INTERNATIONAL CRIMINAL COURTS PRIOR TO THE SECOND WORLD WAR: AN HISTORICAL ANALYSIS OF INTERNATIONAL AND MULTINATIONAL CRIMINAL COURTS PRECEDING NUREMBERG

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ABSTRACT

The International Criminal Court (ICC) is arguably the international community's greatest achievement of the 20th Century. The Rome Statute of the ICC was adopted by an overwhelming majority of States on July 17, 1998 and entered into force on July 1, 2002. The ICC maintains jurisdiction over the worst international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. While the Rome Statute is only twenty years old, its evolution dates back over a century. Much literature on international criminal tribunals begins with the Nuremberg Trial after the Second World War. This paper analyzes the evolution of international criminal courts prior to the Second World War to gain a deeper understanding of the evolution of the International Criminal Court.

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INTRODUCTION

The Intentional Criminal Court ("ICC") adopted the Rome Statute by an unrecorded vote on July 17, 1998.[1] Excluding abstentions, 120 States voted in favor while seven States voted against the adoption of the Rome Statute.[2] The Rome Statute entered into force on July 1, 2002, after the ratification of 60 States as required under Article 126.[3] The ICC has jurisdiction over "the most serious crimes of concern to the international community as a whole,"[4] which include genocide, crimes against humanity, war crimes, and the crime of aggression.[5] The purpose of the ICC is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of these crimes."[6] The Rome Statute applies to all persons without distinction based on official capacity, including heads of State.[7]

Establishment of the ICC spanned over 150 years. More immediately influencing the ICC's creation were the International Criminal Tribunal for the former Yugoslavia ("ICTY")[8] and the International Criminal Tribunal for Rwanda ("ICTR"),[9] both founded by the United Nations Security Council in the 1990s. However, these tribunals are generally not considered the first international criminal tribunals. The International Military Tribunal and the International Military Tribunal for the Far East were created to prosecute Nazi and Japanese war criminals after the Second World War and are traditionally considered the first international criminal tribunals.

To many international legal scholars, it is common practice to link the beginning of international criminal justice to the International Military Tribunal (often referred to as the Nuremberg Tribunal). The Nuremburg Tribunal was founded to prosecute major war criminals of the Nazi regime after the Second World War. Over the past 75 years, scholars and

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1. Votes were counted but not recorded. There is no dispute that China, Israel, and the United States were among the seven that voted against the Rome Statute; however, there is some dispute as to who the other four states were.

2. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *9th Plenary Meeting*, ¶ 10, U.N. Doc. A/CONF.183/SR.9 (July 17, 1998).

3. *See generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

4. *Id.* at pmbl., art. 5.

5. *Id.* art. 5.

6. *Id.* at pmbl.

7. *Id.* art. 27(1).

8. S.C. Res. 827, ¶ 2 (May 25, 1993).

9. S.C. Res. 955, ¶ 1 (Nov. 8, 1994).

government officials have continuously praised the Tribunal. Henry Stimson, former Secretary of War who was partially responsible for establishing the International Military Tribunal, called it a "landmark in law."[10] Indeed, one member of the Nuremberg Tribunal described the judgments as "a landmark in law, a turning point."[11] William Schabas, a leading international criminal law and human rights expert, correctly asserts that centuries from now the Nuremberg Tribunal will be considered one of the "signposts of the progress of humanity."[12]

In the same breath, Schabas and others acknowledge that the ICC traces its roots to as early as the aftermath of the First World War.[13] This is often accredited with brief discussion and a footnote on the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.[14] To date, few publications critically analyze the debates at the Paris Peace Conference on establishing an ICC through archival research of the original minutes of the meetings of the Commission.[15]

This paper analyzes the evolution of ICCs prior to the Second World War and demonstrates that the International Military Tribunal should not be considered the beginning of international criminal justice, although the Tribunal was highly significant. In fact, the Tribunal was preceded by decades of policy debates for establishing ICCs. This research is the result of qualitative analysis of the archives, including official government documents, personal collections, and minutes of the meetings of war

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10. *See generally* Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOR. AFF. 179 (1947).

11. B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, 100 RECUEIL DES COURS 323, 355 (1960).

12. WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIALS 1 (2012).

13. *Id.* at 6.

14. *See generally* VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES (1919), *reprinted in* PEACE PAMPHLET NO. 32, DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (1919); *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. OF INT'L L. 95 (1920).

15. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR ch. 5 (1982); *see generally* Harry M. Rhea, *The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Contribution to International Criminal Justice After World War II*, 25 CRIM. L. F. 147 (2014). It should be noted that other scholars have written on the *realpolitik* and international criminal justice at the Paris Peace Conference. *See* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS ch. 3 (2000).

crimes commissions. This paper also analyzes written records of government debates over international criminal tribunals.

I. BRIEF HISTORY OF INTERNATIONAL CRIMINAL COURTS PRIOR TO WWI[16]

With few exceptions, scholars reached the consensus that the first international criminal trial occurred in 1474 when the Archduke of Austria ordered the trial of Sir Peter von Hagenbach for "trampl[ing] under foot the laws of God and man."[17] On May 4, 1474, 28 justices representing the Holy Roman Empire tried Hagenbach for allowing his troops to rape, kill, and destroy the properties of innocent civilians, including women and children.[18] One author describes Hagenbach's crimes as "unique in their ferocity even in those rough and dangerous times."[19] Consequently, the Holy Roman Empire convicted and executed Hagenbach for his crimes.

Scholars question the international nature of Hagenbach's prosecution.[20] Although the Holy Roman Empire was dissolving, it continued as one entity while its subjects remained under one imperial power. For example, Switzerland had not disassociated herself from the Empire until the Peace of Basel in 1499, 25 years after the trial.[21] Moreover, neither Switzerland nor any other State was recognized as independent until the

16. *See generally* THE HIDDEN HISTORIES OF WAR CRIMES TRIALS (Kevin Jon Heller & Gerry Simpson eds., 2013) (providing the history of war crimes trials, including national and mixed tribunals).

17. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1 (4th ed. 2011); *see also* GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 465 (1968); Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of the International Criminal Law Regime*, *in* THE LAW OR WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 31, 38 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997); Georg Schwarzenberger, *A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474*, MANCHESTER GUARDIAN (LONDON), Sept. 28, 1946, at 4; *see generally* M. Cherif Bassiouni & C. L. Blakesley, *The Need for an International Criminal Court in the New World Order*, 25 VAND. J. OF TRANSNAT'L L. 151 (1992); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991).

18. SCHWARZENBERGER, *supra* note 17, at 465

19. ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 19 (1962).

20. *See* SCHWARZENBERGER, *supra* note 17, at 465; *see also* McCormack, *supra* note 17, at 38; *see generally* SCHABAS, *supra* note 17; Bassiouni & Blakesley, *supra* note 17; Bassiouni, *supra* note 17; Schwarzenberger, *supra* note 17.

21. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 61 (1954).

Peace of Westphalia was signed on October 24, 1648, after the 30-Year War.[22]

International legal scholar Georg Schwarzenberger, on the other hand, argued that the Hagenbach trial was "the first international war crime trial" and should be considered the forerunner of the International Military Tribunal.[23] Schwarzenberger, recognizing the Holy Roman Empire remained one entity until 1648, argued it "had degenerated to such an extent that relations between its members were conducted on a footing hard to distinguish from international relations," and that the relations between territories within the Empire were "more comparable and akin to those of international law than municipal law."[24]

If the Holy Roman Empire degenerated to the extent that its units were independent, then Schwarzenberger accurately argued that Hagenbach's trial should be considered a forerunner to the International Military Tribunal. However, Schwarzenberger inaccurately called the Hagenbach trial an "international war crimes trial." An "international" tribunal did not conduct the trial, as the Archduke of Austria—who can hardly be considered an international authority—established the tribunal. With limitations on the court's participants, the tribunal only rises to the level of a multinational tribunal. Yet, the tribunal remains a forerunner to the International Military Tribunal, which, too, was an ad hoc tribunal with limitations on the court's participants—the United States, United Kingdom, Soviet Union, and France—making it a multinational tribunal, not an international one.

Little known literature remains considering international prosecutions over the four centuries following Hagenbach's trial. One reason for the lack of international criminal tribunals was the Peace of Westphalia that established a policy of sovereignty between States, which meant that States would not interfere with each other's affairs. Therefore, it was up to each State to police its own affairs, including prosecuting violators of the law of nations through national courts.

More than two centuries after the Peace of Westphalia, the Geneva International Conference of 1863 established the International Committee of the Red Cross ("ICRC").[25] The following year, States adopted the Geneva Convention for the Amelioration of the Condition of the

22. *Id.* at 62.

23. Schwarzenberger, *supra* note 17, at 4.

24. SCHWARZENBERGER, *supra* note 17, at 464.

25. *Resolutions of the Geneva International Conference*, INT'L COMMITTEE RED CROSS, *available at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/115?OpenDocument (last visited Mar. 7, 2019).

Wounded on the Field of Battle. In 1865 an Italian jurist, Pasquale Fiore, wrote a book urging the creation of an ICC to determine States' rights during armed conflict, and suggesting that an international army be established to enforce the court's decisions.[26] However, Fiore's views were considered extreme and were therefore unheeded.[27]

One of the founding members of the ICRC, Gustave Moynier, originally thought that public criticism of Geneva Convention violations would be strong enough to deter future violators. Moynier believed that an ICC was unnecessary and perhaps problematic since, in his opinion, "a treaty is not a law imposed by a superior authority on its subordinates," but "it is only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them."[28] Moynier's position rested on the belief 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."[29]

Moynier later became 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 Convention.[30] 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.[31]

Consequently, at a meeting of the ICRC on January 3, 1872, Moynier presented a proposal for an international criminal tribunal to punish violators of the Geneva Convention of 1864.[32] This was the first proposal for a permanent ICC.[33] No State, however, publicly considered Moynier's draft.[34] At this time, an ICC was not welcome.

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26. 1 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS 5 (1980).

27. *Id.*

28. PIERRE BOISSIER, FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 282 (1985).

29. *Id.*

30. *Id.*

31. *Id.* at 282-83.

32. *See* Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INT'L REV. OF RED CROSS 57, 72-74 (1998) (reproducing Moynier's draft convention for an international criminal court).

33. *See generally id.* at 57-74.

34. *Id.* at 65.

Nearly 30 years later in 1899, Russia's Czar Nicholas II called for an international conference for the purpose of limiting armaments.[35] From May 18 to July 29, 1899, 26 States sent a total of 100 representative delegates to The Hague for the first Hague Peace Conference.[36] The Czar believed the conference would establish "the principles of justice and right, upon which repose the security of states and the welfare of peoples."[37] At the conclusion of the conference, four conventions were adopted: (1) Convention for the Pacific Settlement of International Disputes;[38] (2) Convention Respecting the Laws and Customs of War on Land;[39] (3) Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864;[40] and (4) Convention for Prohibiting Launching of Projectiles and Explosives From Balloons.[41] The most notable convention was the Convention Respecting the Laws and Customs of War on Land, which codified many general principles of customary international humanitarian law. However, there was no mention in the convention that violations were crimes and should result in prosecution. The Convention for the Pacific Settlement of International Disputes established the Permanent Court of Arbitration, which does not have criminal jurisdiction. Establishing the court, however, symbolized that the international community was yearning for international justice through law. As Tryon explains of adopting the convention:

> [t]his is sometimes called the Magna Carta of the coming World State. It contains a declaratory preamble recognizing the "solidarity uniting the members of the society of civilized nations," and expressing the desire of the signatory powers to extend the "empire of law" and strengthen "the appreciation of international justice." The belief is expressed that "the permanent institution of a Tribunal of Arbitration accessible to all in the midst of independent powers, will contribute effectively to this

35. U.S. DEP'T OF STATE, *Translation of a Document Delivered by Count Mouravieff, Russia Imperial Minister of Foreign Affairs, to Ethan Allen Hitchock, Ambassador of the United States, on Wednesday, August 12 (24), 1898, reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 541-42 (1901).

36. FERENCZ, *supra* note 26, at 7-15.

37. J. L. Tryon, *The Hague Conferences*, 20 YALE L. J. 470, 472 (1911).

38. *Pacific Settlement of International Disputes (Hague I), in* 1 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 230 (1899).

39. *Laws and Customs of War on Land (Hague II), in* BEVANS, *supra* note 38, at 247.

40. *Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864 (Hague III), in* BEVANS, *supra* note 38, at 263.

41. *Prohibiting Launching of Projectiles and Explosives from Balloons (Hague IV), in* BEVANS, *supra* note 38, at 270.

> result." By the first article of the convention, "the contracting powers agree to use their best efforts to insure the pacific settlement of international differences."[42]

A second Hague peace conference commenced on June 15, 1907, when 44 States sent 256 delegates to the Knights Hall located in the center of The Hague for the second time in ten years. The second conference ended on October 18, 1907, but not before adopting another Convention on Laws and Customs of War on Land.[43] This convention, like its predecessor, did not indicate that violations were crimes and that violators should be prosecuted. It was agreed after the second conference that a third conference would take place within no more than the eight years that had separated the first two conferences.[44] However, the First World War commenced in 1914, preventing the anticipated third conference.

II. POST WORLD WAR I

A. International High Tribunal

After signature of the armistice with Germany on November 11, 1918, the Allied powers of the First World War convened a Preliminary Peace Conference in Paris ("Paris Peace Conference") to discuss post-war policies that would be adopted as a permanent peace treaty. During negotiations, the Allied powers faced a major dilemma of whether to create an ICC to prosecute war criminals, particularly Germany's former Emperor Wilhelm II. On January 18, 1919, State delegates at the Paris Peace Conference were invited to submit memoranda on the responsibilities of the authors of the war and punishment of war criminals.[45] A commission was established the following week to examine the "Responsibility of the Authors of the War and the Enforcement of Penalties."[46] The resolution establishing the commission read as follows:

> [t]hat 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:

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42. *Id.* at 474.

43. *Id.* at 631.

44. *Final Act of the Second International Peace Conference* (Oct. 18, 1907), in JAMES B. SCOTT, THE REPORTS OF THE HAGUE CONFERENCES OF 1899 AND 1907 207-17 (1917).

45. *Preliminary Peace Conference, Protocol No. 1, Session of January 18, 1919*, U.S. DEP'T OF ST.: OFF. OF THE HISTORIAN, *available at* https://history.state.gov/historicaldocuments/frus1919Parisv03/d3 (last visited Mar. 5, 2019).

46. *Preliminary Peace Conference, Protocol No. 2, Plenary Session of January 25, 1919*, U.S. DEP'T OF ST.: OFF. OF THE HISTORIAN, *available at* https://history.state.gov/historicaldocuments/frus1919Parisv03/d4 (last visited Mar. 7, 2019).

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 offenses.
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.[47]

The Commission was officially titled the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties." Ten States sat on the Commission: the United States, the British Empire, France, Italy, and Japan represented the five "Great Powers," while five smaller States were represented by Belgium, Greece, Poland, Rumania, and Serbia. Robert Lansing, from the United States, was elected Chair of the Commission at the first meeting.[48] He proposed establishing three sub-commissions to answer important questions.[49] Gordon Hewart, from the British Empire, stated that two sub-commissions should consider the question of an appropriate tribunal to prosecute war criminals, including Wilhelm II.[50] Lansing "emphasized the fact that the Commission was sitting to some extent as a 'Grand Jury' charged not to determine guilt, but to decide whether there was a case."[51] Lansing later wrote:

> [i]t was apparent at the very beginning of our sessions that certain members of the Commission were determined before everything else to bring the Kaiser to trial for a criminal offense before an international high tribunal of justice to be constituted for the purpose primarily of determining his guilt and imposing upon him a suitable penalty for his crimes.[52]

A memorandum, previously sent on January 18, 1919 to all delegates at the Paris Peace Conference at the first meeting, was annexed to

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47. *Id.*

48. *See Frank L. Polk Papers, Group No. 656, Series No. III, Box No. 30*, YALE UNIV. ARCHIVES, *available at* https://archives.yale.edu/repositories/12/top_containers/153825 (last visited Mar. 7, 2019) (specifically, Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Minutes of the First Meeting (Feb. 3, 1919)) [hereinafter *Polk Papers*].

49. *Id.*

50. *Id.* at 2-3.

51. *Id.* at 2.

52. Robert Lansing, *The Trial of the Kaiser: Five Great Powers to be Judges, in* 62 THE FORUM 530-31 (1919).

the Commission's minutes of its first meeting. The memorandum describes the penal liabilities of Wilhelm II, noting that he should be prosecuted in an international criminal tribunal.[53] The majority of States on the Commission, in particular the British Empire and France, favored creating an ICC to prosecute crimes that did not fall within the national jurisdiction of one of the Allied or Associated powers, as well as crimes that affected more than one State.[54] The United States was vehemently against creating an ICC and thought that where States did not have jurisdiction over crimes, there was simply no jurisdiction to prosecute.[55] The Commission encouraged States to prosecute war criminals in military courts or commissions within national jurisdictions, as these courts were already established with legal jurisdictions over war crimes.[56] The United States also favored two or more States establishing special tribunals, which would enable multiple States to prosecute war criminals.[57]

States that favored creating an ICC did so mainly for the prosecution of Germany's former Emperor Wilhelm II. Members of the Commission were confused over whether jurisdiction of the former Emperor and other high officials were within the jurisdiction of enemy national courts. Larnaude had asked "to whom the culprits would be handed over when once they had been arrested[,]" which Ernest Pollock, from the British Empire, answered, "they would have to appear before an international court."[58]

The United States stood against establishing an ICC in its entirety. Lansing was not alone; President Woodrow Wilson was also against creating an ICC. Lansing once wrote to a colleague 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."[59]

A sub-commission listed violations of the laws and customs of war prohibited by the 1907 Hague Conventions, and recommended

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53. *Polk Papers*, *supra* note 48, at 4-18.

54. *See* Preliminary Peace Conference, *Memorandum by the Representatives of the United States: Reservations to the Report of the Commission on Responsibilities* (April 4, 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* (Mar. 29, 1919), *reprinted in* THE AM. J. OF INT'L. LAW (Jan. – April 1920) [hereinafter Memorandum of Reservations].

55. *Id.*

56. *Id.*

57. *Id.*

58. *Polk Papers*, *supra* note 48, at 23 (specifically, Minutes of the Second Meeting (Feb. 7, 1919)).

59. Letter from Robert Lansing to Frank L. Polk, (March 17, 1919) (on file with Seeley G. Mudd Manuscript Library, Princeton Univ.).

establishing a "High Tribunal" for the prosecution of all persons alleged to have been guilty of offenses against the laws and customs of war and the laws of humanity.[60] The High Tribunal included only members of the Allied and Associated Powers—three persons appointed by the United States, the British Empire, France, Italy, and Japan, and one person appointed by Belgium, Greece, Poland, Portugal, Romania, Serbia, and Czecho-Slovakia.[61] The High Tribunal would apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience."[62]

A super-majority of States on the Commission strongly supported establishing the High Tribunal. The blueprint of the High Tribunal was multinational rather than international, as it remained limited to 12 States, and the majority of the international community was not invited to participate, indicating it would be a tribunal for the victors to prosecute the vanquished. The sub-commission recommended that the high tribunal be provided by the Treaty of Peace, and most members of the Commission agreed.[63] Its recommendation further stipulated:

> That the enemy Governments shall, notwithstanding that Peace may have been declared, recognize the jurisdiction of the National Tribunals and the High Tribunal, that all enemy persons alleged to have been guilty of offenses against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree, and that the Governments of such persons shall undertake to surrender them to be tried.[64]

The United States, which was against establishing an ICC and argued for prosecuting war criminals in national and multinational military tribunals, submitted two memoranda that were attached to the sub-commission's report. The first described the principles that should determine violations of the laws and customs of war.[65] The second considered the

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60. *Polk Papers*, *supra* note 48, at 50-54 (specifically, Report of Sub-Commission III on the Violation of the Laws and Customs of War: Minutes of the Third Meeting (Mar. 12, 1919)).

61. *Id.* at 53.

62. *Id.* at 53, ¶ 4.

63. *Id.* at 54.

64. *Id.* at 54, ¶ 2(a).

65. *Polk Papers*, *supra* note 48, at 55 (specifically, Annex A of the Report of Sub-Commission III on the Violation of the Laws and Customs of War: Minutes of the Third Meeting, Memorandum on the Principles Which Should Determine Inhuman and Improper Acts of War (Mar. 12, 1919)).

jurisdiction over such violations.[66] It included five rules that should apply when considering jurisdiction:

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violation thereof;
2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offenses is exercised by military tribunals;
3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offense was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offense is of the same nationality as the military tribunal;
4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and procedure or determining and punishing such violations established by the military law of the country against which the offense is committed; and
5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offenses.[67]

The United States and Japan submitted their memoranda on April 4, 1919.[68]

The Paris Peace Conference submitted its report to the Commission recommending the creation of an "International High Tribunal" for the prosecution of Wilhelm II.[69] Ultimately, the Paris Peace Conference decided to establish a "Special Tribunal" to arraign the former Kaiser for immoral offenses rather than war crimes.[70]

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66. Memorandum of Reservations, *supra* note 54.

67. *Polk Papers*, *supra* note 48, at 55-56 (specifically, Annex B of the Report of Sub-Commission III on the Violation of the Laws and Customs of War: Minutes of the Third Meeting, Proposition of the United States Delegations (March 12, 1919)).

68. Memorandum of Reservations, *supra* note 54 (specifically, Annex II); *see also* Reservations by the Japanese Delegation, Annex III, *reprinted in Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, *supra* note 54.

69. *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, *supra* note 54, at 122.

70. Lansing, *supra* note 52, at 531.

Article 227 of the Treaty of Peace between the Allied and Associated Powers and Germany read as follows:

> The Allied and Associated Powers publicly arraign Wilhelm 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 defense. 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 the punishment which it considers should be imposed.[71]

The "special tribunal" referenced in Article 227 never came to fruition, as Wilhelm II had fled to the Netherlands, which refused to extradite him for prosecution. It may look like the special tribunal would have been an ICC; however, if created, it would have been a multinational tribunal, as it would have been limited to the United States, British Empire, France, Italy, and Japan. The five "Great Powers" together would have prosecuted Wilhelm II. As a multinational tribunal rather than an international tribunal, the special tribunal in Article 227 would have been similar to the tribunal that prosecuted Hagenbach in 1474, as well as the International Military Tribunal later established in 1945. Nevertheless, the first serious international debate concerning the legality of establishing an ICC took place.

B. High Court of International Justice

The Paris Peace Conference established the League of Nations, whose charter (often referred to as the Covenant) included the first 26 articles of the Treaty of Peace.[72] Shortly 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.[73] The Committee was established in February 1920 and held meetings that same year from June 16 to July 24. At the Committee's fifth meeting, Baron Descamps from Belgium and President of the Committee, explained his "Project for the

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71. Treaty of Versailles art. 227, Jan. 28, 1919.

72. *Covenant of the League of Nations Adopted by the Peace Conference at Plenary Session, April 28, 1919,* 13 AM. J. OF INT'L LAW SUPP. 128, 128-40 (1919).

73. *Id.* at 133 (quoting art. 14: "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.").

organization of international justice."[74] He proposed that the organization of international justice include three tribunals: (1) the existing Permanent Court of Arbitration established at the Hague Peace Conference of 1899; (2) the High Court of International Justice; and (3) the Permanent Court of International Justice.[75] Descamps suggested 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."[76]

Descamps later submitted a proposal to the Committee for the establishment of the High Court of International Justice. He supported his proposal by arguing that there was consensus about the existence of crimes of an international character that victimize the international community. Descamps further argued that an international tribunal with jurisdiction to try crimes of an international character should not be established *ex post facto* when such crimes are committed in the future.[77] 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 such a court could possibly have a deterrent effect, preventing such crimes from being committed again.[78]

The Committee unanimously adopted two proposals as resolutions in its final report. The first resolution 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"[79] and the title of "the new Conference should be called the Conference for the Advancement of International Law."[80] The second paragraph of the final report 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 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.[81]

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74. Procès-Verbaux of the Proceedings of the Committee June 16th – July 24th, 1920 with Annexes, 1920 P.C.I.J. Advisory Committee of Jurists 142-43 [hereinafter Procès-Verbaux Proceedings of the Committee].

75. *Id.*

76. *Id.* at 142.

77. *Id.* at 498.

78. *Id.*

79. Procès-Verbaux Proceedings of the Committee, *supra* note 74, at 747.

80. *Id.* at 748.

81. *Id.* at 747-48.

Article 3 of the second resolution proposed creating the High International Court of Justice that would "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."[82] After much debate in the League of Nations over the resolutions adopted by the Advisory Committee of Jurists, the League did not support creating an international criminal court embodied in the High International Court of Justice. M. Henry Lafontaine, representing 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."[83] Other members of the League agreed. Yet, this was not the end of the discussion on an international criminal court in the League of Nations.[84]

C. International Criminal Court

Approximately 15 years later, on December 10, 1934, the League of Nations established the Committee for the International Repression of Terrorism.[85] A number of States sent proposals and suggestions for the Committee to consider when creating a draft convention on the repression of terrorism.[86] Among France's suggestions was a proposal to create an ICC competent to prosecute certain acts of terrorism.[87] Members of the Committee held differences of opinion as to the principle and utility of establishing an ICC, and it was agreed that it should be a separate instrument that parties to the terrorism convention could elect to freely accept.[88] On January 15, 1936, the Committee for the International Repression of Terrorism adopted its report to the Council.[89] Annexed to the report were

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82. *Id.* at 748.

83. LEAGUE OF NATIONS: THE RECORDS OF THE FIRST ASSEMBLY; MEETINGS OF THE COMMITTEES 329 (1920).

84. It should be noted the League of Nations established the Permanent Court of Justice under Article 14 of the Covenant. The PCIJ dissolved with the League of Nations during the Second World War. The PCIJ is considered the predecessor to the current International Court of Justice. The Permanent Court of Arbitration established by the 1899 Hague Peace Conference continues today.

85. *See generally Report to the Council on the Second Session of the Committee*, League of Nations Doc. C.36(I).1936.V (1936) [hereinafter *Report to the Council*].

86. *Id.* at 2, 3.

87. *See Request by the Yugoslav Government Under Article 11, Paragraph 2, of the Covenant Communication From the French Government Note by the Secretary-General*, League of Nations Doc. C.542.M.249 1934 VII (1934).

88. *See generally Report to the Council, supra* note 73.

89. *Id.*

two draft conventions: (1) a Draft Convention for the Prevention and Punishment of Terrorism;[90] and (2) a Draft Convention for the Creation of an International Criminal Court.[91]

On January 23, 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 July 15, 1936.[92] Most governments favored an international machinery to enforce violations of the Terrorism Convention. On May 27, 1937, the League of Nations passed a resolution scheduling the Conference on the International Repression of Terrorism to commence on November 1 of that year.[93] The conference included delegates from 34 States.[94] The two draft conventions were adopted on November 16, 1937, the last day of the conference.

The 1937 Convention for the Creation of an International Criminal Court (hereinafter "1937 ICC") never entered into force, since it failed to receive the sufficient number of ratifications.[95] If established, the 1937 ICC would have sat at the Hague[96] and acted as a "permanent" court in theory, since it would sit only when it seized proceedings for a violation of the Terrorism Convention.[97] The International Criminal Court would consist of judges representing State Parties to the Convention,[98] and, after their nominations, would be chosen by the Permanent Court of

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90. *Draft Convention for Prevention and Punishment of Terrorism, in Report to the Council Adopted by the Committee on January 15, 1936*, League of Nations Doc. C.36(I).1936.V, Annex 1 (1936).

91. *Id.*

92. *See generally Report Adopted by the Council on January 23, 1936*, League of Nations Doc. C.60.1936.V (1936).

93. *Convocation of the Conference on the International Repression of Terrorism*, 18 LEAGUE OF NATIONS OFFICIAL J. 308, 308 (1937).

94. They included: Afghanistan; Albania; Argentina; Belgium; Bulgaria; Czechoslovakia; Denmark; the Dominican Republic; Ecuador; Estonia; Egypt; Finland; France; Greece; Haiti; Hungary; India; Latvia; Lithuania; Mexico; Monaco; the Netherlands; Norway; Peru; Poland; Romania; San Marino; the Soviet Union; Spain; Switzerland; Turkey; the United Kingdom; Uruguay; Venezuela; and Yugoslavia. *See Convention for the Creation of an International Criminal Court*, League of Nations Doc. C.547.M.384.1937.V. (1936).

95. SCHABAS, *supra* note 17, at 5.

96. *Convention for the Creation of an International Criminal Court*, *supra* note 94, art. 4.

97. *Id.* art. 3. There would be nothing preventing the Court from gaining jurisdiction of future crimes, such as genocide and war crimes, thus becoming a permanent court in practice.

98. *Id.* art. 6.

International Justice.[99] The Convention did not define its criminal law; therefore, in determining the substantive criminal law, the judges would consider the law of the territory where the offense was committed and the law of the State of which the accused was a national.[100]

The High Contracting Parties, acting as an Assembly of State Parties, would have financed the Court and held meetings regularly to decide necessary modifications in order to attain the objects of the Convention.[101] All decisions needed to be adopted by two-thirds of the High Contracting Parties present at that meeting.[102] Member States of the League of Nations and non-Member States were able to ratify the Convention and become a member to the Court. Rather than a permanent prosecutor representing all States Parties, the State that charged the accused would prosecute the offender in the Court, unless the State on whose territory the offense was committed expressed a wish to prosecute.[103]

If the 1937 ICC had entered into force, it would have been truly an international court as its statute was adopted by a League of Nations conference of plenipotentiaries. Therefore, the Rome Statute is not to be considered the first statute adopted for a permanent international criminal court. Indeed, it was preceded by the 1937 ICC, adopted by the League of Nations by nearly 60 years.[104] Although adopted by a League of Nations conference, the 1937 Court was not a League of Nations court to the extent that the ICTY and ICTR were United Nations courts. Rather than establishing the court through resolution and coercively applying the court to its State Members, the 1937 ICC depended on States ratifying it. Excluding much legal specificity in the Rome Statute, the 1937 ICC indeed would have been similar to the current ICC.

CONCLUSION

There is a long history of prosecuting political figures through national courts.[105] The evolution of ICCs took its path through the establishment of multinational criminal courts. These courts include those

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99. *Id.* art. 7(2).

100. *Id.* art. 21.

101. *Convention for the Creation of an International Criminal Court*, *supra* note 94, art. 46(1).

102. *Id.* art. 46(4).

103. *Id.* art. 25(3).

104. *See generally id.*

105. *See generally* JOHN LAUGHLAND, A HISTORY OF POLITICAL TRIALS: FROM CHARLES I TO SADDAM HUSSEIN (2nd ed. 2008).

used for the trial of Peter von Hagenbach and the trial of Wilhelm II, inserted in Article 227 of the Treaty of Peace between Germany and the Allied and Associate Powers. The International Military Tribunal represents the epitome of a multinational criminal tribunal. The Tribunal stated in its judgment that,

> the making of the Charter was an exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered . . . 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 of one of them might have done singly.[106]

An authoritative scholar of the International Military Tribunal once wrote, "Nuremberg and Tokyo were multi-national tribunals, but not international tribunals in the strict sense . . . For the time being national or multi-national tribunals fulfill the function that belongs to an international criminal court."[107]

The Security Council created the first international criminal tribunal nearly a half century after the judgments of the Nuremberg Tribunal with the creation of the ICTY on May 25, 1993.[108] International criminal law scholar Robert Cryer asserts, "[a]s the ICTY was set up by an organ of an international organization under the powers delegated to it by States under a treaty, its basis is international."[109] The Security Council established the ICTR the following year.[110] The establishment of these tribunals influenced the adoption of the Rome Statute of the International Criminal Court on July 17, 1998 and entered into force on July 1, 2002, and, in many ways, resembles the 1937 ICC.

This is not to say the two courts are similar; there are many differences. For example, the 1937 ICC had criminal jurisdiction only over acts of terrorism as defined by the Convention on the Prevention and

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106. 1 TRIAL OF THE MAJOR WAR CRIMINALS, THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945-1 OCTOBER 1946 218 (1947); *see also* OFF. OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 48 (1947).

107. Röling, *supra* note 11, at 355 n. 1.

108. *See generally* S.C. Res. 827, *supra* note 8.

109. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 54 (2005); *see generally* M. CHERIF BASSIOINI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (1995); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006).

110. S.C. Res. 955, *supra* note 9.

Punishment of Terrorism. The current ICC, on the other hand, has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and aggression.[111] Yet, the current ICC resembles the 1937 ICC, as their statutes were both adopted by conference and required a sufficient number of States Parties to enter into force. There are other resemblances as well, such as jurisdiction over territories and nationals of States Parties. The promises of the 1937 ICC were fulfilled in 2002, when the Rome Statute entered into force after acquiring its required 60th ratification. The Rome Statute of the International Criminal Court celebrated its 20th anniversary on July 17, 2018.

International criminal justice remains a work-in-progress. Globalization helped the social attitude of the international community to ensure perpetrators of the worst crimes of international concern are prosecuted and punished for their crimes. Current international criminal tribunals are a direct result of the International Military Tribunal, which, itself, was greatly influenced by centuries of international relations, and, in particular, the debates in the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and the Advisory Committee of Jurists, as well as the League of Nations' Convention for the Creation of an International Criminal Court.

111. Rome Statute, *supra* note 3, art. 5.