefit from judicial expertise, and they supported its ability to hear claims filed by and against non-state actors.²⁸⁵ Developing countries strongly favored ITLOS because they viewed the ICJ as biased against weaker countries²⁸⁶ and as too conservative.²⁸⁷ Although the U.S. proposal for ITLOS sparked the initial round of discussions, it was not the driving force for the next eight years. After discussing the U.S. draft, an informal group of delegates, including one from the United States, “proceeded independently of the United States proposal”²⁸⁸

In explaining the delay of entry into force, the hegemonic power argument also risks overstating the U.S. role. For the same reason as the United States, almost all other industrialized countries refrained from ratifying UNCLOS III after it was adopted. They, too, opposed the seabed mining regime.²⁸⁹ Their decision to ratify the Convention following the negotiations of the 1994 framework implementation agreement,²⁹⁰ while the United States continued to refrain, shows that their participation did not depend on U.S. support for the regime.

E. Recapitulation

Combined with the two cases discussed in Part II, these sketches suggest that international legal crises have been important drivers of international judicialization during the 20th century. Of the four main international judicial bodies that states successfully created, legal crisis was the primary impe-

285. KLEIN, *supra* note 265, at 55.

286. *Id.*, at 54–55; *See also* Noyes, *supra* note 247, at 115 n.33; Sohn, *supra* note 272, at 261 n.127. Developing states in particular believed that compulsory dispute settlement “would counterbalance political, economic, and military pressures from powerful states.” Noyes, *supra* note 247, at 115.

287. Noyes, *supra* note 247, at 119.

288. IGOR V. KARAMAN, DISPUTE RESOLUTION IN THE LAW OF THE SEA 2 (2012). In drafting the articles, the working group concentrated on eleven issues. ADEDE, *supra* note 280, at 16.

289. *See* John Alton Duff, *UNCLOS and the New Deep Seabed Mining Regime: The Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT’L L. REV. 1, 53 (1995-1996) (stating “most industrialized States have reviewed their respective positions on becoming members of the Convention.”).

290. Negotiated under the leadership of the United States, United Kingdom, and Germany, the Framework Agreement revamped the seabed regime to make it more palatable to developed states. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, G.A. Res. 48/263, U.N. Doc. A/RES/48/263 (Aug. 17, 1994), 1836 U.N.T.S. 3, 33 I.L.M. 1309 (1994); *see* Harry Scheiber, *supra* note 283, at 4. For an extensive analysis of U.S. opposition to Framework Agreement, *see* Duff, *supra* note 289.

tus in two, the PCIJ (now ICJ) and the ICC.²⁹¹ It arguably provided the initial impetus for the third, ITLOS, with expanding coastal state jurisdictions constituting a legal crisis, but cannot explain why the court was ultimately created. Hegemonic power, not crisis, explains the fourth case, the PCA. Hegemonic power also offers insight into the impetus but not the ultimate creation of the ICC and ITLOS, since the United States was the initial proposer and early supporter for a court in both cases. But even in these two cases, a legal crisis argument offers greater analytical depth, since U.S. support for the court was greatly influenced by prior legal crises, the 1990s mass atrocities, and the 1970s expanding jurisdiction by coast states.

Explaining non-events, here the seven failed attempts, is difficult. In three of the cases, however, states failed to create a proposed international court despite strong hegemonic support in two cases and initial but waning support in the third. The absence of a legal crisis, this Article argues, helps explain why. The proposed Court of Arbitral Justice and International Prize Court lacked any sense of urgency that attends a crisis, and so states clung to concerns about sovereignty. In the case of the Terrorism Court, states were less concerned about sovereignty than distracted by increasing regional instability. Even if British support for the court had not abated, the impending rise of Nazi Germany meant that other states did not view terrorism as posing a political, or a legal, crisis. In the fourth case, the 1950s criminal court, states abandoned their attempt at judicialization despite the presence of a legal crisis and network. Hegemonic power explains why. Although the United States had led efforts to construct a new multilateral order in the mid-1940s, by the early 1950s, with the onset of the Cold War, its priorities had shifted: it viewed a criminal court as a possible threat to its position as a hegemon. Both crisis and hegemonic power can explain the failed, and rather fleeting, attempts at creating a genocide tribunal and world human rights court, the fifth and sixth cases. The crisis argument focuses on the absence of an international legal regime, whereas a power explanation points to a lack of hegemonic support. Finally, crisis provides a better account than hegemonic power of why the 1920 proposal for a criminal court was quickly discarded. Britain would have likely opposed the proposal, but it never came to that; members of the League Council dismissed the idea before it gained real traction.

That crisis explains two of the four existing international courts may seem like a modest achievement; yet, compared to functionalism and hegemonic power, the conventional dominant explanations, this figure suggests comparable if not stronger explanatory power. Ultimately, scoring cases in this way is not particularly useful. If this analysis has established anything definitively, it is that neither legal crisis nor hegemonic power guarantees international judicialization. Legal crisis did not lead to the creation of a

291. Dubin, *supra* note 176, at 1.

permanent criminal court in 1950, and hegemonic power did not foster the creation of the 1907 Court of Arbitral Justice or the 1909 International Prize Court. And neither crisis nor power is indispensable to judicialization: the 1899 PCA was created despite the absence of a crisis, the 1998 ICC over the ultimate opposition of the United States. No single theoretical account thus succeeds in offering a comprehensive explanation of international judicialization.

Fortunately, there is no need for any one account to be that ambitious and successful. When it comes to understanding the successful creation of international courts, the trite rings true: legal crisis and hegemonic power should be viewed as complementary, not competing, explanations. Taken together, they explain ten of the eleven attempts at judicialization during the 20th century.

V. IMPLICATIONS FOR ADVOCACY AND THEORY

An analysis of legal crisis and legal networks can deepen our understanding of the forces that facilitate or impede judicialization. Understanding when and why states create international courts is important in its own right, not only for those who study international courts, but also for those who seek to build new ones. The circumstances surrounding the creation of international courts can also have significant consequences for the courts going forward, affecting both their efficacy and legitimacy. In this Part, I first suggest that the crisis argument provides three insights for current and future attempts to create international courts. I then discuss how an analysis of the origins of international courts informs a central theoretical debate among international law scholars concerning judicial efficacy.

A. *Insights for Advocates*

As the international and regional landscape becomes increasingly filled with courts, the creation of new ones seems less likely in the future. But the era of this form of international judicialization has not yet ended. In recent years, for instance, legal advocates have launched campaigns for both an international environmental court²⁹² and a global court for human rights.²⁹³ The desirability of such initiatives should be considered carefully; there are persuasive reasons to turn to existing courts or other forms of enforcement instead.²⁹⁴ Nonetheless, for those advocates committed to proposing new international courts, the crisis argument offers three insights.

292. See Kalas, *supra* note 18.

293. See Nowak & Kozma, *supra* note 18.

294. For a recent critique of the proposal for a global human rights court, see Philip Alston, *Against a World Court for Human Rights* (N.Y.U. Pub. L. & Legal Theory Res. Paper Series, Working Paper No. 13-71, Oct. 2013).

First, and most explicitly, legal advocates should recognize crises as moments of opportunity in which they are particularly well-positioned to advance their agendas, including their proposals for an international court. As the preceding analysis indicates, governments are usually more receptive to advocacy by non-state actors during moments of legal upheaval than during periods of legal stability. Because they want to re-stabilize the legal and political order, governments are more willing to listen to legal experts that have recommendations for policy responses.

For legal crises to occur at all, however, the substantive law needs to exist (and then be severely undermined), which leads to the second insight: before deciding to push for a new international judicial body, legal advocates should consider how developed the legal rules are that their proposed court would apply, or ensure that legal rules exist in the first place. As the 1948 Genocide Convention and the 1949 Human Rights Court cases both illustrate, governments are less willing to turn to international judicial bodies to enforce new rules than they are to enforce legal rules that have been widely accepted but are seriously threatened.²⁹⁵ In cases where the rules are nascent, then, legal advocates would be better advised to promote less sovereignty-intrusive forms of enforcement. Rather than mobilize for an international court, they could push for giving jurisdiction to domestic courts or propose the creation of an international monitoring body or a private petitioning mechanism. Since such alternative procedural tools do not require governments to yield as much autonomy as is required by international courts, they are more likely to create them. Alternatively, advocates can attempt to influence whether governments perceive a given event not only as a political or security crisis, but a legal one. Rather than only argue that the legal rule threatened by crisis warrants judicialization, advocates would, in this case, need to persuade government officials that a given legal rule exists, in the first place, and has been undermined.

The final and most important insight comes from the one case of international judicialization that neither hegemonic power nor crisis can explain fully: ITLOS. The tribunal entered into force in the mid-1990s without a pressing legal crisis, an engaged legal network, or full hegemonic support.²⁹⁶ The experience of ITLOS suggests that legal advocates should give states a choice between joining a new tribunal or submitting to an old one. This kind of flexibility means that states that oppose the new tribunal can simply opt out of it rather than mobilize to block the tribunal from being created.²⁹⁷ This à la carte approach was crucial in securing state support for the 1982 UNCLOS Convention and ensuring that both the treaty and ITLOS entered into force.

295. See *supra* Parts IV.B.3 (1948 Genocide Convention), IV.C (1949 International Court of Human Rights).

296. See *supra* Part IV.D.

297. See *supra* Part IV.D.2 (discussing the UNCLOS treaty).

Historical contingency should make us cautious about drawing strong lessons from the past. Advocates for new international courts may mobilize behind their proposals as soon as a crisis hits, adhere to more modest proposals when the international law is nascent, and ensure that their proposals are flexible when the legal regime is stable. And yet there is no guarantee of success.

B. *Theoretical Implications*

International law scholars have been engaged in an ongoing and lively debate about the efficacy of international courts.²⁹⁸ The debate is premised on three assumptions that the crisis argument calls into doubt. First, scholars assume that governments create international courts for functionalist reasons, but differ on the precise incentives. The crisis argument suggests that government motives underlying judicialization are more complex. Second, scholars on both sides of the debate assume that judicial independence influences judicial efficacy, but differ on whether the relationship is positively or negatively correlated. The crisis argument suggests that judicial efficacy may be a function of other forces. Finally, both sets of scholars assume that judicial efficacy can be captured by quantifiable indicators for usage and compliance rates, whereas the crisis argument holds that the concept of judicial efficacy should be more expansive.

Professors Eric Posner and John Yoo triggered this debate with their argument challenging the conventional wisdom about the relationship between judicial independence and judicial efficacy. They argued that states create international courts for the limited purpose of providing information and reducing the transaction costs of dispute settlement.²⁹⁹ States are drawn to create independent courts, characterized by compulsory jurisdiction and independent judges, because such courts have institutional memory and do not need to be established every time a dispute arises.³⁰⁰ But, they argue, independent courts are less effective than their dependent counterparts; analyzing the relationship between judicial independence and judicial efficacy,³⁰¹ they find that courts with independent judges are used less and have lower rates of compliance than courts with judges beholden to their national governments.³⁰² Posner and Yoo's broader argument suggests that having no courts may be preferable to establishing them.³⁰³

298. For a recent summary and critical analysis of this debate, see Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225 (2012).

299. See Posner & Yoo, *supra* note 26, at 14–22. But see Helfer & Slaughter, *supra* note 11, at 932.

300. Posner & Yoo, *supra* note 26, at 25.

301. For independence, they use measures such as the methods for appointing judges and the nature of a court's jurisdiction. For efficacy, they examine usage and compliance rates. *Id.* at 26–28.

302. *Id.* at 12–35.

303. "We argue . . . that independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant

Professors Laurence Helfer and Anne-Marie Slaughter have argued in response that states create international courts largely to signal their credibility, and that judicial independence allows courts to serve this important function.³⁰⁴ Helfer and Slaughter provide a more comprehensive analysis of existing international courts. They argue that judicial independence—or what they refer to as “constrained independence”³⁰⁵—is associated with more effective international courts, defined also in terms of usage and compliance rates.³⁰⁶

Both sides of the judicial efficacy debate direct their attention almost exclusively to the impact of judges,³⁰⁷ without examining why states choose to empower or constrain judges in the first place, and why they do so in some instances but not others. Rather than assume that states create independent courts to address informational asymmetries or signal credibility, the crisis argument holds that states create international courts partly to legitimize the legal regime that has been undermined. Independent judges are often perceived as more legitimate and, thus, better able to validate a discredited legal regime.³⁰⁸ States may therefore be more inclined to establish independent judges for courts created in response to conditions of crisis than courts established in response to considerations of power.

The argument that crisis shapes the degree of judicial independence (as well as courts’ other features) does not speak directly either to Posner and Yoo’s assertion that courts with dependent judges are effective or to Helfer and Slaughter’s response. It does, however, suggest that any policy prescription about judicial independence that does not consider full diversity of state motives in creating courts will miss the mark: they will not resonate with state officials and non-state actors authorized to design courts.

A crisis argument also suggests that the origins of courts in crisis may affect their efficacy irrespective of the role of judges. The argument here is not the typical one that holds that institutions created in response to crises tend to be dysfunctional—as they are designed to deal with severe and anomalous problems rather than common and routine matters. That argument is less relevant because legal networks usually mobilize and draft the core templates creating courts before the onset of a crisis. Crises are mo-

to use international tribunals unless they have control over the judges. On our view, independence prevents international tribunals from being effective.” *Id.* at 7.

304. See Helfer & Slaughter, *supra* note 11.

305. Asserting that states limit judicial autonomy through a range of tactics, ensuring that courts “operat[e] within a set of legal and political constraints.” *Id.* at 902.

306. *Id.* at 902; see also *id.* at 911–13. They analyze more courts, *id.* at 911–13, 911 n.38, and more systematically evaluate potentially confounding factors, omitted variables, etc., *id.* at 906, 906 n.16, 917–31.

307. For a more comprehensive analysis of the factors that may influence judicial efficacy, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 298–337 (1997) (identifying thirteen factors, including independence, that contributed to the efficacy of international adjudication in Europe).

308. Grossman, *supra* note 78 at 124.

ments in which states become receptive to such proposals, not moments of institutional epiphany that become obsolete once the crisis is over.

Yet, courts created in response to crisis may still confront challenges to their efficacy that courts created in times of stability do not. If states create international courts in order to legitimize a legal regime and as a response to crisis, they may design such courts to favor legitimacy over efficacy when the two are in tension. For example, the 1998 Rome Statute establishing the ICC prohibits states from filing reservations to the treaty.³⁰⁹ This sent a powerful normative signal about the non-derogability of human rights, but deterred participation of states, including the United States. In 1998, the ICC's independent prosecutor provision was celebrated as giving the court greater independence from the Security Council and the political machinations of states. The past decade, however, has shown how crucially dependent the prosecutor is on state cooperation and support for its decisions to be effective.³¹⁰ These examples suggest that the legitimating and efficacy roles of courts can be in tension.

It is of course also possible, indeed likely, that legitimacy and efficacy complement one another. It may be that courts created by powerful states risk being ineffective because they lack legitimacy.³¹¹ States that did not participate in the court's creation, for instance, may refrain from using it. In contrast, courts that are created in response to crisis may inspire more participation. This type of proposition could be evaluated empirically by comparing state use of the courts during the early years of their existence.

Yet the crisis argument questions whether current proxies, such as usage and compliance rates, are always the most appropriate indicators of a court's efficacy. Instead, it suggests that the concept of efficacy should be expanded. If the argument is correct that states create international courts not only for functional and political reasons but also for their legitimizing effect, then what makes a court effective may have little to do with rates of use and compliance. In this view, international courts are effective if they validate a legal regime that has been discredited, stabilize the international political legal order, and reaffirm legal rules and norms. To capture these political dynamics requires a more capacious metric for assessing the performance of courts.

309. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

310. See Darren Hawkins, *Power and Interests at the International Criminal Court*, 28 SAIS REV. INT'L AFF. 107, 117 (2008) (stating "[t]he prosecutor is deeply dependent on powerful states and has few tools to push cases forward in the absence of suspects"). For an interesting discussion of how the prosecutor has attempted to navigate this dependent role on state cooperation, see Prosper M. Bernard, *The Paradox of Institutional Conversion: The Evolution of Complementarity in the International Criminal Court*, 1 INT'L J. HUMAN. & SOC. SCI. 203 (2011).

311. For an overview of empirical research on the positive impact of procedural justice on legitimacy and compliance, see Stefan Machura, *Introduction: Procedural Justice, Law and Policy*, 20 L. & POL'Y 1 (1998).

CONCLUSION

This Article offers one of the first systematic and historically-grounded analyses of states' attempts to create international courts during the 20th century, examining both successes and failures. It argues that functionalism is hard-pressed to explain why some attempts at judicialization succeed and others fail. A power account provides more insight into judicialization for economic issues. For non-economic issues, however, the role of power does not conform to traditional expectations in which power shapes institutional outcomes. Instead, power matters, but mainly in providing the initial trigger for or exerting a veto effect on attempts at judicialization. For courts outside of the international economy, directing attention to the role of international legal crises can bridge the gap in our understanding. International legal crises facilitate the creation of international courts by both transforming state interests and empowering legal networks. States and non-state actors turn to the creation of international courts in the aftermath of crises to increase the efficacy of international law that has been challenged and to legitimize the legal regime that has been undermined. A fuller account of why states have turned to international courts requires integrating an analysis of political context, power structures, and the role of individual actors, including top political leaders, as well as international lawyers. In the end, crises pose serious challenges to international law. They also offer, however, important opportunities for its affirmation and dynamic evolution.

