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# **The United States and International Criminal Tribunals**

By

Harry M. Rhea

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School of Law  
National University of Ireland, Galway  
Galway, Ireland

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Supervised By: Professor William A. Schabas

## Summary of Contents

### *Summary of Contents*

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This study examines the policies put forth by the United States during international debates that established international criminal tribunals from the pre-First World War era to 2012. Each chapter closely considers the United States's role and position during each era. The first chapter covers the era prior to the First World War, including the development of the Lieber Code and the prosecution of Henry Wirz. The second chapter analyzes the United States's position on establishing an international criminal court for the prosecution of Germany's former Emperor, William II, at the Paris Peace Conference in 1919. Chapter three covers the interwar period. Chapter four covers the post-Second World War era and the United States's role in establishing the International Military Tribunal and the International Military Tribunal for the Far East. Chapter five considers the Cold War era and the United States's policy during the debates in the General Assembly, Genocide Convention, and Apartheid Convention on the topic of establishing an international criminal court. Chapter six considers the post-Cold War era and includes discussions in the United States to establish an international criminal tribunal for Iraq, as well as the United States's role in establishing the international criminal tribunals for the former Yugoslavia and Rwanda and the special courts for Sierra Leone and Lebanon. Furthermore, this study devotes two chapters to the relationship between the United States and the International Criminal Court. Chapter seven analyzes the period immediately following the Cold War from 1989 through the Rome Conference in 1998. Chapter eight analyzes the United States's position on the International Criminal Court during the period following the Rome Conference to the present time, including the last two years of William Clinton's presidency, the eight years of George W. Bush's presidency, and the first term of Barack Obama's presidency.

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*Introduction*

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The International Criminal Court is the first permanent international court to charge and prosecute those accused of violating international criminal law, those who commit war crimes, crimes against humanity, and genocide. Historically, permanent national and temporary multinational and international courts have been established to charge and prosecute perpetrators of international crimes for their offenses. In most circumstances, however, perpetrators have lived out their lives unpunished. The continuing need to create temporary courts for the prosecution of international crimes eventually resulted in the establishment of the permanent International Criminal Court. The Rome Statute of the International Criminal Court was adopted on 17 July 1998 and entered into force on 1 July 2002.

**Brief History of the International Criminal Court**

The idea of the International Criminal Court was long in the making.<sup>1</sup> The Allied Powers of the First World War originally preferred to create an international criminal court to prosecute Germany's former Kaiser, William II; however, they later abandoned the idea by compromising on a possible multinational criminal court that never came to fruition. Shortly thereafter there were discussions on the creation of a permanent international

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<sup>1</sup> Benjamin B. Ferencz, *An International Criminal Court: A Step Toward World Peace-A Documentary History and Analysis* (Oceana 1980); M. Cherif Bassiouni, "The Time Has Come for an International Criminal Court" (1991) 1 *Indiana Int'l & Comp L Rev* 1; M. Cherif Bassiouni, "The Need for an International Criminal Court in the New International World Order" (1992) 25 *Vanderbilt J Transnat'l L* 151; William N. Gianaris, "The New World Order and the Need for an International Criminal Court" (1992) 16 *Fordham Int'l LJ* 88; M. Cherif Bassiouni, "Establishing an International Criminal Court: Historical Survey" (1995) 149 *Military LR* 49; Timothy L. H. McCormack, "Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law" (1996-1997) 60 *Alb L Rev* 681; M. Cherif Bassiouni, "From Versailles to Rwanda in 75 years: The Need to Establish a Permanent International Court" (1997) 10 *Harv Hum Rts J* 11; Leila Nadya Sadat, "The Evolution of the ICC: From the Hague to Rome and Back Again," (1999) 8 *Mich St U-DCL J Int'l L* 97; Shabtai Rosenne, "Antecedents of the Rome Statute of the International Criminal Court Revisited" (2000) 75 *Int'l L Stud Ser US Naval War Col* 387; Dawn Rothe and Christopher W. Mullins, *Symbolic Gestures and the Generation of Global Social Control: The International Criminal Court* (Rowman & Littlefield 2006) Appendix B, 121-123; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 1-27; William A. Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 1-22.

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court with jurisdiction over criminal matters.<sup>2</sup> States had been willing to agree to certain rules and regulations during warfare (i.e., the Geneva Convention of 1864 and The Hague Conventions of 1899 and 1907), but they were unwilling to apply individual criminal responsibility to violators of these laws.

At the conclusion of the First World War, international law had not developed as a means of preventing and punishing individuals who violated the law. For example, the law created at the Hague Peace Conferences did not define violations as criminal conduct; therefore, they excluded procedural law for the prosecution and punishment of individuals accused of violating certain conventions. In May 1915, the British Empire, France, and Russia warned the “Young Turks” that they would be held accountable for the “crimes of Turkey against humanity and civilization” perpetrated by members of the Ottoman Empire against Armenian Christians, which included the mass deportation and murder of innocent men, women, and children during the First World War.<sup>3</sup> Pursuit of accountability for these crimes was unsuccessful.

Calls for creating an international criminal court gained little momentum during what turned out to be the interwar period. In 1937, the League of Nations responded to the crime of terrorism by adopting the Convention for the Prevention and Punishment of Terrorism.<sup>4</sup> The Convention for the Creation of an International Criminal Court was adopted by the League of Nations on the same day for the purpose of punishing violators of the Convention for the Prevention and Punishment of Terrorism.<sup>5</sup> The convention, however, only received the signature of India and never entered into force. More attention was focused on prohibiting war itself.<sup>6</sup> The Second World War commenced two decades after the end of the First World War and was greater than its predecessor in most respects, particularly regarding destruction and death.

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<sup>2</sup> See for example, H. E. Megalos Caloyanni, “The Proposals of M. Laval to the League of Nations for the Establishment of an International Permanent Tribunal in Criminal Matters” (1935) 21 *Transactions of the Grotius Society* 77; Manley O. Hudson, “The Proposed International Criminal Court” (1938) 32 *AJIL* 549.

<sup>3</sup> The Ambassador in France (Sharp) to the Secretary of State, 28 May 1915, *Papers Relating to the Foreign Relations of the United States, The World War, 1915, Supplement* (US GPO 1928) 981.

<sup>4</sup> Convention for the Prevention and Punishment of Terrorism (adopted 16 November 1937) LN Doc. C.547(I).M.384(I).

<sup>5</sup> Convention for the Creation of an International Criminal Court (adopted 16 November 1937) LN Doc. C.547.M.384.1937.V.

<sup>6</sup> For example, see General Treaty for the Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 24 July 1929) 2 *Bevans* 732.

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At the conclusion of the Second World War in 1945, the Allied victors formed a multinational military court to prosecute the major German war criminals for committing crimes against the peace, war crimes, and crimes against humanity.<sup>7</sup> This court was the International Military Tribunal, otherwise known as the Nuremberg Tribunal. The following year, the International Military Tribunal for the Far East was created. It charged and prosecuted Japanese war criminals for committing the same crimes as the Germans during the Second World War.<sup>8</sup>

Significant developments in international human rights law and international humanitarian law followed the conclusion of the tribunals' work. For example, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which referred to an international penal tribunal to prosecute accused *génocidaires*,<sup>9</sup> was adopted on 9 December 1948. The following day, the United Nations General Assembly adopted the Universal Declaration of Human Rights. Less than one year later, on 12 August 1949, four Geneva Conventions were adopted that specifically defined protected groups during armed conflicts. International criminal law evolved and, arguably, there became a legitimate need for an international criminal court.

During the drafting of the Genocide Convention, States made known their dislike for the idea of international criminal jurisdiction.<sup>10</sup> They realized that to create a permanent international criminal court, their military and political officials might also be at risk of prosecution if they committed a questionable act subject to international criminal jurisdiction. The United States recommended that the question of an international criminal court be considered at a later date to prevent delay in adopting the Genocide Convention.<sup>11</sup> This was agreed. Article VI of the Genocide Convention states that individuals accused of committing the crime of genocide may be prosecuted by an “international penal tribunal as may have jurisdiction with respect to those Contracting

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<sup>7</sup> Charter of the International Military Tribunal, appended to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed 8 August 1945) 13 *Dep't St Bull* 222; *Trial of War Criminals: Documents* (Dep't of St Pub 2420 US GPO 1945) 13; 82 UNTS 279 (IMT Charter) art. 6.

<sup>8</sup> Charter of the International Military Tribunal for the Far East (established 19 January 1946, General Order No. 1, amended 26 April 1946, General Order No. 20) 14 *Dep't St Bull* 361; *Trial of Japanese War Criminals: Documents* (Dep't of State Pub 2613 US GPO 1946) (IMTFE Charter) art. 5.

<sup>9</sup> GA Res. 260 A (III) art. 6.

<sup>10</sup> William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) ch. 8.

<sup>11</sup> Schabas, *Genocide in International Law*, 446.

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Parties which shall have accepted its jurisdiction.” States that disliked the idea of their nationals being prosecuted by an international criminal court were satisfied that each State would have to agree to be a party to such a court if one was ever created.

Following adoption of the Genocide Convention, the United Nations General Assembly immediately decided to pursue investigating the possibility of creating a permanent international criminal court. In the same resolution that adopted the Genocide Convention, the General Assembly invited the International Law Commission “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.”<sup>12</sup> As the Cold War heightened in 1954, the General Assembly postponed considering the question of an international criminal jurisdiction until the definition of aggression could be resolved.<sup>13</sup>

Excluding writings by academicians,<sup>14</sup> there was little progress in the United Nations towards creating a permanent international criminal court. As the Cold War came to an end, talks of creating a court resurfaced. In the late 1980s, Trinidad and Tobago proposed a resolution to the General Assembly that the International Law Commission should continue its study of a draft statute for an international criminal court, which had been suspended in 1954. The proposal came in response to widespread drug trafficking in Trinidad and Tobago, as well as throughout South America and the Caribbean Islands. In 1989, the General Assembly instructed the International Law Commission “to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons” accused of committing international crimes.<sup>15</sup>

The following year, the United States called for the prosecution of Saddam Hussein for his army’s illegal invasion of Kuwait and unlawful killing and hostage-taking of civilians. Shortly thereafter, mass atrocities including genocide, crimes against humanity and war crimes occurred in the former Yugoslavia and Rwanda. As a result,

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<sup>12</sup> GA Res. 260 B (III).

<sup>13</sup> GA Res. 898 (IX).

<sup>14</sup> See for example, John W. Bridge, “The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law” (1964) 13 *Int’l & Comp LQ* 1255; Jacob W. F. Sunberg, “The Case for an International Criminal Court” (1971) 37 *J Air L & Com* 211.

<sup>15</sup> GA Res. 44/39.



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the United Nations Security Council, through its power under Chapter VII of the United Nations Charter, created ad hoc international criminal tribunals to prosecute and punish those most responsible for the commission of international crimes in the former Yugoslavia and Rwanda.<sup>16</sup> The Security Council's power to create such tribunals was subsequently confirmed in the 2 October 1995 *Prosecutor v. Tadić* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.<sup>17</sup>

Concurrent with the Security Council creating the international criminal tribunals for the former Yugoslavia and Rwanda, the International Law Commission was completing its response to the question of creating an international criminal court. In 1994, the International Law Commission adopted the Draft Statute for an International Criminal Court and submitted it to the General Assembly.<sup>18</sup> In February 1995, the General Assembly established an Ad Hoc Committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission. In December 1995, the General Assembly established a preparatory commission open to all States to discuss major issues in the International Law Commission's draft statute and work towards a widely accepted convention for an international criminal court that could be considered by a conference of plenipotentiaries.<sup>19</sup>

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) was held in Rome from 15 June to 17 July 1998. On the last day of the Rome Conference, the Statute of the International Criminal Court was adopted.<sup>20</sup> After 60 States ratified the Rome Statute, it entered into force on 1 July 2002.

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<sup>16</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, SC Res. 827 (1993) UN Doc. S/RES/827, annex; Statute of the International Criminal Tribunal for Rwanda, SC Res. 955 (1994) UN Doc. S/RES/955, annex.

<sup>17</sup> *Prosecutor v. Duško Tadić* (IT-94-1-AR72) Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (2 October 1995).

<sup>18</sup> Report of the International Law Commission on the Work of its 46th Session (2 May - 22 July 1994) UN Doc. A/49/10, pp. 43-161.

<sup>19</sup> GA Res. 50/46, UN Doc. A/RES/50/46, para. 2.

<sup>20</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

### **United States Policy and International Criminal Tribunals**

Since the conception of an international criminal court, the United States has played an important role in each international debate. The United States influenced the creation of temporary international criminal tribunals and international support for national tribunals, as well as any progress towards creating a permanent international criminal court with certain restrictions. The one international criminal tribunal that has deviated from the United States's influence in the establishment of its statute, specifically in its relationship to the Security Council and jurisdiction over the crime of aggression, is the International Criminal Court.

The United States supports the idea and purpose of the International Criminal Court. Since post-American Civil War prosecutions, the United States has acknowledged that there are crimes so egregious that their perpetrators are to be prosecuted in the “great tribunal of nations.”<sup>21</sup> This statement, originally used to justify the prosecution of war criminals after the American Civil War, refers to the fact that some crimes shock the conscience of all humans and violate the criminal laws shared by all nations.

Since then, the United States has consistently argued that States must willingly participate in multinational or internationalized tribunals, except when the Security Council establishes ad hoc international criminal tribunals under Chapter VII of the United Nations Charter with respect to threats to the peace and breaches of the peace. Otherwise, prosecutions of international crimes should be practiced with consent from the prosecuting State. Such courts include national courts, including courts-martial and special commissions, multinational courts, and ad hoc international criminal tribunals established by agreement between States and the United Nations.

At the conclusion of the First World War, the majority of the Allied powers, including France and the British Empire, had pushed for the establishment of an international criminal tribunal to indict and prosecute Germany's ex-Kaiser, William II. The United States, however, had dissented against creating an international criminal court,<sup>22</sup> arguing that only national prosecutions by the concerned State or States should

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<sup>21</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM2975) Record Group 153, National Archives Building, Washington, DC.

<sup>22</sup> Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 4 April 1919, PPC Doc. F.W.181.12302/7, General Records of the

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occur. It was agreed that a special criminal tribunal of an “international character” would be established to prosecute German war criminals.<sup>23</sup> This tribunal would be a mixed, or united, tribunal<sup>24</sup> – in other words, a multinational criminal court.

Toward the end of the Second World War, the United States did not change its policy regarding an international criminal court, but it did favor and was influential in creating the International Military Tribunal, which was multinational rather than international.<sup>25</sup> Subsequently, on 19 January 1946, General MacArthur, Supreme Commander of the Pacific Allies, issued a proclamation establishing the International Military Tribunal for the Far East. Charters for both tribunals included crimes against the peace, war crimes, and crimes against humanity.<sup>26</sup> All three categories of crimes are now included under the jurisdiction of the International Criminal Court.<sup>27</sup> Crimes against the peace are called the “crime of aggression” in the Rome Statute. During the Cold War, the United States was suspicious of an international criminal court. It did not ratify the Genocide Convention until 1988, and included a reservation concerning an international penal tribunal under Article VI. The United States voted against the Apartheid Convention in 1973, which also included an international penal tribunal under Article V.

After the Cold War concluded, the United States supported the International Criminal Tribunals for the former Yugoslavia and Rwanda. The Security Council established both tribunals either during a breach of the peace or shortly thereafter. The United States also actively participated in drafting a statute and making many constructive proposals for the International Criminal Court before and during the Rome Conference. It argued for Security Council referrals as the means of triggering International Criminal Court investigations rather than creating ad hoc tribunals every time there were breaches of the peace. The majority of States at the Rome Conference

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American Commission to Negotiate Peace 1918-1931 (National Archives Microfilm No. 820, roll 142) Record Group 256, National Archives College Park, College Park, MD. The Memorandum was appended to the Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, p. 51 (Memorandum of Reservations).

<sup>23</sup> Memorandum of Reservations.

<sup>24</sup> Treaty of Peace Between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) (Treaty of Peace) art. 227.

<sup>25</sup> B.V.A. Röling, “The Law of War and the National Jurisdiction since 1945” (1961) 100 *Hague Academy of International Law, Collected Courses* 323, 356.

<sup>26</sup> IMT Charter, art. 6(a) & IMTFE Charter, art. 5(a).

<sup>27</sup> ICC Statute, art. 5.

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did not agree that the Security Council should control which situations the International Criminal Court would investigate, and the United States voted against the Rome Statute, which was adopted on 17 July 1998.

The United States, however, has demonstrated that it supports the idea and purpose of the International Criminal Court, as it has supported tribunals – national, multinational, and ad hoc international criminal tribunals – in the far and recent pasts. National, multinational, and ad hoc international criminal tribunals established by agreements all have State consent and cooperation.<sup>28</sup> The United States has demonstrated that it only supports international or multinational criminal tribunals without State consent and cooperation under two conditions: 1) when established by an occupying power after the victory of an armed conflict, and 2) through Security Council resolutions when a situation disrupts international peace and security. The United States has maintained a policy that the Security Council should establish an international criminal tribunal or refer a situation to the International Criminal Court. Otherwise, the United States supports ad hoc international criminal tribunals with State support and cooperation, for example, the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

On 17 July 1998, the United States was one of seven States that voted against the Rome Statute of the International Criminal Court.<sup>29</sup> Since then, much literature has been written to both criticize and defend the position of the United States. There has been substantially more written about the United States and the International Criminal Court than about any other State that has refused to ratify the Rome Statute, including China and Russia, which are also permanent members of the Security Council. This extra criticism is the result of the United States, which has claimed moral legitimacy in the international community and actively participated in and supported the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, challenging the establishment of a permanent institution with the purpose of prosecuting and punishing perpetrators who commit international crimes. However, as this study attempts to demonstrate, the United States is not concerned with the International Criminal Court as

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<sup>28</sup> It is true that Germany and Japan were coerced, but both unconditionally surrendered and the Allied victors that created these tribunals were occupying States at the time.

<sup>29</sup> States that joined the United States in voting against the Rome Statute were China, Israel, Iraq, Libya, Qatar, and Yemen.

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an institution; rather, it is concerned with the jurisdiction of the Court and the potential to undermine United States leadership in the international community through politically motivated indictments against its political or military leaders. According to some authors, it is hypocritical for the United States to impose international criminal justice on other States while refusing to hold itself equally accountable.<sup>30</sup> It is important to appreciate that some United States concerns regarding the International Criminal Court are illegitimate (i.e., constitutional concerns), while others are legitimate (i.e., jurisdiction over non-State Party nationals and potential politically motivated investigations by the prosecutor via *proprio motu* powers).

### Purpose of Study

Currently, throughout the international community there are many criticisms concerning the United States's foreign relations policies, in particular its position on the International Criminal Court. Yet, all previous multinational and international criminal tribunals that helped influence the creation of the International Criminal Court had the support of the United States. The question this study attempts to answer has two parts. First, does the United States have an underlying position towards international criminal tribunals that has remained constant throughout presidential administrations? If so, what are the reasons for this underlying policy? Another purpose of this study is to inform the relationship between the United States and international criminal tribunals, which has been evolving for more than 100 years. Today the relationship is at a particularly interesting point, since the United States is still considered to be the only superpower and there is only one permanent international criminal tribunal, the International Criminal Court.

It is also important for the reader to know what this study is not. First, this study does not attempt to criticize the success or failure of any international, national, or multinational criminal tribunal that the United States has or has not supported. Second, this study is not an attempt to criticize any past or present argument by the United States in favor of or against any international or multinational criminal tribunal.

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<sup>30</sup> See, for example, Mark D. Kielsgard, *Reluctant Engagement: U.S. Policy and the International Criminal Court* (Martinus Nijhoff 2010); Philipp Meißner, *The International Criminal Court Controversy: A Scrutiny of the United States' Major Objections Against the Rome Statute* (Lit Verlag 2005); Erna Paris, *The Sun Climbs Slow* (Seven Stories Press 2009).

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### **Methodology**

This research is based on the primary and secondary written records of the debates and positions taken by the United States regarding international criminal tribunals, as well as interviews with individuals who participated in the process. Many of the documents consulted seem never to have been studied previously. Interviewees included M. Cherif Bassiouni, Roger S. Clark, David Crane, Benjamin B. Ferencz, Richard J. Goldstone, Sandy Hodgkinson, William K. Lietzau, John F. Murphy, David J. Scheffer, Michael P. Scharf, David Tolbert, Ruth Wedgwood, and two delegates to the Rome Conference who spoke on condition of anonymity.

### **Concepts of International Courts and Tribunals<sup>31</sup>**

There are three types of tribunals to which this researcher will refer throughout the following chapters. These include national, multinational, and international criminal courts. National criminal courts are common State criminal courts, as well as special commissions and tribunals established by the State. An example of a national criminal court established to prosecute international crimes is the Iraqi High Tribunal.<sup>32</sup> Multinational criminal courts are courts established by two or more States to prosecute the same defendants for similar crimes. Examples of multinational criminal courts include the special court that was foreseen in Article 227 of the Treaty of Peace after the First World War and the International Military Tribunal established by France, the Soviet Union, the United Kingdom, and the United States after the Second World War.<sup>33</sup> Finally, international criminal courts and tribunals are established either by the Security Council through its Chapter VII powers of the Charter of the United Nations (i.e., the International Criminal Tribunals for the former Yugoslavia and Rwanda), by agreements between States and international organizations, such as the United Nations (i.e., the Special Court for Sierra Leone and the Special Tribunal for Lebanon), or States through the adoption of a treaty (i.e., the International Criminal Court).

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<sup>31</sup> For a more descriptive summary of concepts of international criminal courts, see Harry M. Rhea, "International Criminal Courts" in Cindy J. Smith, Sheldon X. Zhang, and Rosemary Barberet (eds), *Routledge Handbook of International Criminology* (Routledge 2011) 134-41.

<sup>32</sup> Iraqi High Criminal Court Law No. 10 (18 October 2005) *Al-Waqa'I Al-Iraqiya* No. 4006.

<sup>33</sup> Treaty of Peace, art. 227.

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### **Structure of Study**

Each chapter of this study brings to light the United States's role and position in each era considering the establishment of either an ad hoc or a permanent international or multinational criminal tribunal. The first chapter covers the era prior to the First World War. It sheds light on the practices and positions of the United States regarding the prosecution of international crimes in national courts and sets the stage for the fact that the United States favors and supports the prosecutions of war crimes in national courts. Shortly after General Orders No. 100, also known as the Lieber Code, was established in 1863, the United States prosecuted a former member of the Confederate Army for violations of the laws of war. The United States's position was that there was a higher law, and if violated, national courts may become instruments of enforcement on behalf of the international community.

After the first chapter, the reader will be familiar with the United States's previous positions when the question of establishing an international criminal court to prosecute the former Kaiser of Germany was debated in Paris after the First World War, which is analyzed in the second chapter. The United States argued against creating an international criminal court during the post-First World War debates; however, it agreed to the potential creation of a multinational court with "international character" and without juridical substance. The court that was envisioned in Article 227 of the Treaty of Peace was a multinational court, which was consistent with the past position of the United States that national courts were the proper instruments for enforcing the higher law – the law of nations.

Chapter three analyzes the interwar period, while chapter four analyzes one of the most crucial eras of international criminal law. After the Second World War, the United States was instrumental in establishing the International Military Tribunal for the prosecution of Nazi war criminals, as well as the International Military Tribunal for the Far East for the prosecution of Japanese war criminals. Previously, the United Nations War Crimes Commission had recommended establishing a United Nations War Crimes Court to prosecute war criminals, but the United States was one of the States that thought it best that 1) a multinational criminal court be established to prosecute major German war criminals, and 2) Allied powers establish national tribunals under their occupational

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law. The United States agreed that, as Supreme Allied Commander of the Pacific, General MacArthur would proclaim the establishment of the International Military Tribunal for the Far East, which included prosecutors from ten States other than the United States.

Chapter five covers the Cold War era and analyzes the United States's position during the debates leading to adoption of the Genocide Convention over the establishment of an international criminal court for the prosecution of the crime of genocide, as well as early efforts by the United Nations General Assembly to establish a permanent international criminal court between 1946 and 1954. The chapter concludes with the United States arguing against including an international penal tribunal within the jurisdiction of the Apartheid Convention.

Chapter six analyzes the United States's position on international criminal tribunals in the post-Cold War era. The United States's policy regarding the prosecution of international crimes committed during the First Gulf War and in the former Yugoslavia and Rwanda is of particular interest. It is during this era that the United States conceded the establishment of international criminal tribunals under certain conditions. Such conditions included a threatening presence to the international community and a resolution by the Security Council pursuant to its powers under Chapter VII of the Charter of the United Nations. Chapter six also analyzes the United States's role and support for the Special Court of Sierra Leone and the Special Tribunal for Lebanon.

This study devotes two chapters on the relationship between the United States and the International Criminal Court. Chapter 7 analyzes the period immediately following the Cold War from 1989 through the Rome Conference in 1998. While some political officials encouraged the United States to support the establishment of the International Criminal Court, the United States consistently maintained a high level of suspicion. At the Rome Conference in 1998, the United States favored the International Criminal Court if its investigations were triggered by the Security Council under Chapter VII of the Charter of the United Nations. This position was consistent with the United States's support of the ad hoc tribunals for the former Yugoslavia and Rwanda, which were created by the Security Council authorization under Chapter VII of the Charter of the



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United Nations. The media and other States should not have been surprised that the United States voted against the Rome Statute, especially given that the United States had not favored the International Criminal Court that was adopted on 17 July 1998, especially given that the United States had always been suspicious of an international criminal court.

Chapter 8 analyzes the United States position on the International Criminal Court following the Rome Conference to the present. This includes the last two years of the William Clinton's presidency, 8 years of George W. Bush's presidency, and the first term of Barack Obama's presidency. The chapter covers the United States's signing the Rome Statute and the first Review Conference of the International Criminal Court that took place in May-June 2010. The United States attended under its observer status as a signatory to the Rome Statute. The chapter concludes with analyses of official statements by the United States delegation at the Review Conference and Security Council 1970, which may give us a better understanding of where the relationship between the United States and the International Criminal Court is headed.

Chapter 9 concludes the study with the inference that the United States has consistently supported national, multinational, and ad hoc international criminal tribunals with the consent of the State, except in extreme circumstances – threats and breaches of the peace, in which case the United States supports international criminal tribunals, including the International Criminal Court, triggered by the Security Council. This policy has been consistent with United States presidents from Woodrow Wilson to the Barack Obama. While attitudes toward the International Criminal Court have changed over the years, there is no indication that the United States's policy toward international criminal tribunals will change in the foreseeable future.

*Chapter 1*

*Pre-First World War Era*

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The Constitution of the United States gives Congress the power to ordain and establish, from time to time, courts inferior to the Supreme Court,<sup>34</sup> and “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”<sup>35</sup> Treason was considered the worst crime in early America and is the only crime defined in the United States Constitution.<sup>36</sup> Moreover, “[t]he Continental Congress adopted a resolution on [21 August] 1776, stating that all persons not owing allegiance to America, ‘found lurking as spies in or about the fortifications or encampments of the armies of the United States,’ shall suffer death of punishment by sentence of a court-martial.”<sup>37</sup> In 1780, American soldiers captured Major John Andre while dressed as a civilian attempting to transfer a secret message from Benedict Arnold, who was attempting to betray America by surrendering his fort at West Point.<sup>38</sup> A military tribunal of officers designated by George Washington tried Andre.<sup>39</sup> He was sentenced to death and hanged on 2 October 1780.<sup>40</sup>

The trial of Major John Andre is an example of an early American tribunal established to prosecute what was considered the worst offense against the United States. In addition to the crime of treason, the United States Constitution authorizes Congress to punish crimes against the Law of Nations, a concept now referred to as international law. The United States had demonstrated since its beginning that national courts, particularly military tribunals, were well-equipped to prosecute the worst crimes. Numerous military tribunals were established to prosecute war criminals from the trial of John Andre through the American Civil War. It was during the Civil War that President Abraham Lincoln would call on a professor from Columbia College to develop the first

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<sup>34</sup> Constitution of the United States (signed 17 September 1787, inaugurated 4 March 1789) (US Constitution) art.1, sec. 8, and art. 3, sec. 1.

<sup>35</sup> US Constitution, art. 1, sec. 8.

<sup>36</sup> US Constitution, art. 3, sec. 3.

<sup>37</sup> Louis Fisher, “Military Tribunals: Historical Patterns and Lessons” (9 July 2004) CRS Report for Congress, p. 2.

<sup>38</sup> Fisher, “Military Tribunals,” 2.

<sup>39</sup> Fisher, “Military Tribunals,” 3.

<sup>40</sup> Fisher, “Military Tribunals,” 3.

codification of military conduct with the aim of minimizing unnecessary suffering during armed conflict.

### **General Orders No. 100**

The American Civil War saw great suffering and devastation.<sup>41</sup> In response, President Abraham Lincoln authorized the United States War Department to develop a code of conduct for the United States Army, which subsequently became one of the most important precedents for both the United States and the international community concerning international criminal law. Francis Lieber, a professor from Columbia College, developed a codification of 159 articles to govern the conduct of combatants participating in the Civil War.<sup>42</sup> On 24 April 1863, Lincoln approved General Orders No. 100,<sup>43</sup> the first codification of the laws of war.

Under Article 13 of the Lieber Code, military jurisdiction can either be conferred and defined by statute or derived from the common law of war.<sup>44</sup> Crimes defined by statute must be tried in the manner therein directed, but the character of courts to try and punish crimes under common law depends on the laws of each particular State.<sup>45</sup> Accordingly, in the United States military, crimes violating the “Rules and Articles of War” were to be tried by courts-martial; otherwise, common law crimes were to be tried by military commissions.<sup>46</sup>

Prisoners of war were to be prosecuted for crimes,<sup>47</sup> and the death penalty could be imposed for certain offenses:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized office, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding,

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<sup>41</sup> Benjamin B. Ferencz, *An International Criminal Court: A Step Toward World Peace-A Documentary History and Analysis*, vol. 1 (Oceana 1980) 4.

<sup>42</sup> “General Orders No. 100: Instructions for the Government of Armies of the United States in the Field” (24 April 1863) *General Orders, War Department, Office of the Adjutant General’s Office, January-June 1863*, Box 7, Record Group 94, National Archives Building, Washington, DC. (Lieber Code).

<sup>43</sup> Lieber Code; See also Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Dep’t of War 1898); William S. Shepard, “One Hundredth Anniversary of the Lieber Code” (1963) 18 *Military LR* 157; George B Davis, “Dr. Francis Lieber’s Instructions for the Government of the Armies in the Field” (1907) 1 *AJIL* 13.

<sup>44</sup> Lieber Code, art. 13.

<sup>45</sup> Lieber Code, art. 13.

<sup>46</sup> Lieber Code, art. 13.

<sup>47</sup> Lieber Code, art. 59.

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maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.<sup>48</sup>

Moreover, under Article 71, “[w]hoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted.”<sup>49</sup> Much of the Lieber Code subsequently was recognized as an authoritative statement of customary international law, limiting States and military personnel to specific conduct in the field during war in the attempt to diminish unnecessary suffering.

There was no discussion of establishing an international court to prosecute violators of the Lieber Code, since the purpose of the Code was to regulate the conduct of the Union Army. It was a national code and violators would be prosecuted in national courts. During an interview, Lincoln was once asked about an international arbitral court to resolve disputes; he answered that “he thought the idea was a good one in the abstract” and that it was worth airing,<sup>50</sup> but that the American people did not have the temper for such a court.<sup>51</sup> There was no further initiative to create an international tribunal with either civil or criminal jurisdiction.

### **International Committee of the Red Cross**

The International Committee of the Red Cross was founded in 1863. In Geneva on 22 August 1864, at least twelve States signed and adopted the Committee’s first convention in an attempt to lessen the suffering of those wounded on the battlefield. The title of the convention was the Amelioration of the Condition of the Wounded on the Field of Battle (Geneva Convention).<sup>52</sup> The Geneva Convention was short and only included 10 articles, protecting the wounded on the battlefield, in ambulances, and in hospitals.

One of the founding members of the International Committee of the Red Cross, Gustave Moynier, originally thought that public criticism of violations of the Geneva Convention would be strong enough to deter future violators. Moynier believed that an

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<sup>48</sup> Lieber Code, art. 44.

<sup>49</sup> Lieber Code, art. 71.

<sup>50</sup> Thomas Balch, *International Courts of Arbitration* (4th edn, Allen, Lane & Scott 1912) 9.

<sup>51</sup> Balch, *International Courts of Arbitration*, 9.

<sup>52</sup> Amelioration of the Condition of the Wounded on the Field of Battle (signed on 22 August 1864, entered into force on 22 June 1865) 1 Bevens 7.

international criminal court was unnecessary and perhaps problematic since, in his opinion, “a treaty is not a law imposed by a superior authority on its subordinates.”<sup>53</sup> He wrote, “It is only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them.”<sup>54</sup> Moynier’s position was that “public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down.”<sup>55</sup> However, when the Franco-Prussian War, which included human rights atrocities, commenced shortly afterwards, he realized that public criticism would be insufficient to deter war crimes.<sup>56</sup> Moynier was concerned that there was no practical enforcement of the Geneva Convention. He changed his prior opinion that punishment could not be implemented for violations of the Geneva Conventions.<sup>57</sup> He also realized that punishment “could not be exercised by ‘the belligerents’ ordinary tribunals because, however respectable their magistrates might be, they could at any time unknowingly be influenced by their social environment.’ Such cases, therefore, would have to be handled by an international tribunal, appointed by another convention.”<sup>58</sup> Consequently, at the meeting of the International Committee of the Red Cross on 3 January 1872, Moynier presented a proposal for an international criminal tribunal to punish violators of the Geneva Convention.<sup>59</sup> This was the first proposal for a permanent international criminal court.<sup>60</sup>

According to Moynier’s proposal, as soon as war was declared, the President of the Swiss Confederation would choose three neutral States who would, along with the belligerent States, nominate an adjudicator.<sup>61</sup> The five-member international criminal

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<sup>53</sup>Quoted in Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (first published 1963, Henry Dunant Institute, ICRC 1985) 282.

<sup>54</sup> Quoted in Boissier, *From Solferino to Tsushima*, 282.

<sup>55</sup> Quoted in Boissier, *From Solferino to Tsushima*, 282.

<sup>56</sup> Boissier, *From Solferino to Tsushima*, 282.

<sup>57</sup> Boissier, *From Solferino to Tsushima*, 282.

<sup>58</sup> Boissier, *From Solferino to Tsushima*, 282-83.

<sup>59</sup> For the text of Moynier’s draft convention for an international criminal court, see “Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention” reproduced in Christopher Keith Hall, “The First Proposal for a Permanent International Criminal Court” (1998) 322 *Int’l Rev of the Red Cross* 57, annex.

<sup>60</sup> Hall, “The First Proposal.”

<sup>61</sup> “Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention” reproduced in Hall, “The First Proposal for a Permanent International Criminal Court,” annex, art. 2.

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tribunal would study the facts of the case, present a decision of guilty or not guilty, and if guilt was established, pronounce a penalty in accordance with international law.<sup>62</sup> The tribunal would also have the ability to rule on a claim for damages and to fix the amount of the compensation.<sup>63</sup>

The problem with Moynier's attempt to form a permanent international criminal tribunal for the prosecution of violations of the Geneva Convention was that States Parties had been reluctant to pass domestic laws criminalizing violations of the Convention;<sup>64</sup> therefore, an international criminal court was not welcomed. No State publicly considered Moynier's draft.<sup>65</sup> Moreover, Moynier received little support, including from international legal progressives, for his draft proposal for a permanent international criminal court. Even Francis Lieber, who had developed the first codification of the law of war only one year before the Geneva Convention, did not support Moynier's proposal.<sup>66</sup> And while dozens of books and articles have been written covering the historic attempts to create a permanent international criminal court, almost none refer to the first proposal.<sup>67</sup>

### Henry Wirz Trial

On 23 August 1865, under Special Orders No. 453, a Special Military Commission was appointed for the trial of Henry Wirz and such other prisoners as may be brought before it.<sup>68</sup> After the conclusion of the American Civil War, Captain Wirz, Commandant of

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<sup>62</sup> Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention" reproduced in Hall, "The First Proposal," annex, art. 5

<sup>63</sup> Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention" reproduced in Hall, "The First Proposal," annex, art. 8

<sup>64</sup> Hall, "The First Proposal," 60.

<sup>65</sup> Hall, "The First Proposal," 60.

<sup>66</sup> Boissier, *From Solferino to Tsushima*, 283, 285.

<sup>67</sup> Hall, "The First Proposal."

<sup>68</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM2975) Box 153, Folder 1, p. 1, Record Group 153 (RG 153), National Archives Building, Washington, DC (NAB). The transcript of the Henry Wirz trial was reproduced in *Trial of Henry Wirz, Letter from the Secretary of War Ad Interim in Answer to a Resolution of the House of April 16, 1866, transmitting a summary of the Trial of Henry Wirz*, 40th Cong, Ex Doc. No. 23. However, the pages differ from the original transcripts at the archives. For other writings on the Wirz trial, see, generally, Norton Parker Chipman, *The Tragedy at Andersonville: Trial of Captain Henry Wirz, the Prison Keeper* (Bancroft 1911); Lewis L. Laska and James M. Smith, "'Hell and the Devil': Andersonville and the Trial of Henry Wirz, C.S.A., 1865" (1975) 68 *Military LR* 77; Darrett B. Rutman, "War Crimes and the Trial of Henry Wirz" (1960) 6 *Civ War Hist* 117.

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Camp Sumter, the Confederate prison in Andersonville, Georgia, was arraigned before a special military commission constituted by the President of the United States.<sup>69</sup> Captain Wirz was charged with two offenses. The first charge read as follows:

Maliciously, willfully, and traitorously, and in aid of the then existing armed rebellion against the United States of America, on or before the first day of March, A.D. 1864, and on divers other days between that day and the tenth day of April, 1865, combining, confederating, and conspiring together with John H. Winder, Richard B Winder, R. R. Stevenson, and others unknown, to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States and in the military prisons thereof, to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.<sup>70</sup>

The second charge read, “Murder, in violation of the laws and customs of war.”<sup>71</sup>

Special military commissions were and continue to be lawful under United States law, but the legality of the charges against Wirz was questionable. For example, both charges against Wirz stated that he had acted “in violation of the laws and customs of war.”<sup>72</sup> The Lieber Code had only been developed two years prior; therefore, it was questionable if there had been previously established customary international law concerning the laws of war, and if there was, to what extent. There have always been arguments over the validity of customary international law; in 1865, the argument against it would have been especially strong.

The Special Military Commission established to prosecute Wirz violated the expressed stipulations under which the Confederacy had surrendered, specifically that “all officers and men” fighting under the Confederacy “[would] be permitted to return to their homes not to be disturbed by the United States authorities, so long as they observe

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<sup>69</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM297), Box 1264, Folder 1, p. 1, RG 153, NAB.

<sup>70</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM2975) Box 1264, Folder 1, p. 5, RG 153, NAB.

<sup>71</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM2975) Box 1264, Folder 1, p. 7, RG 153, NAB.

<sup>72</sup> S. S. Gregory, “Criminal Responsibility of Sovereigns for Willful Violations of the Laws of War” (1920) 6 *Virginia LR* 400.

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their obligation and the laws in force where they may reside.”<sup>73</sup> Wirz was never charged with any violations of the laws in force where he resided. Rather, he was charged for acts he had committed during the American Civil War. Wirz made this argument on 24 August 1865, the day after his arraignment, when his defense denied the jurisdiction of the commission, stating that it was against well-established usage to violate conditions of peace treaties with prosecutions.<sup>74</sup>

In response to Wirz’s argument over the jurisdiction of the court, including violations of customary law and the principle of legality, the judge advocate stated:

It cannot be admitted for one moment that anything short of a special pardon by the President of the United States, setting forth precisely the offences pardoned, can give exemption for trial for acts in violation of the laws and customs of civilized warfare, especially when they involve crimes so enormous and atrocious as those charged upon the prisoner here arraigned.<sup>75</sup>

The judge advocate further stated:

In the forum of nations there is a higher law, a law paramount to any rule of action prescribed by either of them, and which cannot be abrogated or nullified by either. Whatever the peculiar forms or rights of this or that government, its subjects acquire no control or power other than is sanctioned by the great tribunal of nations. We turn then to the code international where the purest morals, the highest sense of Justice, the most exalted principles of ethics, are the corner-stones, that we may learn to be guided in our duties to this prisoner.<sup>76</sup>

The judge advocate’s reference to the “great tribunal of nations” concerns a tribunal in which the offender could be judged by a national court representing all nations – in other words, the international community. He also notes the “code international” that is to guide the court’s duties. The very fact that the United States prosecuted Wirz under a higher law in the “great tribunal of nations” demonstrated that he was prosecuted

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<sup>73</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM2975) Box 1264, Folder 1, p. 20, RG 153, NAB.

<sup>74</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM2975) Box 1264, Folder 1, p. 20, RG 153, NAB.

<sup>75</sup> Records of the Office of the Judge Advocate General (Army), Court Martial Case Files 1809-1894 (File No. MM2975) Box 1264, Folder 1, p. 58, RG 153, NAB.

<sup>76</sup> Gregory, “Criminal Responsibility of Sovereigns,” 404-05.



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for crimes against the international community in a national court on behalf of the international community. Thus, the situation lived up to the “code international.”

It was also questionable whether a superior could be prosecuted for acts committed by subordinates in the absence of evidence that these were perpetrated pursuant to his orders. There was no evidence that Wirz had ever directly murdered any prisoners. He was held responsible because he was the commander of Andersonville Prison, where several prisoners of war were improperly treated, resulting in death.

The issue concerning customary international law may also be raised concerning the retroactivity of laws, since they were based on customs and not treaties or positive law. When Wirz argued that his trial violated the immunity included in the terms of peace between the Northern and Southern armies, the trial judge advocate stated that there could be no “exception from trial for acts in violation of the laws and customs of civilized warfare, especially when they involve crimes so enormous and atrocious as those charged upon the prisoner here arraigned.”<sup>77</sup> However, there must have been exceptions, since there are no known prosecutions of the troops who fought for the United States Army and committed war crimes. This criticism is known as “victors’ justice,” which refers to the policy decision of the victorious army to prosecute only their adversaries in the conflict without prosecuting members of its own army for committing war crimes.

### **Conclusion**

From its infancy through the end of the 19th century, the United States conferred upon its national courts, particularly courts-martial and military commissions, jurisdiction to prosecute war crimes. Moreover, by prosecuting Henry Wirz, the United States established a policy of recognizing a “higher law” that may be prosecuted in national courts representing the “great tribunal of nations.” Therefore, the United States confirmed its belief that violations of international law, such as war crimes, should be prosecuted in national courts on behalf of the international community.

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<sup>77</sup> Gregory, *Criminal Responsibility of Sovereigns*,” 405-06.

*Chapter 2*

*Post-First World War Era*

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The First World War began in 1914. As the war ensued, American popular opinion held that the German Kaiser, William II, was the chief villain for his role in initiating the war.<sup>78</sup> Politicians and world leaders also shared this attitude.<sup>79</sup> On 9 November 1918, William II abdicated his throne and left for Holland, where he would remain. Two days later, the armistice to end hostilities entered into force.<sup>80</sup> The armistice would control relations between the contracting parties until the entry into force of a permanent peace treaty. During the armistice, President Woodrow Wilson focused on a peaceful future rather than punishing violators of the laws and customs of war.

Shortly after the armistice with Germany entered into force, States from around the world gathered in Paris to negotiate a peace treaty that would permanently end hostilities. At the Conference on the Preliminaries of Peace (Paris Peace Conference), Wilson promoted the establishment of the League of Nations, which included in its Covenant an international court<sup>81</sup> without jurisdiction to prosecute individuals who commit international crimes. This court, the Permanent Court of International Justice, had limited jurisdiction to hear disputes between States. It would be similar to the Court of Arbitral Justice, which had never come to fruition but had been supported by the United States at the Second Hague Peace Conference in 1907.

Differences of opinion between Wilson, David Lloyd George (British Empire), and Georges Clemenceau (France) concerning how to punish war criminals became a controversial issue prior to the start of the Paris Peace Conference. A meeting was held in London on 2 December 1918, at which time the governments of France, the British Empire, and Italy “agreed to recommend that a demand ought to be presented to Holland

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<sup>78</sup> See Robert J. Mener, “The Kaiser and Germany in Popular Opinion” (1916) 15 *South Atlantic Quarterly* 101; see also James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press 1982) 37, 40.

<sup>79</sup> Henry F. Pringle, *The Life and Times of William Howard Taft*, vol. 2 (Farrar and Rinehart 1939) 872. Theodore Roosevelt shared this view. President Woodrow Wilson inconsistently shared this view. France, Belgium, and particularly the British Empire’s political leaders would push for the indictment of the former Kaiser.

<sup>80</sup> Terms of the Armistice with Germany (signed 11 November 1918)

<sup>81</sup> Treaty of Peace Between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) (Treaty of Peace) art. 14.

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for the surrender of the person of the Kaiser for trial, by an International Court to be appointed by the Allies.<sup>82</sup> The agreement was influenced by the following considerations:

- a. That justice requires that the Kaiser and his primal accomplices who designed and caused the war with its malignant purpose or, who were responsible for the incalculable sufferings inflicted on the human race during the war, should be brought to trial and punished for the crimes.
- b. That certain inevitable personal punishment for crimes against humanity and international right will be a very important security against future attempts to make war wrongfully or to violate International Law and is a necessary stage in the development of the authority of a League of Nations.
- c. That it will be impossible to bring to justice lesser criminals, such as those who have oppressed the French and Belgians and other peoples, committed murder on the high seas, and maltreated prisoners of war, if the arch-criminal, who for 30 years has proclaimed himself the sole arbiter of German policy and has been so in fact, escapes condign punishment.
- d. That the Court, by which the question of responsibility for the war and its grosser barbarities should be determined, ought to be appointed by those nations who have played a principal part in winning the war and have thereby shown their understanding of what freedom means and their readiness to make unlimited sacrifices in its behalf. This clause is intended to relate only to the composition of the Court which will deal with the crimes committed in connection with the late war and is not intended to prejudice the question of the composition of the International Courts under a League of Nations.<sup>83</sup>

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<sup>82</sup> The British Embassy to the Department of State, received 3 December 1918, quoting the Telegram from Mr. Balfour to Mr. Barclay, London, 2 December 1918, *Foreign Relations of the United States, Diplomatic Papers (FRUS), 1919, Paris Peace Conference (PPC)*, vol. 2 (US GPO 1934) 653.

<sup>83</sup> The British Embassy to the Department of State, received 3 December 1918, quoting the Telegram from Mr. Balfour to Mr. Barclay, London, 2 December 1918, *FRUS, 1919, PPC*, vol. 2 (US GPO 1934) 653-54.

France, the British Empire, and Italy hoped that the United States representatives would share their views and join them in presenting a request to Holland for William II's surrender so that he could be prosecuted in an international criminal tribunal.<sup>84</sup>

After arriving in Paris to a hero's welcome, Wilson presented his agenda to the preliminary conference on 17 January 1919, where he suggested a list of issues be debated: the League of Nations, reparations, new States, frontiers and territorial changes, and colonies.<sup>85</sup> This event suggests that from the beginning, the United States did not consider punishing war criminals, particularly the former Kaiser, to be an important question. Lloyd George suggested adding to Wilson's list the issue of "Punishment of those guilty of offences against the Law of Nations."<sup>86</sup> Mr. Pichon (France) immediately presented a more complete list that included 18 questions. Pichon's list had been prepared in advance; it was very specific and included Lloyd George's suggestion. Number 15 on Pichon's list was "Penalties against crimes committed during the war."<sup>87</sup>

The following day, Wilson recommended that Georges Clemenceau be elected President of the Paris Peace Conference. Lloyd George and Baron Sonnino (Italy) agreed. As the last part of the order of the day, Clemenceau put forward three important questions for the Conference regarding responsibilities of the authors of the war, penalty for the crimes committed during the war, and international legislation on labor.<sup>88</sup> Clemenceau stated that the first question was urgent and "if it is wished to establish law in the world, penalties for the breach thereof can be applied at once, since the Allied and Associated Powers are victorious."<sup>89</sup> According to Clemenceau, the Allied powers were justified in establishing law and immediately implementing punishment for its violations simply because they had won the war. Most States that supported an international criminal court were not concerned with implementing victors' justice.

It was evident that the Allied powers, particularly the British Empire and France, intended to make good on their previous punitive threats by prosecuting high-ranking German officials, including William II. A commission would need to be established to

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<sup>84</sup> The British Embassy to the Department of State, received 3 December 1918, quoting the Telegram from Mr. Balfour to Mr. Barclay, London, 2 December 1918, *FRUS, 1919, PPC*, vol. 2 (US GPO 1934) 654.

<sup>85</sup> Council of Ten meeting, 17 January 1919, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 602.

<sup>86</sup> Council of Ten meeting, 17 January 1919, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 606.

<sup>87</sup> Council of Ten meeting, 17 January 1919, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 607.

<sup>88</sup> Plenary Session, 18 January 1919, Protocol No. 1, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 169.

<sup>89</sup> Plenary Session, 18 January 1919, Protocol No. 1, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 169.

determine who would be prosecuted and in what type of court they would stand trial. This would not be an easy task. Clemenceau had acknowledged that law needed to be established, which meant there was no law in place at the time.

**Commission on the Responsibility of the Authors of the War and on the  
Enforcement of Penalties**

On 25 January 1919, the order of the day was to appoint five commissions, each to be charged with the duty of examining one of the following questions: the League of Nations; responsibility of the authors of the war and enforcement of penalties; reparations for damage; international legislation on labor; and international control of ports, waterways, and railways.<sup>90</sup> Later in the day, the Draft Resolution Relative to the Responsibility of the Authors of the War and the Enforcement of Penalties was presented, which stated the following:

That a Commission, composed of two representatives apiece from the five Great Powers and five representatives to be elected by the other Powers, be appointed to inquire into and report upon the following:

1. The Responsibility of the authors of war.
2. The facts as to the breaches of the customs of law committed by the forces of the German Empire and their Allies on land, on sea and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.
4. The Constitution and procedure of a tribunal appropriate to the trial of these offences.
5. Any other matters cognate or ancillary to the above which may arise in the course of the inquiry and which the Commission finds it useful and relevant to take into consideration.<sup>91</sup>

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<sup>90</sup> Plenary Session, 25 January 1919, Protocol No. 2, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 177.

<sup>91</sup> Draft Resolution Relative to the Responsibility of the Authors of the War and the Enforcement of Penalties, Preliminary Peace Conference, Protocol No. 2, 25 January 1919, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 176, annex 2, at 202; Excerpt from the Minutes of a Meeting of the Plenary Session-Protocol No. 2, 25 January 1919, PPC Doc. 181.12/3, annex 2 (National Archives Microfilm No. 820 (M820), roll

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According to the Draft Resolution, the five “Great Powers” that would each appoint two members to the Commission consisted of the United States, the British Empire, France, Italy, and Japan. The five other States consisted of Belgium, Greece, Poland, Rumania, and Serbia.<sup>92</sup> Each of the five other States appointed one representative to the Commission, totaling 15 members in all. United States members on the Commission were the Secretary of State, the Honorable Robert Lansing, and Mr. David Hunter Miller.<sup>93</sup> On 3 February 1919, shortly before the Commission held its first meeting, Mr. James Brown Scott, United States member of the Commission for the Study of International Control over Ports, Waterways and Railways, switched commissions with Miller and joined Lansing on the Commission of Responsibility of the Authors of the War and on the Enforcement of Penalties.<sup>94</sup> On the first day of meetings, Lansing was nominated and unanimously elected as President of the Commission.<sup>95</sup>

During his address to the Commission, Lansing proposed a system of sub-commissions to consider the five points submitted by the Conference.<sup>96</sup> Three sub-commissions were created.<sup>97</sup> Sub-Commission No. 1 on Criminal Acts was instructed to investigate and “establish the facts relating to culpable conduct which (a) brought about the World War and accompanied its inception, and (b) took place in the course of hostilities.”<sup>98</sup> Based on the facts established by Sub-Commission No. 1, Sub-

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140) General Records of the American Commission to Negotiate Peace 1918-1931 (GR 1918-1931), Record Group 256 (RG 256), National Archives at College Park, College Park, MD (NACP).

<sup>92</sup> Preliminary Peace Conference, Protocol No. 2, 25 January 1919, *FRUS, 1919, PPC*, vol. 3 (US GPO 1943) 204-05, annex 7, para. 2; Excerpt from the Minutes of a Meeting of the Plenary Session-Protocol No. 2, 25 January 1919, PPC Doc. 181.12/3½ (M820, roll 140) GR 1918-1931, RG 256, NACP.

<sup>93</sup> US Naval Communication Service Attached to the American Commission to Negotiate Peace, Outgoing Dispatch, 31 January 1919, PPC Doc. 181.12/8A, (M820, roll 140) GR 1918-1931, RG 256, NACP.

<sup>94</sup> US Naval Communication Service Attached to the American Commission to Negotiate Peace, Outgoing Dispatch, 3 February 1919, PPC Doc. 181.12/9A, (M820, roll 140) GR 1918-1931, RG 256, NACP.

<sup>95</sup> Minutes of the First Meeting, 3 February 1919, at 3 p.m., *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Minutes of Meetings of the Commission*, PPC Doc. 181.1201/16, pp. 1-2 (M820, roll 142) GR 1918-1931, RG 256, NACP. (Minutes of Meetings of the Commission). An official copy of the minutes is also in the Frank L. Polk Papers, Group 656, Series III, Box 30, Folder 530, Yale University Library’s Manuscripts and Archives, New Haven, CT, with pp. ii, iii, 206 and 207 missing from the document. It should be noted that these are the same minutes that James F. Willis cites from Yale University. However, when this researcher examined Polk’s Papers, they had since been moved from Drawer 76 (as cited by Willis) to Group 656, Series III, Box 30, Folder 530.

<sup>96</sup> Minutes of the First Meeting, 3 February 1919, at 3 p.m., Minutes of Meetings of the Commission, p. 2.

<sup>97</sup> Minutes of the First Meeting, 3 February 1919, at 3 p.m., Minutes of Meetings of the Commission, pp. 2-3.

<sup>98</sup> Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, PPC Doc. 181.1202/7, p. 2 (M820,

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Commission No. 2 on the Responsibility for the War was instructed to determine if prosecutions of persons who had brought about the World War could be instituted.<sup>99</sup> If it was agreed that prosecutions could be instituted, then Sub-Commission No. 2 was further instructed to prepare a report listing the persons who should be prosecuted and the type of court that should hear the proceedings.<sup>100</sup> Also based on the facts established by Sub-Commission No. 1, Sub-Commission No. 3 on the Responsibility for the Violation of the Laws and Customs of War was instructed to determine if prosecutions of persons who had violated the laws and customs of war could be instituted.<sup>101</sup> If it was agreed that prosecutions could be instituted, then Sub-Commission No. 3 was further instructed to prepare a report listing the persons who should be prosecuted and the type of court that should hear the proceedings.<sup>102</sup>

### Initial Proposals for a Tribunal

Immediately after the Commission's first meeting, the question arose as to whether or not there was any "responsibility of the Emperor William II before the Allied and Associate military tribunals."<sup>103</sup> There was no argument that terrible crimes had been committed and few States disagreed with how to punish the perpetrators – summary executions were not an option, so the most popular alternative was criminal prosecutions. However, who would be prosecuted and by what form of court was hotly debated.

During the Commission's first meeting, F. Larnaude and A. de Lapradelle submitted a report describing the criminal liability of William II. In the report, the authors stated that "a tribunal must be found which by its composition, the position it occupies, and the authority with which it is clothed, is able to deliver the most solemn

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roll 142) GR 1918-1931, RG 256, NACP. An official copy of the Commission's Report is also in the Papers of Colonel E. M. House, Group 466, Series III, Box 197, Folder 2/408, Yale University Library's Manuscripts and Archives, New Haven, CT. The Commission's Report originally appeared in the Appendix to Minutes of the Eleventh Meeting of the Meetings of the Commission, p. 2. Subsequently, the Commission's Report was reproduced by the Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *Violations of the Laws and Customs of War: Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities* (Clarendon Press 1919); see also "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" (1920) 17 *AJIL* 95 (Commission's Report).

<sup>99</sup> Commission's Report, p. 2.

<sup>100</sup> Commission's Report, p. 2.

<sup>101</sup> Commission's Report, p. 2.

<sup>102</sup> Commission's Report, p. 2.

<sup>103</sup> Inquiry into the Penal Liabilities of the Emperor William II by F. Larnaude and A. de Lapradelle, Annex to Minutes of First Meeting, Minutes of Meetings of the Commission, p. 4.

judgment the world has ever seen.”<sup>104</sup> The report further noted that “the facts charged against William II are international crimes” and that “he must be tried before an international tribunal.”<sup>105</sup> Larnaude and de Lapradelle wrote that it was necessary to create an international criminal court since national tribunals of any one of the Allied or Associate powers were not competent to pass judgment upon crimes against the law of nations.<sup>106</sup>

These statements focused on two of the three goals that the Commission would attempt to achieve and that the United States would counter: the creation of an international criminal tribunal, the prosecution of a head of State, and the charge of violating the “laws of humanity.” The report presented positions supporting the creation of an international criminal tribunal that proponents would argue during the Commission’s meetings. The call for the creation of an international criminal tribunal within the Commission had been made and agreed to by the British Empire, France, and other States. Members of Sub-Commission No. 3 voted to recommend an international tribunal in its final report to the Conference.<sup>107</sup>

Ernest Pollock (British Empire) favored an international criminal tribunal more than any other member on the Commission. Speaking before the Commission at its second meeting, Pollock informed the other members that a Committee in London had already examined many facts relating to war crimes and that its deliberations had led to a point at which it was able “to indicate a number of persons whom it is desirable to bring before the Tribunal, when it has been duly established.”<sup>108</sup> Pollock and others thought that nothing should interfere with the creation and procedure of the tribunal. He argued that the time offered an opportunity to establish and develop international law based on

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<sup>104</sup> F. Larnaude and A. de Lapradelle, “May William II be Tried by a Special International Tribunal” Annex to Minutes of First Meeting, Minutes of Meetings of the Commission, p. 9.

<sup>105</sup> F. Larnaude and A. de Lapradelle, “May William II be Tried by a Special International Tribunal” Annex to Minutes of First Meeting, Minutes of Meetings of the Commission, p. 9.

<sup>106</sup> F. Larnaude and A. de Lapradelle, “May William II be Tried by a Special International Tribunal” Annex to Minutes of First Meeting, Minutes of Meetings of the Commission, p. 14.

<sup>107</sup> Willis, *Prologue to Nuremberg*, 73.

<sup>108</sup> Proceedings of a Meeting of the Commission on the Responsibilities for the War, 7 February 1919, at 11:00 a.m., PPC Doc. 181.1201/2 (M820, roll 140) GR 1918-1931, RG 256, NACP. See also Memorandum Presented by the Solicitor-General of England, Minutes of the Second Meeting, Minutes of Meetings of the Commission, annex III, pp. 28-29.



public opinion.<sup>109</sup> Pollock further argued that strict measures should be taken to surrender guilty persons so that they could appear before an international criminal court.<sup>110</sup> Five days after the Commission's second meeting concluded, the British Empire submitted a memorandum that included the composition of an international tribunal.<sup>111</sup> The first paragraph of the memorandum read, "That an International Tribunal be established, composed of representatives of the chief Allied States and the United States for the trial and punishment of offences against the laws and customs of war and the laws of humanity."<sup>112</sup>

Pollock also wished to expand the duties of the Commission. He emphasized the importance of arresting all the guilty parties belonging to enemy States and demanding from enemy governments evidence that would establish the guilt of the accused.<sup>113</sup> Pollock proposed that the Commission immediately adopt a resolution that would ask the Conference of the Allies and the United States to "insert a condition in the next extension of the Armistice, whereby the enemy shall undertake to hand over to an authority designated by the Allied Powers and the United States, for the detention and trial, these persons whose names will be delivered to the enemy from time to time, and also all documents to be indicated hereafter."<sup>114</sup> After hearing support for Pollock's proposal by other members of the Commission, Lansing stated that he could not support the proposal for two reasons: "In the first place, I think it exceeds the jurisdiction of this commission to make such a recommendation; and in the second place, I do not think it is the part of an armistice to do that, as that is purely a military matter, and not for that purpose, or for

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<sup>109</sup> Minutes of the Seventh Meeting, 17 March 1919, at 10:30 a.m., Minutes of Meetings of the Commission, p. 70.

<sup>110</sup> Minutes of the Second Meeting, 7 February 1919, at 11:30 a.m., Minutes of Meetings of the Commission, pp. 22-3.

<sup>111</sup> Memorandum Submitted by the British Delegates, 13 February 1919, Minutes of Second Meeting, annex IV, Minutes of Meetings of the Commission, p. 27.

<sup>112</sup> Memorandum Submitted by the British Delegates, 13 February 1919, Minutes of Second Meeting, annex IV, Minutes of Meetings of the Commission, p. 31.

<sup>113</sup> Proceedings of a Meeting of the Commission on the Responsibilities for the War, 7 February 1919, at 11:30 a.m., PPC Doc. 181.1201/2 (M820, roll 140) GR 1918-1931, RG 256, NACP; See also, Minutes of the Second Meeting, 7 February 1919, at 11:30 a.m., Minutes of the Meetings of the Commission, p. 22.

<sup>114</sup> Proceedings of a Meeting of the Commission on the Responsibilities for the War, 7 February 1919, at 11:30 a.m., PPC Doc. 181.1201/2, pp. 18-19 (M820, roll 140) GR 1918-1931, RG 256, NACP. See also, Minutes of the Second Meeting, 7 February 1919, at 11:30 a.m., Minutes of the Meetings of the Commission, p. 22.

other than military purposes.”<sup>115</sup> The Commission voted on Pollock’s proposal with 12 in favor and 2 against.<sup>116</sup> The United States subsequently filed a memorandum explaining its justification in opposition to the resolution.<sup>117</sup> The question of an international criminal court was held over for discussion by Sub-Commissions Nos. 2 and 3.<sup>118</sup>

### **Debates in Sub-Commission No. 2**

Sub-Commissions Nos. 2 and 3 held their first meeting jointly on 14 February 1919. Pollock was appointed Chairperson of Sub-Commission No. 2 and Lansing was appointed Chairperson of Sub-Commission No. 3.<sup>119</sup> There was debate whether the two sub-commissions should meet separately or jointly since the substance of their studies overlapped. It was eventually agreed that they would meet separately.

The question to be answered by Sub-Commission No. 2 was whether the acts that had provoked the First World War and had taken place at its beginning should be punished.<sup>120</sup> Pollock stated that there should be agreement, based on overwhelming evidence, that Germany was responsible for initiating the war.<sup>121</sup> Larnaude agreed with Pollock, and what most interested his nation was “the constitution of a tribunal which would condemn depredations committed during the war by the Germans.”<sup>122</sup> Larnaude further stated his concern over whether the tribunal would convince the German people

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<sup>115</sup> Proceedings of a Meeting of the Commission on the Responsibilities for the War, 7 February 1919, at 11:30 a.m., PPC Doc. 181.1201/2, p. 23 (M820, roll 140) GR 1918-1931, RG 256, NACP. See also, Minutes of the Second Meeting, 7 February 1919, at 11:30 a.m., Minutes of the Meetings of the Commission, pp. 23-24.

<sup>116</sup> Proceedings of a Meeting of the Commission on the Responsibilities for the War, 7 February 1919, at 11:30 a.m., PPC Doc. 181.1201/2 (M820, roll 140) GR 1918-1931, RG 256, NACP. See also, Minutes of the Second Meeting, 7 February 1919, at 11:30 a.m., Minutes of the Meetings of the Commission, p. 24.

<sup>117</sup> PPC Doc. F.W.181.12301/1 (M820, roll 140) GR 1918-1931, RG 256, NACP.

<sup>118</sup> Proceedings of a Meeting of the Commission on the Responsibilities for the War, 7 February 1919, at 11:30 a.m., PPC Doc. 181.1201/2 (M820, roll 140) GR 1918-1931, RG 256, NACP. See also, Minutes of the Second Meeting, 7 February 1919, at 11:30 a.m., Minutes of the Meetings of the Commission, p. 24.

<sup>119</sup> Proceedings of a Joint Meeting with Sub-Commissions No. 2 and No. 3, 14 February at 11:00 a.m., PPC Doc. 181.12201/1 (M820, roll 143) GR 1918-1931, RG 256, NACP. See also, British Secretary’s Note of Joint Meeting of the Sub-Commissions Nos. II and III of the Commission on the Responsibility for the War, held at the Ministry of the Interior, 14 February 1919, at 11:00 a.m., PPC Doc. F.W.-181.12201/1 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>120</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>121</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 2 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>122</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 6 (M820, roll 143) GR 1918-1931, RG 256, NACP.

that they were victims of William II rather than victims of the Allied and Associated Powers.<sup>123</sup> Pollock responded that he did not think “any number of tribunals, or any number of decisions of any tribunal would ultimately carry conviction to the Germans.”<sup>124</sup>

Larnaude argued that it was the duty of the Peace Conference to lodge the responsibility for the war against William II: “And the Peace Conference shall not have finished its task until it had done this, and also to examine the question on a juridical basis.”<sup>125</sup> According to Scott, the question of William II’s responsibility could be considered from two points of view: first, the moral point of view, and second, the juridical point of view.<sup>126</sup> Scott argued that the Peace Conference could determine the moral responsibility for the war, but as a sub-commission, “we are rather concerned with the juridical side of the question rather than the moral side of the question.”<sup>127</sup> Other members of the Sub-Commission disagreed. Pollock read from a short memorandum he prepared:

“[For] reasons which are given hereafter, there appears to be ample evidence of which a charge can be made against the ex-Kaiser as the chief director of the methods of warfare adopted – a charge, moreover, which can be presented with comparative directness and cogency and with which a Tribunal can be well qualified to deal.

We, therefore, do not advise that the acts which provided the war and its initiation should be charged against their authors and made the subject of a charge before the Tribunal to be set up.<sup>128</sup>

Larnaude considered the law as described by Pollock’s memorandum to be too narrow. Pollock responded that if William II was charged with violating the treaties with

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<sup>123</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 6 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>124</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 6 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>125</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 7 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>126</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 7 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>127</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, pp. 7-8 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>128</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 13 (M820, roll 143) GR 1918-1931, RG 256, NACP.

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Belgium and Luxembourg when Germany had initiated the war, “The defense would be that it was an act by the State as a whole.”<sup>129</sup> Pollock continued, “Now with regard to violations during the course of the war, in consequence of the orders he gave, and which I know of – for instance, the submarine warfare – it is quite easy to say William Hohenzollern is guilty. That is the difference.”<sup>130</sup> In response, Larnaude initiated the concept of a multinational criminal court outside the previously proposed international criminal court. He stated:

Outside the ordinary international tribunal it is proposed to institute, there should be a High Court of Justice, such as exists in Great Britain, France and Belgium, and which would be qualified to know what offenses are crimes, from a broader, more practical point of view. As we cannot take it upon ourselves to refer those crimes to the ordinary international tribunal, could you imagine a higher court of justice - a form of court of justice which would be qualified to judge and pass sentence on such heinous crimes as the premeditated aggression and preparation for the war, and the violation of Belgium and Luxembourg.<sup>131</sup>

Pollock stated that he would alter his memorandum to satisfy Larnaude.<sup>132</sup> Scott proposed that the passage in Pollock’s memorandum speaking about the crimes committed by William II during the war should be omitted.<sup>133</sup> He also proposed that omitting any reference to “moral responsibility will be of value.”<sup>134</sup> However, it seems that Pollock completely disregarded Scott’s comments. Pollock’s only response to Scott’s suggestions was, “I shall undertake to prepare the memorandum – to alter the memorandum in order to meet the views of M. Larnaude.”<sup>135</sup> It was clear that even if

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<sup>129</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 17 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>130</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 17 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>131</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 18 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>132</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 19 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>133</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 20 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>134</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 20 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>135</sup> Proceedings of a Meeting of Sub-Commission No. 2, 17 February 1919, at 3:00 p.m., PPC Doc. 181.12201/2, p. 20 (M820, roll 143) GR 1918-1931, RG 256, NACP.

they did not agree on the charges, Larnaude and Pollock wanted to see William II prosecuted in some form of international or higher court.

The last paragraph of the draft of the Sub-Commission No. 2 report read:

It may be that the Peace Conference, notwithstanding the technical and practical difficulties which we have mentioned, may think it right, in a matter so unprecedented, to adopt special measures, and even to create special machinery in order to deal with the authors of such acts, and to exhibit in an unmistakable way the condemnation in which they are held.”<sup>136</sup>

Lansing argued that the last sentence was unnecessary and should be deleted.<sup>137</sup> It was agreed and all words after “such acts” were removed.<sup>138</sup>

### **Report of Sub-Commission No. 2**

On 6 March 1919, Sub-Commission No. 2 submitted its report to the Commission on the Responsibilities of the Authors of the War and on Enforcement of Punishments. The report opened by stating that Germany’s premeditation of the initiation of the war had been proved and that the matter had been considered from the point of view of whether the charge could successfully be brought before a tribunal.<sup>139</sup> In its report, Sub-Commission No. 2 was convinced that “[t]he proceedings and discussion, charges and countercharges, if adequately and dispassionately examined might consume much time and the result might conceivably confuse the simpler issues into which the Tribunal will be charged to enquire.”<sup>140</sup> Any tribunal appropriate to deal with other crimes investigated by Sub-Commission Nos. 1 and 3 might hardly be an appropriate tribunal to deal with the authorship of the war.<sup>141</sup> Therefore, Sub-Commission No. 2 did not advise that the acts that had provoked the War and its initiation should be charged against the authors and

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<sup>136</sup> Report of Sub-Commission No. 2 on the Responsibility of the Authors of the War, Minutes of Third Meeting, annex, Minutes of Meetings of the Commission, p. 46.

<sup>137</sup> Minutes of the Third Meeting, 12 March 1919, at 11 a.m., Minutes of Meetings of the Commission, p. 36.

<sup>138</sup> Minutes of the Third Meeting, 12 March 1919, at 11 a.m., Minutes of Meetings of the Commission, p. 36.

<sup>139</sup> Sub Commission No. 2’s Report submitted to the Commission on 6 March 1919, PPC Doc. 181.12202/3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>140</sup> Sub Commission No. 2’s Report submitted to the Commission on 6 March 1919, PPC Doc. 181.12202/3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>141</sup> Sub Commission No. 2’s Report submitted to the Commission on 6 March 1919, PPC Doc. 181.12202/3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

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made the subject of proceedings before a tribunal.<sup>142</sup> Furthermore, even Sub-Commission No. 2 acknowledged that Germany had invaded Luxembourg and Belgium in violation of international law and treaties; however, it was of the opinion “that no criminal charge should be made against the responsible persons, or individuals, (and notably the ex-Kaiser),” but it was of the opinion that the violations should be reported to the Peace Conference.<sup>143</sup>

### **Debates in Sub-Commission No. 3**

At its first meeting, Sub-Commission No. 3 outlined a determined method of work as follows:

1. A collection on broad lines of the Laws and Customs of War as based on the Hague Conventions and the laws in force in the enemy countries as published in their manuals, is to be made.
2. The acts established by Sub-Commission No. 1 will be tested by reference to the Laws and Customs of War as outlined above.
3. Those acts which are found contrary to the above-mentioned Laws will be declared punishable.<sup>144</sup>

It was requested that the delegates of Sub-Commission No. 3 submit for consideration at the next meeting collections of the laws and customs of war.<sup>145</sup> Lansing felt it was imperative to focus the Sub-Commission’s study on distinguishing between acts that were simply immoral and those that were illegal. He stated, “[T]o assume that certain crimes have been committed and that therefore we are going to declare beforehand that they are criminal, I do not believe lies within the province of this Sub-Commission.”<sup>146</sup> Lansing went on, making the following statement:

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<sup>142</sup> Sub Commission No. 2’s Report submitted to the Commission on 6 March 1919, PPC Doc. 181.12202/3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>143</sup> Sub Commission No. 2’s Report submitted to the Commission on 6 March 1919, PPC Doc. 181.12202/3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>144</sup> Notes on Meeting of Sub-Commission No. 3, 16 February 1919, at 11:30 a.m., PPC Doc. 181.123/5 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>145</sup> Notes on Meeting of Sub-Commission No. 3, 16 February 1919, at 11:30 a.m., PPC Doc. 181.123/5 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>146</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

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My suggestions would be that we collect the rules of warfare issued at various times, and particularly prior to this great war, that were in force in Great Britain, in Germany, in Austria, in France, and in the United States, and from that we can make comparisons to see whether or not they differ and whether there is reason for such difference which can be supported by the general principles of international law.<sup>147</sup>

Larnaude, Rolin-Jaequemyns, and Pollock took issue with Lansing's positions, however. Larnaude did not see the point of studying the laws of war in various States, since he considered them already known.<sup>148</sup> Rolin-Jaequemyns insisted that the goal was not to know whether the laws of war existed or what they were; instead, the goal was to find proper sanction.<sup>149</sup> In his opinion, the tribunal would have to find out the law and apply it.<sup>150</sup> Pollock argued that through common sense, it could easily be established that the Germans and their allies had committed war crimes. He also stated that there was no doubt about it, "all the nations and people are carrying with one voice that they shall be punished."<sup>151</sup> It was clear that Pollock was pursuing the creation of an international criminal court, and he disagreed with Lansing that the Sub-Commission could not decide what acts were illegal.<sup>152</sup> "If we are going to set up a tribunal to try these persons, it is before that tribunal that you will have to determine what are the proper rules of warfare, and what is the law."<sup>153</sup> According to Pollock, "That would be anticipating the duties of the tribunal which is going to be set up."<sup>154</sup>

Lansing could not have disagreed with Pollock more. According to Lansing, the Commission had the authority to establish the jurisdiction that could punish war

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<sup>147</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>148</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 6 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>149</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>150</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 6 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>151</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 3 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>152</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 5 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>153</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 5 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>154</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 5 (M820, roll 143) GR 1918-1931, RG 256, NACP. Emphasis added by the author.

criminals, but it did not have the authority to establish a tribunal.<sup>155</sup> Lansing cited the Wirz trial as an example of various forms of jurisdiction that did not require establishing a new tribunal.<sup>156</sup> According to Pollock's position, the Sub-Commission had

got to deal with the question of setting up an international tribunal, and that, of course, is important from the British point of view, because the one demand is that, to take a leading case, the responsibility of the Kaiser, and the outrages committed in the course of the war, the whole of Great Britain demands that he should be tried. And it seems to me impossible to hand him over to anything except an international tribunal.<sup>157</sup>

Rolin-Jaequemyns sided with Pollock that Sub-Commission No. 3 should create a tribunal and decide its constitution.<sup>158</sup> Larnaude agreed that a single international tribunal to prosecute major cases would be better than several different prosecutions in various States.<sup>159</sup> Lansing, being outnumbered, argued that the Sub-Commission could only decide whether the cases could be within an international or national jurisdiction, but it could not decide on the institution that would enforce that jurisdiction.<sup>160</sup> The men finally agreed to establish a drafting committee to interpret if it was within Sub-Commission No. 3's authority to establish an international tribunal.<sup>161</sup> Lansing formed the drafting committee without delay, and appointed as its members Larnaude, Pollock, Rosetal, and Scott.<sup>162</sup>

Immediately following the meeting of Sub-Commission No. 3 that established the drafting committee, the United States submitted a memorandum in which it referred to the five inquiries within the Commission's mandate when it had been created by the Paris

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<sup>155</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 12 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>156</sup> Proceedings of a Meeting of Sub-Commission No. 3, 18 February 1919, at 11:30 a.m., PPC Doc. 181.12301/2, p. 13 (M820, roll 143) GR 1918-1931, RG 256, NACP.

<sup>157</sup> Proceedings of a Meeting of Sub-Commission No. 3, 25 February 1919, at 11:00 a.m., PPC Doc. 181.12301/4, pp. 2-3 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>158</sup> Proceedings of a Meeting of Sub-Commission No. 3, 25 February 1919, at 11:00 a.m., PPC Doc. 181.12301/4, p. 3 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>159</sup> Proceedings of a Meeting of Sub-Commission No. 3, 25 February 1919, at 11:00 a.m., PPC Doc. 181.12301/4, p. 5 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>160</sup> Proceedings of a Meeting of Sub-Commission No. 3, 25 February 1919, at 11:00 a.m., PPC Doc. 181.12301/4, p. 6 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>161</sup> Proceedings of a Meeting of Sub-Commission No. 3, 25 February 1919, at 11:00 a.m., PPC Doc. 181.12301/4, p. 18 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>162</sup> Proceedings of a Meeting of Sub-Commission No. 3, 25 February 1919, at 11:00 a.m., PPC Doc. 181.12301/4, p. 19 (M820, roll 144) GR 1918-1931, RG 256, NACP.



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Peace Conference on 25 January 1919.<sup>163</sup> The fourth inquiry within the Commission's mandate was to determine "the Constitution and procedure of a tribunal appropriate to the trial of these offences." According to the United States, before a tribunal could be constituted, the jurisdiction of the crimes must first be established.<sup>164</sup> It was "unreasonable to interpret the word 'jurisdiction' as meaning 'the constitution and procedure of a tribunal.'" <sup>165</sup>

It was evident that Pollock and others were not concerned about crimes within the jurisdiction of the court; rather, they cared mostly about establishing an international criminal court to prosecute William II. Pollock, who talked a great deal during the Commission's meetings, "made a very strong and unpleasant impression" on Lansing.<sup>166</sup> Prior to the Paris Peace Conference, Lloyd George had promised the prosecution of William II and, according to Lansing, Pollock would not let up on the idea of creating an international criminal court to prosecute the former Kaiser. Rather than conducting himself as a diplomat, Pollock acted as an attorney with Lloyd George as his client.<sup>167</sup> Lansing thought that British insistence on an international criminal tribunal was nothing other than an attempt to please British public opinion for political gains. He wrote, "Lloyd George promised to do this in campaigning for votes last December and Sir Ernest Pollock, the Solicitor General, who is on the Commission with me is insisting on it." <sup>168</sup>

However, Lansing disagreed with Pollock's position that creating a tribunal should be based on public opinion. After all, the American public also had strong feelings regarding an international criminal tribunal, but President Wilson did not care what the

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<sup>163</sup> American Memorandum Relative to the Terms of Submission to Sub-Commission No. 3 in Regard to Jurisdiction, 25 February 1919, PPC Doc. 181.12301/4 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>164</sup> American Memorandum Relative to the Terms of Submission to Sub-Commission No. 3 in Regard to Jurisdiction, 25 February 1919, PPC Doc. 181.12301/4, pp. 1-2 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>165</sup> American Memorandum Relative to the Terms of Submission to Sub-Commission No. 3 in Regard to Jurisdiction, 25 February 1919, PPC Doc. 181.12301/4, p. 2 (M820, roll 144) GR 1918-1931, RG 256, NACP.

<sup>166</sup> Impressions of Other Statesmen at the Peace Conference, Robert Lansing Papers, Box 8, Folder 8, p. 88, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

<sup>167</sup> Impressions of Other Statesmen at the Peace Conference, Robert Lansing Papers, Box 8, Folder 8, pp. 88-89, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

<sup>168</sup> Impressions of Other Statesmen at the Peace Conference, Robert Lansing Papers, Box 8, Folder 8, pp. 88-89, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

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American people thought.<sup>169</sup> Ultimately, Lansing disagreed with the creation of the tribunal in its entirety. In a letter to Frank Polk, he stated that he had “been wrestling with a British madness to try the Kaiser by an international tribunal.”<sup>170</sup> President Wilson evidently shared Lansing’s attitude toward the establishment of an international criminal tribunal. Lansing stated that the President “approved entirely of my attitude in regard to an international tribunal for trial of the Kaiser and others, only he is even more radically opposed than I am of that folly.”<sup>171</sup>

### **Conclusions of the Sub-Commissions**

After examining the facts established by Sub-Commission No. 1 concerning the culpable conduct which had brought about the World War and accompanied its inception, Sub-Commission No. 2 determined that the responsibility for the First World War rested first on Germany and Austria and secondly on Turkey and Bulgaria.<sup>172</sup> After examining the facts established by Sub-Commission No. 1, Sub-Commission No. 3 determined that the Central Powers, using methods in violation of the established laws and customs of war, had carried out the First World War.<sup>173</sup> The fourth section of Sub-Commission No. 1’s report included a recommendation that a high tribunal be established.<sup>174</sup> The United States proposed an amendment that “Any of the Powers represented on the High Tribunal or on the Prosecuting Commission may at its discretion withdraw its judge or judges from the High Tribunal or its member from the Prosecuting Commission in any trial or other proceeding.”<sup>175</sup> After Pollock asked for some explanation for the United States’s proposal, Lansing clarified, “The intention of the amendment was to reserve to his

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<sup>169</sup> Letter from Robert Lansing to Frank L. Polk, 14 March 1919, Robert Lansing Papers, Box 3, Folder 17, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

<sup>170</sup> Letter from Robert Lansing to Frank L. Polk, 14 March 1919, Robert Lansing Papers, Box 3, Folder 17, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

<sup>171</sup> Letter from Robert Lansing to Frank L. Polk, 14 March 1919, Robert Lansing Papers, Box 3, Folder 17, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

<sup>172</sup> Commission’s Report, p. 3.

<sup>173</sup> Commission’s Report, p. 11.

<sup>174</sup> Report of Sub-Commission No. 3 on the Violation of the Laws and Customs of War, Minutes of the Third Meeting, annex III, Minutes of Meetings of the Commission, p. 53.

<sup>175</sup> Minutes of the Seventh Meeting, 17 March 1919, at 10:30 a.m., Minutes of Meetings of the Commission, p. 69.

Government the right of withdrawing from the tribunal whenever a case seemed to it to lack a legal basis.”<sup>176</sup>

### **Proposed Tribunal in the Commission’s Final Report**

#### *Composition*

In its final report, the Commission recommended that an international “high tribunal” be established.<sup>177</sup> Much of the British Empire’s earlier memorandum regarding the composition of an international court was included in the Commission’s final report,<sup>178</sup> which also recommended that the high tribunal should be composed of three persons appointed by the United States, the British Empire, France, Italy, and Japan.<sup>179</sup> Belgium, Greece, Poland, Portugal, Romania, Serbia, and Czechoslovakia would each appoint one member to the tribunal.<sup>180</sup> What followed was the establishment of “a Prosecuting Commission of five members, of whom one shall be appointed by the Governments of the United States of America, the British Empire, France, Italy and Japan.”<sup>181</sup> The Prosecuting Commission would ultimately select the cases for trial before the tribunal. All applications by any Allied or Associated powers for prosecution before the international high tribunal would be addressed also to the Prosecuting Commission.<sup>182</sup>

The Commission further recommended that “each Allied and Associated Government adopt such legislation as may be necessary to support the jurisdiction of the International Court, and to assure the carrying out of its sentences.”<sup>183</sup> The international court could only be as strong as the support of its members. If legislation were passed requiring support for the tribunal, there would be more incentive for members to support the tribunal rather than violate their national legislation. If established, the international high tribunal would have primacy over national courts. If the tribunal preferred a case for

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<sup>176</sup> Minutes of the Seventh Meeting, 17 March 1919, at 10:30 a.m., Minutes of Meetings of the Commission, p. 69.

<sup>177</sup> Commission’s Report, p. 15.

<sup>178</sup> Commission’s Report, p. 12.

<sup>179</sup> Commission’s Report, p. 14, para. 1.

<sup>180</sup> Commission’s Report, p. 14, para. 1.

<sup>181</sup> Commission’s Report, p. 14, para. 6.

<sup>182</sup> Commission’s Report, p. 14, para. 7.

<sup>183</sup> Commission’s Report, p. 14, para. 5.

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trial, a national court could not try the case.<sup>184</sup> If a national court tried a case, the trial or punishment would not bar trial or punishment by the international high tribunal.<sup>185</sup>

### *Jurisdiction over Persons and Crimes*

The Commission's minutes focused a good deal on how to prosecute William II. Prior to the commencement of the Paris Peace Conference, European States, especially the British Empire, had focused on how to charge and prosecute William II. Deciding which crimes should be included in the tribunal's jurisdiction was also hotly debated during the Commission's meetings. These offenses included violations of the laws of treaties, violations of the laws of humanity, and violations of the laws and customs of war.

### Violations of the Laws of Treaties

There was little argument that the violation of laws of treaties had ultimately led to war and that the charge should be included within the high tribunal's jurisdiction. The Commission concluded that the responsibility for initiating the World War rested "first on Germany and Austria" and "secondly on Turkey and Bulgaria."<sup>186</sup> By initiating war, it was further concluded that "[t]he neutrality of Belgium, guaranteed by the Treaties of the 19<sup>th</sup> April, 1839, and that of Luxemburg, guaranteed by the Treaty of the 11<sup>th</sup> May, 1867, were deliberately violated by Germany and Austria-Hungary."<sup>187</sup>

Interestingly, the special tribunal did not include violations of the laws of treaties as a crime per se. According to the United States, and agreed to by the other members of the Commission, declaring war and violating treaties were not violations "in point of law, although in the forum of morals" they assuredly were.<sup>188</sup> By starting the war and

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<sup>184</sup> Commission's Report, p. 14, para. 8.

<sup>185</sup> Commission's Report, pp. 14-15, para. 8.

<sup>186</sup> Commission's Report, p. 3; "Decide on Authors of War: Sub-Committee of Commission of Responsibility Has Finished Work" *New York Times* (25 February 1919) 2; "Guilt of War Told in Official Report: Paris Temps Gives Text Showing 'Barbarities' for Which the 'Highest' Should Answer" *New York Times* (25 April 1919) 8.

<sup>187</sup> Commission's Report, p. 9.

<sup>188</sup> James Brown Scott, "The Trial of the Kaiser" in Edward Mandell House and Charles Seymour (eds), *What Really Happened At Paris: The Story of the Peace Conference 1918-1919* (Charles Scribner's Sons 1921) 231, 237.

violating treaties, William II had committed a great moral and unpardonable offense, but the Commission could find no positive law declaring such acts to be criminal.<sup>189</sup>

The Commission stated its conclusions in the final report as follows:

1. The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.
2. On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.
3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.
4. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.<sup>190</sup>

#### Violations of the Laws and Customs of War and the Laws of Humanity

There was common agreement that laws and customs of war had been violated once war had commenced. The Commission argued that the rights of both combatants and civilians had been violated throughout the war, stating that “not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance.”<sup>191</sup> The exact violations were specified in an extensive list of 32 crimes.<sup>192</sup>

#### *Procedure*

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<sup>189</sup> Robert Lansing, “The Trial of the Kaiser: Five Great Powers to be Judges” (December 1919) *Forum* 530, 531.

<sup>190</sup> Commission’s Report, p. 13.

<sup>191</sup> Commission’s Report, p. 10.

<sup>192</sup> Commission’s Report, p. 17. The list was subsequently provided by several media outlets. See, for example, “How America Would Punish William” (26 April 1919) 61 *The Literary Digest* 13.

More problematic, however, was the lack of established international criminal procedure. National criminal procedure varied and a consensus of minimum standards of due process did not yet exist. Rather than initially deal with this issue, which would lengthen debate further, the Commission simply stated, “The tribunal shall determine its own procedure.”<sup>193</sup> It was noted, however, that the tribunal could not sit with fewer than five members.

### **American Minority Report**

#### *Reservations of the Charge of Violations of Laws of Humanity*

The United States began its Memorandum of Reservations by stating that it was as committed to bringing criminal justice as any other States, but “the American members declared that there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offenses were justifiable and liable to trial and punishment by appropriate tribunals, but that moral offenses, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.”<sup>194</sup> The United States clearly stated that criminal acts should be punished according to the law. But if “there is no law making them crimes of affixing a penalty for their commission, they are moral, not legal, crimes, and the American Representatives fail to see the advisability or indeed the appropriateness of creating a special organ to deal with the authors of such acts. In any event, the organ in question should not be a judicial tribunal.”<sup>195</sup>

The United States could not agree with the other members of the Commission on Responsibility that persons should be prosecuted for violating the laws of humanity. The Commission’s mandate was limited to determining “facts as to the violations of the laws and customs of war.” By adding violations of the laws of humanity, the United States argued that the Commission went beyond its mandate. Not only had the Commission gone beyond its mandate by calling certain acts violations of the laws and principles of humanity, but the United States did not agree that violations of laws of humanity were a

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<sup>193</sup> Commission’s Report, p. 14, para. 5.

<sup>194</sup> Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 4 April 1919, appended to Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, annex II, p. 51 (Memorandum of Reservations).

<sup>195</sup> Memorandum of Reservations, p. 57.

chargeable offense since they were culturally relative; that is, each State had its own view on what constituted the basic laws of humanity (and therefore, violations of those laws). In its argument, the United States stated that “the laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.”<sup>196</sup> Any persons singled out for trial and punishment should only be those persons who had been charged with violations of the laws and customs of war.<sup>197</sup> Thus, the United States was unable to agree on the international high tribunal to prosecute offenses that were not considered crimes and in violation of positive law.

*Reservations of Negative Criminality*

The United States was unwilling to agree with the majority of the members of the Commission that highly ranked persons, including chiefs of States, could be held legally responsible for crimes committed by their subordinates.<sup>198</sup> The United States disagreed with what it referred to as “negative criminality”: persons of higher authority abstaining from preventing crimes committed by their subordinates.<sup>199</sup> The United States argued that “it is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war.”<sup>200</sup>

*Reservations of Infringement of Head of State immunity*

The United States could not agree that all persons, however highly ranked, including Chiefs of States, should be prosecuted before the international high tribunal or enemy national courts.<sup>201</sup> It referenced *Schooner Exchange v McFaddon and Others*, in which the United States Supreme Court decided that sovereign agents of a State are exempt

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<sup>196</sup> Memorandum of Reservations, p. 54.

<sup>197</sup> Memorandum of Reservations, p. 54.

<sup>198</sup> Memorandum of Reservations, p. 59.

<sup>199</sup> Memorandum of Reservations, p. 59.

<sup>200</sup> Memorandum of Reservations, p. 59.

<sup>201</sup> Memorandum of Reservations, p. 61.

from judicial process.<sup>202</sup> The United States agreed that highly ranked officials, including William II, could be held accountable under their national laws, but they could not be held legally accountable to foreign laws. Regarding William II, the United States stated:

His act may and does bind his country to render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, a chief executive, thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.<sup>203</sup>

The United States believed that this State immunity was true to liability under law but that it was not intended to apply to political sanctions. However, that debate was outside the scope of the Commission's mandate and unnecessary to enter upon discussion.<sup>204</sup> Offenses against morality or the sanctity of treaties were political crimes and should be heard by a political tribunal. President Wilson had included in Article 227 of the original draft Treaty of Peace a statement that the arraignment of William II was "not for an offense against criminal law, but for a supreme offense against international morality and the sanctity of treaties."<sup>205</sup> However, it is believed that the first part was deleted at the suggestion of Lloyd George.<sup>206</sup> Since the special tribunal would possibly try the accused, it was necessary to delete the reference to a lack of criminal law. Including the statement would be an invitation to ask what rule of law he had violated.<sup>207</sup>

The first paragraph of Article 227 of the Treaty of Peace stated, "The Allied and Associated Powers arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties." The fact that there is no mention of law or crime was "in effect an admission that law, in the legal sense of the word, did not exist for either offense, or that its violation was not a crime in

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<sup>202</sup> (1813) 11 US 116.

<sup>203</sup> Memorandum of Reservations, p. 55.

<sup>204</sup> Memorandum of Reservations, p. 55.

<sup>205</sup> Simeon E. Baldwin, "The Proposed Trial of the Former Kaiser" (1919) 29 *Yale LJ* 75, 80.

<sup>206</sup> Scott, "The Trial of the Kaiser," 231, 237.

<sup>207</sup> Baldwin, "The Proposed Trial of the Former Kaiser," 80.



the sense of criminal law.”<sup>208</sup> Therefore, the offenses would be heard in a special tribunal established without the purpose of hearing criminal cases.

Excluding the controversy over violations of the laws of humanity, there lay a greater dilemma. If the special tribunal would not have jurisdiction over crimes, how was it possible to hear cases involving violations of the laws and customs of war that were found in books of authority and in the practice of nations? It was impracticable. The only purpose of establishing the special tribunal had been to try and punish William II. According to the United States, it was not possible to try the accused for violations of laws and customs of war since he had not actually committed the acts himself. The United States further argued that a head of State was immune to criminal prosecution by foreign courts. The United States prevailed on these issues, and as a result, William was not arraigned for violating the laws and customs of war.

### **Content of the Treaty of Peace**

Article 227 of the Treaty of Peace between the Allied and Associated Powers and Germany included a “special tribunal,” rather than the “high tribunal” recommended by the Commission.<sup>209</sup> The special tribunal would only include one member from each of five States, consisting of the United States, the British Empire, France, Italy, and Japan.<sup>210</sup> In making its decisions, “the tribunal [would] be guided by the highest motives of international policy with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It [would] be its duty to fix the punishment which it considers should be imposed.”<sup>211</sup>

The German government also recognized the right of the Allied and Associated Powers to prosecute in military tribunals Germans accused of violating the laws and customs of war.<sup>212</sup> Individuals would be prosecuted by the State of the nationality of their victims.<sup>213</sup> Those accused of victimizing nationals of States would be brought before military tribunals composed of members of the military tribunals of the States

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<sup>208</sup> Scott, “The Trial of the Kaiser,” 237.

<sup>209</sup> Treaty of Peace, art. 227.

<sup>210</sup> Treaty of Peace, art. 227.

<sup>211</sup> Treaty of Peace, art. 227.

<sup>212</sup> Treaty of Peace, art. 228.

<sup>213</sup> Treaty of Peace, art. 229.

concerned.<sup>214</sup> Such courts would function as multinational military tribunals, since the tribunals would be composed of prosecutors and judges from more than one State. Articles 228 and 229 closely reflected the method of prosecution that the United States had promoted. For example, the United States argued that national and multinational courts, including military tribunals, were the proper venue to prosecute persons accused of committing violations of the laws and customs of war that were well recognized and defined.<sup>215</sup> Neither article mentions violations of the laws of humanity.

### **Germany's Concerns with the Special Tribunal**

After the Commission's report was submitted to the Paris Peace Conference, there was discussion among the major powers about the questions the Commission attempted to answer along with its recommendations. The final decision by the Conference was included in Article 227 of the Treaty of Peace, which read as follows:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A Special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix punishment which it considers imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.<sup>216</sup>

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<sup>214</sup> Treaty of Peace, art. 229.

<sup>215</sup> See, generally, Minutes of the Meetings and Memorandum of Reservations.

<sup>216</sup> Treaty of Peace, art. 227.

## Post-First World War Era

When the Treaty of Peace was delivered to the German delegation at the Paris Peace Conference,<sup>217</sup> the delegation refused to recognize the competence of the special tribunal to prosecute the former Kaiser or any other legal basis for prosecution.<sup>218</sup> Germany could not admit that one of its nationals should be brought before a foreign court based on special law that would enact a penalty for acts committed that had no prescribed punishment at the time they were committed.<sup>219</sup> The German delegation made clear in its correspondence with the Allied and Associated Powers that by signing the Treaty of Peace, cooperation on the part of Germany was provided for neither in the formation of the tribunal nor its procedure.<sup>220</sup> Germany argued that there was no law and, therefore, no criminal court competent to try the accused.<sup>221</sup> The German delegation also said that it could not agree with a demand to the Netherlands to surrender the former Kaiser for prosecution by the special tribunal.<sup>222</sup>

Germany was, however, “ready to submit to an international court composed of neutrals the decision of the preliminary question of international law, whether an act committed in the war is to be regarded as a breach of the laws and customs of war.”<sup>223</sup> To Germany, the international court should not be applied only to the losers of the World War, but should have the jurisdiction to prosecute all parties. The suggested requirements were as follows:

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<sup>217</sup> “The Signing of the Treaty of Peace with Germany at Versailles on June 28th, 1919,” Robert Lansing Papers, Box 4, Folder 1, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

<sup>218</sup> Treaty of Peace between the Allied and Associate Powers and Germany, Signed at Versailles, 28 June 1919: Annotations of the Text, *FRUS, 1919, PPC*, vol. 13 (US GPO 1947) 371.

<sup>219</sup> Observations of the German Delegation on the Conditions of Peace, 19 May 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 800, 874-75; see also Treaty of Peace between the Allied and Associate Powers and Germany, Signed at Versailles, 28 June 1919: Annotations of the Text, *FRUS, 1919, PPC*, vol. 13 (US GPO 1947) 371-72.

<sup>220</sup> Observations of the German Delegation on the Conditions of Peace, 19 May 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 800, 874-75.

<sup>221</sup> Observations of the German Delegation on the Conditions of Peace, 19 May 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 800, 875.

<sup>222</sup> Observations of the German Delegation on the Conditions of Peace, 19 May 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 800, 875.

<sup>223</sup> Observations of the German Delegation on the Conditions of Peace, 19 May 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 800, 876; see also Treaty of Peace between the Allied and Associate Powers and Germany, Signed at Versailles, 28 June 1919: Annotations of the Text, *FRUS, 1919, PPC*, vol. 13 (US GPO 1947) 372.

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1. That violations of the laws and customs of war committed by nationals of all the parties signatories of the Treaty may be brought before the international tribunal;
2. That Germany has an equal part with the Allied and Associated Powers in the formation of the international tribunal;
3. That the competence of the International Tribunal is confined to the decisions of questions of international law and that punishment is left to the national courts.<sup>224</sup>

In their response, the Allied and Associated Powers clarified the fact that they agreed there was no law prescribing punishment by an international court for acts committed by Germany during the war, but that the purpose of the Treaty was to depart “from the traditions and practices of earlier settlements which have been singularly inadequate in preventing the renewal of war.”<sup>225</sup> The purpose of trial and punishment for such acts would serve as a deterrent and was “inseparable from the establishment of that reign of law among nations.”<sup>226</sup>

The issue of a retrospective international court applying *ex post facto* law was then reconciled. In its response to the German delegation, the Allied and Associated Powers confirmed that the special tribunal that would prosecute the former Kaiser was without juridical character. The statement to the German delegation read as follows:

Finally, they wish to make it clear that the public arraignment under Article 227 framed against the German ex-Emperor has not a juridical character as regards its substance but only in its form. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice. The Allied and Associated Powers have desired that judicial forms, a judicial procedure and a regularly constituted tribunal should be set up in order to assure to

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<sup>224</sup> Observations of the German Delegation on the Conditions of Peace, 19 May 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 800, 876.

<sup>225</sup> Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, 16 June 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 935, 961.

<sup>226</sup> Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, 16 June 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 935, 961-62.

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the accused full rights and liberties in regard to his defense, and in order that the judgment should be of the most solemn judicial character.<sup>227</sup>

During the debates, Lansing had indicated that while William II could not be criminally prosecuted, he could be held accountable for acts of immorality, which was included in arraignment as a “supreme offence against international morality.” Ultimately, the Conference’s compromise to politically arraign William II while refusing to criminally prosecute him in a court of law satisfied the United States, States calling for the punishment of William II, and the German delegation that had refused to sign a Treaty which included a judicial court for the former emperor’s prosecution.

### **Post-First World War Prosecutions of War Criminals**

#### *William II*

On 3 July 1919, Lloyd George announced to the House of Commons that the former Kaiser would be prosecuted in London by an international tribunal composed of judicial representatives from the United States, France, Italy, and Japan, with a British judge presiding.<sup>228</sup> There were reports that Washington, D.C., had been considered the place to hold the trial but that Wilson preferred Europe.<sup>229</sup> There seemed a possibility that the trial might happen. On 11 July 1919, a Copenhagen dispatch reported that “informal negotiations were already in progress with Holland and that the Dutch Government was ready to deliver the ex Kaiser to the Entente Powers.”<sup>230</sup>

Any report of the Netherlands’ willingness to extradite the former Kaiser was unreliable, however. The Conference had little interest in actually obtaining William II.<sup>231</sup> The Netherlands refused to surrender him for trial and as a result, he was never

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<sup>227</sup> Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, 16 June 1919, *FRUS, 1919, PPC*, vol. 6 (US GPO 1946) 935, 962.

<sup>228</sup> “Preparations for Trial of the Former Kaiser” *New York Times Current History* (1919) 222; Alan Westcott, “Germany Ratifies Peace Treaty” *Diplomatic Notes from 18 June to 18 July* (1919) 1465 (notes the date 4 July 1919); “The Trial of the Kaiser” *The Independent* (19 July 1919) 80.

<sup>229</sup> Alan Westcott, “Germany Ratifies Peace Treaty” *Diplomatic Notes from 18 June to 18 July* (1919) 1465.

<sup>230</sup> Alan Westcott, “Germany Ratifies Peace Treaty” *Diplomatic Notes from 18 June to 18 July* (1919) 1465.

<sup>231</sup> Willis, *Prologue to Nuremberg*, 101.

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prosecuted.<sup>232</sup> There had been no consensus on the terms of guilt and punishment by the Allied and Associated Powers and Wilson stated that there was no legal means of forcing the Netherlands to extradite the former Emperor, since there was no extradition treaty that covered the charge against William II under Article 227.<sup>233</sup>

### *Leipzig Trials*

In January 1920, the Supreme Council of the Paris Peace Conference made an official demand to the Netherlands for the surrender of William II,<sup>234</sup> who had fled there for sanctuary. The Netherlands refused to extradite the former German Kaiser, and no further requests were made on behalf of the Supreme Council or any other State for his surrender.<sup>235</sup> Without the possibility of implementing Article 227, the Allies had to depend on Articles 228 and 229, which Germany recognized as the right of the Allies to prosecute German nationals for war crimes and for Germany to hand over persons accused to be prosecuted by the Allies in national courts.<sup>236</sup> In early 1920, Germany sent a letter to the Allies requesting that Article 228 of the Treaty of Peace not be executed so that instead, Germany could prosecute its own war criminals in German courts.<sup>237</sup> The Allies denied Germany's request and on 3 February 1920 delivered a list of 890 German war criminals to be surrendered.<sup>238</sup> The list was delivered to the lead German delegate at the Paris Peace Conference, Baron Kurt von Lersner, who, instead of forwarding the list to the German government, submitted his resignation.<sup>239</sup>

A few weeks later, Allies agreed to a second request by Germany to prosecute their war criminals in German courts. In late February, the Allies sent a list to the

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<sup>232</sup> For analyses of Prosecutions of other Germans prosecuted for war crimes in the Leipzig Trials, see Willis, *Prologue to Nuremberg*; see also M. Cherif Bassiouni, "World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System" (2001-2002) 30 *Denv J Int'l L & Poly* 224;

<sup>233</sup> Willis, *Prologue to Nuremberg*, 101.

<sup>234</sup> George Gordon Battle, "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes" (1921) 8 *Virginia LR* 1, 4.

<sup>235</sup> Battle, "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes," 4.

<sup>236</sup> Treaty of Peace, arts. 228 & 229.

<sup>237</sup> Battle, "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes," 4-5.

<sup>238</sup> Battle, "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes," 5.

<sup>239</sup> Battle, "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes," 5.

German government of 46 men to be prosecuted before Germany's Supreme Court in Leipzig.<sup>240</sup>

### Conclusion

During the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' debates, the United States did not agree with the criminal liability of a head of State, for example, William II, or of superiors via negative criminality. Moreover, the United States argued for national prosecutions of war criminals, since the jurisdiction of national courts had already been established. The Special Tribunal envisaged in Article 227 of the Treaty of Peace was a multinational court that the United States argued was more appropriate for prosecuting war criminals than an international criminal court. Articles 228 and 229 were exactly what the United States had argued for concerning the prosecution of war criminals. The United States maintained its policy that national courts had jurisdiction over international crimes, particularly violations of the law and customs of war.

The Allied Powers also signed a peace treaty with Turkey in 1920.<sup>241</sup> In it "[t]he Turkish Government recogni[zed] the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."<sup>242</sup> Turkish officials or officers accused of crimes against the nationals of one of the Allied Powers were to be brought before national military tribunals of that Power or by multinational tribunals established by two or more Allied Powers.<sup>243</sup> The treaty also included the possibility of the League of Nations creating in sufficient time a tribunal competent to deal with the atrocities committed by Turkish officials or officers.<sup>244</sup> Such a tribunal, if established, may have been considered the first international criminal tribunal.

Four major Ottoman courts-martial were held that prosecuted Turkish officials for crimes during the First World War. However, after only a few trials, the Treaty of Sevres

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<sup>240</sup> Battle, "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes," 5.

<sup>241</sup> Treaty of Peace with Turkey (signed in Sevres on 10 August 1920) (1920) UKTS 11 (Treaty of Sevres).

<sup>242</sup> Treaty of Sevres, art. 226.

<sup>243</sup> Treaty of Sevres, art. 227.

<sup>244</sup> Treaty of Sevres, art. 230.

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was replaced with the Treaty of Lausanne,<sup>245</sup> which did not include criminal prosecutions. The United States had little to do with peace treaties with the Ottoman Empire and never signed the Treaty of Sevres or the Treaty of Lausanne.

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<sup>245</sup> Treaty of Peace between Principal Allied and Associated Powers and Turkey (signed 24 July 1923) 28 LNTS 11.



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**Advisory Committee of Jurists**

After the Treaty of Peace entered into force, the League of Nations established an Advisory Committee of Jurists to prepare a scheme for the establishment of the Permanent Court of International Justice provided for in Article 14 of the Covenant of the League of Nations.<sup>246</sup> The Committee was established in February 1920 and held meetings that same year from 16 June to 24 July. Elihu Root served as the United States representative on the Committee, and James Brown Scott, who also served as the United States representative on the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, served as Root's legal advisor.

At the Committee's fifth meeting, Baron Descamps (Belgium, President of the Committee) explained his "Project for the organization of international justice."<sup>247</sup> Descamps proposed that the organization of international justice include three tribunals: the existing Permanent Court of Arbitration, the High Court of International Justice, and the Permanent Court of International Justice.<sup>248</sup> He proposed that the High Court of International Justice would have jurisdiction to hear cases "which concern international public order, for instance: crimes against the universal Law of Nations."<sup>249</sup> Descamps later submitted a proposal to the Committee for the establishment of the High Court of International Justice.<sup>250</sup> He supported his proposal by arguing that there was consensus about the existence of crimes of an international character that had victimized the international community. Descamps further argued that an international tribunal with

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<sup>246</sup> The Covenant of the League of Nations included arts. 1-26 of the Treaty of Peace Between the Allied and Associated Powers and Germany. The first sentence of art. 14 stated, "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice."

<sup>247</sup> 5th Meeting held at the Peace Palace, 21 June 1920, Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16th – July 24th 1920 with Annexes* (Van Langenhuisen Brothers 1920) (*Procès-Verbaux of the Proceedings*) 131.

<sup>248</sup> Organization of International Justice, Proposal by Baron Descamps, annex no. I, *Procès-Verbaux of the Proceedings*, 142.

<sup>249</sup> Organization of International Justice, Proposal by Baron Descamps, annex no. I, *Procès-Verbaux of the Proceedings*, 142.

<sup>250</sup> 23rd Meeting held at the Peace Palace, 13 July 1920, *Procès-Verbaux of the Proceedings*, 498.

jurisdiction to try crimes of an international character should not be established *ex post facto* when such crimes are committed in the future.<sup>251</sup> He went on to say that it would be wiser to establish a tribunal that could not later be criticized for being used for “revenge” and that it could possibly have a deterrent effect, preventing such crimes from being committed again.<sup>252</sup>

Root sympathized with Descamps’ proposal to establish the High Court of International Justice. However, consistent with the views of the United States representatives on the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties the previous year, Root argued that an international criminal court could not be established without an international criminal code giving it jurisdiction over individuals. Up to that point, international law had only applied to States; only national courts had jurisdiction to try individuals for violations of well-established crimes, i.e., violations of the laws and customs of war. Root argued for an international conference to be held to help answer major questions about international law, including the establishment of an international criminal court. Root and Descamps submitted a draft resolution “concerning the convocation of conferences on international law.”<sup>253</sup> Descamps followed with his own proposal for the creation of the High Court of International Justice.<sup>254</sup>

The Committee unanimously adopted the two proposals as resolutions in its Final Report. The first resolution submitted by Root and Descamps stated, “A new interstate Conference, to carry on the work of the two first Conferences at The Hague, should be called as soon as possible” and the title of “the new Conference should be called the Conference for the Advancement of International Law.”<sup>255</sup> The second paragraph of Root and Descamps’ resolution made the following statement:

[T]he Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method, or

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<sup>251</sup> 23rd Meeting held at the Peace Palace, 13 July 1920, *Procès-Verbaux of the Proceedings*, 498.

<sup>252</sup> 23rd Meeting held at the Peace Palace, 13 July 1920, *Procès-Verbaux of the Proceedings*, 498.

<sup>253</sup> Draft Resolution concerning the convocation of Conferences on International Law, submitted by Mr. Root and Baron Descamps, annex No. 1, *Procès-Verbaux of the Proceedings*, 519.

<sup>254</sup> Proposal submitted by Baron Descamps, annex no. 2, *Procès-Verbaux of the Proceedings*, 521.

<sup>255</sup> 34th Meeting held at the Peace Palace, 24 July 1920, *Procès-Verbaux of the Proceedings*, First Resolution, pp. 747-48, paras. I & III.

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use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realization of this work.<sup>256</sup>

The second resolution submitted by Descamps that proposed creating the High International Court of Justice read as follows:

The Advisory Committee of Jurists assembled at The Hague to prepare the constituent Statute of a Permanent Court of International Justice;

Having had laid before it by its President a proposition for the establishment for the future, of a High Court of International Justice;

Recognizing the great importance of this proposition;

Recommends it to the consideration of the Nations.

This proposition is conceived as follows:

### Article 1

A High Court of International Justice is hereby established.

### Article 2

This Court shall be composed of one Member for each State, to be chosen by the group of Delegates of each State on the Court of Arbitration.

### Article 3

The High Court of International Justice shall be competent to try crimes constituting a breach of International public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations.

### Article 4

The Court shall have the power to define the nature of the crime, to fix the penalty and to decide the appropriate means of carrying out the sentence. It shall formulate its own rules of procedure.<sup>257</sup>

The Third Committee of the League of Nations was responsible for reviewing questions pertaining to the establishment of the Permanent Court of International Justice

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<sup>256</sup> 34th Meeting held at the Peace Palace, 24 July 1920, *Procès-Verbaux of the Proceedings*, First Resolution, pp. 747-48, para. II.

<sup>257</sup> 34th Meeting held at the Peace Palace, 24 July 1920, *Procès-Verbaux of the Proceedings*, 2nd Res., p. 748

and sending its recommendations to the Assembly of the League of Nations for consideration. However, members of the Third Committee did not agree with the Committee's resolution that a conference should take place to codify international law. M. Huber of Switzerland argued that in international law, it was impossible to distinguish between legal and political considerations.<sup>258</sup> M. Ricci Busatti of Italy thought that codifying international law should be left entirely to State governments.<sup>259</sup> Sir Cecil Hurst of the British Empire "thought that it was premature for the League of Nations to start work on the codification of international law before the League was really universal."<sup>260</sup>

With so much debate on the codification of international law, the Third Committee did not support creating an international criminal court. M. Lafontaine of Belgium thought that it was impossible to create an international criminal court, "since there was no defined notion of international crimes and no international penal law."<sup>261</sup> Lafontaine further stated that if a criminal court was needed in the future, it should be a special court within the Permanent Court of International Justice.<sup>262</sup> The other members of the Third Committee agreed.<sup>263</sup>

The Third Committee did vote to retain the Committee of Jurists' recommendation that the authoritative legal institutions should be asked in what way they might collaborate in the preparation of codifying international law.<sup>264</sup> Two days later, Lafontaine presented the Third Committee's Report on the recommendations of the

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<sup>258</sup> Resolutions of the Jurists' Committee, Tenth Meeting, Held on December 16th, 1920, at 9.30 a.m., *League of Nations, The Records of the First Assembly, Meetings of the Committees* (1920) 326, 327.

<sup>259</sup> Resolutions of the Jurists' Committee, Tenth Meeting, Held on December 16th, 1920, at 9.30 a.m., *League of Nations, The Records of the First Assembly, Meetings of the Committees* (1920) 326, 327.

<sup>260</sup> Resolutions of the Jurists' Committee, Tenth Meeting, Held on December 16th, 1920, at 9.30 a.m., *League of Nations, The Records of the First Assembly, Meetings of the Committees* (1920) 326, 27-28.

<sup>261</sup> Resolutions of the Jurists' Committee, Tenth Meeting, Held on December 16th, 1920, at 9.30 a.m., *League of Nations, The Records of the First Assembly, Meetings of the Committees* (1920) 326, 329.

<sup>262</sup> Resolutions of the Jurists' Committee, Tenth Meeting, Held on December 16th, 1920, at 9.30 a.m., *League of Nations, The Records of the First Assembly, Meetings of the Committees* (1920) 326, 329.

<sup>263</sup> Resolutions of the Jurists' Committee, Tenth Meeting, Held on December 16th, 1920, at 9.30 a.m., *League of Nations, The Records of the First Assembly, Meetings of the Committees* (1920) 326, 329.

<sup>264</sup> The Report of Committee No. III on the Recommendations Presented by the Committee of Jurists at The Hague, Thirty-First Plenary Meeting, 18 December 1920, *League of Nations, The Records of the First Assembly, Plenary Meetings* (1920) 744, 745.

Committee of Jurists to the Assembly of the League of Nations.<sup>265</sup> Lafontaine explained that the Third Committee had agreed that criminal cases should be entrusted to “ordinary tribunals” as it was the custom in international procedure, and any consideration of an international criminal court at that moment was premature.<sup>266</sup> The Assembly of the League of Nations agreed and the matter was not discussed any further. The Assembly also was not interested in taking steps towards the codification of international law. It voted against inviting authoritative legal institutions to consider methods of codifying international law.<sup>267</sup> Two years later, the Assembly of the League of Nations considered the matter once again. It invited the Council of the League of Nations to appoint a committee to prepare a provisional list of subjects sufficiently ripe for codification along with a proper procedure.<sup>268</sup> The Council appointed a committee, which invited authoritative legal institutions that had been included in the Committee of Jurists’ recommendation in 1920.<sup>269</sup>

### **Committee for the International Repression of Terrorism**

On 10 December 1934, the Council of the League of Nations established the Committee for the International Repression of Terrorism.<sup>270</sup> A number of States sent proposals and suggestions for the Committee to consider when creating a draft convention to repress terrorism.<sup>271</sup> Among the suggestions of France was a proposal to create an international criminal court competent to prosecute certain acts of terrorism.<sup>272</sup> There were differences

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<sup>265</sup> The Report of Committee No. III on the Recommendations Presented by the Committee of Jurists at The Hague, Thirty-First Plenary Meeting, 18 December 1920, *League of Nations, The Records of the First Assembly, Plenary Meetings* (1920) 744, 744-45.

<sup>266</sup> The Report of Committee No. III on the Recommendations Presented by the Committee of Jurists at The Hague, Thirty-First Plenary Meeting, 18 December 1920, *League of Nations, The Records of the First Assembly, Plenary Meetings* (1920) 744, 744-45.

<sup>267</sup> The Report of Committee No. III on the Recommendations Presented by the Committee of Jurists at The Hague, Thirty-First Plenary Meeting, 18 December 1920, *League of Nations, The Records of the First Assembly, Plenary Meetings* (1920) 744, 746-47.

<sup>268</sup> Hugh H. L. Bellot, “Codification of International Law” (1926) 8 *J Comp Legis & Intl L* 3d ser. 137, 139.

<sup>269</sup> Hugh H. L. Bellot, “Codification of International Law” (1926) 8 *J Comp Legis & Intl L* 3d ser. 137, 139. For a summary of the studies conducted by the authoritative legal institutions, see William A. Schabas, *The International Criminal Court: A Commentary* (OUP 2010)

<sup>270</sup> Report to the Council Adopted by the Committee on 15 January 1936, LN Doc. C.36(I).1936.V. reproduced in *Series of League of Nations Publications V: Legal* (1936) V.2, p. 2.

<sup>271</sup> Replies from Governments after the First Session of the Committee, LN Doc. C.36(I).1936.V. reproduced in *Series of League of Nations Publications V: Legal* (1936) V.2, p. 13.

<sup>272</sup> Letter from the French Government to the Secretary-General, Proposed Basis of an International Convention for the Suppression of Terrorism (9 December 1934) LN Doc. C.542.M.249.1934.VII.

of opinion between members of the Committee as to the principle and utility of the establishment of an international criminal court, and it was agreed that it should be established as a separate instrument that parties to the terrorism convention could be free to accept or not.<sup>273</sup> On 15 January 1936, the Committee for the International Repression of Terrorism adopted its Report to the Council.<sup>274</sup> Annexed to the Report were two draft conventions: a Draft Convention for the Prevention and Punishment of Terrorism<sup>275</sup> and a Draft Convention for the Creation of an International Criminal Court.<sup>276</sup>

On 23 January 1936, the Council of the League of Nations adopted its Report and directed the Secretary-General to transmit the Committee's Report to governments with a request that they submit any observations they wished to make by 15 July 1936.<sup>277</sup> On 27 May 1937, the Council of the League of Nations passed a resolution scheduling the Conference on the International Repression of Terrorism to commence on 1 November of that year.<sup>278</sup> Two conventions were adopted on the last day of the conference: the Convention for the Prevention and Punishment of Terrorism<sup>279</sup> and the Convention for the Creation of an International Criminal Court.<sup>280</sup> The treaty never entered into force, since it failed to receive the sufficient number of ratifications.<sup>281</sup>

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<sup>273</sup> Report to the Council Adopted by the Committee on January 15th, 1936, LN Doc. C.36(I).1936.V. reproduced in *Series of League of Nations Publications V: Legal* (1936) V.2, p. 2.

<sup>274</sup> Report to the Council Adopted by the Committee on January 15th, 1936, LN Doc. C.36(I).1936.V. reproduced in *Series of League of Nations Publications V: Legal* (1936) V.2, p. 2.

<sup>275</sup> Draft Convention for Prevention and Punishment of Terrorism, appendix 1 of Report to the Council Adopted by the Committee on 15 January 1936, LN Doc. C.36(I).1936.V. reproduced in *Series of League of Nations Publications V: Legal* (1936) V.2, p. 3.

<sup>276</sup> Draft Convention for the Creation of an International Criminal Court, appendix 2 of Report to the Council Adopted by the Committee on 15 January 1936," LN Doc. C.36(I).1936.V. reproduced in *Series of League of Nations Publications V: Legal* (1936) V.2, p. 8.

<sup>277</sup> Report Adopted by the Council on January 23rd 1936, LN Doc. C.60.1936.V, reproduced in *Series of League of Nations Publications V: Legal* (1936) V.2, p. 16.

<sup>278</sup> "Convocation of the Conference on the International Repression of Terrorism" (1937) 18 *League of Nations OJ* 308, 309.

<sup>279</sup> Convention for the Prevention and Punishment of Terrorism (adopted 16 November 1937) LN Doc. C.546.M.383.I937.V.

<sup>280</sup> Convention for the Creation of an International Criminal Court (adopted 16 November 1937) LN Doc. C.547.M.384.I937.V.

<sup>281</sup> William A. Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 5.

*Chapter 4*

*Post-Second World War Era*

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The failure to prosecute German war criminals after the First World War demonstrated the international community's unwillingness to effectively implement international criminal justice. Speaking to his chief commanders and commanding generals on 22 August 1939, Adolf Hitler had blatantly referred to intentionally killing several members of the same race or ethnicity, also considering the weak prosecutions of Turkish *génocidaires*, when he stated, "Who after all is today speaking about the destruction of the Armenians?"<sup>282</sup> Ten days later, on 1 September 1939, Germany invaded Poland, effectively beginning the Second World War. During the next two years, Germany attempted to control most of Europe. Germany's preliminary stages to war included the persecution of German Jews and Gypsies within Germany's borders, an act that would later be relevant to the prosecution of war criminals. As a result of the Nazis' "Final Solution" to the "Jewish Question," systematic killings of Jews and Gypsies significantly increased beginning in 1941.

**Declarative Threats of Punishment for War Crimes**

The crimes committed by the Nazis were so horrible that their severity was hard to describe. In a speech delivered in August 1941, British Prime Minister Winston Churchill stated, "The whole of Europe has been wrecked and trampled down by the mechanical weapons and barbaric fury of the Nazis. [...] As [Hitler's] armies advance, whole districts are exterminated."<sup>283</sup> On 25 October 1941, soon after Churchill's speech, President Franklin D. Roosevelt and Churchill stated that one of the war's major goals was to bring retribution to Nazis who killed prisoners of war through reprisal killings.<sup>284</sup>

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<sup>282</sup> Prosecution Exhibits Submitted to the International Military Tribunal (USA 1-34) (National Archives Microfilm Publication T988, roll 8) Record Group (RG) 238, National Archives at College Park, College Park, MD (NACP).

<sup>283</sup> Winston S. Churchill, *The Churchill War Papers: The Ever-Widening War 1941*, vol. 3 (Martin Gilbert (ed), W. W. Norton 2000) 1099-1106, quoted in Samantha Power, *"A Problem From Hell:" America and the Age of Genocide* (Basic Books 2003) 29.

<sup>284</sup> *Punishment for War Crimes: The Inter-Allied Declaration signed at the St. James's Palace London on 13th January, 1942, and relative documents*, vol. 1 (His Majesty's Stationary Office 1942) 15; see also Whitney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of The*

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Roosevelt stated, “The Nazis might have learned from the last war the impossibility of breaking men’s spirit by terrorism” and that such “[f]rightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring frightful retribution.”<sup>285</sup> Neither Roosevelt nor Churchill knew what type of retribution would bring justice, however. Prosecutions of war criminals after the First World War had limited success; therefore, it was important for the Allied victors not to repeat mistakes previously made. In addition, at the time of the declarations, the United States was a neutral State<sup>286</sup> and considered its declaration to be independent of declarations made by other States.<sup>287</sup>

On 13 January 1942, nine Nazi-occupied States met at St. James’s Palace in London to discuss retribution against Germany for invading their countries.<sup>288</sup> The United States attended as an observer. These States affirmed their collective intention to bring Nazi war criminals to justice.<sup>289</sup> The statesmen who met at St. James’s Palace developed the principles that had been previously proclaimed on 25 October by President Roosevelt.<sup>290</sup> Roosevelt followed with a declaration of punishment for war crimes later that year when, on 21 August 1942, he announced that the United States’s main goal was to punish the Germans judicially once military victory was achieved. He stated, “When victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe

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*First World War at Nuremberg, Germany, 1945-1946* (First Southern UP 1999) 3; Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A. Knopf 1992) 25.

<sup>285</sup> *Punishment for War Crimes*, vol. 1, 15; see also Harris, *Tyranny on Trial*, 3.

<sup>286</sup> *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty’s Stationary Office 1948) 87; Arieh K. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (University of North Carolina Press 1998) 19.

<sup>287</sup> Secretary of State (Hull) to the Ambassador to the Polish Government in Exile (Biddle) at London, 27 November 1941, *Foreign Relations of the United States, Diplomatic Papers (FRUS), 1941*, vol. 1 (US GPO 1958) 449; See also Kochavi, *Prelude to Nuremberg*, 19.

<sup>288</sup> *Punishment for War Crimes*, vol. 1, 15; *History of the United Nations War Crimes Commission*, 89-92.

<sup>289</sup> *Punishment for War Crimes*, vol. 2, 27; see also Harris, *Tyranny on Trial*, 4; Peter Maguire, *Law and War: An American Story* (Columbia UP 2000) 86; Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-1946: A Documentary History* (Bedford Books 1997) 20-22; Taylor, *The Anatomy of the Nuremberg Trials*, 25; Drexel A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account*, vol. 1 (University Press of America 1999) 22.

<sup>290</sup> *Punishment for War Crimes*, vol. 1, 15, n. 1.



and Asia.”<sup>291</sup> Importantly, Roosevelt included Asia in his statement, referring to Japan, because United States policy stated that Japanese war criminals would also be punished for their crimes. Initially, Roosevelt had stated that United States policy said that war criminals should be prosecuted in national tribunals based on the principle of territoriality, saying, “It seems only fair that they shall have to stand in courts of law in the very countries they are now oppressing and answer for their acts.”<sup>292</sup> It was clear that United States policy stated that any prosecutions would be national or multinational rather than “international,”<sup>293</sup> since court proceedings would occur in the affected countries or through a combination of national courts. There was also no mention at that time of prosecuting highly ranked German officials.

Around the same time, the Cambridge Commission for Penal Reconstruction and Development had recommended that war crimes should be prosecuted “wherever possible” in municipal courts,<sup>294</sup> but where it was not possible for municipal courts to prosecute such crimes, some members of the Commission recommended establishing an international criminal court, while others did not think the time was ripe for such a court.<sup>295</sup> The United States did not fully agree with the formation of an international criminal court. Instead, officials argued for national military courts or courts including multiple nations that would have the capability to prosecute as many persons as possible on the basis of territoriality or nationality,<sup>296</sup> which would allow courts to extraterritorially prosecute where municipal courts could not without establishing one higher international criminal court.

The most significant warning came at the conclusion of the Tripartite Conference in Moscow in 1943. From 19 to 30 October, the governments of the Soviet Union, the

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<sup>291</sup> Quoted in *History of the United Nations War Crimes Commission*, 93; see also Maguire, *Law and War*, 86; Harris, *Tyranny on Trial*, 4.

<sup>292</sup> Quoted in *History of the United Nations War Crimes Commission*, 93.

<sup>293</sup> United States references to an “international” tribunal are not how we know them to be today. Its version of “international” would consist of several nations participating together in a military tribunal, each with their own prosecutors and representatives. The United States, as well as several other states, “used the word ‘international court’ simply as a convenient phrase referring to some sort of an organization for the trial of those accused of war crimes,” see The American Representative on the United Nations War Crimes Commission (Pell) to the Secretary of State, 29 February 1944, *FRUS, 1944, General* (US GPO 1966) 1285.

<sup>294</sup> *History of the United Nations War Crimes Commission*, 95.

<sup>295</sup> *History of the United Nations War Crimes Commission*, 95.

<sup>296</sup> *New York Times* (11 December 1942).

United Kingdom, and the United States met in Moscow to discuss matters concerning the Second World War, including German atrocities. On 30 October 1943, Roosevelt, Churchill, and Stalin signed the Declaration of German Atrocities, which was published on 1 November.<sup>297</sup> Referring to crimes, the declaration stated,

[T]hose German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein.<sup>298</sup>

The final paragraphs were a warning that the three Allied parties would punish the guilty:

Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.<sup>299</sup>

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<sup>297</sup> “Declaration on German Atrocities,” The Tripartite Conference in Moscow, 18 October – 1 November 1943, *FRUS, 1943, General*, vol. 1 (US GPO 1963) 513, annex 10, at 768-69; “Declaration on German Atrocities” (1943) 9 *Dep’t St Bull* 310.

<sup>298</sup> “Declaration on German Atrocities,” The Tripartite Conference in Moscow, 18 October – 1 November 1943, *FRUS, 1943, General*, vol. 1 (US GPO 1963) 513, annex 10, at 768-69; “Declaration on German Atrocities” (1943) 9 *Dep’t St Bull* 310.

<sup>299</sup> “Declaration on German Atrocities,” The Tripartite Conference in Moscow, 18 October – 1 November 1943, *FRUS, 1943, General*, vol. 1 (US GPO 1963) 513, annex 10, at 768-69; “Declaration on German Atrocities” (1943) 9 *Dep’t St Bull* 310.

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The Moscow Declaration mentioned particular crimes committed in certain countries, including France, the Soviet Union, and Poland. However, there was no reference to crimes committed by Germans against persons in Germany. Additionally, while there was mention of sending common war criminals to be prosecuted back in the territories where they had committed their crimes, there was no mention at all of prosecuting major war criminals, including Hitler, Göring, and Hess. The Declaration broadly stated that the Governments of the Allies would decide their punishments jointly.

### **United Nations War Crimes Commission**

In June 1942, while in Washington, D.C., Churchill suggested to Roosevelt that a commission be established to investigate atrocities.<sup>300</sup> Roosevelt favored the idea and on 7 October 1942, the United States and the United Kingdom both declared that the United Nations War Crimes Commission would be created to investigate and hold enemy “ringleaders” responsible for the organization and implementation of war crimes.<sup>301</sup> This statement was the first assertion that members of the Nazi hierarchy would be prosecuted instead of lower-ranked soldiers, an act that represented a significant turning point in United States policy. At the Paris Peace Conference after the First World War, the United States argued against prosecuting persons, particularly superiors, who had not committed the actual crimes.<sup>302</sup> On 17 December 1942, the United States and European members of the United Nations confirmed their determination to punish Nazi war criminals.<sup>303</sup> In January 1943, Sir Cecil Hurst, judge of the Permanent Court of International Justice at The Hague, was named British representative to the Commission. Hurst would go on to become Chairman of the Commission. On 28 June 1943, the

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<sup>300</sup> Kochavi, *Prelude to Nuremberg*, 27.

<sup>301</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, p. 2, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>302</sup> Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 4 April 1919, appended to Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, annex II.

<sup>303</sup> *History of the United Nations War Crimes Commission*, 106; *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Dep’t of St. Pub. 3080 US GPO 1949) 9-10; see also Harris, *Tyranny on Trial*, 4-5; Taylor, *The Anatomy of the Nuremberg Trials*, 26; Sprecher, *Inside the Nuremberg Trial*, 24.

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United States informed the United Kingdom that Herbert C. Pell had been appointed United States representative to the United Nations War Crimes Commission.<sup>304</sup>

### *Establishing the Commission*

The United Nations War Crimes Commission assembled for the first time on 20 October 1943.<sup>305</sup> The United Kingdom wished for the Commission to sit in London, nearer to the “scene of the crimes.”<sup>306</sup> During the Commission’s first meeting, “it was agreed that the Headquarters of the Commission should be established in London.”<sup>307</sup> The Soviet Union, which was not present at the 20 October 1943 meeting, had proposed that the chairmanship of the Commission be shared on a rotating basis between the United Kingdom, the United States, the Soviet Union, and China.<sup>308</sup> The Netherlands delegates proposed that the chairman be from the United Kingdom and argued against four large States rotating the chairmanship of the Commission, while smaller States would not be represented.<sup>309</sup> Delegates from France, Greece, and Poland stated that the continued rotation of the chairman proposed by the Soviet Union would be difficult for practical reasons.<sup>310</sup> Mr. Winant, the United States representative, said that while the United States did not object to the Soviet Union’s proposal, “he had the authority to support the proposal for a British chairman and that personally he would be prepared to support it.”<sup>311</sup> It was agreed that the matter of choosing a chairman would be left for a later date.<sup>312</sup>

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<sup>304</sup> The Secretary of State to the Ambassador in the United Kingdom, 28 June 1943, *FRUS, 1943*, vol. 1 (US GPO 1963) 407.

<sup>305</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>306</sup> The Chargé in the United Kingdom (Matthews) to the Secretary of State, 22 January 1943, *FRUS, 1943, General*, vol. 1 (US GPO 1963) 402.

<sup>307</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, p. 4, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>308</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, pp. 4-5, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>309</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, p. 5, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>310</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, pp. 5-6, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>311</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, p. 6, United Nations War Crimes Commission Minutes, RG 238, Box 1, Entry 52J, NACP.

<sup>312</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, p. 7, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

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During its initial meeting, the Commission also discussed creating a technical committee of legal scholars to assist in creating an international instrument to try to punish German war criminals, particularly those who did not fall within the jurisdiction of national tribunals. The Committee would work concurrently with the Commission and would be charged with advising the concerned governments about matters of a technical nature (for example, the sort of tribunals to be employed for the trial of war criminals, the law and procedure to be applied, and the rules of evidence).<sup>313</sup> It was later decided that a technical committee would not be developed and that the Commission itself would decide the instrument for prosecuting war criminals. On 11 January 1944, Mr. Herbert C. Pell (United States) proposed a resolution that stated, “The Commission will consider itself organized for business on Tuesday January 18th. It considers itself now sufficiently organized to elect officials and adopt rules of procedure.”<sup>314</sup> The Commission adopted Pell’s proposed resolution and elected Sir Cecil Hurst as its chairman.<sup>315</sup> The chairmanship would not rotate.

After deciding that a technical committee would not be established, Dr. E. Ečer (Czechoslovakia) proposed resolutions that three subcommittees be established with particular responsibilities. One subcommittee would consider facts and evidence, a second subcommittee would consider means and methods of enforcement, and a third subcommittee would consider legal questions.<sup>316</sup> After discussion on the respective competence of the proposed subcommittees, a vote was taken and Dr. Ečer’s resolutions were adopted.<sup>317</sup> On 1 February 1944, the three subcommittees were established. Dr. Lawrence Preuss (United States) was on the Subcommittee on Facts and Evidence and the Subcommittee on Legal Questions. Similar to Robert Lansing’s position as chairman of Sub-Commission No. 3 of the Commission on the Responsibility of the Authors of the

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<sup>313</sup> Meeting of Allied and Dominion Representatives, 20 October 1943, Doc. C.12968/31/62, p. 9, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>314</sup> Notes of Fourth Meeting, 11 January 1944, Doc. M.4, p. 1, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>315</sup> Notes of Fourth Meeting, 11 January 1944, Doc. M.4, p. 1, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>316</sup> Minutes of Sixth Meeting, 25 January 1944, Doc. M.6, p. 2, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>317</sup> Minutes of Sixth Meeting, 25 January 1944, Doc. M.6, p. 5, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP; Communication from the British Foreign Office quoted in a telegram from The Ambassador in the United Kingdom to the Secretary of State, 25 February 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1281-82.

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War and on the Enforcement of Penalties 25 years prior, Pell chaired the Subcommittee on Enforcement. On the proposal of Hurst, it was subsequently agreed that the existing “subcommittees” would be called “committees.”<sup>318</sup>

### *United Nations War Crimes Court*

At the Commission’s tenth meeting, Pell stated that the Committee on Enforcement “regarded the consideration of the organization of an international court as a necessary preliminary to its work, and therefore proposed, with the Commission’s permission, to begin discussions on the subject as soon as possible.”<sup>319</sup> Hurst agreed that the Committee should not wait any longer before taking up the question.<sup>320</sup> Three days later, the Committee on Enforcement held a meeting that included the subject of an international enforcement organization in its general debate.<sup>321</sup> There was consensus among the members that a court was necessary “to provide jurisdiction over cases which cannot be appropriately dealt with by national tribunals.”<sup>322</sup> In contrast to Lansing’s position in 1919, Pell was more open to an “international court” and thought that one was needed as “part of the machinery organized to make the outbreak of future wars less probable.”<sup>323</sup>

Pell was instructed by the State Department to “cautiously” proceed with discussions of an international tribunal. However, in view of the Moscow Declaration, the State Department believed in “a simpler and more expeditious method of handling most of the cases,”<sup>324</sup> specifically those involving crimes against nationals of more than one country “or cases in which higher officials are charged with ultimate responsibility for policies and practices executed by subordinates.”<sup>325</sup> The United States would wait to

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<sup>318</sup> Minutes of Tenth Meeting, 22 February 1944, Doc. M.10, p. 1, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>319</sup> Minutes of Tenth Meeting, 22 February 1944, Doc. M.10, p. 2, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>320</sup> Minutes of Tenth Meeting, 22 February 1944, Doc. M.10, p. 2, United Nations War Crimes Commission Minutes, Entry 52J, Box 1, RG 238, NACP.

<sup>321</sup> Report on the Constitution of and the Jurisdiction to be conferred on an International Criminal Court, 25 February 1944, Doc. SC II/3, Entry 52Q, Box 1, RG 238, NACP.

<sup>322</sup> The American Representative on the United Nations War Crimes Commission to the Secretary of State, 29 February 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1282.

<sup>323</sup> The American Representative on the United Nations War Crimes Commission to the Secretary of State, 29 February 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1282 at 1285.

<sup>324</sup> The Acting Secretary of State (Edward R. Stettinius, Jr.) to the American Representative on the United Nations War Crimes Commission, 15 February 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1279.

<sup>325</sup> The Acting Secretary of State (Edward R. Stettinius, Jr.) to the American Representative on the United Nations War Crimes Commission, 15 February 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1278-79.

see the United Nations War Crimes Commission's vision of an international criminal court before giving its official position on the court.

Contrary to the United States Acting Secretary of State's comments, the Committee on Enforcement took the position that the Moscow Declaration opened the door to creating an international criminal court to prosecute war criminals. In a note on the interpretation of the Moscow Declaration, the Committee on Enforcement made the following statement:

Assuming that the Declaration settles the policy that, as a rule, war criminals are to be punished in the countries in which they have committed their crimes, there is still need for conferring a residuary jurisdiction upon an international tribunal in cases where the trial of the accused by national courts would be impracticable or inexpedient. Thus it would probably be impracticable or inexpedient if national courts were to try; (1) Persons who have committed crimes in more than one of the invaded countries and who are demanded for trial by all of the countries in which the crimes took place; (2) Persons who have committed crimes affecting the persons or property of more than one country, and who are demanded for trial by all of the countries affected; and (3) Persons who have taken refuge in neutral countries and have been extradited to the United Nations for trial on account of war crimes.

The reasons which make it impracticable or inexpedient to have such persons tried by national courts appear to be fairly obvious. It will suffice to mention that jurisdictional questions and problems created by the possible contentions of two or more States for the custody of a given person would be bound to hamper the prompt trial and punishment of the war criminals. It may further be pointed out that neutral countries of asylum would probably be willing to accord extradition of persons for trial by an international whom they would refuse to extradite for trial by a national court. Hence it can be argued with considerable force that the conferring of jurisdiction upon an international tribunal

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in the situations mentioned in the preceding paragraph would implement, and not contravene, the basic purposes of the Moscow Declaration.<sup>326</sup>

### Draft Statutes

At a meeting on 28 April 1944, the Committee on Enforcement circulated and discussed a draft convention for an international criminal court, a preliminary document prepared two weeks earlier.<sup>327</sup> The draft convention included 44 articles, the first of which would be titled either “Offences” or “Definition of War Crimes.” A subsequent article listed the specific offenses, including murder or massacre, execution of hostages, and rape. The court’s territorial jurisdiction would be retroactively applied beginning 7 July 1937.<sup>328</sup> Personal jurisdiction included all who committed, ordered, caused, aided, abetted, or incited another person to commit a war crime, irrespective of rank.<sup>329</sup>

The first draft statute was biased in favor of United Nations members. While the draft convention authorized jurisdiction over both enemy and member nationals, United Nations members were precluded from prosecuting their own nationals or former nationals<sup>330</sup> “over whom the Tribunal has jurisdiction under the terms of this Convention.”<sup>331</sup> Jurisdiction also did not extend to enemy nationals in the custody of a United Nations member,<sup>332</sup> who “shall not be precluded from trying persons in its custody.”<sup>333</sup> Further, the draft convention only included traditional war crimes committed by enemy nationals against members of the United Nations.

As the draft was being sent to the governments of United Nations members, the idea of expanding the proposed court’s jurisdiction was discussed within the

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<sup>326</sup> A Note on the Interpretation of the Moscow Declaration, 10 March 1944, Doc. II/7, p. 2, Entry 52Q, Box 1, RG 238, NACP.

<sup>327</sup> Draft Convention on the Trial and Punishment of War Criminals, 14 April 1944, Doc. II/11, Entry 52Q, Box 1, RG 238, NACP; *FRUS, 1944, General*, vol. 1 (US GPO 1966) 1299.

<sup>328</sup> Draft Convention on the Trial and Punishment of War Criminals, 14 April 1944, Doc. II/11, art. 1, Entry 52Q, Box 1, RG 238, NACP; *FRUS, 1944, General*, vol. 1 (US GPO 1966) 1299.

<sup>329</sup> Draft Convention on the Trial and Punishment of War Criminals, 14 April 1944, Doc. II/11, art. 2, Entry 52Q, Box 1, RG 238, NACP; *FRUS, 1944, General*, vol. 1 (US GPO 1966) 1299.

<sup>330</sup> Draft Convention on the Trial and Punishment of War Criminals, 14 April 1944, Doc. II/11, art. 27(2), Entry 52Q, Box 1, RG 238, NACP; *FRUS, 1944, General*, vol. 1 (US GPO 1966) 1299.

<sup>331</sup> Draft Convention on the Trial and Punishment of War Criminals, 14 April 1944, Doc. II/11, arts. 28(2) and 30(4), Entry 52Q, Box 1, RG 238, NACP; *FRUS, 1944, General*, vol. 1 (US GPO 1966) 1299.

<sup>332</sup> Draft Convention on the Trial and Punishment of War Criminals, 14 April 1944, Doc. II/11, art. 28(1), Entry 52Q, Box 1, RG 238, NACP; *FRUS, 1944, General*, vol. 1 (US GPO 1966) 1299.

<sup>333</sup> Draft Convention on the Trial and Punishment of War Criminals, 14 April 1944, Doc. II/11, art. 28(2), Entry 52Q, Box 1, RG 238, NACP; *FRUS, 1944, General*, vol. 1 (US GPO 1966) 1299.



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Commission. Pell agreed that the jurisdiction of the United Nations War Crimes Court should include crimes committed by Germans against other Germans in Germany. He further argued that the Court should include jurisdiction over enemy nationals wanted for prosecution who were subsequently naturalized by neutral States. Pell informed the State Department that “a certain number of Germans, and perhaps citizens of Axis countries, have taken out Spanish naturalization papers with the possible intention of thereby escaping the attention of the United Nations.”<sup>334</sup> Hull responded to Pell that the State Department’s tentative view was “that the Commission should consider cases of war criminals regardless of any change in nationality.”<sup>335</sup>

The United States took issue with the draft convention as a whole. Originally, the purpose of the United Nations War Crimes Commission had been to investigate and recommend punishment only when members of the enemy committed war crimes against members of the United Nations. Hull stated in a letter to Pell,

The suggestion which you mention has far-reaching implications, both from the point of view of law and policy. Your attention is called to the fact that undoubtedly many persons, former nationals of Axis states, have been naturalized in this country both before and after our entry into the war. It has been the historical policy of this Government to insist that the right of expatriation is, as stated in the joint resolution of Congress of July 27, 1868, “a natural and inherent right of all people.”<sup>336</sup>

By May 1944, the Commission had considered prosecuting and punishing offenders who had not committed war crimes *stricto sensu* (i.e., crimes against persons committed based “on racial, political, or religious grounds in enemy territory”).<sup>337</sup> At the time, the Nazi’s Final Solution to resolve the “Jewish Question” was being implemented, and millions of Jews and other German and foreign nationals were being killed in Germany and German-occupied territories. According to Hurst, it was assumed that

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<sup>334</sup> The Ambassador in the United Kingdom to the Secretary of State, 30 November 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1395.

<sup>335</sup> The Ambassador in the United Kingdom to the Secretary of State, 30 November 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1395.

<sup>336</sup> The Secretary of State to the American Representative on the United Nations War Crimes Commission, 24 May 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1321.

<sup>337</sup> Scope of the Retributive Action of the United Nations, 1 June 1944, Doc. No. C.23(1), *FRUS, 1944*, vol. 1 (US GPO 1966) 1321.

when the United Nations War Crimes Commission was created, “it would be part of the duties of the Commission to investigate atrocities of this character committed by the enemy in enemy territory as well as occupied territory.”<sup>338</sup> The need to punish these crimes was equal to the need to punish traditional war crimes.<sup>339</sup>

It was clear that members of the United Nations War Crimes Commission considered it within the Commission’s authority to recommend an international criminal court and to include crimes other than traditional war crimes within the court’s jurisdiction. On 22 September 1944, Committee No. 2 presented to the Commission a draft for a convention for the establishment of a United Nations joint court.<sup>340</sup> The draft was supported and on 30 September 1944, the United Nations War Crimes Commission released its Draft Convention for the Establishment of a United Nations War Crimes Court.<sup>341</sup> Recognizing that delay may occur while its recommendation and proposed convention for the United Nations War Crimes Court was considered by States, the Commission recommended that mixed military tribunals be established under the authority of supreme military commanders for the expeditious trials of war criminals.<sup>342</sup>

### A Different Course

Shortly after the draft was released, States became concerned that the United Nations War Crimes Commission may have gone beyond its mandate. One month after the draft convention was released, the United Kingdom sent an Aide-Mémoire informing the United States that it did not agree with the United Nations War Crimes Commission’s creation of a war crimes court.<sup>343</sup> The United Kingdom and the United States both felt that the jurisdiction of the United Nations War Crimes Court would be too broad if it included crimes committed in Germany against its own nationals or other non-enemy

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<sup>338</sup> Scope of the Retributive Action of the United Nations, 1 June 1944, Doc. No. C.23(1), *FRUS, 1944*, vol. 1 (US GPO 1966) 1321 at 1322.

<sup>339</sup> Scope of the Retributive Action of the United Nations, 1 June 1944, Doc. No. C.23(1), *FRUS, 1944*, vol. 1 (US GPO 1966) 1321 at 1322.

<sup>340</sup> Convention for the Establishment of a United Nations Joint Court, 22 September 1944, Doc. C.50, Entry 52Q, Box 1, RG 238, NACP.

<sup>341</sup> Draft Convention for the Establishment of a United Nations War Crimes Court, 30 September 1944, Doc. No. C.50(1), Entry 52Q, Box 1, RG 238, NACP.

<sup>342</sup> Recommendation in Favor of the Establishment by Supreme Military Commanders of Mixed Military Tribunals for the Trial of War Criminals, 29 September 1944, Doc. C.52(1), Entry 52Q, Box 1, RG 238, NACP.

<sup>343</sup> Aide-Mémoire from the British Embassy to the Department of State regarding United Nations War Crimes Court, 30 October 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1389-91.

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nationals in enemy territory.<sup>344</sup> In its meeting on 17 October 1944, the United Nations War Crimes Commission considered including another crime within the jurisdiction of the proposed court, but the question remained as to whether the preparation and launching of the Second World War could be considered a war crime.<sup>345</sup> As of the end of 1944, the United States had no clear policy on the question.

The United Kingdom's position was that a diplomatic conference to consider and conclude a convention for the establishment of a United Nations War Crimes Court was unnecessary and inconsistent with the Moscow Declaration.<sup>346</sup> The United Kingdom thought it best to establish mixed courts if member governments of the United Nations were unable to try war criminals in their national courts,<sup>347</sup> and it hoped that the United States agreed with its position against the establishment of a United Nations War Crimes Court.<sup>348</sup>

Shortly after receiving the United Kingdom's Aide-Mémoire, the United States Ambassador to the United Kingdom, John G. Winant, met in Washington, D.C., with Assistant Secretary of War John J. McCloy, Attorney General Francis Biddle, and Roosevelt about the United States's policy on war crimes.<sup>349</sup> After Winant's return to the United Kingdom, Pell was ordered back to the United States, where he returned on 6 December 1944. The following day, Pell and Hackworth discussed the work of the United Nations War Crimes Commission. Pell stated that since he had arrived in London in late 1943, the State Department had given him no instructions regarding the creation of an international criminal court by the United Nations War Crimes Commission.<sup>350</sup> Hackworth replied that the establishment of an international criminal court was being considered by the State, War, and Navy Departments and that "it would be necessary to

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<sup>344</sup> The British Ambassador to the Secretary of State, 12 December 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1401-02.

<sup>345</sup> The American Representative on the United Nations War Crimes Commission to the Secretary of State, 2 November 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1391.

<sup>346</sup> Aide-Mémoire from the British Embassy to the Department of State regarding United Nations War Crimes Court, 30 October 1944, *FRUS, 1944*, vol. 1. (US GPO 1966) 1389.

<sup>347</sup> Aide-Mémoire from the British Embassy to the Department of State regarding United Nations War Crimes Court, 30 October 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1390.

<sup>348</sup> Aide-Mémoire from the British Embassy to the Department of State regarding United Nations War Crimes Court, 30 October 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1390.

<sup>349</sup> The Ambassador in the United Kingdom to the Secretary of State, 30 November 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1395.

<sup>350</sup> Memorandum of Conversation, by the Legal Advisor, 7 December 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1397-98.

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be sure of our ground before undertaking to reach conclusions.”<sup>351</sup> They agreed the matter was sensitive and would not discuss it further until decisions had been made.

Five days later, Pell wrote to Hackworth pushing the subject of war criminals and stating that he had inferred from their previous conversation that the State Department approved of the creation of a “Military Court” to prosecute war criminals.<sup>352</sup> Hackworth immediately responded with the following:

I thought that it was made clear in our conversation that the whole matter relating to war crimes was under consideration by the interested agencies of the Government and that nothing definite and final could be said at this time regarding any phase of the subject on which you have asked for instructions [...] You would not, therefore, be privileged to act on any impressions that you may have gained from our conversations.<sup>353</sup>

It was clear that the United Kingdom and the United States thought the United Nations War Crimes Commission was going far beyond its original mandate of investigating crimes and making recommendations. On 26 January 1945, Pell was informed that he would not return to London to represent the United States on the United Nations War Crimes Commission.<sup>354</sup> Cecil Hurst later resigned from the Commission.<sup>355</sup>

The United Nations War Crimes Commission remained a valuable organization for its investigations and recommendations, but it was secondary to the Allied Powers. In early 1945, the Commission made the following recommendations regarding the prosecution of war criminals:

It has recommended (1) that, generally speaking, the cases should be tried in the national courts of the countries against which the crimes have been committed; (2) that a convention be concluded providing for the establishment of a United Nations court to pass upon such cases as are referred to it by the Governments;

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<sup>351</sup> Memorandum of Conversation, by the Legal Advisor, 7 December 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1397-98.

<sup>352</sup> The American Representative on the United Nations War Crimes Commission (Pell) to the Legal Advisor (Hackworth), 11 December 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1399.

<sup>353</sup> The Legal Advisor (Hackworth) to the American Representative on the United Nations War Crimes Commission (Pell), 12 December 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1400.

<sup>354</sup> Bertram D. Hulen, “Pell Leaves War Crimes Board: He Favored Wider Punishments” *New York Times* (27 January 1945) 1.

<sup>355</sup> Bertram D. Hulen, “Pell Leaves War Crimes Board: He Favored Wider Punishments” *New York Times* (27 January 1945) 1.

and (3) that pending the establishment of such a court there be established mixed military tribunals to function also in addition to the United Nations court when the latter is established.<sup>356</sup>

### **The United States Initiative for Prosecutions by National Courts**

In 1942, the United States had established the Office of Strategic Services, the precursor to its Central Intelligence Agency. Over the next three years, the Office of Strategic Services obtained much incriminating evidence through its investigations into war crimes. By 1943, the United States had already begun establishing plans to prosecute German war criminals once the war was over. On 9 March 1943, the United States Congress passed a Senate resolution that stated that accountability and punishment would be commensurate with the offenses committed.<sup>357</sup>

On 1 October 1943, the War Department instructed Thomas H. Green, Acting Judge Advocate General, to make recommendations for guidance in any discussions involving the possible trial of enemy nationals who had committed war crimes.<sup>358</sup> In his recommendations, Green stated that two sources had established courts to prosecute war criminals, constitutional law and international law. The United States Constitution authorized Congress “to constitute Tribunals inferior to the Supreme Court.”<sup>359</sup> The Supreme Court had decided that provisions in the United States Constitution gave the United States the authority to establish military tribunals to implement the law of war.<sup>360</sup> The Constitution also authorizes Congress “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”<sup>361</sup> The laws and customs of war, a branch of international law, had authorized George Washington to establish a military commission during the Revolutionary War prior to the establishment of the United States Constitution.<sup>362</sup> Therefore, the President and Congress had the

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<sup>356</sup> The Secretary of State to the President, 6 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 401.

<sup>357</sup> *Report of Robert H. Jackson*, 10-11; See also Harris, *Tyranny on Trial*, 5; Sprecher, *Inside the Nuremberg Trial*, vol. 1, 25.

<sup>358</sup> Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266.

<sup>359</sup> US Constitution, art. 1, sec. 8.

<sup>360</sup> *Ex parte Quirin* (1942) 317 U.S. 1, 25-28

<sup>361</sup> US Constitution, art. 1, sec. 8.

<sup>362</sup> Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1267.

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power to authorize the trial of war criminals by general courts-martial and military commissions. In addition to national tribunals, international tribunals could be authorized by international law.<sup>363</sup>

On 28 October 1943, the Combined Chiefs of Staff informed General Eisenhower that “[i]ndividuals suspected of having committed war crimes should not be tried before military tribunals. Until a determination has been made by the United Nations as to their ultimate disposal, they will be retained in custody by the Allied command.”<sup>364</sup> Eisenhower’s only authority to appoint military courts was for the prosecution of persons who had committed offenses against his command during military occupation.<sup>365</sup> At the time, there was consensus to allow the United Nations War Crimes Commission to accomplish its mandate in the investigation of war criminals from enemy nations.

On 30 October 1943, the Judge Advocate General, Brigadier General Thomas H. Green, responded to a memorandum he had received on 1 October requesting his recommendations regarding the possibility of trying war criminals by military tribunals.<sup>366</sup> In response, General Green cited *United States v. Curtiss-Wright Corp.*,<sup>367</sup> a case that had established international law as a fundamental source of law that would exist even in the absence of national constitutional law.<sup>368</sup> International law had authority over the laws and customs of war.<sup>369</sup> Therefore, he argued, just as national laws authorized national tribunals to prosecute national crimes, international tribunals were authorized under international law.<sup>370</sup> The only problem was that there had never been an international criminal tribunal in modern history. Thus, military tribunals were more likely to adjudicate as they had in the past.

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<sup>363</sup> Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1267.

<sup>364</sup> The Combined Chiefs of Staff to General Eisenhower, 28 October 1943, *FRUS, 1943*, vol. 1 (US GPO 1963) 424.

<sup>365</sup> The Combined Chiefs of Staff to General Eisenhower, 28 October 1943, *FRUS, 1943*, vol. 1 (US GPO 1963) 424.

<sup>366</sup> Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266.

<sup>367</sup> *United States v. Curtiss-Wright Corp.* (1936) 299 U.S. 304.

<sup>368</sup> *United States v. Curtiss-Wright Corp.* (1936) 299 U.S. 304, 318; See Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1267.

<sup>369</sup> See Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1267.

<sup>370</sup> See Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1267.

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Regarding any limitations of persons to be prosecuted by military tribunals, General Green stated, “From the point of view of international law, all persons, military and civilian, charged with having committed offenses directed against the United States or our cooperating cobelligerents in violation of the laws of war are subject to the jurisdiction of military tribunals.”<sup>371</sup> General Green limited the ability of military tribunals to cover *rationa materiae* crimes to the following conditions:

- (a) General international treaties or conventions declaratory of the law of war, and particular treaties establishing rules of the law of war expressly recognized by the belligerent states;
- (b) International customs of war, as evidence of a general practice accepted as law;
- (c) Pertinent general principles of law, including criminal law, recognized by civilized nations;
- (d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of the law of war; and
- (e) Local law and military regulations and orders, during military occupation.<sup>372</sup>

Considering only the first condition, individual Nazis would be covered under international law within the jurisdiction of military tribunals. Germany had been a party to both Hague Conventions on the Laws and Customs of War on Land in 1899<sup>373</sup> and 1907,<sup>374</sup> and the country had ratified the Treaty of Peace, which implemented certain restrictions on its territory and military. General Green did state, however, that there would be time limitations for crimes prosecutable by a military tribunal. Such limitations included war crimes, which took place both during the time of actual hostilities and as

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<sup>371</sup> Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1269.

<sup>372</sup> Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1268-69. (a) through (d) came from the Statute of the Permanent Court of International Justice, 16 December 1920, art. 38.

<sup>373</sup> Laws and Customs of War on Land (Hague II) (signed 29 July 1899, entered into force 4 September 1900) 1 *Bevans* 247.

<sup>374</sup> Laws and Customs of War on Land (Hague IV) (signed 18 October 1907, entered into force 26 January 1919) 1 *Bevans* 631.

long as the state of war continued.<sup>375</sup> Green seems to have indicated that prosecuting war criminals for committing crimes against humanity would have to be linked to a state of war.

If prosecutions for war crimes should take place, the War Department's tentative views regarding the procedure to be considered were as follows:

- (1) As many cases as possible, consistent with orderly procedure, should be disposed of by the military or civil tribunals of the respective countries against whose nationals the offenses were committed;
- (2) Where offenses have been committed against nationals of different countries consideration should be given to the possibility of mixed military tribunals, that is to say, if an offender has committed offenses against nationals of two or more of the United Nations, he might be tried before a military tribunal on which each nation would be represented. At this point you might well consider the memorandum prepared by the Office of the Judge Advocate General, which was transmitted to you with the Department's instruction no. 2 of January 15, 1944; and
- (3) As a possible alternative to the procedure just suggested in paragraph 2, or possibly in addition to that procedure, consideration might be given to an international tribunal composed of civilian jurists to try mixed cases, i.e., those involving offenses against nationals of more than one country, or cases in which higher officials are charged with ultimate responsibility for policies and practices executed by subordinates.<sup>376</sup>

By November 1943, special investigation teams from the United States and the United Kingdom were following closely behind the front lines of infantry troops and collecting evidence of war crimes to be used in post-war prosecutions.<sup>377</sup>

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<sup>375</sup> Memorandum Prepared in the Office of the Judge Advocate General, War Department, 30 October 1943, *FRUS, 1944*, vol. 1 (US GPO 1966) 1266 at 1269.

<sup>376</sup> The Acting Secretary of State to the American Representative on the United Nations War Crimes Commission (Pell), 15 February 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1279.

<sup>377</sup> Norman E. Tutorow (ed.). *War Crimes, War Criminals, and War Crimes Trials: An Annotated Bibliography and Source Book* (Greenwood Press 1986) 10; Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services* (Routledge 2007) 2.



### Henry v. Henry

As the Allied Powers began winning the war, an internal struggle within the United States government evolved concerning how to punish Nazi war criminals. Franklin Roosevelt's Secretary of Treasury, Henry Morgenthau, Jr., delivered a memorandum to the President stating that Germany should be stripped of its industries and turned into a pure agricultural state after the summary executions of German war criminals.<sup>378</sup> Morgenthau argued that German war criminals responsible for the greatest attempt to systematically destroy a people were not going to escape punishment as the "Young Turks," who had been responsible for the previous genocide, had escaped justice. He further asserted that there would not be a repeat of the unsuccessful Leipzig trials.

Morgenthau favored the strictest punishment for the German people and exactions for the Nazi hierarchy. He had convinced both Roosevelt and Churchill that prosecutions would be a waste of time and that Nazi war criminals were not entitled to the same respect as the common criminal. Further, prosecutions meant the possibility of failing, just as the Leipzig trials had failed after the First World War. Summary executions would be a more successful way of achieving justice.

Churchill, who had been a minister in the British Empire during the First World War, remembered the results of the Leipzig trials very well and was already set on summary executions for the Nazi hierarchy. Roosevelt began seeing international criminal justice through the same lens as Morgenthau. The Nazis had committed the ultimate crimes and deserved the ultimate punishment, which would also deter future would-be war-starters and potential *génocidaires*. Roosevelt and Churchill both initialed Morgenthau's memorandum, later referred to as the Morgenthau Plan, on 15 September 1944.<sup>379</sup>

Contrary to Morgenthau's views, though, Secretary of War Henry L. Stimson insisted that trials should be held, and he urged President Roosevelt to reconsider prosecuting German war criminals in lieu of executions.<sup>380</sup> Stimson explained that the whole German people should not be punished. He argued, "Vindictive peace treaties 'do

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<sup>378</sup> Kochavi, *Prelude to Nuremberg*, 80-87; Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton UP 2000), 157; Maguire, *Law and War*, 88.

<sup>379</sup> Bass, *Stay the Hand of Vengeance*, 157; Maguire, *Law and War*, 89; Harris, *Tyranny on Trial*, 7.

<sup>380</sup> Harris, *Tyranny on Trial*, 6.

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not prevent war' but 'tend to breed war.'"<sup>381</sup> Prior to the Second World War, Germans had suffered from "war guilt" imposed by the Treaty of Peace between the Allied and Associate Powers and Germany,<sup>382</sup> thus, they had been a vulnerable people when Hitler began propagandizing. Moreover, Stimson argued that by executing presumed war criminals without trial, the Allied victors would be imitating the war crimes of the Germans.<sup>383</sup>

Stimson took the view that while the Leipzig trials had not been a mistake, they should have been conducted with stronger enforcement. The real mistake had been made when the Allied Powers developed the stipulations against Germany within the Treaty of Peace. These conditions had punished the German people, making them victims. Stimson believed prosecutions conducted with strict enforcement, unlike the Leipzig trials, would be a success.

As of early September 1944, Roosevelt did not buy into Morgenthau's plan to dismantle all of Germany's industrialism, but he held the position "that Germany could live happily and peacefully on soup from soup kitchens."<sup>384</sup> Both had several meetings with the President in the attempt to win over his position. Stimson argued that destroying Germany's industrialism would also destroy resources desperately needed for the reconstruction of Europe as well as arouse sympathy for Germany all over the world.<sup>385</sup>

On 11 September 1944, the Octagon Conference commenced in Quebec at which time Roosevelt and Churchill held discussions on the German problem. On 13 September the President called Morgenthau to the conference, and on 16 September Roosevelt and Churchill accepted the Morgenthau plan.<sup>386</sup> On 24 September 1944, a report of Stimson and Morgenthau's disagreement was published in the newspapers.<sup>387</sup> The public favored Stimson's position and reacted negatively to Morgenthau's plan and

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<sup>381</sup> Maguire, *Law and War*, 90

<sup>382</sup> Treaty of Peace, arts. 228-229.

<sup>383</sup> Harris, *Tyranny on Trial*, 8.

<sup>384</sup> Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War* (Harper & Brothers 1948) 573.

<sup>385</sup> Stimson and Bundy, *On Active Service*, 574-575.

<sup>386</sup> Stimson and Bundy, *On Active Service*, 576-577.

<sup>387</sup> Stimson and Bundy, *On Active Service*, 580.

toward Roosevelt for supporting it.<sup>388</sup> On 3 October 1944, Roosevelt decided to discard Morgenthau's plan.<sup>389</sup>

### **International Military Tribunal**

#### *United States Initiative*

Stimson pushed for a tribunal with a criminal procedure that integrated most basic principles of the United States Bill of Rights,<sup>390</sup> which are the first ten Amendments of the United States Constitution. On 22 January 1945, Stimson, Secretary of War Edward R. Stettinius, Jr., and Attorney General Francis Biddle submitted a memorandum to President Roosevelt clarifying the challenges of an effective war crimes program and possible resolutions for the prosecution of major war criminals.<sup>391</sup> The memorandum criticized the United Nations War Crimes Commission's inability to prosecute war criminals.<sup>392</sup> In reference to the Moscow Declaration, the memorandum recommended the creation of "an international military commission or military court, established by Executive Agreement of the heads of State of the interested United Nations"<sup>393</sup> to prosecute major war criminals. Subsequent trials would be held in occupied courts or in the national courts of the countries concerned.<sup>394</sup> Articles 227 and 228 of the Treaty of Peace with Germany most likely influenced the memorandum.

A suggested draft was immediately created in which the basic ideas of the memorandum were brought together.<sup>395</sup> With some minor adjustments, the United States's draft proposal for the prosecution of war criminals was presented to foreign ministers in San Francisco in April 1945.<sup>396</sup> In the draft proposal, the United States proposed the establishment of at least one more military tribunal, which would be

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<sup>388</sup> Stimson and Bundy, *On Active Service*, 580.

<sup>389</sup> Stimson and Bundy, *On Active Service*, 580-582.

<sup>390</sup> Harris, *Tyranny on Trial*, 8.

<sup>391</sup> Memorandum to President Roosevelt from the Secretaries of States and War and the Attorney General, 22 January 1945, *Report of Robert H. Jackson*, 3.

<sup>392</sup> Memorandum to President Roosevelt from the Secretaries of States and War and the Attorney General, 22 January 1945, *Report of Robert H. Jackson*, 4.

<sup>393</sup> Memorandum to President Roosevelt from the Secretaries of States and War and the Attorney General, 22 January 1945, *Report of Robert H. Jackson*, 7.

<sup>394</sup> Memorandum to President Roosevelt from the Secretaries of States and War and the Attorney General, 22 January 1945, *Report of Robert H. Jackson*, 8.

<sup>395</sup> The Legal Adviser to the Secretary of State for the President, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 409, attachment 2-memorandum B.

<sup>396</sup> American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, reprinted in *Report of Robert H. Jackson*, 22.

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referred to as the “International Military Tribunal”<sup>397</sup> and would “have the power to establish its own rules of procedure.”<sup>398</sup> So that preparation of charges and prosecution of war criminals could commence, it was proposed that the United States, the United Kingdom, the Soviet Union, and France should designate one representative and one alternate each, “and such representatives acting as a group shall prepare the charges [...] and shall institute and conduct the prosecution.”<sup>399</sup> The International Military Tribunal would not be a permanent international criminal court, however. From its conception, the United States proposed a “short-lived” tribunal.<sup>400</sup> The draft proposal was accepted in principle and on 30 April, the United States submitted an explanatory memorandum to accompany the draft proposal.<sup>401</sup> On 14 June 1945, the United States submitted a revision of its draft proposal as an executive agreement to the Embassies of the United Kingdom, the Soviet Union, and France in Washington, D.C.<sup>402</sup>

Roosevelt eventually reversed his decision to summarily execute the Nazi ringleaders and called for judicial prosecutions, referring back to the United Nations War Crimes Commission’s recommendations. However, the tribunal would not be established by convention as recommended by the United Nations War Crimes Commission; instead, it would be drawn up by the four Allied victors to prosecute the “principal culprits” and lay the foundation for other offenders to be prosecuted in national courts, civilian or military, in different countries as would be decided.<sup>403</sup> This plan would implement the Moscow Declaration.<sup>404</sup>

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<sup>397</sup> American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, reprinted in *Report of Robert H. Jackson*, 25.

<sup>398</sup> American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, reprinted in *Report of Robert H. Jackson*, 25.

<sup>399</sup> American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, reprinted in *Report of Robert H. Jackson*, 27.

<sup>400</sup> The Legal Adviser (Hackworth) to the Secretary of State for the President, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 402.

<sup>401</sup> American Memorandum Presented at San Francisco, 30 April 1945, reprinted in *Report of Robert H. Jackson*, 28.

<sup>402</sup> Revision of American Draft of Proposed Agreement, 14 June 1945, reprinted in *Report of Robert H. Jackson*, 55.

<sup>403</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 402.

<sup>404</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 402; for Moscow Declaration, see The Tripartite Conference in Moscow, 18 October - 1 November 1943, *FRUS, 1943, General*, vol. 1 (US GPO 1963) 513, annex 10, at 768-69; (1943) 9 *Dep’t St Bull* 310.

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Stimson asked Lieutenant Colonel Murray Bernays, Chief of the War Department's Special Projects Office, to come up with a plan that eventually used the crime of conspiracy to link the major war criminals to a common plan that included specific crimes perpetrated by lower-level Nazis through their superiors' orders.<sup>405</sup> Jackson would take Bernays' plan and use it as his main argument against the highest Nazi officials at the International Military Tribunal.

The United States's position was that the criminals to be punished should include the leaders of the Nazi Party and German Reich, who since 30 January 1933 had carried out acts of oppression and terrorism.<sup>406</sup> By 1945, there was no longer any possibility that the United States would go along with political punishments, including summary executions, even though it had previously promoted the idea and the United Kingdom was still arguing for it at that time. The Legal Advisor stated in his report:

After Germany's unconditional surrender the United Nations could, if they elected, put to death the most notorious Nazi criminals, such as Hitler or Himmler, without trial or hearing. We do not favor this method. While it has the advantages of a sure and swift disposition, it would be violative of the most fundamental principles of justice, common to all the United Nations. This would encourage the Germans to turn these criminals into martyrs, and, in any event, only a few individuals could be reached in this way.<sup>407</sup>

The United States instead argued that judicial punishment would serve two purposes: (1) to morally condemn the offenders through a criminal conviction, which would maximize the public support and receive the respect of history; and (2) to make available for all future generations an authentic record of Nazi crimes and criminality.<sup>408</sup> Regarding the court's makeup, the United States foresaw seven judges on the bench: one each from France, the Soviet Union, the United Kingdom, and the United States, with the

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<sup>405</sup> John F. Murphy, "Norms of Criminal Procedure at the International Military Tribunal" in George Ginsburgs and V. N. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Martinus Nijhoff 1990) 63.

<sup>406</sup> The Legal Adviser (Hackworth) to the Secretary of State for the President, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 403, attachment 1-memorandum B, at 404.

<sup>407</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 405.

<sup>408</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 405.

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other three representing countries that became parties to the proposed procedure.<sup>409</sup> The United States held the opinion that while the United Nations War Crimes Commission had served its purpose, it was now incapable of being employed to hold trials; thus, it should be dissolved.<sup>410</sup>

The United States had begun positioning itself to play an influential role in the prosecution of war criminals. It recommended that France, the Soviet Union, the United Kingdom, and the United States together should establish an international criminal tribunal and play the administrative and prosecuting roles.<sup>411</sup> The United Kingdom was for the time being prepared to agree and cooperate in establishing mixed military tribunals,<sup>412</sup> but it made no commitment to an international tribunal. From the beginning, the Soviet Union supported “bringing Hitlerites and their accomplices to justice, and favor[ed] their trial before ‘the courts of the special international tribunal.’”<sup>413</sup> However, when creating the International Military Tribunal, the United States and the Soviet Union had two completely different views concerning the tribunal’s purpose.

Prosecuting war criminals was exactly the principle for which the United States had always stood. War crimes trials had taken place in the United States after both the Revolutionary and Civil Wars. The United States, too, had suffered from Germany’s initiation of war and genocide during the war. Crimes committed against certain groups were so large and heinous that the international community had been victimized. Moreover, many American lives had been lost during the war in an attempt to prevent Germany from occupying all of Europe. Once the United States came to terms with its losses, it favored prosecutions. This emotional response from States that had been invaded by Germany was not unreasonable and is often the case with traditional national crimes.

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<sup>409</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 407.

<sup>410</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 407.

<sup>411</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 408.

<sup>412</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 408.

<sup>413</sup> The Legal Adviser (Hackworth) to the Secretary of State, 22 January 1945, *FRUS, 1945, The Conferences at Malta and Yalta* (US GPO 1955) 408.

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The Soviet Union and France had remained consistent in their stance that prosecutions should occur. The United Kingdom held out the longest and put up the biggest argument against prosecuting the Nazi ringleaders.<sup>414</sup> Churchill agreed with Morgenthau's plan of summary executions, and the United Kingdom insisted that prosecutions would take too long and be unfair to the defendants. British spokesman Lord John Simon insisted that an international tribunal would be impractical since the crimes of the Nazis were a political question and not a legal one.<sup>415</sup> Furthermore, if trials were to be held to determine guilt, there would be no need to prosecute higher-ranking officials like Hitler, Himmler, Göring, Goebbels, and Ribbentrop, since their guilt had already been established.<sup>416</sup> This stance represented a complete reversal from the relatively recent "hang the Kaiser" cries. Interestingly, the United Kingdom had been the biggest advocate for an international tribunal to prosecute William II and other top German military leaders for initiating the First World War.

### *London Conference*

On 2 May 1945, President Truman officially designated Associate United States Supreme Court Justice Robert H. Jackson to represent the United States at the London Conference and lead the way in developing the London Charter and prosecuting Nazi war criminals on America's behalf.<sup>417</sup> Jackson was responsible for the case of the major war criminals whose crimes had no geographical localization and who would be punished by Allied powers according to the Moscow Declaration of 1 November 1943.<sup>418</sup>

The Second World War ended in Europe on 8 May 1945, and prosecution plans were underway. Within one month, Jackson had

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<sup>414</sup> Aide-Mémoire from the United Kingdom, 23 April 1945, reprinted in *Report of Robert H. Jackson*, 18-20; Harry M. Rhea, "Setting the Record Straight: Criminal Justice at Nuremberg" (2007) 7 *J Inst Just & Int'l Stud* 254.

<sup>415</sup> Maguire, *Law and War*, 89.

<sup>416</sup> Marrus, *The Nuremberg War Crimes Trial*, 23.

<sup>417</sup> The President's News Conference, 2 May 1945, *Public Papers of the Presidents of the United States, Harry S. Truman, 12 April - 31 December 1945* (US GPO 1961) 34, para. 5; "Appointment of Justice Robert H. Jackson as Chief of Counsel for the United States," (1945) 12 *Dep't St Bull* 866.

<sup>418</sup> "Atrocities and War Crimes: Report from Robert H. Jackson to the President" (released for publication by President Truman with his approval on 7 June 1945) 12 *Dep't St Bull* 1071; *Trial of War Criminals: Documents* (Dep't of St. Pub. 2420 US GPO 1945); reprinted in Robert H. Jackson, *The Nürnberg Case* (Alfred A. Knopf 1947) 3; *Report of Robert H. Jackson*, 42; (1945) 39 *Am J Int'l L* 178; (1944-1945) 19 *Temple LQ* 144.

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selected staffs from the several services, departments, and agencies concerned; worked out a plan for preparation, briefing, and trial of the cases; allocated the work among several agencies; instructed those engaged in collecting or processing evidence; visited the European Theater to expedite the examination of captured documents, and the interrogation of witnesses and prisoners; coordinated our preparation of the main case with preparation by Judge Advocates of many cases not included in my responsibilities; and arranged co-operation and mutual assistance with the United Nations War Crimes Commission and with Counsel appointed to represent the United Kingdom in the joint prosecution.<sup>419</sup>

In his report to the President, Jackson claimed that an inescapable responsibility rested on the United States to conduct a trial, preferably in association with other States, but alone if necessary.<sup>420</sup> Jackson explained that releasing the prisoners or executing them without trial were not options and that “the only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and the horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.”<sup>421</sup>

On 29 May 1945, Churchill appointed Attorney General David Maxwell Fyfe to represent the United Kingdom at the London Conference.<sup>422</sup> After meeting with Fyfe, it was clear to Jackson that the United Kingdom was taking steps parallel to the United States to prepare for an international trial.<sup>423</sup> On 3 June 1945, the British Ambassador to the United States invited the Secretary of State to send delegates to London for meetings concerning an international trial to prosecute Nazi war criminals.<sup>424</sup> The first meeting took place on 26 June 1945. The conference aimed to achieve two goals: first, to develop an agreement between the United Kingdom, France, the Soviet Union, and the United States to participate in an international tribunal, and second, to develop a statute that would legally guide the tribunal.

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<sup>419</sup> “Report from Robert H. Jackson to the President.”

<sup>420</sup> “Report from Robert H. Jackson to the President,” 1073.

<sup>421</sup> “Report from Robert H. Jackson to the President,” 1073.

<sup>422</sup> “Report from Robert H. Jackson to the President,” 1073.

<sup>423</sup> “Report from Robert H. Jackson to the President,” 1073.

<sup>424</sup> Aide-Mémoire from the United Kingdom, 3 June 1945, reprinted in *Report of Robert H. Jackson*, 41.



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It was obvious from the onset of the London Conference that the four States had different views about how the tribunal should be framed. The first international military tribunal would have to combine continental law and common law. When the London Conference commenced, the representatives of the four Allied powers did not agree on the Tribunal's procedure. The Soviet representative, Judge Nikitchenko, argued that the accused were already guilty and that the purpose of the trial was to dictate punishment.<sup>425</sup> Justice Jackson strongly disagreed and argued that even "the President of the United States has no power to convict anybody. He can only accuse."<sup>426</sup> Conviction of the Nazi hierarchy would be based on evidence rather than references by heads of State.<sup>427</sup> Jackson further argued, "I have no sympathy with these men, but, if we are going to have a trial, then it must be an actual trial."<sup>428</sup> He was so vehemently against using trials to confirm political guilt that he said it might be best for each State to try its own prisoners in national tribunals.<sup>429</sup> With this threat, the United States gained an advantage. The United States had "in the neighborhood of 200,000 prisoners,"<sup>430</sup> of which 350 were classified as major war criminals.<sup>431</sup> This classification was due in part to the fact that the United States was the only country to have set up a full-scale investigation and evidence-gathering operation.<sup>432</sup>

The four Allied powers agreed that the tribunal would be military rather than civilian and that each State would appoint a prosecutor, a judge, and one alternate judge. Done in London on 8 August 1945, the United States, the United Kingdom, the Soviet Union, and France signed the Agreement establishing the International Military Tribunal.<sup>433</sup> Included in the Agreement was the Tribunal's Charter.<sup>434</sup>

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<sup>425</sup> Minutes of Conference Session of 29 June 1945, *Report of Robert H. Jackson*, 105.

<sup>426</sup> Minutes of Conference Session of 29 June 1945, *Report of Robert H. Jackson*, 115.

<sup>427</sup> Minutes of Conference Session of 29 June 1945, *Report of Robert H. Jackson*, 115.

<sup>428</sup> Minutes of Conference Session of 29 June 1945, *Report of Robert H. Jackson*, 115

<sup>429</sup> Minutes of Conference Session of 29 June 1945, *Report of Robert H. Jackson*, 115

<sup>430</sup> Minutes of Conference Session of 2 July 1945, *Report of Robert H. Jackson*, 130.

<sup>431</sup> Robert E. Conot, *Justice at Nuremberg* (Carroll & Graf Publishers 1983) 20.

<sup>432</sup> Conot, *Justice at Nuremberg*, 20.

<sup>433</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed 8 August 1945) 13 *Dep't St Bull* 222; *Trial of War Criminals: Documents*, 13; 82 UNTS 279.

<sup>434</sup> Charter of the International Military Tribunal, appended to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed on 8 August 1945) 13 *Dep't St Bull* 222; *Trial of War Criminals: Documents*, 13; 82 UNTS 279 (IMT Charter).

*Jurisdiction over Crimes*

When the issue of an actual trial was eventually resolved, the United States debated with the other Allies concerning the crimes within the jurisdiction of the Tribunal, particularly crimes against the peace. Marshal Stalin had initiated the concept of punishing those responsible for committing the crime of aggression as early as 6 November 1943.<sup>435</sup> However, at the London Conference the Soviet Union did not support the United States's belief that aggression should be included as one of the prosecutable crimes.<sup>436</sup> The United States was the only State that argued for including crimes against the peace as a crime within the International Military Tribunal's jurisdiction. The United Kingdom, the Soviet Union, and France did not support criminalizing the initiation of war.<sup>437</sup> As Röling wrote, "That the Nuremberg Trial took place and that the Charter of Nuremberg contained the 'crimes against peace' are due to the attitude of the United States, so ably defended and brought to victory by Justice Jackson."<sup>438</sup> Ironically, the United States was the only State at the London Conference that had not been attacked by Germany.

Jackson realized the effect of not prosecuting the Germans for committing crimes against the peace. If Germany's initiation of war was not criminal, then the United States had had no right to enter the war in Europe since it had been a neutral State.<sup>439</sup> Yet, Jackson's argument was only correct if all countries had the right to defend any State that had been attacked by another State. If not, then the United States had violated existing laws of neutrality by entering the European war. The United Kingdom, the Soviet Union, and France had all been attacked by Germany and therefore had been justified in entering the armed conflict. The United States, however, needed to justify entering the European theatre of war; that justification was based on the claim that Germany's act of aggression was a "crime against the peace."

It was also important for the United States to prosecute German war criminals for crimes against the peace, since the United States would later create a second international military tribunal to prosecute Japanese war criminals for crimes against the peace for

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<sup>435</sup> Bert V. A. Röling, "The Nuremberg and the Tokyo Trials in Retrospect" in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux, (OUP 2008) 460.

<sup>436</sup> Röling, "The Nuremberg and the Tokyo Trials in Retrospect," 460.

<sup>437</sup> Conot, *Justice at Nuremberg*, 21; Röling, "The Nuremberg and the Tokyo Trials in Retrospect," 460.

<sup>438</sup> Röling, "The Nuremberg and the Tokyo Trials in Retrospect," 459.

<sup>439</sup> Röling, "The Nuremberg and the Tokyo Trials in Retrospect," 459.

attacking the United States at Pearl Harbor. It would be inconsistent to prosecute Japan for crimes against the peace and not Germany. Once crimes against the peace were included in the Charter of the International Military Tribunal, the door was open for the United States to include it in the Charter of the International Military Tribunal for the Far East.

Crimes against the peace were not the only offense within the International Military Tribunal's jurisdiction. Two other crimes included war crimes and crimes against humanity. The crimes were defined as follows in Article 6 of the Charter of the International Military Tribunal:

- (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>440</sup>

*Jurisdiction over Persons*

The last sentence of Article 6 states, "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit

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<sup>440</sup> IMT Charter, art. 6.

any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”<sup>441</sup> Therefore, not only were the individuals who had actually committed the acts responsible, but so also were the individuals who had held leadership and organizer positions. This was the purpose of the International Military Tribunal: to prosecute the leaders, planners, and organizers of the Second World War as well as the systematic crimes committed during the war. Article 7 confirmed that official positions, no matter how high, did not relieve an individual of responsibility: “The official positions of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”<sup>442</sup> The Charter also prevented the accused from claiming that they had only been following orders when committing the crimes.<sup>443</sup>

### *Judgment*

Robert Jackson began the opening statement of the International Military Tribunal on 21 November 1945.<sup>444</sup> The trial lasted a little more than ten months. Judgments were handed down on 1 October 1946.<sup>445</sup> Nineteen defendants were found guilty of one of the crimes under Article 6, while three defendants were acquitted on all counts. Sentences were also handed down on 1 October 1946,<sup>446</sup> when 12 were sentenced to death and seven received sentences of incarceration.

### *Possibility of a Second Trial by International Military Tribunal*

Article 22 of the Charter of the International Military Tribunal envisaged the possibility of subsequent trials: “The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.”<sup>447</sup> The proposition of a second trial by the International Military Tribunal arose shortly before the first trial commenced.<sup>448</sup> Gustav Krupp was included in the original indictment of the first trial but

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<sup>441</sup> IMT Charter, art. 6.

<sup>442</sup> IMT Charter, art. 7.

<sup>443</sup> IMT Charter, art. 8.

<sup>444</sup> *Trial of the Major War Criminals before the International Military Tribunal*, vol. 2 (1947) 98.

<sup>445</sup> *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (1947) 171; 41 *AJIL* 172.

<sup>446</sup> *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (1947) 365.

<sup>447</sup> IMT Charter, art. 22.

<sup>448</sup> Telford Taylor, *Final Report to the Secretary of the Army on The Nuernberg War Crimes Trials Under Control Council Law No. 10* (Dep’t of the Army 1949) 17.

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was later considered incompetent to stand trial.<sup>449</sup> Krupp's attorney filed a motion on 4 November 1945, requesting that the Tribunal defer his client's case and not try him in absentia.<sup>450</sup> Robert Jackson requested on 12 November that Krupp be tried in absentia.<sup>451</sup> On 15 November, the Tribunal ruled to postpone the proceedings against Krupp, but directed that the charges in the indictment against him be retained upon the docket of the Tribunal for future trial.<sup>452</sup> Jackson submitted a memorandum the next day stating "that the United States has not been, and is not by this order committed to participate in any subsequent Four Power trial."<sup>453</sup>

A meeting of chief prosecutors was held on 5 April 1946, at which time Hartley Shawcross (United Kingdom) brought up the possibility of a second trial by the International Military Tribunal. Shawcross, along with the French and Soviet delegates, was in favor of a second trial.<sup>454</sup> Jackson stated that he, himself, was not available to participate in a second trial and "could not commit the United States to a second trial until they had seen the result of [the first trial]."<sup>455</sup> Jackson felt sure that more Nazi war criminals should be prosecuted but was not certain of the best method.<sup>456</sup> Jackson informed the Department of War on 8 April 1946 of the discussion three days earlier about a second trial, saying that he thought it would be disadvantageous for the United States.<sup>457</sup> The Secretary of War replied to Jackson on 24 April 1946, stating that a second trial under the International Military Tribunal would be "highly undesirable" for the Department of War and the Department of State.<sup>458</sup>

The Subsequent Proceedings Division was established while the International Military Tribunal was in still session. Its purpose was to establish a policy for prosecuting other highly ranked Nazi war criminals. Telford Taylor was responsible for

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<sup>449</sup> Taylor, *Final Report*, 22.

<sup>450</sup> Taylor, *Final Report*, 22.

<sup>451</sup> Taylor, *Final Report*, 22.

<sup>452</sup> Taylor, *Final Report*, 23.

<sup>453</sup> Cited in Taylor, *Final Report*, 23.

<sup>454</sup> Minutes of Chief Prosecutors held in Room 117, 5 April 1946, 1730 hours, Excerpt reproduced in Taylor, *Final Report*, appendix I, 269-270.

<sup>455</sup> Taylor, *Final Report*, appendix I, 270.

<sup>456</sup> Taylor, *Final Report*, appendix I, 270.

<sup>457</sup> Taylor, *Final Report*, 24.

<sup>458</sup> Taylor, *Final Report*, 24.

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planning the work of the Subsequent Proceedings Division.<sup>459</sup> In April 1946, Jackson instructed Taylor to coordinate with the other three prosecution teams with respect to a possible second trial under the International Military Tribunal.<sup>460</sup> Taylor submitted his report based on the discussion to Washington, DC, on 29 July 1946.

### Nuremberg War Crimes Trials

As early as August 1944, the Joint Chiefs of Staff considered a proposed draft of a directive concerning the handling of war crimes matters.<sup>461</sup> According to the proposed draft, war crimes “[did] not include acts committed by enemy authorities against their own nationals.” The term “criminal” as used in the draft was “intended to refer to persons who have held high political, civil or military (including General Staff) positions in Germany or in one of its allies, co-belligerents or satellites or in the financial, industrial or economic life of any of these countries.”<sup>462</sup> On 1 October 1944, the Joint Chiefs of Staff approved the directive and presented it to the Combined Chiefs of Staff for consideration.<sup>463</sup> The President considered war crimes matters urgently and appointed Judge Samuel Rosenman as his personal representative on the war crimes problem in January 1945.

As the United States was preparing drafts to establish the International Military Tribunal, the Joint Chiefs of Staff advised the Combined Chiefs of Staff in April 1945 not to further consider the draft directive.<sup>464</sup> The Combined Chiefs of Staff lifted any restrictions on 19 June 1945 and informed theater commanders to proceed with prosecutions of suspected war crimes, except for those “who held high political, civil, or military positions,” since such cases “should be deferred pending reference to Combined Chiefs of Staff to ascertain whether it is desired to try such persons before an international tribunal.”<sup>465</sup> On July 1945, the Joint Chiefs of Staff approved a revised draft directive prepared by the Informal Policy Committee on Germany, titled “Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other

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<sup>459</sup> Taylor, *Final Report*, 22.

<sup>460</sup> Taylor, *Final Report*, 24.

<sup>461</sup> Taylor, *Final Report*, 1.

<sup>462</sup> Draft Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, reproduced in Taylor, *Final Report*, appendix C, p. 244.

<sup>463</sup> C.C.S. 705 (2 October 1944). See Taylor, *Final Report*, 2, n. 7.

<sup>464</sup> Taylor, *Final Report*, 3.

<sup>465</sup> Taylor, *Final Report*, 3-4.

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Offenses and Trial of Certain Offenders.”<sup>466</sup> J.C.S. 1023/10 was used as a statement of United States policy for negotiations with the United Kingdom, France, and the Soviet Union in the hope that it would furnish the formulation of war crimes policy applicable throughout occupied Germany.<sup>467</sup>

General Eisenhower’s headquarters made the Judge Advocate, Brigadier General Edward C. Betts, responsible for the application of J.C.S. 1023/10 in September 1945.<sup>468</sup> In a letter dated 19 October 1945, Betts brought J.C.S. 1023/10 to Jackson’s attention.<sup>469</sup> A series of conferences ensued and it was agreed that Jackson’s organization would be utilized as the administrative base of operations for future war crimes trials and that someone should be immediately appointed to take charge of the project.<sup>470</sup> On or about 20 November 1945, Telford Taylor was approached to take the lead of conducting subsequent Nuremberg war crimes trials.<sup>471</sup> J.C.S. 1023/10 would be the basis of a draft proposed law that would subsequently be adopted as Control Council No. 10.<sup>472</sup>

### *Control Council Law No. 10*

On 20 December 1945, Control Council Law No. 10 was enacted. Its purpose was “to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, as well as the Charter issued pursuant thereto and in order to establish a legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.”<sup>473</sup> Control Council Law No. 10 had jurisdiction over four crimes, three of which consisted of the crimes in the International Military Tribunal’s jurisdiction: Crimes against humanity, war crimes, and crimes against humanity.<sup>474</sup> The fourth crime was “membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.”<sup>475</sup>

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<sup>466</sup> J.C.S. 1023/10 (8 July 1945) reproduced in Taylor, *Final Report*, appendix C, p. 242.

<sup>467</sup> Taylor, *Final Report*, 4.

<sup>468</sup> Taylor, *Final Report*, 5.

<sup>469</sup> Taylor, *Final Report*, 6, n. 29.

<sup>470</sup> Taylor, *Final Report*, 6.

<sup>471</sup> Taylor, *Final Report*, 6.

<sup>472</sup> Taylor, *Final Report*, 6.

<sup>473</sup> Control Council Law No. 10, reproduced in Taylor, *Final Report*, appendix D, p. 250, Preamble.

<sup>474</sup> Control Council Law No. 10, art. 2 (a) (b) (c).

<sup>475</sup> Control Council Law No 10, art. 2 (d).

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On 24 October 1946, shortly after the judgments of the International Military Tribunal were passed, the United States established the Office of Chief of Counsel for War Crimes, which had been envisaged the previous year by the Judge Advocate, Brigadier General Edward C. Betts, and the Director of the Legal Division of Office of Military Government of the United States for German, Charles Fahy.<sup>476</sup> The purpose of creating the Office of Chief of Counsel for War Crimes was to prepare and administer Nuremberg War Crimes Trials constituted under Military Government Ordinance No.7.<sup>477</sup>

The four Allied powers that signed the London Agreement establishing the International Military Tribunal each conducted national trials of Nazi war criminals in their occupied zones in Germany under Control Council Law No. 10. The United States prosecuted more cases and convicted more Nazi war criminals than any other State. In addition to the twelve subsequent Nuremberg war crimes trials, the United States prosecuted 1,672 Nazi war criminals in United States Army military tribunals.<sup>478</sup>

### **International Military Tribunal for the Far East**

The Potsdam Declaration was signed on 26 July 1945 by the United States, the United Kingdom, China, and subsequently the Soviet Union.<sup>479</sup> These signatories promised that if Japan did not surrender, then the nation would be utterly devastated and war criminals would face “stern justice.”<sup>480</sup> As Yuma Totani writes, the two devastating atomic bombs dropped on Japan in the following weeks proved “that the warning of ‘utter devastation of the Japanese homeland’ was by no means a rhetorical statement.”<sup>481</sup> On 2 September 1945, Japan signed the Instrument of Surrender, which also stipulated that the Allied

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<sup>476</sup> Taylor, *Final Report*, vii.

<sup>477</sup> Taylor, *Final Report*, vii.

<sup>478</sup> Frank M. Buscher, *The U.S War Crimes Trial Program in German, 1946-1955* (Greenwood Press 1989) 2.

<sup>479</sup> Proclamation Defining Terms for Japanese Surrender (signed on 26 July 1945) *13 Dep't St Bull* 137; *FRUS, 1945, The Conference of Berlin*, vol. 2 (US GPO 1960) 1474; reprinted in *The Axis in Defeat: A Collection of Documents on American Policy Toward Germany and Japan* (Dep't of State Pub. No. 2423, US GPO 1945) 27.

<sup>480</sup> Statement of Individual Responsibility for Crimes Set out in the Indictment, Appendix E, MacArthur Archives, cited in Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (University Press of Kentucky 2001) 34.

<sup>481</sup> Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard UP 2008) 44-45.



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victors would hold Japanese war criminals to “stern justice”<sup>482</sup> through criminal prosecutions.

Before the Supreme Commander, General MacArthur, was to constitute an international military tribunal in Tokyo to try major Japanese war criminals charged with crimes against the peace, he would appoint judges and associate prosecutors as nominated by signatories of the Japanese surrender instrument.<sup>483</sup> In October 1945, the United States sent other States a request to submit names of potential judges and associate prosecutors who would participate in the prosecutions of accused Japanese war criminals. There were few responses to the request, though. The Chairman of the United Nations War Crimes Commission, Cecil Hurst, and the French, Belgian, and Dutch delegates all considered the prosecution of Japanese war criminals a low priority.<sup>484</sup> Pell, the United States representative on the United Nations War Crimes Commission, considered these views “Eurocentric” since there had been an outcry from these same States to punish Nazi war criminals.<sup>485</sup> The United States, however, had a bone to pick with Japan.

Japan had attacked the United States at Pearl Harbor on 7 December 1941. A few days later, President Roosevelt had cabled Tokyo requesting that it comply with the rules of war and all international agreements concerning the treatment of prisoners of war.<sup>486</sup> Shortly thereafter, when Japanese war crimes had become well-publicized, Roosevelt warned Japan that its crimes would be punished at the war’s end.<sup>487</sup> As early as 1944, the United States had begun planning the mechanics of Japanese war crimes trials.<sup>488</sup>

On 29 November 1945, President Truman designated by Executive Order Joseph Keenan as “Chief of Counsel in the preparation and prosecution of charges of war crimes against the major leaders of Japan and their principal agents and accessories.”<sup>489</sup> Thereafter, Keenan was appointed by MacArthur as Chief of the International

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<sup>482</sup> Instrument of Surrender (signed on 2 September 1945) *13 Dep’t St Bull* 364; *The Axis in Defeat*, 36.

<sup>483</sup> The Acting Secretary of State to the Chargé in the Soviet Union (Kennan), 8 January 1946, *FRUS, Diplomatic Papers, The Far East 1946*, vol. 8 (US GPO 1971) 386.

<sup>484</sup> Maga, *Judgment at Tokyo*, 28.

<sup>485</sup> Maga, *Judgment at Tokyo*, 28.

<sup>486</sup> Maga, *Judgment at Tokyo*, 27.

<sup>487</sup> Solis Horwitz, “The Tokyo Trial” (1950) *2 Int’l Conciliation* 475, 477-78; Maga, *Judgment at Tokyo*, 27-28

<sup>488</sup> Maga, *Judgment at Tokyo*, 28.

<sup>489</sup> Executive Order 9660, 29 November 1945.

Prosecution Section at the Supreme Commander's headquarters in Japan. Keenan had been Assistant Attorney General in charge of the Criminal Division at the Department of Justice from 1933 to 1936 and the Assistant Attorney General of the United States, the third ranking officer of the entire Justice Department, from 1936 to 1939. Keenan and his initial team of prosecutors landed in Japan on 6 December 1945.<sup>490</sup> As of January 1946, Keenan's staff within the International Prosecution Section at the Supreme Commander's Headquarters in Japan consisted of approximately 40 American members.<sup>491</sup>

In late December, after no submissions of potential judges and prosecutors had been made by any of the other Allies, MacArthur's advisor, George Atchenson, recommended that if an international tribunal was not established soon, the United States should conduct trials alone.<sup>492</sup> As weeks went by, the Allies still failed to submit names of potential judges and prosecutors. As a result, on 19 January 1946, General MacArthur issued his declaration:

I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Terms of Surrender which requires the meting out of stern justice to war criminals, do order and provide [...] there shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against the peace.<sup>493</sup>

The Charter for the International Military Tribunal for the Far East was very similar to the Charter of the International Military Tribunal at Nuremberg. Thus, Robert Jackson's vigorous debating on moral principles at the London Conference were just as important to the International Military Tribunal for the Far East as to the International Military Tribunal at Nuremberg.<sup>494</sup> Instead of a Tokyo conference, the Charter of the

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<sup>490</sup> Arnold C. Brackman, *The Other Nuremberg: The Untold Story of The Tokyo War Crimes Trials* (Quill 1987) 55.

<sup>491</sup> The Acting Secretary of State to the Chargé in the Soviet Union (Keenan) 15 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 389.

<sup>492</sup> Brackman, *The Other Nuremberg*, 59.

<sup>493</sup> Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo (19 January 1946) (1968) 4 Bevens 20, 21.

<sup>494</sup> Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton UP 1971) 23.

International Military Tribunal for the Far East was an executive decree made by General MacArthur on 19 January 1946.<sup>495</sup> Since the Allies of the United States during the Pacific War had failed to participate in the early stages of postwar justice, they were unaware of the development of the Charter, which had primarily been drawn up by Keenan.<sup>496</sup> The Soviet Union considered itself inadequately informed about the trial, thus stating in a cable to the United States:

They wished to have [a] copy of [the] indictment and also a list of leading criminals. Furthermore, they were unable to understand [the] position of George [Joseph] B. Keenan [...] as Chief of the International Section of Prosecuting Attorneys. What body was this? By whom [was it] established? And who, exactly, was Mr. Keenan? Was he an official of [the] United States Government?<sup>497</sup>

The United States responded to the Soviet Union's requests for information by saying that the preparation of the defendant list and the indictment of criminals to be charged with crimes against the peace were presently being considered by the International Prosecution Section. It was expected that the associate prosecutors from other countries would contribute to this consideration with a view to submitting a list of defendants, the indictments of whom would be approved by the Supreme Commander.<sup>498</sup>

#### *Jurisdiction over Crimes*

The International Military Tribunal for the Far East's jurisdiction over crimes was listed under Article 5 of its charter. They were the same three crimes already within the International Military Tribunal's jurisdiction: crimes against peace, war crimes, and crimes against humanity. The crimes were defined as follows:

- (a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or

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<sup>495</sup> Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo (19 January 1946) (1968) 4 Bevens 20.

<sup>496</sup> Horwitz, "The Tokyo Trial," 483 see also, Minear, *Victors' Justice*, 20; B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Polity Press 1994) 2.

<sup>497</sup> The Chargé in the Soviet Union (Keenan) to the Secretary of State, 13 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 388-89.

<sup>498</sup> The Acting Secretary of State to the Chargé in the Soviet Union (Keenan), 15 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 389.

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- conspiracy for the accomplishment of any of the foregoing;
- (b) Conventional War Crimes: Namely, violations of the laws or customs of war;
- (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.<sup>499</sup>

### *Jurisdiction over Persons*

The accused were categorized into three classes: Class A included those who would be prosecuted by the international tribunal, while Classes B and C were lower-level offenders to be prosecuted in national military tribunals. Similar to the Charter of the International Military Tribunal, the Charter of the International Military Tribunal for the Far East did not relieve an accused of responsibility based on rank.<sup>500</sup> The major dilemma was whether Emperor Hirohito should be indicted and prosecuted. When the Class A list was originally released, it did not include Emperor Hirohito,<sup>501</sup> though his name had been on the early lists of individuals to be punished. In 1944, the United Nations War Crimes Commission reported that political punishments, including executions, if used at all, should be restricted to Hitler, Hirohito, and Mussolini, who were in fact heads of State.<sup>502</sup> Beginning with the close of armed conflicts in the Second World War and the start of postwar justice, important legal decisions were political in nature because the Cold War was beginning. One of the most important decisions concerned prosecuting Emperor Hirohito.

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<sup>499</sup> Charter of the International Military Tribunal for the Far East (established 19 January 1946, General Orders No. 1, amended 26 April 1946, General Order No. 20) 14 *Dep't St Bull* 361, *Trial of Japanese War Criminals: Documents* (Dep't of State Pub 2613 US GPO 1946) 39 (IMTFE Charter).

<sup>500</sup> IMTFE Charter, art. 6.

<sup>501</sup> Maga, *Judgment at Tokyo*, 35.

<sup>502</sup> Proposal by the Chairman of Committee I, Doc. No. C.14, 25 April 1944, *FRUS, 1944*, vol. 1 (US GPO 1966) 1292 at 1298.

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An investigation into the criminal responsibility of Japan's Emperor had been completed, and it was MacArthur's view that

[n]o specific and tangible evidence has been uncovered with regard to [Hirohito's] exact activities which might connect him in varying degree with the political decisions of the Japanese Empire during the last decade.<sup>503</sup> I have gained the definite impression from as complete a research as was possible to me that his connection with affairs of state up to the time of the end of the war was largely ministerial and automatically responsive to the advice of his counselors.<sup>504</sup>

The Soviet Union, however, insisted that the Emperor be indicted and prosecuted.<sup>505</sup> In response, the Far East Commission, which had been established to investigate crimes and recommend who should be indicted, pointed out that the "U. S. Government [...] should not be construed to authorize any action against the Emperor as a war criminal" and that the Supreme Commander should "exempt the Japanese Emperor from indictment as a war criminal without direct authorization" from the United States government.<sup>506</sup> Moreover, MacArthur foresaw no positive, but many negative, consequences resulting from the Emperor's prosecution. Indeed, the Soviet Union would have an opportunity to take advantage of a chaotic Japan. Regarding any possibility of prosecution, MacArthur wrote:

His indictment will unquestionably cause a tremendous convulsion among the Japanese people, the repercussions of which cannot be overestimated. He is a symbol which unites all Japanese. Destroy him and the nation will disintegrate. Practically all Japanese venerate him as the social head of the state and believe rightly or wrongly that the Potsdam Agreements were intended to maintain him as the Emperor of Japan. They will regard allied action to the contrary as the greatest betrayal in their history and the hatreds and resentments engendered by this thought will unquestionably last for all measurable time. A vendetta for

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<sup>503</sup> General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower), 25 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 396.

<sup>504</sup> The Acting Secretary of State to the Chargé in the Soviet Union (Kennan), 8 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 386.

<sup>505</sup> Brackman, *The Other Nuremberg*, 58.

<sup>506</sup> Excerpt From Minutes of the Seventh Meeting of the Far Eastern Commission, 3 April 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 427-28.

revenge will thereby be initiated whose cycle may well not be complete for centuries if ever.<sup>507</sup>

Prosecuting the Emperor would have turned the Japanese people against the American military and the war crimes tribunal; thus, the Japanese would have resented the United States. MacArthur thought it pertinent to have the support of the Japanese people. With the Cold War beginning, he believed that bad relations between the United States and Japan could result in the Soviet Union taking control of a disarmed Japan:

The whole of Japan can be expected, in my opinion, to resist the action either by passive or semi-active means [...] all hope of introducing modern democratic methods would disappear and that when military control finally ceased some form of intense regimentation probably along communistic line would arise from the mutilated masses.<sup>508</sup>

Popular thought has often said that General MacArthur had complete control over the International Criminal Tribunal for the Far East. As Professor Jean Chesneaux describes:

McArthur was the absolute governor of Japan, although, the administration which he directed bore the name of S.C.A.P. (Supreme Command of Allied Powers). The First World War Tokyo Tribunal was directly subject to McArthur's administration, the latter had chosen the judges from a list drawn up by the interested parties. He had chosen the president, the general secretary and the members of the secretariat. More importantly, he had elaborated the principles upon which the Tribunal was founded and defined the nature of "war crimes." The procedure that was followed was purely American, giving for instance, the defense extended rights to cross-examination. The defense was composed of both Americans and Japanese.<sup>509</sup>

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<sup>507</sup> General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower), 25 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 396.

<sup>508</sup> General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower), 25 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 396; See also Totani, *The Tokyo War Crimes Trial*, 60.

<sup>509</sup> Quoted in Robert J. C. Butow, *Japans Decision to Surrender* (Stanford UP 1954) 243-44.

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Conversely, Yuma Totani writes, “MacArthur was vested with no actual power to make policy regarding the trial of Hirohito.”<sup>510</sup> In truth, MacArthur’s real policy-making power lay somewhere between having absolute power and no actual power in deciding whether or not to prosecute the Emperor. After stressing the fact that prosecuting the Emperor would be against the United States’s best interest, MacArthur wrote in a letter to the United States Army’s Chief of Staff:

The decision as to whether the Emperor should be tried as a war criminal involves a policy determination upon such a high level that I would not feel it appropriate for me to make a recommendation; but if the decision by the heads of states is in the affirmative, I recommend the above measures as imperative.<sup>511</sup>

President Truman and the majority of his top advisors also took the position that Emperor Hirohito should not be prosecuted and should instead remain on the throne.<sup>512</sup> Because MacArthur was the Supreme Commander, and even though he did not have the final word, the White House approved most of his recommendations. The decision not to prosecute the Emperor did not concern the leader’s guilt or innocence, but was instead meant to sustain and strengthen the United States’s relationship with Japan and strike an early blow to the Soviet Union in the Cold War.

### *Judgments*

The International Military Tribunal for the Far East indicted 27 individuals,<sup>513</sup> all of whom were convicted of one of the crimes included in the Court’s jurisdiction under Article 5. Not all of the judges agreed with the convictions, however. Judge Röling of the Netherlands and Judge Pal of India both dissented from the majority opinion regarding the Charter’s law and the defendants’ guilt. Both were positivists; however, Pal was more extreme and concluded that he would acquit all defendants of all

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<sup>510</sup> Totani, *The Tokyo War Crimes Trial*, 44.

<sup>511</sup> General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower), 25 January 1946, *FRUS, 1946, The Far East*, vol. 8 (US GPO 1971) 397.

<sup>512</sup> Totani, *The Tokyo War Crimes Trial*, 47.

<sup>513</sup> *Trial of Japanese War Criminals: Documents* (Pub 2613 US GPO 1946) 97.

charges.<sup>514</sup> Pal believed that the Tribunal, as well as the crimes included in the Charter, was victors' justice applied to Japan.<sup>515</sup>

### Conclusion

The United States, in proposing the establishment of the International Military Tribunal at the United Nations conference in San Francisco in May 1945, influenced the creation of a court similar to the one in Article 227 of the Treaty of Peace after the First World War. However, this time the court would have both juridical character and criminal jurisdiction. The International Military Tribunal was not an international court, but rather a multinational military court established by the four Allied victors through agreement.<sup>516</sup> In his opening statement, Jackson said, "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."<sup>517</sup> The multi-nationalism of the International Military Tribunal was again supported in the Judgment when it was stated that:

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.<sup>518</sup>

The United States was the driving force behind the International Military Tribunal for the Far East. In some instances, the United States controlled the Tribunal by establishing its Charter and approving the Tribunal's personnel. The United States also drove the prosecutions, rather than equally sharing the responsibility with other States. Conversely, the International Military Tribunal for the Far East was more internationalized than the International Military Tribunal. Judges represented more

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<sup>514</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford 2008) 285.

<sup>515</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 285.

<sup>516</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed and entered into force on 8 August 1945) (1951) 82 UNTS 279.

<sup>517</sup> *Trial of the Major War Criminals before the International Military Tribunal*, vol. 2 (1947) 99.

<sup>518</sup> *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (1947) 218.



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States from the international community, and rather than having judges from four States represented on the prosecution team, the Tribunal included judges from eleven States.

The International Military Tribunal did not represent a change in post-First World War United States policy regarding the establishment of multinational or “mixed” national prosecutions. The International Military Tribunal was the court in which the United States was willing to participate if ex-Kaiser William II was ever brought to trial. United States policy regarding an international criminal court also did not change. The United States decided not to support the convention for the establishment of a United Nations war crimes court. Finally, most statements made by United States officials, including Robert Jackson, promoted the prosecution of international crimes, not the establishment of an international criminal court.

*Chapter 5*  
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**Genocide Convention**

Raphael Lemkin introduced the word “genocide” in 1944<sup>519</sup> when he constructed the term from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).<sup>520</sup> He defined genocide as “the destruction of a nation or of an ethnic group.”<sup>521</sup> Many of the acts within the scope of Lemkin’s definition that had been committed by Nazi and Japanese war criminals were charged as crimes against humanity at the International Military Tribunal and the International Military Tribunal for the Far East. The definition of crimes against humanity, however, was limited to the charters of the international military tribunals. Moreover, the tribunals limited their jurisdiction of crimes against humanity to acts committed before or during the Second World War.<sup>522</sup> Therefore, crimes against humanity, as defined by the international military tribunals, did not protect persons or groups during peacetime.

Two months after the International Military Tribunal was completed, the General Assembly affirmed genocide as “a crime under international law which the civilized world condemns” and requested “the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.”<sup>523</sup> After some debate, the Economic and Social Council passed Resolution 47(IV) asking the Secretary General to submit a draft convention on the crime of genocide to the next session of the Economic and Social Council.<sup>524</sup>

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<sup>519</sup> Raphael Lemkin, *Axis Rule in Occupied Europe* (first published 1944, Howard Fertig 1973).

<sup>520</sup> Lemkin, *Axis Rule in Occupied Europe*, 79.

<sup>521</sup> Lemkin, *Axis Rule in Occupied Europe*, 79.

<sup>522</sup> Charter of the International Military Tribunal, appended to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed 8 August 1945) 13 *Dep’t St Bull* 222; *Trial of War Criminals: Documents* (Dep’t of St Pub 2420 US GPO 1945) 13; 82 UNTS 279 (IMT Charter) art. 6 & Charter of the International Military Tribunal for the Far East (established 19 January 1946, General Order No. 1, amended 26 April 1946, General Order No. 20) 14 *Dep’t St Bull* 361; *Trial of Japanese War Criminals: Documents* (Dep’t of State Pub 2613 US GPO 1946) (IMTFE Charter) art. 5(c).

<sup>523</sup> GA Res. 96(I).

<sup>524</sup> William A. Schabas, *Genocide in International Law: the Crime of Crimes* (2nd edn, CUP 2009) 59-60.

*International Penal Tribunal*

When the General Assembly requested the draft genocide convention, it did not indicate the creation of an international criminal court.<sup>525</sup> Yet, the Secretary General's draft convention included an international criminal court for the prosecution of the crime of genocide. Article IX required that "[t]he High Contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial by an international court."<sup>526</sup> Annexed to the Secretary General's draft convention were two draft statutes for an international criminal court. The first draft statute was for a permanent international criminal court,<sup>527</sup> while the second was for the establishment of an ad hoc international criminal court.<sup>528</sup> Both draft statutes had taken much of their substance from the League of Nations' 1937 Convention for the Creation of an International Criminal Court<sup>529</sup>

The legal obligation for State Parties to pledge to commit their nationals to an international criminal court was controversial. Initially, the United States welcomed the inclusion of the draft statutes for the establishment of an international criminal court. In its commentary on the Secretary General's draft convention, however, the United States described the wording of Article IX as "faulty" since persons were considered "guilty" when committed to the international criminal court before trial.<sup>530</sup> The United States recommended rewording the Article to substitute the word "guilty" with the word "charged."

The United States also commented on the draft statutes proposed in the Secretariat draft. Although the statutes were welcomed, the United States thought they should not be attached to the genocide convention for two reasons. First, the drafts were very detailed and the task of adopting a convention on an international criminal court at least equaled

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<sup>525</sup> See Schabas, *Genocide in International Law*, 61.

<sup>526</sup> Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide, UN Doc. A/362.

<sup>527</sup> Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide, UN Doc. A/362, annex 1, p. 10.

<sup>528</sup> Establishment of an Ad Hoc International Criminal Court for the Punishment of Acts of Genocide, UN Doc. A/362, annex 2, p. 18.

<sup>529</sup> Convention for the Creation of an International Criminal Court (adopted 16 November 1937) LN Doc. C.547.M.384.I937.V.

<sup>530</sup> Commentary by the Government of the United States, UN Doc. A/401/Add.2, p. 10.

that of the genocide convention.<sup>531</sup> Second, since there was already controversy regarding a convention for an international criminal court, attaching it as an instant agreement might result in the failure to adopt the genocide convention.<sup>532</sup>

According to the United States, the institution of a permanent international criminal court was of such magnitude that it necessitated a separate project of its own. During the debates regarding the establishment and inclusion of an international criminal court within the genocide convention, the United States was concerned that the issue of an international criminal court might result in the failure to adopt a convention,<sup>533</sup> so it proposed that the question of an international criminal court be referred to the newly established International Law Commission.<sup>534</sup> As a result of such careful consideration, a separate convention would invite “the largest number of States possible to become party thereto.”<sup>535</sup> In the meantime, the United States recommended the establishment of ad hoc tribunals similar to the International Military Tribunal for the prosecution of genocide or, more generally, international crimes.<sup>536</sup> The United States recommended that an article be inserted into the Secretary General’s draft convention stating the following:

The High Contracting Parties agree to take steps, through negotiation or otherwise, looking to the establishment of a permanent international penal tribunal, having jurisdiction to deal with offenses under this Convention. Pending the establishment of such tribunal, and whenever a majority of States party to this Convention agrees that the jurisdiction under Article VIII has been or should be invoked, they shall establish by agreement an ad hoc tribunal to deal with any such case or cases.

Such an ad hoc tribunal shall be provided with the necessary authority to indict, to try, and to sentence persons or groups who shall be subject to its jurisdiction, and to summon witnesses and demand production of papers and

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<sup>531</sup> Commentary by the Government of the United States, UN Doc. A/401/Add.2, p. 11.

<sup>532</sup> Commentary by the Government of the United States, UN Doc. A/401/Add.2, p. 11.

<sup>533</sup> UN Doc. A/401. See Schabas, *Genocide in International Law*, 445-46.

<sup>534</sup> Commentary by the Government of the United States, UN Doc. A/401/Add.2, p. 11; Sixth Committee (2nd Session) Summary Records of the Meetings (16 September – 26 November 1947) 20 (Mr. Fahy, United States).

<sup>535</sup> Commentary by the Government of the United States, UN Doc. A/401/Add.2, p. 11.

<sup>536</sup> Commentary by the Government of the United States, UN Doc. A/401/Add.2, p. 11.

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documents, and shall be provided with such other authority as may be needed for the conduct of a fair trial and the punishment of the guilty.<sup>537</sup>

On 3 March 1948, the Economic and Social Council created the Ad Hoc Committee on Genocide, chaired by United States representative John Maktos, to develop a draft genocide convention. The committee held meetings from 5 April through 10 May 1948 and published its report on 24 May 1948.<sup>538</sup> Although the committee had previously decided to use the Secretariat's draft convention as a basis for its negotiations, which stipulated that "the High contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial to an international court,"<sup>539</sup> it later decided only to take the draft into consideration.<sup>540</sup> The Ad Hoc Committee would drastically revise the Secretariat's draft provisions regarding an international criminal court.<sup>541</sup>

During the discussions, more representatives agreed on the principle of an international criminal jurisdiction rather than an international criminal court.<sup>542</sup> The mention of an international criminal court in the draft convention was subtle. Opponents of an international criminal court argued that its inclusion would interfere with State sovereignty and would have little value since there was no international criminal jurisdiction.<sup>543</sup> Proponents merely asked that an international criminal court, in principle, be included without setting up the actual organization of the court.<sup>544</sup> Maktos proposed the creation of an international criminal court that would have a complementary role to national courts. According to Maktos, "It was precisely to meet situations where national tribunals were unable to ensure the punishment of the crime that the convention provided for the creation of an international tribunal without which the convention would lose all value."<sup>545</sup> His proposal stated, "Assumption of jurisdiction by the international tribunal

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<sup>537</sup> Commentary by the Government of the United States, UN Doc. A/401/Add.2, p. 12.

<sup>538</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794.

<sup>539</sup> First Draft of the Genocide Convention, Prepared by the UN Secretariat, UN Doc. E/447.

<sup>540</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 4.

<sup>541</sup> Benjamin B. Ferencz, *An International Criminal Court: A Step Toward World Peace-A Documentary History and Analysis*, vol.2 (Oceana 1980) 12.

<sup>542</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 30.

<sup>543</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794

<sup>544</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 29.

<sup>545</sup> Sixth Committee (3rd Session) Summary Records of the Meetings (21 September – 10 December 1948) 320.

shall be subject to a finding by the tribunal that the State in which the crime was committed has failed to take adequate measures to punish the crime.”<sup>546</sup> The United States’s proposal was defeated by a vote of 5-1 and was not included in the draft convention.<sup>547</sup> By a vote of 4-3, the mention of an international tribunal was included in Article VII. It read, “Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.”<sup>548</sup>

The Ad Hoc Committee report included groups with political opinions as a protected group under the definition of genocide in Article II.<sup>549</sup> States including Poland and the Soviet Union disagreed with the inclusion of political groups since they lacked stability and were less defined.<sup>550</sup> The inclusion of political groups was accepted by a 4-3 vote.<sup>551</sup> During discussion in the Sixth Committee, it was voted to omit political groups from the definition of genocide.<sup>552</sup> Since political groups had been removed as one of the protected groups in the definition of genocide, the United States proposed that Article VI be amended to read:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international penal tribunal subject to the acceptance at a later date by the contracting party concerned of its jurisdiction.<sup>553</sup>

According to Ernest Gross, representative of the United States, delegations that had been in favor of the principle of establishing an international criminal court voted against its original text in Article VII of the Ad Hoc Committee’s report because they did not wish to bind themselves before a tribunal with jurisdiction over political groups.<sup>554</sup> According to Gross, the removal of political groups and the optional competence of the

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<sup>546</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 30.

<sup>547</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 30.

<sup>548</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 56.

<sup>549</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 13.

<sup>550</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 29.

<sup>551</sup> Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, p. 13.

<sup>552</sup> Sixth Committee (3rd Session) Summary Records of the Meetings (21 September – 10 December 1948) 663-64.

<sup>553</sup> United States: Amendments to the draft resolution proposed by the Drafting Committee, UN Doc. A/C.6/295.

<sup>554</sup> Sixth Committee (3rd Session) Summary Records of the Meetings (21 September – 10 December 1948) 669.

future international penal tribunal should dispel any fears by the tribunal's opponents.<sup>555</sup> France and Belgium joined the United States's proposal and on 30 November 1948, the joint United States, French, and Belgian amendment to Article VI was adopted by 29-9 votes, with five abstentions.<sup>556</sup> The Genocide Convention was adopted on 9 December 1948. Article VI read as follows:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties shall have accepted its jurisdiction.<sup>557</sup>

*The United States and the "International Penal Tribunal"*<sup>558</sup>

The United States signed the Genocide Convention on 11 December 1948. On 16 June 1949, Acting Secretary of State James E. Webb submitted a report to the President, including a certified copy of the Genocide Convention along "with the recommendation that it be submitted to the Senate for its advice and consent to ratification."<sup>559</sup> Regarding an international penal tribunal under Article VI, Webb argued that the commission of genocide on United States territory would only be tried in United States courts.<sup>560</sup> Webb further argued that the United States should not be wary of one of its nationals falling within the jurisdiction of an international penal tribunal since

No international tribunal is authorized to try anyone for the crime of genocide. Should such a tribunal be established, Senate advice and consent to United States ratification of any agreement establishing it would be necessary before such an agreement would be binding on the United States.<sup>561</sup>

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<sup>555</sup> Sixth Committee (3rd Session) Summary Records of the Meetings (21 September – 10 December 1948) 669.

<sup>556</sup> Sixth Committee (3rd Session) Summary Records of the Meetings (21 September – 10 December 1948) 684.

<sup>557</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art. VI.

<sup>558</sup> For an excellent description of the United State's position on an international penal tribunal at the Genocide Convention, see Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Duke UP 1991) ch. 7.

<sup>559</sup> "Report of the Secretary of State," (1949) 21 *Dep't of St Bull* 844.

<sup>560</sup> "Report of the Secretary of State," (1949) 21 *Dep't of St Bull* 844, 846.

<sup>561</sup> "Report of the Secretary of State," 16 June 1949 (1949) 21 *Dep't of St Bull* 844, 846.

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On 16 June 1949, Truman submitted the Genocide Convention to the Senate and urged “that the Senate advise and consent to my ratification of the Convention.”<sup>562</sup> The Senate sent the issue for debate before the Senate Foreign Relations Committee, which established the Subcommittee on the Genocide Convention to hear debate on the issue.<sup>563</sup> Much debate ensued on issues of sovereignty regarding the Genocide Convention, including the jurisdiction of an international penal tribunal envisaged in Article VI.<sup>564</sup> Proponents of the Genocide Convention urged United States ratification for two main reasons:

- (1) Ratifying the Convention would not contract the United States to the jurisdiction of a future international criminal court. There was no court at the time and if one came into effect, the United States did not have to accept its jurisdiction.<sup>565</sup>
- (2) Genocide had never existed in the United States, nor could it ever legally exist, as guaranteed by the United States Constitution and Bill of Rights.<sup>566</sup>

Opponents of the United States’s ratification, such as George A. Finch of the American Bar Association, argued that while no international penal tribunal existed, the Sixth Committee of the General Assembly had been pursuing the establishment of an international criminal court since at least 1948. Regarding the potential court not having jurisdiction over the United States, Finch argued that early in the Sixth Committee’s discussion on the establishment of an international criminal court, a member of the United States delegation to the Sixth Committee had stated that “[t]he United States delegation intended, at a later stage, to show the need for the establishment of an appropriate international tribunal.”<sup>567</sup> Therefore, Finch found it inconsistent that the

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<sup>562</sup> “The President’s Letter of Transmittal,” (1949) 21 *Dep’t of St Bull* 844; see also, “Special Message to the Senate Transmitting Convention on the Prevention and Punishment of the Crime of Genocide,” 16 June 1949, in *Public Papers of the Presidents of the United States: Harry S. Truman* (US GPO 1964) 291.

<sup>563</sup> *The Genocide Convention: Hearings Before a Subcommittee of the Committee on Foreign Relations*, 88th Cong. (1950).

<sup>564</sup> See *The Genocide Convention: Hearings Before a Subcommittee of the Committee on Foreign Relations*, 81st Cong. (1950).

<sup>565</sup> *The Genocide Convention: Hearings Before a Subcommittee of the Committee on Foreign Relations*, 81st Cong. (1950) 44.

<sup>566</sup> *The Genocide Convention: Hearings Before a Subcommittee of the Committee on Foreign Relations*, 81st Cong. (1950) 53.

<sup>567</sup> Quoted in *The Genocide Convention: Hearings Before a Subcommittee of the Committee on Foreign Relations*, 88th Cong. (1950) 215 (statement of George A. Finch).



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United States would later show the need to establish an international criminal court without making a bona fide attempt to become a State Party to the court.<sup>568</sup> Throughout the hearings, even proponents of the United States's ratification of the Genocide Convention argued against the likelihood of establishing an international penal tribunal, which if established, would not apply to the United States. Members of the Subcommittee that opposed an international criminal court were not convinced.

The Truman Administration did not feel that Article VI of the Genocide Convention was a threat to the United States. In June 1952, the Office of Public Affairs of the Department of State issued a leaflet entitled Questions and Answers on the UN Charter, Genocide Convention, and Proposed Covenant on Human Rights.<sup>569</sup> Questions 16, 17, and 18 concerned the potential risks of an international criminal court.

16. How is the Genocide Convention to be enforced?

Under the terms of Article VI of the Genocide Convention, the crime of genocide will be punished in the National courts of each country upon whose territory genocide is committed.

17. Would a person accused of genocide be tried by an International Court?

No, not under the Genocide Convention. The Convention provides that a person accused of Genocide shall be tried in the national courts of the country upon whose territory the acts of genocide were committed.

There is no international criminal court in existence, but if such a court were to be created, it would have no jurisdiction over American citizens for acts committed within the United States unless the United States had agreed to this. This would require a separate ratification of an additional treaty or convention.

18. Would the U.S. ratification of the Genocide Convention place us under a moral obligation to accept the jurisdiction of an International Court?

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<sup>568</sup> *The Genocide Convention: Hearings Before a Subcommittee of the Committee on Foreign Relations*, 88th Cong. (1950) 215-16 (statement of George A. Finch).

<sup>569</sup> *Questions and Answers on the UN Charter, Genocide Convention, and Proposed Covenant on Human Rights* (State Department 1952) reprinted in Frank E. Holman, *State Department Half Truths and False Assurances Regarding the U.N. Charter, Genocide Convention and Proposed Covenant on Human Rights* (December 1952) annex.

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No. As just stated, the President and the Senate have complete freedom to decide whether the United States should accept the jurisdiction of any international court established in the future.<sup>570</sup>

As President, Eisenhower also attempted to achieve the Senate's advice and consent for ratification of the Genocide Convention, but he, too, was unsuccessful.<sup>571</sup> In 1963, Secretary of State Dean Rusk stated that President John F. Kennedy would ratify the Genocide Convention if the Senate gave its advice and consent.<sup>572</sup> In 1965, Rusk made the same statement on behalf of President Lyndon Johnson.<sup>573</sup> In 1970, President Richard Nixon sent a special message to the Senate urging its advice and consent to ratify the Genocide Convention.<sup>574</sup> Later that year, with a vote of 10-2, the Senate Committee on Foreign Relations reported the Convention to the Senate with a recommendation for ratification.<sup>575</sup> In response to criticisms that his ratification would open the door for an American to be prosecuted under Article VI, Nixon asserted that no American would ever be extradited abroad for trial on charges of genocide in international or foreign courts.<sup>576</sup> In 1972, consensus in the Senate could not be reached, preventing Nixon from implementing his ratification.<sup>577</sup> The matter of the United States ratifying the Genocide Convention had now lain dormant for over a decade.

### *Fear of Political Charges of Genocide*

The major concern regarding an international penal tribunal under Article VI was whether it would be politicized. Senator Hickenlooper (Iowa), however, was concerned that the United States would leave itself open to politicized moral and punitive sanctions by ratifying the Genocide Convention.<sup>578</sup> When the Genocide Convention was adopted, the United States still practiced forms of racial segregation. Even though segregation did

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<sup>570</sup> *Questions and Answers on the UN Charter*, pp. 64-65.

<sup>571</sup> Dan Smoot, *The Trap: Stop the U.N. Genocide Convention* (American Opinion 1973) 1.

<sup>572</sup> Smoot, *The Trap*, 1.

<sup>573</sup> Smoot, *The Trap*, 1.

<sup>574</sup> Smoot, *The Trap*, 1-2.

<sup>575</sup> Smoot, *The Trap*, 2.

<sup>576</sup> Smoot, *The Trap*, 8.

<sup>577</sup> Smoot, *The Trap*, 2.

<sup>578</sup> *The Genocide Convention: Hearings Before a Subcommittee of the Committee on Foreign Relations*, 88th Cong. (1950) 37.

not include the special intent (*dolus specialis*) required under Article II,<sup>579</sup> to destroy a group in whole or in part, there was certainly fear that the argument could be made.

The United States feared politically motivated accusations, which was soon justified. On 17 December 1951, the Civil Rights Congress submitted a petition to the United Nations titled “We Charge Genocide: The Crime of Government Against the Negro People.”<sup>580</sup> The allegation stated “that within an unspecified number of years 10,000 negroes were killed and that the United States Government intends the destruction of 15 million negroes.”<sup>581</sup> Earlier in the year, the United States learned that the Soviet Union was aware of the accusation and stated, “It is to be expected that the accusation of genocide vs. the American Negro will be publicized by all means within the UNGA, regardless whether the charge is formally accepted on the GA agenda.”<sup>582</sup>

Though nothing significant developed from the petition against the United States for the political charge of genocide against black people on its territory, the action was an example that countries could use charges of international crimes against each other politically. State Parties to the Genocide Convention, particularly the Soviet bloc, understood that some of their oppressive national laws could arguably be considered international crimes, if not genocide. For this reason, the United States did not ratify the Genocide Convention for nearly 40 years after its adoption by the General Assembly.

### **Attempts within the General Assembly to Create an International Criminal Court**

The Charter of the United Nations was adopted on 26 June 1945 in San Francisco and entered into force on 24 October that same year. Article 13 of the Charter states that “the General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive

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<sup>579</sup> Genocide Convention, art. II.

<sup>580</sup> The petition was later published as a book, see William L. Patterson (ed.), *We Charge Genocide: The Crime of Government Against the Negro People* (International Publishers 1970).

<sup>581</sup> *Possible Lines of Approach to Meet the Communist Charge of Attempted Genocide Against the Negroes of the USA by the US Government*, NSC 13/17, Confidential RR 1000 (17 March 1951) declassified (12 December 1990).

<sup>582</sup> *Possible Lines of Approach to Meet the Communist Charge of Attempted Genocide Against the Negroes of the USA by the US Government* NSC 13/17, Confidential RR 1000 (17 March 1951) declassified (12 December 1990) 1.

development of international law and its codification.”<sup>583</sup> In December 1946, the General Assembly established the Committee on the Progressive Development of International Law and its Codification.<sup>584</sup> Immediately thereafter the General Assembly affirmed the Nuremberg Principles and directed the Committee to treat as a matter of primary importance plans for the formulation of the Nuremberg Principles.<sup>585</sup>

France submitted the first memorandum for a draft proposal for the establishment of an international criminal court to the General Assembly on 15 May 1947.<sup>586</sup> The opening paragraph of the French memorandum stated,

[T]he repression of international crimes against peace and humanity provided for in the application of the principles of the Nuremberg judgment which the General Assembly of the United Nations affirmed by its resolution of 11 December 1946, can only be ensured by the establishment of an international criminal court.<sup>587</sup>

In support of its proposal, the memorandum referenced the debates after the First World War and the previous attempts to establish an international criminal court, including the convention adopted by the League of Nations and the proposals issued by the International Law Association and the International Association of Penal Law.

On 21 November 1947, the General Assembly voted to replace the Committee on the Progressive Development of International Law and its Codification with the International Law Commission,<sup>588</sup> which “shall have for its object the promotion of the progressive development of international law and its codification.”<sup>589</sup> On 9 December 1948, the General Assembly “invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.”<sup>590</sup> As a result of this invitation, in conjunction with an earlier General Assembly resolution instructing the Secretary General to “do the

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<sup>583</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153 (UN Charter) art. 13(1)(a).

<sup>584</sup> GA Res. 94 (I).

<sup>585</sup> GA Res. 95 (I).

<sup>586</sup> UN Doc. A/AC.10/21.

<sup>587</sup> UN Doc. A/AC.10/21, p. 1.

<sup>588</sup> GA Res. 174 (II).

<sup>589</sup> Statute of the International Law Commission (adopted by the General Assembly 21 November 1947) art. 1(1).

<sup>590</sup> Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 260 B (III).

necessary preparatory work for the beginning of the activity of the International Law Commission,<sup>591</sup> the Secretary General completed a historical survey of the question of international criminal jurisdiction.<sup>592</sup> In order to assist the International Law Commission in its study, the survey covered most of the significant debates from the time of the Paris Peace Conference to the international military tribunals. The General Assembly requested the International Law Commission to carry out its study, paying “attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.”<sup>593</sup>

Discussion on the International Law Commission’s study of an international judicial organ for the prosecution of international crimes commenced during the 30th meeting of its first session. Unless there were differences of opinion, the Chairman thought the International Law Commission could prepare a report on its study during the first session.<sup>594</sup> Vladimir Koretsky (USSR) thought the matter of an international judicial organ for the prosecution of international crimes was premature since the formulation of international law recognized by the Nuremberg Tribunal and judgment was not yet complete.<sup>595</sup> Gilberto Amado (Brazil) and James Brierly (United Kingdom) thought the matter of an international judicial organ should be postponed until the International Law Commission’s next session, since the only codified international crime was genocide and the Genocide Convention had not yet been ratified by any States.<sup>596</sup>

Conversely, Jesús María Yepes (Colombia) and Georges Scelle (France) argued that the International Law Commission did not have to wait until the Nuremberg Principles were affirmed or for States to ratify the Genocide Convention. They had been instructed only to study the desirability and possibility of establishing an international judicial organ, and “the Commission should comply with that request without entering into details.”<sup>597</sup> Scelle insisted that a rapporteur should be appointed to lead the

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<sup>591</sup> Preparation by the Secretariat of the work of the International Law Commission, GA Res. 175 (II).

<sup>592</sup> Historical Survey of the Question of International Criminal Jurisdiction - Memorandum submitted by the Secretary General, UN Doc. A/CN.4/7/Rev.1.

<sup>593</sup> Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 260 B (III).

<sup>594</sup> Summary Record of the 30th Meeting, UN Doc. A/CN.4/SR.30, p. 219.

<sup>595</sup> Summary Record of the 30th Meeting, UN Doc. A/CN.4/SR.30, p. 219.

<sup>596</sup> Summary Record of the 30th Meeting, UN Doc. A/CN.4/SR.30, pp. 219-220.

<sup>597</sup> Summary Record of the 30th Meeting, UN Doc. A/CN.4/SR.30, p. 220.

International Law Commission's study on an international judicial organ.<sup>598</sup> A vote regarding whether the matter should be postponed until the next session was rejected 9-4.<sup>599</sup> Ricardo Alfaro (Panama) and Emil Sandström (Sweden) were appointed rapporteurs on the study of an international criminal jurisdiction that an international judicial organ would have jurisdiction.<sup>600</sup> Both were requested to conduct a study on the question of an international criminal jurisdiction and to submit to the International Law Commission's next session a working paper on the topic.<sup>601</sup>

Alfaro and Sandström completed their studies and submitted their reports at the International Law Commission's following session. Sandström's report stated that the time was not yet ripe for the establishment of an international criminal court, since it would be impaired by serious defects that would likely do more harm than good.<sup>602</sup> If an international criminal court were to be established, however, Sandström believed that it would be preferable to establish a criminal chamber of the International Court of Justice.<sup>603</sup> Alfaro's report was more positive than Sandström's. According to Alfaro, it was both possible and desirable to establish an international criminal court.<sup>604</sup> He also found an abundance of favorable opinion in proposals to establish a criminal chamber of the International Court of Justice.<sup>605</sup>

After listening to Sandström and Alfaro read their reports, discussion ensued regarding whether the members should vote separately on the possibility and desirability or to include them both in one vote. Hudson suggested that a single question be put to a vote: Was establishing an international criminal court both possible and desirable?<sup>606</sup> A vote was first put to the question of whether the International Law Commission should

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<sup>598</sup> Summary Record of the 30th Meeting, UN Doc. A/CN.4/SR.30, pp. 220-221.

<sup>599</sup> Summary Record of the 30th Meeting, UN Doc. A/CN.4/SR.30, p. 221.

<sup>600</sup> Report of the International Law Commission covering its First Session (12 April – 9 June 1949) Supp. No. 10, UN Doc. A/925, p. 5.

<sup>601</sup> Report of the International Law Commission covering its First Session (12 April – 9 June 1949) Supp. No. 10, UN Doc. A/925, p. 5.

<sup>602</sup> Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur, UN Doc. A/CN.4/20, p. 23.

<sup>603</sup> Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur, UN Doc. A/CN.4/20, p. 23.

<sup>604</sup> Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, UN Doc. A/CN.4/15/Corr.1, p.16.

<sup>605</sup> Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, UN Doc. A/CN.4/15/Corr.1, p.17.

<sup>606</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 22.

vote separately or jointly on the possibility and desirability of establishing an international criminal court. The decision to vote separately on the two issues passed by 6-4, with one abstention. The International Law Commission voted 8-1, with two abstentions, that it was desirable to establish an international criminal court without voting, if possible.<sup>607</sup> Hudson abstained since he thought the two issues were the same thing.<sup>608</sup> Shortly thereafter, members voted 7-3 in favor of establishing an international criminal court, with one abstention.<sup>609</sup>

If the court was to be established, Hudson was completely against adding an international criminal jurisdiction to the International Court of Justice and feared that by doing so, it would mean utter destruction for the latter.<sup>610</sup> Sandström agreed with Hudson and withdrew the proposal in the final paragraph of his report.<sup>611</sup> Alfaro did not alter his report and stated that in it, he had merely argued that it was possible to create a criminal chamber of the International Court of Justice if the latter's statute was amended.<sup>612</sup> This opinion did not mean he favored the option.<sup>613</sup> Hudson proposed inserting text into the International Law Commission's report stating that it had concluded that establishing a criminal chamber of the International Court of Justice was possible, but not recommended.<sup>614</sup> The text was included as the last sentence in the International Law Commission's report to the General Assembly.<sup>615</sup>

Having given preliminary consideration to the International Law Commission's report on the issue of an international criminal court, the General Assembly decided to establish a committee on international criminal jurisdiction composed of representatives from 17 States<sup>616</sup> "for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal

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<sup>607</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 23.

<sup>608</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 23.

<sup>609</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 23.

<sup>610</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 23.

<sup>611</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 24.

<sup>612</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 24.

<sup>613</sup> Summary Record of the 43rd Meeting, UN Doc. A/CN.4/SR.43, p. 24.

<sup>614</sup> Summary Record of the 44th Meeting, UN Doc. A/CN.4/SR.44, p. 27.

<sup>615</sup> Report of the International Law Commission covering its Second Session (5 June – 29 July 1950) Supp. No. 12, UN Doc. A/1316, p.16.

<sup>616</sup> States included Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom, the United States, and Uruguay.

court.”<sup>617</sup> The Committee on International Criminal Jurisdiction met in Geneva from 1 – 31 August 1951 and subsequently submitted its report to the General Assembly.<sup>618</sup>

The Committee’s report, which included a draft statute for an international criminal court, was transmitted to the governments of member States from the Secretary General on 13 November 1951, requesting their observations.<sup>619</sup> The General Assembly appointed a subsequent committee to examine governments’ comments regarding the draft statute and to explore the implications and consequences of creating an international criminal court, as well as different methods by which a court could be created.<sup>620</sup> After receiving comments from governments, the Committee submitted a report on international criminal jurisdiction.<sup>621</sup> Two major obstacles stood in the way of creating an international criminal court at the time, however: the lack of a definition for the crime of aggression and the height of the Cold War. As a result, the project of creating an international criminal court was suspended indefinitely.<sup>622</sup>

### **International Penal Tribunal under the Apartheid Convention**

During the height of the Cold War, there was little progress on developing an international criminal court. Most discussion occurred through academic scholarship.<sup>623</sup> In 1973, however, the principle of an international criminal court was considered in the Third Committee of the United Nations Economic and Social Council during its discussion on the establishment of the Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention). In 1971, Guinea and the Soviet Union submitted a draft convention.<sup>624</sup> Subsequently, Guinea, Nigeria, and the Soviet Union

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<sup>617</sup> GA Res. 489 (V).

<sup>618</sup> Report of the Committee on International Criminal Jurisdiction, Supp. No. 11, UN Doc. A/2136.

<sup>619</sup> GA Res. 687 (VII).

<sup>620</sup> GA Res. 687 (VII) para. 3(a).

<sup>621</sup> Report of the 1953 Committee on International Criminal Jurisdiction, UN Doc. A/2645.

<sup>622</sup> GA Res. 897 (IX).

<sup>623</sup> See for example, John W. Bridge, “The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law” (1964) 13 *Int’l & Comp LJ* 1255; Jacob W. F. Sandberg, “The Case for an International Criminal Court” (1971) *J Air L & Com* 211; Richard I Miller, “Far Beyond Nuremberg: Steps Toward International Criminal Jurisdiction” (1972-1973) 61 *Kentucky LJ* 925; M. Cherif Bassiouni and Ved P. Nanda, *A Treaties on International Criminal Law* (2 vols., Charles C. Thomas 1973); Leo H. Phillips, Jr., “A Proposal for Alternative Jurisdiction of an International Criminal Court” (1975) 9 *Int’l Lawyer* 327; M Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code* (Sijthoff & Noordoff 1980); Ferencz, *An International Criminal Court*.

<sup>624</sup> UN Doc A/8542, para. 32.



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submitted a revised draft, which the General Assembly requested the Secretary-General to transmit to States for their comments and views.<sup>625</sup> The Third Committee considered the revised draft convention the following year. Mr. Wiggins, United States representative, stated that the United States was against adopting the Apartheid Convention. He said that the United States “had misgivings about the use of international conventions to achieve political ends, no matter how laudable those ends might be.”<sup>626</sup>

Wiggins argued that the International Convention on the Elimination of All Forms of Racial Discrimination<sup>627</sup> outlawed all forms of racial discrimination, including apartheid; thus, the Apartheid Convention establishing apartheid as an international crime was unnecessary.<sup>628</sup> He continued, “In the absence of any effective international penal jurisdiction and enforcement procedure, the proposed new convention would add nothing to the effectiveness of that earlier convention.”<sup>629</sup>

The United States felt that Article 1 of the draft convention was open to very broad interpretations of apartheid and went beyond the intentions of its drafters as well as the geographical limits of South Africa.<sup>630</sup> Therefore, the convention could be applied to unforeseeable situations.<sup>631</sup> According to Wiggins, when it came to punishing apartheid, jurisdiction should be based strictly on territoriality and that exception to this principle of jurisdiction was limited to piracy.<sup>632</sup>

The arguments made by the United States against adopting the Apartheid Convention resulted from fear that other States may accuse it of violating the convention just as the Soviet Union had with the Genocide Convention. The United States also argued that apartheid was already an international crime under a prior convention against racial discrimination and, therefore, the Apartheid Convention was redundant. But the

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<sup>625</sup> GA Res. 2922 (XXVII).

<sup>626</sup> Third Committee (28th Session) Summary Records of the Meetings (19 September – 5 December 1973) UN Doc. A/C.3/SR.2003, para. 11.

<sup>627</sup> 660 UNTS 195.

<sup>628</sup> Third Committee (28th Session) Summary Records of the Meetings (19 September – 5 December 1973) UN Doc. A/C.3/SR.2003, para. 12.

<sup>629</sup> Third Committee (28th Session) Summary Records of the Meetings (19 September – 5 December 1973) UN Doc. A/C.3/SR.2003, para. 12.

<sup>630</sup> Third Committee (28th Session) Summary Records of the Meetings (19 September – 5 December 1973) UN Doc. A/C.3/SR.2003, para.36.

<sup>631</sup> Third Committee (28th Session) Summary Records of the Meetings (19 September – 5 December 1973) UN Doc. A/C.3/SR.2003, para.36.

<sup>632</sup> Third Committee (28th Session) Summary Records of the Meetings (19 September – 5 December 1973) UN Doc. A/C.3/SR.2004, 16.

latter question does not explain why the United States would be against a second international convention criminalizing apartheid. A logical explanation is that an international penal tribunal was not included in International Convention on the Elimination of All Forms of Racial Discrimination, and, therefore, national tribunals could only prosecute violations.

The United States was one of only four States in the General Assembly to vote against the adoption of the Apartheid Convention in 1973.<sup>633</sup> The convention entered into force three years later. The inclusion of an international criminal court in the Apartheid Convention echoed that of the Genocide Convention:

Persons charged with the acts enumerated in [...] the present Convention may be tried by a competent tribunal of any State Party to the Convention [...] or by an international penal tribunal having jurisdiction with respect to those States Parties, which shall have accepted its jurisdiction.<sup>634</sup>

On 26 February 1980, the Commission on Human Rights adopted Resolution 12 (XXXVI), titled “Implementation of the International Convention on the suppression and Punishment of the Crime of Apartheid” by a vote of 30-1, with 9 abstentions.<sup>635</sup> This was a direct result of paragraph twenty of the first annex to General Assembly Resolution 34/24 of 15 November 1979, “A study should be undertaken in 1980 by the Ad Hoc Working Group of Experts on Southern Africa on ways and means of implementing international instruments, such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention.”<sup>636</sup> Subsequently, M. Cherif Bassiouni was appointed “expert consultant” to the Ad Hoc Working Group of Experts, and, with the help of Daniel H. Derby, prepared a report on the establishment of an international criminal court for the implementation of the Apartheid Convention, which consisted of a draft convention for the establishment of an international criminal court and a draft

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<sup>633</sup> South Africa, Portugal, and the United Kingdom were the other three States that voted against the adoption of the Apartheid Convention. See H. Booyesen, “Convention on the Crime of Apartheid” (1976) 2 *S Afr YB Int'l L* 56, 57.

<sup>634</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243.

<sup>635</sup> UN Doc. E/CN.4/1426, para. 1.

<sup>636</sup> GA Res. 34/24, annex 1, para. 20. See also, Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid, UN Doc. E/CN.4/1426, para. 1.

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additional protocol on the penal implementation of the International Convention for the Suppression and Punishment of the Crime of Apartheid,<sup>637</sup> which was unanimously adopted by the Commission on Human Rights.<sup>638</sup> No further action was taken in the development of an international penal tribunal envisaged in Article V of the Apartheid Convention; however, it would be only eight years until the General Assembly would once again consider establishing a permanent international criminal court.

### Conclusion

The United States's policy throughout the Cold War era demonstrates that it favored the prosecution of international crimes via national and multinational tribunals. It did not demonstrate support for a permanent international criminal court and remained skeptical of establishing international penal tribunals included in the Genocide and Apartheid Conventions in the General Assembly debates. On 23 November 1988, the United States submitted its ratification of the Genocide Convention. However, an earlier resolution had been passed concerning the ratification.<sup>639</sup> In the resolution, the United States confirmed that its nationals would not be within the jurisdiction of any future international criminal court without its consent by stating:

That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.<sup>640</sup>

The debates within the United States Senate from 1950 until the Convention's ratification in 1988 remained consistent regarding an international criminal court in Article VI. Both opponents and proponents agreed that an international criminal court should not have jurisdiction over United States nationals unless contracted by a separate treaty. While the United States has ratified international treaties outlawing Apartheid and racial discrimination, it has not ratified the Apartheid Convention because Article V includes an international penal tribunal.

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<sup>637</sup> Both are reproduced in M. Cherif Bassiouni and Daniel H. Derby, "Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments" (1981) 9 *Hofstra LR* 523.

<sup>638</sup> UN Doc. E/CN.4/AC/22CRP.19/Rev.1.

<sup>639</sup> Resolution of Ratification (adopted 19 February 1986) S. Exec. Rep. 2, 99th Cong. (1985) 26-27.

<sup>640</sup> Resolution of Ratification (adopted 19 February 1986) S. Exec. Rep. 2, 99th Cong. (1985) 26-27.

*Chapter 6*

*Post Cold-War Era*

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**An International Criminal Tribunal for Iraq**

On 2 August 1990, Saddam Hussein's army invaded its neighbor, Kuwait, in an attempt to claim the territory as part of Iraq and take command of Kuwait's oil fields. This action might have eventually resulted in Hussein becoming the most dominant ruler in the Middle East. On the same day, the Security Council adopted a resolution condemning the invasion and demanding Iraq's immediate and unconditional withdrawal from Kuwait.<sup>641</sup> After Hussein ignored the resolution, the Security Council passed another resolution on 29 November 1990 authorizing the use of force, under Article 42 of the Charter of the United Nations, against Iraq if it did not withdraw by 15 January 1991.<sup>642</sup>

In response to Iraq's hostility and Hussein's failure to abide by multiple Security Council resolutions, the international community established a coalition and, with United States leadership, entered an armed conflict with Iraq on 16 January 1991 to assist the Kuwaiti people in driving the Iraqi army out of their country. The First Gulf War ended a few weeks later on 8 February 1991. The war's conclusion brought about the opportunity for the international community to hold Hussein for genocide and war crimes, and in 2006, the Iraqi High Tribunal did just that. Unfortunately, the opportunity to prosecute Hussein was not seriously pursued and international support was diminutive.

The purpose of this chapter is to put into greater context the fact that during and after the First Gulf War (1990-1992), the United States modestly attempted to establish a regional criminal tribunal to prosecute Hussein and the military and civilian leaders in his Ba'ath Party for war crimes, crimes against humanity, genocide, and the crime of aggression. President George H. W. Bush insisted that Hussein should be brought to trial in a regional, or if necessary, a non-permanent international criminal tribunal.<sup>643</sup> After the creation of the ad hoc tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, the United States pursued an ad hoc international criminal tribunal for Iraq, to be

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<sup>641</sup> SC Res. 660 (1990).

<sup>642</sup> SC Res. 678 (1990).

<sup>643</sup> *Persian Gulf: The Question of War Crimes: Hearing Before the Committee on Foreign Relations*, 102nd Cong. (1991) (Statement by Robert Woetzel).

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established by the United Nations Security Council under its Chapter VII powers in the United Nations Charter.<sup>644</sup>

### *United States Investigation into Iraqi War Crimes*

After invading Kuwait, Iraqi military forces committed war crimes. The Office of the Judge Advocate General of the United States Army conducted an investigation for the Department of Defense into war crimes committed either at the direction or with the approval of Saddam Hussein and officials of the Iraqi Army.<sup>645</sup> The Office of the Judge Advocate General began informally collecting information on Iraqi war crimes on 3 August 1990, after media reports indicated United States citizens had been taken hostage in Kuwait by the Iraqi Army and forcibly deported to Iraq.<sup>646</sup>

United States hostages in Iraq were released in December 1990; however, the release would not end the United States's investigations into Iraqi war crimes. On 24 December 1990, the Secretary of Defense authorized a formal investigation into Iraqi violations of the law of war.<sup>647</sup> One goal was to accumulate and organize evidence in a fashion that would facilitate preparation of criminal cases for war crimes trials.<sup>648</sup> The evidence obtained from the investigation concluded that Iraqi forces had committed numerous grave breaches of the Geneva Conventions adopted on 12 August 1949, including the taking of over 4,900 United States hostages, 106 of whom were used by Iraq as human shields, and the raping, torturing, and murdering of Kuwaiti civilians, including 120 babies, 153 children, and 57 mentally ill.<sup>649</sup>

### *Echoes from Nuremberg*

On 1 September 1990, British Prime Minister Margaret Thatcher told David Frost in a television interview that she favored a new type of Nuremberg hearing and suggested that

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<sup>644</sup> Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153 (UN Charter) art. 51.

<sup>645</sup> Report on Iraqi War Crimes, Memorandum for the Judge Advocate General, Department of the Army (Desert Shield/Desert Storm) Washington, DC: Department of Defense, Office of General Counsel (19 November 1992) (Report on Iraqi War Crimes) p. 1.

<sup>646</sup> Report on Iraqi War Crimes, p. 2.

<sup>647</sup> Report on Iraqi War Crimes, p. 5.

<sup>648</sup> Report on Iraqi War Crimes, p. 8; Aric Press, Bob Cohn, and Ginny Carroll "To the Victors Go the Trials" *Newsweek* (4 February 1991) 52; Tony Mauro, "War-crimes File Against Saddam is Building" *USA Today* (13 February 1991) A4.

<sup>649</sup> Report on Iraqi War Crimes, p. 9.

an international legal body should punish Saddam Hussein's aggression and use of foreign nationals as human shields.

If anything happened to those hostages then sooner or later when any hostilities were over we could do what we did at Nuremberg and prosecute the requisite people for their totally uncivilized and brutal behavior. They cannot get out of it these days by just saying: "Well we were under orders." That was the message of Nuremberg.<sup>650</sup>

In response to a question regarding her idea of international justice, Thatcher responded: "I mean international justice, that each of us would be in a position, as at the Nuremberg trials, to bring charges to bear and to have them heard."<sup>651</sup> One month later, President George H. W. Bush publicly hinted at prosecuting Hussein at a public fundraiser, where he called Saddam "Hitler Revisited" and mentioned that "when Hitler's war ended there were the Nuremberg Trials."<sup>652</sup>

Other government officials also favored prosecuting Hussein. Secretary of State James Baker and Secretary of Defense Dick Cheney insisted that Iraqi war criminals should be held "personally accountable."<sup>653</sup> Ben-Elissar, Chairman of the Israeli Knesset Foreign Affairs and Defense Committee, stated, "It will be proper to try Saddam Hussein in a Nuremberg-type war crimes court after the fighting is over."<sup>654</sup>

Initially, however, George H. W. Bush's administration was unsure how to pursue a war crimes tribunal. The administration did not want to pursue a tribunal unilaterally, but they were also unwilling to include the United Nations in the process.<sup>655</sup> M. Cherif Bassiouni, a professor at DePaul Law School and long-time scholar who had promoted international criminal justice for several decades, writes that he had been contacted by a partner of a Saudi law firm in Riyadh to solicit his views on a proposal for an "Arab

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<sup>650</sup> Geoffrey Marston (eds), "United Kingdom Materials on International Law 1990" (1990) *BYBIL* 463, 602.

<sup>651</sup> Geoffrey Marston (ed), "United Kingdom Materials on International Law 1990" (1990) *BYBIL* 463, 602.

<sup>652</sup> Remarks at a Fundraising Luncheon for Gubernatorial Candidate Clayton Williams in Dallas, Texas, 15 October 1990, in *Public Papers of the Presidents of the United States: George Bush*, Book II (US GPO 1991) 1408 at 1411; excerpts reprinted in (1990) 1 *Dep't St Disp* 205.

<sup>653</sup> Peter Kellner, "Why Iraq War Crimes May Go Unpunished" *The Independent* (London 1 February 1991) 19

<sup>654</sup> Asher Wallfish, "Saddam Should Be Tried as War Criminal" *The Jerusalem Post* (22 January 1991).

<sup>655</sup> M. Cherif Bassiouni, "Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal" (2005) 38 *Cornell Int'l L J* 327, 339.

League initiative to establish an Arab war crimes tribunal for Iraq.”<sup>656</sup> The idea of the proposal was assumed to have originated from a United States government source.<sup>657</sup>

After the Arab League chose not to pursue a war crimes tribunal for Iraq because of uninterested Arab governments, it is believed that the United States suggested that a Gulf Cooperation Council should be established to sponsor a war crimes tribunal.<sup>658</sup> This council never developed, either, since Saudi Arabia probably did not welcome the idea.<sup>659</sup> For years to come, the United States continued contemplating how to one day bring Hussein and other Iraqi war criminals to justice.

Many European States called for Hussein’s prosecution. Germany’s Foreign Minister, Hans-Dietrich Genscher, proposed to the European Community that Hussein should be held “personally responsible” for committing genocide and war crimes, while the former Prime Minister of Belgium, Mark Eyskens, insisted that Hussein should be prosecuted through a “Nuremberg-type procedure.”<sup>660</sup> On 15 April 1991, the European allies called on the United Nations to look into the possibility of prosecuting Hussein for the attempted genocide of Kurdish people living in Iraq.<sup>661</sup> These proposals were the first true attempts by Western governments to prosecute Hussein.<sup>662</sup>

As time went by, discussion about prosecuting Hussein lessened, which may have been a result of not having Hussein in custody. An international legal scholar, Howard Levie, had written, “To make rabbit stew, first you must catch the rabbit.”<sup>663</sup> The failure to create an international criminal tribunal for Iraq after the First Gulf War sent a message that Hussein’s actions would be tolerated without criminal justice. There was no attempt to deter either Hussein specifically or future war criminals and *génocidaires* in general. Instead, the international community believed it best to contain Hussein with threats and international sanctions.

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<sup>656</sup> Bassiouni, “Post-Conflict Justice in Iraq,” 338.

<sup>657</sup> Bassiouni, “Post-Conflict Justice in Iraq,” 338.

<sup>658</sup> Bassiouni, “Post-Conflict Justice in Iraq,” 339.

<sup>659</sup> Bassiouni, “Post-Conflict Justice in Iraq,” 339.

<sup>660</sup> *The Path to the Hague*, p. 19, Doc. 2.

<sup>661</sup> William Drozdiak, “EC Ministers Seek Trial of Saddam Hussein” *Washington Post* (15 April 1991) A14.

<sup>662</sup> William Drozdiak, “EC Ministers Seek Trial of Saddam Hussein” *Washington Post* (15 April 1991) A14.

<sup>663</sup> Tony Mauro, “War-crimes File Against Saddam is Building” *USA Today* (13 February 1991) A4.

*Internal Attempts to Establish an International Criminal Tribunal for Iraq*

Throughout the 1990s, efforts within the United States continued regarding the removal of Saddam Hussein as the President of Iraq and his prosecution for international crimes. In March 1991, Whitney Harris, a former Nuremberg war crimes prosecutor, chaired a symposium that passed a resolution, the final paragraph of which read:

[We] urge that the United Nations, the United States and coalition partners, and all peace-loving nations take all appropriate action to investigate, indict, prosecute, and punish those Iraqi nationals who have planned and prosecuted an Aggressive War against Kuwait or committed War Crimes or Crimes Against Humanity in the course of that war in violation of the Nuremberg Principles, the United Nations Charter, the Security Council Resolutions, or International Conventions of which Iraq is a signatory.<sup>664</sup>

On 9 April 1991, the United States began its quest to bring Hussein to justice when the Senate Foreign Relations Committee convened on the topic of war crimes and the First Gulf War.<sup>665</sup> On 18 April 1991, the United States Senate approved a bill urging George H. W. Bush's administration to propose an international tribunal for the prosecution of Iraqi war criminals.<sup>666</sup> However, the administration did not pursue the proposal, since there was no interest in working with the United Nations in creating an international criminal tribunal for Iraq.

In 1992, William Jefferson Clinton was elected President of the United States. Over the next two years, the Security Council would establish two ad hoc international criminal tribunals. After they were established, the Clinton Administration began preliminary informal consultations with Security Council members to consider establishing a war crimes commission to investigate war crimes committed by Iraq during its wars with Iran and Kuwait.<sup>667</sup> The commission would have been similar to the Commission of Experts to Investigate Violations of International Humanitarian Law in

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<sup>664</sup> William F. Buckley, Jr., "On the Right: Get Saddam Hussein" (27 May 1991) 43 *National Review* 62.

<sup>665</sup> *Persian Gulf: The Question of War Crimes: Hearing Before the Committee on Foreign Relations United States Senate*, 102nd Cong. (1991).

<sup>666</sup> Richard L. Berke, "After The War: Senate Urges War-Crimes Trials" *New York Times* (19 April 1991) A08.

<sup>667</sup> Bassiouni, "Post-Conflict Justice in Iraq," 339.



the Former Yugoslavia, which the Security Council had created in 1992.<sup>668</sup> The informal consultations continued for the next few years; however, they were abandoned after other permanent members of the Security Council opposed establishing a commission for Iraq.<sup>669</sup> France, Russia, and the United Kingdom had economic ties with Iraq, and China did not want the Security Council to become more involved with the business of regime violation investigations.<sup>670</sup>

On 13 March 1998, the United States Senate passed a resolution urging the creation of a United Nations international criminal tribunal to try Hussein as an international war criminal; the resolution was confirmed in the House of Representatives on 16 March 1998.<sup>671</sup> The Senate resolution stated that the President of the United States should:

1. Call for the creation of a commission under the auspices of the United Nations to establish an international record of the criminal culpability of Saddam Hussein and other Iraqi officials;
2. Call for the United Nations to form an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and any other Iraqi officials who may be found responsible for crimes against humanity, genocide, and other violations of international humanitarian law; and
3. Upon the creation of a commission and international criminal tribunal, take steps necessary, including the reprogramming of funds, to ensure United States support for efforts to bring Saddam Hussein and other Iraqi officials to justice.<sup>672</sup>

Congress had hoped to change Clinton's policy from containment of Hussein to actively promoting his removal. Congress reminded Clinton that bringing Hussein to justice for war crimes had been a stated goal of his administration since 1993, prior to informal consultations with Security Council members, and that now, the State

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<sup>668</sup> Bassiouni, "Post-Conflict Justice in Iraq," 339.

<sup>669</sup> Bassiouni, "Post-Conflict Justice in Iraq," 339.

<sup>670</sup> Bassiouni, "Post-Conflict Justice in Iraq," 339.

<sup>671</sup> S. CON. RES. 78 (1998); see also, Mary Ann Akers, "Senate calls for U. N. trial of 'war criminal' Saddam," *Washington Times* (14 March 1998) A03; Helen Dewar, "Senate Urges Tribunal to Try Saddam: Iraq is Targeted As War Criminal," *Washington Post* (14 March 1998) A20.

<sup>672</sup> S. CON. RES. 78 (1998).

Department should try to persuade the Security Council to approve the creation of an international criminal tribunal for Iraq.<sup>673</sup>

An international criminal tribunal to prosecute Hussein had not gained very much momentum and may not have been very feasible immediately after the First Gulf War; not since the International Military Tribunal for the Far East had there been such a multinational or international criminal prosecution. In 1998, however, the potential for an international criminal tribunal for Iraq was realistic, since five years prior, the Security Council had created the International Criminal Tribunal for the Former Yugoslavia, which had begun to gain acceptance as a success by the international community. The International Criminal Tribunal for Rwanda had also become recognized as a success, although the same degree of effort had not been contributed as had been made for the Yugoslav tribunal. Nevertheless, the United Nations Security Council could have feasibly created a tribunal for Iraq in 1998.

In 1999, the Clinton administration pursued criminal charges against Hussein.<sup>674</sup> David Scheffer, then the United States Ambassador for War Crimes, says that it was the United States's goal to bring Hussein to justice.<sup>675</sup> However, to successfully pass a resolution, the Security Council must have a majority vote without a veto from any of the Permanent Five members (the United States, the United Kingdom, France, Russia, and China). In the end, Russia and China disagreed with the United States and other States that had supported the creation of an ad hoc international criminal tribunal for Iraq.<sup>676</sup> In 2005, Iraq established the Iraqi High Criminal Court<sup>677</sup> and, in 2006, Saddam Hussein was prosecuted for genocide, war crimes, and crimes against humanity. He was subsequently convicted and hanged.

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<sup>673</sup> Walter Pincus, "Senators Urge Undermining of Saddam: Republicans Propose \$38 Million for Foes of Iraqi Leader" *Washington Post* (11 March 1998) A06.

<sup>674</sup> Warren P. Strobel and Kevin Whitelaw, "Saddam Hussein and the Bar of Justice: Can Lawyers Succeed where Bombs Failed?" *U.S. News & World Report* (25 October 1999) 40.

<sup>675</sup> Warren P. Strobel and Kevin Whitelaw, "Saddam Hussein and the Bar of Justice: Can Lawyers Succeed where Bombs Failed?" *U.S. News & World Report* (25 October 1999) 40.

<sup>676</sup> Warren P. Strobel and Kevin Whitelaw, "Saddam Hussein and the Bar of Justice: Can Lawyers Succeed where Bombs Failed?" *U.S. News & World Report* (25 October 1999) 40.

<sup>677</sup> Iraqi High Criminal Court Law (18 October 2005) 47 *Al-Waqa' I Al-Iraqiya*, No. 4006.

### **International Criminal Tribunal for the Former Yugoslavia**

As a result of States declaring independence from Yugoslavia beginning in the early 1990s, extreme beliefs about cultural identity resulted in Orthodox and Catholic Serbians rounding up and deporting their neighboring Muslims, a practice that became known as “ethnic cleansing.” All parties to the conflict committed serious war crimes, but not since the Holocaust had the world actually seen such brutal and systematic attacks on civilians, including women and children. The former Yugoslavia was a region in turmoil, and as a consequence of modern media technology, this turmoil became widely known to the international community through the Internet and international cable news networks, which added pressure for an international response.

By mid-1991, the fighting was so ferocious that on 16 May, Mirko Klarin published an article titled “Nuremberg Now” that called for prosecuting those who were committing crimes.<sup>678</sup> On 25 September 1991, the Security Council passed Resolution 713, which stated that the continuation of the situation in the former Yugoslavia “constitutes a threat to international peace and security.”<sup>679</sup> In the same resolution, the Security Council recalled that its primary responsibility under the Charter of the United Nations is to maintain international peace and security. Therefore, the Security Council had decided that it could act under Chapter VII of the Charter of the United Nations, which gives it the authority to take measures to reestablish international peace and security.<sup>680</sup> The Security Council may use methods without the use of force first,<sup>681</sup> and if such measures are considered inadequate, then the Security Council may use force through the air, land, or sea.<sup>682</sup>

After several months of continued fighting, the Security Council passed Resolution 764 warning that individual perpetrators who violated international humanitarian law in the former Yugoslavia would be held accountable.<sup>683</sup> The violence did not lessen, however, and the United States introduced a resolution to the Security

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<sup>678</sup> Mirko Klarin, “Nuremberg Now!” *Borda* (Belgrade, 16 May 1991) reprinted in English in *The Path to the Hague: Selected Documents on the Origins of the ICTY* (United Nations ICTY, 2001) 43.

<sup>679</sup> SC Res. 713 (1991).

<sup>680</sup> Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153 (UN Charter) arts. 41 & 42.

<sup>681</sup> UN Charter, art. 41.

<sup>682</sup> UN Charter, art. 42.

<sup>683</sup> SC Res. 764 (1992).

## Post Cold-War Era

Council that urged States to submit information in their possession regarding international crimes committed in the former Yugoslavia.<sup>684</sup> On 13 August 1992, the Security Council passed Resolution 771, which called upon

States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.<sup>685</sup>

In total, the United States submitted eight reports, which listed evidence based on firsthand testimony of victims and witnesses to serious international crimes, including crimes against humanity and violations of the laws and customs of war in the former Yugoslavia.<sup>686</sup> The United States was the only State to submit reports of war crimes and human rights violations in the former Yugoslavia as requested in Resolution 771.<sup>687</sup>

### *Commission of Experts*

On 5 August 1992, the United Kingdom informed the Office for Democratic Institutions and Human Rights that the United Kingdom, along with the support of nine States, including the United States, was invoking the Moscow Human Dimension Mechanism, which allows the engagement of a participating State of the Conference on Security and Cooperation in Europe (CSCE) “considers that a particularly serious threat to the fulfillment of the provisions of the [Conference for Security and Cooperation in Europe] human dimension has arisen in another participating State.”<sup>688</sup> On 28 September 1992,

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<sup>684</sup> M. Cherif Bassiouni, “The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)” (1992) 88 *AJIL* 784, 790, n. 42.

<sup>685</sup> SC Res. 771 (1992) p. 2, para. 5.

<sup>686</sup> “War Crimes in the Former Yugoslavia: Department Statement, US Report to the UN Security Council” (1992) 3 *Dep’t of St Disp* 732; “Supplemental Report on War Crimes in the Former Yugoslavia” (1992) 3 *Dep’t of St Disp* 802; “Third Report on War Crimes in the Former Yugoslavia” (1992) 3 *Dep’t of St Disp* 825; “Fourth Report on War Crimes in the Former Yugoslavia” (1992) 3 *Dep’t of St Disp* 917; “Fifth Report on War Crimes in the Former Yugoslavia” (1993) 4 *Dep’t of St Disp* 75; “Sixth Report on War Crimes in the Former Yugoslavia” (1993) 4 *Dep’t of St Disp* 243; “Seventh Report on War Crimes in the Former Yugoslavia” (1993) 4 *Dep’t of St Disp* 257; “Eighth Report on War Crimes in the Former Yugoslavia” (1993) 4 *Dep’t of St Disp* 537.

<sup>687</sup> Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Tribunal for the Former Yugoslavia* (James Thomas Snyder, trans, Texas A&M UP 2004) 25.

<sup>688</sup> Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell – Turk – Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia – Herzegovina and Croatia, 9 February 1993, p. 15.

the Conference for Security and Cooperation in Europe established a small team of three rapporteurs, giving them the mandate “to investigate reports of atrocities against unarmed civilians in Croatia and Bosnia, and to make recommendations as to the feasibility of attributing responsibility for such crimes.”<sup>689</sup> The rapporteurs visited Croatia from 30 September - 2 October 1992, to investigate crimes being perpetrated. The rapporteurs stated in their report of 7 October 1992 what they observed:

There are numerous reports regarding atrocities perpetrated against unarmed civilians as well as the practice of "ethnic cleansing" in territory of the Republic of Croatia. Although responsibility for these grave violations of human rights and the norms of international humanitarian law is to be attributed to both parties to the conflict, it appears that the scale and gravity of the crimes committed by the Yugoslav National Army, Serbian paramilitary groups and the police forces of the Knin authorities are by far the most serious. On the Serbian side, such violations of generally accepted international norms seem to form part of an officially tolerated or even supported systematic policy.<sup>690</sup>

The rapporteurs' report also listed specific crimes perpetrated in Croatia, including mass-killings and arbitrary executions,<sup>691</sup> forced deportations and detention camps,<sup>692</sup> ethnic cleansing,<sup>693</sup> destruction and confiscation of property,<sup>694</sup> harassment and discriminatory dismissal from employment,<sup>695</sup> and arbitrary arrests.<sup>696</sup>

The rapporteurs did not think justice could wait for the International Criminal Court to be established before action was taken against serious criminal acts in the former

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<sup>689</sup> Quoted in Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell – Turk – Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia – Herzegovina and Croatia, 9 February 1993, p. 9.

<sup>690</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 1.

<sup>691</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 18

<sup>692</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 19

<sup>693</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 20

<sup>694</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 21

<sup>695</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 22

<sup>696</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 23

Yugoslavia.<sup>697</sup> They believed that an “international ad hoc criminal jurisdiction” was feasible and listed some difficult issues of establishing an international criminal jurisdiction, including applicable law,<sup>698</sup> procedural law,<sup>699</sup> establishment of a jurisdiction,<sup>700</sup> prosecution,<sup>701</sup> implementation of sentences,<sup>702</sup> and language.<sup>703</sup> The rapporteurs proposed that a “committee of experts from interested States be convened as soon as possible” to prepare a draft treaty establishing an international ad hoc tribunal for the former Yugoslavia.<sup>704</sup>

On 6 October 1992, the Security Council unanimously adopted Resolution 780,<sup>705</sup> requesting “the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyze the information submitted” by States on war crimes in the former Yugoslavia.<sup>706</sup> The language in the original resolution, which was introduced by the United States,<sup>707</sup> argued for the Security Council to establish a commission similar to the United Nations War Crimes Commission during the Second World War, which investigated atrocities that were later prosecuted at the International Military Tribunal.<sup>708</sup> The United States wanted the words “war crimes” in the Commission’s title with the expectation that an international criminal tribunal would later be established.<sup>709</sup> The United States spent days persuading its allies to go along with its initiative, but the United Kingdom, France, and China would not go along with the

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<sup>697</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 37.

<sup>698</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 37

<sup>699</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 39

<sup>700</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 39

<sup>701</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 40

<sup>702</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 40

<sup>703</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 41

<sup>704</sup> Report, Rapporteurs (Corell – Turk – Thune) under the Moscow Human Dimension to Croatia, 30 September – 5 October 1992, p. 42.

<sup>705</sup> UN Doc. S/PV.3119, p. 11.

<sup>706</sup> SC Res. 780 (1992) UN Doc. S/RES/780, p. 2, para. 2.

<sup>707</sup> Hazan, *Justice in a Time of War*, 23.

<sup>708</sup> Mark Tran and Hella Pick, “UN to Set Up Commission to Investigate Atrocities in Former Yugoslavia: Europeans Dilute US Call for War Crimes Tribunal” *Guardian* (London, 7 October 1992) 8.

<sup>709</sup> Bassiouni, “The United Nations Commission of Experts,” 790, n. 42; Hazan, *Justice in a Time of War*, 24.

idea.<sup>710</sup> The United Kingdom argued the need to continue communicating with the Bosnian Serbians so that further crimes could be prevented.<sup>711</sup> In the resolution's final wording, the Security Council requested that the Secretary-General establish a Commission of Experts to examine and analyze evidence of international crimes and report back to the Security Council.<sup>712</sup> The then-French Minister of Foreign Affairs, Ronald Dumas, stated that the Security Council's decision to create the Commission of Experts "opens the way for the establishment of a Permanent International Criminal Court."<sup>713</sup> The matter of establishing an international criminal tribunal was left open.

Initially, the Commission had no office, no money, and no administrative personnel. States, particularly France and the United Kingdom, were uninterested in financially supporting the Commission. An anonymous United States diplomat recalled:

We wanted to give the power of investigation to the new commission. The British and the French thought that the pursuit of war criminals would place the political solution in danger. Their preference was to create a passive committee that would collect and analyze information that would be transmitted to it. Under the force of American pressure, [the Europeans] accepted, but they reached it by torpedoing its financing, in obligating this commission to take its resources out of regular U.N. budget and not from a specific budget.<sup>714</sup>

The Commission of Experts received several thousand pages of documents, which alleged that violations of the Geneva Conventions and international humanitarian law had been committed and that large-scale victimization had taken place in the former Yugoslavia.<sup>715</sup> After analyzing the evidence of international crimes committed in the former Yugoslavia, the Commission of Experts concluded in its interim report that an

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<sup>710</sup> Mark Tran and Hella Pick, "UN to Set Up Commission to Investigate Atrocities in Former Yugoslavia: Europeans Dilute US Call for War Crimes Tribunal" *Guardian* (London, 7 October 1992) 8.

<sup>711</sup> Mark Tran and Hella Pick, "UN to Set Up Commission to Investigate Atrocities in Former Yugoslavia: Europeans Dilute US Call for War Crimes Tribunal" *Guardian* (London, 7 October 1992) 8.

<sup>712</sup> SC Res. 780 (1992) UN Doc. S/RES/780, p. 2, paras. 2-3.

<sup>713</sup> Statement of the French Minister of Foreign Affairs, Mr. Dumas, following the vote by the Security Council on Resolution 780 (1992) reprinted in *The Path to the Hague*, 65.

<sup>714</sup> Pierre Hazan, Interview with anonymous United States diplomat, (Washington, D.C., 30 November 1999) quoted in Hazan, *Justice in a Time of War*, 24, n. 37.

<sup>715</sup> Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, UN Doc. S/25274, p. 7.

international criminal tribunal established by the “Security Council or another competent organ of the United Nations...would be consistent with the direction of its work.”<sup>716</sup>

During the early stages of the conflict in the former Yugoslavia, the United States and other Western States were initially unconcerned with prosecuting State officials through an international criminal tribunal. Some were even hostile toward the idea.<sup>717</sup> The United States “was not ready to entrust the United Nations with the authority to conduct trials of Yugoslav war criminals.”<sup>718</sup> George H. W. Bush previously had not wanted a Security Council tribunal established to prosecute Saddam Hussein, and he believed that the Yugoslav crisis was not an issue of concern for the United States. However, as a result of public outrage and calls for a tribunal from other States, particularly France, and several non-government organizations (NGOs), George H. W. Bush’s administration changed its position and publicly called for a temporary Security Council-controlled international criminal tribunal.<sup>719</sup> The goal was to establish a tribunal similar to the International Military Tribunals at Nuremberg and for the Far East, both of which had limited temporal and territorial jurisdiction over persons and crimes.

*The United States Calls for a “Second Nuremberg”*

When the Yugoslav crisis first had been reported, the United States took the position that if criminal prosecutions were to take place, then the countries involved should be the prosecuting parties. The United States did not feel that it should intervene. Secretary of State James Baker had stated, “We don’t have a dog in that fight.”<sup>720</sup> Just as they had been adamant in distrusting the Security Council to establish a tribunal to prosecute Saddam Hussein and other Iraqi officials, George H. W. Bush’s administration originally did not want to entrust the Security Council with the authority to conduct trials of Yugoslav war criminals, either.<sup>721</sup>

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<sup>716</sup> Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, UN Doc. S/25274, p. 20, para. 74.

<sup>717</sup> Interview with Michael P. Scharf (Cleveland, OH, 12 March 2007); Hazan, *Justice in a Time of War*.

<sup>718</sup> Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Carolina Academic Press 1997) 39.

<sup>719</sup> Lawrence Eagleburger, “The Need to Respond to War Crimes in the Former Yugoslavia,” Statement at the International Conference on the Former Yugoslavia, (1992) 3 *Dep’t St Dispatch* 923.

<sup>720</sup> JFO McAllister, Jasmina Kuzmanovic, William Rademaekers, and Bruce van Voorst, “Atrocity and Outrage” *Time Magazine* (US, 17 August 1992) <<http://www.time.com/time/magazine/article/0,9171,976238-1,00.html>> accessed 10 October 2011.

<sup>721</sup> Scharf, *Balkan Justice*, 39.



As the crisis within the former Yugoslavia grew, though, the United States changed its position and called for a tribunal similar to the International Military Tribunal established on 8 August 1945 for the prosecution of Nazi war criminals. On 16 December 1992, United States Secretary of State Lawrence Eagleburger publicly called for the creation of a “second Nuremberg” to try persons believed to be responsible for atrocities in the former Yugoslavia and accused Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic of committing international crimes during the ethnic cleansing.<sup>722</sup> Other States were surprised by Eagleburger’s statement, as prior to his statement, they had not been “naming names” of persons who should be prosecuted.<sup>723</sup> France and the United Kingdom were not happy with Eagleburger’s call for the prosecution of Milosevic, Karadzic, and Mladic,<sup>724</sup> since they were interested in peace first and justice later, if at all.

Consistent with the previous two years concerning a court to prosecute Hussein, the United States called for a Nuremberg-type of tribunal. At the time Eagleburger made his speech, George H. W. Bush had already been defeated in the previous month’s presidential election. Rather than remaining adamant in its opposition to a war crime tribunal set up by the Security Council, George H. W. Bush’s administration completely changed its position, leaving the situation to be handled by the Clinton administration.

### *The United States’s Role in Creating the ICTY*

On 20 January 1993, President Clinton was inaugurated. David Scheffer, who would later become the first Ambassador at Large for War Crimes Issues, stated “When the Clinton administration entered the White House, Ambassador Albright’s first initiative at the Security Council...in February of 1993 was to create a war crimes tribunal for the Balkans. So, as far as the Clinton Administration [was] concerned, we did it as issue number one.”<sup>725</sup> Warren Christopher, Clinton’s newly appointed Secretary of State, also

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<sup>722</sup> Eagleburger, “The Need to Respond to War Crimes in the Former Yugoslavia,” 924-25.

<sup>723</sup> Elaine Sciolino, “US Names Figures it Wants Charged with War Crimes” *New York Times* (17 December 1992) 1.

<sup>724</sup> Hazan, *Justice in a Time of War*, 32.

<sup>725</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

supported the creation of war crimes tribunals for Iraq and the former Yugoslavia.<sup>726</sup> When asked by Senator Jessie Helms if a Nuremberg-type trial for alleged Serbian war crimes should be convened, Christopher answered, “Those suspected of war crimes should be tried and brought to justice.”<sup>727</sup> Also, when asked if a case should be brought against individual Iraqis for crimes against humanity and genocide in a specially constituted court, a United States court, or the International Court of Justice, Christopher responded, “I do think these war crimes, atrocities, genocide crimes ought to be pursued in the best possible forum, whether it be the ICJ or a new forum set up for that purpose.”<sup>728</sup> He further stated, “It is clear that under the ICJ – the International Court of Justice – it might be possible to set up a war crimes tribunal.”<sup>729</sup> Christopher explained,

[M]ost of my colleagues are asking, I think, very important questions regarding Bosnia and Somalia and Iraq, and the specifics. These are case specific. I would like to go beyond that. Senator Kassebaum talked about holding a Nuremberg type of trial in the case of Saddam Hussein or even possibly Milosevic and others. It was exactly 51 years ago today, on January 13, 1942, that a group of representatives of the allied powers met at St. James Palace in London and announced that the crimes of the Nazi regime would not go unpunished. [...] The political will to do something in Bosnia, though, I think is probably a more difficult question than the problem of the various techniques of establishing a war crimes tribunal. I think if you decided that you had the political will and were going to find the people and round them up, that you could develop in some way an adequate tribunal.<sup>730</sup>

During his confirmation hearing before the Senate Committee of Foreign Relations, Christopher explained why the United States’s policy was to establish a war

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<sup>726</sup> *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103rd Cong. (1993).

<sup>727</sup> *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103rd Cong. (1993) 203.

<sup>728</sup> *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103rd Cong. (1993) 41.

<sup>729</sup> *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103rd Cong. (1993) 68.

<sup>730</sup> *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103rd Cong. (1993) 68.

crimes tribunal for the prosecutions of Serbian war criminals rather than solely focusing on peace. He stated,

As heroic as the peace efforts of Mr. Vance and Mr. Owen have been in Geneva, I am pessimistic their efforts would lead to a just settlement in Bosnia. For this reason, I support [...] preparations for war-related trials for those responsible for genocide, the destruction of heavy weapons in Bosnia by airstrikes, and a NATO-led plan to deploy substantial ground forces in Bosnia for the purpose of imposing law and order and ensuring the safe return of refugees.<sup>731</sup>

Christopher continued, saying, “Peace agreements quite often produce amnesties, widespread amnesties, rather than war crimes trials.”<sup>732</sup>

Shortly after Christopher’s confirmation hearing, Madeleine K. Albright went before the Committee on Foreign Relations for her confirmation hearing as United States Ambassador to the United Nations.<sup>733</sup> During the hearing, Senator Moynihan (New York) stated, “What is going on in Bosnia-Herzegovina is genocide. It is exactly what this book – the UN Charter – that the chairman carries around says will not happen again,” and “I hope we are going to press the United Nations for war crimes tribunals.”<sup>734</sup> Albright responded to Moynihan that as a Czech, she was very concerned about the situation in the former Yugoslavia. She stated,

[President Clinton] also has called for a tribunal to try these people as war criminals. I think we have to pursue that, and I think mainly we jointly have to show some will to make sure that it is very clear to the world that this is no acceptable behavior in any time, but certainly not at this period. So I would hope that we would all be able to work together to really enforce United Nations resolutions on this particular issue.”<sup>735</sup>

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<sup>731</sup> *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103rd Cong. (1993) 7.

<sup>732</sup> *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103rd Cong. (1993) 68.

<sup>733</sup> *Nomination of Madeleine K. Albright to be United States Ambassador to the United Nations: Hearing Before the Committee on Foreign Relations*, United States Senate, 103rd Cong. (21 January 1993).

<sup>734</sup> *Nomination of Madeleine K. Albright to be United States Ambassador to the United Nations: Hearing Before the Committee on Foreign Relations*, United States Senate, 103rd Cong. (21 January 1993) 24.

<sup>735</sup> *Nomination of Madeleine K. Albright to be United States Ambassador to the United Nations: Hearing Before the Committee on Foreign Relations*, United States Senate, 103rd Cong. (21 January 1993) 25.

## Post Cold-War Era

When asked by Senator Larry Pressler (South Dakota) in a prepared statement if she supported the establishment of a United Nations war crimes tribunal to investigate Serbian atrocities, including the prosecution of Bosnian Serb leader Radovan Karadzic, Albright responded,

The United States is actively supporting the investigation of atrocities in former Yugoslavia, including Serbian government atrocities. We proposed the establishment of the U.N. War Crimes Commission to investigate atrocities and prepare information useful for the prosecutions. It is imperative that persons responsible for atrocities be held individually responsible.”<sup>736</sup>

Albright immediately began efforts to establish the United States’s position to establish a United Nations war crimes tribunal for the former Yugoslavia. David J. Scheffer, who was Albright’s Senior Advisor and Counsel in the Office of the United States Permanent Representative to the United Nations from March 1993 to January 1997, writes, “within days of her confirmation as the U.S. permanent representative to the United Nations, Albright instructed me to begin moving the Washington bureaucracy toward a firm U.S. policy to establish a war crimes tribunal for the Balkans conflict.”<sup>737</sup>

In January 1993 at a meeting of the United States Human Rights Delegation, the United States decided that it could implement Eagleburger’s mandate at the upcoming session of the United Nations Commission on Human Rights by proposing “the formation of an expert working group to prepare the statute for an ad hoc international tribunal.” Upon completion, the working group would send the statute to the Security Council for approval.<sup>738</sup> The following month, while the United States was consulting with its allies at the United Nations Human Rights Commission, France was circulating in New York a draft Security Council resolution that would create a Yugoslavia war crimes tribunal.<sup>739</sup> The United States immediately began working on a response to the French draft, which

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<sup>736</sup> Responses of Dr. Albright to Questions Asked by Senator Pressler, *Nomination of Madeleine K. Albright to be United States Ambassador to the United Nations: Hearing Before the Committee on Foreign Relations*, United States Senate, 103rd Cong. (21 January 1993) annex, 59 at 62.

<sup>737</sup> David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton UP 2012) 20.

<sup>738</sup> Scharf, *Balkan Justice*, 52.

<sup>739</sup> Scharf, *Balkan Justice*, 52.

requested that the Security Council approve and establish a Yugoslavia war crimes tribunal and subsequently approve the tribunal's statute.<sup>740</sup>

A partnership developed between the United States and France to push for a Security Council resolution to create a statute for the International Criminal Tribunal for the Former Yugoslavia.<sup>741</sup> The United States was determined to create successfully an international criminal tribunal and made the most of the opportunity to pass the resolution without interference from its previous detractors. At the time, Russia needed strong financial support from the United States, and China was not in the business of vetoing Security Council resolutions; at the most, China would abstain.<sup>742</sup>

On 22 February 1993, the Security Council adopted a resolution and in it decided that it would establish an international criminal tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."<sup>743</sup> Scheffer writes that "Albright actively drove the Security Council toward approval of Resolution 808."<sup>744</sup> At the Security Council meeting when the resolution was passed, Madeleine Albright, United States Ambassador to the United Nations, stated, "The Nuremberg Principles have been reaffirmed. We have preserved the long-neglected compact made by the community of civilized nations forty-eight years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles."<sup>745</sup> Albright also stated clearly that the United States strongly supported the Security Council's adoption of Resolution 808, "which takes the first step in establishing an ad hoc tribunal to prosecute persons accused of war crimes and other serious violations of international humanitarian law in the territory of the former Yugoslavia,"<sup>746</sup> and that the United States looked forward to working with the Secretary-General to establishing a war crimes tribunal expeditiously with the options for the statute and rules of procedure of such a tribunal.<sup>747</sup>

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<sup>740</sup> Scharf, *Balkan Justice*, 53.

<sup>741</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>742</sup> Interview with Michael P. Scharf (Cleveland, OH, 12 March 2007).

<sup>743</sup> SC Res. 808 (1993) UN Doc. S/RES/808.

<sup>744</sup> Scheffer, *All the Missing Souls*, 22.

<sup>745</sup> UN Doc. S/PV.3175, p. 11.

<sup>746</sup> UN Doc. S/PV.3175, pp. 11-12.

<sup>747</sup> UN Doc. S/PV.3175, p. 12.

## Post Cold-War Era

According to Scharf, three lawyers at the Department of State, James O'Brien, Robert Kushen, and himself, prepared the United States's draft statute.<sup>748</sup> Scheffer writes that Michael Matheson, then the State Department's deputy legal adviser, also played a major role in preparing the United States draft statute.<sup>749</sup> On 5 April 1993, the United States submitted to the Secretary General a draft charter, along with its views on how the International Criminal Tribunal for the Former Yugoslavia should proceed.<sup>750</sup> The United States preferred any court with basic norms of due process, including "an impartial and independent trial court and a prosecutorial authority independent from the trial court."<sup>751</sup> Seventeen States other than the United States submitted draft statute proposals to the United States Secretary General for consideration.<sup>752</sup> Though France had made the initiative to draft a resolution to establish the International Criminal Tribunal for the former Yugoslavia, the United States may have had the biggest impact on the Secretary General's draft statute. The United States's "proposals on the general organization of the Tribunal, the rights of the accused, the double jeopardy principle, and the standard for appeals found their way into the Secretary General's draft statute. In addition, our proposal that rape be listed for the first time in the history of humanitarian law as an international crime was also accepted."<sup>753</sup> The United States also included a clause, which was eventually included in Security Council Resolution 827, authorizing a voluntary fund for the tribunal and urging States to contribute funds, equipment, and personnel to its operation.<sup>754</sup>

Some legal experts in the United States had some concerns with the Secretary-General's draft statute. Louis Henkin, preeminent scholar in international law at Columbia Law School, and Diane Orentlicher, international law professor at American University's Washington College of Law and former Deputy in the Office of War Crimes

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<sup>748</sup> Scharf, *Balkan Justice*, 55.

<sup>749</sup> Scheffer, *All the Missing Souls*, 23.

<sup>750</sup> Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/25575.

<sup>751</sup> Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/25575, annex I, p. 2.

<sup>752</sup> The proposals of States and organizations for the Statute of the International Tribunal for the former Yugoslavia are reproduced in Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 2 (Transnational Publishers 1995) 209-497.

<sup>753</sup> Scharf, *Balkan Justice*, 55.

<sup>754</sup> Scharf, *Balkan Justice*, 62.

## Post Cold-War Era

Issues for the Department of State, were both concerned that the crimes against humanity must be associated with an armed conflict to be prosecuted before the tribunal.<sup>755</sup> The Charter of the International Military Tribunal had set the requirement that crimes against humanity must be committed in association with an armed conflict as precedent in 1945.<sup>756</sup>

The Security Council unanimously passed Resolution 827 on 25 May 1993, officially creating the International Criminal Tribunal for the former Yugoslavia.<sup>757</sup> The tribunal's statute was annexed to the resolution. Also included in Resolution 827 was a United States clause that required all States to comply with the tribunal's orders.<sup>758</sup> Madeline Albright warned that States not complying with their obligations would suffer Security Council sanctions, especially in the case of Serbia, which was already under Security Council sanctions.<sup>759</sup>

The International Criminal Tribunal for the Former Yugoslavia was created to bring to justice “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>760</sup> Just as the International Military Tribunal at Nuremberg had exposed the Holocaust to the world and documented history during the prosecution, the International Criminal Tribunal for the Former Yugoslavia exposed the modern world to a form of crime against humanity referred to as “ethnic cleansing.” Both tribunals shared much in common in terms of their development and jurisdiction. First, both tribunals benefitted from United States support and would not have been as successful without it. Second, both tribunals were controlled and had limited jurisdiction concerning the territories where crimes were committed and when they were committed.

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<sup>755</sup> Scheffer, *All the Missing Souls*, 24.

<sup>756</sup> Charter of the International Military Tribunal, appended to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed 8 August 1945) 13 *Dep't St Bull* 222; *Trial of War Criminals: Documents* (Dep't of St Pub 2420 US GPO 1945) 13; 82 UNTS 279 (IMT Charter) art. 6(c).

<sup>757</sup> SC Res. 827 (1993) UN Doc. S/RES/827.

<sup>758</sup> Scharf, *Balkan Justice*, 62.

<sup>759</sup> David Ottaway, “U.S. Warns Serbs on War Trials” *Washington Post* (17 January 1994) A19. See also Scharf, *Balkan Justice*, 62.

<sup>760</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, annex (ICTY Statute) art. 1.

*United States Early Support the ICTY*

The judges for the International Criminal Tribunal for the Former Yugoslavia opened their first plenary session on 17 November 1993. They had been elected in September and Antonio Cassese was voted president of the Tribunal. Unfortunately, at that time, the United Nations had not approved a budget for the tribunal. The International Criminal Tribunal for the Former Yugoslavia faced a terrible and unnecessary dilemma. When the tribunal had been created, the leaders of the European community and the Balkan wars were negotiating peace. Some countries felt that any strong support for the tribunal would halt negotiations.

For 14 months, deciding on a prosecutor for the International Criminal Tribunal for the Former Yugoslavia was “a ghastly nightmare.”<sup>761</sup> The Office of the Prosecutor was practically empty. The United Nations Security Council had rushed to create the International Criminal Tribunal for the Former Yugoslavia as a result of international public pressure; however, it was only interested in satisfying public concerns.<sup>762</sup> As the sole superpower following the Cold War, the United States felt particularly strong pressure to call for a Nuremberg-type tribunal to prove itself capable of assisting States in turmoil. It also wanted to demonstrate that it was not only concerned with its own interests when widespread or systematic attacks against civilians occurred. Once the International Criminal Tribunal for the Former Yugoslavia was created and the public had been temporarily appeased, the international community proved politics was more important than justice.

The United States was searching for a prosecutor for the tribunal immediately following the passage of Security Council Resolution 827.<sup>763</sup> Originally, the United States had favored Luis Moreno Ocampo (Argentina) for prosecutor; however, the Argentine government, including the president, opposed the nomination.<sup>764</sup> The United States then considered M. Cherif Bassiouni, who had been Chairman of the Commission

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<sup>761</sup> Iain Guest, *On Trial: The United Nations, War Crimes, and the Former Yugoslavia* (Refugee Policy Group 1995) 149.

<sup>762</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton UP 2000) ch. 6.

<sup>763</sup> David J. Scheffer, “Symposium on ‘The ICTY 10 Years On: The View from Inside,’ Three Memories from the Year of Origin, 1993” (2004) 2 *JICJ* 353, 359.

<sup>764</sup> Scheffer, “Symposium on ‘The ICTY 10 Years On,’” 353; see also Scheffer, *All the Missing Souls*, 31.



of Experts.<sup>765</sup> Members within the Security Council, however, opposed Bassiouni.<sup>766</sup> The United Kingdom was concerned that Bassiouni might be unfair since he was an Egyptian Muslim and Muslims were being persecuted in the former Yugoslavia.

Subsequently, as recommended by France, Antonio Cassese requested Richard J. Goldstone. Goldstone, however, was not in a position to accept the title because he was serving on South Africa's new Constitutional Court. After he was elected South Africa's president, however, Nelson Mandela urged Goldstone to take the opportunity and informed him that South Africa's Constitution would be amended so that the position on South Africa's Constitutional Court would still be his when he returned two years later.<sup>767</sup> Goldstone's wife also urged him to accept the position. Goldstone stated that between Mandela and his wife urging him to accept the position, he was inclined to do so.<sup>768</sup>

Six months prior to the time Goldstone had been approached about the job, he had already been considered for the position of prosecutor.<sup>769</sup> At the time, however, Goldstone was investigating violence in South Africa and was not aware of his original consideration.<sup>770</sup> Not until Mandela was elected president had Goldstone officially been requested. After Cassese proposed Goldstone as a qualified candidate, the United States moved quickly to solidify the proposal.<sup>771</sup> As David Scheffer writes, "Judge Goldstone proved to be the right individual at the right time for the right job."<sup>772</sup>

Finally, on 8 July 1994, the International Criminal Tribunal for the Former Yugoslavia had its "Pope." Just one day after Secretary General Boutros Boutros-Ghali had nominated him, the Security Council approved Goldstone's appointment as prosecutor by a 15-0 vote.<sup>773</sup> Choosing Goldstone was in the best interest of the

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<sup>765</sup> Scheffer, "Symposium on 'The ICTY 10 Years On,'" 360.

<sup>766</sup> Scheffer, "Symposium on 'The ICTY 10 Years On,'" 360.

<sup>767</sup> "U.N. Chief Prosecutor to Quit in 1996" *Deutsche Presse-Agentur* (30 January 1996).

<sup>768</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>769</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>770</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>771</sup> Scheffer, "Symposium on 'The ICTY 10 Years On,'" 360.

<sup>772</sup> Scheffer, "Symposium on 'The ICTY 10 Years On,'" 360.

<sup>773</sup> SC Res. 939 (1994) UN Doc. S/RES/939; Annual Report of the International Criminal Tribunal for the former Yugoslavia, UN Doc. A/49/342-S/1994/1007, p. 38, para. 142; see also Stanley Meisler, "U.N. Names South African Judge as Balkans War Crimes Prosecutor" *Los Angeles Times* (9 July 1994) A5;

International Criminal Tribunal for the Former Yugoslavia for two important reasons. First, he was somebody with whom the Security Council could agree and as a result, the tribunal could move forward. Second, he knew “zero” about international criminal law. During an interview with the author, Goldstone stated that he did not know if he was truly the right man for the job, saying he was “ill-qualified” for the position.<sup>774</sup> His ignorance was an important factor, however, since his neutrality would serve symbolically for the Tribunal’s reputation and his decisions would be in the interest of justice. As a judge on South Africa’s Constitutional Court, he did not need the job for any political reasons. Also, even though scholars had written extensively on international criminal law, except for surviving Nuremberg and Tokyo prosecutors, no one had any experiential qualifications for the job.

Soon after his appointment as Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, he was invited to the United Nations headquarters in New York to be briefed on his work.<sup>775</sup> Goldstone explained that while in New York, the United States had originally given him support for his position. He stated:

I was warmly welcomed by Madeleine Albright, who had played the leading role in having the tribunal established. Her continued support for the work of the Yugoslavia tribunal, and later the Rwanda tribunal, was crucial to their success. She appointed one of her senior advisors, David Scheffer, to take special responsibility for moving the work of the tribunal forward. David became a friend and adviser to me, especially with regard to my contacts with the various branches of the United States administration. His commitment to the work of both tribunals was deep and supportive.<sup>776</sup>

When he first arrived at The Hague, the home of the International Criminal Tribunal for the Former Yugoslavia, Goldstone was both excited and discouraged. The United Nations had given the prosecutor’s office only 40 personnel to work for the Tribunal. In addition, “The United States [had] made a pledge of a contribution in kind

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Evelyn Leopold, “S. African Named as Ex-Yugoslav War Crimes Prosecutor” *Reuters World Service* (9 July 1994).

<sup>774</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>775</sup> Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (Yale UP 2000) 76.

<sup>776</sup> Goldstone, *For Humanity*, 78.

of a computer system for the Office of the Prosecutor to a maximum value of \$3 million and, in addition, [had] seconded 22 Professional staff to the Office of the Prosecutor for terms of up to two years.”<sup>777</sup>

In May 1994, the United States sent 22 people to the tribunal as a gift to the United Nations,<sup>778</sup> although it could also have been viewed as a way of gaining influence over the tribunal, so the tribunal could begin preparing for its trials. Goldstone stated, “When I arrived at The Hague, there were 40 staff members, when I left there were 240. When I arrived there were twenty-[two] Americans, when I left two and a quarter years later, there were twenty-[two] Americans.”<sup>779</sup> According to Goldstone, the United States would have given more funds and personnel, but the United Nations disallowed it in order to prevent the Tribunal from being viewed as an American body.<sup>780</sup> He admitted that the United Nations was an obstacle for the International Criminal Tribunal for the Former Yugoslavia. If it were not for the 22 persons provided by the United States, he would have been set back at least six months before he got his first indictment.<sup>781</sup> In its early days, the International Criminal Tribunal for the former Yugoslavia received very little support from other States. For example, as of 29 May 1995, the tribunal had received five personnel from the United Kingdom, three personnel from the Netherlands, two personnel from Denmark, two personnel from Norway, and two personnel from Sweden.<sup>782</sup>

Clint Williamson, who would later serve as the Ambassador at Large for War Crimes Issues for George W. Bush’s second term, shares Goldstone’s view. Williamson was one of the original prosecutors sent by the United States to the International Criminal Tribunal for the former Yugoslavia. When he arrived at the Office of the Prosecutor in 1994, there were seven staff-people. When he left in 2001, the Office of the Prosecutor

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<sup>777</sup> Annual Report of the International Criminal Tribunal for the former Yugoslavia, UN Doc. A/49/342-S/1994/1007, p. 47, para. 186.

<sup>778</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>779</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>780</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>781</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>782</sup> Annual Report of the International Criminal Tribunal for the former Yugoslavia, UN Doc. A/50/365-S/1995/728, pp. 33-34, para. 146.

had expanded to about 400 people, and the International Criminal Tribunal for the former Yugoslavia had over 1,000 people within its institution. He, too, emphasizes that the United States initially had financially contributed well more than all other States involved.<sup>783</sup>

Scheffer also believes that the United States was the only State that did its fair share of contributing to the International Criminal Tribunal for the Former Yugoslavia. According to Scheffer, other States had resolved not to contribute:

In those very, very early months and first couple of years of the Yugoslavia Tribunal, we were not really getting the other governments to step forward and pitch in their fair share in support of the Yugoslavia Tribunal [...] [T]he U.S. was sort of the vanguard of pressing other governments to focus and support the Yugoslav Tribunal.<sup>784</sup>

The United Nations may have been more concerned about the reputation of the International Criminal Tribunal for the former Yugoslavia than the actual success of the tribunal. Originally, the International Criminal Tribunal for the former Yugoslavia looked as if the Security Council had established it without genuine support or intentions for it to succeed. It appeared only to appease the international community and to save face for the United Nations' failure to relieve the atrocities committed in the former Yugoslavia. Many scholars have taken this position over the years; for example, Gary J. Bass called the International Criminal Tribunal for the former Yugoslavia "an act of tokenism by the international community [that] did not mind creating an institution that would give the appearance of moral concern."<sup>785</sup> Samantha Power wrote, "UN lawyers at the ad hoc tribunals were disappointed by the seeming indifference of the UN member States."<sup>786</sup> Moreover, Aryneh Neier wrote that by creating the Tribunal, some major powers of the Security Council "seemed to feel obliged to show that they were doing

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<sup>783</sup> Clint Williamson, former United States Ambassador for War Crimes Issues, Panelist for Panel – Fifteen Years of International Tribunals: Past, Present, and Future – American Branch of the International Association conference, New York, 17 October 2008.

<sup>784</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>785</sup> Bass, *Stay the Hand of Vengeance*, 207.

<sup>786</sup> Power, "A Problem From Hell," 491.

something.”<sup>787</sup> Neither Goldstone nor Scheffer agree with the theory that the United Nations created the International Criminal Tribunal for the former Yugoslavia without sincerity. Goldstone does not buy into conspiracy theories because, as he says, they are easy to claim but hard to prove. He believes that if the Security Council had purposely developed the first international criminal tribunal only to have it fail, its intentions would have reached a London or Washington, D.C., newspaper within 24 hours.<sup>788</sup>

Scheffer, who served on the Deputies Committee of the National Security Council and was Senior Adviser and Counsel to the United States Representative to the United Nations from 1993 to 1996, insists that critics of the ad hoc tribunals who think that they were created only to appease the international community are “way off” with their theories. The core group in the United States government working on the tribunals was “deeply committed to searching for an international justice remedy”<sup>789</sup> for the former Yugoslavia. Where the conspiracy theorists “get it wrong,” says Scheffer, is that “they inflate the importance of the tribunal to the policy process, and that’s where their fatal error is.”<sup>790</sup>

In 1993, while the International Criminal Tribunal for the former Yugoslavia was being created, it was not the only issue at hand. Peace negotiations in the region were occurring and military action was still an option. The tribunals were not the only issues being discussed in the Policy Room in the White House. Subsequently, Scheffer writes that as someone deeply involved in both the judicial and politico-military policy-making of 1993 when the International Criminal Tribunal for the former Yugoslavia was established, he recalls “there being almost no connection between the judicial and military strategizing.”<sup>791</sup> The scholarship claiming that the International Criminal Tribunal for the former Yugoslavia had been created to appease criticisms for the lack of

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<sup>787</sup> Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (Random House, 1998) 112.

<sup>788</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>789</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>790</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>791</sup> David J. Scheffer, “Symposium on ‘The ICTY 10 Years On,’” 353.

military force assumed that the two variables were connected; Scheffer claims that they were not.

As the United States Ambassador to the United Nations, Madeleine Albright was the driving force behind the tribunal. She had once lived in the Balkans and felt a connection to the territory. It was more than just politics to her; she wanted real justice. Goldstone praises her for her helpfulness and the United States's contribution to the tribunal. He says that the United States gave him "whatever [he] wanted," and that "it was extraordinary to reach an agreement with the United States to get intelligence information."<sup>792</sup> He continued, "The thought of sharing intelligence information with an international prosecutor from South Africa" would have been unheard of otherwise; "[w]ithout the United States's political muscle and economic muscle, there wouldn't have been a Yugoslavia tribunal. [...] There was a genuine certainty on the part of the US to have a working, successful international criminal tribunal."<sup>793</sup>

*United States Support to Affirm ICTY's Legitimacy*

The United States was on a mission to affirm that the International Criminal Tribunal for the former Yugoslavia was going to be a credited legal institution. It had much at stake, including trying to prove that if ad hoc international criminal tribunals worked, then they should be preferable over a permanent international criminal court. On 24 June 1997, the International Criminal Tribunal's highest-ranked Croatian official, General Tihomir Blastic, was ready to begin trial for massacring Muslims during the ethnic conflict. While Croatia had reluctantly handed him over to the tribunal, the United States insisted the country had failed to turn over evidence and thus had not done enough to assist prosecutors.<sup>794</sup>

In an attempt to pressure Croatia to be more cooperative with the International Criminal Tribunal for the Former Yugoslavia, the United States opposed a \$30 million loan to Croatia from the World Bank.<sup>795</sup> Senator Frank Lautenberg (New Jersey) demanded that Croatia take the United States and Bosnian peace agreements seriously,

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<sup>792</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>793</sup> Interview with Richard J. Goldstone, former prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda (Washington, DC, 19 March 2008).

<sup>794</sup> Tom Gjelten, "U.S. Pressures Croatia" *National Public Radio, Morning Edition* (24 June 1997).

<sup>795</sup> Tom Gjelten, "U.S. Pressures Croatia" *National Public Radio, Morning Edition* (24 June 1997).

which required all parties to cooperate with the International Criminal Tribunal for the former Yugoslavia. If Croatia did not agree, Lautenberg believed that the United States ought to force them live up to their promise.<sup>796</sup>

On 22 May 1999, the prosecutor of the International Criminal Tribunal for the Former Yugoslavia submitted an indictment for Serbia's sitting head of State, Slobodan Milosevic.<sup>797</sup> Two days later, the indictment was confirmed. This was an important event, since an international criminal tribunal had never before indicted a sitting head of State. In 2000, Milosevic lost re-election. On 6 October 2000, Madeleine Albright stated in an interview that the United States was watching carefully the new president-elect of Serbia, Vojislav Kostunica, and his people push out Milosevic, who had appealed the election. The United States insisted that sanctions would not be lifted until Milosevic was handed over to the International Criminal Tribunal for the former Yugoslavia. Regarding the sanctions, Albright stated, "They are against Milosevic's regime, not against the people of Serbia."<sup>798</sup>

Serbian police arrested Slobodan Milosevic on 1 April 2001. As one New York Times writer described it, "The man who once called himself 'the Ayatollah Khomeini of Serbia' found himself jailed and called up before a judge investigating a series of crimes, initially financial, that will very likely include more serious charges like conspiracy to murder political opponents."<sup>799</sup> Milosevic's less serious, domestic crimes were not pursued. On 28 June 2001, after much pressure from the United States, the former Serbian president was handed over to the International Criminal Tribunal for the former Yugoslavia, further legitimizing the tribunal.<sup>800</sup>

There have been many significant accomplishments by the International Criminal Tribunal for the former Yugoslavia, including the capture of Radovan Karadzic and Ratko Mladic. Karadzic was a highly ranked political official and Mladic was a military

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<sup>796</sup> Tom Gjelten, "U.S. Pressures Croatia" *National Public Radio, Morning Edition* (24 June 1997).

<sup>797</sup> *Milosevic et al.* (IT-99-37-PT) Indictment (22 May 1999).

<sup>798</sup> Madeleine Albright, quoted by Jane Clayson, "Secretary of State Madeleine Albright Discusses the Takeover of Slobodan Milosevic's Government," *The Early Show*, CBS News Transcripts, 6 October 2000.

<sup>799</sup> Steven Erlanger, "The Milosevic Surrender: News Analysis: After the Arrest: Wider Debate About the Role of Milosevic, and of Serbia" *New York Times* (2 April 2001) A8.

<sup>800</sup> Ruth Wedgwood, "Former Yugoslav President Slobodan Milosevic To Be Tried in the Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo" *American Society of International Law Insights* (July 2001) <<http://www.asil.org/insights/insigh76.htm>> accessed 6 July 2008.

general. Both were accused of being responsible for the deaths of thousands of Muslims, including the mass murders of Muslim boys and men in Srebrenica in 1995. However, the most significant accomplishment of any international criminal tribunal thus far has been the International Criminal Tribunal for the former Yugoslavia's arrest and prosecution of Slobodan Milosevic. Though Milosevic died before a verdict in his case, a precedent had been set for further indictments of heads of States by subsequent national, international, and internationalized criminal tribunals.

*Unforeseen Circumstances*

When the International Criminal Tribunal for the Former Yugoslavia was created, the United States did not feel it was important to include an end date for the tribunal's temporal jurisdiction. Thus, the Tribunal had "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."<sup>801</sup> As a result, unforeseen circumstances would arise six years after the adoption of the tribunal's statute.

From 24 March 1999 to 9 June 1999, the North Atlantic Treaty Organization (NATO) conducted a bombing campaign against the Federal Republic of Yugoslavia in Kosovo, attempting to end ethnic cleansing against the Albanians.<sup>802</sup> There is general agreement that approximately 500 civilians were killed because of the bombing campaign.<sup>803</sup> As a result, several nongovernment organizations and legal scholars called for the indictment of NATO personnel, including senior political officials in the United States government, not to exclude William Cohen, Madeleine Albright, and even President Bill Clinton.<sup>804</sup> The prosecutor of the International Criminal Tribunal for the former Yugoslavia at the time, Louise Arbour, and her replacement, Carla Del Ponte,

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<sup>801</sup> ICTY Statute, art. 1.

<sup>802</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257, para. 1.

<sup>803</sup> Andreas Laursen, "NATO, the War over Kosovo, and the ICTY Investigation" (2001-2002) 17 *Am U Int'l L Rev* 765, 767.

<sup>804</sup> Clint Williamson, comments during panel titled "Fifteen Years of International Tribunals: Past, Present, and Future," International Law Weekend hosted by the International Law Association - American Branch (New York, 17 October 2008). Clint Williamson worked for the Office of the Prosecutor for the ICTY from 1994-2001; see also "Report Looks at Claims against NATO" *Associated Press* (4 January 2000).



“both insisted that the leaders of NATO, the United States, and any other parties involved in the Balkan wars were fair game for prosecution – if grounds were found.”<sup>805</sup>

Article 18(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia states, “The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”<sup>806</sup> As per the Article, on 14 May 1999 Louise Arbour established a committee to assess the allegations of NATO crimes and to report whether or not there was a sufficient basis to proceed with an investigation.<sup>807</sup>

Ironically, while the media was publicizing the NATO airstrikes and calls for the indictments of United States officials, on 22 May 1999, Louise Arbour presented an indictment for confirmation against Slobodan Milosevic.<sup>808</sup> On 24 May 1999, Milosevic was officially indicted for crimes against humanity and violations of international humanitarian law committed in Kosovo from 1 January 1999 to 20 June 1999.<sup>809</sup> The NATO bombings had stopped on 9 June 1999 and Milosevic would later use the bombings in his defense, stating that they were responsible for the mass killing and fleeing of innocent civilians in Kosovo.

NATO admitted that “errors of judgment” and other “mistakes” occurred during the bombing campaign; however, the Committee established by the prosecutor found that “neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents [were] justified.”<sup>810</sup> Consistent with its finding, the Committee recommended “that no investigation be commenced by the OTP

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<sup>805</sup> John Hagan, *Justice in the Balkans: Prosecuting War Criminals in the Hague* (University of Chicago Press 2003) 208.

<sup>806</sup> ICTY Statute, art. 18(1).

<sup>807</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257, para. 3.

<sup>808</sup> Statement by Louise Arbour, Prosecutor ICTY, The Hague, 27 May 1999, at <http://www.icty.org/sid/7764>

<sup>809</sup> The Prosecutor of the Tribunal Against Slobodan Milošević et al, IT-99-37 (22 May 1999).

<sup>810</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257, para. 90.

in relation to the NATO bombing campaign or incidents occurring during the campaign.”<sup>811</sup>

The Final Report did, however, state that even though NATO had not committed war crimes or crimes against humanity, the bombing campaign itself may have been a crime of aggression.<sup>812</sup> Under Chapter 7 of the United Nations Charter, the Security Council decides breaches against international peace and security and consequently authorizes the use of force. The NATO bombing campaign had been conducted without Security Council approval. Whether the campaign was a crime against peace or a crime of aggression was hotly debated,<sup>813</sup> yet, the International Criminal Tribunal for the former Yugoslavia could not prosecute responsible individuals since the crime was not in its jurisdiction.<sup>814</sup>

By contributing to the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United States may have been either attempting to show that ad hoc tribunals were better forums for international criminal justice than the International Criminal Court, or that the International Criminal Court should imitate the ad hoc tribunals. However, in reality, it was helping to create the very institution that it would subsequently attempt to prevent. With the sense of urgency to develop the two tribunals, the United Nations General Assembly decided to hasten work being pursued toward the establishment of a permanent international criminal court by developing substantive statutes and codes that would ensure the highest legal standards and end impunity for heads of State.<sup>815</sup>

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<sup>811</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257, para. 91.

<sup>812</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257, para. 4.

<sup>813</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257, para. 30.

<sup>814</sup> The ICTY has jurisdiction to prosecute grave breaches of the Geneva Conventions of 1949 (art. 2), violations of the laws and customs of war (art. 3), genocide (art. 4), and crimes against humanity (art. 5). See also, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257, para. 30.

<sup>815</sup> M. Cherif Bassiouni and Christopher L. Blakesley, “The Need For an International Criminal Court in the New International World Order” (1992) 25 *Vanderbilt J of Transnat'l L* 151.

### **International Criminal Tribunal for Rwanda**

In 1994, in the African country of Rwanda, an internal ethnic conflict broke out between the Hutus and Tutsis. Both ethnic groups committed crimes; however, Hutus committed genocide against the Tutsis by butchering more than 800,000 members of its ethnic group. As the killings slowed, the United States began internal discussions concerning the creation of an international criminal tribunal.<sup>816</sup>

On 25 May 1994, the Commission on Human Rights adopted Resolution S-3/1, which requested the appointment of a special rapporteur to investigate the human rights situation in Rwanda.<sup>817</sup> While the Commission on Human Rights was conducting its investigation, the United States Mission to the United Nations recommended that the Department of State decide whether the United States should submit a proposal to the United Nations on prosecuting those responsible for genocide in Rwanda.<sup>818</sup> The United States Mission to the United Nations anticipated that other States would do it soon, citing as an example Spain's draft Security Council resolution calling for the establishment of a commission of experts to gather evidence related to war crimes and genocide in Rwanda, which was circulated on 10 June 1994.<sup>819</sup> The United States had considered Spain's draft resolution and supported it.<sup>820</sup> However, establishing a commission was separate from any eventual action on establishing a mechanism for prosecution.

The United States Mission to the United Nations suggested that the Department of State review three approaches to prosecuting persons responsible of genocide in Rwanda. First, the United States could propose establishing an international criminal tribunal for Rwanda.<sup>821</sup> This option would follow the procedure of the International Criminal Tribunal for the former Yugoslavia, but it would be time-consuming and involved considerable expenditure and resources.<sup>822</sup> Secondly, the United States could propose expanding the competence of the International Criminal Tribunal for the former

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<sup>816</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>817</sup> Report on the Situation of Human Rights in Rwanda submitted by Mr. R. Degni-Séqui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/7, para. 1.

<sup>818</sup> "Rwanda: Bringing the Guilty to Justice," USUN Cable 02491, 15 June 1994.

<sup>819</sup> "Rwanda: Bringing the Guilty to Justice," USUN Cable 02491, 15 June 1994.

<sup>820</sup> "Draft Spanish Resolution on Commission of Experts for Rwanda," Dep't of State Cable 161019.

<sup>821</sup> "Rwanda: Bringing the Guilty to Justice," USUN Cable 02491, 15 June 1994.

<sup>822</sup> "Rwanda: Bringing the Guilty to Justice," USUN Cable 02491, 15 June 1994.

Yugoslavia to include the situation in Rwanda.<sup>823</sup> This perhaps would prove the most expeditious way of moving forward on the situation in Rwanda, since the Tribunal and its procedures were well on their way to being established.<sup>824</sup> However, the International Criminal Tribunal for the former Yugoslavia had not proven itself capable of fulfilling its own mandate and adding an additional mandate may have been too much for a “wobbly bicycle” to hold.<sup>825</sup> Thirdly, the United States could wait for the establishment of an international criminal court to handle the situation in Rwanda.<sup>826</sup> According to the United States Mission to the United Nations, this was the best option to serve the international community in the long run, but it realized the option would take years to bring to reality.<sup>827</sup>

Mr. R. Degni-Sequi, who was appointed Special Rapporteur by the Commission on Human Rights to investigate human rights abuses in Rwanda, submitted his report in June 1994.<sup>828</sup> The report concluded that cruel and inhuman massacres were perpetrated against Tutsis and Hutu moderates<sup>829</sup> and that pending the establishment of a permanent international criminal court, the United Nations should establish an ad hoc international criminal tribunal for Rwanda or, alternatively, should extend the jurisdiction of the International Criminal Tribunal for the former Yugoslavia.<sup>830</sup> The report concluded that the United Nations should establish a reinforced team of human rights observers.<sup>831</sup> Consequently, the United States co-sponsored Security Council Resolution 935 on 1 July 1994, requesting the Secretary-General to establish, as a matter of urgency, an impartial

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<sup>823</sup> “Rwanda: Bringing the Guilty to Justice,” USUN Cable 02491, 15 June 1994.

<sup>824</sup> “Rwanda: Bringing the Guilty to Justice,” USUN Cable 02491, 15 June 1994.

<sup>825</sup> “Rwanda: Bringing the Guilty to Justice,” USUN Cable 02491, 15 June 1994.

<sup>826</sup> “Rwanda: Bringing the Guilty to Justice,” USUN Cable 02491, 15 June 1994.

<sup>827</sup> “Rwanda: Bringing the Guilty to Justice,” USUN Cable 02491, 15 June 1994.

<sup>828</sup> Report on the Situation of Human Rights in Rwanda submitting by Mr. R. Degni-Sequi, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/7.

<sup>829</sup> Report on the Situation of Human Rights in Rwanda submitting by Mr. R. Degni-Sequi, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/7, para. 46.

<sup>830</sup> Report on the Situation of Human Rights in Rwanda submitting by Mr. R. Degni-Sequi, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/7, para. 75.

<sup>831</sup> Report on the Situation of Human Rights in Rwanda submitting by Mr. R. Degni-Sequi, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/7, para. 76.

commission of experts to investigate the evidence of international crimes committed in Rwanda.<sup>832</sup>

Shortly thereafter, the United States quickly mobilized “to help staff the commission, fund it, and provide as much support as possible for its operation.”<sup>833</sup> Scheffer approached the then-president of the International Criminal Tribunal for the former Yugoslavia, Antonio Cassese, about the Security Council establishing an ad hoc tribunal for Rwanda.<sup>834</sup> Both agreed that a second ad hoc tribunal would be a waste of money and that it would be ideal to have the International Criminal Tribunal for the former Yugoslavia to cover Rwanda cases.<sup>835</sup>

The United States began working on issues related to assisting the Commission’s efforts and possible next steps.<sup>836</sup> Considering that the Commission on Human Rights’ Special Rapporteur had concluded that war crimes and genocide occurred in Rwanda and that a United Nations ad hoc tribunal should be established, it seemed likely that the Secretary-General’s Commission of Experts would reach similar conclusions.<sup>837</sup> On 15 July 1994, the Department of State sent an “Action Message” to its diplomats requesting them

to contact [governments] [...] to say that [the United States] is now actively considering what steps that we will take to assist the new Commission. In addition, we have concluded that we will support creation of an international tribunal for violations of international humanitarian law in Rwanda if the Commission of Experts confirms that such violations have occurred. (Such a tribunal might be structured along the lines of the tribunal set up for Yugoslavia, and the two tribunals might be combined in some respects.)<sup>838</sup>

Scheffer writes that Ambassador Albright became impatient with a timeline dependent on the Commission of Experts and, on 18 July, spoke to the Security Council

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<sup>832</sup> SC Res. 935 (1994) UN Doc. S/RES/935.

<sup>833</sup> Scheffer, *All the Missing Souls*, 71.

<sup>834</sup> Scheffer, *All the Missing Souls*, 71.

<sup>835</sup> Scheffer, *All the Missing Souls*, 71.

<sup>836</sup> “Consultations with France and Others on Rwanda War Crimes Issues,” Dep’t of State Communication 184612, 12 July 1994.

<sup>837</sup> “Consultations with France and Others on Rwanda War Crimes Issues,” Dep’t of State Communication 184612, 12 July 1994.

<sup>838</sup> “Next Steps in Addressing War Crimes in Rwanda,” Dep’t of State Communication 184612, 15 July 1994.

calling on quick action to establish a war crimes tribunal for Rwanda.<sup>839</sup> Rwanda's new government supported the Security Council establishing an ad hoc international criminal tribunal for Rwanda.<sup>840</sup> While the United States and France supported establishing a tribunal, other permanent five members of the Security Council had differing views. The United Kingdom wanted to wait for the Commission of Experts to complete its investigation,<sup>841</sup> Russia wanted a separate tribunal from the International Criminal Tribunal for the former Yugoslavia,<sup>842</sup> and China did not want a tribunal at all.<sup>843</sup>

The Department of State sent an "Action Message" to its embassy in Kigali, Rwanda, on 24 August 1994, stating that promptly establishing an international criminal tribunal for Rwanda was its highest priority.<sup>844</sup> The United States wanted the Commission of Experts to issue an interim report as soon as possible so that a tribunal could be established no later than mid-September.<sup>845</sup> In its message, the Department of State requested that the American Embassy in Kigali seek a meeting with the Commission of Experts as soon as they arrived in Rwanda and to "underline the urgency felt by the [United States] and the Government of Rwanda that an International Tribunal should be established immediately."<sup>846</sup> In doing so, the Department of State provided the embassy with talking points for the Commission of Experts when they arrived. They were as follows:

Welcome to Kagali. Your mission here is of the highest importance to the future of Rwanda and to the promotion of the rule of law here.

The Government of Rwanda has informed the UN Secretary General that it strongly supports the establishment of an international tribunal to try those accused of genocide, [violations of] international humanitarian law, and other

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<sup>839</sup> Scheffer, *All the Missing Souls*, 71.

<sup>840</sup> Scheffer, *All the Missing Souls*, 71-72; William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 24-34.

<sup>841</sup> Scheffer, *All the Missing Souls*, 71.

<sup>842</sup> Scheffer, *All the Missing Souls*, 73.

<sup>843</sup> Scheffer, *All the Missing Souls*, 73.

<sup>844</sup> "Demarche for International Tribunal in Rwanda," Dep't of State Communication 228408, 24 August 1994.

<sup>845</sup> "Demarche for International Tribunal in Rwanda," Dep't of State Communication 228408, 24 August 1994.

<sup>846</sup> "Demarche for International Tribunal in Rwanda," Dep't of State Communication 228408, 24 August 1994, para. 7.

## Post Cold-War Era

crimes against humanity in Rwanda. We understand the Secretary-General agrees with this approach.

We believe it is important to promptly establish an international tribunal. An international tribunal will be perceived by Rwandans as impartial, fair, and untainted by motives of ethnic revenge.

The world awaits your conclusions on what crimes have been committed in Rwanda. We hope you will recommend that an international tribunal should be established to indict, detain, and try those who committed atrocities in Rwanda. However, if a tribunal is to be established, its creation must not be delayed until your final report.

Delay in establishment of a tribunal may lead to summary executions and a new round of atrocities committed by those outraged at the slowness of the process of justice. The Government of Rwanda has warned that it cannot wait as long as the UN has taken to establish an international war crimes tribunal for the former Yugoslavia.

We therefore urge you to issue an interim report recommending the establishment of an international tribunal as soon as possible. We hope you can issue this report early in your visit to Rwanda.

Please let us know how we can help you in your work. Your work is the highest priority to us and to the world. We will do everything we can to help you.<sup>847</sup>

On 1 September, the Department of State sent an "Action Message" to the United States Mission to the United Nations, which included the United States's draft resolution establishing an international criminal tribunal for the situation in Rwanda.<sup>848</sup> In its message, the United States urged the Security Council to establish a war crimes tribunal for Rwanda, linked to the existing International Criminal Tribunal for the former Yugoslavia, as soon as the Commission of Experts issued its (interim) report confirming that war crimes and genocide had been committed in Rwanda and the Secretary-General

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<sup>847</sup> "Demarche for International Tribunal in Rwanda," Dep't of State Communication 228408, 24 August 1994, pp. 2-3.

<sup>848</sup> "Resolution Establishing War Crimes Tribunal for Rwanda," Dep't of State Communication 237220, 1 September 1994.

conveyed this conclusion to the Security Council.<sup>849</sup> The United States proposed that the Security Council extend the jurisdiction of the International Criminal Tribunal for the former Yugoslavia “to provide for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda, or in States bordering Rwanda and related to the crisis in Rwanda, since 6 April 1994.”<sup>850</sup> On 14 September 1994, Scheffer met with Richard Goldstone, who had officially begun his duties as prosecutor for the International Criminal Tribunal for the former Yugoslavia the previous month. Goldstone supported the United States’s draft resolution to expand the Yugoslav tribunal.<sup>851</sup>

Albright got mixed responses from her colleagues on the Security Council when she circulated the United States’s draft resolution. France, Spain, and Russia promoted separate tribunals.<sup>852</sup> China and numerous African States, including Rwanda, sided with the United States.<sup>853</sup> Shortly thereafter, however, there were positive developments. New Zealand proposed a compromise in late September that suggested the Security Council establish a separate tribunal for Rwanda that would share a prosecutor and appeals chamber. In a letter to the Security Council dated 28 September 1994, Rwanda formally requested the Security Council to set up an international criminal tribunal “as soon as possible.”<sup>854</sup> Furthermore, Pasteur Bizimungu, the President of Rwanda, said in his address to the General Assembly in October 1994, “It is absolutely urgent that this international tribunal be established.”<sup>855</sup> The Secretary-General submitted his letter, which included the Commission of Experts’ preliminary report,<sup>856</sup> to the Security Council the following week.<sup>857</sup> It seemed the Commission gave the United States what it had previously wanted, as it recommended “that the Security Council amend the Statute of

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<sup>849</sup> “Resolution Establishing War Crimes Tribunal for Rwanda,” Dep’t of State Communication 237220, 1 September 1994, para. 3.

<sup>850</sup> “Resolution Establishing War Crimes Tribunal for Rwanda,” Dep’t of State Communication 237220, 1 September 1994, para. 5(1).

<sup>851</sup> Scheffer, *All the Missing Souls*, 77-78.

<sup>852</sup> Scheffer, *All the Missing Souls*, 77.

<sup>853</sup> Scheffer, *All the Missing Souls*, 77.

<sup>854</sup> Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, UN Doc. S/1994/1115, annex, p. 4.

<sup>855</sup> UN Doc. S/PV.3453, p. 14.

<sup>856</sup> Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), UN Doc. S/1994/1125, annex.

<sup>857</sup> Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1994/1125.



the International Criminal Tribunal for the former Yugoslavia to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda.”<sup>858</sup> However, by the time the preliminary report was submitted, States favored the New Zealand compromise.

Rwanda held a seat as a rotating member of the Security Council. The Tutsis were now in charge of Rwanda’s government and wanted the draft treaty to contain certain stipulations for a Rwanda tribunal. For example, they wanted the death penalty included, which at the time was Rwanda’s national law. The government also wanted the tribunal’s jurisdiction to cover crimes committed well before January 1994, when the Hutus had been in control, and end in July 1994, when the Tutsis had gained control of the country. These negotiations only slowed down the process of creating the tribunal.

The Security Council held steadfast: “Ultimately, we were able to bring it to the Security Council without Rwandan support [...] but we still got the sufficient support of the Council to authorize the establishment of the tribunal by November of 1994.”<sup>859</sup> On 8 November, the Security Council voted on a draft resolution establishing a separate ad hoc tribunal for Rwanda co-sponsored by the United States and six other States.<sup>860</sup> Thirteen States voted in favor, Rwanda voted against, and China abstained.<sup>861</sup> Thus, the Security Council established the International Criminal Tribunal on 8 November 1994.<sup>862</sup>

#### *ICTR Statute*

The Statute of the International Criminal Tribunal for Rwanda was annexed to Security Council Resolution 955. It is very similar to the Statute of the International Criminal Tribunal for the former Yugoslavia. The International Criminal Tribunal for Rwanda has concurrent jurisdiction with national courts to prosecute persons accused of committing serious violations of international humanitarian law connected to the territory of Rwanda,<sup>863</sup> but has primacy over the national courts of all States<sup>864</sup> as a result of being

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<sup>858</sup> Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), UN Doc. S/1994/1125, annex, para. 152.

<sup>859</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>860</sup> UN Doc. S/1994/1168. The other six States included Argentina, France, New Zealand, Russia, Spain, and the United Kingdom.

<sup>861</sup> UN Doc. S/PV.3453, pp. 2-3.

<sup>862</sup> SC Res. 955 (1994) UN Doc. S/RES/955.

<sup>863</sup> UN Doc. S/RES/955, annex (ICTR Statute) art. 8(1).

<sup>864</sup> ICTR Statute, art. 8(2).

established by the Security Council under Chapter VII of the Charter of the United Nations.

The temporal jurisdiction of the International Criminal Tribunal for Rwanda is from 1 January to 31 December 1994.<sup>865</sup> Articles 2-4 include the three crimes within the Tribunal's criminal jurisdiction, including the crime of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions adopted on 12 August 1949, as well as Additional Protocol II. Genocide is the first crime listed in the statute<sup>866</sup> because the situation in Rwanda was foremost a genocide; one benefit of ad hoc tribunals is that they are established for specific events, which are reflected in their statutes. Article 3 included crimes against humanity, which was defined as widespread or systematic attacks on civilian populations based on national, political, ethnic, racial, or religious grounds. The specific grounds were unnecessary; however, they reflected that crimes against humanity were committed against an ethnic group and thus closely resembled the crime of genocide. Article 4 included violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, which cover grave breaches committed during non-international armed conflicts.

#### *Conclusion*

The International Criminal Tribunal for Rwanda had some successes, but it is not as prized as the International Criminal Tribunal for the former Yugoslavia. As of May 2012, it has completed 38 cases, with 8 cases in progress and one awaiting trial.<sup>867</sup> One of the most important successes of the International Criminal Tribunal for Rwanda has been the conviction of the crime of genocide,<sup>868</sup> since the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly on 9 December 1948.<sup>869</sup>

Conversely, the International Criminal Tribunal for Rwanda has been tainted with "victors' justice." It has been used as a prosecuting tool against the Hutus rather than as a neutral institution of justice for both parties in the conflict. As the Hutu extremists were

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<sup>865</sup> ICTR Statute, preamble, arts. 1 & 7.

<sup>866</sup> ICTR Statute, art. 2.

<sup>867</sup> <<http://www.unictr.org>> accessed 15 May 2012.

<sup>868</sup> *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998).

<sup>869</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

losing the war to the Tutsi military, known as the Rwandan Patriotic Front, Tutsi military personnel killed unarmed Hutus in the manner of war crimes. As a result, Rwanda's newly formed government, which was controlled by the Tutsis, argued for war crimes not to fall within the jurisdiction of the International Criminal Tribunal for Rwanda during the negotiations of the tribunal's statute. Therefore, only persons accused of committing genocide and crimes against humanity would be prosecuted, eliminating most Tutsis from the reach of the tribunal's jurisdiction.<sup>870</sup>

Carla Del Ponte, a former prosecutor for the international criminal tribunals writes that the Tutsi-run Rwandan government, whose president, Paul Kagame, was a military leader in the Rwandan Patriotic Front, did not cooperate with the International Criminal Tribunal for Rwanda after she launched a special investigation into war crimes committed by members of the Rwandan Patriotic Front against the Hutus shortly after the genocide.<sup>871</sup> Del Ponte argues that Kagame hijacked the tribunal, preventing it from functioning properly by ensuring Rwanda's lack of cooperation. She also writes that the United States supported Kagame's political pressure over the tribunal and insisted that she drop the special investigation that had resulted in evidence of highly ranked military officials who served in the Rwanda Patriotic Front, including Kagame, committing war crimes.<sup>872</sup> After she refused the request from the United States, she was removed from the position of prosecutor of the International Criminal Tribunal for Rwanda in 2003. She maintained her post as prosecutor of the International Criminal Tribunal for the former Yugoslavia until 1 January 2008.

The International Criminal Tribunal for Rwanda will complete its mandate in the near future. History will judge its successes and failures. There can be little argument, however, that the United States has significantly contributed to its establishment and progress. By supporting the International Criminal Tribunal for Rwanda, the United States has demonstrated that it is an advocate of international criminal tribunals established by the Security Council under Chapter VII of the Charter of the United

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<sup>870</sup> Scheffer, *All the Missing Souls*, 79.

<sup>871</sup> Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press, 2008) ch. 9.

<sup>872</sup> Del Ponte and Sudetic, *Madame Prosecutor*, ch. 9.

Nations when national legal systems are incapable of achieving justice on behalf of the international community.

### **Special Court for Sierra Leone**

Charles Taylor was elected Liberia's president in July 1997, when he received 75 percent of the country's vote.<sup>873</sup> In 1998, Sierra Leone was engulfed in a civil war. Members of the Revolutionary United Front and the Armed Forces Revolutionary Council committed brutal crimes against civilian populations, including murder and rape. Taylor supported these groups while he was president of Liberia. According to Scheffer:

Pressure mounted upon neighboring [S]tates to negotiate with the Revolutionary Patriotic Front out of fear for their own survival. Revolutionary Patriotic Front rebels had seized enough territory to force the Sierra Leone government to enter talks. But U.S. diplomats in West Africa advised me and other State Department officials as early as May 1998 that a sharp message had to be sent to the rebels: that they risked standing before a war crimes tribunal for their atrocities against civilians and that Sierra Leone would be no exception to the march of justice in Africa.<sup>874</sup>

The president of Sierra Leone at the time, Ahmad Tejan Kabbah, visited Washington, D.C. on 31 July 1998, to talk to Scheffer and other State officials about the United States's judicial assistance to hold trials of suspected war criminals.<sup>875</sup> The United States did not consider it a priority since the Commonwealth of Nations had previously promised to provide assistance.<sup>876</sup> However, Kabbah wanted the United States to provide computers and means of transportation for prisoners as well as funding for mutilated victims trying to resume their lives.<sup>877</sup>

In December 1998, President Clinton established the Atrocities Prevention Interagency Working Group with the dual purpose of examining emerging scenarios of killings and formulating policies to prevent the situations from escalating.<sup>878</sup> Clinton

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<sup>873</sup> Abdul Tejan-Cole, "A Big Man in a Small Cell: Charles Taylor and the Special Court for Sierra Leone" in Ellen L. Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (CUP 2009) 205, 206-207.

<sup>874</sup> Scheffer, *All the Missing Souls*, 298.

<sup>875</sup> Scheffer, *All the Missing Souls*, 298-99.

<sup>876</sup> Scheffer, *All the Missing Souls*, 299.

<sup>877</sup> Scheffer, *All the Missing Souls*, 299.

<sup>878</sup> Scheffer, *All the Missing Souls*, 300.

assigned Scheffer as the chairman of the Working Group.<sup>879</sup> The following month, the Working Group held its first meeting, which focused on the situation in Sierra Leone.<sup>880</sup> Subsequent Working Group meetings were held in February and March 1999, which were influential in exploring options for the situation in Sierra Leone.<sup>881</sup> As a result of the meetings, Scheffer and Susan Rice (a Department of State official) favored a Security Council recommendation that would condemn international crimes committed in Sierra Leone and threaten individual criminal responsibility.<sup>882</sup> Other members of the Security Council, including the United Kingdom, were uninterested in establishing another international criminal tribunal under Chapter VII of the Charter of the United Nations. On 3 June 2000, however, the United States Ambassador to the United Nations, Richard Holbrooke, recommended to Scheffer that he “press for a full-fledged international criminal Tribunal for Sierra Leone.”<sup>883</sup>

Scheffer sent Pierre-Richard Prosper, a former prosecutor at the International Criminal Tribunal for Rwanda who worked for the Department of Justice at the time, to Sierra Leone to talk with President Kabbah about developing a Security Council tribunal.<sup>884</sup> Kabbah and his attorney general agreed on a Security Council tribunal but thought that it should include Sierra Leone law as well as international law.<sup>885</sup> They also recommended that Sierra Leone lawyers and judges be included in the tribunal along with international judges and lawyers.

Kabbah wanted the United States to assist in sponsoring a Security Council resolution.<sup>886</sup> On 8 June 2000, Scheffer achieved consensus at a United States interagency meeting on invoking Chapter VII of the Charter of the United Nations to build a “special court for Sierra Leone.”<sup>887</sup> However, the United States would have to convince the United Kingdom, which was still against another ad hoc tribunal and urged national prosecutions in Sierra Leone to go along with the idea.

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<sup>879</sup> Scheffer, *All the Missing Souls*, 300.

<sup>880</sup> Scheffer, *All the Missing Souls*, 300.

<sup>881</sup> Scheffer, *All the Missing Souls*, 309.

<sup>882</sup> Scheffer, *All the Missing Souls*, 309-10.

<sup>883</sup> Scheffer, *All the Missing Souls*, 322.

<sup>884</sup> Scheffer, *All the Missing Souls*, 322-323.

<sup>885</sup> Scheffer, *All the Missing Souls*, 323.

<sup>886</sup> Scheffer, *All the Missing Souls*, 325.

<sup>887</sup> Scheffer, *All the Missing Souls*, 325.

In a letter to the Security Council dated 12 June 2000, Kabbah requested the Security Council “to initiate a process whereby the United Nations resolve on the setting up of a special court for Sierra Leone [...] in order to bring and maintain peace and security in Sierra Leone.”<sup>888</sup> Kabbah also requested that the Security Council respond to the crimes against humanity in Sierra Leone similarly to the way it did to the crimes committed in the former Yugoslavia and Rwanda.<sup>889</sup> As a result, the Security Council passed a resolution requesting the Secretary-General negotiate an agreement with the government of Sierra Leone to create an independent special court<sup>890</sup> and recommended that the court’s subject matter jurisdiction include crimes against humanity, war crimes, and crimes under Sierra Leonean law committed within the territory of Sierra Leone.<sup>891</sup>

The Secretary-General’s report on the establishment of a special court for Sierra Leone stated that unlike the International Criminal Tribunals for the former Yugoslavia and Rwanda, which had been established by Security Council resolutions, the Special Court for Sierra Leone would be established by an agreement in the form of an international treaty between the government of Sierra Leone and the United Nations; it will also have a mixed jurisdiction and composition.<sup>892</sup> The agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone was signed in Freetown on 16 January 2002 and entered into force on 12 April 2002.<sup>893</sup> The Special Court for Sierra Leone is often considered an internationalized criminal tribunal or a hybrid or mixed tribunal, since its powers are shared between the State and an international organization.<sup>894</sup> Other scholars, including William Schabas, consider it to be an international criminal tribunal.<sup>895</sup>

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<sup>888</sup> Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, annex, p. 2.

<sup>889</sup> Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, annex, p. 2.

<sup>890</sup> SC Res. 1315 (2000) UN Doc. S/RES/1315, para. 1.

<sup>891</sup> SC Res. 1315 (2000) UN Doc. S/RES/1315, para. 2.

<sup>892</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 9.

<sup>893</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137.

<sup>894</sup> See for example, Cesare P. R. Romano, Andre Nollkaemper, and Jann K. Kleffner (eds), *Internationalized Criminal Court: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004).

<sup>895</sup> Schabas, *The UN International Criminal Tribunals*.

*SCSL Statute*

The Statute of the Special Court for Sierra Leone is annexed to the agreement between the United Nations and the government of Sierra Leone.<sup>896</sup> The mandate of the court is to prosecute “those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.”<sup>897</sup> Article 2 of the Statute defines crimes against humanity as certain crimes committed “as part of a widespread or systematic attack against any civilian population.” The list included as “crimes” the worst offenses against the international community, i.e. murder, extermination, enslavement, torture, rape, etc.<sup>898</sup>

Article 3 includes violations of Article 3 common to the Geneva Conventions adopted on 12 August 1949 and of Additional Protocol II, adopted on 8 June 1977. These charges pertain to armed conflicts not of an international character. Article 4 includes serious violations of international humanitarian law other than those included in Article 3 common to the Geneva Conventions adopted on 12 August 1949 and of Additional Protocol of 8 June 1977.<sup>899</sup> Such violations date back to the first and second Hague Peace Conferences of 1899 and 1907.<sup>900</sup>

The Statute of the Special Court of Sierra Leone stands out from previous statutes of international criminal tribunals in that national law is included within the Statute’s jurisdiction. Article 5 enables the Special Court for Sierra Leone to prosecute persons who have committed crimes under Sierra Leonean law.<sup>901</sup> Like previous international criminal tribunals, the Special Court for Sierra Leone has primacy over national courts of Sierra Leone. The primacy principle in this instance, however, is less likely to be an issue since Sierra Leone consensually agreed to the Special Court’s jurisdiction.

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<sup>896</sup> Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137 (SCSL Statute).

<sup>897</sup> SCSL Statute, art. 1; Alison Smith, “Sierra Leone: The Intersection of Law Policy, and Practice,” in Cesare P. R. Romano, Andre Nollkaemper, and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 125, n. 1.

<sup>898</sup> SCSL Statute, art. 2(a-i).

<sup>899</sup> SCSL Statute, art. 4.

<sup>900</sup> Laws and Customs of War on Land (Hague II) (signed 29 July 1899, entered into force 4 September 1900) 1 Bevens 247; Laws and Customs of War on Land (Hague IV) (signed 18 October 1907, entered into force 26 January 1910) 1 Bevens 1968.

<sup>901</sup> SCSL Statute, art. 5.

*Indicting Charles Taylor*

The Bush Administration called Crane, who worked in the Department of Defense, asking him if he would be interested in being the United States's nominee for the chief prosecutor of the Special Court for Sierra Leone. Crane was hesitant because he thought it was unlikely that an American would be selected, since three months earlier the United States had sent a letter to the United Nations stating that it would not fulfill its obligations as a signatory to the Rome Statute of the International Criminal Court. He reluctantly said he would be interested, though, and with the support of Secretary of State Colin Powell, on 19 April 2002, Crane was informed that Kofi Annan had selected him as the first Chief Prosecutor of the Special Court of Sierra Leone. According to Crane, the United Nations is "terrible" at creating justice mechanisms; therefore, he considered himself fortunate that the Special Court of Sierra Leone was "*of* the United Nations" (emphasis added) and not *in* the United Nations, a fact that allowed him to hire people as he saw fit rather than go through the channels of hiring through the United Nations. This ability assisted him greatly in his investigations.

Crane immediately set his sights on Charles Taylor. Throughout investigations of international crimes, "the name Charles Taylor constantly came up."<sup>902</sup> Crane did not receive any orders from the United States, nor did he ask for permission regarding issuing an indictment against Taylor. Crane ultimately decided to indict Taylor because according to the law, he had committed crimes against humanity and war crimes. On 3 March 2003, Crane signed an indictment against Charles Taylor and issued the first case file and indictment against Taylor on 7 March 2003.<sup>903</sup> Crane requested that the indictment and arrest warrants be sealed and remain hidden from the public until what he felt was the proper moment to release the indictment and arrest warrant against Taylor.<sup>904</sup> He was concerned that if it became known that Taylor had been indicted, it would be difficult to get him into custody and witnesses would potentially start to disappear.

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<sup>902</sup> Tejan-Cole, "A Big Man in a Small Cell," 211.

<sup>903</sup> *The Prosecutor against Charles Ghankay Taylor* (SCSL-2003-01-I) Indictment (7 March 2003).

<sup>904</sup> Interview with David Crane, former prosecutor for the Special Court for Sierra Leone (Washington, D.C., 21 May 2008).



Crane waited as Taylor was losing power, as “regional and Western diplomats, including the United States, intensified efforts to bolster the Liberian peace process.”<sup>905</sup> On 4 June 2003, peace talks had opened in Accra, Ghana, and African leaders and United States diplomats had persuaded Taylor to personally attend the peace negotiations.<sup>906</sup> It was on this opening day of peace talks that Crane unsealed the indictment against Taylor and asked the Ghanaian government to arrest him and transfer him to Sierra Leone for prosecution.<sup>907</sup>

Crane did not want to inform the Ghanaian government ahead of time about his intentions to release the indictment against Taylor, since he could not be sure that Taylor would not be warned, thus preventing him from personally attending the peace negotiations.<sup>908</sup> Ghanaian authorities took Crane’s strategy as an insult. United States officials who co-sponsored the talks also did not appreciate what was viewed as a disruption to the peace process.<sup>909</sup> But as Crane explained in an interview, he had been appointed to the Special Court by the United Nations Secretary General, not by any particular State.<sup>910</sup> In addition, at no time had the United States pressured him into making any decisions. He was completely free of any United States control, which enabled him to perform his job as effectively as possible.<sup>911</sup>

After Nigeria had custody of Taylor, there was talk that the President of Nigeria was going to secretly set Taylor free. It was also around this time that the President of Nigeria went to Washington, D.C., to talk to President George W. Bush about regional security in Africa. The night before the President of Nigeria was supposed to meet President Bush, he was told that he would not meet with the President until he handed Charles Taylor over to the Special Court for Sierra Leone. Taylor was subsequently

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<sup>905</sup> Tejan-Cole, “A Big Man in a Small Cell,” 212.

<sup>906</sup> Tejan-Cole, “A Big Man in a Small Cell,” 212.

<sup>907</sup> See Statement by Chief Prosecutor for the Special Court, David M. Crane, 5 June 2003.

<sup>908</sup> Interview with David Crane, former prosecutor for the Special Court for Sierra Leone (Washington, D.C., 21 May 2008); see also, Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, Centre for Humanitarian Dialogue and International Center for Transitional Justice, November 2007, p. 8.

<sup>909</sup> Lansana Gberie, Jarlawah tonpoh, Efam Dovi, and Osei Boateng, “Charles Taylor Why Me?” *New African* (May 2006) 3.

<sup>910</sup> Interview with David Crane, former prosecutor for the Special Court for Sierra Leone (Washington, D.C., 21 May 2008).

<sup>911</sup> Interview with David Crane, former prosecutor for the Special Court for Sierra Leone (Washington, D.C., 21 May 2008).

extradited to Sierra Leone, where he was later handed over to the Special Court for Sierra Leone.

### *Conclusion*

On 26 April 2012, the Special Court for Sierra Leone convicted Charles Taylor of several counts of crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>912</sup> Taylor, a former head of State, is the signature trial of the Special Court of Sierra Leone and while the legal subtleties of his conviction will be debated, it signifies the Court as a success. According to the United States, the Special Court for Sierra Leone is a success not solely based on Taylor's conviction, but because its establishment was initiated by Sierra Leone and the agreement with the United Nations that formulated the Court included State participation in achieving international justice. As the International Criminal Court grows stronger, special courts and tribunals are more likely to gain the United States's support as an alternative.

### **Special Tribunal for Lebanon**

On 14 February 2005, the former Lebanese Prime Minister, Rafiq Hariri, and others were killed in Beirut, Lebanon, in a terrorist attack. The Security Council unequivocally condemned the attacks the following day and called on the Lebanese government to bring to justice those responsible for the attack.<sup>913</sup> The Secretary-General dispatched a Fact-Finding Mission to Beirut to inquire into the causes of the attack and review the Lebanese investigation and legal proceedings.<sup>914</sup> In its report, the Fact-Finding Mission recommended that an international independent investigation would be necessary to uncover those responsible for the terrorist attack.<sup>915</sup>

On 7 April 2005, the Security Council decided to establish the Independent International Investigation Commission to assist the Lebanese authorities in their

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<sup>912</sup> *Prosecutor v. Charles Ghankay Taylor* (SCSL-03-01-T) Judgment (26 April 2012).

<sup>913</sup> UN Doc. S/PRST/2005/4.

<sup>914</sup> Report of the Fact-finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of former Prime Minister Rafik Hariri, annexed to Letter dated 24 March 2005 from the Secretary-General to the President of the Security Council, UN Doc. S/2005/203.

<sup>915</sup> Report of the Fact-finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of former Prime Minister Rafik Hariri, annexed to Letter dated 24 March 2005 from the Secretary-General to the President of the Security Council, UN Doc. S/2005/203, para. 62.

investigation into the terrorist attack, including helping to identify those responsible.<sup>916</sup> In establishing the Investigation Commission, the Security Council requested that the Commission complete its work within three months, calling on all States to cooperate fully with the Commission.<sup>917</sup> Subsequently, the Security Council extended the Commission's mandate so it could complete a thorough investigation. The Commission submitted 11 reports.<sup>918</sup>

On 13 December 2005, Lebanon formally requested that the United Nations “establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Prime Minister Hariri.”<sup>919</sup> After considering several options, there was “a common understanding that it would be most appropriate to establish the tribunal through an agreement concluded between Lebanon and the United Nations.”<sup>920</sup> The Security Council then requested that the Secretary-General “negotiate an agreement with the government of Lebanon aimed at establishing a tribunal of an international character based on the highest standards of criminal justice.”<sup>921</sup>

John R. Bolton, the United States's permanent representative to the United Nations, stated that the United States had strongly supported the effort of the Security Council to create “the International Independent Investigation Commission to assist the Government of Lebanon in investigating the assassination of former Prime Minister Rafiq Hariri, and begun work on arrangements for establishing a tribunal of an international character.”<sup>922</sup> Bolton continued by saying that the United States believed the Investigation Commission and the Special Tribunal for Lebanon would make

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<sup>916</sup> SC Res. 1595 (2005) UN Doc. S/RES/1595, para. 1.

<sup>917</sup> SC Res. 1595 (2005) UN Doc. S/RES/1595, paras. 7 & 8.

<sup>918</sup> UN Docs. S/2005/662, S/2005/775, S/2006/161, S/2006/375, S/2006/760, S/2006/962, S/2007/150, S/2007/424, S/2007/684, S/2008/210.

<sup>919</sup> Letter dated 13 December 2005 from the Chargé d' affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, UN Doc. S/2005/783, annex.

<sup>920</sup> Report of the Secretary-General pursuant to paragraph 6 of Resolution 1644 (2005), UN Doc. S/2006/176, para. 6.

<sup>921</sup> SC Res. 1664 (2006) UN Doc. S/RES/1664, para. 1.

<sup>922</sup> Statement of Ambassador John R. Bolton at the Security Council Thematic Debate on Strengthening International Law: Rule of Law and the Maintenance of International Peace and Security, 22 June 2006, USUN Press Release No. 136 (06), reprinted as “U.S. UN Representative Characterizes U.S. Views on Role of International Law” (2006) 101 *AJIL* 922, 923.

“meaningful contributions to the restoration of international peace and security” in the region.<sup>923</sup>

In May 2007, Ambassador Zal-may Khalilzad, the United States’s permanent representative to the United Nations, introduced a resolution to the Security Council to create a tribunal under its Chapter VII powers of the United Nations Charter.<sup>924</sup> The purpose of the tribunal would be to try individuals accused of assassinating Lebanon’s former Prime Minister and 22 others on 14 February 2005, as well as other attacks on anti-Syrian journalists, politicians, and public figures.<sup>925</sup> On 29 May, the draft resolution was distributed and co-sponsored by the United States and included an agreement between the United Nations and the Lebanese Republic on the establishment of a special tribunal for Lebanon.<sup>926</sup> The draft resolution was adopted the following day,<sup>927</sup> with five members abstaining, including China and Russia, both Permanent Members of the Security Council.<sup>928</sup>

The Special Tribunal for Lebanon opened 1 March 2009 in Leidschendam, a village on the outskirts of The Hague. On the same day, Acting Department of State Spokesman Robert Wood stated,

We applaud the brave and tireless work of the UN International Independent Investigation Commission and Lebanese judicial authorities who have brought the investigation and Tribunal this far. We will continue to assist their efforts, and recently pledged another \$6 million, pending Congressional approval, towards the Tribunal’s operations in addition to the \$14 million already contributed.<sup>929</sup>

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<sup>923</sup> USUN Press Release No. 136 (06), Statement of Ambassador John R. Bolton at the Security Council Thematic Debate on Strengthening International Law: Rule of Law and the Maintenance of International Peace and Security, 22 June 2006, reprinted as “U.S. UN Representative Characterizes U.S. Views on Role of International Law” (2006) 101 *AJIL* 922, 923.

<sup>924</sup> “United States Leads in Urging UN Tribunal for Hariri Assassination” (2007) 101 *AJIL* 647.

<sup>925</sup> “United States Leads in Urging UN Tribunal for Hariri Assassination” 2007) 101 *AJIL* 647; “Tribunal for Lebanon Killings a Landmark in Ending Impunity – UN Legal Chief” *States News Service* (3 March 2009).

<sup>926</sup> UN Doc. S/2007/315, annex.

<sup>927</sup> SC Res. 1757 (2000) UN Doc. S/RES/1757.

<sup>928</sup> “United States Leads in Urging UN Tribunal for Hariri Assassination” (2007) 101 *AJIL* 647.

<sup>929</sup> Robert Wood, Acting Department Spokesman, Office of the Spokesman, “Opening of Special Tribunal for Lebanon” *State Dep’t Press Release* (1 March 2009).

On 12 February 2009, President Barack Obama vowed to support the Special Tribunal for Lebanon.<sup>930</sup> In a statement on the anniversary of Rafiq Hariri's assassination, President Obama made the following statement:

Saturday marks the fourth anniversary of the assassination of former Lebanese Prime Minister Rafiq Hariri. As we share our grief with the Lebanese people over the loss of Prime Minister Hariri, we also share our conviction that his sacrifice will not be in vain. The United States fully supports the Special Tribunal for Lebanon, whose work will begin in a few weeks, to bring those responsible for this horrific crime and those that followed to justice.<sup>931</sup>

Secretary of State Hillary Clinton also said, "The United States is confident that the Special Tribunal for Lebanon will bring to justice those responsible for financing, planning, and carrying out the assassination of former Prime Minister Hariri."<sup>932</sup> She followed her statement up by saying, "The United States pledges \$6 million for the second year of the Tribunal's operations, subject to Congressional approval of the FY09 budget, in addition to the \$14 million already contributed."<sup>933</sup>

#### *STL Statute*

The crimes within the jurisdiction of the Special Tribunal for Lebanon differ from those that are traditionally in international criminal tribunals. The Tribunal's applicable criminal law includes acts of terrorism and crimes and offenses against life and personal integrity.<sup>934</sup> Crimes against humanity and war crimes are not included. Similar to other ad hoc international tribunals, the Special Tribunal for Lebanon was established after a particular situation and, therefore, the crimes within the Statute reflect the crimes committed that lead to its establishment. The Special Tribunal has concurrent jurisdiction with national courts of Lebanon, but it has primacy over national courts, consistent with ad hoc international criminal tribunals.

#### *Conclusion*

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<sup>930</sup> "Obama Vows Support for Hariri Murder Trial" *Voice of America News* (12 February 2009).

<sup>931</sup> "Statement by the President on the Anniversary of the Assassination of Rafiq Hariri" *Office of the Press Secretary* (12 February 2009).

<sup>932</sup> "U.S. Pledges Support for Hariri Probe" *U.P.I.* (14 February 2009).

<sup>933</sup> "U.S. Pledges Support for Hariri Probe" *U.P.I.* (14 February 2009).

<sup>934</sup> UN Doc. S/RES/1757 (2007) annex, attachment (STL Statute) art. 2.

## Post Cold-War Era

The Special Tribunal for Lebanon officially opened on 1 March 2009. The first indictment was submitted by the prosecutor on 17 January 2011 and confirmed on 28 June 2011.<sup>935</sup> The success of the Special Tribunal is yet to be determined. However, the tribunal itself is a significant accomplishment. Like the Special Tribunal for Sierra Leone, the Special Tribunal for Lebanon is an example of a State taking the initiative to create an international criminal tribunal as a result of its inability to bring the perpetrators of international crimes to justice on its own. The United States has continued to support the Special Tribunal since its inception.<sup>936</sup> The United States will continue to support the Special Tribunal for Lebanon since there is no jurisdiction over United States nationals and the tribunal was initiated by the concerned State. The United States prefers this form of international criminal tribunal.

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<sup>935</sup> Ayyash et al. (STL-11-01).

<sup>936</sup> Special Tribunal for Lebanon: Annual Report (2009-2010) para. 154; Special Tribunal for Lebanon: Second Annual Report (2010-2011) para. B(5)(i); Special Tribunal for Lebanon: Third Annual Report (2011-2012) para. B(5)(i).

*Chapter 7*

*Creating the International Criminal Court: 1989 – Rome Conference*

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The United States was intricately involved in the negotiation process to create a statute for the International Criminal Court both before and during the Rome Conference in 1998.<sup>937</sup> As the previous chapters have displayed, throughout history the United States has been greatly influential in determining whether international criminal tribunals would be established. The Rome Conference adopting the Statute of International Criminal Court, however, ended this 80-year tradition. The purpose of this chapter is to analyze the United States's policy on establishing the International Criminal Court from 1989 to the 1998 Rome Conference.

**Proposals within the United States and United Nations**

Just as there had been internal arguments within the United States government concerning the prosecution of William II, the creation of the International Military Tribunal, and the ratification of the Genocide Convention, which referenced an international penal tribunal,<sup>938</sup> there began internal debate regarding whether an international criminal court was in the interest of the United States. Some elected officials thought it was a good idea. Congressman James Leach (Iowa) initiated the first action on 12 July 1988, when he sponsored “a concurrent resolution calling for the creation of an International Criminal Court with jurisdiction over internationally recognized crimes of terrorism, genocide, and torture, as those crimes are defined in various international conventions.”<sup>939</sup> The resolution urged the President to explore convening an international conference that would adopt an international criminal court by way of a multinational treaty.<sup>940</sup> The resolution did not gain much support. The following year, Leach sponsored an identical resolution.<sup>941</sup> Twenty-eight House Representatives cosponsored Leach's resolution, which was referred to the House

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<sup>937</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998* (United Nations 2002) UN Doc. A/CONF.183/13.

<sup>938</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art. 6.

<sup>939</sup> H.R. Con. Res. 333, 100th Cong. (1988).

<sup>940</sup> H.R. Con. Res. 333, 100th Cong. (1988).

<sup>941</sup> H. Con. Res. 66, 101st Cong. (1989).

## Creating the International Criminal Court: 1989 – Rome Conference

Committee on Foreign Affairs on 2 March 1989.<sup>942</sup> The House Committee on Foreign Affairs requested an executive comment from the Department of State on 16 May 1990.<sup>943</sup> Janet G Mullins, Assistant Secretary of Legislative Affairs, responded with the views of the Department of State in a letter dated 11 December 1990.<sup>944</sup> In her letter, Mullins stated, “The Department believes that it would be premature for the U.S. Congress to go on record at this time as supporting the general concept of creating an International Criminal Court.”<sup>945</sup> But the United States did not want to publicly stand completely against the concept of an international criminal court; therefore, section 599E of the Foreign Operations Appropriations Act of 1990 used subtle terminology when Congress stated that “the United States should explore the need for the establishment of<sup>946</sup> an International Criminal Court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions.”<sup>947</sup>

One month after Leach introduced his original resolution, Congressman Thomas Foley (Washington) sponsored a resolution that eventually became law.<sup>948</sup> Foley’s resolution stated, “The President should begin discussions with foreign governments concerning the feasibility and advisability of establishing an international criminal court to expedite cases involving international drug trafficking and other international crimes.”<sup>949</sup> Although the Anti-Drug Act of 1988 became law, there was no effort to establish an international criminal court.

Overall, the United States did not think that creating an international criminal court was a good idea.<sup>950</sup> According to Michael P. Scharf, who at the time worked as an

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<sup>942</sup> Bill Summary & Status, 101st Congress (1989-1990) H. Con. Res. 66 <<http://thomas.loc.gov>> accessed 16 January 2012.

<sup>943</sup> Bill Summary & Status, 101st Congress (1989-1990) H. Con. Res. 66 <<http://thomas.loc.gov>> accessed 16 January 2012.

<sup>944</sup> Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives (11 December 1990).

<sup>945</sup> Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives (11 December 1990) 3.

<sup>946</sup> “Remarks to Genocide Survivors in Kigali, Rwanda,” 25 March 1998, *Public Papers of the Presidents of the United States, William J. Clinton, 1998*, Book I (US GPO 1999) 431 at 433.

<sup>947</sup> Public Law 101-513 (1990) Sec. 599E (b) (1).

<sup>948</sup> Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong. (1988).

<sup>949</sup> Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong. (1988).

<sup>950</sup> Interview with Michael P. Scharf (Cleveland, 12 March 2007); Telephone Interview with M. Cherif Bassiouni (15 August 2008).



## Creating the International Criminal Court: 1989 – Rome Conference

Attorney Advisor for the Office of the Legal Advisor in the Department of State, the United States wanted the idea of an international criminal court to simply go away.<sup>951</sup> In doing so, the United States sought to prolong debate preventing any progression on the issue.<sup>952</sup>

On 27 September 1989, Congressman Bruce Morrison (Connecticut) sponsored a resolution titled “Directing the Attorney General to pursue the creation of an international criminal court with jurisdiction over certain internationally recognized crimes.”<sup>953</sup> That effort did not gain much support. The first action taken in the Senate was not until 6 November 1989, when Senator Arlen Specter (Pennsylvania) encouraged President George H. W. Bush to utilize the February 1990 drug summit to call for negotiations to create an international strike force and an international criminal court to combat international drug trafficking.<sup>954</sup> The resolution was referred to the Senate Committee on Foreign Relations, but no further action was taken.

As resolutions were being sponsored in the United States Congress in 1989 that supported the creation of an international criminal court, the matter was also brought to the international arena. On 21 August 1989, the permanent representative of Trinidad and Tobago to the United Nations, Marjorie R. Thorpe, submitted a letter to the Secretary General requesting that an item be added to the agenda of the forty-fourth session of the General Assembly.<sup>955</sup> The item requested was entitled “International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational activities: establishment of an international criminal court with jurisdiction over such crimes.”<sup>956</sup> On 22 September 1989, the General Assembly decided to include the item on its agenda and allocated it to the Sixth Committee.<sup>957</sup>

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<sup>951</sup> Interview with Michael P. Scharf (Cleveland, OH, 12 March 2007).

<sup>952</sup> Michael P. Scharf, “Getting Serious About an International Criminal Court” (1994) 6 *Pace Int’l L Rev* 103.

<sup>953</sup> H.R. 3355, 101st Cong. (1989).

<sup>954</sup> S. Res. 218, 101st Cong. (1989).

<sup>955</sup> Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-Fourth Session, UN Doc. A/44/195.

<sup>956</sup> Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-Fourth Session, UN Doc. A/44/195, p. 1.

<sup>957</sup> UN Doc. A/44/251, item 152, p. 14.

## Creating the International Criminal Court: 1989 – Rome Conference

On 10 November 1989, Thorpe argued before the General Assembly that the time was “propitious” for establishing a permanent international criminal court with jurisdiction over universal crimes, for example, genocide, torture, crimes against diplomats, and illicit trafficking of drugs across borders.<sup>958</sup> The representative from the United States, Jason Abrams, wondered if an international criminal court might glamorize criminals by making them more famous. He stated that drug traffickers and terrorists should be treated as common criminals and not be given special status.<sup>959</sup>

Abrams recognized the potential contribution that a permanent international criminal court could make and determined that the concept merited a sober and thoughtful study.<sup>960</sup> He recommended that the matter be referred to the International Law Commission to study the feasibility and usefulness of an international criminal court and prepare a report on its views.<sup>961</sup> Trinidad and Tobago introduced a draft resolution<sup>962</sup> on 22 November 1989 to the Sixth Committee, requesting the International Law Commission to address the question of establishing an international criminal court.<sup>963</sup> The Sixth Committee adopted the draft resolution without a vote and recommended that the General Assembly also adopt the draft resolution.<sup>964</sup> On 4 December 1989, the General Assembly passed a resolution requesting the International Law Commission “address the question of establishing an international criminal court or other international criminal trial mechanism”<sup>965</sup> and decided “to consider the question of establishing an international criminal court or other international criminal trial mechanism at its forty-fifth session when examining the report of the International Law Commission.”<sup>966</sup>

In the United States, shortly after the General Assembly adopted Resolution 44/39, Congressman David Obey (Wisconsin) sponsored a House resolution concerning

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<sup>958</sup> GA Sixth Committee (44th Session) Summary Record of the 38th Meeting (10 November 1989) UN Doc. A/C.6/44/SR.38, p. 8, para. 25 (Thorpe, Trinidad and Tobago).

<sup>959</sup> GA Sixth Committee (44th Session) Summary Record of the 40th Meeting (14 November 1989) UN Doc. A/C.6/44/SR.40, p. 8, para. 12 (Abrams, United States).

<sup>960</sup> GA Sixth Committee (44th Session) Summary Record of the 40th Meeting (14 November 1989) UN Doc. A/C.6/44/SR.40, p. 8, para. 13 (Abrams, United States).

<sup>961</sup> GA Sixth Committee (44th Session) Summary Record of the 40th Meeting (14 November 1989) UN Doc. A/C.6/44/SR.40, p. 8, para. 13 (Abrams, United States).

<sup>962</sup> UN Doc. A/C.6/44/L.18.

<sup>963</sup> UN Doc. A/C.6/44/SR.46, para. 3.

<sup>964</sup> UN Doc. A/C.6/44/SR.46, para. 4.

<sup>965</sup> GA Res. 44/39, para. 1.

<sup>966</sup> GA Res. 44/39, para. 3.

foreign operations, export financing, and related programs.<sup>967</sup> Arlen Specter proposed an amendment to Obey's resolution on 20 October 1990.<sup>968</sup> Specter's amendment called for the United States to create an international criminal court for the purpose of prosecuting crimes defined in international conventions, including "acts such as war crimes, crimes against humanity, torture, piracy and crimes on board commercial vessels, aircraft hijacking and sabotage of aircraft, crimes against diplomats and other internationally protected persons, hostage-taking, and illicit drug cultivation and trafficking."<sup>969</sup> The amendment passed in the Senate by a voice vote.<sup>970</sup> Five days before Specter proposed his amendment, George H. W. Bush had hinted at the possibility of prosecuting Saddam Hussein for such crimes committed during the First Gulf War. On 15 October, he publicly compared Saddam Hussein to Hitler and reminded his audience that after Hitler's war ended, the International Military Tribunal had been established.<sup>971</sup>

The following year, Specter proposed another resolution to encourage the President of the United States to confer with the sovereign State of Kuwait, countries of the Coalition or the United Nations to establish an international criminal court or an international military tribunal to try and punish all individuals, including President Saddam Hussein, involved in the planning or execution of crimes against peace, war crimes, and crimes against humanity as defined under international law.<sup>972</sup>

On 5 March 1991, the resolution was submitted to the Senate Committee on Foreign Relations. No further action was taken. However, two days later on 7 March, Specter sponsored a subsequent resolution almost identical to the previous one.<sup>973</sup> The following

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<sup>967</sup> H.R. 5114, 101st Cong. (1990).

<sup>968</sup> S. AMDT. 3068, 101st Cong. (1990).

<sup>969</sup> S. AMDT. 3068, 101st Cong. (1990) sec. (a)(1).

<sup>970</sup> Bill Summary and Status, S. AMDT. 3068, 101st Cong. (20 October 1990) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d101:SP03068>> accessed 19 March 2011.

<sup>971</sup> "Remarks at a Fundraising Luncheon for Gubernatorial Candidate Clayton Williams in Dallas, Texas" (15 October 1990) in *Public Papers of the Presidents of the United States: George Bush*, Book II (US GPO 1991) 1408 at 1411.

<sup>972</sup> S. Res. 71, 102nd Cong. (1991).

<sup>973</sup> S. Res. 76, 102nd Cong. (1991).

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week, the Senate agreed to the resolution by a yea-nay vote of 97-0.<sup>974</sup> No further action followed.<sup>975</sup>

Meanwhile, in response to General Assembly Resolution 44/39 of 4 December 1989, the International Law Commission considered the question of the possible establishment of an international criminal court at its forty-second session. On 16 May 1990, the International Law Commission formed a working group pursuant to the request by the General Assembly contained in Resolution 44/39.<sup>976</sup> The Working Group's mandate was to draw up a draft response in the form of a report by the International Law Commission to the request of the General Assembly in paragraph one of the Resolution 44/39.<sup>977</sup> The Working Group's draft response was considered by the International Law Commission, which "reflected broad agreement, in principle, on the desirability of establishing a permanent international criminal court."<sup>978</sup> The International Law Commission further stated that there were at least three possible models with respect to the competence and jurisdiction of an international criminal court: 1. An international criminal court with exclusive jurisdiction; 2. An international criminal court with concurrent jurisdiction with national courts; 3. An international criminal court having only review competence.<sup>979</sup>

Having considered the report of on the work of its forty-second session, the General Assembly invited the International Law Commission to further consider the issues concerning establishing an international criminal jurisdiction along with an international criminal court.<sup>980</sup> The International Law Commission established a working group in 1992 "with the mandate to consider further and analyze the main issues raised in Commission's report on the work of its forty-second session concerning the question of

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<sup>974</sup> Record Vote No. 27 (14 March 1991).

<sup>975</sup> While there was no further action in the United States Congress promoting the establishment of an international criminal court, members of Congress did attempt to establish an ad hoc criminal tribunal to prosecute Saddam Hussein. See M. Cherif Bassiouni, "Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal" (2005) 38 *Cornell Int'l L J* 327; Harry M. Rhea, "An International Criminal Tribunal for Iraq After the First Gulf War: What Should Have Been" (2009) 19 *Int'l Crim Just Rev* 308.

<sup>976</sup> Summary Record of the 2158th Meeting, UN Doc. A/CN.4/SR.2158, paras. 70-72.

<sup>977</sup> Report of the International Law Commission on the Work of its Forty-Second Session (1 May – 20 July 1990) UN Doc. A/45/10, p. 20, para. 101.

<sup>978</sup> Report of the International Law Commission on the Work of its Forty-Second Session (1 May – 20 July 1990) UN Doc. A/45/10, p. 24, para. 155.

<sup>979</sup> Report of the International Law Commission on the Work of its Forty-Second Session (1 May – 20 July 1990) UN Doc. A/45/10, pp. 24-25, para. 155(i)(ii)(iii).

<sup>980</sup> GA Res 45/41 (1990).

an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism.”<sup>981</sup>

In its 1992 report, the Working Group on the question of an international criminal jurisdiction agreed that “[a]n international criminal court should be established by a statute in the form of a treaty agreed to by State parties.”<sup>982</sup> The Working Group touched on several issues regarding establishing an international criminal court. As a result, the General Assembly invited States to submit written comments on the Working Group’s report.<sup>983</sup> The General Assembly also requested the International Law Commission to undertake “the project for the elaboration of a draft statute for an international criminal court as a matter of priority at its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view of drafting a statute on the basis of the report of the Working Group.”<sup>984</sup> Subsequently, the International Law Commission re-established the Working Group on the Question of an International Criminal Jurisdiction.<sup>985</sup> It was agreed that the Working Group should complete a draft statute for an international criminal court as soon as possible.

Back in the United States, on 28 January 1993, Senator Christopher Dodd (Connecticut) sponsored a resolution calling for the United States to support efforts by the United Nations to conclude an international agreement for the establishment of the International Criminal Court.<sup>986</sup> Senator Dodd’s father had served on the prosecution team at the Nuremberg Trials and also had favored the creation of an international criminal court after the Second World War. A subsequent hearing of the Subcommittee on Terrorism, Narcotics, and International Operations discussed Dodd’s resolution to determine if the International Criminal Court was in the interest of the United States.

While studies on creating an international criminal court were ensuing in the United States and the United Nations, crimes against humanity were being committed in

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<sup>981</sup> Report of the International Law Commission on the Work of its forty-fourth Session (4 May – 24 July 1992) UN Doc. A/47/10, p. 31, para. 98.

<sup>982</sup> Report on the Working Group on the Question of an International Criminal Jurisdiction, UN Doc. A/CN.4/L.471, annex, para. 4(a).

<sup>983</sup> UN Doc. A/RES/47/33, para. 5.

<sup>984</sup> UN Doc. A/RES/47/33, para. 6.

<sup>985</sup> Summary Record of the 2298th Meeting, UN Doc. A/CN.4/SR.2298, para. 43.

<sup>986</sup> S.J. Res. 32, 103rd Cong. (1993).

the former Yugoslavia. In one of its efforts to deal with the crisis, on 22 February 1993, the Security Council decided to create an international criminal tribunal.<sup>987</sup> Two months later, the Security Council passed Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia.<sup>988</sup> The tribunal's statute was annexed to the resolution. The United States fully supported establishing the International Criminal Tribunal for the former Yugoslavia, which furthered discussions through Congressional hearings on what United States policy should be regarding the establishment of a permanent international criminal court.

On 12 May 1993, the Subcommittee on Terrorism, Narcotics, and International Operations heard testimony from four witnesses on the matter relating to the establishment of the International Criminal Court. On 20 May 1993, the Committee on Foreign Relations, which included nine congressional findings, adopted a joint resolution.<sup>989</sup> Congressional finding number nine stated, "Given the developments of recent years, the time is propitious for the United States to lend its support to this effort,"<sup>990</sup> that of establishing the International Criminal Court. However, the resolution only called for the United States to lend its support for the concept of the International Criminal Court; it did not seek to resolve any substantive issues regarding the Court's jurisdiction.<sup>991</sup> The following year, the Senate indefinitely postponed the resolution.

#### **United States Responses to ILC Reports on an ICC**

While Congress conducted hearings on the International Criminal Court, the United States submitted its comments on the Working Group's 1992 report. In its comments, the United States made clear from the beginning that its original support for the project was not an endorsement of an international criminal court.<sup>992</sup> Also, the United States emphasized that failure to comment on any aspects of the report "should not be viewed as an endorsement" of those aspects of the report.<sup>993</sup> However, the United States praised the

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<sup>987</sup> UN Doc. S/RES/808 (1993).

<sup>988</sup> UN Doc. S/RES/827 (1993).

<sup>989</sup> S.J. Res. 32, 103rd Cong. (1993).

<sup>990</sup> S.J. Res. 32, 103rd Cong. (1993).

<sup>991</sup> International Criminal Court, Report of the Senate on Foreign Relations to accompany, S.J. Res. 32, 103rd Cong. (1993) 7.

<sup>992</sup> UN Doc. A/CN.4/452, p. 25.

<sup>993</sup> UN Doc. A/CN.4/452, p. 25.

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Working Group for its work and noted that it was a contribution to the discussion of an international criminal court.

The United States was most concerned with the subject-matter jurisdiction of an international criminal court as recommended in the Working Group's report. The Working Group felt that an international criminal jurisdiction should not be limited to certain crimes such as genocide and war crimes, but should include all crimes of an international character. The United States argued that such jurisdiction would be too broad and most international and multinational treaties dealing with criminal offenses "are clearly premised on, and are designed to facilitate, national prosecution."<sup>994</sup>

President Clinton had not taken a formal position on the International Criminal Court<sup>995</sup> in 1993 when the Security Council adopted Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia. However, the United States urged the International Law Commission and General Assembly to consider the International Criminal Tribunal for the former Yugoslavia as a model for any permanent international criminal court.<sup>996</sup> The United States preferred that the International Criminal Court have characteristics similar to the International Criminal Tribunal for the former Yugoslavia. Such characteristics would include having cases referred by the Security Council, just as the International Criminal Tribunals for the former Yugoslavia and Rwanda had been created by the Security Council under Chapter VII of the Charter of the United Nations. The United States foresaw the International Criminal Court as a "mega-Yugoslav tribunal."<sup>997</sup>

The United States mentioned several specific concerns regarding the International Criminal Court in its comments on the Working Group's report. Such concerns included "subject-matter jurisdiction of the court; how matters are to be brought to the court; whether States must consent to the court's jurisdiction and, if so, which States must consent; and how the court will secure personal jurisdiction over an offender."<sup>998</sup> As Scharf stated concerning the United States's attitude about the International Criminal

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<sup>994</sup> UN Doc. A/CN.4/452, p. 28.

<sup>995</sup> International Criminal Court, Report of the Senate on Foreign Relations to accompany S.J. Res. 32, 103rd Cong. (1993) 3.

<sup>996</sup> UN Doc. A/CN.4/452, p. 26.

<sup>997</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>998</sup> UN Doc. A/CN.4/452, p. 27.

Court in the early 1990s, it could be inferred that the United States was intentionally slowing the process down.

The United States also remarked that the International Law Commission needed to give “fuller treatment” on six critical issues, including “the system of prosecution, the initiation of the case, bringing defendants before the court, international legal assistance, implementation of sentences, and relationship of the court to the existing extradition systems.”<sup>999</sup> Still other concerns were “who consents where the crime is one of an ‘international character.’”<sup>1000</sup> The United States also questioned whether it could be a party to an international criminal court under Article 3, Section 1 of the Constitution of the United States, which states that Congress shall from time to time establish courts inferior to the United States Supreme Court.<sup>1001</sup> This article, however, did not stop the United States from becoming parties to other international courts without criminal jurisdiction. The United States was a State party to the Permanent Court of International Justice and has remained a State party to the Permanent Court of Arbitration and the International Court of Justice. Also, three months before the United States submitted its comments, it voted in the Security Council to create the International Criminal Tribunal for the former Yugoslavia,<sup>1002</sup> and 15 days after the submission of its comments, it voted in the Security Council to adopt the Statute of the Tribunal.<sup>1003</sup>

The Working Group reestablished to draft the statute for an international criminal court held 22 meetings from 17 May to 16 July 1993.<sup>1004</sup> Its goal was to draft a statute on the basis of the 1992 report of the Working Group on the Question of an International Criminal Jurisdiction, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States.<sup>1005</sup> The Working Group submitted its revised report on 19 July 1993, which included the draft statute for

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<sup>999</sup> UN Doc. A/CN.4/452, p. 27.

<sup>1000</sup> UN Doc. A/CN.4/452, p. 28.

<sup>1001</sup> US Constitution, art. 3, sec. 1.

<sup>1002</sup> UN Doc. S/RES/808 (1993).

<sup>1003</sup> UN Doc. S/RES/827 (1993).

<sup>1004</sup> Revised Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc. A/CN.4/L.490, para. A(1).

<sup>1005</sup> Revised Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc. A/CN.4/L.490, para. A(2).



an international criminal court.<sup>1006</sup> The draft statute included 67 articles separated into seven different parts: Establishment and Composition of the Tribunal; Jurisdiction and Applicable Law; Investigation and Commencement of Prosecution; The Trial; Appeal and Review; International Cooperation and Judicial Assistance; and Enforcement of Sentences.<sup>1007</sup>

Crimes within the court's jurisdiction were listed in part two of the Working Group's draft statute. Counter to the comments submitted by the United States on the 1992 report of the Working Group on the Question of an International Criminal Jurisdiction, Article 22 of the draft statute listed violations of numerous international conventions,<sup>1008</sup> and Article 26 included crimes "under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals."<sup>1009</sup> Examples of crimes under general international law included aggression, which was not defined by treaty, genocide, in the case of States not parties to the Genocide Convention, and crimes against

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<sup>1006</sup> Revised Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc. A/CN.4/L.490.

<sup>1007</sup> Revised Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc. A/CN.4/L.490, p. 5.

<sup>1008</sup> Working Group Draft Statute, Article 22 reads, "The Court may have jurisdiction conferred on it in respect of the following crimes: (a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; (b) grave breaches of: (i) The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces Field of 12 August 1949, as defined by article 50 that Convention; (ii) The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by article 51 of that Convention; (iii) The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by article 130 of that Convention; (iv) The Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by article 147 of that Convention; (v) Protocol I additional to the Geneva Conventions of 12 August 1949 and relating to the protection of Victims of International Armed Conflicts of 8 June 1977, as defined by article 85 of that Protocol; (c) the unlawful seizure of aircraft as defined by article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; (d) the crimes defined by article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; (e) apartheid and related crimes as defined by article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973; (f) the crimes defined by article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973; (g) hostage-taking and related crimes as defined by article 1 of the International Convention against the Taking of Hostages of 17 December 1979; (h) the crimes defined by article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, both of 10 May 1988."

<sup>1009</sup> Working Group Draft Statute, art. 26, para. 2(a)

humanity not included in the Geneva Conventions of 1949 or Additional protocol I of 1977.<sup>1010</sup>

Article 29 of the Working Group's draft statute described how an investigation and prosecution could commence. There were three ways a complaint could be brought to the attention of the court: 1. A State Party to the court that had jurisdiction over a particular crime through an international convention could submit a complaint, 2. A non-State Party to the court that had jurisdiction over a particular crime through an international convention, and had accepted the court's jurisdiction, could submit a complaint, and 3. The Security Council could refer a situation to the court under its authority under Chapter VII of the Charter of the United Nations.<sup>1011</sup>

On 2 June 1994, the United States submitted its comments on the 1993 report of the Working Group on a Draft Statute for an International Criminal Court. The United States agreed that genocide, war crimes, and crimes against humanity ought to be within the jurisdiction of the court, since these crimes are a fundamental concern to all States and their commission may create instabilities that threaten international peace and security or may be committed during armed conflict.<sup>1012</sup> The United States suggested that the International Law Commission consider developing a definition for crimes against humanity and that the International Law Commission "make clear that there is no requirement that crimes against humanity be limited to those cases arising out of or even during an armed conflict."<sup>1013</sup> The United States did not support including "crimes under general international law or crimes under national law which give effect to provisions of a multilateral treaty"<sup>1014</sup> that were not relevant to genocide or war crimes within the jurisdiction of the court. It argued that the concept of "crimes under general international law" was not sufficiently defined and that lodging a complaint or initiating a prosecution on this basis was ill-advised."<sup>1015</sup>

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<sup>1010</sup> Working Group Draft Statute, art. 26, commentary, para. 2.

<sup>1011</sup> Working Group Draft Statute, art. 29.

<sup>1012</sup> UN Doc. A/CN.4/458/Add.7, pp. 25-26.

<sup>1013</sup> UN Doc. A/CN.4/458/Add.7, p. 26.

<sup>1014</sup> UN Doc. A/CN.4/458/Add.7, p. 29.

<sup>1015</sup> UN Doc. A/CN.4/458/Add.7, pp. 29-30.

The United States argued that only the Security Council should be able to refer a case to the court. It made clear that even with respect to genocide, crimes against humanity, and war crimes,

Cases should not be initiated in the Tribunal by individual States. The Council is well-placed to make judgments about when particular situations are of so great a concern to the international community that an international (rather than a national) prosecution is required. In addition, we are concerned that there would be a temptation for States to invoke the jurisdiction of the Tribunal for political purposes.<sup>1016</sup>

One of the more controversial issues was including the crime of aggression within the jurisdiction of the court. As noted above, aggression was considered a crime under general international law. The Working Group limited the potential for the charge to be politically motivated. Under Article 27, no one could be charged of or directly related to an act of aggression “unless the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge.”<sup>1017</sup> But the United States argued that the crime of aggression should not be within the court’s jurisdiction even if the Security Council has decided that an act of aggression occurred.<sup>1018</sup> The premises of its argument were based on the fact that “the offence of aggression is not yet sufficiently well-defined as a matter of international criminal law to form the basis of ICC jurisdiction,” and that “charges of aggression are essentially charges of State and not individual responsibility.”<sup>1019</sup> The court would have jurisdiction only over individuals and not States; therefore, the crime of aggression should not be included in the court’s jurisdiction.

Thus, the United States argued for the International Criminal Court to function only under the following conditions:

1. It must apply solely to States that consented to its jurisdiction;
2. It must prosecute cases referred by the Security Council;

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<sup>1016</sup> UN Doc. A/CN.4/458/Add.7.

<sup>1017</sup> Working Group Draft Statute, art. 27.

<sup>1018</sup> Working Group Draft Statute, art. 29.

<sup>1019</sup> UN Doc. A/CN.4/458/Add.7.

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3. It must have jurisdiction over three specific crimes [genocide, war crimes, and crimes against humanity]; and
4. Under no circumstances would it be able to prosecute individuals for the crime of aggression.<sup>1020</sup>

The International Law Commission decided at its 2,331st and 2,332nd meetings on 5 May 1994 to reinstitute the Working Group on a Draft Statute for an International Criminal Court.<sup>1021</sup> The Working Group submitted its report on 17 June 1994, which included a subsequent draft statute for an international criminal court.<sup>1022</sup> The draft statute was adopted and included in the 1994 Report of the International Law Commission.<sup>1023</sup> In its report, “the Commission decided [...] to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.”<sup>1024</sup> According to Scheffer, the United States thought the 1994 draft statute was a good start.<sup>1025</sup>

### **Ad Hoc Committee**

The General Assembly established an ad hoc committee “to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.”<sup>1026</sup> In the same resolution, the General Assembly also invited States to submit to the Secretary-General written comments on the International Law Commission’s draft statute so the Secretary-General

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<sup>1020</sup> See generally, Comments of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court, UN Doc. A/CN.4/458/Add.7, pp. 20-42.

<sup>1021</sup> Summary Records of the 2331st and 2332nd Meetings (1994) 1 YB ILC 14, 14-29, UN Doc. A/CN.4/SR.2331 and UN Doc. A/CN.4/SR.2332.

<sup>1022</sup> UN Doc. A/CN.4/L.491.

<sup>1023</sup> Report of the International Law Commission on the Work of its Forty-Sixth Session, UN Doc. A/49/355, pp. 3-31 (ILC Draft Statute); For commentaries on the ILC’s draft statute, see James Crawford, “The ILC Adopts a Statute for an International Criminal Court” (1995) 89 *AJIL* 404; William C. Gilmore, “The Proposed International Criminal Court: Recent Developments” (1995) 5 *Transnat’l L & Contemp Probs* 263; Daniel H. Derby, “An International Criminal Court for the Future” (1995) 5 *Transnat’l L & Contemp Probs* 307.

<sup>1024</sup> Report of the International Law Commission on the Work of its Forty-Sixth Session (2 May - 22 July 1994) UN Doc. A/49/10, para. 90.

<sup>1025</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>1026</sup> UN Doc. A/RES/49/53, para. 2.

could submit a preliminary report to the Ad Hoc Committee prior to it convening.<sup>1027</sup>

The United States submitted its comments on the International Law Commission's draft statute to the Ad Hoc Committee on 30 March 1995, in accordance with the General Assembly's request.<sup>1028</sup> In its comments, the United States considered the 1994 draft statute to be a substantial improvement over the International Law Commission's initial 1993 draft statute.<sup>1029</sup> However, it still had major areas of concern, including but not limited to, complementarity jurisdiction and well-established international crimes within the court's jurisdiction.<sup>1030</sup>

#### *Complementarity Jurisdiction*

The third preambular paragraph in the International Law Committee's draft statute states, “*Emphasizing further* that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.”<sup>1031</sup> The United States agreed with the complementarity principle and echoed the premises in its argument favoring national prosecutions of war criminals in 1919. For example, it favored national prosecutions because they included established legal systems as well as existing bilateral and multilateral arrangements.<sup>1032</sup> National courts also applied applicable law that was more developed and clear; they were less expensive, they had minimum language barriers, they had access to local witnesses and evidences, and they had stronger prosecutions and legal defenses.<sup>1033</sup>

The United States, however, felt that the draft statute frequently failed to uphold the principle of complementarity.<sup>1034</sup> For example, under Article 25 a State Party could lodge a complaint with the prosecutor, at which time the prosecutor shall initiate an investigation.<sup>1035</sup> The prosecutor could file an indictment if he or she determined there was a *prima facie* case.<sup>1036</sup> The United States argued in its comments that complementarity was not taken into account until the very late stage in the prosecutor's

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<sup>1027</sup> UN Doc. A/RES/49/53, paras. 4 & 5.

<sup>1028</sup> UN Doc. A/AC.244/1/Add.2, p. 7.

<sup>1029</sup> UN Doc. A/AC.244/1/Add.2, p. 7, para. 1.

<sup>1030</sup> UN Doc. A/AC.244/1/Add.2, pp. 7-9, para. 3(1-9).

<sup>1031</sup> ILC Draft Statute, preamble.

<sup>1032</sup> UN Doc. A/AC.244/1/Add.2, p. 9, para. 7.

<sup>1033</sup> UN Doc. A/AC.244/1/Add.2, p. 9, para. 7.

<sup>1034</sup> UN Doc. A/AC.244/1/Add.2, p. 10, para. 8.

<sup>1035</sup> ILC Draft Statute, art. 26.

<sup>1036</sup> ILC Draft Statute, art. 27.

presentation for prosecution to the court.<sup>1037</sup> Also, the United States stated that it was against Article 53 (4) of the draft statute, which granted the International Criminal Court primacy over extradition requests.<sup>1038</sup> The United States argued that the International Criminal Court should also complement extradition treaties and other international agreements between States.<sup>1039</sup>

*Well-Established International Crimes*

It was the United States's position that the International Criminal Court's jurisdiction should be limited to clear, well-defined, and well-established crimes.<sup>1040</sup> It supported the inclusion of the crime of genocide.<sup>1041</sup> However, the draft statute simply listed the crime of genocide in Article 20 without a definition. The United States thought that the definition of genocide from Article 2 of the Genocide Convention should be incorporated into the draft statute.<sup>1042</sup> The United States also supported the inclusion of war crimes and crimes against humanity, but thought crimes against humanity should be carefully defined.<sup>1043</sup>

The United States did not support the inclusion of the crime of aggression in the draft statute. In its comments to the Ad Hoc Committee, the United States recognized the historical significance of the Nuremberg trials' prosecution of crimes against the peace as well as General Assembly's resolution in 1974 outlawing aggression.<sup>1044</sup> Yet, the United States was concerned that individuals would be prosecuted for State actions, particularly regarding a crime, which has not had its elements adequately defined.<sup>1045</sup> The United States did not support the inclusion of terrorism or narcotics crimes within the International Criminal Court's jurisdiction, either. It felt that including these crimes would dramatically increase the costs and burdens of the court,<sup>1046</sup> and that States were already obligated to prosecute these crimes under international and multinational treaties.<sup>1047</sup>

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<sup>1037</sup> UN Doc. A/AC.244/1/Add.2, p. 10, para. 12.

<sup>1038</sup> UN Doc. A/AC.244/1/Add.2, p. 10, para. 13.

<sup>1039</sup> UN Doc. A/AC.244/1/Add.2, pp. 10-11, para. 14.

<sup>1040</sup> UN Doc. A/AC.244/1/Add.2, p. 11, para. 16.

<sup>1041</sup> UN Doc. A/AC.244/1/Add.2, p. 12, para. 21.

<sup>1042</sup> UN Doc. A/AC.244/1/Add.2, p. 12, para. 21.

<sup>1043</sup> UN Doc. A/AC.244/1/Add.2, p. 12, paras. 22 & 61.

<sup>1044</sup> UN Doc. A/AC.244/1/Add.2, p. 11, para. 18.

<sup>1045</sup> UN Doc. A/AC.244/1/Add.2, p. 12, para. 19.

<sup>1046</sup> UN Doc. A/AC.244/1/Add.2, p. 14, para. 2.

<sup>1047</sup> UN Doc. A/AC.244/1/Add.2, p. 16, para. 39.

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After receiving comments from States, the Secretary-General submitted his preliminary report to the Ad Hoc Committee in accordance with paragraph 5 of General Assembly resolution 49/53 of 9 December 1994.<sup>1048</sup> The Secretary-General's report stated that the International Criminal Court would encompass four crimes under general international law: genocide, crimes against humanity, war crimes, and genocide, as well as "exceptionally serious crimes of international concern defined under or pursuant to the treaties listed in the annex to the draft statute."<sup>1049</sup> These treaties included at least three related to crimes of terrorism.<sup>1050</sup> Most of the Secretary-General's report reflected the International Law Commission's draft statute.

The Ad Hoc Committee met at the United Nations Headquarters from 3 to 13 April and from 14 to 25 August 1995, in accordance with paragraph 3 of General Assembly Resolution 49/53 of 9 December 1994.<sup>1051</sup> When the Ad Hoc Committee completed its work, many delegations welcomed the possibility of convening a conference in 1996 or 1997,<sup>1052</sup> while other delegations thought many difficult and novel problems needed to be resolved and that it was unwise to set unrealistic timetables referring to the convening of a conference.<sup>1053</sup> Italy had offered to host the conference whenever there was consensus on a date.<sup>1054</sup>

The General Assembly had hoped that the Ad Hoc Committee would have resolved many of the differences States regarding the International Law Commission's draft statute, so that the General Assembly could review the Ad Hoc Committee's report and "decide on convening an international conference of plenipotentiaries to conclude a convention on the establishment of an international criminal court."<sup>1055</sup> However, it was concluded in the Ad Hoc Committee's report that more work needed to be done and that

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<sup>1048</sup> UN Doc. A/AC.244/L.2

<sup>1049</sup> UN Doc. A/AC.244/L.2, para. 8.

<sup>1050</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205.

<sup>1051</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR 50th Session, Supp. No. 22, UN Doc. A/50/22, (Report of the Ad Hoc Committee) para. 1

<sup>1052</sup> Report of the Ad Hoc Committee, para. 252.

<sup>1053</sup> Report of the Ad Hoc Committee, para. 253.

<sup>1054</sup> Report of the Ad Hoc Committee, para. 254.

<sup>1055</sup> UN Doc. A/RES/50/46, para. 5.

further discussions toward preparing a consolidated text of a convention was the next step towards consideration by a conference of plenipotentiaries.<sup>1056</sup> Bassiouni writes that the meetings of the Ad Hoc Committee produced much knowledge to States that were unfamiliar with the issues involved with creating the International Criminal Court, which benefitted future negotiations in establishing the Court.<sup>1057</sup>

*Preparatory Committee*

Although the United States referenced major issues of concern with the International Law Commission's draft statute in its comments to the Secretary-General, it was satisfied with many key provisions. The trigger mechanisms in the draft statute included referrals by the Security Council<sup>1058</sup> and States' parties.<sup>1059</sup> Further, the draft statute proposed a voluntary jurisdiction regime that States could join and accept or reject on a case-by-case basis.<sup>1060</sup> The United States, however, was still suspicious regarding the court and urged a "go-slow" approach.<sup>1061</sup>

Even though the United States had supported the concept of the International Criminal Court, it still had not decided to support its creation until October 1995, when President Clinton first endorsed creating the International Criminal Court.<sup>1062</sup> Clinton's aides remained concerned that States might raise politically motivated complaints against American soldiers abroad.<sup>1063</sup> The United States argued that the Security Council should be able to block any action by the Court if a State referred a situation to the Court that was also being dealt with by the Security Council.<sup>1064</sup> Therefore, the United States's position was that the Security Council should have effective control over the court to

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<sup>1056</sup> Report of the Ad Hoc Committee, para. 257.

<sup>1057</sup> M. Cherif Bassiouni, "Observation Concerning the 1997-98 Preparatory Committee's Work (1997) 25 *Denv J Int'l L & Pol'y* 397, 400.

<sup>1058</sup> Report of the International Law Commission on the Work of its Forty-Sixth Session, UN Doc. A/49/355, art. 23.

<sup>1059</sup> Report of the International Law Commission on the Work of its Forty-Sixth Session, UN Doc. A/49/355, art. 24.

<sup>1060</sup> ILC Draft Statute, art. 22; see also Benjamin N. Schiff, *Building the International Criminal Court* (CUP 2008) 79.

<sup>1061</sup> Richard Dicker, "Why Does U. S. Stall on New World Court?" *New York Times* (7 September 1995) A26.

<sup>1062</sup> "Remarks at the University of Connecticut in Storrs," 15 October 1995, *Public Papers of the Presidents of the United States, William J. Clinton, 1995*, Book II (US GPO 1996) 1595 at 1597-98.

<sup>1063</sup> "Endgame for the International Court" *New York Times* (3 November 1995) A28.

<sup>1064</sup> Barbara Crossette, "U.N. Seeking an Accord on a Permanent Court for War Crimes" *New York Times* (7 April 1996) 5; Barbara Crossette, "Legal Experts Agree on an Outline for a Global Criminal Court" *New York Times* (14 December 1997) 24.



decide either to block or approve actions by the court.<sup>1065</sup> It was and continues to be the position of the United States that “the Security Council is the body charged with insuring international peace and security”<sup>1066</sup> and that no other institution has equal authority to the Security Council in this respect.

On 11 December 1995, the General Assembly established a preparatory committee to discuss further the major issues arising out of the draft statute adopted by the International Law Commission.<sup>1067</sup> The Preparatory Committee was given the task “to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.”<sup>1068</sup> The General Assembly decided that the Preparatory Committee would meet from 25 March to 12 April and from 12 to 30 August 1996.<sup>1069</sup> In achieving its task, “the work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report of the Ad Hoc Committee and the written comments submitted by State to the Secretary-General on the draft statute for an international criminal court.”<sup>1070</sup>

During the Preparatory Committee’s meetings in 1996, the United States delegation stressed that States must accept the exercise of the International Criminal Court’s jurisdiction. The United States recognized that there was attraction for an all or nothing package approach by many States regarding the core crimes; however, it felt as though the “opt-in” approach was the one most likely to maximize universal participation.<sup>1071</sup> As it stood, Article 22 of the International Law Commission’s draft statute allowed States to “opt-in” to jurisdiction on a case-by-case basis. The United States was satisfied with this aspect of the statute. However, according to the United States the draft statute was flawed in that it gave jurisdiction to the Court over nationals of non-States’ parties. For example, Article 21 allowed for the Court to have jurisdiction

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<sup>1065</sup> “An Effective Global Court” *New York Times* (28 October 1996) A18; Barbara Crossette, “World Criminal Court Having a Painful Birth” *New York Times* (13 August 1997) A10.

<sup>1066</sup> UN Doc. A/CN.4/458/Add.7, p. 26; see also William A. Schabas, “United States Hostility to the International Criminal Court: It’s All About the Security Council” (2004) 15 *EJIL* 701.

<sup>1067</sup> UN Doc. A/RES/50/46.

<sup>1068</sup> UN Doc. A/RES/50/46, para. 2.

<sup>1069</sup> UN Doc. A/RES/50/46, para. 3.

<sup>1070</sup> UN Doc. A/RES/50/46, para. 2.

<sup>1071</sup> “Statement of U.S. Delegation, ‘Trigger Mechanism,’ First Question – Acceptance of and Exercise of Jurisdiction, Articles 21 and 22,” 2 April 1996, p. 1.

over a person if the State which has custody of the suspect with respect to the crime has accepted jurisdiction or by the State on the territory of which the act in question occurred.<sup>1072</sup> According to the United States, “[t]o the extent that one seeks to fashion a State consent regime, [...] the current approach represents a very unhappy compromise.”<sup>1073</sup>

The Preparatory Committee discussed the major substantive and administrative issues arising out of the International Law Commission’s draft statute as requested by the General Assembly. It was unable to prepare a widely acceptable consolidated text of a convention for an international criminal court. In its report, the Preparatory Committee recommended the General Assembly to reaffirm its mandate so it could meet three or four times up to a total of nine weeks before the diplomatic conference.<sup>1074</sup> The Preparatory Committee considered that if its mandate was reaffirmed, it was realistic to regard the holding of a diplomatic conference in 1998 as feasible.<sup>1075</sup>

The General Assembly reaffirmed the mandate of the Preparatory Committee on 17 December 1996.<sup>1076</sup> The Preparatory Committee held three sessions in 1997. David Scheffer, Ambassador-at-Large for War Crimes Issues, stated that the United States had three major areas of concern with the International Criminal Court: its trigger mechanisms, degree of complementarity, and procedures.<sup>1077</sup> On 12 August 1997, Scheffer spoke about the problems the United States had with the International Criminal Court having too broad a jurisdiction. He stated:

There is a reality, and the reality is that the United States is a global military power and presence...other countries are not. Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this

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<sup>1072</sup> ILC Draft Statute, art. 21(b)(i)(ii).

<sup>1073</sup> “Statement of U.S. Delegation, ‘Trigger Mechanism,’ First Question – Acceptance of and Exercise of Jurisdiction, Articles 21 and 22,” 2 April 1996, p. 2.

<sup>1074</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22, UN Doc A/51/22, para. 368(a).

<sup>1075</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22, UN Doc A/51/22, para. 370.

<sup>1076</sup> UN Doc. A/RES/51/207, para. 3.

<sup>1077</sup> Barbara Crossette, “World Criminal Court Having a Painful Birth” *New York Times* (13 August 1997) A10.

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proposal does not limit the capacity of our armed forces to legitimately operate internationally. We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power.<sup>1078</sup>

Until this point, all Permanent Five members of the Security Council argued that the Security Council should have sole power to refer cases to the International Criminal Court. However, by the end of 1997, the United Kingdom “broke ranks”<sup>1079</sup> and joined the like-minded group by supporting a popular compromise proposed by Singapore that the Security Council could block investigations,<sup>1080</sup> but investigations by the International Criminal Court could be triggered by State referrals or by the prosecutor *proprio motu*.

On 15 December 1997, the General Assembly accepted Italy’s offer to host the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and scheduled it to be held in Rome from 15 June to 17 July 1998.<sup>1081</sup> The Preparatory Committee submitted its draft statute for consideration by the Diplomatic Conference in its report adopted at its last session in April 1998.<sup>1082</sup> There were many changes from the International Law Commission’s draft statute adopted in 1994 in the Preparatory Committee’s draft statute. The articles in the latter included many options as well as several square brackets that indicated a lack of consensus in the Preparatory Committee.<sup>1083</sup>

For example, Article 12 of the draft statute<sup>1084</sup> stated, “The Procuracy is an independent organ of the Court responsible for the investigations of complaints brought in accordance with the Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.”<sup>1085</sup> Although the draft statute described an “independent” prosecutor, it did not include the power of

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<sup>1078</sup> Barbara Crossette, “World Criminal Court Having a Painful Birth” *New York Times* (13 August 1997) A10.

<sup>1079</sup> Barbara Crossette, “Legal Experts Agree on an Outline for a Global Criminal Court” *New York Times* (14 December 1997) 24.

<sup>1080</sup> “An Effective International Court” *New York Times* (15 December 1997) A22; Schiff, *Building the International Criminal Court*, 71.

<sup>1081</sup> UN Doc. A/RES/52/160, paras. 1 & 3.

<sup>1082</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/CONF.183/2/Add.1.

<sup>1083</sup> William A. Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 17-18.

<sup>1084</sup> ILC Draft Statute.

<sup>1085</sup> ILC Draft Statute, art. 12(1).

the prosecutor to initiate an investigation *proprio motu*. The trigger mechanisms of the draft statute included either a referral by the Security Council acting under Chapter VII of the Charter of the United Nations<sup>1086</sup> or a complaint by a State party.<sup>1087</sup> Without a referral by the Security Council or a complaint by a State party, the prosecutor could not proceed with an investigation. However, Article 12 of the Preparatory Committee's draft statute read, "The Prosecutor [may] [shall] initiate investigations [ex officio] [*proprio motu*] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]."<sup>1088</sup> The United States was extremely concerned that the prosecutor could have the power to initiate an investigation by the International Criminal Court without a referral by either a State or the Security Council. The power for the prosecutor to initiate an investigation had not been included in the draft statute adopted in 1994 by the International Law Commission.

The United States did not have any issues with the power of the prosecutor in the draft statute. According to Scheffer, "When we started this process in 1995, we looked at the ICC as a mega Yugoslav Tribunal, something that would be triggered by the Security Council on a situation by situation basis."<sup>1089</sup> Other States wished for State referrals. While the United States did not have any issues with this request,<sup>1090</sup> as the Preparatory Committee on the Establishment of an International Criminal Court began meeting in 1995, nongovernmental organizations began calling for an independent prosecutor with the ability to initiate an investigation *proprio motu*.<sup>1091</sup> The role of the prosecutor and the debates regarding the crime of aggression would be two major issues for the United States at the Rome Conference. Just prior to Rome, it was evident that many States and most nongovernmental organizations had reached consensus on the fact that the draft statute would not be the same statute adopted in 1998, if one was adopted at all.

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<sup>1086</sup> ILC Draft Statute, art. 23.

<sup>1087</sup> ILC Draft Statute, art. 25.

<sup>1088</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/CONF.183/2/Add.1, art. 12.

<sup>1089</sup> Interview with Scheffer.

<sup>1090</sup> Interview with Scheffer.

<sup>1091</sup> See generally Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan 2008); "Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute" (1996) A Position Paper of the Lawyers Committee for Human Rights 22.

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An unfortunate precedent had been set in 1997 while the United States was involved in the Preparatory Committee meetings. Less than a year prior to the Rome Conference, a United States delegation had attended the Ottawa Convention on the Banning of Landmines.<sup>1092</sup> Displeased with the statute, the United States delegation had walked out of the Convention to avoid embarrassment before States voted in favor of the treaty, thus undermining the United States. William Lietzau, who had attended the Convention as part of the United States delegation, insists that it was an unfortunate event for the United States.<sup>1093</sup>

Lietzau's experience would be a valuable one, as he was the only delegate on the United States delegations to both the Ottawa Convention and Rome Conference. He claims that the higher officials within the agencies, represented by delegates, were not truly awake to the reality of what could possibly and would eventually occur in Rome.<sup>1094</sup> Prior to the Rome Conference, Lietzau realized that there was a possibility of the Ottawa Convention repeating itself in Rome.<sup>1095</sup>

### Rome Conference

The Rome Conference began on 15 June 1998 at the United Nations Food and Agriculture Organization building in Rome, Italy, and concluded on 17 July 1998. The United States had the largest delegation at the Rome Conference and included a powerhouse team of attorneys from several agencies, including but not limited to the Departments of State, Justice, and Defense, as well as the Joint Chiefs of Staff. Unfortunately, since each of these agencies had different interests at stake, the United States had not developed a clear overall position on the International Criminal Court.<sup>1096</sup> According to M. Cherif Bassiouni, the position of the United States was not always clear, which was likely a result of the uncertainty with which the United States approached the

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<sup>1092</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

<sup>1093</sup> Interview with William K. Lietzau, United States Delegate at the Rome Conference (Arlington, VA, 31 July 2008).

<sup>1094</sup> Interview with William K. Lietzau, United States Delegate at the Rome Conference (Arlington, VA, 31 July 2008).

<sup>1095</sup> Interview with William K. Lietzau, United States Delegate at the Rome Conference (Arlington, VA, 31 July 2008).

<sup>1096</sup> Interview with William K. Lietzau, United States Delegate at the Rome Conference (Arlington, VA, 31 July 2008).

entire endeavor.<sup>1097</sup> Another possibility may have been the result of the United States not realizing that a treaty would actually be adopted at the end of the conference.

The United States delegation stayed at the Holiday Inn and used the United States Mission to the Vatican to hold its formal talks.<sup>1098</sup> As the Rome Conference commenced, the United States attempted to gain support from other States that would prevent an unfavorable statute from being adopted. There were four main issues that the United States was concerned about: 1. The International Criminal Court's investigations should be triggered only by Security Council referrals under Chapter VII of the Charter of the United Nations; 2. The prosecutor should not have the authority to trigger an investigation *proprio motu*; 3. The International Criminal Court should not have jurisdiction over nationals of a non-State party; and 4. The crime of aggression should not be within the International Criminal Court's jurisdiction.

#### *Independent Prosecutor*

The United States attempted to prevent including prosecutors initiating an investigation on their own accord into the Rome Statute. Prior to the Rome Conference, States had warmed to the idea of a prosecutor that could initiate investigations *proprio motu*, including the United Kingdom. The United States had not. At Rome, the United States remained unconvinced by the arguments put forward in favor of a *proprio motu* prosecutor. It rejected the idea that the community of States was so lacking in moral and political courage that when faced with an international crime meriting the attention of the International Criminal Court, not one State party would refer the situation to the prosecutor.<sup>1099</sup> The fact that the prosecutor would have evidence to initiate an investigation without a referral from a State party was suspicious. The United States has always been skeptical of politically motivated investigations and/or indictments against

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<sup>1097</sup> M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32 *Cornell Int'l LJ* 443, 457, n. 51.

<sup>1098</sup> Scheffer, *All the Missing Souls*, 199.

<sup>1099</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998*, vol. 2 (United Nations 2002) UN Doc. A/CONF.183/13, p. 202, para. 126.

its nationals. Scheffer stated that his delegation favored the deletion of all references to *proprio motu* action by the prosecutor.<sup>1100</sup>

Conversely, States and nongovernmental organizations had argued that the experience of human rights treaty bodies, which provide for a State-to-State complaint procedure, had been abysmal to date.<sup>1101</sup> States had proved unwilling to initiate proceedings against other States and/or their nationals because of political and diplomatic ramifications.<sup>1102</sup> It was believed by proponents of the prosecutor with *proprio motu* power that the reluctance of the United States was based on a fear of inviting retaliatory scrutiny of its own human rights practices.<sup>1103</sup>

The United States decided to come out swinging against an independent prosecutor.<sup>1104</sup> Richardson stated in the United States's opening address that

it would be unwise to grant the Prosecutor the right to initiate investigations. That would overload the Court, causing confusion and controversy, and weaken rather than strengthen it. The Prosecutor should not be turned into a human rights ombudsman responding to complaints from any source. The proposal that the Prosecutor should have powers to initiate proceedings was premature. However, he or she should have maximum independence and discretion in prosecuting cases referred by States parties or the Security Council.<sup>1105</sup>

According to Scheffer, the United States lost the argument against an independent prosecutor two weeks into the Rome Conference, which was a consequence of the United States "sticking so fervently to the Security Council as the controlling factor for referrals" and that "other governments regarded their support for an independent prosecutor as a means of bluntly opposing [the United States's] fixation on control by the Security Council."<sup>1106</sup>

### *Jurisdiction over Non-State Party Nationals*

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<sup>1100</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998*, vol. 2 (United Nations 2002) UN Doc. A/CONF.183/13, p. 202, para. 126.

<sup>1101</sup> "Establishing an International Criminal Court," 22.

<sup>1102</sup> "Establishing an International Criminal Court," 22.

<sup>1103</sup> "Establishing an International Criminal Court," 22.

<sup>1104</sup> Scheffer, *All the Missing Souls*, 201.

<sup>1105</sup> 5th Plenary Meeting, 17 June 1998, at 10 a.m. (Mr. Richardson, United States) UN Doc. A/CONF/183/SR.5, p. 9, para. 60.

<sup>1106</sup> Scheffer, *All the Missing Souls*, 201.

The United States was unwilling to support a treaty that would give the International Criminal Court jurisdiction to prosecute non-State party nationals. At Rome the United States argued that the International Criminal Court should have automatic jurisdiction over the crime of genocide, but that State should have to consent to having their nationals prosecuted for crimes against humanity and war crimes.<sup>1107</sup> Most other States welcomed the United States's complementarity proposal,<sup>1108</sup> which would prevent the International Criminal Court from having primacy over national courts. But this would not prevent non-State party nationals from being charged for committing a crime on the territory of a State party. In the late evening of 8 July, Scheffer received President Clinton's instructions from Eric Schwartz at the National Security Council, which included that "[t]he court would exercise no jurisdiction over nationals of nonparty states unless the Security Council referred the situation to the court or the nonparty state expressly consented to such jurisdiction."<sup>1109</sup> Subsequently, Schwartz told Scheffer that if non-State party nationals could fall within the International Criminal Court's jurisdiction, then the United States would vote against the final draft of the Rome Statute at the Rome Conference's conclusion.<sup>1110</sup>

#### *The Crime of Aggression*

Perhaps one of the most controversial issues at Rome focused on the inclusion of the crime aggression within the International Criminal Court's jurisdiction. The United States was vigorously against it and argued that if there was jurisdiction over the crime of aggression, the situation must first be considered an act of aggression by the Security Council. According to Chapter VII of the Charter of the United Nations, the Security Council has the authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures should be taken [...] to maintain or restore international peace and security."<sup>1111</sup> It would be inconsistent if the Security Council did not consider a situation to be an act of aggression but the International Criminal Court did and an investigation ensued. The United States thought there may be a chance that aggression would not be included under

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<sup>1107</sup> Scheffer, *All the Missing Souls*,

<sup>1108</sup> Scheffer, *All the Missing Souls*, 205.

<sup>1109</sup> Scheffer, *All the Missing Souls*, 209.

<sup>1110</sup> Scheffer, *All the Missing Souls*, 215.

<sup>1111</sup> Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) art. 39.



the crimes within the jurisdiction of the Court, since there was no consensus to adopt the General Assembly's 1974 definition<sup>1112</sup> or any other definition. Nevertheless, the crime of aggression was included in the Rome Statute, which stated that a definition would be adopted at a later date according to the rules of the Statute.<sup>1113</sup>

The inclusion of the crime of aggression within the Rome Statute may have been the biggest defeat for the United States. If it had not been included, the United States could have taken advantage of the seven-year opt-out clause for war crimes. Therefore, even with the *proprio motu*, the United States would not have been as concerned with politically motivated prosecutions for genocide and crimes against humanity.

One of the goals was to convince France that the International Criminal Court should only have immediate jurisdiction over the crime of genocide and that war crimes and crimes against humanity should have a ten-year opt-out clause.<sup>1114</sup> France agreed with the United States, but would eventually agree to the adopted seven-year opt-out clause for war crimes only. According to Scheffer, if the United States had been aware of France's compromise, there may have been United States support for it as well.<sup>1115</sup> This situation demonstrated that while States were working together, they were also working alone to serve their own interests.

Well into the conference, many States thought that the United States was being too inflexible with its positions.<sup>1116</sup> Bassiouni writes, "Most delegations, especially those from the 'like-minded States,' had bent over backwards to accommodate the United States."<sup>1117</sup> He further notes, "The articles dealing with procedure and with the definition of crimes were substantially as the United States wanted."<sup>1118</sup> Eventually, States decided not to compromise any further with the United States, expecting that it would never be satisfied because it had no intention of signing the Treaty.<sup>1119</sup>

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<sup>1112</sup> GA Res. 3314 (1974) art. 2.

<sup>1113</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc. A/CONF.183/9; 2187 UNTS 90, art. 5.

<sup>1114</sup> Interview with Scheffer; see also David Scheffer, "The United States and the International Criminal Court" (1999) 93 *AJIL* 12.

<sup>1115</sup> Interview Scheffer.

<sup>1116</sup> M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32 *Cornell Int'l LJ* 443, 457.

<sup>1117</sup> Bassiouni, "Negotiating the Treaty of Rome," 457.

<sup>1118</sup> Bassiouni, "Negotiating the Treaty of Rome," 457.

<sup>1119</sup> Bassiouni, "Negotiating the Treaty of Rome," 457.

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With only one week left of the Rome Conference, much negotiation continued among States and it was undetermined if a final statute would be adopted. The reality was that the like-minded group was not going to let the conference end without a statute being adopted. Members worked around the clock making last-minute deals in order to reach a draft that would be adopted before the conference closed.

On 15 July 1998, the Bureau of the Committee of the Whole, which conducted most of the ground work with delegations to resolve controversial issues, had a choice to make: it could either complete a final package with the hope of being adopted by the conference as the final statute or report to the Plenary that an agreement could not be made and to begin preparations for a second conference for States to negotiate at a later date.<sup>1120</sup> The United States preferred that the International Criminal Court not be created in a rush to meet a conference deadline.<sup>1121</sup> Kirsch and Holmes write, “The few delegations that favored deferral were mostly those that were not enthusiastic about the establishment of a strong court to begin with.”<sup>1122</sup> This statement, written in 1998, is consistent with Scharf’s statement to this author that in 1989 when the International Criminal Court was being seriously reconsidered, the United States wanted to prevent its formation. However, the Bureau of the Committee of the Whole and other States present at the Rome Conference thought everything that had been accomplished over the past five weeks would “unravel” and that a second conferences would be just as likely to fail in creating the International Criminal Court.<sup>1123</sup> Moreover, there was less to lose by aiming to adopt a treaty. If unsuccessful, the Bureau of the Committee of the Whole would then begin preparations for a second conference.<sup>1124</sup>

In the early hours of 17 July, a final statute had been formulated and disseminated to the delegations. The United States was disappointed, since the crime of aggression

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<sup>1120</sup> Philippe Kirsch and John T. Holmes, “The Birth of the International Criminal Court: The 1998 Rome Conference,” (1998) 36 *Can YBIL* 3, 29; see also Philippe Kirsch and John T. Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process” (1999) 93 *AJIL* 2, 9-10.

<sup>1121</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

<sup>1122</sup> Kirsch and Holmes “The Birth of the International Criminal Court,” 29-30; see also Kirsch and Holmes, “The Rome Conference,” 10.

<sup>1123</sup> Kirsch and Holmes, “The Birth of the International Criminal Court,” 29; see also Kirsch and Holmes, “The Rome Conference,” 10

<sup>1124</sup> Kirsch and Holmes, “The Birth of the International Criminal Court,” 34; see also Kirsch and Holmes, “The Rome Conference,” 11

was included as one of the crimes under Article 5 and the prosecutor could initiate investigations *proprio motu* under Articles 13 and 15. These articles were contrary to what the United States had argued for in its 1993 and 1994 comments. The power of the prosecutor to initiate investigations was also contrary to the 1994 draft statute adopted by the General Assembly.

In order to gain the support needed for the adoption of the final statute with only hours left of the conference, the like-minded group “began an active lobbying campaign to build momentum towards adoption.”<sup>1125</sup> According to a General Assembly mandate, the Rome Conference was supposed to end by midnight on 17 July 1998. As midnight was approaching, the United States and India attempted to introduce last-minute amendments to the Statute.<sup>1126</sup> Just then, Norway introduced a no-action motion. The Chairman of the Committee of the Whole gave precedence to the no-action motion so that the Conference could continue.<sup>1127</sup> India lost the no-action vote on its proposal. The no-action vote on the proposal by the United States resulted in a vote of 113 in favor, 17 against, and 25 abstentions.<sup>1128</sup> It was after the vote in favor of no action on the proposal submitted by the United States that “the delegates burst into a spontaneous standing ovation, which turned into a rhythmic applause that lasted close to ten minutes.”<sup>1129</sup>

The White House instructed Scheffer to request a recorded vote to see exactly how many and which States supported and opposed the Statute.<sup>1130</sup> Scheffer thought this would be “self-destructive,” as he knew the United States would overwhelmingly lose the vote. Therefore, Scheffer requested a vote that would only be recorded by total numbers and not by how each government actually voted on the Statute,<sup>1131</sup> which was perhaps one last effort to prevent its adoption. Philippe Kirsch invited the Conference to vote on the adoption of the Statute for the International Criminal Court.<sup>1132</sup> One hundred and

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<sup>1125</sup> Kirsch and Holmes, “The Birth of the International Criminal Court,” 29; see also Kirsch and Holmes, “The Rome Conference,” 10.

<sup>1126</sup> Bassiouni, “Negotiating the Treaty of Rome,” 458.

<sup>1127</sup> Bassiouni, “Negotiating the Treaty of Rome,” 457.

<sup>1128</sup> Bassiouni, “Negotiating the Treaty of Rome,” 457-58.

<sup>1129</sup> Bassiouni, “Negotiating the Treaty of Rome,” 459.

<sup>1130</sup> Scheffer, *All the Missing Souls*, 224.

<sup>1131</sup> Scheffer, *All the Missing Souls*, 224. The vote, however, was considered “unrecorded.” See UN Doc. A/CONF.183/SR.9, para. 8.

<sup>1132</sup> UN Doc. A/CONF.183/SR.9, para. 9.

twenty States voted in favor of the treaty, 21 abstained, and seven voted against the treaty.<sup>1133</sup> The vote confirmed the overwhelming support for the statute.

The United States was one of the seven States that voted against the adoption of the Rome Statute. The vote was a huge defeat for the United States. For over a century, the United States had had great influence in international debates concerning international tribunals. Never before had a statute for an international court been adopted without the support of the United States. After the Department of State had been notified that the Rome Statute had been adopted, one of the delegates received a phone call on his/her mobile phone to confirm the defeat of the United States by lifting the mobile to the cheering crowd.<sup>1134</sup> A delegate representing another State described the cheering after the vote on the Rome Statute as “extraordinarily long.” Also, he/she described that there was a feeling in the air that something was amidst. He/she thought, “We’re going to regret this.”<sup>1135</sup>

Delegates had the opportunity to speak before the Conference and explain their reasons for voting in favor or against the Statute. Scheffer said that he did not agree with the application of the Statute to non-State party nationals and that “[t]he only way to bring non-parties within the scope of the regime was through the mandatory powers of the Security Council under the [United Nations] Charter.”<sup>1136</sup> Scheffer further explained that any future definition of the aggression “must also clearly refer to the Security Council’s exclusive role under the Charter to determine that aggression had taken place, as a pre-condition to the exercise of the judicial authority of the ICC.”<sup>1137</sup>

Scheffer also explained that Article 16 of the Statute, which allows the Security Council to defer a case from the International Criminal Court for a period of 12 months, was unwise as a matter of policy, and questionable as a matter of law, to purport to specify that Security Council action was effective only for a limited period of time such as twelve months. The Council ha[s] the primary responsibility for the

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<sup>1133</sup> UN Doc. A/CONF.183/SR.9, para. 10.

<sup>1134</sup> Interview with confidential delegate to the Rome Conference.

<sup>1135</sup> Interview with confidential delegate to the Rome Conference.

<sup>1136</sup> UN Doc. A/CONF.183/SR.9, para. 28.

<sup>1137</sup> UN Doc. A/CONF.183/SR.9, para. 29.

## Creating the International Criminal Court: 1989 – Rome Conference

maintenance of international peace and security, and the Conference should not seek to constrain the activities of the Council under the Charter.<sup>1138</sup>

Lastly, Scheffer stated that he could not support Resolution E in Annex I of the Final Act of the Conference, which seemed to reflect the view that crimes of terrorism and drug crimes should subsequently be included within the International Criminal Court's jurisdiction.<sup>1139</sup> The United States delegation thought that they had put those crimes behind them long before the Rome Conference, and yet at the last moment they were included.<sup>1140</sup> The Final Act of the Rome Conference established the Preparatory Commission for the International Criminal Court consisting of representatives from States that have signed the Final Act, and other States that have been invited to participate in the Conference.<sup>1141</sup> Scheffer signed the Final Act of the Conference that enabled the United States to participate as an observer in future meetings of the Assembly of States Parties.<sup>1142</sup> Thus, as the Rome Conference concluded, the relationship between the United States and the International Criminal Court was only beginning.

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<sup>1138</sup> UN Doc. A/CONF.183/SR.9, para. 30.

<sup>1139</sup> UN Doc. A/CONF.183/SR.9, para. 31. For the Final Act, see Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/Conf.183/10.

<sup>1140</sup> Scheffer, *All the Missing Souls*, 224.

<sup>1141</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" (17 July 1998) UN Doc. A/Conf.183/10, annex I, res. F.

<sup>1142</sup> Interview with David J. Scheffer, former Ambassador-at-Large for War Crimes Issues (Galway, Ireland, 24 June 2008).

*Chapter 8*

*International Criminal Court: Post-Rome Conference - 2012*

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Since the Rome Conference, United States policy concerning the International Criminal Court has changed, though to no great extent. Originally, President Clinton stated that he did not think it was wise for the United States to join the Court, but he also aimed to diminish concerns within the Rome Statute that would enable the United States to become a State party. Once 60 States had ratified the Rome Statute, President George W. Bush (George W. Bush), in his first term, took what has been described as a “hostile” position against the International Criminal Court. The United States was unsuccessful in preventing the Court from gaining strength, and as it was evident that it was here to stay, George W. Bush took a non-aggressive, cooperative position toward the International Criminal Court during his second term.

During President Barack Obama’s first term, United States policy concerning the International Criminal Court has remained similar to George W. Bush’s second term, but the United States has attended the Assembly of States Parties meetings since 2009, as well as the first Review Conference of the International Criminal Court in 2010. The purpose of this chapter is to analyze the relationship between the United States and the International Criminal Court from 1989 to the present. Also, this chapter aims to explain that a position towards a concept so deeply imbedded in a State’s foreign policy cannot be changed overnight. It is a process that can take several years, if it changes at all.

**United States Reaction to Rome**

A congressional hearing on the International Criminal Court was held by the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate exactly one week after the Rome Conference ended. Scheffer reported before it to explain the intricacies at Rome and why the United States had voted against the statute.<sup>1143</sup> Other foreign policy experts, including John R. Bolton, Lee A. Casey, and Michael P. Scharf prepared statements. The Chairman of the Subcommittee,

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<sup>1143</sup> *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations, 105th Cong. (23 July 1998).*

Senator Rod Grams of Minnesota, told Scheffer that he was relieved that the Clinton Administration voted against the Rome Statute, but he was unconvinced that it was itself sufficient to safeguard United States's interests.<sup>1144</sup> Grams stated that the United States must affirm that it "will not cede its sovereignty to an institution which claims to have the power to override the United States legal system and pass judgment on our foreign policy actions."<sup>1145</sup> Grams explained that he thought the International Criminal Court was not only a bad idea, but also that it was dangerous and the United States should aggressively oppose the International Criminal Court.<sup>1146</sup> He even went so far as to say that "the International Criminal Court is a monster"<sup>1147</sup> and that "I hope that now the administration will actively oppose this court to make sure that it shares the same fate as the League of Nations and collapses without U.S. support for this court truly I believe is the monster and it is the monster that we need to slay."<sup>1148</sup>

The Chairman of the Committee on Foreign Relations, Senator Jesse Helms of North Carolina, also spoke critically of the International Criminal Court. Like Grams, in Helms' opinion, rejecting the statute of the International Criminal Court at the Rome Conference was not enough.<sup>1149</sup> He stated that the United States must never vote for a Security Council referral under Article 13(b) and "not provide any assistance whatsoever to the Court or to any other international organization in support of the Court either in

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<sup>1144</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 1.

<sup>1145</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 4.

<sup>1146</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 1.

<sup>1147</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 2.

<sup>1148</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 4.

<sup>1149</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 6.

funding or in-kind contributions or other legal assistance.”<sup>1150</sup> Helms firmly stated that the Rome Statute would be “dead on arrival” if it ever went before the Foreign Relations Committee.<sup>1151</sup>

Scheffer presented his statement to the Subcommittee on International Operations after the senators finished. He explained that the International Criminal Tribunals for the former Yugoslavia and for Rwanda convinced the Clinton Administration of the merit of creating the International Criminal Court and how the United States negotiators had labored since early 1995 in the ad hoc and preparatory committee sessions at the United Nations to help craft a statute for the International Criminal Court that would be acceptable to the United States.<sup>1152</sup> Scheffer explained how the inclusion of “the de facto universal jurisdiction,” the independent prosecutor, and the crime of aggression, into the Rome Statute forced the United States to vote against the final draft.

Bolton and Casey spoke against the United States joining, supporting, or cooperating with the International Criminal Court. Bolton stated that the United States’s concern should not be that the International Criminal Court will prosecute lower-ranked American troops, but that the “main concern should be for the President, the cabinet officers on the National Security Council, and other senior leaders responsible for our defense and foreign policy.”<sup>1153</sup> Bolton referred to his recommended response to the International Criminal Court as the “Three Noes: no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute.”<sup>1154</sup> According to Bolton, whether the International Criminal Court

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<sup>1150</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 7.

<sup>1151</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 8.

<sup>1152</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 11.

<sup>1153</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 30.

<sup>1154</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 32.



survived or flourished depended in large measure on the United States.<sup>1155</sup> Therefore, his “Three Noes” approach was “likely to maximize the chances that the ICC will wither and collapse, which should be our objective.”<sup>1156</sup> Michael Scharf was the lone supporter of the United States joining the International Criminal Court. He expressed concern that it would be a “disaster” if the United States did not sign the Rome Statute and participate in future negotiations.<sup>1157</sup> He also explained that “this Court is going to happen” with or without the United States and that the Rome Statute would enter into force in the near rather than the far future, since there were enough States in the like-minded group alone to enter the Statute into force.<sup>1158</sup>

The United States had several specific issues with the Rome Statute that prevented it from voting in favor of its adoption; however, there were three major arguments. First, the position of the United States was clear: “Official actions of a non-party State should not be subject to the Court’s jurisdiction if that country does not join the treaty, except by means of Security Council action under the UN Charter.”<sup>1159</sup> The United States had argued that the Rome Statute violated the Vienna Convention on the Law of Treaties, particularly Article 34, which states, “A treaty does not create either obligations or rights for a third State without its consent.”<sup>1160</sup> Under the Convention, an international treaty cannot be used against a non-State party. Under Article 12 of the Rome Statute, the International Criminal Court has jurisdiction over nationals of a non-State party if a national committed one of the crimes under Article 5 on the territory of a

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<sup>1155</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 31.

<sup>1156</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 32.

<sup>1157</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 38.

<sup>1158</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 39.

<sup>1159</sup> *Is a U.N. International Criminal Court in the In the U.S. National Interest? Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations*, 105th Cong. (23 July 1998) 13.

<sup>1160</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 34.

State party.<sup>1161</sup> The United States had taken the position that it could not ratify an international treaty that violated international treaty law.

Jurisdiction over nationals of States that have not joined the International Criminal Court has been used as a primary argument to reflect the loyalty of the United States to international treaty law, but it is actually a secondary argument. As of 2012, more than 121 States have ratified or acceded to the Rome Statute. Certainly not all of these States are inclined to join a treaty that violates international treaty law. The United States uses this position as a primary argument since it refuses to allow the International Criminal Court to have jurisdiction over its nationals. If the United States did not have other major concerns with the Rome Statute, like the crime of aggression and *proprio motu* power of the Prosecutor, it would more likely accede to the Rome Statute and the issue of jurisdiction over non-State party nationals would be a non-issue, allowing the United States to become a State party to the International Criminal Court.

On 26 March 1999, Scheffer addressed the American Society of International Law at its annual meeting, where he stated, “The single most problematic part of the Rome Treaty is Article 12,”<sup>1162</sup> which enables jurisdiction of the International Criminal Court of nationals of non-State parties if one of the crimes under Article 5 is committed on the territory of a State party.<sup>1163</sup> In 2001, Scharf argued that the United States has ratified numerous treaties that give States jurisdiction over nationals of non-State parties.<sup>1164</sup> Therefore, the United States is inconsistent in its argument against Article 12 of the Rome Statute. But there are differences between the treaties cited by Scharf and the Rome Statute. For example, the treaties cited by Scharf include jurisdiction over non-State parties within national courts rather than an independent, autonomous court. The ultimate decision to prosecute in national courts lay in the hands of the States. Conversely, States party to the Rome Statute would have to prosecute or extradite to the

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<sup>1161</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 2 July 2002) 2187 UNTS 90 (ICC Statute), art. 12(2)(a) reads that the Court may exercise jurisdiction if the “State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.”

<sup>1162</sup> David J. Scheffer, Address at the Annual Meeting of the American Society of International Law, Washington, DC (26 March 1999) <[http://www.state.gov/www/policy\\_remarks/1999/990326\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1999/990326_scheffer_icc.html)> accessed 27 March 2011.

<sup>1163</sup> ICC Statute, art. 12(2)(a).

<sup>1164</sup> Michael P. Scharf, “The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position” (2001) 64 *Law & Contemp Probs* 67, 99-100.

International Criminal Court if the court issued an arrest warrant for the person in custody. Traditionally, the United States prefers States to interpret treaties and resolve differences. Scharf does, however, successfully weaken the argument made by the United States that it cannot join a treaty that would give a court jurisdiction over nationals of non-State parties.

A second major argument presented by Scheffer was the creation of a “self-initiating prosecutor.” The position of the United States against *proprio motu*-initiated investigations is not a new one. In fact, the United States has a long history of similar positions dating over a century. As far back as the Paris Peace Conference in 1919, and as recent as the ad hoc international criminal tribunals established by the Security Council in 1993 and 1994, the United States has never intentionally taken a chance with an independent prosecutor that could initiate investigations on his/her own accord.

The prosecutors at the International Military Tribunal and the International Military Tribunal for the Far East were not independent as they represented their respective governments, and the tribunals had limited jurisdiction over defendants, time, and crimes. Prosecutors for the International Criminal Tribunals for the former Yugoslavia and Rwanda were independent but could only initiate investigations within the limitations of the territories, time, and crimes under their respective statutes.<sup>1165</sup> Therefore, they were able to investigate crimes within the situations that the Security Council had created for them, but they could not investigate new situations. As a result, any argument that the United States had supported independent prosecutors for previous international criminal tribunals does not hold much water.

A third major issue Scheffer presented was regarding the International Criminal Court having the power to determine a situation to be a crime of aggression.<sup>1166</sup> As previously stated, the United States has taken the position that under international law, the Security Council has the authority to decide acts of aggression. If an act is determined to be an act of aggression by the Security Council and that situation is subsequently referred to the International Criminal Court, then an investigation and

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<sup>1165</sup> See also William A. Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 157.

<sup>1166</sup> ICC Statute, art. 5.

prosecution may commence.<sup>1167</sup> The Charter of the United Nations clearly gives the Security Council the power to decide which situations infringe on the peace and security of the international community.<sup>1168</sup>

### **The United States Signs the Rome Statute**

Five days after the United States voted against the Rome Statute, the Clinton Administration came under pressure from proponents of the International Criminal Court to reconsider its position.<sup>1169</sup> The Rome Statute set the deadline to sign the statute at 31 December 2000,<sup>1170</sup> and only signatories to the statute could remain in negotiation discussions prior to the Statute entering into force. As the deadline was approaching, President Clinton received heightened pressure from proponents and opponents of the International Criminal Court. For example, On 12 December 2000, the New York Times published an article written by Robert S. McNamara and Benjamin B. Ferencz, a former Nuremberg War Crimes prosecutor. McNamara and Ferencz began their article that “[w]ith the stroke of a pen, President Bill Clinton has a last chance to safeguard humankind from genocide, crimes against humanity, and war crimes.”<sup>1171</sup> The article ended stating,

If President Clinton fails to sign the treaty, he will weaken our credibility and moral standing in the world. We will look like a bully who wants to be above the law. If he signs, however, he will reaffirm America’s inspiring role as a leader of the free world in its search for peace and justice.<sup>1172</sup>

According to Richard Dicker, the director of Human Rights Watch’s international justice program, signing would give the United States more clout with and influence on the Court than if it was on the outside looking in.<sup>1173</sup> Dicker also claims that the signature would give the United States influence in the Court process but would be

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<sup>1167</sup> GA Res. 3314 (XXIX) (14 December 1974) art. 2.

<sup>1168</sup> Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) art. 39.

<sup>1169</sup> See, Senator Ashcroft, “International Criminal Court” *Congressional Record* (20 July 1998) S8554.

<sup>1170</sup> ICC Statute, art. 125.

<sup>1171</sup> Robert S. McNamara and Benjamin B. Ferencz, “For Clinton’s Last Act” *New York Times* (12 December 2000) A33.

<sup>1172</sup> Robert S. McNamara and Benjamin B. Ferencz, “For Clinton’s Last Act” *New York Times* (12 December 2000) A33.

<sup>1173</sup> Betsy Pisik, “Deadline Looming as Clinton Wavers on World Court Treaty” *Washington Times* (18 December 2000) A1.

legally meaningless.<sup>1174</sup> Dicker's claims are a bit exaggerated, though. A State that signs a treaty does have legal obligations. State signatories to an international treaty are obliged to refrain from acts which would defeat the object and purpose of the treaty until it shall have made its intention clear not to become a party to the treaty.<sup>1175</sup>

Moreover, the United States, or any other State, should not sign or ratify the Rome Statute to assert its influence over the International Criminal Court by getting its lawyers and judges active in the Court. In reality, this strategy may be why States have ratified or acceded to the Rome Statute, but the goal should be to diminish rather than increase political influence within the International Criminal Court. This rationale remains one of the major reasons that the United States is cautious of the International Criminal Court; it fears that the Court may be used as a political weapon against it, just as the United States could use its influence as a political weapon if it was a State party.

There were some Senators and Congresspersons who also urged the President to sign the treaty before the deadline.<sup>1176</sup> Just as this study has argued, there have consistently been internal debates among political officials and departments within the United States government concerning international criminal tribunals. So far, proponents of the International Criminal Court have remained the minority.<sup>1177</sup>

Opponents, on the other hand, saw no useful purpose in signing the Rome Statute, since it would only force a "course of action" on the incoming President, George W. Bush.<sup>1178</sup> Nevertheless, on 31 December 2000, the final day the Rome Statute was open for signature, President Clinton authorized David Scheffer to sign the Rome Statute on behalf of the United States.<sup>1179</sup> Clinton made it a point to say, "In signing, however, we

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<sup>1174</sup> Betsey Pisik, "Deadline Looming as Clinton Wavers on World Court Treaty" *Washington Times* (18 December 2000) A1

<sup>1175</sup> Vienna Convention on the Laws of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 18(a).

<sup>1176</sup> See for example, Senator Leahy, "The International Criminal Court" *Congressional Record* (15 December 2000) S11899.

<sup>1177</sup> See Charles A. Smith and Heather M Smith, "Embedded Realpolitik? Reevaluating United States' Opposition to the International Criminal Court" in Steven C. Roach (ed), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (OUP 2009) 29-53.

<sup>1178</sup> Betsey Pisik, "Deadline Looming as Clinton Wavers on World Court Treaty" *Washington Times* (18 December 2000) A1.

<sup>1179</sup> "Statement of the Rome Treaty on the International Criminal Court" (31 December 2000) in *Public Papers of the Presidents of the United States: William J. Clinton*, Book III (US GPO 2002) 2816-17; see also "U.S. Signing of the Statute of the International Criminal Court" (2001) 95 *AJIL* 392, 399; Steven Lee

are not abandoning our concerns about significant flaws in the treaty.”<sup>1180</sup> He further stated, “Given these concerns, I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.”<sup>1181</sup>

President Clinton stressed that the purpose of the United States becoming a signatory to the Rome Statute was, in fact, not to consider ratifying the treaty, but to further influence the structure and practice of the International Criminal Court. One could justifiably question if Clinton did the right thing for the wrong reasons or if he authorized a signature of a treaty not in good faith. Realizing that the next president would be hostile towards the International Criminal Court and that ratification was unlikely, he signed the treaty anyway. Further, he authorized the signing of a treaty that he recommended not be ratified in its current form and should have realized that its current form was unlikely to be significantly altered, particularly the major issues that the United States had with it regarding jurisdiction over nationals of non-State parties, the crime of aggression, and the self-initiating prosecutor. The purpose of a State’s signature to an international treaty is to agree with the treaty with the intent not to undermine the treaty’s object and purpose. Clinton recommended that the Rome Statute in its present form not be sent to the Senate for its advice and consent for accession. Nevertheless, the United States became a signatory to the Rome Statute.

The totality of the circumstances regarding the United States’s signature was completely unique. Article 125 of the Rome Statute stated that 31 December 2000 was the deadline for signature. The deadline, however, happened to fall between the administrations of a liberal president, who had to decide whether or not the United States should be involved with further negotiations regarding the shape of the International Criminal Court, and a conservative president, who was unlikely to accede to the Rome Statute regardless of the end result in shaping the International Criminal Court. If Article

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Myers, “U.S. Signs Treaty for World Court to Try Atrocities” *New York Times* (1 January 2001) A1; Thomas E. Ricks, “U.S. Signs Treaty on War Crimes Tribunal” *Washington Post* (1 January 2001) A1.

<sup>1180</sup> “Statement of the Rome Treaty on the International Criminal Court” (31 December 2000) in *Public Papers of the Presidents of the United States: William J. Clinton*, Book III (US GPO 2002) 2816-17; see also “U.S. Signing of the Statute of the International Criminal Court” (2001) 95 *AJIL* 392, 399.

<sup>1181</sup> “Statement of the Rome Treaty on the International Criminal Court” (31 December 2000) in *Public Papers of the Presidents of the United States: William J. Clinton*, Book III (US GPO 2002) 2816-17; see also “U.S. Signing of the Statute of the International Criminal Court” (2001) 95 *AJIL* 392, 400.

125 had presented any other year as the deadline for signatures, the situations would not have been as nearly unique.

### **George W. Bush's Presidency: First Term**

In January 2001, George W. Bush became President of the United States. The International Criminal Court was of no concern to the Bush Administration, since at the time there were fewer than 30 State ratifications. On 11 September 2001, terrorists attacked the United States. Symbolic elements of the United States were affected, including the Pentagon, the World Trade Towers in New York City, and potentially the White House. Consequently, the United States was at the beginning of an offensive on the “war on terror” that would subsequently include militarily attacking other States.

#### *“Unsigning” the Rome Statute*

As the United States went to war with Afghanistan, the Rome Statute was rapidly gaining ratifications. In early 2002, hardliners in President Bush's administration argued that the United States should attempt to prevent the Rome Statute from entering into force, while there were others that realized there were over 50 States that had ratified the treaty, that it would inevitably receive its 60th ratification, and that the International Criminal Court would become reality.<sup>1182</sup> The issue ultimately went to Bush, and he rejected the idea of attempting to prevent the Rome Statute from entering into force.<sup>1183</sup> The decision was to formalize the policy that the United States was not going to become a State party to the International Criminal Court and that the administration would take steps required to protect its nationals from the Court.<sup>1184</sup>

On 11 April 2002, the Rome Statute received its required 60th ratification.<sup>1185</sup> As a result, the Rome Statute would enter into force on 1 July 2002. The United States considered the International Criminal Court to be a potential threat or at the very least, an interference in its war on terror. Sixteen days after the Rome Statute received its 60th ratification, the Bush Administration took a public position towards the International

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<sup>1182</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1183</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1184</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1185</sup> Schabas, *An Introduction to the International Criminal Court*.

Criminal Court. On 27 April 2002, the Undersecretary of State for Arms Control and National Security, John R. Bolton, wrote a letter to the United Nations Secretary General, Kofi Annan, stating that the United States no longer considered itself a signatory to the Rome Statute. The letter read as follows:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on 31 December 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.<sup>1186</sup>

For Bolton, who has always opposed the International Criminal Court, sending the letter to the Secretary General was his “happiest moment” during his time at the Department of State.<sup>1187</sup> He told the Secretary of State, Colin Powell, that he “felt like a kid on Christmas Day” when he was signing the letter.<sup>1188</sup> Some Department of State attorneys were against the letter, knowing that European States would react negatively.<sup>1189</sup> This was the signifying act by the Bush Administration's campaign against the International Criminal Court that there would be no evidence of support for it. Bolton was determined “to remove any vestigial argument that America's signature had any continuing effect.”<sup>1190</sup>

The letter from the United States to the Secretary General shortly became known as the “unsigning” of the Rome Statute. This labeling, unfortunately, misconstrued the intent of the letter. The United States did not request to withdraw its signature; rather, it wished to be recognized within the depositary's status list as not intending to ratify the Rome Statute. There was no reason for the United States to “unsign” the Rome Statute, since there was no expressed consent in the Rome Statute to be bound by the treaty by

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<sup>1186</sup> Letter to the Secretary-General of the United Nations Regarding the Rome Statute of the International Criminal Court (27 April 2002) 41 *ILM* 1014.

<sup>1187</sup> John Bolton, *Surrender is Not an Option: Defending America at the United Nations and Abroad* (Threshold Editions 2007) 85.

<sup>1188</sup> Bolton, *Surrender is Not an Option*, 85.

<sup>1189</sup> Bolton, *Surrender is Not an Option*, 85.

<sup>1190</sup> Bolton, *Surrender is Not an Option*, 85.



signature under Article 12 of the Vienna Convention on the Laws of Treaties.<sup>1191</sup> Article 125 of the Rome Statute states that the Statute is subject to ratification, acceptance or approval by signatory States, but it does not indicate that a signature expresses consent to be bound by the Statute. The United States submitted its letter to the Secretary General of the United Nations, who is to receive instruments of ratification, acceptance, or approval as well as instruments of accession.<sup>1192</sup> The letter to the Secretary General was considered received by signatory and contracting States of the Rome Statute.<sup>1193</sup>

The letter from the United States to the Secretary General of the United Nations was not necessary, but it was proper. It was unnecessary since a signatory State is not bound by the Rome Statute. However, the letter was proper to other signatory and contracting States, putting them on notice that the United States did not intend to become a State party to the International Criminal Court. The letter was effective since the Rome Statute had received its 60th ratification and would enter into force shortly thereafter.<sup>1194</sup>

Bolton's letter was published on 6 May 2002, on which day Marc Grossman, Undersecretary for Political Affairs, attempted to justify the letter to the Secretary-General and reaffirm reasons why the United States was against the International Criminal Court. He noted the following reasons:

We believe the ICC undermines the role of the United Nations Security Council in maintaining international peace and security;

We believe in checks and balances. The Rome Statute creates a prosecutorial system that is an unchecked power;

We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty;

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<sup>1191</sup> Vienna Convention on the Laws of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 12.

<sup>1192</sup> ICC Statute, art. 125.

<sup>1193</sup> Vienna Convention on the Laws of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 77(1)(e), art. 77(2), and art. 78(c).

<sup>1194</sup> ICC Statute, art. 126.

We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.<sup>1195</sup>

Grossman further stated that the “United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.”<sup>1196</sup> Indeed, the United States not only intended not to join the International Criminal Court, it intended to do anything it could to protect its nationals from falling within the jurisdiction of the Court. The letter to the Secretary General would prove only to be a warm-up to more controversial steps the United States would take to prevent its nationals from falling within the jurisdiction of the International Criminal Court. More than anything, however, Grossman’s statement clarified that the purpose of Bolton’s letter to the Secretary-General was to free the United States of any obligations it had as a signatory to the Rome Statute.<sup>1197</sup> As Grossman explained, the United States respected the decision of other States to join the International Criminal Court, and the same respect should be reciprocated to the United States for its decision not to join the court.

#### *Security Council Deferrals*

Under Article 16 of the Rome Statute, in a resolution adopted under Chapter VII of the Charter of the United Nations, the Security Council can prevent or stop an investigation or prosecution by the International Criminal Court for a period of 12 months.<sup>1198</sup> As the Rome Statute was nearing its entry into force, the United States announced that it would veto all future peacekeeping missions unless the Security Council passed a resolution to prevent the International Criminal Court from investigating United Nations-authorized missions.<sup>1199</sup> As a result, the Security Council passed Resolution 1422, which stated that under its Chapter VII powers, it

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<sup>1195</sup> Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C., 6 May 2002.

<sup>1196</sup> Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C., 6 May 2002.

<sup>1197</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1198</sup> ICC Statute, art. 16.

<sup>1199</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 328.

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.<sup>1200</sup>

The Security Council also expressed its intent to renew the request “under the same conditions” every 12 months “for as long as may be necessary.”<sup>1201</sup> As a result, on 12 June 2003, the Security Council renewed the request under the same conditions for another 12 months.<sup>1202</sup> Resolutions 1422 and 1487 were controversial as States considered them to be misapplications of Article 16.<sup>1203</sup> As a result of these concerns, in addition to accusations of torture being carried out in prisons in Iraq and Guantanamo Bay, Cuba, the United States decided not to propose a resolution to the Security Council to renew its request to defer any potential investigation by the International Criminal Court under Article 16 of the Rome Statute.<sup>1204</sup>

#### *Article 16 Deferrals for Non-State Party Nationals*

The United States received protection from prosecution by the International Criminal Courts during its second week of operation. Under Article 16 of the Rome Statute, the Security Council can defer a case from the International Criminal Court up to 12 months, at which time the deferral expires or is renewed through a subsequent resolution.<sup>1205</sup> The Security Council passed a resolution on 12 July 2002, stating that

if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.<sup>1206</sup>

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<sup>1200</sup> SC Res. 1422 (2002) UN Doc. S/RES/1422, para. 1.

<sup>1201</sup> SC Res. 1422 (2002) UN Doc. S/RES/1422, para. 2.

<sup>1202</sup> SC Res. 1487 (2003) UN Doc. S/RES/1487, para. 1.

<sup>1203</sup> Schabas, *A Commentary on the Rome Statute*, 330.

<sup>1204</sup> Schabas, *A Commentary on the Rome Statute*, 330.

<sup>1205</sup> ICC Statute, art. 16.

<sup>1206</sup> SC Res. 1422 (July 2002) UN Doc. S/RES/1422, para. 1.

The Security Council passed the deferral with the expressed intent to renew it the following year,<sup>1207</sup> which it did on 12 June 2003.<sup>1208</sup> Resolution 1487 also was passed with the express intent to renew the deferral the following year.<sup>1209</sup> The United States, however, decided not to propose a 12-month deferral in 2004.<sup>1210</sup> In June 2004, Deputy Ambassador to the United Nations, James Cunningham, announced that “[t]he United States has decided not to proceed further with consideration and action on the draft at this time in order to avoid a prolonged and divisive debated” in the Security Council.<sup>1211</sup> The lack of Security Council support for a third deferral resulted from public accusations of prisoner abuse in Iraq and Guantanamo Bay prisons. For example, the Chinese Ambassador to the United Nations, Wang Guangya, stated that “from the very beginning this year, China has been under pressure because of the scandals and the news coverage of the prisoner abuse, and it made it very difficult for my government to support it,” which would give the United States a “blank check to the U.S. for the behavior of its forces.”<sup>1212</sup> No subsequent steps were taken in the Security Council to pass a deferral.

#### *American Service Members’ Protection Act*

A few weeks after the United States found protection from the International Criminal Court through the Security Council, President Bush signed into law the American Service Members’ Protection Act.<sup>1213</sup> The law referred to the International Criminal Court with what many may call harsh language. It restricts States that receive United States military support from cooperating with the International Criminal Court,<sup>1214</sup> restricts United States military personnel in certain United Nations peacekeeping operations,<sup>1215</sup> and authorizes the United States to “free members of the armed forces [...] and certain other persons

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<sup>1207</sup> SC Res. 1422 (July 2002) UN Doc. S/RES/1422, para. 2.

<sup>1208</sup> SC Res. 1487 (June 2003) UN Doc. S/RES/1487.

<sup>1209</sup> SC Res. 1487 (June 2003) UN Doc. S/RES/1487, para. 2.

<sup>1210</sup> Warren Hoge, “U.S. Drops Bid to Keep Immunity for Troops, UN Council Opposed Extending Exemption from World Court,” *Int’l Herald Tribune* (24 June 2004).

<sup>1211</sup> Warren Hoge, “U.S. Drops Bid to Keep Immunity for Troops, UN Council Opposed Extending Exemption from World Court,” *Int’l Herald Tribune* (24 June 2004).

<sup>1212</sup> Warren Hoge, “U.S. Drops Bid to Keep Immunity for Troops, UN Council Opposed Extending Exemption from World Court,” *Int’l Herald Tribune* (24 June 2004).

<sup>1213</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§2001-2015, 116 Stat 820 (2 August 2002).

<sup>1214</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §2007, 116 Stat 820 (2 August 2002).

<sup>1215</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §2005, 116 Stat 820 (2 August 2002).

detained or imprisoned by or on the behalf of the International Criminal Court.”<sup>1216</sup> Opponents of United States policies on the International Criminal Court quickly nicknamed the American Service Members’ Protection Act as the “Hague Invasion Act.” This label was unfortunate.

Although the American Service Members’ Protection Act does not prevent the United States from using force against the International Criminal Court, it is highly unlikely that the United States would ever need to, or want to, use force against the Court. Labeling the American Service Members’ Protection Act as the “Hague Invasion Act” based on the most extreme interpretation of the law may not have been the best response to it. The law, more than anything else, was passed so the United States could prevent the International Criminal Court from having actual, personal jurisdiction over a United States national, since it is not a State party to the Court. Moreover, extreme opponents of the International Criminal Court in Bush’s administration did not agree with the Presidential exceptions included in the American Service Members’ Protection Act, but Bush insisted that there be waiver language in a number of provisions.<sup>1217</sup> Republicans and Democrats in the Senate voted in favor to pass it into law. Ironically, Hillary Clinton, current Secretary of State for President Obama and wife of former President Clinton, who had signed the Rome Statute, voted in favor of possibly invading The Hague. According to Bellinger, on the outside, proponents of the International Criminal Court mistakenly perceived the Bush administration as trying to “kill” the Court, and, therefore, caused a counter-reaction of declaring Bush as the archenemy of the International Criminal Court.<sup>1218</sup>

For the next few years, the United States continued its hostility towards the International Criminal Court. State parties to the Rome Statute were pressured to sign Bilateral Immunity Agreements with the United States to continue receiving maintain economic and military support. Eventually, over 100 States signed these immunity agreements under Article 98 of the Rome Statute. The agreements, however, did not

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<sup>1216</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §2008, 116 Stat 820 (2 August 2002).

<sup>1217</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1218</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

slow international support for the International Criminal Court. Eventually, the hostility of the United States towards the International Criminal Court diminished and change in policy for how to deal with the Court began in 2005.

### **George W. Bush's Presidency: Second Term**

John Bellinger was the Legal Advisor for the United States National Security Council from 2001-2005. From the very beginning of George W. Bush's presidency, Bellinger was heavily involved with International Criminal Court issues, particularly coordinating United States policy regarding the Court.<sup>1219</sup> For example, he was the chief negotiator between agencies within the United States government as well as the principle negotiator between the White House and the House of Representatives concerning the language included in the American Service Members' Protection Act of 2002.<sup>1220</sup> According to Bellinger, Bush's policy concerning the International Criminal Court from 2002-2005 was not as hostile as the international media and many scholars portrayed it to be. In an interview with the author, Bellinger explains, "The administration was divided" on the International Criminal Court. "While some were implacably hostile to the ICC, others were much more moderate or pragmatic about" the Court.<sup>1221</sup> Bellinger further states,

The perception of the Bush administration as being implacably hostile to the International Criminal Court, and if fact out to try and kill it, and that it stemmed from the President on down, was really an unfortunate misperception [...] The perception was much more negative than the reality and that all of the things being blamed on the administration as being really, completely hostile to the ICC and unable to work with anybody on it was not accurate and was really unfortunate.<sup>1222</sup>

After Bush was reelected at the end of 2004, Condoleezza Rice requested the senior staff on the National Security Council write her and the President a paper on what they felt had been accomplished in their respective areas, as well as what they thought

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<sup>1219</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1220</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1221</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1222</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

needed to be done during Bush's second term. In his paper, Bellinger wrote that the issues of detainee policy and the policy on the International Criminal Court were the two most significant issues in his area that needed attention.<sup>1223</sup> He considered both of these issues yardsticks on which Bush's presidency would be judged in the international law arena.<sup>1224</sup> Bellinger realized that in the international arena, international criminal law embodied the International Criminal Court. Therefore, a State against the International Criminal Court was perceived to be a State against international criminal law.<sup>1225</sup> According to Bellinger, this is a "false syllogism" and without changing the United States policy on the International Criminal Court, the record needed to be set straight. The United States had to clarify that it favored achieving international criminal justice as much as any other State in the international community, though it differed with many States on the means of achieving international criminal justice.<sup>1226</sup> Bellinger became the Legal Advisor for the Department of State in April 2005, and, in essence, his paper would become the theme of Bush's second term regarding the International Criminal Court.

*Security Council Resolution 1593*

The United States launched an investigation of the atrocities in Darfur in July 2004. When the evidence collected by the United States investigation team was combined with other evidence widely reported throughout the international community, the United States concluded that genocide had occurred in Darfur.<sup>1227</sup> On 9 September 2004, during Congressional testimony, Secretary of State Colin Powell publicly described the mass atrocities in Darfur as "genocide."<sup>1228</sup> President Bush also called the mass atrocities in Darfur "genocide" in his address to the General Assembly on 21 September 2004.<sup>1229</sup> The United States had officially taken the position that the government of Sudan was

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<sup>1223</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1224</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1225</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1226</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1227</sup> *The Current Situation in Sudan and the Prospects for Peace: Hearing Before the Committee on Foreign Relations*, 108th Cong. (8 September 2004) 8 (statement of Colin Powell, Secretary of State).

<sup>1228</sup> *The Current Situation in Sudan and the Prospects for Peace: Hearing Before the Committee on Foreign Relations*, 108th Cong. (8 September 2004) 8 (statement of Colin Powell, Secretary of State).

<sup>1229</sup> President George W. Bush, Address to the United Nations General Assembly (21 September 2004).

committing genocide; therefore, States had an obligation to act under the Convention of the Prevention and Punishment of the Crime of Genocide,<sup>1230</sup> a position that the international community was criticized for failing to take during the 1994 genocide in Rwanda.

The United States was instrumental in passing Security Council Resolution 1564 in September 2004, which established the United Nations Commission of Inquiry, chaired by Antonio Cassese, to investigate the situation in Darfur.<sup>1231</sup> According to John Bolton, establishing the Commission of Inquiry was an obvious preliminary to a referral to the International Criminal Court.<sup>1232</sup> This placed the United States in a difficult spot. Powell and Bush were on the record as calling the atrocities in Darfur “genocide.” To prevent the establishment of an investigative commission would have placed politics over justice. It may also have been considered a violation of Article 1 of the Genocide Convention if the only State to call genocide prevented the establishment of an investigative commission. Shortly before retiring in January 2005, United States Representative to the United Nations, John Danforth, wrote a memorandum to Rice describing how United States opposition to the International Criminal Court was hurting its relations with Europe and suggesting that it “back down and allow the Security Council to refer Darfur to the ICC.”<sup>1233</sup> The Commission of Inquiry investigated the atrocities in Darfur and submitted its report on 25 January 2005.<sup>1234</sup> The Report of the Commission of Inquiry stated that there was no conclusive evidence that genocide occurred in Darfur but that there was evidence of crimes against humanity and war crimes.<sup>1235</sup> As expected, the Commission of Inquiry recommended that the Security

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<sup>1230</sup> Article 1 of the Genocide Convention reads, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

<sup>1231</sup> SC Res. 1564 (2004) UN Doc. S/RES/1564, para. 12; See also John R. Cook, “President and Secretary of State Characterize Events in Darfur as Genocide” (2005) 99 *AJIL* 266.

<sup>1232</sup> John Bolton, *Surrender is Not an Option: Defending America at the United Nations and Abroad* (Threshold Editions 2007) 349.

<sup>1233</sup> Rebecca Hamilton, *Fighting for Darfur* (Palgrave Macmillan, 2011) 58.

<sup>1234</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005).

<sup>1235</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005) 4, 158-60.



Council refer the situation to the International Criminal Court pursuant to Article 13(b) of the Rome Statute.<sup>1236</sup>

At this point, the perception of United States policy on the International Criminal Court remained hostile. Anticipating that the Commission of Inquiry would recommend that the Security Council refer the Darfur situation to the International Criminal Court, Rice sought the Ambassador-at-Large for War Crimes Issues, Pierre Prosper, to seek an alternative to the International Criminal Court.<sup>1237</sup> The alternative proposed was a new regional court that would “be administered jointly by the African Union and the United Nations.”<sup>1238</sup> By proposing an ad hoc tribunal specifically for Darfur, the United States remained consistent with its past positions regarding international criminal tribunals – that national or regional courts should prosecute international crimes, and if necessary, international criminal tribunals established by the Security Council under Chapter VII of the Charter of the United Nations.

The United States spent February 2005 attempting to prevent the Darfur situation from going to the International Criminal Court.<sup>1239</sup> The United States Office of War Crimes Issues circulated its concept paper promoting the United States proposal for an ad hoc tribunal for Sudan.<sup>1240</sup> Other members of the Security Council disagreed with the United States and debate ensued.<sup>1241</sup> France and the United Kingdom were able to garner support from most of the States serving on the Security Council at the time to refer the Sudan situation to the International Criminal Court. The United States needed to decide to either refer the Darfur situation to the International Criminal Court, which it had opposed so vigorously over the previous three years, or use its veto power to prevent the Security Council from successfully referring the situation, which it had called genocide, to the Court. To undermine the International Criminal Court at the expense of mass

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<sup>1236</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005) 162, para. 647.

<sup>1237</sup> Rebecca Hamilton, *Fighting for Darfur* (Palgrave Macmillan, 2011) 58.

<sup>1238</sup> “U.S Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC” (2005) 99 *AJIL* 502; “U.S. Urges War Crimes Tribunal for Darfur Atrocities” *Washington Post* (28 January 2005) A23.

<sup>1239</sup> Rebecca Hamilton, *Fighting for Darfur* (Palgrave Macmillan, 2011) 61.

<sup>1240</sup> Hamilton, *Fighting for Darfur*, 61.

<sup>1241</sup> Colum Lynch, “U.S., Europe Debate Venue for Darfur Trials” *Washington Post* (21 January 2005) A11.

atrocities would have damaged the reputation of the United States in pursuing international criminal justice.

On 31 March 2005, draft resolutions referring the situation in Darfur to the Prosecutor of the International Criminal Court were submitted to the Security Council.<sup>1242</sup> Later that day, the Security Council voted to refer the situation in Darfur to the International Criminal Court under Article 13(b) of the Rome Statute. Eleven States voted in favor<sup>1243</sup> and four States abstained.<sup>1244</sup> Rather than use its veto power, the United States abstained allowing the resolution to pass, and the Security Council referred the situation in Darfur to the International Criminal Court.<sup>1245</sup>

Resolution 1593 protected the United States and other non-State parties to the International Criminal Court from potential investigation and prosecution. Paragraph six read that the Security Council:

Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts of omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.<sup>1246</sup>

After Resolution 1593 was passed, United States representative Mrs. Patterson made a statement to the Security Council. In her statement, Patterson reiterated that the United States did not agree with the resolution and preferred establishing an internationalized criminal tribunal for Darfur. She stated:

By adopting this resolution, the international community has established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution will refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution. While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it

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<sup>1242</sup> See UN Doc. S/2005/199 and UN Doc. S/2005/218.

<sup>1243</sup> Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russia, United Kingdom, and United Republic of Tanzania.

<sup>1244</sup> Algeria, Brazil, China, United States.

<sup>1245</sup> SC Res. 1593 (2005) UN Doc. S/RES/1593.

<sup>1246</sup> SC Res. 1593 (2005) UN Doc. S/RES/1593, para. 6.

is important that the international community speak with one voice in order to help promote effective accountability.

The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty. Because of our concerns, we do not agree to a Security Council referral of the situation in Darfur to the ICC and abstained in the voting on today's resolution. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.<sup>1247</sup>

Patterson's statement confirmed that the United States abstention to Resolution 1593 was not a change in policy regarding the International Criminal Court. However, by not vetoing the resolution, the United States lessened its confrontation with the International Criminal Court. Therefore, the United States kept its policy but changed its tune. This was confirmed the following November when the United States Minister Counselor for International Legal Affairs, Carolyn Willson, stated to the General Assembly, "While our concerns about the ICC have not changed, we would like to move beyond divisiveness on this issue."<sup>1248</sup> She stated that the United States and the International Criminal Court share the same commitment to international criminal justice and that the United States's abstention from voting on Resolution 1593 demonstrated the United States's willingness to work constructively with the International Criminal Court when they share common objectives.<sup>1249</sup>

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<sup>1247</sup> UN Doc. S/PV.5158, p. 3 (Patterson, United States).

<sup>1248</sup> Statement by Carolyn Willson, Minister Counselor for International Legal Affairs, on the Report of the International Criminal Court, in the General Assembly (23 November 2005) USUN Press Release No. 229(05).

<sup>1249</sup> Statement by Carolyn Willson, Minister Counselor for International Legal Affairs, on the Report of the International Criminal Court, in the General Assembly (23 November 2005) USUN Press Release No. 229(05).

*Diminishing Bilateral Immunity Agreements*

Foreign officials consistently voiced their concerns over Article 98 agreements.<sup>1250</sup> In May 2006, Secretary of State Condoleezza Rice stated that military aid cuts to Latin American countries that did not sign Article 98 agreements were the same as “shooting ourselves in the foot.”<sup>1251</sup> Although this statement refers to Latin American countries, it can be viewed as a general statement. Many of the States contracted into Article 98 agreements with the United States needed its military and economic assistance to help the United States win the War on Terror.<sup>1252</sup> Therefore, it was not in the interest of the United States to pursue these agreements. George W. Bush began exempting States from Article 98 agreements in 2003<sup>1253</sup> and as of 2009, the United States does not pursue Article 98 agreements.<sup>1254</sup>

*Damage Control*

As Legal Advisor for the Department of State, Bellinger spent much of his time speaking at venues attempting to repair the misperceived relationship between the United States and the International Criminal Court, while at the same time maintaining the United States’s concerns with the Rome Statute. In his remarks at the DePaul University College of Law in 2008, Bellinger stated that the United States and the International Criminal Court should work together to achieve common goals.<sup>1255</sup> He also explained that the United States accepts that “the ICC is a reality and will remain so for the foreseeable future,” but the International Criminal Court and its supporters need to accept that “absent changes to address fundamental U.S. concerns, it is highly unlikely that the

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<sup>1250</sup> Report of an Independent Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (ASIL 2009) 12-14.

<sup>1251</sup> Condoleezza Rice, US Secretary of State, Trip Briefing: En Route to San Juan, Puerto Rico, Department of State (10 March 2006). See Report of an Independent Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (ASIL 2009) 13.

<sup>1252</sup> Interview with John Bellinger III, former National Security Council Legal Advisor (2001-2005) and former Department of State Legal Advisor (2005-2009) (Washington, DC, 13 July 2011).

<sup>1253</sup> Presidential Determination No. 2004-09, 21 November 2003; Presidential Determination No. 2004-27, 6 April 2004; Presidential Determination No. 2004-35, 3 June 2004.

<sup>1254</sup> Clint Williamson, Ambassador at Large for War Crimes Issues, Department of State, Remarks at the Century Foundation on Reassessing the International Criminal Court: Ten Years Past Rome (13 January 2009); see also Report of an Independent Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (ASIL 2009) 14.

<sup>1255</sup> John B. Bellinger, Legal Advisor, “The United States and the International Criminal Court: Where We’ve Been and Where We’re Going,” Remarks to the DePaul University College of Law (25 April 2008).

United States will become a party to the Rome Statute anytime in the foreseeable future.”<sup>1256</sup>

### **Barack Obama’s Presidency: First Term**

As a senatorial candidate for Illinois in 2004, Barack Obama stated that “the United States should cooperate with the ICC investigation in a way that reflects American sovereignty and promotes our national security interests.”<sup>1257</sup> As a presidential candidate in 2007, Obama stated,

Now that it is operational, we are learning more and more about how the ICC functions. The Court has pursued charges only in cases of the most serious and systemic crimes and it is in America’s interests that these most heinous of criminals, like the perpetrators of the genocide in Darfur, are held accountable. These actions are a credit to the cause of justice and deserve full American support and cooperation. Yet the Court is still young, many questions remain unanswered about the ultimate scope of its activities, and it is premature to commit the U.S. to any course of action at this time.

The United States has more troops deployed overseas than any other nation and those forces are bearing a disproportionate share of the burden in the protecting Americans and preserving international security. Maximum protection for our servicemen and women should come with that increased exposure. Therefore, I will consult thoroughly with our military commanders and also examine the track record of the Court before reaching a decision on whether the U.S. should become a State Party to the ICC.<sup>1258</sup>

While the above statements by Obama may have sounded positive to proponents of the International Criminal Court, they were statements not inconsistent with George W. Bush’s policy during his second term, which was a more cooperative relationship with the Court. However, the fact that Obama was open to the possibility of “reaching a

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<sup>1256</sup> John B. Bellinger, Legal Advisor, “The United States and the International Criminal Court: Where We’ve Been and Where We’re Going,” Remarks to the DePaul University College of Law (25 April 2008).

<sup>1257</sup> Josh Rovenger, “Analysis: Obama vs. McCain on the ICC” (30 June 2008)

<[http://archive2.globalsolutions.org/in\\_the\\_news/analysis\\_obama\\_vs\\_mccain\\_icc](http://archive2.globalsolutions.org/in_the_news/analysis_obama_vs_mccain_icc)> accessed 3 May 2012.

<sup>1258</sup> Barack Obama, 2008 Presidential Candidate Questionnaire, 6 October 2007,

<<http://globalsolutions.org/08orbust/quotes/2007/10/31/quote484>> accessed 3 May 2012.

decision on whether the U.S. should become a State Party to the ICC” is a position that differs from his predecessor. There was no possibility of George W. Bush reaching a decision that the United States should accede to the Rome Statute and become a State party to the International Criminal Court. This decision has remained unstated by Obama since his presidency commenced, but in May 2010 the United States White House released its National Security Strategy.<sup>1259</sup> In its National Security Strategy, the United States confirmed its support for Security Council tribunals established under Chapter VII of the Charter of the United Nations and tribunals established by and with the consent of the State. It stated that The United States is thus working to strengthen national justice systems and is maintaining our support for ad hoc international tribunals and hybrid courts.<sup>1260</sup> Regarding the International Criminal Court, the National Security Strategy stated,

Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC’s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.<sup>1261</sup>

Importantly, the United States will “always protect U.S. personnel” and will only support the International Criminal Court’s prosecutions and values if they are “consistent with the requirements of U.S. law.” Therefore, the United States reconfirmed that it will not become a member of the International Criminal Court until the Congress repeals the American Service Members’ Protection Act of 2002, which is unlikely to happen within the near future.

Since President Obama entered into office, the relationship between the United States and the International Criminal Court has limitedly evolved through engagement. The United States participated for the first time as an observer in the Eighth Session of the Assembly of States Parties to the International Criminal Court in November 2009,<sup>1262</sup> something that the United States did not do for the first eight years of the Court under

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<sup>1259</sup> National Security Strategy, May 2010.

<sup>1260</sup> National Security Strategy, May 2010, 48.

<sup>1261</sup> National Security Strategy, May 2010, 48.

<sup>1262</sup> Elizabeth R. Wilcox (ed.), *Digest of United States Practice in International Law, 2009* (International Law Institute and OUP, 2009) 97.

President Bush. In his speech to the Assembly of States Parties, Ambassador-at-Large for War Crimes Issues Stephen J. Rapp explained, “Although we have not joined previous meetings of the Assembly, we have not been silent in the face of crimes against the basic code of humanity, crimes that call for condemnation in the strongest possible way.”<sup>1263</sup> As a former Chief Prosecutor for the Special Court for Sierra Leone under President Bush, Rapp expressed how he was “especially proud of my country’s historic role in demanding justice for those who survived soul-shattering violence in their own countries-and for those who did not survive.”<sup>1264</sup> Most importantly, Rapp expressed to the Assembly that the United States “places the greatest importance on assisting countries where the rule of law has been shattered to stand up their own system of protection and accountability-to enhance their capacity to ensure justice at home.”<sup>1265</sup> This has been United States policy historically and in more recent years as the United States has supported national, multinational, and internationalized tribunals for the prosecution of accused international criminals. Yet, the United States showed its willingness to compromise in the interest of international justice under circumstances such as the situation in Darfur.

*2010 Review Conference of the International Criminal Court*

The United States attended the first Review Conference of the International Criminal Court in Kampala, Uganda, from 31 May to 11 June 2010. The Legal Advisor of the Department of State, Harold Koh, and Rapp headed the multi-agency delegation in Kampala. The United States attended the conference as an observer nation, although it did not attend to simply observe, but also to influence. Prior to the Review Conference, Koh spoke at the annual meeting of the American Society of International Law. In his speech, Koh compared the International Criminal Court to a “wobbly bicycle” that was finally starting to move forward.<sup>1266</sup> A “wobbly bicycle” is fragile and limited in its

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<sup>1263</sup> Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Address to the Assembly of States Parties, The Hague, Netherlands, 19 November 2009.

<sup>1264</sup> Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Address to the Assembly of States Parties, The Hague, Netherlands, 19 November 2009.

<sup>1265</sup> Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Address to the Assembly of States Parties, The Hague, Netherlands, 19 November 2009.

<sup>1266</sup> Harold Hongju Koh, Legal Adviser, U.S. Department of State, “The Obama Administration and International Law,” Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010.

ability to move fast or smoothly. Koh used this comparison to explain to his audience that the International Criminal Court was already carrying a heavy load and that adding a definition of the crime of aggression would be “more weight than the bicycle can bear.”<sup>1267</sup> Koh used the “wobbly bicycle” analogy to caution his audience that it may not be in the interest of the International Criminal Court, if it is to become effective, to adopt a definition of the crime of aggression at the first review conference of the International Criminal Court in Uganda from 30 May to 11 June 2010. The overall tone of Koh’s speech was positive, stating that the Obama Administration has been actively looking at ways that the United States can assist the International Criminal Court in achieving international criminal justice.<sup>1268</sup> When studying Koh’s remarks carefully, they almost echo those of Bellinger from 2005-2009.

Prior to the Review Conference, the United States had accepted that the definition of aggression would probably be adopted, since there was strong support for the definition proposed by a working group established to define the crime of aggression. Therefore, the United States sought to limit the scope of the crime of aggression as much as possible. Initially, it may seem that the United States lost the battle over the crime of aggression, since it would have preferred a definition not be adopted. Taking a closer look, however, the United States won in regards to the enforcement of the definition adopted in Kampala, since the International Criminal Court cannot exercise its jurisdiction over the crime of aggression until at least 1 January 2017.<sup>1269</sup> Furthermore, when the crime of aggression becomes enforceable, it will not apply to nationals of non-State parties even if committed on the territory of a State party, as stated by Article

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<sup>1267</sup> Harold Hongju Koh, Legal Adviser, U.S. Department of State, “The Obama Administration and International Law,” Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010.

<sup>1268</sup> Harold Hongju Koh, Legal Adviser, U.S. Department of State, “The Obama Administration and International Law,” Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010.

<sup>1269</sup> Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res. 4 (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) annex I, at 3, para. 3(3).



12(2),<sup>1270</sup> unless the Security Council under Article 13(b) refers the situation to the International Criminal Court.

As the crime of aggression was being negotiated in Kampala, the United States submitted “understandings” that it wished to be included in the definition prior to its adoption.<sup>1271</sup> Three United States understandings were included in the adoption of the crime of aggression.<sup>1272</sup> These understandings read as follows”

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.<sup>1273</sup>
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.<sup>1274</sup>
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.<sup>1275</sup>

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<sup>1270</sup> ICC Statute, article 12(2)(a) reads that a precondition to exercise of jurisdiction by the International Criminal Court is if “The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.”

<sup>1271</sup> The author was provided with a copy of the US understandings by William A. Schabas in an email attachment on 14 July 2010.

<sup>1272</sup> Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res. 6 (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) annex III.

<sup>1273</sup> Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res. 6 (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) annex III, Understanding No. 4.

<sup>1274</sup> Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res. 6 (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) annex III, Understanding No. 5.

<sup>1275</sup> Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res. 6 (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) annex III, Understanding No. 7.

The definition of the crime of aggression, together with the understandings, is considered a victory for the United States. To have adopted a different definition or not to have included the understandings proposed by the United States may have prevented the United States from supporting the definition, and it may have driven the United States away from supporting the International Criminal Court. The definition of the crime of aggression, which the United States supported, was a direct result of the United States engaging with the Assembly of States Parties by attending its meetings and the Review Conference in Kampala. William Lietzau was called to represent the Department of Defense at the Review Conference. He was the only delegate to attend both the 2010 Review Conference and the 1998 Rome Conference. In an interview with this researcher, Lietzau stated that the United States delegation at Kampala maintained policy consensus across departments and agencies,<sup>1276</sup> a position that was missing in Rome. This may have been why the United States was unhappy with the final product in 1998 but happy with the final product in 2010.

In an interview with this author after the Review Conference, Lietzau stated that by attending the Review Conference, the United States was able to negotiate and influence the outcome of the definition of the crime of aggression, which was in the best interest of the United States.<sup>1277</sup> It was clear that not having a definition of the crime of aggression adopted would have been the ultimate victory for the United States. Koh demonstrated this in his speech at the Annual Meeting of the American Society in International Law a few weeks prior to the Review Conference, when he called the International Criminal Court a “wobbly bicycle” and warned that adopting a definition on the crime of aggression may be too much for the young Court.<sup>1278</sup> Yet, in several speeches since Kampala, Koh has stated that the United States benefitted by attending the Review Conference even with the adoption of the crime of aggression.<sup>1279</sup>

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<sup>1276</sup> Telephone Interview with William K. Lietzau (8 July 2010). Lietzau is a retired Marine Corps Colonel. He was delegate representative for the Joint Chiefs of Staff at the Rome Conference in 1998 and delegate representative for the Department of Defense at the Review Conference. He is the current Deputy Assistant Secretary of Defense for Detainee Affairs.

<sup>1277</sup> Telephone Interview with William K. Lietzau (8 July 2010).

<sup>1278</sup> Harold Hongju Koh, Legal Adviser, U.S. Department of State, “The Obama Administration and International Law,” Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010.

<sup>1279</sup> See, for example, Harold Hongju Koh and Stephen J. Rapp, “US Engagement with the ICC and the Outcome of the Recently Concluded Review Conference,” Washington, DC, 15 June 2010.

According to Koh, by attending the Review Conference, the United States pushed the reset button on its relationship with the International Criminal Court. There are two important points concerning Koh's perspective. First, more important than resetting the relationship with the International Criminal Court, by attending the Review Conference the United States was able to negotiate and propose its understandings concerning major issues, including the crime of aggression. If the United States had not attended the Review Conference, its influence would have been absent and the United States would not have been able to bring attention to its major concerns.

Secondly, Koh's perspective on "reset" may be exaggerated, since the United States had noticeably lessened its hostility towards the Court in 2005 when it decided to abstain, rather than use its veto power, in the vote that referred the situation in Sudan to the International Criminal Court.<sup>1280</sup> Since then, the hostility from the United States toward the International Criminal Court has lessened and representatives of George W. Bush's administration during the second term of his presidency attempted to repair the damage resulting from George W. Bush's first term. Although under the Obama Administration, the United States has attended meetings of the Assembly of States Parties (which should be viewed as a change), there has been no recent significant change or the push of a "reset" button in United States policy regarding the International Criminal Court. Furthermore, the American Society of International Law's Independent Task Force stated in its report in 2009 that positive steps had been taken and that the United States should continue to work towards "furthering positive engagement" with the International Criminal Court.<sup>1281</sup>

*Security Council Resolution 1970*

Beginning in 2010, citizens in several States around the world, particularly in the Middle East, began to revolt against their long-established regimes. One of the revolutions was in Libya against the dictator Muammar al Qadhafi. In early 2011, Qadhafi retaliated with military force against the protesters. The situation gained international attention as a result of numerous military attacks against civilians. Several States, including the United

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<sup>1280</sup> SC Res. 1593 (2005) UN Doc. S/RES/1593.

<sup>1281</sup> Report of an Independent Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (ASIL 2009).

States, condemned the actions of Qadhafi. The situation in Libya quickly made it onto the Security Council's agenda. On 26 February 2011, the Security Council referred the situation in Libya to the International Criminal Court under Article 13(2) of the Rome Statute.<sup>1282</sup>

Resolution 1970 was only the second Security Council referral to the International Criminal Court. Different from the Darfur referral in 2005, however, the United States supported the Libya referral by voting to refer it to the International Criminal Court rather than abstaining. Consistent with the Darfur referral, language in the Libya referral protects nationals of non-State parties to the International Criminal Court. Paragraph six of the Resolution 1970 read similarly to Resolution 1593 in that the Security Council

Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.<sup>1283</sup>

### **Conclusion**

The United States's tune towards the International Criminal Court has changed since the Rome Conference in 1998. Initially, the United States did not approve of the Rome Statute and signed it only to play an influential role in the Preparatory Commission's meetings. Immediately after the Rome Statute received its 60th ratification, the Bush administration did everything it could, domestically and in the international arena, to protect United States nationals from the Court. The United States accepted the Court more during the Bush administration's second term. Finally, the United States played a more supportive role of the International Criminal Court during the Obama administration's first term. Yet, one thing has remained consistent with United States policy from 1998-2012: no president has publically stated that the United States should become a State party to the International Criminal Court.

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<sup>1282</sup> SC Res. 1970 (2011) UN Doc. S/RES/1970.

<sup>1283</sup> SC Res. 1970 (2011) UN Doc. S/RES/1970, pp. 2-3, para. 6.

United States policy regarding international criminal courts and tribunals is complex, but at the same time it is consistent with that seen in past decades and presidential administrations.<sup>1284</sup> Whether the administrations have been conservative or liberal, Republican or Democrat, the United States has maintained a policy of suspicion towards the International Criminal Court, while supporting, perhaps more than any other State, ad hoc multinational and international criminal tribunals. This policy was reflected at the Paris Peace Conference in 1919 during negotiations within the United Nations War Crimes Commission, as well as in London in 1945, during the 1990s, and to the present day with the Obama Administration.

In Paris in 1919, Woodrow Wilson, who believed in a more cosmopolitan world society, pushed for the development of the League of Nations; yet, personal records and memoirs show that he was against developing an international criminal court for the prosecution of William II. The minutes of the debates of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties demonstrate that the United States delegates argued for States to prosecute war criminals in national and multinational courts and that they would not participate in an international criminal court.

When the United Nations War Crimes Commission recommended establishing a United Nations War Crimes Court to prosecute Nazi war criminals after the Second World War, the United States removed its delegate to the Commission, who also promoted the idea. Soon after, the United States led the establishment of the International Military Tribunal, a multinational criminal court. The United States was also against establishing a second international military tribunal when other Allied States favored it. The United States favored subsequent Nuremberg trials to be conducted in national military courts.

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<sup>1284</sup> For a summary analysis, see Harry M. Rhea, "The United States and International Criminal Tribunals: An Historical Analysis" (2009) 16 *ILSA J Int'l & Comp L* 19.

## Conclusion

While there was little discussion during the Cold War, the United States did not vocally support establishing an international criminal court. Records show that the United States was content with Article VI of the Genocide Convention as States would have to join the international penal tribunal, which was unlikely to be established. Records also show that the United States did not favor including an international penal tribunal in Article V of the Apartheid Convention. Starting in the 1990s, the United States formed a policy of promoting and supporting ad hoc international criminal tribunals established either by the Security Council under Chapter VII powers of the Charter of the United Nations or by agreement with the United Nations and the concerned State. Concurrently, while some United States politicians, including Christopher Dodd, Arlen Specter, and even President Clinton, favored the concept of the International Criminal Court, the United States Government, which includes many multi-level agencies, remained suspicious and disapproved establishing the Court.

David Scheffer has argued for the United States to join the International Criminal Court in his academic writings. However, when he represented the United States as Ambassador-at-Large for War Crimes Issues, he argued for the policy of the United States, which was one of suspicion - suspicion of a prosecutor with *proprio motu* powers, suspicion of jurisdiction over non-State party nationals, suspicion of jurisdiction over the crime of aggression. Clint Williamson, one of the original prosecutors who worked under Richard Goldstone at the International Criminal Tribunal for the former Yugoslavia and former Ambassador-at-Large for War Crimes Issues under George W. Bush's administration, as well as John Bellinger, former Department of State Legal Advisor under George W. Bush, argued that the United States would support the International Criminal Court on a case-by-case basis, but would maintain its suspicion of the Court. Stephen J. Rapp, former Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, former prosecutor of the Special Court for Sierra Leone, and current Ambassador-at-Large and head of the Office of Global Criminal Justice<sup>1285</sup> in the Department of State, as well as Harold Koh, current Department of States Legal Advisor, also have argued the United States's suspicion of the International Criminal Court on the same premises as their predecessors.

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<sup>1285</sup> Formerly the Office of War Crimes Issues.

## Conclusion

Though the United States has maintained a policy of suspicion toward the International Criminal Court, it has been a strong supporter of national prosecutions and multinational and international criminal tribunals. For example, it argued for national and multinational courts and commissions to prosecute war criminals after the First World War and was the leader in establishing the International Military Tribunal and the International Military Tribunal for the Far East to prosecute war criminals after the Second World War. It was one of the leading States in developing and supporting the international criminal tribunals for the former Yugoslavia and Rwanda after the Cold War. Finally, it was the leader in working with States to develop the Special Court for Sierra Leone and the Special Tribunal for Lebanon, while other States supported referring the situations to the International Criminal Court. It also promoted establishing an ad hoc international criminal tribunal for Sudan, but lost that debate in the Security Council.

The International Criminal Court and the United States have more in common than not. For example, both promote national prosecutions of genocides, war crimes, and crimes against humanity. Also, both concede that the Security Council plays a major role in determining methods of international criminal responsibility for non-State parties to the International Criminal Court when a State is unable or unwilling to prosecute perpetrators of international crimes.<sup>1286</sup> The United States will work with the International Criminal Court on a case-by-case basis for the foreseeable future, essentially treating it as a de facto ad hoc international criminal tribunal. Such examples to date include the situations in Sudan and Libya.

There are two final questions that need to be considered, but cannot yet be answered, when evaluating United States policy regarding the International Criminal Court. First, will the International Criminal Court really be a permanent institution? That is, will it be a functioning court 50 years from now? So far, the International Criminal Court has hardly been a successful court compared to ad hoc international criminal tribunals. For example, the International Criminal Court has completed one case in its first ten years.<sup>1287</sup> The defendant in this case was guilty of conscripting and

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<sup>1286</sup> However, the United States argues that the Security Council should maintain this role even for States party to the International Criminal Court.

<sup>1287</sup> *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06) Judgment (14 March 2012).

## Conclusion

recruiting children to participate in armed conflict.<sup>1288</sup> All of the ad hoc international criminal tribunals from the International Military Tribunal to the Special Court for Sierra Leone have achieved more international justice within their first ten years than the International Criminal Court.

If the International Criminal Court does in fact prove to be a permanent institution, then it will be necessary to ask a second question: How can the United States change a position that is so deeply imbedded in its foreign policy? Some literature has been written on this issue.<sup>1289</sup> One option is for the United States not to change its policy and continue to support ad hoc international criminal tribunals established through agreement with the United Nations, such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon, so that they may become the customary alternative to the International Criminal Court. If so, then the United States policy regarding the International Criminal Court will become less relevant than it is today. This would not necessarily be a bad thing. The International Criminal Court is a court of last resort, a court to prosecute those that would otherwise not be held accountable for committing international crimes. As a last resort, it should be an option after ad hoc tribunals that include State participation, such as the “Special” courts and tribunals that aim to achieve the same objective as the International Criminal Court.

The United States may have to steadily change its policy toward the International Criminal Court if the Court proves to be permanent. As the world continues to globalize, it becomes in the best interest of States to participate in international institutions that they would otherwise not join. United States policy toward international criminal courts and tribunals cannot be transformed overnight. It is a process that has already proven to take several decades, if it changes at all. How and when the United States becomes a State party to the International Criminal Court is difficult to predict, as it is not in the foreseeable future.

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<sup>1288</sup> *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06) Judgment (14 March 2012) para. 1358.

<sup>1289</sup> Lee Feinstein and Tod Linberg, *Means to an End: U.S. Interest in the International Criminal Court* (Brookings Inst. Press 2009); Report of an Independent Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (ASIL 2009).



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