FROM THE NUREMBERG AND TOKYO WAR CRIMES TRIALS TO THE INTERNATIONAL CRIMINAL COURT: THE CONVERGING PATHS OF GREAT BRITAIN AND GERMANY

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Elizabeth A. P. Schultz

Thesis Committee:
Herbert F. Ziegler, Chairperson
Peter H. Hoffenberg
Yuma Totani

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For my father and grandfather, whose love of history inspired my own.
Abstract

This study chronicles the participation of Great Britain and Germany in the international criminal legal system from the post-World War II trials at Nuremberg and Tokyo through the two ad hoc tribunals for the former Yugoslavia and Rwanda. Finally, it focuses on British and German debates at the Rome Conference and in their respective parliaments, which led to each government’s decision to ratify the Rome Statute and join the International Criminal Court. The two nations’ converging paths highlight a greater movement among the international community as a whole towards recognizing the necessity of an independent legal body that is able to hold accountable those who commit the most serious of crimes.
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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IMT</td>
<td>International Military Tribunal</td>
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<td>IMTFE</td>
<td>International Military Tribunal for the Far East</td>
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<td>MP</td>
<td>Member of Parliament (Britain)</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNWCC</td>
<td>United Nations War Crimes Commission</td>
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**Introduction**

The huge, two-tower building at The Hague is imposing with its white façade and barbed wire, but once I skirt the prisoners’ entrance, a friendly security guard greets me and, passing through the metal detectors, I am escorted in to the bright and comfortable waiting area. Without having to give any reason for the visit, the receptionists explain to me how to get to courtroom currently in session, and hand me a dossier on the case and a paper with the short list of rules while visiting the court, including: stay quiet, the court members can see you at all times, no photography, and no pointing. Once in the observation gallery, which is separated by a glass window that can be covered by curtains if the court must go into a closed session, another security guard explains the headphone system which allows you to listen to the dialogue as a live feed or translated into English or French, the two working languages of the court.

The man on trial, Jean-Pierre Bemba Gombo, is indicted for two counts of crimes against humanity: rape and murder, and three war crimes: rape, murder, and pillaging. These crimes allegedly occurred during an internal conflict in the Central African Republic (CAR) in 2002 and 2003, during which Bemba led the *Mouvement de Libération du Congo* (MLC), which conducted a widespread attack on CAR civilians while under his command. He sits, as stony-faced as in the picture included in his dossier, as his lawyers question a witness. The witness, who wishes to remain anonymous for fear of retribution, remains disguised from observers by a curtain surrounding the witness box on three sides, so that only the judges can see her. Her picture is unrecognizably blurred on the courtroom video monitors, and her voice is heard only through translation. If any information that might identify her or her family is
necessary, the court goes into closed session, allowing the gallery a view only of
concealing curtains and silence over the headsets. As the witness becomes increasingly
flustered by the defending lawyer’s questions, the presiding judge interrupts and asks if
she would like to take a break. The witness says no; she would like to tell her story now.

Individual criminal accountability for international law violations began at the
Nuremberg and Tokyo trials following World War II.¹ These trials opened an entirely
new chapter in international accountability, which has carried on to the present day. The
founding of the International Criminal Court (ICC) in July 2001 and the support that the
Court has continued to muster on the international stage are a testament to the lasting
power of the ideals espoused in 1945. The atrocities that continue to be committed
throughout the world have inspired national governments, non-government organizations
(NGOs), and international organizations to support ad hoc tribunals and the ICC itself, in
order to bring perpetrators of the worst types of crimes to justice.

The extremely visible and well-documented crimes of the Nazi regime during
World War II presented the Allies with a difficult situation as they emerged from the
wreckage of the War. In times past, a nation’s leaders would have been held responsible
in an international justice arena only as representatives of their nation, thus distributing
guilt across a nation’s entire population. Given the exceptional nature of the crimes
committed and the authoritarian government structure in Germany, it seemed appropriate
to punish the *individuals* who had committed atrocities while in public positions.

¹ The International Military Tribunal (IMT), also called the Nuremberg trials, placed the major
German war criminals on trial under international law after World War II. The International
Military Tribunal for the Far East (IMTFE), or Tokyo trials, did the same for suspected war
criminals from Japan.
Though the war crimes trials at Nuremberg and Tokyo were often labeled as an exercise in “victor’s justice,” they set an important example for the international courts that would follow. First, the aforementioned individual criminal accountability for atrocities did away with any impunity that a criminal could find under the umbrella of his official position. Nuremberg and Tokyo sent a strong message to future mass criminals: the international community would no longer stand idly by as atrocities were committed. National sovereignty was not an acceptable hiding place.

After the Nuremberg and Tokyo trials, an international justice system took a back seat to Cold War politics. The next two venues for international criminal justice were both founded in the early 1990s out of an institutional legacy of the post-World War II era: the United Nations. There was clearly more international consensus in the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) than either Nuremberg or Tokyo could boast. For the first time, it was not only the victorious nations of a world war that would judge their defeated rivals, but a conglomeration of nations, uninvolved in technically internal conflicts, that felt the need to step into a situation where justice could not be served otherwise. The ICTY and ICTR were created by the United Nations Security Council (UNSC) under its Chapter VII powers; they are financed by the UN, but are not directly overseen by its members.

Following the establishment of these two ad hoc tribunals, the UN established a preparatory committee to investigate the establishment of a permanent international criminal court. Although this was not the first time that a standing international criminal court had been proposed, the two ad hoc tribunals had shown that such a court was within
the realm of possibility. The preparatory committee resulted in a draft statute, which was
the basis of the 1998 Rome Conference. Some 160 nations sent representatives to the
Conference, and 120 of those voted in favor of the resulting Rome Statute, while 21
nations abstained and only 7, including the USA, voted against the Statute.

The Rome Conference resulted in the heavily negotiated Rome Statute that had to
be ratified through all signatories’ national governments in order to come into effect.
Once the Statute was ratified and national laws were brought up to the standards outlined
in the Statute, a nation became a State Party to the Statute. As of January 2012, there are
120 States Parties with some notable exceptions, including the USA, India, China, and
Russia. The nations that make up the Assembly of States Parties represent all inhabited
continents, come from the entire spectrum of GDPs, and represent various population
sizes and political leanings.

The Rome Statute was so heavily negotiated in order to make it amenable to the
entire spectrum of nations that must become States Parties so that the International
Criminal Court would have the wide-ranging jurisdiction needed for it to be effective.
The main points of contention during the Conference were: the independent prosecutor,
position of the UN Security Council, the definition of aggression, the inclusion of nuclear
weapons, the amendment process, and the principle of complimentarity.

Prosecutorial independence centered on the elected prosecutor’s ability to initiate
and conduct investigations. The nations that were inclined to elect a more independent
prosecutor wished for the office to be endowed with the ability to initiate investigations
proprizio motu— by his own volition. Other nations, particularly the permanent members
of the UN Security Council, were concerned that such powers would allow the prosecutor
to wield the court as a political tool based on personal or political whims. Instead, conference participants proposed checks on the prosecutor from either a pre-trial chamber of judges, which was ultimately incorporated into the Statute, all the way to total review by the UN Security Council, which was not.

The UN Security Council’s level of involvement with the Court was hotly debated at Rome. Those not on the permanent Security Council were concerned that Security Council review would turn the Court into a political and ideological tool that would be tainted by heavy influence from powerful Western nations. The Council’s role was especially controversial where the declaration of a crime of aggression was concerned. Larger nations, most notably the permanent members of the UN Security Council, argued for the declaration of a crime of aggression to be the purview of the Security Council itself, while many smaller nations insisted on total independence from the Security Council. This division between UN Security Council members and a large group of smaller, more change-oriented nations, who called themselves the Like-Minded States, was present throughout the Conference over a variety of issues. No definition of aggression was decided upon at Rome. Instead, it was agreed that the issue would be discussed at the Review Conference scheduled for seven years after the Statute came into force.

The enumeration of weaponry under Article 5 of the Rome Statute, dealing with war crimes, was also an issue that split the Conference participants into UN Security Council and Like-Minded State groups. Especially controversial was the proposed inclusion of nuclear weapons in the Statute, making their use automatically a war crime. The permanent UN Security Council members, who happen to also be nuclear super
powers, opposed including them in the Statute. This issue was, once again, left to be dealt with at the Review Conference.

The amendment process for the Rome Statute also divided the attending nations into their respective ideological groups. Amendment to the statute is allowed by a 2/3 majority based on a single vote per State Party, though 7/8 of the Assembly of States Parties must ratify the amendment for it to enter into force. Larger nations were concerned that the more numerous small states would outvote large nations on all issues, amending the court until it becomes overly powerful. Especially the permanent UN Security Council members, who wield considerable power over other nations in the UN, were reluctant to part with so much influence, while small nations found this to be an opportunity to rectify the inequalities present in the international community. The final statute gave each state party a single vote, though this was also up for amendment at the Review Conference.

Negotiations at the Rome Conference involved a constant push and pull between those nations that believed in the integrity and independence of the Court and those that saw the Court as important, but in need of built-in checks on its considerable power. The underlying issue was that of national sovereignty. In order to be effective in situations like those in the former Yugoslavia and Rwanda, the Court would have to be imbued with the powers to usurp national authority, even to the point that acting government officials could be indicted. The question then, was: in what situation would the Court be able to step in over and above a nation’s domestic courts?

The compromise position on jurisdiction, which was reached by the preparatory commission and then validated at the Rome Conference, was called the Complimentarity
principle. Complimentarity allows the Court to take precedence over national courts only in situations in which a nation is either unwilling or unable to effectively carry out justice domestically. Some nations took issue with the word “unwilling,” arguing that nations could have legitimate reasons to decide not to prosecute, and that this could therefore become an avenue for the Court to exercise politically motivated influence over member nations. Despite these concerns, the complimentarity principle made it through the Rome Conference unscathed, as there was really no other compromise position presented that would allow nations to maintain their sovereignty while giving the Court the power to exercise jurisdiction in the types of situations for which it was created. These compromise positions were outlined within the Rome Statute, which had to be ratified by at least 60 nations to come into force. Despite much skepticism on the part of critics, the ICC garnered its first 60 ratifications and was able to begin operation by 1 July 2002.

Great Britain and Germany are the focus of this study for two main reasons. First, the two nations began their experience with the international criminal legal system in opposite positions. Great Britain, as one of the victors of World War II, helped design the International Military Tribunal at Nuremberg. The British government had a say in who came to trial and for which crimes. Germany, on the other hand, first interacted with the international criminal legal system as an occupied nation that supplied the defendants. This leads to the second reason that these nations are the focus of this study: despite their disparate beginnings, both Great Britain and Germany ratified the Rome Statute, thereby becoming States Parties to the International Criminal Court. The two nations’ converging paths highlight a greater movement among the international community as a whole towards recognizing and accepting the necessity of an independent legal body that
is able to hold accountable those who commit the most serious of crimes. The discussions at Rome and in both Britain and Germany’s Parliaments highlight the overall push and pull between Like-Minded States and permanent UN Security Council Members, which is the division that has prevented the ICC from being universally accepted. Though Germany wishes the court to become more independent and Britain wishes to maintain the compromises reached at Rome, the fact that both nations ratified the Rome Statute illustrates that the ICC is widely acceptable as it stands, even if there is much debate to come as the Court develops.

Chapter one contains a discussion of the Nuremberg and Tokyo trials. As the first experience in international criminal law for all nations, these two tribunals were important in the early shaping of a nation’s views on such institutions. Britain, as one of the Allied powers, had a heavy hand in deciding to conduct trials to render justice after WWII rather than participate in any of the numerous other suggestions, up to and including summary execution of reputed war criminals. The British experience at Nuremberg also set the precedent of allowing an international legal body to claim jurisdiction over a national government. Once set, this precedent paved the way for British support for the ad hoc tribunals in the 1990s and for the ICC.

After the major trial at Nuremberg, Britain conducted smaller trials in its own zone of occupied Germany. These trials tended to focus on low profile, substantive crimes, and especially on criminals who were linked to crimes against British servicemen. The sheer volume of possible cases led to selectivity and the imposition of end dates for all trials. Though these end dates were seldom strictly followed, pressure
from finances, a public weary of the War, and a desire to reestablish a healthy nation in Germany, brought an end to vigorous prosecution of Nazi war criminals.

British participation at the Tokyo Trial was more limited in scope, as Britain was one of many more prosecuting nations. Instead of the four main Allies acting as prosecutor and judge, Tokyo widened the scope of the international trial to include 11 contributing nations, including, at British insistence, India. Though Britain’s prosecution team ended up taking a leading role at Tokyo, the British government expressed a willingness to let the US take a lead in forming the trial for expediency’s sake. At both Nuremberg and Tokyo, Britain experienced the chaos, financial burden, and negative public opinion that accompanied the ad hoc, postwar trials. This experience could very well have contributed to the later decision to support a standing legal body to deal with situations that merited international justice, removing the burden from Britain.

Germany was not at all involved in the Tokyo trial, and found itself on the opposite side of international law at Nuremberg because of its position at the close of World War II. Despite the fact that Germany exclusively provided defendants at Nuremberg, this trial was an important first encounter with the international criminal justice system. Germany had prepared extensive war crimes documentations, mostly against Soviet troops, but the one-sided nature of the Nuremberg trial prevented any crimes but those committed in Germany from being brought to light. This could perhaps have fed into Germany’s insistence that the ICC be as independent of political leanings as was possible, in order to provide justice to both parties in a conflict, instead of just the victor.
Still a divided nation, East and West Germany proceeded with post-war justice in divergent ways. These domestic trials were only possible under Control Council Law No. 10, meaning post-War justice in Germany was inextricably linked to the new precedents being set in international criminal law. East and West German courts reflected the goals and ideologies of their occupying nations as the Cold War played out around the world. In both East and West Germany the focus turned quickly from retribution to reconciliation and rebuilding. The focus on individual criminal guilt allowed German citizens to avoid collective guilt and to move forward from Nazi atrocities. This positive effect could explain Germany’s quick and fervent support for the ad hoc tribunals of the 1990s and for the ICC.

Chapter two contains, first, a discussion of Britain and Germany’s participation in the formation and operation of the ICTY and ICTR, followed by an analysis of each nation’s main arguments and reservations at the Rome Conference. British support for the ICTY was mixed. Vocally, British representatives supported the Court in order to serve as a deterrent for crimes still being committed. However, the British personnel conducting peace negotiations were concerned that the tribunal could actually serve a counter purpose by prolonging negotiations and stalling the end of the war, allowing more atrocities to be committed. The British government was also concerned with the tribunal’s mandate, as the ICTY would have authority over and above domestic courts, raising the sticky subject of national sovereignty, which British officials were loathe to hand over to any international institution. Despite reservations and amid pressure from the international community, Britain participated in creating, staffing, and funding the
ICTY. The ICTR followed quickly on its heels, and because of the precedent already set and the lack of peace talks to be tampered with, Britain quickly offered its support.

The ICTY was Germany’s first experience on the prosecuting side of an international criminal tribunal. Germany was not on the UN Security Council, and therefore did not directly participate in creating the ICTY or ICTR, although vocally Germany supported both tribunals in the General Assembly. German support of the ICTY was made clear when Germany provided the first defendant for the tribunal, Dusko Tadic, who had been hiding in Germany. This extradition was not only an act of support for the court, but also a willful submission of national sovereignty, as Germany claimed the right to try Tadic under domestic laws. Germany also showed its support for both ad hoc tribunals through significant contribution of personnel and financial resources to both the ICTY and ICTR.

Chapter two ends with an overview of Britain and Germany’s participation at the 1998 Rome Conference. Britain, recently having gone through a change in leadership, joined the more change-oriented, Like-Minded States group just before the Conference began. Despite the new British leadership, Britain was still a permanent member of the UN Security Council, and so exhibited mixed perspectives at Rome, being neither wholly in the Like-Minded nor the Security Council camp. Overall, British arguments aimed for a Court that was largely independent, but had important procedural steps in place to guarantee that the ICC would only usurp national sovereignty in especially dire instances. The unique British perspective, as a change-oriented Security Council member, led Britain to propose compromise positions on key issues that were largely adopted, as they were amendable to both groups.
German delegates, on the other hand, approached Rome firmly from a change-oriented, Like-Minded State perspective. Because of Germany’s position at the UN, the nation had no foot in the Security Council Camp, and although German representatives wished for large nations, especially the US, to sign on to the Rome Statute, its main concern was the creation of an independent court. This led German representatives to proposals that tended more towards an independent court, resulting in more rejections and disappointments for the German delegation.

Chapter three contains a discussion of domestic debate over ratifying the ICC in the British and German Parliaments. The British Labour government that had argued at Rome was faced with the Conservative opposition party’s objections as an obstacle to ratification. The Conservative Party argued along the lines of the Security Council camp at Rome, leaning towards more checks on the court’s independence, including greater scrutiny of its personnel, more involvement from the UN Security Council, and amendment to voting procedures. Despite these objections, the Statute remained unchanged and Britain did not offer reservations along with its ratification.

Instead of arguing for the ICC to be shaped into a more regulated institution, the German Parliament argued that ratification was necessary in order to become a State Party immediately so that Germany could help shape the Court into a more independent body. Despite considerable hurdles to ratification, including altering the German constitution, the two necessary bills passed through the German Parliament with overwhelming support across party lines. German goals once the ICC came into being were to attempt to persuade other nations to join, rendering it a more effective mechanism for justice, and to help mold the Court into a more independent institution.
All three chapters serve to highlight the movement from the first international criminal tribunal towards the standing, independent International Criminal Court by examining British and German experiences from Nuremberg to the ratification of the Rome statute. Though these are just two of the many nations that have come to view the ICC as a necessary mechanism in international law, their experiences highlight the historical progression that led to a Rome Statute that was acceptable enough for nations that had experienced such disparate beginnings in international criminal law. Even though Britain and Germany experienced previous international criminal tribunals so distinctly and hold divergent positions in the international arena, they have both become States Parties to the ICC, highlighting the Court’s wide appeal and acceptability as custodian of the principles of individual justice first outlined at Nuremberg.
Chapter 1: The Beginning of International Criminal Justice

The aftermath of the Second World War was unlike that of any other international conflict, not only because of the unprecedented destruction of the war, but also because it saw the very first international tribunal to try individuals for crimes committed in a time of war. Nearly sixty years after the International Military Tribunal (IMT) played out at Nuremberg to put these first individuals on trial, the first standing international criminal court opened for business.

While we cannot look at the International Criminal Court (ICC) as a direct successor to Nuremberg, we can trace the participation of nations in the IMT and its counterpart in Tokyo, the International Military Tribunal for the Far East (IMTFE), in order to better understand international movement towards a standing international criminal court. Great Britain, along with the its Allies, the US, Russia, and France, took on a leadership role in both the IMT and the IMTFE, solidifying Britain’s commitment to individual criminal responsibility that transcended national jurisdictions in certain extreme cases. This commitment carried through its participation in the two ad hoc tribunals of the 1990s, as well as, ultimately, to the ratification of the Rome Statute in order to become party to the ICC.

Germany’s post-WWII experience with international tribunals was decidedly different from that of Great Britain. For one, Germany provided the defendants rather than the judges for the Nuremberg trial. Germany was under Allied occupation, and the German population was attempting to rebuild. The principle of individual criminal responsibility, upon which Nuremberg was built, helped with that rebuilding by distributing blame for the disastrous war and Nazi atrocities to the individual defendants.
rather than to Germany as a whole. The success of this principle in helping reconcile the nation with its past was perhaps responsible for Germany’s later participation in international criminal tribunals, including Germany’s prompt ratification of the Rome Statute.

The International Military Tribunal

The IMT, commonly referred to as the Nuremberg Tribunal, was the first in a series of international tribunals that established legal precedents and led to the International Criminal Court. It was at the IMT that the nations who would both support and oppose signing the Rome Statute to make the ICC operational got their first experiences with international criminal justice. Examining Great Britain and Germany’s roles at Nuremberg and the tribunals that followed it will shed historical light on the question of why these two nations ratified the Rome Statute and became parties to the ICC.

Great Britain and Germany were on decidedly different sides of the Nuremberg Tribunal. The Allies were occupying Germany, its justice system effectively incapable of dealing with criminal actions relating to World War II. As victors of a long, bloody conflict, Great Britain and the rest of the Allies were responsible for making decisions concerning post-war justice. Germany, on the other hand, was responsible for providing the IMT with defendants.

The IMT charter clearly established that the Allies were to try individuals instead of the German Government or the German people as a whole. As the often-quoted chief
prosecutor at Nuremberg, Robert H. Jackson put it, the state as a whole was not on trial because,

Crimes are always committed only by persons…the charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind…Under the charter, no defense based on either of these doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.²

Unlike the Treaty of Versailles that ended World War I, Germany as a nation was not to be held responsible for its aggressive actions. Rather, state responsibility was perceived as being an easy way out for those major war criminals who had planned, instigated, and committed crimes. The IMT tried the leading individuals who were party to the “conspiracy to wage aggressive war” or were directly responsible for aggression, war crimes, or crimes against humanity.

The focus of the tribunal was on retributive justice carried out in a common law tradition. The crimes covered in the IMT charter were: conspiracy, crimes against peace (the crime of aggression), war crimes, and crimes against humanity.³ Crimes against humanity is a category of crime that was not codified until Nuremberg. Crimes against humanity included, “murder, extermination, enslavement, deportation, or other inhumane acts…or persecutions on political, racial or religious grounds.”⁴ This definition clearly references and gives the IMT jurisdiction over the crimes of the Holocaust. The tribunal focused on punishing a representative group of individuals from some of the most

⁴ The Avalon Project: Charter of the International Military Tribunal, Article 6(c). <http://avalon.law.yale.edu/imt/imtconst.asp>
powerful Nazi organizations. The IMT passed down 12 death sentences, three life sentences, four sentences of between ten and twenty years, and three acquittals.\(^5\)

\textit{Britain and the IMT}

Like the other three major Allies, the US, USSR, and France, Great Britain was thoroughly involved in establishing and carrying out the IMT. Although Winston Churchill famously promoted rounding up and shooting Nazi criminals, Britain ended up participating in the IMT’s formation and operation. As evidence of Nazi brutality was broadcast over national news stations in Britain and the USA, public opinion became influential. In support of a speech given by Roosevelt on 25 October 1941, Churchill declared the retribution for Nazi atrocities as one of the principle aims of the war.\(^6\) Though this is characteristic of Churchill’s commitment to punishment through undisclosed methods instead of specifically through trials, it shows that public opinion was pushing heavily towards retributive action on the part of Allied governments, and Churchill felt the need to respond publicly. However, Churchill did not fully commit to the Nine-Power Agreement in January of 1942, which was the first declaration that committed the Allies to pursue post-war justice through criminal courts.\(^7\) Instead of a signatory, Great Britain was an “observer” to the agreement, showing Churchill’s reluctance to fully place his faith in Allied courts as the harbingers of justice for crimes committed during WWII.

\(^7\) Ibid., 85,
Churchill’s reluctance grew from two main factors: disbelief and the wish to avoid the chaos that ensued after WWI.\(^8\) Nazi atrocities were generally disbelieved, especially after the extensive, and often completely fabricated, propaganda campaigns of WWI. Churchill wished to substantiate the rumored atrocities further before committing to their prosecution. After WWI, there was also a jurisdictional battle over war criminals that had been identified by the Allied governments, twelve of which were eventually tried, but in German courts.\(^9\) It is understandable that the Nine-Power Agreement, committed to by so many, alerted Churchill to a jurisdictional situation that could possibly be even more complicated than the one that came before.

Soon after the Nine-Power Agreement, however, reports of Japanese military violations against British nationals in the Far East began to reach the British government. It was after this knowledge reached the UK that the War Cabinet Committee on the Treatment of War Criminals was established.\(^10\) At the same time these reports were coming in from the East, German atrocities in Europe, especially Poland, were being increasingly substantiated by eyewitnesses.\(^11\) On 1 November 1943, Britain, along with the US and Soviet Union, took part in the Moscow Declaration, which formalized a plan for post-war justice involving trials in the nations in which crimes were committed via national courts.

The 1943 Moscow Conference stated the intention of Britain, the United States, and the USSR to try minor criminals in the countries in which they committed their

\(^8\) Ibid., 87.
\(^9\) Article 228 of the Treaty of Versailles mandated that the German government extradite German citizens if requested to stand trial by any of the Allied governments. Effectively, Germany ignored this provision, and the only post-War trials that occurred were carried out under the German judicial system.
\(^10\) Fox, “The Jewish Factor,” 88.
\(^11\) Ibid., 89.
transgressions and major criminals, whose crimes crossed national boundaries, through joint international cooperation. Importantly, the Moscow Declaration involved specific declarations for offering up war criminals to the nation requesting them for trial, whether or not the nation in which they were found had jurisdiction in the case. This was a step towards the shape the IMT would eventually take, but it was still predicated on national courts assuming the prosecutorial role. Thus, while international cooperation for extradition was laid out, the Allies did not yet fully commit themselves to an international military tribunal.

In 1945, under the leadership of Clement Attlee, the Labour Party won control of the British Parliament. Like the previous Prime Minister, Attlee and his party took steps favoring post-war justice in trial form, but continued to express a reluctance to fully commit. The United Nations War Crimes Commission (UNWCC), which began gathering information in 1943 on war crimes committed during WWII, produced a draft convention on war crimes on 28 February 1945. Great Britain did not become party to this convention, which at first glance could indicate a reluctance to adhere to the 1943 Moscow Conference. However, new issues were emerging on the international stage, and Great Britain’s reluctance can be explained by examining new tensions brought on by the Cold War.

Distrust of the USSR had been building in the UK and US since the end of the war, and it was rapidly deteriorating the delicate bonds that had held during WWII. The USSR also did not become party to the UNWCC Convention, which made Great Britain

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14 Ibid., 178.
wary of extraditing criminals to the unabashedly authoritarian state. According to Anthony Glees, the British government, “wanted to be satisfied that a *prima facie* case existed against those requested, since it did not want to break Britain’s long tradition of providing refuge to political exiles by delivering political opponents to illiberal regimes on the pretext that they were criminals.”\(^1^5\)

Great Britain also did not see the need to make an international commitment via the UNWCC Convention, as it was assumed that postwar screening of immigrants would be sufficient to keep out any non-British nationals wanted for war crimes. Because of logistics this was not actually the case, and Britain became a jurisdictional safe haven for those accused of war crimes.\(^1^6\) While British policy in its portion of occupied Germany was to put war criminals in its possession on trial or extradite them to another occupied zone, its refusal to be party to the UNWCC Convention made extradition from Britain itself complicated. This problem was so persistent that the late 1980s saw Great Britain’s unwanted role as a safe haven spark a renewed debate on the nation’s role in international criminal justice.\(^1^7\)

Out of the 1945 Moscow Declaration came the IMT, through which the Allies put on trial twenty-two major Nazi war criminals. Per the United States’ preference, the main criminal charge on which the prosecution focused was count one, Conspiracy. Each of the four prosecuting nations, the US, Great Britain, France, and the USSR, contributed two judges and one chief prosecutor to the tribunal. As mentioned above, the final four

\(^{15}\) Ibid.
\(^{16}\) Ibid., 172.
\(^{17}\) Ibid., 171.
counts in the IMT indictment were, in short: count one: conspiracy, count two: crimes against peace, count three: war crimes, and count four: crimes against humanity.¹⁸

Because the US prosecution team’s main goal was to focus on the Conspiracy charge, British representatives were responsible for the crimes against peace charge, and so focused on substantive crimes above those of membership in criminal organizations or conspiratorial circles.¹⁹ Dennis Allen of the British Foreign Office, in a memo on his recommendations concerning prosecuting Nazi crimes against the Jewish community, declared the importance of focusing on the wider German policy of persecution, instead of Hitler’s specific plan, which would be in keeping with the British approach to Nazi war crimes in general.²⁰ The focus on smaller, substantive crimes carried over into subsequent British trials in occupied Germany.

Aside from retributive punishment, one of the main goals of the IMT was education of the population and discrediting the Nazi regime through the publicity of Nazi crimes. The German public was the main target of this facet of the trials, and there was great disappointment in the widespread negative reception of the IMT. Much of the German public vilified the Nuremberg trial as an exercise in victor’s justice: a one-sided retribution designed to saddle the loser of the Second World War with all moral and economic responsibility for the conflict, whether or not this was actually truthful or even just. The US policy of favoring documents over witness testimonies and its focus on crimes towards non-Germans, despite the widespread knowledge of atrocities committed by the Nazi government towards its own citizens, added to these perceptions.

²⁰ Fox, “Jewish Factor,” 99.
The IMT was a joint venture, after which the four allied powers had the option of instituting a second joint trial for lesser criminals, including the representatives of German wartime industry, that were left out of the Nuremberg trial. The British government opted out of a subsequent trial, despite French pressure to participate.\textsuperscript{21} Instead, Britain, the US, the USSR, and France each instituted their own trials within their zone of occupation in Germany.

Priscilla Jones posits a clear distinction between British war crimes trials policy as it developed during World War II and as it played out once the war ended. According to Jones:

British war crimes policy before 1945 – like American war crimes policy, to which it was closely connected – developed largely as a response, first, to news of German atrocities committed against civilians in Nazi-occupied Europe; second, to continuing pressure on British government from officials of the allied governments-in-exile based in London to condemn those atrocities; third, to information about Japanese atrocities, particularly against British POWs and civilians; and fourth, to news of German war crimes committed against allied military personnel, especially the murder of fifty allied airmen after their escape from Stalag Luft III.\textsuperscript{22}

Because of these pressures, the war crimes trials carried out in the British zone of occupation proceeded vigorously between 23 July 1945 and 19 December 1949. The Stalag Luft III case merits some explanation, as it played such an important role in moving the British government towards resolving to punish war crimes through trials. Stalag Luft III was a German Prisoner of War camp in Silesia. On 24-25 March 1944, 80 Allied POWs attempted an escape, resulting in three successful escapees, and 77 recaptured officers. The three who escaped made their way to Britain, while 50 of those

\textsuperscript{21} Bloxham, “British War Crimes Trial Policy,” 100.
who remained were executed under an order that came directly from both Adolph Hitler and Heinrich Himmler.\textsuperscript{23}

As mentioned above, Winston Churchill and his Conservative government were by no means committed to punishing those who lost WWII through trials. Instead, summary execution was favored for a time. The British government was very careful to remain uncommitted to post-war trials until the 1945 London Agreement solidified the plan for the IMT. The British Foreign Secretary, Anthony Eden, drafted a statement to be given before the House of Commons on 23 June 1944 which included a condemnation of the Stalag Luft III murders and a call to bring those who were guilty to trial. In the final draft of the speech, however, all references to a trial were removed.\textsuperscript{24} A legal representative of the Foreign office advised the use of the vague “exemplary justice” instead of committing to any concrete steps that must be taken in the future. The government again sidestepped the difficult issue of how to bring those responsible to justice by using the term “exemplary justice” during House of Lords and House of Commons debates the following month.\textsuperscript{25}

Despite initial reluctance to commit wholly to the trial format, the British government did end up carrying out extensive trials in its portion of occupied Germany. A Royal Warrant provided the guidance and authority for the trials in the British zone of occupation, which are thus sometimes referred to as the Royal Warrant trials. They involved any war crime committed after 2 September 1939 as a part of any conflict in which Great Britain was involved.\textsuperscript{26} As Donald Bloxham notes, Britain’s post-IMT

\textsuperscript{23} Ibid., 545.
\textsuperscript{24} Ibid., 545-546.
\textsuperscript{25} Ibid., 546.
\textsuperscript{26} Glees, “British Policy,” 178.
policy was to finish its trials as quickly as possible by focusing on individuals who committed substantive crimes mostly against British nationals.\textsuperscript{27} This strategy was a response to the negative public opinion that had grown in Britain as a reaction to the Nuremberg trial. Beyond economic concerns, there was a real concern over the violation of the rights of the accused. Some British government ministers considered two years to be an unacceptable amount of time to hold someone awaiting trial for murder.\textsuperscript{28} Through the experience of the IMT, British officials were able to see the dilatory effects of drawn-out trials that elicited little personal interest in their audience. Britain was reluctant to put more major war criminals on trial, and instead moved them to the US zone of occupation to be tried there without using up British time or financial resources.

As early as Autumn of 1945, despite a very slow start to Britain’s war crimes trials, proposals were made to set an end date for prosecution.\textsuperscript{29} Prime Minister Attlee set a non-binding end date at 30 April 1946, but the chaos of the war crimes trials made that date unrealistic. The number of people to be brought to trial had always been a complicated issue, especially since the IMT declared organizations such as the SS, which had widespread membership throughout Germany, criminal. Along with the 30 April deadline, the Attorney-General projected a target of 500 cases to be tried by that time. Had the British government adhered to Attlee’s initial deadline, only 209 defendants would have come to trial.\textsuperscript{30} This was an embarrassing shortfall led to clever

\textsuperscript{27} Bloxham, “British War Crimes Trial Policy,” 104.
\textsuperscript{28} Jones, “Nazi Atrocities,” 560.
\textsuperscript{29} Ibid., 548.
\textsuperscript{30} Ibid.
manipulation of wording in some reports to make the goal seem a bit closer to completion.31

At least as early as 1946, the British government was concerned with rebuilding Germany into a viable economic and political entity. This contributed to the Cabinet decision to end the war crimes trials as swiftly as possible. The British government was still under considerable public pressure to prosecute those who were suspected of crimes against British citizens, however. The Stalag Luft III case was illustrative of this public pressure’s effect on British war crimes policy. British diplomatic officials were so wary of having to answer “embarrassing” questions about why the Stalag Luft III murders were going unpunished that they involved themselves in an ultimately unsuccessful custody battle with the USSR.32 Those who supported continuing the British war crimes trials program referred to the Stalag Luft III case time and again to rally support for the trials. The British public was particularly concerned with this case, as it was widely publicized and condemned. Officials were worried that if an end date for trials was set and a criminal related to the Stalag Luft III murders surfaced, he would be untouchable.33

Britain’s policy, along with expedition, was based on concentrating on crimes committed against British servicemen. By 25 October 1946, the British military courts had tried 461 cases committed against British nationals, and only 59 against other Allied victims.34 These numbers can be seen as a representation of how necessary it was to maintain public interest and approval for British trials. Temporal considerations were based not only on German public opinion and the growing desire to leave the past in the

31 Ibid., 551-552.
32 Ibid., 550.
33 Ibid., 561.
34 Ibid., 552.
past, but also on predictions of how long the British public would support war crimes trials that cost large amounts of money. At a basic level, public opinion was either for or against continuing postwar trials based on the trials’ perceived success versus how costly they continued to be. The success of the trials could be based on many factors, but the British government saw the most important to be how many criminals were brought to justice for the most serious crimes committed against British citizens. Because of this need for perceived success, and despite viewing the British public as eager to end war crimes trials, the government held out on setting an absolute end date for “particularly heinous crimes,” including those involved in the Stalag Luft III case.35

Public opinion is always difficult to measure. In no case are all members of the public of any nation ever in absolute agreement. The British public was divided, as one might expect, on the controversial topic of war crimes trials. A member of the JAG’s office, Lieutenant-Colonel Geoffrey Barratt described the public thus:

For every man who demands to know why we are continuing to grind the faces of our former enemies, there is another who asks why we have not yet traced and arrested his son’s murderer. But the average pre-occupied little man on the street passes by knowing very little on this subject and not caring very much.36

Inherent in the view found in the above quote is the reasoning that the British public only really cares about those cases that are personal to them. This, as seen above, was a major factor in shaping how British trials played out.

Beyond financial and public opinion concerns, new political developments encouraged Britain to move quickly to end its post war trials. The growing rift between the USSR and its former allies was pushing Britain and the USA to ally with Western Germany and begin to rebuild it as a buffer against the Soviet Union. Ending the war

35 Ibid., 555.
36 Ibid., 557.
crimes trials would be a big step in returning normality to the British zone of occupation and toward the eventual integration of Germany into the West’s Cold War camp. This concern ultimately guided the British government to go against the wishes of the War Office, which was adamant in its view that trials must continue, though their focus could be more concentrated on crimes committed against British nationals.

The British concern with expediency and reluctance to continue opening new cases is illustrated when examining the debate over trying four German Field Marshals: Walter von Brauchtisch, Gern von Rundstedt, Erich von Manstein, and Colonel General Adolf Strauss. All four had been in British captivity since 1945 and were held without significant push for a trial or even efforts to collect evidence against them until 1947, when the American Chief Counsel for War Crimes, Telford Taylor, presented evidence against the four Field Marshals which had been collected by the United States during ongoing investigations against other defendants. True to their established *modus operandi*, British officials requested that the US courts include the four Field Marshals in their own indictment of two other prominent war criminals. However, the US was experiencing similar pressures to wind down their trials, and was not interested in including four more defendants, thereby prolonging their trial.

The US Government, especially Taylor himself, and both British and German public opinion, placed considerable pressure upon British officials to go ahead with trying the four Field Marshals. The fact that de-Nazification trials were daily punishing those who committed relatively minor crimes, and these high-profile offenders could be

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37 Ibid., 564.
38 Ibid., 565.
40 Ibid., 20.
allowed to go free, would have appeared to the German public as a real injustice. This would not have helped the reputation of the already unpopular de-Nazification program, which the German public would then see as targeting the lower-level members of German organizations, who were merely following orders, while those who were responsible for giving orders were exempt from punishment. Despite the fact that the British had recently announced an end date for the war crimes trial program, a move that was met with considerable German public approval in the British zone of occupation, some British officials insisted that these officers had to be tried to prevent the above-stated injustice. \(^{41}\) Debates in Parliament focused on which course of action would help sustain German public faith in the British occupation. Labour representatives argued that putting an end to the trials would sustain necessary goodwill from Germans in the British zone of occupation, while Churchill, leading the Conservative opposition, argued that failing to try superior officers when those under their command had been found guilty would be seen as unfair. \(^{42}\)

Taylor had handed over to the British information that created a substantial *prima facie* case against the four defendants, so there was no question about their eligibility for trial on that head. However, the four officers were now pushing seventy years old and were in various stages of physical fitness. The British conducted three medical examinations to ensure the defendants were fit for trial, the second of which declared only von Manstein fit enough to go through the legal process. \(^{43}\) Now the debate centered over whether the British wanted to go ahead with the trial with only one defendant, or if the trials would only serve justice if all four Generals were tried together. In May of

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\(^{41}\) Ibid., 24.
\(^{42}\) Ibid., 26.
\(^{43}\) Ibid., 22.
1949, British officials reached the decision to try only von Manstein, and put this declaration in front of Parliament as a part of a larger discussion on how to proceed further with war crimes trials. The general sentiment among British Members of Parliament (MPs) and Cabinet members was that the aging men should be repatriated after their four years of imprisonment and because of their age and overall ill health.\textsuperscript{44} Some British MPs also argued that the point of British war crimes trial participation was to make an example of a select number of high officials and that trying to add an additional new example would not aid that aim.\textsuperscript{45}

Despite these objections, a British court convened in Hamburg from 24 August to 19 December 1949 tried von Manstein on seventeen counts. The gravest of these counts covered mistreatment of prisoners of war: the court convicted von Manstein of shooting Russian POWs, killing Jews and Gypsies, and harshly punishing partisans.\textsuperscript{46} The British military court in Hamburg tried von Manstein using precedents sent at the IMT, but the British Parliament made the decision prior to his trial that any cases after von Manstein’s would be tried in German courts for violations of German laws.\textsuperscript{47} These subsequent proceedings in German courts (discussed below) were the first venue for German officials and the German public to interact as anything but defendants in the international justice process, as they were conducted under both German domestic law and under international power in the shape of Control Council Law No. 10.

As the von Manstein trial demonstrates, the British government decided to move away from retribution for past crimes and focus instead on deterring these types of crimes

\textsuperscript{44} Ibid., 28.
\textsuperscript{45} Ibid., 29.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
in the future, which its representatives reasoned could be better accomplished by ending war crimes trials and rebuilding Germany. Those members of criminal organizations who, in the view of British prosecutors, did not merit their own trial, were put through the Spruchkammern, so-called de-Nazification, courts. The British occupation government established these courts mostly for expediency’s sake. There was such a large portion of the German population that had held membership in now criminal organizations that it was impractical to try them all from a logistical standpoint, and to attempt to do so would impede Germany’s successful recovery. The courts officially marked the defendant’s former criminal membership or activity in order to help prevent his rise back into prominence in German government and society as the nation was rebuilt. Those found to be too offensive to release without trial were sent to British courts under the Allied Control Council for Germany. What these smaller, expediency-focused trials showed is that Britain was focused on quickly finishing the trial process in order to bring about a final resolution for the War. As early as November 1946, the British government handed down a Cabinet Decision to begin the process of finishing the trials but they were only finally terminated in 1949. The three-year delay between the cabinet resolution and the end of the trials showed concern with bringing justice, albeit limited, to those who committed war crimes against British servicemen, though this aim would be altered in the 1950s.

In 1949, the Number One War Crimes Review of Sentences Board began working to review the sentences handed down by Royal Warrant courts in the preceding years. Two hundred and forty-seven cases were reviewed, covering 564 convicted individuals.

50 Ibid. 108.
One hundred and seven sentences were either shortened or partially remitted, and the equivalent of a death sentence was changed to 21 years imprisonment. The Conservative Party, headed by Winston Churchill, returned to power in 1951. Following his return, the politician constituted a second review, which further reduced sentences and allowed many more convicted to go free. The reason for this shift in policy, which was by no means unprecedented or unexpected, can be found in the changing diplomatic situation of the post-war world. With the defeat of the German menace, the Allies’ tenuous ties, which had transcended differences of opinion concerning political philosophies out of wartime necessity, were strained to the breaking point.

Britain’s experience with the IMT was as a leading member of the first international criminal tribunal. Britain’s subsequent trials, all drawing authority from the international order and using the precedents set at Nuremberg, continued this experience. Britain’s post-war trial policy was to focus on expediency and British-related crimes, although the trials were constantly plagued with problems of capacity and funding. Had this post-war trial experience been smoother or easier, it is possible that British officials would have viewed a standing international criminal court as unnecessary, as their past experience would lead them to favor single-nation attempts at justice. However, Britain’s very difficult post-war experience could very well have influenced its later support for international criminal tribunals, and ultimately the ICC, by illustrating the chaos and overwhelming cost of an ad hoc, single-nation attempt to punish war criminals.

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51 Ibid., 114.
The International Military Tribunal for the Far East

Closely following the Nuremberg Tribunal was the International Military Tribunal for the Far East, commonly referred to as the Tokyo Trial or the Tokyo Tribunal. Along with its participation at Nuremberg, Great Britain also participated in the IMTFE in a significant way. Perhaps because the IMTFE followed so closely on the heels of the IMT and deviated only slightly from the policies and legal precedents set at Nuremberg, many scholars unfortunately overlook the Tokyo Trial altogether.\(^{52}\)

However, the IMTFE still helped shape the postwar experience of both the winning and losing powers. The IMTFE was organized in less time than the Nuremberg Trial, as Tokyo was able to use Nuremberg as a model, but ended up lasting much longer than the IMT. It began in 1946 and encompassed a total of 28 defendants under three of the same charges found at Nuremberg, the main difference being that the charge of crimes against peace was required to be brought against all of the indictees. This principle was applied in practice at Nuremberg, but cemented into official policy at Tokyo.\(^{53}\) Only 25 were included in the judgment, pronounced in November of 1948, because of death or ill health of the other three.

The structure of the IMTFE granted the US Government more authority than it had enjoyed at Nuremberg. The Charter of the Tokyo Tribunal was not created by an international conference, but was viewed as “essentially an American project.”\(^{54}\)

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\(^{52}\) To give just one example among many, Michael P. Scharf, who holds extensive credentials in international law, named his book on the first trial at the ICTY, “Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg,” completely omitting the IMTFE.  


Supreme Commander for of the Allied Powers appointed the Chief of Counsel, who in turn appointed the prosecuting team, whereas at Nuremberg, each signatory had the right to appoint a Chief Prosecutor.55 The IMTFE was comprised of members from 11 contributing nations, significantly more participants than the four major powers at Nuremberg. Britain, indicating a trend towards widening the participation in the international justice arena, was aggressive in pushing for its former colony, India, to be included as a member nation at Tokyo, even though India would not become an independent nation until 1947.56 In exchange for including India, the US bargained to include the Philippines.57

Following closely on the heels of Nuremberg, the Tokyo Trial was a continuation of the Allied commitment to seek justice against those individuals considered most responsible for aggressively initiating WWII and for committing the war crimes and atrocities that followed. As mentioned above, the US took a leading role at Tokyo because of its strong position as head of the occupying forces. This meant that the British Commonwealth took more of a backseat than it had at Nuremberg, allowing itself to take on a lesser role along with the nine other subordinate prosecuting states, though it was far from absent from the Trial.58

The British government voiced its support for American leadership because of its aversion to another drawn out international conference ala Nuremberg.59 The willingness

55 Woetzel, Nuremberg Trials, 228.
58 Yves Beigbeder, Judging War Criminals, 1999, p. 56.
of Great Britain to take a backseat to the US is clearly present in the decision-making process that led to Emperor Hirohito’s exclusion from trial. Although Great Britain and the US communicated on the topic, Great Britain deferred to US judgment concerning Hirohito’s place in the trials, though the British Prime Minister did offer the opinion that it would be best not to try the Emperor.60

However, even though the United States had a leading formative role, the actual shape of the trial was determined by the push and pull of the various prosecution teams, including that from Great Britain. The prosecution teams were fraught with problems from the outset. The American prosecutors, who arrived first and were the largest group, were directed under the questionable leadership of Joseph B. Keenan, who had directed evidence collection in a disorganized way, was frequently absent from Tokyo, botched important examinations of witnesses in court, and was rumored to have a drinking problem.61 As a result, the British head prosecutor, Arthur S. Comyns-Carr, was one of those who took on an informal leadership role.62

It was Comyns-Carr, as head of the British Prosecution team, who first suggested selecting a representative group of war criminals to put on trial in order to narrow down the long list of possible defendants.63 This policy was in line with the precedent set at Nuremberg, where defendants were selected to represent various branches of the Nazi government and sectors of Nazi society. Although ultimately the selection of defendants required that Comyns-Carr convince Keenan to approve his plan, this exchange illustrates

60 Ibid., 46.
61 Ibid., 32-40.
62 Ibid., 18.
63 Ibid., 66-67.
the high level of participation of nations other than the US in general, and of Great Britain, in particular.

The inclusion of more states in leading the IMTFE could represent a very early learning experience for Great Britain that would prove important when it came time to establish the two ad hoc tribunals of the 1990s. Working with teams from many different nations, British prosecutors had to align their own government’s goals with those of international justice overall. This ability would be necessary when dealing with the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the tricky negotiations at the Rome Conference.

**Germany’s Post-War Experience with International Law**

Much as the United Nations can be seen as building upon the precedents of the League of Nations, established after World War I, so too can the IMT be seen as an extension of the short-lived investigative measures taken after the First World War. In no case is this more evident than in that of Germany. After World War I, despite its position as the official scapegoat of the conflict, the German government proposed the establishment of an international commission to investigate violations of the laws of war by all parties to the conflict. The Allies roundly rejected such a commission at the Geneva Convention of 1921, by which time the German government had already prepared 5,000 dossiers on Allied war crimes.⁶⁴

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Just as the German government prepared extensive evidence in anticipation of post-World War I trials, so did it also prepare cases against Allied war crimes committed during World War II. Half of these documented violations of the laws of war were committed by Soviet troops.\textsuperscript{65} Extended documentation of Soviet atrocities also exists in British and US records, though its position as one of the victors of WWII allowed members of the USSR to escape prosecution. The most famous case found in the Wehrmacht files was the Katyn Massacre. It has received extensive international attention, especially because the USSR originally accused Nazi troops of committing the atrocity and attempted to include it in the German crimes prosecuted at Nuremberg.\textsuperscript{66}

The fact that Germany, along with the Allied governments, was preparing information for anticipated war crimes trials, gives interesting insight into international law developments after WWII. The IMT, perhaps with some justification, was condemned as an exercise in victor’s justice because of its one-sided nature.\textsuperscript{67} The stark contrast between known Soviet atrocities and their seat at the head of the courtroom instead of on the defendant’s bench must have seemed a glaring injustice to the accused and to the German public in general, especially in light of all of the evidence gathered by the German government. In order to avoid the appearance of this kind of partiality, the two ad hoc tribunals of the 1990s focused on prosecuting violations of international law on both sides of their specific conflict. The ICC has shown a tendency to do the same in order to appear less politically biased. Perhaps if the ICC had existed in 1945, the Allies would have been subject to the same disciplinary process for their wartime violations as

\textsuperscript{65} Ibid., 392.
Germany was. This consideration, the safeguard of impartiality, could help elucidate Germany’s decision to ratify the Rome Statute and become party to the ICC. Germany’s experience with one-sided, post-WWII justice helps to explain the nation’s later enthusiasm for a standing, impartial international criminal court.

The German public’s experience with Nuremberg was one of absolution. Putting on trial the upper echelon of the Nazi leadership allowed the rest of the nation to focus blame on these few instead of dispersing guilt among the general public. This allowed Germany to move forward and rebuild after such a devastating war. Despite this release of guilt, the trials have been condemned in Germany as unfair because of their one-sided nature and the retroactive application of international criminal laws such as crimes against humanity and crimes against peace. With a standing international criminal court, retroactive application of new laws would not be an issue. Furthermore, an independent court would be able to try crimes committed on both sides of any conflict. These considerations could very well have contributed to Germany’s fervent support of an independent ICC at the Rome Conference.

The Nuremberg trial experience seeped down into Germany at the national level by providing norms, precedents, and authority to conduct domestic trials that charged German citizens with crimes committed during the war. Though under occupied supervision, West German courts were responsible for trying over 6000 Nazi War Criminals in total, 5228 of which were offered to the courts by occupying powers between 1945-1949. The British policy towards war criminals in its occupation zone was to turn over all possible cases to either other occupying powers or to West German

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69 Ibid., 145, 162.
courts. This was a part of the post-war measures designed to restore some measure of normalcy to western Europe in order to face what was seen as the rising threat posed by the Eastern European communist bloc. The responsibility given to West German courts to try war criminals was based on restored faith in the legal system of the de-Nazified nation.

Postwar justice from the viewpoint of the German public was a complex situation. The normal divisions of victim and persecutor, or innocent and guilty, were blurred by the Nazi regime’s time in power. Those who remained at the end of the war faced a past in which most were both innocent and guilty or at least could be perceived to be guilty of aiding some of the crimes of the regime. With most of the German public in this partial-guilt situation, many Germans questioned the efficacy of post-war trials. The near total destruction of those who opposed the Nazi regime and the fact that it had come to an end through international conflict rather than internal dissent or uprising, meant that few Germans were discontent with standing German legal and institutional norms. Much of the German infrastructure used by Nazi leadership to carry out the atrocities for which people were being put on trial had also been in place pre-war. This situation meant that the German public did not fervently call for postwar trials of any alleged criminals beyond the very upper echelons of the Nazi regime.

Postwar West Germany, led by Konrad Adenauer, was concerned with maintaining the rule of law through preserving societal stability. Little self-examination through war crimes trials was wanted, and they were therefore placed at a very low

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72 Ibid., 309.
priority by the government. Political Scientist Anne Sa’Adah explains that the ideological continuity provided by the Communist threat allowed for a smooth transition from Nazism to West German democracy and cooperation with its former enemies.

Also necessary for stability was the retention of educated or specialized personnel in both the public and private sectors. The efficiency and efficacy of the government’s plans for rebuilding would be heavily undermined by the loss of those specialists who had remained at their government posts and become a part of the Nazi machine. It would be highly controversial, but quickly normalized, for even members of the legal apparatus to continue in their positions in postwar Germany out of necessity if not ideology.

With this in mind, was justice achieved at Nuremberg and in the Allies’ subsequent proceedings? As Sa’Adah puts it:

If justice in a transitional setting is defined by the successful institutionalization of democratic politics, then justice was brilliantly served in postwar Germany – a rarity among historical cases. If justice is defined more conventionally as the use of legal and extralegal means to bring perpetrators to book for their acts, and so instruct the population in the new regime’s new rules, then justice was at best very imperfect and often tardy.

Justice after the Second World War was at first meted out with retributive justice as its ultimate goal. As the Cold War began to develop, however, the focus of the Allies and of West Germany shifted from retribution and deterrence through punishment towards rebuilding a healthy democratic nation to aid in the fight against Communism. This did not mean, however, that Germany did not participate in punishing its own wartime criminals. Consistent with the wishes and behavior of its occupying nations, Germany proceeded to try war criminals.

\[73\] Ibid.
\[74\] Ibid., 313.
\[75\] Ibid., 316.
\[76\] Ibid., 317.
Unlike the IMT, which was limited to trying international crimes only, the German courts were able to try crimes committed by the Nazi government against German nationals. Despite the fact that one of the aims of the IMT was to set down a solid historical record of Nazi atrocities, the IMT could only prosecute crimes committed by Germans against citizens of nations other than Germany. Because of this limitation, the IMT was unable to entirely fulfill this portion of its conceptualized duties. Instead of presenting a coherent picture of all of the crimes committed by the Nazi regime that would go down in history as legally established fact, the IMT was forced to largely ignore some of Hitler’s government’s most sinister crimes: the Holocaust and extensive eugenics programs enacted against Roma/Gypsies, the mentally ill, and other “undesirable” members of society. Since these crimes were committed by the legitimate German government against its own citizens, other nations had to deal with the sticky concept of national sovereignty, and so sidestepped it by focusing only on crimes committed elsewhere and against other nation’s nationals. The German courts were able to try German citizens who were no longer in power for crimes they had committed against their fellow Germans.

Under Control Council Law No. 10, created by the Allied Control Council on 20 December 1945, each allied nation was to take over the trials of war criminals in its own zone of occupation. Britain directed the trials, as mentioned above, in such a way as to end them as swiftly as possible once the international order began to shift into the bipolar state of the Cold War. In its zone of occupation, Britain allowed for German nationals to be tried in the standing German legal system under codified law as it stood in the German

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Code of Criminal Procedures, codified in 1877 and the Penal Code set down in 1871.\textsuperscript{78} This effectively eliminated the additional laws added by the Nazi regime while keeping Britain from imposing an entirely alien legal system upon another nation. German law in this form was coupled with Control Council Law No. 10, allowing for German courts to try crimes against humanity, despite the fact that it did not appear elsewhere in its legal code. The coupling of the two legal systems, “made the conviction of Nazi criminals easier by including deeds not previously prohibited by German law, removing distinctions between perpetrator and accomplice, rejecting the defense of superior orders, and providing for penalties higher than did the Penal code.\textsuperscript{79}

Post-war justice in Germany, then, was only conceivable as a hybrid between old domestic laws and the new international legal precedents set at Nuremberg. This also set the precedent that the German legal system was willing to try international crimes in domestic courts. This preference on the part of Germany’s courts played a role in Germany’s participation in the creation of the International Criminal Court for the Former Yugoslavia, discussed in more detail in Chapter 2. The precedent set during post-war trials extended even further, into the creation of the ICC. Germany placed an emphasis on national cooperation with the court through side-by-side proceedings, though it ultimately took the view that the international legal body should take precedence in many cases.

It is difficult, if not impossible, to speak of a generic “Germany” after World War

\textsuperscript{78} Jonathan Friedman, “The Sachsenhausen Trials: War Crimes Prosecution in the Soviet Occupation Zone and in West and East Germany,” in \textit{Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes} ed. Patricia Heberer and Jürgen Matthäus (Lincoln: University of Nebraska Press, 2008), 169.

\textsuperscript{79} Ibid.
victorious Allied powers. The USSR was in possession of the largest of these parts, Stalin having refused to give up a piece of his territory to France as the US and Great Britain had. East Germany, under USSR control, was distinct from West Germany, the combined zones of France, the US, and Great Britain. Because of the mounting Cold War, there existed constant tensions between East and West Germany, which were only resolved once they were unified following the collapse of the Soviet Union in 1990. For postwar justice, those differences manifested themselves in the willingness of East and West German courts to prosecute war crimes cases, the types of cases seen, the laws under which they prosecuted them, and the defenses allowable in each court system.

Most of the crimes tried in West German courts immediately following the war were concerned with random acts of murder and manslaughter committed against Jews. Germany was a nation healing from years of an authoritarian regime bent on conquering Europe and destroying entire groups of people. The economic situation in which its citizens found themselves was dire, all available resources having been spent in the last years of the war. Individual guilt is much more difficult to acknowledge than institutional guilt, and so it is no wonder that in West Germany after 1950, nearly all defendants were found guilty as only accomplices, indicating that those really responsible were Hitler, Himmler, Heydrich, and other members of the Nazi upper-echelon.

In contrast to West Germany’s focus on grave offences found under Germany’s previous law code and willingness to allow superior orders as a defense, East Germany relied heavily on Control Council No. 10 and preferred to try defendants for crimes against humanity without allowing the superior orders defense. East Germany tried a

80 Ibid., 170.
81 Ibid. 171.
much higher proportion of its population and had a much lower acquittal rate than in West Germany. Instead of dealing with violent crimes committed against Jews, East German courts preferred to try those who had caused the imprisonment or even death of others by denouncing their victims as opponents of the Nazi regime. The German Democratic Republic (GDR) also focused on prosecuting crimes concerning persecution of communists or socialist party members, which is in keeping with its association with the USSR. When Control Council No. 10 was repealed in 1955, East Germany, unlike West Germany, continued to try crime against humanity by using the IMT charter as justification, and incorporated crimes against humanity into its own penal code in 1968.

The differences between East and West Germany’s post-war trials has less to do with German views on international accountability, and more to do with how the major nations of the world were coming to terms with the end of such a devastating international conflict. East Germany’s methods reflect its Soviet leadership in the same way that West Germany’s reflect its alliance with its three occupiers. The international tension that developed after World War II did more to shape postwar justice than any objective national views on international justice (if such things indeed exist). Germany’s unique situation as a divided and occupied nation left what remained of its government unable to dictate any national war crimes trial policy that was independent of international issues. However, the experience with international justice undergone after World War II in Allied courts and in Germany’s own courts, still shaped German citizens’ collective experience and became a platform for the formation of future views on international courts.

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82 Ibid., 176.
83 Ibid., 175.
84 Ibid.
There is an ongoing debate as to the efficacy of trials to heal a nation or group torn apart by an atrocity such as genocide. Many contend that instead of focusing on punishment through courts, truth and reconciliation commissions would be more helpful in moving forwards instead of looking back. This movement is a continuing trend stemming from the debate that follows each instance of judicial action after a conflict. In both East and West Germany, as in the rest of Europe, the focus during the 1950s and 60s shifted from retribution to reconciliation.

Like Great Britain, and likely more so, Germany itself had a vested interest in rebuilding after the war. The pervasiveness of the Nazi party in German society and its permeation through all government and most public organizations meant that those touched by the Nazi machine were the vast majority of German citizens, who were found in all walks of life. For German society, both East and West, to function and re-grow after the war, some form of reconciliation had to be achieved. This mindset led both the East and West German governments to hand down amnesties in the 1950s.

East Germany, at the behest of the socialist party, instituted an official amnesty for members of organizations deemed criminal at Nuremberg, including the Nazi party itself, in August of 1947. West Germany also instituted amnesties, and exerted pressure on other European nations to do the same. This was so successful that, “by the end of the 1950s hardly any Nazi criminals were still in prison anywhere in Europe (including

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85 For arguments on the need to provide better provisions for the process of reconciliation in the Former Yugoslavia, Rwanda, and at the ICC, see: Steven R. Ratner and James L. Bischoff, ed., International War Crimes Trials: Making a Difference?: Proceedings of an International Conference held at the University of Texas School of Law (Austin: The University of Texas School of Law: 2004).
Eastern Europe). These amnesties hardly spelled the end to Nazi trials, as there was a reappearance of these types of trials in both Germany and France in the 1960s, but it did slow down their progress and contributed to Germany’s continuing postwar reconciliation with its past.

Conclusion

The International Military Tribunal served as Great Britain and Germany’s first experience with international criminal tribunals. While they were on polar opposite ends of the Nuremberg trial, this experience helped shape the collective experience of both nations.

The Nuremberg experience put Great Britain immediately into a leading role, one that the nation would maintain through all subsequent international criminal tribunals, including Tokyo. The British government expressed a commitment throughout World War II to appropriately punish those considered most responsible for the atrocities of the war. The government followed through on that commitment by participating heavily at Nuremberg and by continuing trials in its own zone of occupied Germany. Great Britain also contributed to the IMTFE by staying in communication with the US government to continue input into the trial’s formative stage, and by sending a prosecution team that took on leadership roles at the trial. Great Britain’s participation as one of the leading nations at both Nuremberg and Tokyo established a precedent and legacy that Britain continued through the two ad hoc tribunals of the 1990s and into the present.

Furthermore, the overwhelming cost of the trials and the negative public opinion faced by

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87 Ibid., 357.
88 Ibid., 362-363.
the British government would be compelling reasons to support a standing international criminal court.

Germany’s experience with the first two international criminal tribunals took a much different shape from Great Britain’s, but it ultimately led Germany to the same place: signing on to the ICC. As the nation that provided the defendants at Nuremberg, the German government and population necessarily viewed the IMT from a unique perspective. Germany focused on reconciling with the past in order to rebuild, and the Nuremberg Trial helped with that process, though it was criticized for being one-sided and retroactive. Both the West and East German governments continued with criminal trials after Nuremberg that were built on international legal precedents and authority, although the length of the trials and the sense of urgency for completion as the 1960s approached led to amnesties that were later criticized.

Overall, the German experience at Nuremberg allowed Germany as a whole to reconcile with its Nazi past by providing defendants who were individually guilty. The guilt of individuals took away from national guilt, and so the novel concept of individual criminal responsibility could be understood from a positive perspective by much of the German population. The fact that international criminal tribunals were grounded in this belief in individual criminal responsibility could explain why Germany, which experienced Nuremberg in a much different way than Great Britain, ended up becoming a supporter of all subsequent tribunals.\(^{89}\)

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\(^{89}\) With the exception of the IMTFE, because of Germany’s postwar position in the international community.
Chapter 2: Towards a Permanent International Criminal Court

A lull of almost 50 years occurred between the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE), and the next international criminal tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda (ICTR). Perhaps the advent of the Cold War made the United States and the USSR, the two superpowers during that long period, wary of any international body of justice that could scrutinize their behavior.\textsuperscript{90} Or, perhaps it was because most conflicts were internal, rather than international, until the Bosnian War broke out.\textsuperscript{91} For whatever reason, and it certainly was not because of a lull in war crimes themselves, the first conflict to spark international intervention in the form of an international criminal tribunal was the breakup of Yugoslavia in the early 1990s.

The breakup of Yugoslavia was a violent process that featured documented war crimes on all sides. The conflict’s extremely violent and public nature led to an outcry on the international stage calling for the UN, charged with keeping international peace, to do something. The UN Security Council used its Chapter VII powers to establish safe areas, such as Srebrenica, and sent in a military force of UN peacekeepers. Despite these actions, the conflict raged on violently, with some of the most abhorrent acts committed in those very areas that the UN had declared safe. By 1993, two years into the conflict, the UN Security Council needed an additional plan of action. This action took the form of the International Criminal Tribunal for the former Yugoslavia, established by the UN


\textsuperscript{91} Theodor Meron, “A Case for War Crimes Trials in Yugoslavia,” \textit{Foreign Affairs}, Vol. 72, No. 3 (Summer, 1993), 124.
Security Council in 1994. The ICTY was established in The Hague under the same
Chapter VII powers that allow the Security Council to send UN troops into conflict. Its
mission was, and continues to be, to help establish lasting peace in the former Yugoslavia
by bringing those most responsible for atrocities to justice.

The ICTY was followed closely by the equivalent tribunal for the 1994 genocide
in Rwanda: the ICTR. In 1994, the conflict in Rwanda between the minority Tutsi
population and the leading majority Hutu population escalated into what has been termed
the Rwandan Genocide. While colonial officials imposed these supposedly ethnic
categories during Belgian occupation, they had become a very real division in Rwandan
society. As the culmination of a conflict between the Hutu government and the Tutsi
RPF (Rwandan Patriotic Front), the Hutu leadership carried out a bloody, systematic
campaign to eliminate the Tutsi population. The ICTR was established in Arusha in 1995
on the heels of both the conflict and of the UN’s first ad hoc tribunal. The conflict in
Rwanda was largely over by the time the Tribunal came into being, and its mandate
covered only those crimes committed between 1 January and 31 December of 1994. The
ICTR’s mission was less focused on ending conflict, and more on bringing and
maintaining post-conflict peace through justice.

Both of these ad-hoc tribunals were created via a United Nations mandate and
involved participation from both the British and German governments. The British
government supported the creation of the tribunals but, especially when considering the
ICTY, held out its support only half-heartedly because of conflicting views concerning
peace and justice. Some British officials believed that a tribunal that indicted those
leaders that were needed to negotiate a peace settlement would seriously hamper ongoing
peace talks, in which the British took a leading role. Despite these concerns and mainly because of international pressures to help resolve the conflict and promote stability in the Former Yugoslavia, Britain publicly supported the ICTY’s creation. The ICTR soon followed, again heavily motivated by outcries from the International community, including non-governmental organizations (NGOs).

As for Germany, as a non-UN Security Council member during the formation of the two ad hoc tribunals, its contribution to this development in international criminal law is a bit less overt. In contrast to Britain’s first efforts, Germany financially supported, and continues to support, both tribunals. Germany was instrumental in solidifying the model of an international criminal tribunal taking precedence over national judicial systems when the nation agreed to hand over the ICTY’s first indictee, the Bosnian Serbian, Dusko Tadic, who was accused of multiple murders as part of an ethnic cleansing campaign. This move indicated considerably less reservation with the prospect of an international judicial system that could potentially hold power over national judiciaries, and will be reflected in the nation’s debates over the creation of the International Criminal Court (ICC).  

Once both ad hoc tribunals were up and running, both Britain and Germany supported them financially and with staff. However, the limited scope of the tribunals and mounting international pressures to come up with a more permanent solution to deal with these most shocking of crimes, soon led to the 1998 Rome Conference. Both Britain and Germany participated heavily in developing the draft statute for the international criminal court at Rome. Their delegates lobbied for nuances in law and procedure that reflected each nation’s particular reserves.

92 See Chapter 3.
The British government, made more change-oriented by the recent rise to power of the Labour Party, but still pulled toward the regulatory viewpoints taken by the UN Security Council, came to the table with proposals that reflected compromise. Germany, sharing no such international pressures, presented more independent-leaning proposals and was disappointed on multiple issues with the compromises reached at the Conference.

This chapter will review these three main developments, the ICTY, ICTR, and the Rome Conference, in temporal order, focusing first on Britain and then on German participation in each. Each nation’s respective position in the international community informs its behavior towards all three subjects, with Britain often playing the part of the regulatory Western power, and Germany that of a more change-oriented European UN member nation.

**The International Criminal Tribunal for the Former Yugoslavia**

One of the principal distinctions between the ICTY and its predecessors at Nuremberg and Tokyo was the ongoing nature of the conflict in the former Yugoslavia.\(^93\) Whereas Nuremberg and Tokyo were meant to be deterrents for future war criminals, the creation of the ICTY was meant to both deter future crimes and put a stop to those crimes being actively committed in the Balkan region. Officially, the main aim of the ICTY is to bring to justice those most responsible for the atrocities committed during the Bosnian War in order to “contribut[e] to a lasting peace in the former Yugoslavia.”\(^94\) It is an

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\(^94\) *International Criminal Tribunal for the Former Yugoslavia*  
<http://www.icty.org/sections/AbouttheICTY>
ongoing debate whether putting a stop to crimes as they were actively being committed in
the region was actually a realistic aim, or if justice and peace are mutually exclusive.

The inability of UN military forces to deter aggression or put a stop to the conflict
was a notorious feature of the Bosnian War. The international justice avenue was
explored simultaneously as a way to help end the conflict. Because of the unsuccessful
military response to the conflict, the international community criticized attempts to create
an international tribunal to deal with ongoing war crimes as a way of avoiding taking any
real steps to end the conflict through force. 95 This thought characterized the cynical
environment in which the ICTY was created, though whether or not political leaders were
in fact using the tribunal as a red herring, or even if that matters at all, is still up for
debate. 96

Despite this cynical environment, there certainly were politicians and NGOs that
genuinely thought an international criminal tribunal would contribute to deterrence. Two
types of deterrence are often discussed in the context of international criminal justice:
general deterrence and specific deterrence. General deterrence refers to the theory that
convicting and punishing criminals for war crimes after the fact will make any potential
wrong-doers think twice before committing the same types of crimes. General
deterrence thus refers to abstract situations that may or may not occur some time in the
future, in which scenario a tribunal acts as a preventative measure. The measure of
success for the ICTY’s general deterrence would be whether future war criminals, for
example, see a figure such as Mladic on trial, conclude that the mass atrocity they had
been planning would just not be worth the risk, and decide not to go through with it.

96 Ibid., 751
Specific deterrence, on the other hand, refers only to the situation for which the tribunal is created, and requires that prosecutable events are still taking place. Specific deterrence refers to the prevention of ongoing situations through the threat of prosecution or the arrest and prosecution of those people currently involved in committing the crimes for which the tribunal was created. If specific deterrence were successful, it might curb the crimes that Mladic was actually committing, as the threat of the ICTY would prove to him that the international community would be holding him accountable for his actions.

Specific deterrence was under fire as a feasible goal for the ICTY, but general deterrence was a bit more credible, as it is an overarching goal of any justice system. Furthermore, general deterrence is not a result that can really be measured: it is vague and happens in the future. Specific deterrence, however, occurs right away and will have measurable signs to prove its effectiveness. In reality, specific deterrence in the case of the former Yugoslavia was obscured by the cloud of war and some of its effects were therefore overlooked.

What is clear is that the goal of general deterrence was upheld either way, and some scholars even point to limited success in specific deterrence as well. Legal advisor for the ICTY, Payam Akhavan, highlights the interesting case of Simo Drljaća, a Serb indicted for genocide committed while he held the position of Deputy Minister of Interior of the Serb Republic of Bosnia. While Drljaća would have liked to summarily execute the approximately 1,500 detainees in the Manjaca camp, he was restrained and had to release them because of negative international opinions.97 This is a poignant example of an instance where the looming prospect of international justice was able to specifically

97 Ibid.
deter a potential war crime and save some lives beforehand, rather than avenging their loss after the fact.

In stark contrast to this encouraging instance of deterrence, the fact that some of the most tragic instances of war crimes occurred while the ICTY was in full swing and specific war criminals had already been indicted, speaks to a failure in the area of specific deterrence. Karadžić and Mladic were first indicted in July of 1995, the same month in which the Srebrenica massacre occurred.\textsuperscript{98} Clearly, issued indictments and the looming ad hoc tribunal were insufficient to save the lives of the approximately 8,000 victims of the massacre.\textsuperscript{99} Although we cannot hold the tribunal at fault for not preventing the massacre, what the instance can show us is that there is a difference between justice and peace, and that tribunals are not able to solely bear the burden of putting an end to a conflict.

\textit{Great Britain and the Creation of the ICTY}

Although there may have been instances of deterrence, what the international community was firstly concerned with was ending the Bosnian War, and the mass human rights violations that came along with it, immediately. Even the British government, a strong outward supporter of the ICTY, questioned the projected effectiveness of the tribunal. No government can be viewed as a single, monolithic entity that is of one mind or even one policy direction. There are always dissenting opinions within any given government and usually within the ruling party itself. In the case of Great Britain, a

\footnotesize{\textsuperscript{98} Ibid., 750.\textsuperscript{99} Ibid., 798.}
heated internal conflict arose over whether the ICTY would prove an effective tool to end the Bosnian War or an impediment to peace that would unwittingly prolong the conflict.

In order for the ICTY to be effective, it would have to put those most criminally responsible for the situation in the former Yugoslavia on the defendant’s dock and allow the international justice system to evaluate their guilt and mete out punishment accordingly. There is no use in putting time, money, and political capital into a sham. It would therefore be pointless to set up a tribunal that did not indict those clearly responsible for the international law violations, including leaders like Radovan Karadzic and Ratko Mladic. However, because Karadzic and Mladic were to be actively engaging in peace negotiations, British officials argued that setting up a tribunal and indicting the pair would further prolong the conflict by blocking any possible diplomatic roads toward peace.100

While Great Britain outwardly supported the creation of the ICTY, the British government used roundabout tactics to undermine the court in order to support peace talks led by a British representative, Lord Owen. The series of negotiations led by Owen and Cyrus Vance, an American lawyer and experienced negotiator, produced what is referred to as the Vance-Owen peace plan. UN Security Council Resolution 780 initiated the ICTY on 6 October, 1992.101 The resolution was adopted unanimously, so Britain outwardly supported the creation of the court. However, because Britain was involved in the ongoing peace operations through its representative, Lord Owen, who strongly

100 Ibid., 738.
believed that preparing for trials would undermine the peace negotiations, Britain also had motive to stall the operations at the ICTY.\textsuperscript{102}

The international investigatory commission created by Resolution 780, officially called the “impartial commission of experts,” or the “780 Commission” for short, was tasked with investigating the situation in the former Yugoslavia and outlining the framework of any recommended tribunal.\textsuperscript{103} From the moment of the commission’s creation, it was clear that the British government was not going to be involved in expediting the creation of a tribunal. Both Great Britain and France were opposed to the commission’s investigatory powers, and would have preferred it to take a back seat to peace negotiations by passively collecting information.\textsuperscript{104} It was only after intervention from the United States that Britain gave way on this point, but Britain found another avenue to disrupt the commission’s smooth operations.

Like all UN organizations, a hefty determining factor in the 780 Commission’s ability to run effectively was its budget. Britain insisted that the Commission’s budget be found within the already stretched UN budget rather than through creating a new budget category for its operations. Because the US had lobbied for a cap on the UN budget for years, it would have been difficult for the US to oppose this requirement.\textsuperscript{105} Eventually, the creation of a trust fund that allowed countries to voluntarily contribute to the commission’s budget solved the budget difficulties.\textsuperscript{106}

Britain’s opposition to the court’s development was partially based on its concrete experiences with hindered peace talks. In December of 1992, US Secretary of State,

\textsuperscript{102} Ibid., 44.
\textsuperscript{103} Ibid., 41-42.
\textsuperscript{104} Ibid., 41.
\textsuperscript{105} Ibid.
\textsuperscript{106} Ibid., 45.
Lawrence Eagleburger, ruffled peace negotiation feathers with a speech in which he specifically outlined ten people who could be brought to trial for international crimes. This speech came to be known as the “naming names speech.” Among the ten named were Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic; three of the leaders that were necessary for the negotiations in order to make the Vance-Owen peace plan successful. This contributed to the antagonistic relationship between those supporting creation of a tribunal and those supporting the peace negotiations; it appeared that the two were fundamentally unable to coexist.

Despite these objections and attempts to undermine the budget of the court as it formed, the ICTY did get off the ground. It also was able to coexist with the ongoing peace negotiations, partly because of the lack of aggressive action taken to arrest indicted leaders. It was proven in the case of the ICTY that peace (the end of the conflict) and justice (the court) each had unique merits that could successfully coexist, though this is far from a universally shared opinion. The peace vs. justice debate is still unresolved, and as British lawmakers debated becoming party to the ICC, this issue was a major roadblock towards ratification of the Rome Statute.

On top of conflict with the peace process, the British government found the issue of national sovereignty a major barrier against fully supporting an ad hoc tribunal in the former Yugoslavia. The charter of the tribunal allows the court to take precedence over national courts. In practice, this means that the court had the authority to order a nation to transfer an indicted to the custody of the court, whether or not the nation in question had already initiated proceedings against the accused. The reasoning behind this was to

107 Ibid., 43.
108 Ibid., 44.
109 See Chapter 3.
allow for a fair trial in a neutral international court. Both the states involved in the tribunal and all UN member states are obliged to cooperate fully with the tribunal, over and above any national concerns about doing so. This situation as written is very worrying for any nation that is reluctant to relinquish national sovereignty, or that views international concerns as secondary to national views and obligations.

Despite the fact that the ICTY’s charter clearly outlines its supremacy over national courts, in practice, the tribunal has no body with which to enforce this privilege. Instead, the court must rely on international pressures and national cooperation, which are at the discretion of national governments. Only in Bosnia, where there was a North Atlantic Treaty Organization (NATO) presence, does the court have any force with which to arrest an indicted person. In Croatia and Serbia, as well as elsewhere, the court has no physical powers of enforcement. However, because the Tribunal has the support of the UN Security Council, any serious actions taken against the court could result in a number of diplomatic consequences.

Even though the ICTY had no physical force to act on behalf of the court, to act in opposition would put a nation in a difficult diplomatic situation with the rest of the international community. Because of this, Britain was wary of accepting any situation in which an international institution would have precedence over its national courts. It seems that Britain was not as concerned with a conflict of interest involving any indictee

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112 Ibid., 1120.
connected with the Bosnian War, but rather, the precedent that this arrangement would set for future international organizations.

Britain’s conflict with the ICTY seems to have come to an end with the Dayton Agreements. The court’s mission no longer conflicted with peace talks, and it was too late to assert national precedence in this instance. Any British efforts to tacitly undermine the new tribunal were no longer necessary, and the British government cooperated with the ICTY in various ways. For example, on top of an increased budget from the UN, in 1998, the ICTY received funding from the United Kingdom, the Netherlands, and the US, to open two new supplementary courtrooms in The Hague. Additionally, the British government provided funding to set up a program to relocate witnesses who might be in danger because of their testimony at the tribunal; it was the first nation to do so.

Britain’s two main concerns with the creation of the ICTY were the court’s effects on ongoing peace talks and the tribunal’s primacy over national courts. Once these two concerns were addressed by the nature of the court in practice, Britain fully participated in supporting the ICTY. Like the nation’s participation at Nuremberg and Tokyo showed, its cooperation with the ICTY affirms Britain’s belief in the necessity of criminal accountability for the most serious of crimes. This belief would be reaffirmed when Britain ratified the Rome Statute and joined the ICC, but first the nation would have to wrestle with the same concerns again, made more vital by the ICC’s permanent nature.

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113 Murphy, “Progress,” 61.
114 Ibid., 62.
Germany and the Creation of the ICTY

Although Germany is not a member of the UN Security Council, and therefore did not directly participate in the creation of the ICTY via the Security Council’s Chapter VII mandate, the nation’s behavior towards the tribunal can shed light on its policies towards international legal bodies. By 1993, the year of the ICTY’s creation, Germany had re-emerged on the international political scene as a united nation that was fully able to participate on equal footing with other UN member nations in this next development in international law. Unlike Germany’s first experience with an international criminal justice system, Germany was not one of the parties in the conflict that inspired the tribunal. Instead, the ICTY was Germany’s first experience with an international criminal tribunal in which the nation was providing staff as opposed to defendants.

Where Britain had already experienced being involved in the formation of an international criminal tribunal, this was Germany’s first opportunity to do so.

One of the differences between the ICTY and the two international criminal tribunals that had come before it, the IMT and the IMTFE, was that the nations that established the ICTY had no direct control, as a result of defeat and occupation, over the nation in which the trials were to take place. In both Germany and Japan after World War II, the Allied powers had set up occupation governments and maintained control over both nations’ judicial systems. The tribunals therefore had a measure of autonomy where state cooperation was concerned. The IMT and IMTFE did not need to pander politically to the nations in which they operated, as they operated in concert with, and under the same authority as, the respective occupation governments. In contrast, the

ICTY was set up by nations which were indirectly involved in an ongoing conflict, and therefore had to depend on the cooperation of the justice systems of various other nations.

As mentioned above, the ICTY had no military or police branch to arrest indicted persons, so once a warrant was issued, it was out of the tribunal’s hands. Under the ICTY charter, as a UN Security Council mandate, states are required to comply with the court’s decisions. However, because of the unprecedented nature of the ad hoc tribunal, most state’s laws had either no provisions addressing cooperation, or provisions that prevented the arrest and transfer of indicted persons. Because the ICTY charter contained no provisions for any sort of force that could track down and arrest indicted persons, the court had to rely on the political will of nations that found indicted persons within their borders to arrest them and then transfer them to the custody of the court in the Hague. Despite a conflict between an ICTY indictment and its own national laws, the nation that set a precedent for doing so was Germany.

As previously mentioned, the ICTY was created amidst a tumultuous debate over its effectiveness as a peace-making apparatus. It was believed that indicting acting leaders in the Bosnian War would exacerbate the conflict. The German government, showing its support for the ICTY through its actions, became the first nation to arrest and transfer an indicted person into the custody of the court when it transferred Dusko Tadic to the tribunal in the Hague in April 1995. Although Tadic was arrested in Germany in February 1994, the German constitution necessitated new legislation in order for the transfer to take place.

117 Ibid.
118 Murphy, “Progress,” 58.
Because German law recognizes universal jurisdiction in cases involving war crimes,\textsuperscript{119} the German government was able to arrest Tadic and begin proceedings against him in the German judicial system. Tadic’s appearance in Germany was not exactly surprising, as Germany had been an outlet for hundreds of thousands of refugees from the Balkan region since the conflict began in 1992.\textsuperscript{120} Inevitably, some of those who relocated had been involved in ethnic violence, and were recognized by other refugees as war criminals. Facing public pressure, the German government initiated investigations and eventually arrested thirteen suspected war criminals, including Tadic.\textsuperscript{121}

Though ICTY prosecutors heard of the arrest almost immediately, the tribunal was still in its formative stages, and no indictment for Tadic was issued. As the ICTY was still in its initial stages, and resources were scarce, the decision was made to allow Germany’s proceedings to go ahead in order to take some of the burden of investigation and cost of trial off of the tribunal.\textsuperscript{122} A change of staff at the ICTY – the appointment of Richard Goldstone as head prosecutor – initiated changes in this policy.

Instead of completing dual investigations into the Omarska prison camp, the camp at which Tadic’s alleged war crimes took place, Goldstone decided, in October 1994, to request that the German government halt proceedings and hand over Tadic for trial in The Hague.\textsuperscript{123} Germany’s Ministry of Justice accepted the primacy of the ICTY, but claimed

\textsuperscript{120} Scharf, \textit{Balkan Justice}, 96.
\textsuperscript{121} Ibid., 97.
\textsuperscript{122} Ibid., 98.
\textsuperscript{123} Ibid.
that the correct laws to allow the transfer of the prisoner were not yet in place and would have to be passed before Tadic could be legally handed over.\textsuperscript{124}

The judges at the ICTY were not exactly thrilled with this stipulation, arguing that a nation cannot avoid its international obligations by hiding behind national laws.\textsuperscript{125} However, the German government stuck to its initial position, and only handed over Tadic in March of 1995 after necessary legislation had been passed. This move can be seen as a manifestation of Germany’s opinion that its legal system was not entirely subordinate to the ICTY, but was able to cooperate in side-by-side proceedings as long as German law supported that cooperation. This was a way for the German government to hand over Tadic and be freed from the cost of his trial without deferring complete authority to the international tribunal. Germany made the statement that it intended to cooperate with the tribunal, but that its national laws still took precedence over international mandates.

Germany’s support of the ICTY made sense politically. As a NATO member, Germany was heavily involved in the peacekeeping operations during the Bosnian War, and took partial blame when NATO generally failed to protect civilians or to end violence in the region. Like Great Britain, then, it was in Germany’s interest to support the creation of the ICTY as a potentially effective response to the crisis in the former Yugoslavia. Germany was also directly affected by the influx of refugees fleeing the conflict, and was therefore eager to improve conditions in the former Yugoslavia in order to accelerate returns of refugees.\textsuperscript{126} Unlike Britain, however, German diplomats were not

\textsuperscript{124} Ibid., 99.
\textsuperscript{125} Ibid., 100.
directly invested as leaders in the ongoing peace talks, and were therefore not as concerned with stalling any war crimes trials that might indict acting leaders in the conflict. Germany was therefore free to not only provide the first defendant for the ICTY, but also to establish itself as a significant voluntary contributor of resources to the tribunal.¹²⁷

**The International Criminal Tribunal for Rwanda**

Much as the Tokyo Trial followed the precedents of Nuremberg, the International Criminal Tribunal for Rwanda developed in the wake of the ICTY. Once the precedents for an ad hoc tribunal under the UN Charter’s Chapter VII powers, and a working model of the court was up and running, there was a much lower barrier to the creation of a second tribunal. On top of the technical aspects, the ICTY also set the precedent of an international tribunal as a proven, at least partially, effective international response to such a conflict.

Critics of the ICTR, as with the ICTY, again accused the international community of using the tribunal as a convenient way to avoid becoming more proactively involved in ending the conflict. Those skeptical of international motives saw the tribunal as an inadequate, after-the-fact response to a deadly situation that should have merited stronger, more direct intervention.¹²⁸ Whether these critics were correct or the international community viewed the tribunal as an effective way to put pressure on those committing atrocities, can perhaps never fully be decided. However, at the behest of the

Rwandan government, and under heavy public pressure, the UN Security Council went ahead with establishing the ICTR.\textsuperscript{129}

The ICTR was established to respond to a very specific timeframe and sequence of events that occurred in Rwanda in 1994.\textsuperscript{130} The violent upheaval that would become known as the Rwandan genocide began in April of 1994, and was almost immediately condemned by the UN Security Council. The Security Council issued a statement declaring that all those responsible for breaches of international law would be held individually responsible.\textsuperscript{131} Conspicuously absent from the statement was any accusation of genocide, which, because of the Genocide Convention of 1948, would have obligated its signatories to take action. The British government was notably reluctant to assign the term Genocide to the conflict at first, but was compelled to acknowledge it as such after a UN commissioned report on the situation concluded that the conflict constituted genocide.\textsuperscript{132} The action the nations of the UN took was to establish the ICTR.

The ICTR was, like the ICTY, set up by a UN Security Council resolution using its Chapter VII powers. Unlike the situation surrounding the ICTY, the Rwandan government was the first party to request a tribunal to deal with the conflict. However, because of the jurisdictional disagreements detailed below, Rwanda ended up being the only nation to vote against its creation.\textsuperscript{133} Similar to the ICTY, the ICTR maintained supremacy over national courts. Although both tribunals still allowed proceedings in national courts to take place alongside international trials, if the tribunal requested any

\textsuperscript{129} Ibid., 49.
\textsuperscript{130} Ibid., 32.
\textsuperscript{131} Ibid., 25.
\textsuperscript{132} Ibid., 25-26.
\textsuperscript{133} Ibid., 31.
nation end its proceedings against an individual and hand him/her over to the court, the nation would technically be obligated to obey.\textsuperscript{134}

Rwanda requested international judicial intervention in order to help ameliorate the cost of trials and legitimize the post-conflict reconciliation process, but the shape of the ICTR was extremely disappointing to the new Rwandan government. The debate over the primacy of the ICTR centered on the Rwandan government itself, which preferred to try major war criminals in national courts instead of at a distant international court. The Rwandan government disagreed with the ICTR’s narrow definition of the conflict, which only extended its jurisdiction to crimes committed between 1 January and 31 December 1994. The new political elites in Rwanda wanted the conflict to extend back to 1990, and forward to July of 1994, which would have downplayed the centrality of the genocide and included possible war crimes committed by both groups.\textsuperscript{135} Rwanda was staunchly opposed to international insistence that the death penalty be excluded from possible sentences. Despite the fact that the death penalty was part of the Rwandan justice system, and that it would be implemented to punish lower-level criminals, major war criminals would be, at most, given life sentences.\textsuperscript{136} The Rwandan government also objected to the primacy of the international court, which compromised the national courts’ ability to have control over the historical record that would be set by the trials.\textsuperscript{137}

That the ICTR insisted on primacy is a reflection of both the ICTY’s precedent on the one hand and the international community’s distrust of the impartiality and abilities of the Rwandan national court system on the other. Interestingly, even though Britain had

\textsuperscript{134} Ibid., 33.
\textsuperscript{135} Ibid., 32.
\textsuperscript{136} Ibid., 39-40.
\textsuperscript{137} Ibid., 33.
been classically weary of any situation in which an international court held primacy over national courts, the British government strongly supported it in this case. Evidently, the British government was concerned that the integrity of the trials would be compromised if the Rwandan government, and not the presumably more impartial international community, were to take control of the trials.\textsuperscript{138}

During the debates at the Rome Conference, the British government reversed this position by supporting national jurisdiction above that of the international court. This reversal can be explained by the specificity of the ICTR. Because the ICTR was an ad hoc tribunal that was given very limited jurisdiction in response to a specific incident in which British citizens were uninvolved, Britain and its citizens were absolutely safe from being put on trial at the ICTR. The British government, then, did not fear a potentially sticky jurisdictional battle over an indicted British citizen, so it was free to fully support international primacy. Furthermore, the precedent of international primacy had already been set by the ICTY, and the ICTR was following suit, so this was not a new concept up for debate. Perhaps Britain would have had more to object to if instead of creating ad hoc tribunals to respond to specific geographical areas, the UN Security Council had decided to go ahead with an international court that had jurisdiction over all areas.\textsuperscript{139} Thus, although the British government would be concerned with protecting its citizens from possible international trial when it came time to debate at the Rome Conference, the limited nature of the ICTR helped cause Britain to support international jurisdictional primacy in this case.

\begin{flushright}
\textsuperscript{138} Ibid., 34.
\textsuperscript{139} Ibid., 41.
\end{flushright}
Germany is an even less clear participant in the development of the ICTR as it was in that of the ICTY. Because Germany was not a member of the UN Security Council when the ICTR’s creation was put to a vote, the nation’s input did not directly impact the creation of the court. Also, since, unlike with the ICTY, Germany had not detained or begun trial proceedings against any war criminals of which the ICTR might request transfer of jurisdiction, Germany’s role remained minor compared to that of Britain. However, Germany’s support of the court can be noted if one examines the voluntary contributions given by nations to support both the ICTY and the ICTR. Germany remains a large contributor to both courts. When compared to other voluntary donors, Germany has donated more than double the international average in finances alone, and is among the top three most frequent donors to the Courts, alongside the US and Canada.\footnote{Roper and Barria, “Gatekeeping,” 288.}

**The Rome Conference: Creating the International Criminal Court**

The creation of the International Criminal Court began, true to its name, as an international endeavor. Although in this particular project I will be focusing on Great Britain and Germany’s journey toward becoming party to the International Criminal Court, it would be irresponsible to ignore the truly international nature of the court’s beginning. The UN’s first concrete move toward the creation of an international criminal court was its creation of the International Law Commission. The International Law Commission prepared a draft statute for a permanent international criminal court and in December 1994, the UN General Assembly established an ad hoc committee, open to all states members of the United Nations and to Non-Government Organizations in related...
areas, to review that draft statue and arrange for an international conference. The ad hoc committee submitted a report in December 1995 that persuaded the UN General Assembly to create a preparatory committee, also open to all states members and NGOs of appropriate nature, to prepare for the conference that ultimately became the Rome conference in 1998.\textsuperscript{141}

\textit{Great Britain at the Rome Conference}

The British delegation to the Rome Conference consisted of 18 representatives and four advisers, which was a comparatively large group.\textsuperscript{142} The delegation was representative of the newly elected Labour government, the more liberal political party in Britain. Before the election, the British government had expressed on multiple occasions that its views towards a permanent international criminal court coincided with those of other permanent UN Security Council members, including the United States. After the elections, just before the Rome Conference was to convene, the British government joined the “Like-Minded States,” a group of 54, mostly smaller nations that joined together out of frustration with larger states’ opposition to establishing an international criminal court.\textsuperscript{143}

The new British alignment with the Like-Minded States rather than the permanent UN Security Council placed Britain in opposition to other Security Council members on a few key issues. The Like-Minded States favored a strong and independent court;

\textsuperscript{143} Arsanjani, “Rome Statute,” 23.
independent of the UN Security Council, among other things.\textsuperscript{144} To protect each nation’s own interests, the four other permanent UN Security Council members, the US, China, Russia, and France, would have preferred a court that was overseen by the Security Council in some way. Each nation at the Rome Conference brought a unique perspective to the discussion. To say that Britain was completely aligned with the Like-Minded Group against the other UN Security Council members, or even that all of the nations in each group agreed totally with each other would be an over simplification. What is important is that Britain was the first of the five permanent UN Security Council members to lend support for a court with largely independent powers.\textsuperscript{145} However, Britain continued to support the UN Security Council as an overseeing apparatus of the court, most notably in any situation where an act might be determined to be a crime of aggression.\textsuperscript{146}

The first speech given by the United Kingdom’s head representative, Sir Franklin Berman, outlined some of Britain’s major concerns about the composition of the court. The British delegate spent a significant portion of his speech cautioning against an approach to the election of judges that would hold any judicial characteristics to be more important than concrete criminal law experience.\textsuperscript{147} Speaking on the appointment of the judges and the prosecutor, the British opinion was that the candidates should be chosen based as little on political considerations as possible. Berman was adamant that any


\textsuperscript{145} Arsanjani, “Rome Statute,” 23.

\textsuperscript{146} Ibid., 29.

\textsuperscript{147} UN, “Diplomatic Conference,” II:98.
judges must have both criminal law and trial experience.\textsuperscript{148} The UK delegation insisted on full time judges that came as close as possible to an outlined ideal which included both international and criminal law experience, and stressed the importance of professional qualifications.\textsuperscript{149} The delegation even voiced the opinion that there should be a review process in place between the nomination of judges and elections.\textsuperscript{150} Britain’s concern with concrete experience and removal of politics from the election process can perhaps be attributed to a fear that if judges were selected based on the nation from which they originate instead of their experience level, Western nations, who are far outnumbered by smaller nations from the rest of the world, would end up being underrepresented on the bench. This concern continued to plague the British government after the Rome Conference as its Members of Parliament (MPs) debated ratifying the Rome Statute in the British Parliament.\textsuperscript{151}

Another issue stressed by the British delegation from the outset was cooperation with the ICC. Britain stressed that states’ full cooperation with the ICC was absolutely necessary for the court to function as intended.\textsuperscript{152} This referred not only to personnel and finances, but also to information. As an example, Berman pointed out his nation’s ready cooperation with the ICTY in allowing its officers to interview over 100 British servicemen and even to use a handful as witnesses in court.\textsuperscript{153} Berman even asserted the importance of striking a balance between national sovereignty and effective justice.\textsuperscript{154} The UK delegation offered a proposal for Article 71, which dealt with information

\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid., 226.
\textsuperscript{150} Ibid.
\textsuperscript{151} See Chapter 3 for a discussion of these debates.
\textsuperscript{152} Ibid., 98.
\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.
requested by the court that might conflict with a state’s national interests. The proposal contains the plea that all possible measures be taken to resolve the issue cooperatively, but outlines the procedures that must be taken if no resolution can be found. These include a judicial hearing and measures for the court to usurp state authority if the state is not acting “in good faith.”\textsuperscript{155} This proposal illustrates the cautious optimism with which the court was treated by the UK delegation. The court should not be given complete powers over national sovereignty, but in some cases it will have principal authority.

This same point of view is present in the discussion of the complimentarity principle concerning the jurisdiction of the court. The UK delegation voiced its full support for the principle of complimentarity as outlined in Article 15 of the draft statute for the Rome Conference.\textsuperscript{156} Under this principle, the ICC would be able to exercise its jurisdiction against the will of a state only in very specific instances, guaranteeing that national courts that maintained the ability to function fairly and appropriately would be able to maintain their jurisdiction, if desired. British support for complimentarity was aimed at, among other things, keeping complete discretion out of the hands of the ICC prosecutor.

The British delegation believed that a prosecutor must be independent, but that there should be “checks and balances” on his power.\textsuperscript{157} To this end, Britain supported complimentarity and pushed for the inclusion of a pre-trial chamber in order to oversee prosecutorial investigations.\textsuperscript{158} Britain’s unique position as a member of both the Like-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{156} UN, “Diplomatic Conference,” II:98.
\item \textsuperscript{157} Ibid., 295.
\item \textsuperscript{158} Ibid., 226.
\end{itemize}
\end{footnotesize}
Minded States and Security Council camps was illustrated quite plainly in this situation. This was a measure designed to support the viewpoint that an entirely independent prosecutor could prove dangerously uncontrollable if no checks on his power to carry out investigations and issue indictments were in place. At the same time, the proposal did not resort to handing powers of review wholly over to the UN Security Council.

As for states that are not parties to the Rome Statute, the UK delegation outlined one of the four proposals given at the conference in order to deal with the issue of jurisdiction. The UK proposal required that in instances of non-states parties’ jurisdiction abutting the court’s jurisdiction, the consent of both the territorial state (the state on which the alleged crime took place) and the custodial state (the state of nationality of the indictee or the state that currently holds the indictee in its custody) would be needed for the court to proceed.\(^{159}\) This did not apply in reference to the core crimes,\(^{160}\) as the UK supported universal jurisdiction of the court for those crimes only.\(^{161}\) This would avoid a situation in which the court needed the consent of the very persons it was set up to act against.\(^{162}\) This proposal would allow the court to operate in conjunction with states that continued to be reluctant to become parties to the court, and illustrates the British government’s desire to produce a practical, rather than idealistic, statute at the Conference.

Nowhere was the conflict between the Security Council camp and the Like-Minded States camp more evident than during the discussions on the definition of the crime of aggression and that crime’s degree of relation to the UN Security Council. The

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\(^{159}\) UN, “Diplomatic Conference,” III:228.

\(^{160}\) The core crimes in the ICC statute are: genocide, crimes against humanity, war crimes, and the crime of aggression.

\(^{161}\) Ibid.

\(^{162}\) UN, “Diplomatic Conference,” II:326.
UK delegation interpreted the proposed definition of the crime of aggression to contain a built-in requirement for the UN Security Council’s prior declaration that a crime had occurred in order for an investigation to go ahead.\textsuperscript{163} In fact, the UK only supported the crime of aggression in the statute if two conditions were met: a definition was adequately outlined, and a link to the UN Security Council was maintained.\textsuperscript{164} However, instead of allowing the Conference to grind to a halt over the issue of aggression, Britain supported allowing the subject to be addressed once the statute was adopted.\textsuperscript{165} Despite the British opinion on the necessity of UN Security Council review in cases of aggression, and because of the heated arguments from the majority of the Like-Minded States against this arrangement in the name of the court’s independence, Britain agreed to put off any decision on this crime until the court was operational. This is an instance in which not only the British delegation, but the entire Conference ended up reaching a pragmatic compromise position instead of an idealistic one.

In the instance of aggression, Britain showed its sympathy with the other four permanent UN Security Council members; the British delegation also clearly supported the Security Council camp viewpoint on the issue of nuclear weapons. The British delegation supported the inclusion of a specific list of weapons, the use of which automatically qualified as war crimes under Article 5.\textsuperscript{166} The delegation clarified that the purpose of such a list would be to prevent the court from making \textit{ex post facto} –

\begin{itemize}
\item \textsuperscript{163} Ibid., 124.
\item \textsuperscript{164} Ibid., 177.
\item \textsuperscript{165} Ibid., 326.
\item \textsuperscript{166} Article 5 of the Rome Statute enumerated those instances and tactics that qualify as war crimes. To include a list of weapons would be to exclude the use of those weapons from any future conflict, as their use would automatically constitute a war crime.
\end{itemize}
retroactive – decisions on the illegality of certain types of weapons.\textsuperscript{167} The British delegation also made it clear that the list was to be very short, should not include nuclear weapons, and should also not include the words “which are inherently indiscriminate,” when describing other weapons that may fall under Article 5.\textsuperscript{168} Because of their status as nuclear superpowers, the nations of the Security Council camp strongly objected to the inclusion of nuclear weapons in the statute, and Britain sided wholly with this opinion.

Close examination of Britain’s overall arguments and concessions at the Rome Conference reveals that British delegates were willing to compromise on issues that would have resulted in a stalemate or in the rejection of the statute by certain states, most especially the other permanent members of the UN Security Council. Perhaps it was Britain’s unique placement as a more change-oriented permanent member that pushed its delegates to present compromise positions on many of the important issues at the Conference.

\textit{Germany at the Rome Conference}

The UK delegation was far from the only group forced to compromise on its key positions at the Rome Conference. The German government participated heavily in the Preparatory Commission that penned the draft statute to be reviewed at the Rome Conference, and was therefore committed to many of its principles from the outset. Germany’s delegation consisted of two representatives, four alternates, and 15 advisors. The most important sticking points for the German delegation were universal jurisdiction

\textsuperscript{167} Ibid., 164.
\textsuperscript{168} Ibid., 326.
of the court, inclusion of the crime of aggression, independence of the prosecutor, and clear enumeration of the elements of war crimes.

On a few points, Germany was forced to compromise in order to allow for general consensus, the most painful of which was universal jurisdiction of the court. Germany had submitted, as had the UK, one of the four proposals for Article 9, on the jurisdiction of the court. Germany’s proposal was considerably less reserved than the United Kingdom’s, in that it gave the court universal jurisdiction over the three core crimes in Article 5. The UK also argued for universal jurisdiction over those crimes, but only with regards to member states. Germany’s proposal extended universal jurisdiction over all states, using reasoning based on the contemporary norms in international law. Germany argued that all states currently held universal jurisdiction over genocide, crimes against humanity, and war crimes under the 1949 Geneva Convention and the Convention Against Torture, as well as because of the principles set forth at the Nuremberg tribunal. The act of signing on to the Rome Statute would confer any given state’s universal jurisdiction onto the court. The ICC would, therefore, unquestionably have universal jurisdiction, and would not require the consent of particular parties in certain situations (as the UK proposal required), because the current international norm did not hold any states to that standard. Germany argued that this would close any loopholes that might occur if a crime were to take place and, for one reason or another, neither any state nor the UN Security Council referred the situation to the prosecutor.

169 Ibid., 184.
172 Ibid.
The German delegation was clearly concerned with the possible ineffectiveness of a proposal that might require consent from the very parties it had been set up to guard against, and sought instead to guarantee that the ICC would have jurisdiction over the statute’s core crimes in all situations. The argument over universal jurisdiction reflects Germany’s lack of concern with issues of national sovereignty when compared with Britain and other Western powers. The German delegation did not take issue with allowing universal jurisdiction in the case of the most offensive of crimes, even if that jurisdiction usurped a state’s authority. Quite a few of the other nations at the Conference voiced support for Germany’s proposal, and the German delegation expressed dismay that it was not even considered in the discussion paper.\textsuperscript{173} Germany’s delegates vocally supported the concept of universal jurisdiction, but in the end, they had to compromise on this view.

Another big disappointment for the German delegation, as well as quite a few others, was the Conference’s inability to reach a consensus on the crime of aggression. Germany was a strong supporter of including aggression, and believed it was possible to find a definition on which all could agree.\textsuperscript{174} The German perspective on aggression was that it should be defined by the historical precedents set by incidents that have proved unquestionably to be considered crimes of aggression.\textsuperscript{175} The two main approaches to defining aggression that had emerged in the Preparatory Committee were: a definition based on UN General Assembly Resolution 3314, which would include an exhaustive list of the types of acts that would constitute aggression, and a definition that listed the most undeniable past cases of aggression. Germany preferred the second option, which

\textsuperscript{173} Ibid., 304.
\textsuperscript{174} Ibid., 171.
\textsuperscript{175} Ibid., 83.
focused on aggressive actions that had violated the UN Charter or attempted or resulted in the annexation of another state’s territory.\footnote{Ibid., 171.} Germany believed that this option was less susceptible to criticism for a frivolous application of the statute, and would not affect the legitimate use of armed force.\footnote{Ibid.}

Closely tied to the definition of aggression was the role of the UN Security Council in determining that it had taken place. Interestingly, Germany supported the role of the Security Council in determining an act of aggression.\footnote{Ibid., 83.} Germany argued that the Rome Conference was not tasked with rewriting the Charter of the UN, nor had it the authority to do so, and that determining that an act of aggression had taken place fell squarely under the Security Council’s current Chapter VII powers.\footnote{Ibid., 171. Chapter VII of the UN Charter gives the Security Council the authority to take military or non-military actions in order to maintain international peace and security. These powers are extremely broadly defined, and, in this instance, interpreted by Germany as automatically giving the Council the authority to determine when acts of aggression take place.} However, many of the delegations at the conference disagreed with this interpretation and pushed for total independence from the UN Security Council. As a consequence, no consensus was reached and the crime of aggression was not included in the statute. Germany’s final remarks ended with a disappointed statement on the Conference’s inability to include aggression, which the German delegation saw as principally important.\footnote{Ibid., 325.}

Another disappointment for the Germany came in the form of Article 16, which dealt with the initiation of prosecutorial investigations.\footnote{UN, “Diplomatic Conference,” III:28-29.} Germany believed that the prosecutor must be endowed with the ability to initiate investigations \textit{ex officio}— without
needing a referral from a state or the UN Security Council.\textsuperscript{182} The German delegates believed that this would depoliticize the process of initiating investigations and would therefore maintain the independence and integrity of the prosecutor.\textsuperscript{183} German representatives were concerned with the steps laid out in Article 16, which provided guidelines for the prosecutor to follow when trying to initiate investigations. German delegates claimed that the Article in its current wording was unacceptable because it required notifying more parties than necessary at the start of proceedings and because it placed the burden of challenge on the court rather than on an objecting state.\textsuperscript{184} Germany considered these “procedural hurdles” unnecessary because of existing safeguards against malicious prosecution found elsewhere in the statute, including review from the pre-trial chamber.\textsuperscript{185} Unfortunately for the German delegation, Article 16 was not sufficiently amended to give the prosecutor the degree of independence that it had wanted. Germany left the conference maintaining its reservations on Article 16.\textsuperscript{186}

The German delegation declared its intent to follow a strategy of “pragmatism” and “compromise” during the discussion on war crimes.\textsuperscript{187} Germany’s main goal in these discussions was to push for a clear enumeration of the essential elements that constituted war crimes to be included in the statute, including minimum quantitative and qualitative requirements for offences.\textsuperscript{188} Like aggression, no agreement was reached on this issue, and once again Germany had to reach a compromise position by pushing for enumeration to occur post-Conference. The German delegation believed this should not stop the

\textsuperscript{182} UN, “Diplomatic Conference,” II:204.
\textsuperscript{183} Ibid.
\textsuperscript{184} Ibid., 325.
\textsuperscript{185} Ibid., 304.
\textsuperscript{186} Ibid., 325.
\textsuperscript{187} Ibid., 159.
\textsuperscript{188} Ibid.
statute from coming into force, as elements could be added as an amendment to the statute.\textsuperscript{189}

Germany’s position at the Rome Conference was oriented towards an independent court, and because of this, the delegation was not fully satisfied on any of its key issues. Universal jurisdiction was rejected, neither aggression nor the elements of war crimes were included in the Statute, and there remained considerable checks on prosecutorial independence. Because the UK delegation approached the Conference with compromise positions already outlined and ready for presentation, it experienced considerably less disappointment than that of the German delegation. Despite any remaining reservations, both nations signed the Rome Statute. All that then remained for them to become parties to the ICC was their respective government’s ratification of the Statute and the adjustment of national laws to accommodate cooperation with the Court.

\textit{Conclusion}

The ICTY, ICTR, and the Rome Conference all represented significant steps in the movement toward the ICC. The composition of the UN Security Council, as a legacy of WWII, placed Great Britain and Germany in very different positions in relation to each of this chapter’s three topics. As a permanent UN Security Council member, Britain was directly responsible for voting into existence both ad hoc courts and approached the negotiations at Rome from a unique ideological position set in-between the more change-oriented and more regulation-minded states. Germany, not having been on the UN Security Council during the formation of the ICTY and ICTR, contributed more indirectly through support for the courts and voluntary donations. At Rome, Germany

\textsuperscript{189} Ibid., 273.
argued from a considerably more change-oriented mindset than Great Britain, and was consequently more disappointed with the heavily compromised outcome.

Clearly, even with the tumultuous Cold War period as a buffer, Great Britain and Germany’s paths are still affected by their respective positions at the close of World War II. Their divergent paths eventually led both nations to the Rome Conference, but their positions there were disparate, as they were informed by their own nation’s history and subsequent placement in the contemporary international status quo. Chapter 3 will examine the last step in each nation’s path towards becoming states parties to the ICC by taking a close look at each nation’s internal debates over ratifying the Rome Statute.
Chapter 3: Domestic Debate Over the ICC

The Rome Conference resulted in a thoroughly negotiated statute that was signed by 139 nations. The next and final step in the creation of the International Criminal Court (ICC) was ratification through each signatory nation’s legislative body. It was this step of the process that brought domestic politics to the forefront of any given nations’ decisions to join the ICC. For Britain and Germany’s representatives at Rome, the debating did not stop once the Conference had ended.

Britain had just experienced a shift from a Conservative to a Labour Party majority government, as noted in the discussion in Chapter 2. The Conservative opposition party was able to assert its opinions concerning the ICC in the Parliamentary debates over ratifying the Rome Statute. These debates became almost a microcosm of the Rome Conference, Labour arguing for the Like-Minded perspective, and the Conservative party arguing from the viewpoint of the permanent UN Security Council members. The basic underlying issue in these debates was trust; Conservative MPs did not trust the ICC to remain politically independent or to continue to coincide with British interests. Despite considerable Conservative opposition and heated debate, the ruling Labour government was able to ratify the Rome Statute and satisfy its desire for Britain to become one of the shaping members of the ICC.

Germany ratified the Rome Statute with considerably less internal debate. As a more change-oriented government overall, the strong opposition to basic principles of the Rome Statute was absent from debates here. Instead, German representatives were more concerned with how watered-down the structure of the court had become because of compromises reached at Rome. German discussions involved how to get as many nations
as possible to join the ICC and how to shape the court into a more independent body once it came into force.

Neither German nor British representatives were completely satisfied with the Rome Statute as it emerged after the Rome Conference, though this was for very different reasons. However, representatives of both nations were committed to joining the ICC and they worked fervently to pass the necessary legislation. Both nations became States Parties to the ICC, but they had diverging plans for the future of the Court.

**Great Britain’s Internal Debates**

In the case of Great Britain, the Prime Minister is responsible for entering into international treaties and agreements. With respect to the ICC, the Prime Minister’s main role was in deciding to sign the Rome Statute. After becoming a signatory, Britain still had to pass a bill that would allow the UK’s laws to be brought in line with the Rome Statute in order to become a State Party to the ICC. The International Criminal Court Bill was subject to review and amendment in both the House of Lords and the House of Commons, effectively involving Parliament in the decision to become Party to the ICC. The representatives of the UK at the Rome Conference were members of the Labour Government, and therefore represented Britain from a single, clear ideological standpoint. The fierce debates over the ICC Bill in the British Parliament centered around the conflict between the ideologies of the Labour Government and the Conservative Opposition.

Any given bill must pass through three Readings in the House of Commons and House of Lords before it is finally passed. The first and second readings are often not
met with much fervent debate, then the Bill goes to committee for discussion, after which it is read for a third time and voted upon. It is in the committee discussions that MPs air their concerns, attempt to sway the Government members towards their argument, or at least get their opposition to certain portions of the bill on record. Because the ICC Bill originated in the House of Lords, it is there that the discussion of the Bill first took place and amendments to it were first adopted. Once it was passed in the House of Lords, it reached the House of Commons where more minor adjustments were made, though Conservative committee members continually pushed for more significant changes.

The House of Commons debates were, out of procedural necessity, dependent upon tabled amendments carefully placed to foster discussion of underlying ideological disagreements between the two major parties. Out of 17 members of the committee, five were from the Conservative Party and 12 from the Labour Party. Mainly the Conservative members proposed the amendments tabled, as the Labour Party originally drafted the Bill. In the committee stage, the ICC Bill went through a line-by-line examination, offering an excellent window into the minutia of the debate surrounding membership in the ICC.

One of the most prevalent Conservative critiques of the process was that the committee was not given nearly enough time to thoroughly examine and debate such a complicated bill. The committee was allowed 10 meetings over five days, during which the debate revolved around the same main issues that were heatedly debated at the Rome Conference. Conservative members quickly pointed out that the timetable given by the government was designed to push the bill through the committee stage in order to allow for Third Reading to take place before the anticipated Parliamentary election on 7 June
In order to meet this deadline, the committee’s deliberations had to be finished by 3 May. Conservative MPs accused the Labour party of rushing the Bill through committee in order to avoid actually addressing any changes that the Conservative party might want to make. In fact, the Conservative Party recommended waiting until after the ICC review conference, scheduled for seven years after the Rome Statute was to come into effect. Labour Party representatives opposed this move not only because of the risk of not being in power in seven years, but also because of the importance of being one of the first 60 nations to ratify the Statute. The Rome Statute would come into effect as soon as 60 nations ratified it, and those first nations would be most influential during the ICC’s earliest operations. The Labour Party did not want to miss the opportunity to be one of those that would control the early development of the Court. As the majority party, the Labour Party ultimately won the argument, but this was certainly not the most controversial sticking point during discussion of the Bill.

The Conservative party, which has always claimed to support the ICC in principle, had serious problems with the implications of the Rome statute as it stood. As the party in power during the Rome Conference, the Labour Party was able to forward its own, more change-oriented views on international cooperation and international law. It is clear from the issues that arose during discussions in the House of Commons that had

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192 HC Standing Committee D, 1st Sitting, Part 3.
193 Ibid.; This pre-scheduled review conference was built into Article 123 of the Rome Statute. This first review conference was scheduled for seven years after the Rome Statute came into effect mainly as a way to reach a compromise on the more contentious issues in the Statute, especially the enumeration of weapons that constitute war crimes under Article 5.
194 Ibid., 4th Sitting, Part 2.
the Conservative Party been in power at Rome, Britain would have taken a decidedly more reserved stance on important issues such as: the powers of the Prosecutor, election of Judges, the amendment process, the definition of aggression, the role of the UN Security Council, and the jurisdiction of the court.

Before any of these technical issues were actually discussed, however, there was a discussion of the inability of the Conservative Party or even members of the Labor Party (should they have wanted) to, “bite on”\textsuperscript{195} the Rome statute itself; because the Rome Statue was an international agreement, the United Kingdom could not actually edit the Statue in its Parliament. Instead, what the Labour party was presenting to the Conservative Party (out of necessity rather than generosity) was an opportunity to get its reservations and opinions on record in the committee stage before the ICC Bill, which was supported by the majority government, was passed. Despite these restrictions, the discussions were by no means viewed as hopeless or pointless. The Conservative party aimed to convincingly argue for changes to the Statute. These changes would not actually amend the Rome Statute, but would effectively cancel out Britain’s signature. If the ICC Bill that passed through the British Parliament did not align to the Rome Statute, Britain could not become a State Party until the Statute itself was amended or another bill was passed through Parliament. The first amendment opportunity of the Rome Statute was the scheduled Review Conference, giving the Conservative Party time to possibly come into power or win others to their point of view. Thus, despite their inability to actually amend the Rome Statute, Conservative arguments for changes to the ICC Bill were not without purpose.

\textsuperscript{195} Ibid., 2\textsuperscript{nd} Sitting, Part 1.
One of the alternatives to revising the Statute, from the viewpoint of the Conservative Party, was to attach a reservation, or declaration, onto the UK’s ratification. Numerous governments had already included reservations, which, as the Labour Party pointed out, were technically “interpretive statements.” For example, France explicitly excluded nuclear weapons and New Zealand explicitly included them in their respective definitions of the Statute. Despite Conservative support of such a statement, the Labour Party opposed it on the grounds that even if such a statement was to be drafted, the ICC was not required to honor a nation’s reservations, rendering it a futile exercise.

As at the Rome Conference, the office of the Prosecutor sparked a heated debate in the House of Commons committee. The Conservative Party argued along the lines of the Security Council camp at Rome, attempting to reign in the powers of the prosecutor. Conservative Members of Parliament (MPs) sought to do this by amending the election process and asserting the need for additional checks on Prosecutorial discretion. The election of the Prosecutor was to be based on a one-vote-per-nation process, giving Britain equal weight with all other States Parties. Conservative objections were based on how outnumbered Britain and other Western nations would become by the numerous small nations of the world. Conservative MPs were concerned that this “bias” towards small states would need to be remedied to ensure that the Prosecutor had the correct “personality.” Furthermore, Conservative members were of the opinion that smaller nations were fundamentally unable to produce qualified candidates because of a lack in sheer numbers, meaning there would be fewer qualified people from these nations than

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196 Ibid., 7th Sitting, Part 9.
197 Ibid., 7th Sitting, Part 8.
198 Ibid., 8th Sitting, Part 8.
199 Ibid., 3rd Sitting, Part 5.
from larger ones, and a deficit in resources needed to properly screen candidates.\textsuperscript{200} Conservatives also believed that the pre-trial chamber, though argued for by the Labour government as a significant check on prosecutorial power at Rome, was not an adequate guard against a misled and overly aggressive Prosecutor.\textsuperscript{201}

These views on large and small states were again made manifest in the discussion on the election process for ICC judges. Opposing the statute as it stood, the Conservative Party proposed selecting judges by appointment rather than election.\textsuperscript{202} This would take the selection of judges away from the Assembly of States Parties (ASP) where, the Opposition feared, Britain would be greatly outnumbered by smaller nations. Contrary to the British delegation at Rome, which stressed practical experience and qualifications above all other characteristics for judges, the Conservative Party thought that finding judges of a “particular outlook” and “attitude to authority,” was paramount.\textsuperscript{203} Perhaps both of these viewpoints were aimed at the same end: making sure the judges’ outlook was in line with current international norms. Labour representatives at Rome couched their argument in terms of practical experience, whereas Conservative MPs chose to argue directly for criteria that would lead to privileging large, Western nations. They were both arguing against judges chosen on the basis of national origin or for political reasons, as those criteria would probably preference other nations over Britain, given the number of smaller states with one vote each in the ASP.

The voting process in the ASP was again a sticking point when the committee discussed the amendment process for the ICC statute. The amendment procedure

\textsuperscript{200} Ibid.  
\textsuperscript{201} Ibid., 8\textsuperscript{th} Sitting, Part 4.  
\textsuperscript{202} Ibid., 3\textsuperscript{rd} Sitting, Part 7.  
\textsuperscript{203} Ibid.
required a 2/3-majority vote from at least 50% of States Parties to be adopted, a situation that would easily overrule a single objecting nation regardless of its size. The amendment would then require a 7/8-majority vote in order to enter into force. That each nation’s vote has equal weight was a sore point for Conservative MPs, who argued that the UK, as the only permanent UN Security Council member likely to ratify the statute, would be “exposed,” presumably to the whims of other nations. Labour MPs pointed out that if votes were weighted based on population, the US, China, Russia, and India would all have more say than Britain. This would also put British interests in a subordinate position, although they would be contending with an entirely different group of nations.

It was not, however, within the ability of the British Parliament to amend voting procedures, so it remained that future amendment of the ICC’s statute could be quite easily imposed upon Britain against its will if it were opposed to the majority of States Parties. Conservative Party members viewed this situation as unfair, as it allowed nations with tiny populations the same say as larger nations, such as Britain. The only recourse for a nation in the case of an irreconcilable disagreement is found in Article 127, which provides the option for a State to withdraw from the Court. Conservative MPs were worried that because national laws must be in compliance with the ICC Statute, the amendment procedure would mean that changes to the Court could also amend British law. While the Labour Party pointed out that domestic laws were the provision of

204 Ibid., 6th Sitting, Part 8.
206 HC Standing Committee D, 1st Sitting, Part 5.
207 Ibid., 3rd Sitting, Part 5.
208 Ibid., 1st Sitting, Part 5.
209 Rome Statute, p. 81-82.
Parliament, and would therefore be subject to domestic review, Conservative MPs were still unsatisfied with the position of the Prime Minister as the only line of review against other amendments to the Court. 210

This led the Conservative Party to introduce a new clause to the House of Commons Bill that would include a provision requiring both Houses of Parliament to approve any amendments to the ICC Statute. 211 This provision would “bind” the Prime Minister, meaning he would be unable to alter Britain’s domestic laws to comply with changes to the ICC Statute without first going through Parliament. 212 On top of being a plea for national sovereignty, this proposal was a bid to restrict the powers of the Prime Minister in dealing with international affairs, effectively upsetting the structure of power in the British government, though only with regards to the ICC. Labour representatives pointed out that this would in effect be elevating Parliamentary powers to the level which is boasted by the US Senate. 213 The Conservative Party was concerned that once Britain was a State Party, a non-Conservative Prime Minister could refuse to exercise Britain’s rights under Article 127 if the Court was unacceptably amended. In this case, Britain would be stuck as a member of an international institution that no longer reflected the will of its people.

The argument over the definition and enumeration of War Crimes also centered on the Conservative Party’s concern with protecting British national interests, though in this instance the focus was mainly on military actions. Conservative MPs were concerned that Britain’s role as a peacekeeping nation would be put at risk if those

210 HC Standing Committee D, 9th Sitting, Part 5.
211 Ibid., 9th Sitting, Part 3.
212 Ibid., 9th Sitting, Part 4.
213 Ibid., 9th Sitting, Part 5.
activities were under the scrutiny of a Court that might not agree with their necessity or scale. One Conservative MP argued that for smaller nations of the world, deliberations over peacekeeping operations were purely academic discussions, whereas larger nations had to deal with realities. Here again Conservative fears over entering a situation in which Britain could be overruled by other nations in its role as one of the permanent UN Security Council members came through. Great Britain has wielded considerable power in the international arena since the end of World War II. The ICC Statute proposed a court that would upset that privileged position by putting Britain on exactly the same level as all other nations of the world. The Conservative Party was clearly having an extremely difficult time in giving up so much influence.

In its role as a Security Council member, Britain has an obligation to maintain international peace and security. Fulfilling this obligation often involves military actions, which could leave Britain vulnerable to scrutiny of its tactics. Conservative MPs believed that though some of the many criteria for war crimes were clearly outlined under Article 8 of the ICC Statute, the Article still allowed room for subjective interpretation in some instances. Conservative members were specifically concerned with the choice of the word “excessive” when dealing with damage dealt versus military necessity. Judging whether an action was “excessive” or not is an extremely subjective activity, which could leave Britain open to prosecution for actions taken even in the pursuit of international peace and security. Conservative MPs were also concerned with the definition of a military objective, giving the controversial British sinking of the Belgrano during the Falklands War as an example of an action that could be interpreted either

214 Ibid., 3rd Sitting, Part 8.
215 Ibid.
216 Ibid., 8th Sitting, Part 1.
way. One Conservative MP even proposed completely removing Article 8 (b)(v), which prohibits bombing undefended buildings that are not military objectives. The Conservative Party felt that such restrictions would severely limit Britain’s ability to confidently fulfill its role as international peacekeeper, and recommended that Britain take the seven-year opt-out from Article 8 Crimes offered by the Rome Statute.

The Labour Party pointed out that the Article 8 definition of war crimes was already outlined in British domestic law because of the Geneva Conventions, and there was therefore no need to opt out. Furthermore, the British delegate at Rome had allowed the opt-out provision to be admitted, but declared that it would not use it in order to lead other nations by example. Labour representatives pointed out that because of the Geneva Convention, all signatories were able to try each other’s nationals, so having an independent legal body would actually give British nationals more protection from biased claims against them. The Labour Party also made the point that unless British laws were completely brought in line with the ICC, through passage of the ICC Bill, British soldiers would automatically fall under the ICC’s jurisdiction in certain cases, as Britain would be unable to try its own soldiers for some international offenses. The discussion over peacekeeping operations and military actions would directly affect the British military, and so each Party desired to prove that the military was on its own side in the ICC Bill debates.

217 Ibid., 10th Sitting, Part 2.
218 Ibid., 10th Sitting, Part 3.
219 Ibid., 7th Sitting, Part 6.
220 Ibid.
221 Ibid., 7th Sitting, Part 7.
222 Ibid., 10th Sitting, Part 4.
223 Ibid.
The definition of War Crimes under the ICC Statute was of particular concern to Britain’s military personnel. Because these Article 8 crimes applied directly to British citizens taking action in armed conflicts, the military was in a particularly delicate situation. Both the Labour and Conservative Party argued that military leaders were on their own side, in an attempt to wield the military’s influence over the other Party. For example, Conservative MPs quoted Admiral Sir Michael Boyce as having reservations against the ICC, in order to show military reluctance for signing over the rights of soldiers to the Court. In turn, Labour MPs insisted that Boyce had been misquoted, and was actually in favor of the ICC Bill. Conservative MPs also cited the Chief of Defense Staff as having concerns about the Court; to which Labour members replied that the military was fully on board with both the negotiations at Rome and with the ICC Bill. The fight over the support of the British military shows how fiercely divided the debate was. Each side claimed that the military, the institution that was most likely to be directly affected by the operation of the ICC, was wholly in agreement with its main tenets.

Regardless of whose side the military actually was on, or if such a large institution could really be allied with a single point of view, the discussion over Article 8, and the ICC’s ability to charge British citizens with the crimes found therein, centered on the status of the Court’s jurisdiction. The structure of the ICC’s jurisdiction was outlined in the Preparatory Committee for the Rome Statute. It was based on the principle of complimentarity, which gave the Court jurisdiction over national courts only if a nation

224 Ibid., 3rd Sitting, Part 8.
225 Ibid., 8th Sitting, Part 5.
226 Ibid., 4th Sitting, Part 5.
227 Ibid., 6th Sitting, Part 5.
was unwilling or unable to carry out justice on its own. Under this system, the nation would be the primary legal apparatus, but the Court could step in by request or if a nation’s legal system or government was compromised to the point that justice could not reasonably be served in national courts. Conservative MPs took issue with the choice of the word “unwilling” in the Statute, arguing that this could encompass any number of situations in which a nation should legitimately maintain precedence over the ICC.

From the Conservative viewpoint, the complimentarity principle as worded in the Statute would remove any governmental discretion over whether or not to prosecute in certain situations. For example, a British serviceman who was following orders for what Britain considered a lawful action would not be tried in Britain, but the ICC could insist on trying him based on Britain’s “unwillingness” to do so.\textsuperscript{228} In this instance, the ICC will have overruled a competent national court for political reasons. Another hypothetical example of such an instance was the Belfast Agreement, under which the British government granted amnesties to the Irish Republican Army (IRA) in order to end the conflict with North Ireland.\textsuperscript{229} If the ICC continued to look on IRA crimes as war crimes, it could presumably insist on trying individuals based on Britain’s unwillingness to do so.\textsuperscript{230} Furthermore, Britain’s role as a UN Security Council member once again became a worrying prospect. If Britain took part in controversial peacekeeping operations that the non-Security Council-heavy Court took to be war crimes, such as the bombing of Baghdad or Iraq, British soldiers could be put on trial for their actions even though they were internationally sanctioned.\textsuperscript{231}

\textsuperscript{228} Ibid., 8\textsuperscript{th} Sitting, Part 6.
\textsuperscript{229} Ibid., 5\textsuperscript{th} Sitting, Part 4.
\textsuperscript{230} Ibid., 6\textsuperscript{th} Sitting, Part 2.
\textsuperscript{231} Ibid., 3\textsuperscript{rd} Sitting, Part 2.
Besides the Conservative Party’s concerns for protecting British soldiers, the Party believed that the ICC Statute conflicted with the fundamental concept of national sovereignty. The Court could usurp a nation’s sovereignty in cases of amnesty, which Conservative MPs believed would conflict with that nation’s ability to decide how to rebuild after a conflict.\(^{232}\) The ongoing debate over the compatibility of peace and justice is not new with regard to the ICC. Conservative MPs brought up this debate in order to illustrate a situation in which the Court might interfere with a nation’s legitimate exercise of its authority in order to reconcile its people after a conflict. If amnesties granted by a national government can be considered an “unwillingness” to prosecute, and could therefore be overturned by the Court, then there will be no place for amnesties given by bodies such as truth and reconciliation commissions in the future.\(^{233}\) This could render truth and reconciliation commissions completely ineffective, as one of their main means of reconciling people is to air grievances and offer amnesties. Conservative MPs believed this would undermine a nation’s sovereign ability to decide in what way it should resolve an internal conflict.\(^{234}\) Furthermore, Conservative MPs advanced a hypothetical scenario in which rival leaders constantly submitted each other to the ICC for investigation, damaging their ability to move on and reconcile after a conflict.\(^{235}\)

If a Western-value based court was the only recourse for a nation recovering from a tumultuous period, then imposing that court on the nation could be seen as a highly insensitive and ethnocentric act. From the Conservative perspective, it was better to allow for a nation to create its own solutions instead of imposing them from an outside

\(^{232}\) Ibid., 6\(^{th}\) Sitting, Part 2.
\(^{233}\) Ibid., 6\(^{th}\) Sitting, Part 1.
\(^{234}\) Ibid.
\(^{235}\) Ibid., 2\(^{nd}\) Sitting, Part 7.
source. If truth and reconciliation commissions, such as that in South Africa, for example, were rendered useless, the Court would effectively be upsetting the ability of a nation to confront its past and move on. If there were only room for retributive justice under the ICC, this would call into question the place of restorative justice in the future. Conservative MPs also feared that a prosecutorial process independent of the international community could impede important peace negotiations in certain situations. This is an example of Britain’s history influencing its opinion on the ICC; hearkening back to the viewpoint that the peace talks between the British representative Lord Owen could have been compromised by the creation of the ICTY. In short, the Conservative Party did not believe that an independent ICC could be trusted to behave with the best interests of member nations in mind.

The Labour Party responded with a number of arguments that addressed the issue of national sovereignty. First, Labour MPs claimed that the ICC would only be in place to investigate amnesties when they were not “appropriate,” meaning that Labour leaders had faith that the court would not overturn amnesties in constructive situations. Labour MPs pointed out that the complimentarity principle was actually a step towards increased national sovereignty as compared to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and in those instances, Britain had no problems cooperating with the Court. The Labour Party also pointed to the structure of the office of the Prosecutor, citing

237 Ibid., 5th Sitting, Part 3.
238 Ibid.
239 Ibid., 2nd Sitting, Part 7.
240 See Chapter 2.
241 HC Standing Committee D, 6th Sitting, Part 3.
242 Ibid., 8th Sitting, Part 8.
prosecutorial discretion in the interests of justice in choosing which cases merited investigation and prosecution. \(^{243}\) Furthermore, the UN Security Council had the authority to suspend a prosecutorial investigation for a period of 12 months in the interests of peace. \(^{244}\) In response to the future prospect of truth and reconciliation commissions, a Labour MP offered Sierra Leone as an example of a situation where a tribunal and a reconciliation process could successfully coexist. \(^{245}\) The Labour Party also pointed out that many nations who had had tumultuous internal conflicts in the past were still in favor of the ICC, so any arguments against the court on the behalf of these types of nations were moot. \(^{246}\)

Inherent in the Conservative viewpoint is the belief that legitimate personnel of any large Western nation, such as Great Britain, will most certainly not need to be brought before the Court in the name of justice. On the contrary, the Conservative party viewed the ICC as something that had to be guarded against and kept in check to ensure that it would not become a misdirected, runaway court that indicted British citizenry willy-nilly. The overarching plan of Conservatives during discussion of the court was to maintain as much influence over the ICC as possible by adding amendments that would keep British citizens from ever being tried by the Court. For example, a Conservative amendment was designed to respond in case “complimentary goes wrong,” meaning a citizen were to be indicted against British better judgment. \(^{247}\) Conservative MPs feared that the relationship between the ICC and the British government could sour in the future.

\(^{243}\) Ibid., 6\(^{th}\) Sitting, Part 3.
\(^{244}\) Ibid., 7\(^{th}\) Sitting, Part 5.
\(^{245}\) Ibid., 6\(^{th}\) Sitting, Part 3.
\(^{246}\) Ibid.
\(^{247}\) Ibid., 3\(^{rd}\) Sitting, Part 1.
and there would be no recourse for Britain under the current Statute.\textsuperscript{248} An example of such a situation would be if an acting Prime Minister were to be indicted. Conservative MPs proposed caution when considering permanently giving up their nation’s power to refuse in such a scenario.\textsuperscript{249}

Underlying Conservative arguments was fear of the Court being turned from its original purpose into a political tool to wield influence over leading nations of the world. Conservative MPs also believed that the Labour Party was using the ICC Bill to transfer national power to an international body in a way that was kept out of the public eye. Conservative MPs warned that this was a “massive – but hidden – transfer of power.”\textsuperscript{250} They went on to caution against a “quiet” but “wholesale” transfer of power to an international body while basing their confidence in that body totally on trust.\textsuperscript{251} Instead, Conservative MPs proposed claiming universal jurisdiction for Britain, removing the ability of the Court to try British citizens.\textsuperscript{252} It would also, they argued, remove the possibility that Britain could become a safe haven for criminals who took up residency there.\textsuperscript{253} The Conservative Party urged the government to hold off on ratifying the Rome Statute until after the scheduled review conference, so for at least seven years.\textsuperscript{254} Conservative MPs were concerned that the ICC would be taken in the wrong direction if other major world powers were not involved, so the Statute must first be made more amenable to those larger nations.\textsuperscript{255}

\textsuperscript{248} Ibid.
\textsuperscript{249} Ibid., 4\textsuperscript{th} Sitting, Part 4.
\textsuperscript{250} Ibid., 7\textsuperscript{th} Sitting, Part 1.
\textsuperscript{251} Ibid., 7\textsuperscript{th} Sitting, Part 2.
\textsuperscript{252} Ibid., 10\textsuperscript{th} Sitting, Part 5.
\textsuperscript{253} Ibid., 10\textsuperscript{th} Sitting, Part 8.
\textsuperscript{254} Ibid., 1\textsuperscript{st} Sitting, Part 3.
\textsuperscript{255} Ibid., 4\textsuperscript{th} Sitting, Part 1.
In response, the Labour Party asserted that Britain should not be above international law. The law should apply not only to poor nations or those that have found themselves on the losing side in a conflict, but also to major world players such as France, the US, and Britain itself.\textsuperscript{256} The Labour party insisted that the court wouldn’t apply to the UK, not because of statutory safeguards, but because the British government and its troops had no problem complying with international law.\textsuperscript{257} Furthermore, British troops were already held to the same standards of war crimes because of British compliance with the Geneva Conventions.\textsuperscript{258} Urging the Conservative Party to consider what the Court would end up like if left to “lesser” nations to shape, the Labour Party suggested throwing its full support behind the Court in order to have a say in its final form.\textsuperscript{259} In response to the argument on universal jurisdiction, Labour MPs asked Conservatives to consider what would happen if all nations took universal jurisdiction, meaning that British citizens could be tried by an extremely biased political body instead of the proposed independent court.\textsuperscript{260} Labour MPs accused Conservatives of being stuck in an imperial viewpoint, thinking of Britain as better than all other nations, rather than an international viewpoint.\textsuperscript{261} Labour members were taken aback that Conservative MPs insisted on presuming a conflict of interest between the ICC and Britain.\textsuperscript{262} These philosophical differences highlight the one fundamental issue of trust; Conservative Party did not trust the ICC to form and function in line with British interests, whereas the Labour Party did.

\textsuperscript{256} Ibid., 8\textsuperscript{th} Sitting, Part 6.
\textsuperscript{257} Ibid., 8\textsuperscript{th} Sitting, Part 7.
\textsuperscript{258} Ibid.
\textsuperscript{259} Ibid., 8\textsuperscript{th} Sitting, Part 5.
\textsuperscript{260} Ibid., 10\textsuperscript{th} Sitting, Part 5.
\textsuperscript{261} Ibid., 10\textsuperscript{th} Sitting, Part 7.
\textsuperscript{262} Ibid., 4\textsuperscript{th} Sitting, Part 5.
The stance of the Conservative Party would have brought Britain much more in line with the Security Council camp at the Rome Conference. If the Conservative Party had been the negotiators at Rome, many British compromise proposals would probably not have been presented there, as the delegation would have no desire to attempt to align itself with the Like-Minded States group. It is likely that Britain would have followed suit with the United States and refused to ratify the Rome Statute to become party to the ICC. However, because the Labour Party had just come into power, and made sure that the ICC Bill was quickly passed through both Houses of Parliament, Britain became a party to the ICC on 4 October 2001, just making it into the first 60 nations to join the Assembly of States Parties.263

Germany’s Internal Debates

The issue of becoming a State Party to the ICC was not as divisive in Germany as it was in Great Britain. The entire spectrum of political parties in the German Parliament was supportive of the move to join the Court.264 Germany experienced considerably less heated internal debate than did Britain, but there were additional technical obstacles to implementing the Rome Statute in Germany, as it necessitated a constitutional change on top of the legal changes required to bring domestic law in line with the Rome Statute. The constitutional amendment, which dealt with the extradition process, was the only portion of the legislative implementation process that was not passed by a unanimous

vote, but it still mustered only an insignificant opposition. The main issues that confronted Germany involved problems that might arise from having universal jurisdiction and finding a way to apply the Rome Statute to Germany’s more strict criminal code. Notably absent from Germany’s discussions were any discussion of potential dangers from the principle of complimentarity or the office of the prosecutor. Instead, Germany fully supported both complimentarity and the independent prosecutor, and attempted to convince other nations, most notably the US, that there was nothing to fear from either.

The German Parliamentary system also requires three readings for a bill to be passed. In this case, the first reading took place before the bill went to committee and the second and third readings took place immediately before the vote in the same Parliamentary sitting. Two separate bills had to be passed in order for Germany to fully become a state party to the ICC. First was the bill ratifying the Rome Statute, and second was a more complex bill that amended the German constitution.265 The bills were considered side-by-side for all three readings, as they were inextricably connected in purpose. Speakers from the main German parties voiced support for both bills on the grounds that the ICC was an extremely important safeguard against impunity for the worst type of crimes. The most controversial topic was the change to the German constitution, which garnered some opposition.

The Bill to Amend the German constitution was necessary to put German law in line with the Rome Statute, because Article 16, Paragraph 2 of the constitution prevented

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extradition of a German national to any foreign body.\textsuperscript{266} This would be problematic if the ICC indicted any German citizen, as any extradition of such persons to The Hague would be constitutionally prohibited. In order to eliminate this problem, the bill proposed adding a sentence to the subparagraph in question, which would then allow extradition to international legal bodies and European Union (EU) member states.\textsuperscript{267} This was the only real point of contention during Parliamentary debates. A representative of The Left Party (PDS) declared PDS dissatisfaction with the amendment to the constitution as it stood, but also stated that PDS representatives would not go so far as to vote against the change since it was so important to become aligned with the ICC as soon as possible.\textsuperscript{268} Thus, even this most controversial part of the ratification process did not present a significant challenge to the German government.

Germany did not encounter any problems with ratification that were due to domestic law not meeting the standards set out in the Rome Statute. Instead, Germany wrestled with the problems that arose because its own domestic laws included higher standards on some points than did the Statute. German domestic law does not include the distinction between international and internal armed conflicts, as does the Rome Statute. This means that Germany’s criminal code applies to both international and internal instances, whereas the Rome Statute contains separate (though often parallel) provisions for the two. The German criminal code also provides very specific penalties and sanctions for crimes, a version of which was not included in the Rome Statute.\textsuperscript{269} These sentencing requirements may or may not be met at the ICC, which presented a problem

\textsuperscript{266} Kaul, “Germany,” 74.
\textsuperscript{267} Bundestag, “Änderung des Grundgesetzes.”
\textsuperscript{269} Kaul, “Germany,” 77.
for Germany. Germany also has very high standards regarding the rights of the accused, and it was questionable whether the Rome Statute met those standards in its current form. However, some German representatives felt that despite disparate wording, the Statute adequately protected the rights of the Accused and of witnesses up to German domestic standards.\textsuperscript{270}

Another problem confronting Germany in signing on to the ICC was Germany’s claim to universal jurisdiction. While complimentarity prevents this from being problematic in and of itself, German law includes a responsibility to prosecute within that jurisdiction, which could present a logistical problem given the sheer volume of cases that would require investigation. Germany had to modify its prosecutorial responsibilities to include discretion over whether to investigate crimes that were committed outside of Germany by non-German nationals.\textsuperscript{271} German commitment to joining the ICC can be seen in its willingness to modify domestic law, and even the constitution itself, in order to make sure there would be no impediments to working with the Court.

In October of 1998, the chancellorship of Germany passed from Christian Democrat (CDU) Helmut Kohl to Gerard Schröder of the Social Democrats (SPD). This means that while CDU leadership guided Germany through the preparatory committee and Rome Conference, the SPD coalition would be responsible for seeing Germany through the steps necessary to become party to the ICC. The new chancellor and his cabinet continued the efforts of the previous government by working for a strong and

\textsuperscript{270} Bundestag, “128. Sitzung,” 12349.
\textsuperscript{271} Kaul, “Germany,” 76.
independent ICC. Representatives of the former coalition leader even vocalized their pride in the new SPD government’s continued support for the previous government’s work. This change in federal government but not in overall policy direction highlights the single-minded push towards a strong and independent International Criminal Court from Germany as a whole. The exceptional cross-party cooperation behind the two ICC bills is especially evident when examining the resolution of the few small-party squabbles that occurred despite the shared goal of ratification.

The Left Party was especially argumentative towards the ruling coalition because its members felt personally left out of discussions concerning the proposed constitutional changes. There was also a long argument between the Green Party and CDU/CSU representatives over whether or not a member of the SPD had solicited some type of recompense for her support of the ICC bills during the recent recess. Despite these squabbles, both bills passed through Parliament with overwhelming majority support. A vote following the second reading of the Bill to Amend the Constitution resulted in 512 yes votes, 5 no votes, and 26 abstentions. Beyond the overwhelming support for the bill, the remarkable part of this result is that those who abstained or voted no were members of four of the five major political parties. Unlike the party-line arguments found in the British Parliament, the two bills in Germany had majority support across party lines, indicating widespread support from all major viewpoints represented in government. To further underline this point, after the third reading, the Bill to Amend the

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275 Ibid., 12355.
276 Ibid., 12351.
Constitution passed through Parliament with 528 yes votes, only one no vote, and two abstentions, and the Bill to Ratify the Rome Statute passed unanimously.\textsuperscript{277}

This overwhelming support for the ICC involved cross-party confidence in some of its basic principles, most notably the principle of complimentarity and a highly independent prosecutor. These two topics were controversial in Britain, where the opposition party exhibited reservations on both points, viewing the Court as a possible threat to British national sovereignty. Members across Germany’s many political parties, however, voiced support for the ICC without any reservation based on fears of an overly powerful, politically motivated court. According to Hans-Peter Kaul:

It is quite noteworthy that, in Germany, there was never a public or restricted internal discussion inside or outside the government, or a public or internal concern that the ICC treaty might be a violation of, or at least an infringement or threat to, the Constitution or to the sovereignty of Germany.\textsuperscript{278}

Instead of viewing it as a threat, German representatives viewed complimentarity as an important mechanism that would allow the ICC to claim jurisdiction in cases where a national government might not wish to prosecute the worst kinds of human rights offenders.\textsuperscript{279} In fact, German representatives, who had argued for the Court to claim universal jurisdiction at the Rome Conference, found the lack of such jurisdiction to be a weakness of the statute.\textsuperscript{280} Rather than seeing complimentarity as a threat to national sovereignty, then, Germany viewed it as a compromise that had watered down the court’s jurisdiction to a still acceptable, but disappointingly regulated, level.

\textsuperscript{277} Ibid., 12361-12362.
\textsuperscript{278} Kaul, “Germany,” 70.
\textsuperscript{279} Bundestag, “90. Sitzung,” 8377.
\textsuperscript{280} Ibid.
Like its British counterpart, the German Parliament was extremely concerned with the timeframe involved in passing necessary legislation to become party to the ICC. Germany was concerned with becoming one of the first 60 nations to ratify the Rome Statute, but unlike Great Britain, German concerns did not only focus on being part of the founding states parties in order to shape the court as soon as possible. While there was certainly an emphasis on maintaining the integrity of the Rome Statute by acting as a responsible state party, Germany was more focused on becoming a state party quickly in order to allow the Court to begin its important work as soon as possible.\textsuperscript{281} German representatives also urged quick passage of the legislation in order to encourage other nations to ratify the Rome Statute after witnessing Germany’s good example.\textsuperscript{282}

Unlike Britain, Germany encouraged other nations, including small nations, to ratify the statute. As mentioned above, British MPs were concerned that British interests would be drowned out by the many small nations that would claim equal voting weight in the Assembly of States Parties. German representatives, however, viewed it as more important that as many nations as possible ratify the Rome Statute so that those who commit the worst types of criminal offenses will have nowhere to hide from justice.\textsuperscript{283} German representatives expressed interest in helping to support other nations through the ratification process in order to further the aforementioned aim.\textsuperscript{284} German representatives also reasoned that a speedy ratification from Germany would inspire confidence in other nations to also ratify the statute quickly.\textsuperscript{285}

\begin{itemize}
\item \textsuperscript{281} Bundestag, "128. Sitzung," 12355.
\item \textsuperscript{282} Ibid., 12359.
\item \textsuperscript{283} Ibid., 12357.
\item \textsuperscript{284} Bundestag, "90. Sitzung," 8376.
\item \textsuperscript{285} Bundestag, "128. Sitzung," 12359.
\end{itemize}
difference was that Germany viewed the addition of nations as a welcome outcome rather than a threat to national sovereignty.

A recurring theme in German discussions on other nations joining the Court was the reluctance of large nations, including China, India, and Russia, but especially the United States, to sign on to the Statute. The US was referred to as one of the nations that felt that the Court would threaten their national sovereignty.\textsuperscript{286} The US was also viewed as having worked against compromise and independent views at the Rome Conference and afterwards.\textsuperscript{287} German representatives viewed convincing the US to ratify the Rome Statute as Germany’s responsibility.\textsuperscript{288} Germany had even invited US representatives for a debate on the Court.\textsuperscript{289} Having the USA ratify the Rome Statute to become a State Party to the ICC would have been a significant step towards Germany’s goal of ending impunity for all of those who commit the most serious of crimes. However, the USA, like the Conservative Party in Britain, held significant reservations about the Rome Statute, including on the independence of the prosecutor, the wording of the complimentarity principle, and the Court’s amendment process.

The German debates over the ICC’s amendment process help to illustrate the disagreement between nations that are used to a position as world leaders, such as Britain and the US, versus nations who viewed the court as a platform for fostering international equality, as Germany did. As mentioned above, one of Britain’s concerns lay in the voting process that gave all nations equal weight as States Parties. The compromise reached at Rome was a delicately balanced agreement that catered to the demands of both

\textsuperscript{286} Bundestag, “90. Sitzung,” 8384.
\textsuperscript{287} Ibid., 8382.
\textsuperscript{288} Bundestag, “128. Sitzung,” 12355.
\textsuperscript{289} Ibid., 12357.
large and small nations. However, the amendment process leaves the Statute open to change without giving large, leading nations the type of weight they maintain in organizations such as the UN. Permanent UN Security Council members, such as Britain or the US, are unaccustomed to meeting other nations on equal terms, and are understandably reluctant to enter into any new agreement that would not perpetuate that unequal relationship. The issues brought to the ICC by this imbalance between large, leading nations and the other nations of the world is clearly represented in German talks over Article 5 of the Rome Statute.

At the Rome Conference, German representatives argued for a detailed list of weapons to be included under Article 5, which outlines the ICC standards for war crimes. German representatives were disappointed that the final version of the Statute left out nuclear, chemical, and biological weapons in order to make it more amenable to large states, especially the US. While it was understood that the reason for this omission was to get larger states to join on the Court without reservation, German representatives hinted that once they did join, the Statute could always be amended. While Germany is by no means a small or economically disadvantaged nation, for ideological reasons, German interests coincided with the more change-oriented, Like-Minded States group at Rome, which was made up mainly of smaller and less wealthy states. The fact that German representatives acknowledge that using a compromise position in the Rome Statute, while aiming to make significant changes once skeptical nations have joined the Court, is an acceptable strategy, might be a confirmation of US and British fears that just such a scenario would arise.

290 Ibid., 12358.
291 Ibid.
Germany had also considered this scenario from the large-state perspective, and was concerned with maintaining the integrity of the Rome Statute by encouraging many nations to join the ICC in order to prevent large states from making changes to suit their interests.  Though it would benefit German interests to stack the court only with the more independent-oriented nations that would help make the changes that German representatives desired, Germany was also interested in leveling the playing field for all citizens of every nation. German representatives felt that no criminal should be above international law simply because the nation from which they came had not ratified the Rome Statute. All people, regardless of their nationality, should be brought equally before the ICC. This type of equality necessitated a widely accepted, independent court that would, ideally, be free from political motivations.

German representatives at Rome and in the German Parliament were concerned with the exclusion of a definition of aggression and with the reliance on the UN Security Council to declare whether aggression had taken place. Germany and Canada had jointly proposed a definition of aggression that was ultimately not included in the Rome Statute, and this was still a disappointment for the German government. German representatives viewed a definition of aggression as a way to depoliticize the Court by making it more independent of the UN Security Council, perhaps because Germany is not a permanent member. The Security Council also holds the power to postpone an investigation for a twelve-month period, which German representatives felt was an

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inordinate curtailment of ICC independence. Unlike Britain, who is a permanent member of the UN Security Council, Germany viewed such powers as a threat to, rather than a safeguard of national interests.

German views on the court were, overall, that it was a step forward in the natural progression begun at Nuremberg and Tokyo; the ICC was seen as the result of a historical progression, building on an almost 100-year legacy. It was also regarded as a significant move forward for human rights. Rather than seeing the ICC as disconnected from the Nuremberg trials, German representatives fully embraced Nuremberg as the starting point of what they viewed as a very positive movement towards international criminal accountability.

Overall, the debates in the German Parliament were a continuation of German views at Rome, despite a change in government regime. German representatives, who were repeatedly disappointed with the compromises at Rome, continued to see the Statute as not independent enough. Despite significant hurdles, including amending the constitution itself, Germany quickly ratified the Rome Statute in order to provide a positive example to other nations that were considering becoming party to the ICC. Despite some cross-party reservations about amending the constitution, Germany ratified the Rome Statute on 27 October 2000, and became a State Party to the ICC on 11 December 2000.

Conclusion

British and German government representatives worked fervently to ensure that their governments’ efforts at Rome were followed through by a ratification of the Rome Statute. Though Britain altered less of its domestic law in order to come into compliance with the ICC, it also experienced a much more heated debate over the Court than did Germany. Because of Britain’s status as a permanent UN Security Council member, its outlook on international politics is inherently skewed towards maintaining the current international power balance. Germany, however, as a more egalitarian contributing nation at the UN and EU, is not under the same pressure.

This difference between Britain and Germany is manifest in each nation’s views on the future of the ICC. Both nations viewed their memberships, especially as part of the all-important first 60 nations, as an opportunity to guide and shape the court. Britain saw it as important to make sure that the Court was kept under control and the current power balance was maintained. Germany, however, saw the future operation of the Court as an opportunity to gain those points that were lost to compromises at Rome. This disparity may well be a reflection of the overarching differences between the more change-oriented and regulation-minded States Parties.
Conclusion

Almost nine years since the International Criminal Court (ICC) first came into force it has grown into quite an impressive institution. Despite doubts about the efficacy of an international legal body that does not have the ability to compel cooperation through military force or international sanctions, the ICC has followed through on its mandate with numerous investigations and trials. It has also followed through with its mission to promote education of the public by welcoming observers to the court with as little hassle as possible. One of its further goals is to promote witness safety, which the Court has continued to attempt through various measures aimed at anonymity. There are, of course, a few high profile cases that highlight the ICC’s dependent nature. Most notably, Omar al-Bashir, the acting head of state in Sudan, who was indicted for crimes against humanity, war crimes and genocide, remains at large and has travelled internationally without arrest. As German representatives argued, the more nations to join the Assembly of States Parties, the less impunity there would be for criminals such as al-Bashir.

Each year since the ICC began its operations it has seen more nations ratify the Rome Statute and join the Assembly of States Parties. As of this writing, there are 114 States Parties, though the high profile holdouts, including the USA, remain unconvinced. Fear of losing national sovereignty, of subjecting a nation’s own citizens to a, perhaps, biased foreign body and of giving up the weighted voting privileges enjoyed in other international institutions, have brought such nations to an impasse with the Court as it stands. However, the continued inability of these nations to shape the ICC while
remaining non-States Parties means that the Court is likely to move further away from a position amenable to them.

The domestic debates in the British Parliament over ratifying the Rome Statute serve as an encouraging example. Despite Conservative doubts of the same nature present in the US, Britain was able to reconcile itself to the Court. Perhaps as the US continues to weary in its position as international policeman, the ICC will present itself as an appealing alternative. For now, however, Britain remains the only permanent UN Security Council Member to have joined the Assembly of States Parties without reservation. Recent revisions to the Rome Statute, made at the 7 year Review Conference in Kampala, Uganda, which concluded on 1 June 2010, show that although the ICC is undergoing change, there is still much caution taken to ensure the Statute’s wide acceptability.

A definition of aggression was adopted based on UN General Assembly (UNGA) Resolution 3314, of 14 December 1974. Under this definition, aggression is, an act planned, prepared or executed by a representative of a state which, “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” As this definition is inextricably linked with the UN, the UN Security Council maintains considerable say in such a case: the Security Council can refer an act of aggression to the ICC whether committed by States Parties or non-States Parties. As a boon to the nations supporting an independent ICC, the Prosecutor may also initiate an investigation of an act of aggression, though this would require permission from the Pre-

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300 Recall from Chapter 3 that France also ratified the Rome Statute, but included a reservation declaring that nuclear weapons do not fall under their interpretation of the Statute.
Trial Chamber. An enumeration of chemical weapons whose use constitutes a war crime was also added to Article 8 of the Statute, covering non-international conflicts. Notably absent from this list are nuclear weapons, again maintaining the broad appeal of the Rome Statute.

These two changes to the Rome Statute can be seen as proof that fears, like those present in the British Parliament, that the Court would be swiftly transformed into an unrecognizably powerful and totally independent body, are entirely unfounded. Perhaps it is mostly because the Assembly of States Parties is aware that it must remain appealing enough to attract more nations to ratification, but it is clear that the push and pull between more change-oriented and more regulation-minded States Parties is still present. The caution displayed at the Review Conference is unlikely to dissolve given the current state of the international community.

The side-by-side comparison of British and German participation in the major international criminal tribunals sheds light on the changes in the international system, or perhaps lack thereof, since World War II. The UN, created after the War, placed Britain and other victor nations in a privileged position over General Assembly members; a distinction that remains to this day. Britain’s position on the UN Security Council played a strong role in determining British arguments at Rome and in domestic institutions, despite a recent, more change-oriented turn by the government. Germany, not having been on the UN Security Council when the ad hoc tribunals for the former Yugoslavia and Rwanda were created, was not able to vote on their creation, leaving the Rome Conference the first opportunity for that government’s opinions to be presented on an equal playing field with other nations. It is only natural, then, that Germany argued for
the court to be more separate from the UN, an institution in which its voice, and the voice of many smaller member nations, had been unequally represented.

In the previous three Chapters, it has been demonstrated through the example of Britain that nations that maintain reservations about national sovereignty can put aside these concerns in order to serve the principles of justice and, more concretely, to help shape the ICC as it develops. The discussion of Germany has shown that more change-oriented nations, which were disappointed with how regulated the ICC Statute remained, were also able to sign on the Court. If the ICC Statute had been altered much in either a more independent or regulated direction, it is possible that instead of being acceptable to most nations, it would be acceptable to none. The USA and other holdouts will have to be willing to compromise, as 120 other nations have done, if they wish to join the rest of the international community in this exceptionally significant endeavor.
Postscript: Suggestions for Further Research

This work has focused on concrete actions by Britain and Germany that marked their converging paths toward membership in the Assembly of States Parties in the International Criminal Court (ICC). Although it was not within the scope of this work to examine the following in depth, there are two larger philosophical issues that merit further study: the justice versus peace debate and the working definition of the crimes found in the Rome Statute.

The debate over justice and peace concerns whether the two can coexist and, barring coexistence, which it is more effective to seek after a conflict. With the creation of the ICC and the widespread support it has received internationally, it is clear that justice has been legitimized as an acceptable form of post-conflict resolution. However, the ICC simply does not have the funding, staff, or the mandate to try each and every criminal in a given conflict in order to promote resolution in a war-torn area. The upper-echelon criminals, those in a leadership position, may find themselves on trial in The Hague, but what of the individuals who, following orders or not, carried out the actual crimes? It is mainly over the fate of these individuals that the justice versus peace debate rages.

One side of this debate holds that privileging judicial proceedings over local forms of conflict resolution does more harm than good: justice prevents peace. Instead, proponents of peace through non-judicial means support alternatives like the truth and reconciliation commissions found in Rwanda and Sierra Leone. Truth and reconciliation commissions can work alongside formal judicial proceedings, but the incompatibility between the two lies in squabbles over jurisdiction. Should someone who confessed
before a truth and reconciliation commission be allowed to stand trial for the same crimes? What if the victims demand more than amnesties? Do all victims find peace without punishment? Furthermore, can peace be achieved if justice is looming over those who would make peace? In this study, the British peace negotiations during the breakup of the Former Yugoslavia offer one example of such a conundrum: the leaders of the conflict could not be expected to lay down their arms only to face arrest and trial under an international tribunal.

For the other side of this debate, justice and peace are inextricably linked: there cannot be peace without justice. Referring to the lack of trials in Gujarat in Western India, Kalpana Sharma writes: “Without justice there can be no peace. The mere removal of the object of violence, in this case the Indian armed forces, will not mean peace…there must be justice, there must be a closure on past wrongs.” For Sharma, justice brings peace because it gives the assurance that the victims will not be victimized again. Is the retribution that justice brings the only way to for individuals to move past a conflict and rebuild? Is peace only tenuous and superficial until justice has been served? What are the limits of addressing war crimes legally?

Currently, peace and justice operate in tandem, on an ad hoc basis according to the situation at hand. Further research must be done in order to determine how post-conflict trials either hinder or contribute to peace. If peace without justice better serves the purpose of post-conflict resolution, then perhaps the international community will have to take a step back from the increasing codification of and support for international criminal justice. However, if justice is shown to be as necessary and effective as is

currently boasted by its supporters, then the ICC may gain even more credence on the international stage.

The other main issue that merits further study is the working definition of the crimes over which the ICC holds jurisdiction. What, in practice, merits a war crime? The nature of a war crime begs the question, are there any acts of war that are legitimate? Can a nation wage a war without it being a crime? The clear enumeration of unacceptable acts of war under Article 5 of the Rome Statute attempts to answer this question by laying down legal guidelines. However, even with these definitions in place, the ICC Office of the Prosecutor can choose when to bring a case to the Court and when to decline.

Undoubtedly, acts of war carried out in defense are less criminal than acts of aggression, and therefore less prone to prosecution. Military actions carried out to protect or prevent further atrocity are also more morally appealing, but they begin to fall in gray areas due to the uncertain nature of preventative action. British government officials were certainly worried that their peacekeeping actions would be open to reinterpretation and perhaps prosecution as war crimes or crimes of aggression. The doubt lies in the uncontrollable nature of an independent Court that can and will interpret the ICC Statute as its prosecutors and judges see fit. What, then, is there to safeguard peacekeeping forces from prosecution? Or, on the other hand, to ensure that the Court does not issue free passes to powerful Western nations in the name of peacekeeping while unfairly judging the developing world?

This issue is not merely theoretical. As more cases are judged in The Hague, International Criminal Law will develop norms of prosecution and interpretation. The
law, which has been codified, will become molded through precedents and judgments. It remains to be seen how, in practice, the Court will define the crimes in its mandate.

The debate over peace and justice, and the further definition of the crimes found in the ICC statute are both issues that presented themselves while I completed this study. The questions raised in this postscript will, I believe, become more pressing as the ICC continues to operate and gain in size and support. These issues, therefore, merit further scholarly examination.
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