Means to an End

U.S. Interest in the International Criminal Court

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CHAPTER TWO

U.S. History and International Justice:

Idealism and Ideology

Many of the concerns that have arisen over the Rome Statute that created the International Criminal Court were previewed in halting U.S. support for a variety of international judicial schemes dating back to the Civil War and beyond. Concerns about surrendering sovereignty to an international judicial body have long been in competition with an American impulse to foster the rule of law everywhere.

Idealistic schemes were proposed and opposed by successive U.S. government officials over the years. Europe and the United States frequently exchanged roles as the main proponents of or skeptics about various judicial proposals. Over the course of a century and a half, the United States has been at the heart of efforts to establish rules governing the conduct of war; has supported with varying degrees of intensity efforts to establish an international criminal court; and has led international efforts to establish the principle of individual accountability (the

Nuremberg principles, undermined to an extent by the over-militarized and inconsistent Tokyo tribunals that followed). But the United States has also generated profound skepticism about the prospects of securing anything like "international justice" or global governance more broadly—a product of the very basic concern that the pursuit of international justice will jeopardize the ability of a free people to pursue justice as they see fit in a sovereign and democratic state that fought a war for independence against an oppressive king. In this view, global governance of uncertain legitimacy will seek to trump democratic and constitutional national governance. At its best, U.S. efforts to advance human rights and political freedom have blended pragmatism with the aspirational values on which the country was founded.

In a 1995 speech delivered at the University of Connecticut, President Bill Clinton said, "We have an obligation to carry forward the lessons of Nuremberg. That is why we strongly support the United Nations War Crimes Tribunal for the former Yugoslavia and for Rwanda."[1] Although this statement may have overstated initial U.S. enthusiasm for the International Criminal Tribunal for the former Yugoslavia (ICTY), in harking back to America's leadership in promoting international justice fifty years earlier the president sought to affirm the United States' aspiration, if not always practice, to stand as a global champion of international justice. Yet just three years later in Rome, owing to opposition to some of the most basic aspects of how the new International Criminal Court would operate, the Clinton administration found itself voting with only a handful of other nations against the treaty language. Clinton eventually signed the Rome Statute—but with the stated intention not to submit the treaty to a highly skeptical Senate for approval until its defects could be corrected. Both the aspiration and the hesitation were very much of a piece with the American historical record.

During the U.S. Civil War, American legal scholars codified the first modern laws of war that fostered humanitarianism on the battlefield and subsequently served as the jurisprudential basis for prosecuting culpable offenders—though at first aimed primarily at the atrocities of the Confederacy, not the Union. The United States was the driving force behind the creation of the Nuremberg and Tokyo tribunals that put World War II war criminals on trial—though of course few Americans would have stood for or been able to conceive of an international war crimes investigation of Allied conduct during the war. Washington in the 1990s led the international community once again in constructing global judicial mechanisms, this time to target the liable generals and *génocidaires* of Yugoslavia and Rwanda. But at the same time, concerns about actual and potential infringement of U.S. sovereignty roiled domestic politics.

In looking at the broad picture, however, America has more often than not demonstrated fidelity to the core principle of international justice: war criminals should not receive impunity for their horrendous actions.

Founding Aspirations

America's Declaration of Independence was self-consciously intended as a global manifesto as well as a national one. The principles of the eighteenth-century Enlightenment—law, liberty, progress, and reason—came to serve as the basis for twentieth-century international justice. In 1625, the Dutch jurist Hugo Grotius, the grandfather of international law, articulated the natural rights of human beings in the context of law.[2] In its revolutionary assertion of natural rights, the Declaration of Independence affirmed that the U.S. government in theory if not

in practice was established to reflect the equality, universality, and naturalness of rights.

As such, the nascent United States became the rhetorical standard-bearer of the Enlightenment. This self-awareness shaped the outlook of the United States toward the rest of the world. Americans "believed their own fate was in some way tied to the cause of liberalism and republicanism both within and beyond their borders."[3] Benjamin Franklin asserted that America's "cause is the cause of all mankind." John Adams remarked that the colonies waged the rebellion "as much for the benefit of the generality of mankind in Europe as for their own." Thomas Jefferson wrote that the westward expansion of the new nation would advance liberal ideals, in keeping with an American ethos that the global spread of republican institutions and the upending of tyrannies would bring a more peaceful and prosperous world. He and other founders saw the French Revolution as part of this global movement. John Marshall said: "I sincerely believed human liberty to depend in a great measure on the success of the French Revolution."[4] In sum, the framers asserted they had a national interest in the ideological upheavals unfolding beyond America's shores.

Of course, the rhetorical promises to export the values of the American Revolution abroad did not extend to large segments of society at home, including slaves, other non-whites, Native Americans, and women. The notions of "women's rights" and political equality were radical when they came up at all.[5]

Suppression of Piracy and Defense of Free Trade

In the decades following its founding, the United States also positioned itself as a promoter of the freedom of the seas and free

trade. In defending these principles, America emerged as an active opponent of piracy in the early nineteenth century. Pirates were seen as operating in direct opposition to the laws of nations and norms of the civilized world.[6] The freedom of the seas served U.S. national interests, allowing America as an expanding seafaring nation to engage safely in commerce.

Overarching the discussion of maintaining the freedom of the seas was the American aspiration for free trade. Once constrained by the yoke of British mercantilism, post-independence Americans sought unfettered access to distant markets and freedom from trade restrictions. From this perspective, the same natural rights of liberty and equality outlined in the Declaration of Independence would govern U.S. commercial relations with the outside world. Free trade was the logical outward behavior of the free and dynamic society being built at home in the United States. Contemporaries harbored convictions in the correlation between free commerce among nations and transnational peace: economic interaction would help foster political harmony. "Americans viewed the pirates as a vestige of an unenlightened and vanishing time when depredations of power, not the rule of law, dictated the rhythms of trade."[7]

The Lieber Code and the Broader Codification of the Laws of War

The nineteenth century witnessed the emergence of an international movement to codify the laws of war. The United States played a role in promoting this jurisprudential movement. The mass production of the Industrial Revolution had forever altered the character of modern warfare. Battlefield combat had been totalized into mass industrial slaughter: a man-made catastrophe.

Jurists posited that the application of Enlightenment values on the field of battle would promote a humanitarian ethos and thwart wartime atrocities. With the American Civil War as the first truly modern war, President Abraham Lincoln selected Columbia College professor Francis Lieber to develop rules of land warfare to guide the Union armies. The subsequent Lieber Code became U.S. law in April 1863 and detailed a broad range of constraints, including conduct in guerrilla warfare, the treatment of captured enemy soldiers, and the handling of enemy property.[8] The Lieber Code was the first concrete legal framework in Western history created to regulate an actual war—a watershed in the history of law and war.[9]

At the conclusion of the horrific conflict, the United States set out to rebuke the violators of the new laws of war. For this emerging era of legalism in warfare, the flouting of laws required due prosecution and punishment—just as in civilian society. Georgia's infamous Andersonville prison camp earned northern wrath against the vanquished Confederacy. Designed to hold 10,000 inmates, the Andersonville prison population ballooned to 33,000 by August 1864. Interned Union soldiers died by the thousands owing to malnourishment and inhospitable conditions. Upon learning of the horrendous details, Secretary of War Edwin Stanton responded passionately, but in the language of law: "The enormity of the crime committed by the rebels cannot but fill with horror the civilized world."[10]

In consequence, a Union military commission in August 1865 indicted Henry Wirz, the commandant of Andersonville, for war crimes. Domestic military courts were the conventional venue at the time for the prosecution of war criminals. The majority of the charges centered on Wirz's deliberate murder and abuse of prisoners in wanton violation of the Lieber Code. In October 1865, the

military court ruled that the commandant was guilty of "conspiring . . . against the United States, against the laws of war, to impair and injure the health, and to destroy large numbers of Federal prisoners." He subsequently was sentenced to death and was hanged in November 1865. The trial of the commandant stood as a modern landmark in the legal regulation of war. In the following decades, the groundbreaking American statute became the blueprint for European efforts to codify their own laws of war.[11]

The Lieber Code did not, however, protect Native Americans under siege from U.S. soldiers in the American West. While Union prisoners were suffering at Andersonville, in November 1864, 700 U.S. soldiers slaughtered 28 men and 105 women and children of the Cheyenne and Arapaho tribes at Sand Creek in Colorado. The same laws governing the treatment of Confederates—white Americans—failed to shield the "savages" in the American West from cruelty.[12] In contrast to the fate of the commandant of Andersonville, no one was held responsible for the massacre at Sand Creek. Non-white peoples still were excluded from the liberalism of the United States.

By the late nineteenth century, the United States' original endeavor to contain the horrors of modern war through legal means had spread to Europe. Delegates from twenty-six nations, including the United States, convened in The Hague, the Netherlands, in 1899. The resulting multilateral accord specified rules on the treatment of prisoners, casualties, and spies as well as detailing procedures for capitulation and neutrality. The legal paradigm the Lieber Code introduced was broadened in scope. The American representatives were more ambitious than their European counterparts at The Hague. The United States proposed the creation of the Permanent Court of Arbitration that would resolve disputes between states in hopes of preventing

needless bloodshed. Rather than simply placing parameters around the waging of war, the American delegation put forth bold (often overreaching) designs to revolutionize the way international relations were conducted. The United States wanted to mitigate the menace of international anarchy with a supersovereign institution. The proposed international court of arbitration reflected the objective, as explained by American delegate Joseph Choate, to render war "an anachronism, like dueling or slavery, something that international society had simply outgrown."[13] The Hague Convention of 1899 catalyzed optimism in the West that the power of law would usher in a more peaceful twentieth century.

At the behest of President Theodore Roosevelt, forty-four nations gathered once again at The Hague in 1907 to revise the first Hague Convention. The second summit boasted of the same mission: to "serve the interests of humanity and the ever progressive needs of civilization by diminish[ing] the evils of war." The general laws and customs of war were expanded from the 1899 Hague Conference.[14] In addition, the United States aspired to enhance the scope of the new Permanent Court of Arbitration. The secretary of state encouraged the American delegation to advance "international justice and peace." Choate remarked at the global summit, "And so at last, after three centuries, will be realized the dream of Grotius, the founder of international law, that all civilized nations of the earth will submit to its dictates, whether in war or peace."[15]

Despite the lofty rhetoric supporting international jurisprudential structures, no participant, including the United States, harbored any willingness to create an institution that would hold *individual* war criminals to account. In adherence to precedent, domestic courts would remain responsible for enforcing the laws

of war.[16] There were limits to the American willingness to submit to international bodies.

The Paris Peace Conference 1919: War Crimes Trials and the Fourteen Points

In the face of the unparalleled scope and shocking brutality of the Great War, the United Kingdom and France crafted elaborate judicial designs to bring Germany's Kaiser Wilhelm II and other accused war criminals to account. Over the course of the four-year slog, Germany unleashed merciless tactics on the land, at sea, and in the air that repulsed the moral consciences of the Allies. The conduct of Germany, including unlimited submarine warfare and the strategic air bombing of London, shattered the humanitarian hopefulness and idealism that had been building along legal lines over the preceding century. The spirit of the Hague Conventions was undone.[17] In the eyes of the Allies, the barbarism of Germany signified a treacherous regression into medievalism: the twentieth century could not tolerate a return to fourteenth-century ideas about acceptable conduct in wartime.

As a result, from the British perspective, the Teutonic assault on Enlightenment values would be parried with the reinforcement of those principles. The British and French delegations at the 1919 Paris Peace Conference pressed the Allies to allow for unprecedented multinational tribunals to punish German war criminals, including the Kaiser, for their atrocities. In January 1919 the Allies established the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties. Its purview was to ascertain guilt for the authorship of the Great War and for the war crimes committed. Over the next two months, British and American delegations clashed over the

proper venue for the judicial punishment of the Germans. This time it was the American side resisting the forward-leaning British. The secretary of state maintained that there was no precedent for trying heads of state for crimes committed by their subordinates: the trial of the Kaiser would violate the legal precept of ex post facto. In addition, according to the Americans, the notion of "laws and principles of humanity" articulated by the commission was too vague to be judicially salient.[18]

The United States did not favor impunity for German war criminals. Instead, and in contrast to the enthusiasm for the potential of the Permanent Court of Arbitration, Washington was suspicious of super-national judicial organs. Relying on precedent, the secretary of state proposed a more conventional mechanism to prosecute the Germans: the United States, along with each of the aggrieved allies, would erect "a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war" for crimes against its citizens and property.[19] In its *Memorandum of Reservations*, the U.S. delegation reaffirmed that "those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal." However, in the end, the Americans were outvoted.[20] The commission, responding pragmatically to the fact that Germany had waged war on many countries, recommended a veritable revolution in international law: international courts, not domestic ones, would hold individual war criminals responsible for their transgressions.

Despite America's obstructionism on the commission, Washington had at times voiced support for the punishment of German war criminals. The First World War was a less costly and searing experience for the United States than for its European allies. In consequence, the Europeans pursued war crimes tri-

bunals with much more determination. The German actions that left American noncombatants dead, however—unlimited submarine warfare—did indeed arouse the United States to call for postwar punishment. After the May 1915 sinking of the *Lusitania*, which killed 128 American citizens, Washington warned Berlin that the United States would seek "strict accountability." Using the language of law, not just war, the secretary of state demanded that "the officer of the German Navy responsible for the sinking of the *Lusitania . . .* be punished for having committed a lawless and inhumane act in thus causing the death of citizens of the United States." In the aftermath of the *Lusitania*, President Woodrow Wilson even privately entertained the notion that this wanton violation of international law should be countered with international justice. The United States' declaration of war against Germany in April 1917 focused on the war crime of unlimited submarine warfare, condemning the Second Reich for discarding "all restraints of law or of humanity." Arriving in France in December 1918, the president again foretold "the certainty of just punishment" for war criminals.[21] While America was dubious at Paris of unprecedented multinational tribunals, it is relevant that the United States shared the same core legal objective as the Europeans: war criminals should not be immune from justice.

The United States did accommodate the Europeans' drive for postwar justice, but sought to make it less sweeping. Compromises among the peacemakers led to the passage of Articles 227 and 228 of the Versailles Treaty. Article 227 charged the Kaiser with "a supreme offense against international morality and the sanctity of treaties." The indictment was political and moral in nature—based on "international morality," not international law. Nonetheless, Article 227 was revolutionary in holding a head of state to account. (The trial of the Kaiser would never

come to fruition: the Netherlands, where the German monarch fled after the war, refused to extradite the royal fugitive.)

Article 228 called upon Germany to extradite hundreds of war criminals for trial at the hands of the Allies. To ameliorate the fear that the trials would further destabilize Germany, the Allies were later reluctantly pressured into allowing the German Supreme Court to try these individuals instead. The trials at Leipzig devolved into a farce. Only a dozen accused criminals were eventually tried. Those convicted received light jail sentences.[22] The Leipzig experience was on one hand a cautionary tale about the political risk potentially posed by holding the perpetrators to account, and on the other a cautionary tale about the risk of impunity when the vanquished are responsible for assessing the wartime conduct of their own citizens. The inherent danger in "victors' justice" is vengefulness. The inherent danger of local justice is impunity. The desire for a procedure that mitigates these risks is the origin of the idea of international justice.

Despite episodic rumblings that the United States would seek justice against liable German submariners, the American delegation focused its energies on Wilson's Fourteen Points. Above all, Wilson aspired to capitalize on the historic global summit to further progressive principles and erect a new liberal international order in the hope of averting another European catastrophe. For the United States, war crimes tribunals were a secondary concern. The liberal tenets that Wilson laid out in his Fourteen Points—self-determination, democratic government, international law, and collective security—became hallmarks of twentieth-century international relations, contending for influence with the more "realist" school that sees great-power conflict as ameliorable, if at all, only by carefully maintaining a balance of power.[23] "More than any American administration before or since," political sci-

entist Gary Bass has noted, "the Wilson administration based its vision of world order on international law."[24] Wilson tapped into the broader American tradition of desire for a rule-based world—to be sure, rules not imposed on Americans by others, but written by Americans. Wilson roundly rejected realpolitik and a balance-of-power calculus. He envisioned a "community of power" that would promote law and justice. Wilson deemed the enterprise to try the Kaiser too punitive and retroactive: the introduction of collective security was instead forward-looking.[25] Both the Americans and the Europeans worked to advance liberal ends, but differed on the means (not for the last time). And of course the Second World War was a stark reminder of the limits of idealism, the ongoing relevance of power, and the danger of neglecting serious threats to international peace.

Nuremberg and Tokyo

The crimes the Nazi regime committed during the Second World War inspired a renewed, ultimately successful, effort to bring liable parties to justice in front of an international tribunal. Genuine planning to hold the German leadership accountable did not commence until the waning days of the war. In November 1943, the Moscow Declaration, signed by President Franklin Roosevelt, Soviet ruler Joseph Stalin, and British prime minister Winston Churchill, proclaimed that Germans responsible for "atrocities, massacres and executions" would be punished according to the laws of the aggrieved nations. The declaration assured that the Germans would be "judged on the spot by the peoples whom they outraged." The declaration offered local judgment for those Germans who had committed atrocities in particular places—that is, Czech judgment for those who killed

Czechs—but reserved for later the fate of major war criminals whose crimes had no geographic localization, like Adolf Hitler and Hermann Göring. Amid the passions of the war, it seemed that mass executions, not trials, would be the fate of accused war criminals. At the Tehran Conference that year, Stalin was publicly talking about executing 50,000 Germans.[26] Churchill was considering executing 50–100 top Axis criminals. However, the lobbying of Secretary of War Henry Stimson—with the strong support of the U.S. military, including Army Chief of Staff General George Marshall—convinced Roosevelt to pursue judicial means to punish offenders.

With the urging of Stimson, the president disavowed Treasury Secretary Henry Morgenthau's plan to demilitarize and partition postwar Germany and summarily execute its leadership. The stark philosophical differences between Stimson and Morgenthau boiled over into an intense White House debate in late 1944. In making his case against the Morgenthau Plan, Stimson enlisted Supreme Court Justice Felix Frankfurter, who agreed with him that the United States "must give [the Nazis] the substance of a fair trial and that they cannot be railroaded to their death without trial." Stimson felt that Soviet-style executions were beneath the United States' standards: "There would be methods used . . . in the liquidation of the military clique in Germany which the United States would not like to participate in directly." A lawyer by training, the secretary of war wanted American legal precepts to guide the Allied treatment of the Nazis. Stimson insisted that the Nazis be afforded such basic protections as notification of charges, the right of self-defense, and the ability to summon witnesses. Emboldened by the blessing of Frankfurter, Stimson wanted the international tribunal to meet the basic standards of the Bill of Rights.[27]

Roosevelt approved the War Department's plan for war crimes trials in January 1945. He wrote at the time: "The charges against the top Nazis should include an indictment for waging aggressive warfare, in violation of the Kellogg Pact."[28] The judicial scheme became official Allied policy with the February 1945 Yalta Memorandum: "Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history." Although British and American public opinion would have likely supported summary execution of Axis war criminals at least initially, elite opinion recognized that an important international norm was shifting. The Allies appreciated that history, in light of the advances in the laws of war, would disapprove of the summary executions of Germans without trials.[29]

"At the end of America's most brutal war ever, the Germans would be accorded the benefit of legal procedure as it had evolved in America, because of an American belief in the rightness of its own domestic legalism," Bass concludes. He emphasizes the leadership the United States offered in bringing the Nuremberg tribunals to reality.[30] The United States took the dramatic step of seconding U.S. Supreme Court Justice Robert Jackson to serve as the chief prosecutor at Nuremberg. He was a true believer in the international tribunal's promise that the force of law would come to replace the force of arms.[31] Twenty-four Nazis were indicted, twenty-two were prosecuted, and in the end, twelve were sentenced to death.[32] The enduring and prodigious legacy of Nuremberg was the expansion of the reach of international law by holding senior officials personally accountable in a multinational setting for their war crimes.

While orchestrating the trial of Nazi war criminals in Europe, the United States also led the effort to hold Japanese war crimi-

nals to account. U.S. General Douglas MacArthur, the Supreme Commander for the Allied Powers in the Pacific, enjoyed the most influential role in steering the efforts to punish the Japanese. The international lawyer M. Cherif Bassiouni has commented, "Virtually every aspect of justice in the Far East was guided by MacArthur's views and his political perspectives on the region."[33] MacArthur decreed the establishment of the International Military Tribunal for the Far East in January 1946. The United States led the investigation of war crimes and drew up the rosters of the accused Japanese.

The procedure was fraught, however, with political considerations and a sense of arbitrariness. The "American Caesar," not the chief prosecutor, rendered the most significant decision of the whole endeavor: to grant Japanese Emperor Hirohito immunity. To several Americans, the United States' pragmatic and overriding concerns about ensuring a smooth occupation of Japan tarnished the legal integrity of the project. A senior American military intelligence officer blasted the proceedings as the "worst hypocrisy in recorded history."[34] To others, MacArthur's perspective on the need to strike a balance between competing goods was the correct course. Sitting in Tokyo from May 1946 to November 1948, the tribunal, which consisted of eleven judges from various nations, tried twenty-five senior military and political authorities for war crimes. Though the tribunal handed down stringent punishments, over the ensuing years, the Americans utilized their authority to grant clemency and shorten the prison sentences of convicted war criminals.[35] While the United States strove to punish those responsible, the realities of the occupation shaped the Tokyo tribunal.[36]

Of course neither the European nor the Pacific judicial procedures contemplated investigating the actions of the victors in winning the war, from Dresden to Tokyo to Hiroshima and

Nagasaki—any more than William Tecumseh Sherman's "hard war" March to the Sea in 1864 was subjected to legal scrutiny.

American Advocacy in the Early Efforts to Form an ICC

In the wake of the World War II international tribunals, the newly formed United Nations General Assembly, at the request of the United States, in 1946 affirmed the broad principles of Nuremberg. The principles Stimson and Jackson passionately championed—the universal accountability of individuals for war crimes and aggression—began to take root in the theory if not the practice of international law.

The idea for the creation of a permanent international criminal court gained momentum in the United Nations in the optimistic postwar environment of international cooperation. In 1948 the United States lobbied for the inclusion of language in the Genocide Convention that would call for the establishment of such a court. The American representative on the presiding committee noted that "it was precisely because it had been felt that national courts might not be sufficiently effective in the punishment of genocide that States had realized the need for an international convention on the subject."[37] This statement underscores the evolution in U.S. policy toward international justice that had unfolded over the decades. Three decades earlier, the American delegation at Versailles was advocating the use of domestic courts to try German war criminals. In response to American pressure in the 1940s, in the text of the resolution passing the Genocide Convention, the General Assembly instructed its 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."[38]

Subsequently, in 1951, the Special Committee of the General Assembly drafted a working statute for the creation of the court. Two years later, another UN committee revised the existing plan to accommodate the reservations of member states. This 1953 blueprint outlined an envisioned court that would receive jurisdiction through convention, special agreement, or unilateral decision; while it would not provide for trial by jury, the court would guarantee defendants many of the rights enshrined in the U.S. Constitution.[39]

Then, because of strong opposition from the United Kingdom, American enthusiasm for the court waned. A U.S. diplomat assigned to the negotiations insisted that, while Washington remained open to the project, the court should have jurisdiction only over those individuals whose states have become parties.[40] And the 1954 publication of a Draft Code of Offenses against the Peace and Security of Mankind, listing thirteen indictable international crimes, became a stumbling block in the establishment of the judicial organ. The states responsible for the draft could not agree on the definition of "aggression."[41] Since the prosecution of bellicose leaders who waged expansionist wars would be one of the central duties of the court, there was little reason to further contemplate the venture until consensus was reached.

The cold war standoff between the two superpowers frustrated any meaningful progress on the issue. The Soviet Union, with veto power in the Security Council, interpreted the proposed court as an infringement on its sovereignty and became a stalwart opponent.[42] Although the UN General Assembly passed a nonbinding resolution defining aggression in 1974, the language has been subject to sharp criticism ever since, and negotiators of the Rome

Statute themselves were unable to come to agreement, putting the question off to deliberations that are now under way. Plans for an international criminal court continued to flounder in the contentious atmosphere of cold war politics.[43]

America's Role in the Modern Movement to Form an ICC

The reshaping of the geopolitical landscape in the waning years of the cold war generated a new opening for pursuit of an international criminal court. The difficulty that states encountered in prosecuting two mounting transnational crimes—terrorism and drug trafficking—spurred the international community to seek a global forum to more effectively address the two concerns. As such, the intended purview of the court pivoted away from war crimes and genocide toward terrorism and narcotics. National pride and concerns about sovereignty rendered many governments reluctant to extradite their own citizens to foreign judicial bodies. Other states had scant interest in prosecuting suspects at all or simply lacked the witnesses and evidence to do so. The unwillingness of Libya to extradite to the United States Libyan citizens accused of orchestrating the 1988 terrorist bombing of Pan Am flight 103 exemplified the growing international conundrum. The idea began to take hold that a "neutral" judicial forum might make it easier for states like Libya to be more cooperative. States harboring suspects would be more inclined, in this view, to extradite suspects to an international court. In the absence of such judicial machinery, states resorted to ad hoc measures, such as sanctions in the case of the United States and Libya, to enforce the law.[44] By the 1990s, the existing international criminal law system had revealed plenty of shortcomings. Traditional concepts of sov-

ereignty, jurisdiction, and state responsibility were evolving in response to transnational threats. Many had come to believe that a permanent, formal, and legitimate judicial mechanism was required to prosecute such elusive criminals, though concerns about sovereign rights remained.

American support in both governmental and nongovernmental circles emerged amid this renewed campaign for an international criminal court. The American Bar Association as early as 1978 urged the State Department to start negotiations to create a court to try cross-border crimes of hijacking and violence against diplomats. (The ABA would reinforce its advocacy in 1990 and again in 1992.)[45] The U.S. Congress's enactment of the Omnibus Diplomatic Security and Anti-Terrorist Act of 1986 broadened U.S. jurisdiction to include foreign nationals who committed crimes that injured American citizens. This legislation codified the United States' commitment to bring certain violent criminals to justice irrespective of political boundaries. Reflecting the consensus of the American legal community, in 1987 the Restatement (Third) of the Foreign Relations Law of the United States affirmed U.S. jurisdiction over "conduct outside . . . [U.S.] territory that has or is intended to have substantial effect within its country."[46] The next step in this evolutionary process targeted transnational fugitives: the 1988 Anti-Drug Abuse Act expressed the interest of Congress in an international criminal court designed to prosecute drug traffickers.[47] The U.S. House of Representatives, in a nonbinding resolution, broadened this appeal the following year: "[The United States] should pursue the establishment of an International Criminal Court to assist the international community in dealing more effectively with those acts of terrorism, drug trafficking, genocide and torture."[48] Through these legislative acts and resolutions, the United States codified and promoted the view

that international criminals should not be allowed to hide behind state sovereignty and remain immune to accountability. The 101st Congress in October 1990 enacted H.R. 5114, recommending that the president explore the creation of an international criminal court in hopes of more effectively combating egregious transnational crimes.[49]

The push in the Democratic-majority Congress for the court was met with cautious pessimism in the Republican White House of Ronald Reagan and George H. W. Bush. However, Iraqi dictator Saddam Hussein's invasion and war crimes against Kuwait in the Persian Gulf War heralded a reinvigorated spirit of international unity and judicial accountability. That the UN Security Council was able to rally together for the first time to act collectively and repulse an act of aggression fostered this attitudinal shift. The Executive Branch began to share some of Congress's enthusiasm for an international criminal court. Both Secretary of State James Baker and Undersecretary of State Robert Kimmitt told Congress in September 1990 that the court deserved serious consideration from the White House.[50] Nevertheless, the White House was still wary. The American stance in the following years at the Sixth Committee of the UN International Law Committee's negotiations over the court remained "ambivalent, if not negative."[51]

The Democratic Congress continued to vocalize its support for a court. Senate Joint Resolution 32 of 1993—dubbed the International Criminal Court Act—called "for the United States to support efforts of the United Nations to conclude an international agreement to establish an international criminal court." The text of the resolution noted that the judicial body would "serve the interests of the United States and the world community" and that "the United States delegation should make every

effort to advance this proposal at the United Nations." According to the legislation, the freedom and security of the international community depended on institutionalizing the rule of law at the global level. The Senate specifically cited the legacy of the post–World War II tribunals as demonstrative that "fair and effective prosecution of war criminals could be carried out in an international forum."[52] Despite Washington's common reference to the spirit of Nuremberg, serious concerns about the court's jurisdiction and powers remained.

The Balkan and Rwanda Ad Hoc Tribunals

The atrocities of the wars in the former Yugoslavia in the 1990s and the 1994 genocide in Rwanda cried out for accountability. The conclusion of the cold war fostered a political climate favorable to such a goal for the first time in half a century. With the demise of the Soviet Union, the United States emerged as the dominant power on the Security Council. The Clinton administration used this unrivaled position to urge the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, the first such tribunals since the Second World War. According to international lawyer John Cerone, "It is clear that without the support of the United Sates, the ICTs would never have come into being."[53] The State Department viewed the proceedings of the ICTR as imperative to the future of peace and stability in Central Africa.[54] In light of concentration camps being constructed once again in Europe, U.S. Permanent Representative to the UN Madeleine Albright drew on the tradition of American advocacy for international justice to promote ICTY: "The Nuremberg principles have been reaffirmed. The lesson that we

are all accountable to international law may finally have taken hold in our collective memory."[55]

At the outset, it seemed that the tribunals were stillborn. The ICTY was underfunded. Disturbed by this development, Washington provided over $93 million to the ICTY. Financial and in-kind contributions aside, however, the American record is more ambiguous. For fear of casualties, the Clinton administration dragged its feet in dispatching soldiers to war-torn Bosnia. This unwillingness to deploy American forces to the Balkans undermined the capabilities of the ICTY prosecutor. For example, the State Department and the Pentagon—fearing Serb retaliation—declined in June 1993 to provide military engineers to aid with the forensic investigation of a mass grave in Croatia.[56] The United States and its NATO allies were reluctant to task NATO troops with arresting accused war criminals. It took some time to reorient the U.S. intelligence community toward the provision of useful intelligence to the ICTY prosecutor. This was due to many factors, including the collection of information from sources and methods that could not be disclosed, development of procedures for declassification of intelligence and acceptable protection of classified information, staff shortages to review the ICTY's requests for information, and the lack of specificity in many of the ICTY requests. Shortly after the Srebrenica genocide of July 1995, aerial imagery flowed more quickly to the ICTY. By 1998 the United States had become more active in seeking to arrest indicted war criminals and increasingly forthcoming with its own intelligence. The Kosovo conflict in 1999 accelerated the government's cooperation with the ICTY. The United States also exerted diplomatic and financial pressure on Serbia to arrest Ratko Mladic and Radovan Karadzic, the two most notorious fugitives.

The Saddam Trial

Human rights proponents long sought the punishment of Saddam Hussein for crimes committed during his brutal years as president of Iraq. Following the 1990 invasion of Kuwait, government officials also raised the possibility of a trial for war crimes, including both British Prime Minister Margaret Thatcher and President George H. W. Bush.[57] The European Commission drafted a letter to the UN secretary-general requesting that he examine trying Saddam for violations of the Genocide Convention after Saddam's suppression of the Kurdish revolt that followed his ejection from Kuwait by U.S.-led forces. Saddam remained firmly in power, however, despite his defeat in 1991, a fact that reflected the Bush administration's limited objectives for the first Gulf War. The Clinton administration explored several avenues to investigate and issue indictments against Saddam and his regime, including creation of an ad hoc international criminal tribunal by the Security Council similar to ICTY and ICTR, but these efforts met firm opposition from some Security Council members. It was not until the 2003 invasion of Iraq and subsequent capture of Saddam that the former Iraqi leader would be put on trial, in a "hybrid" process that was widely criticized for a lack of due process, secrecy, a rush to mete out punishment, and a botched and controversial execution.

After Saddam's capture, many sought his trial before an international tribunal or hybrid court. The rift in the Security Council over the Iraq invasion, however, worked against efforts to mount an international trial. Countries opposing the war feared an international tribunal would confer legitimacy on the invasion after the fact. European opposition to capital punishment magnified differences with the Americans and Iraqis.[58] Bringing Saddam

before the International Criminal Court was never a serious option. It would have required Security Council referral, a course the United States, which still actively opposed the Court, sought to avoid, and Saddam's worst crimes were outside the jurisdiction of the Court in any case, because they took place before the Court was established.

The head of the Coalition Provisional Authority, Paul Bremer, wielded veto power over decisions concerning the procedure and indictments. Critics condemned the trial for failing to meet international standards. In the end, Iraqis seeking to punish Saddam, while attempting to manifest their own sovereignty despite the American occupation, were permitted by the American-led occupation authorities to try Saddam essentially with limited outside input. The Court was staffed with Iraqi judges and Iraqi prosecutors only, with foreign experts in international law permitted to advise the court.[59]

The controversy that swirled around the flawed trial of Saddam served to weaken principles the United States had espoused in other conflicts. Perhaps the best that can be said is that having swung that far, the pendulum was poised to begin to swing back.