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*Interviewer:* And I guess I want to begin the same way you began the book, *Stay the Hand of Vengeance*, and that is asking the question: What makes governments create and then support international war tribunals?

And I know it's tough because these kind of require long answers, and we can only do so much, but what's a good way to kind of summarize that answer, if there is one?

*Gary Bass:* I think it's a real variation in the amount of support that government's have for these kinds of efforts. The United States was extremely enthusiastic about the Nuremberg Trials after World War II and also at the Tokyo Trials after World War II, much less enthusiastic in comparison about the ex-Yugoslavia Tribunal and, under the Bush Administration, outright hostile towards the International Criminal Court.

In the Nuremberg and Tokyo proceedings, the United States felt that it itself had been a victim of war crimes, and that really pushed the American government and the American public towards prosecutions.

In the case of the former Yugoslavia and Rwanda and Uganda the United States was way off to the side and didn't – wasn't in any way directly victimized. So, it's just a much lower priority for the U.S. government.

*Interviewer:* And speaking a little bit more generally, because we just kind of want an opening, thematic statement here about why prosecute war criminals? Why conduct these tribunals? And I know one of the answers in your book was it depends on the type of government. Liberal governments tend to do this. Can you kind of extrapolate on that a little bit?

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*Gary Bass:* Yeah. There are liberal and legal norms inside the United States that made justice seem like a kind of moral priority, that there were a lot of people in the U.S., probably the majority of the American public, who would have rather seen the Nazi leadership executed without trial. That was actually the original plan of the American government was to shoot people without trial. But there were also people within the U.S. government who insisted that the basics of

the Bill of Rights had to be applied, even to the Nazis. So, you'd see these legal scruples within American society coming to play a big role in the way that U.S. is setting its policy towards war criminals.

*Interviewer:* Can we say that more generally too about countries that want to hold these international tribunals? Is it that they're kind of coming from a legalist and liberal tradition?

*Gary Bass:* Yeah. The governments that are most interested in promoting war crimes tribunals tend to be ones that come out of a liberal, legalist tradition.

*Interviewer:* And then, I mean, what's the goal? Because you mentioned the alternatives were just executions. What is the hope or what are the benefits that an international tribunal can bring that its proponents point to?

*Gary Bass:* The people who support war crime tribunals point to a huge number of possible things that they can do that – most immediately, they punish people. They take potentially dangerous political leaders outside of the regular politics in a country. They also – they're meant to provide a sense of satisfaction to victims, to make victims feel that there's being some kind of accountability for the horrible things they've gone through.

Some people say they provide a deterrent to future war criminals, that they provide a truth-telling function that establishes a historical record of what horrors happened in the past and, therefore, hopefully helps to prevent them in the future. People also talk about the role that war crimes tribunals are supposed to play in bringing reconciliation within a country and taking population groups who had been at each other's throats and turning them from bitter enemies into sort of more reconciled neighbors.

*Interviewer:* And you have a historical perspective on this. You did kind of an extensive study. How valid are those claims if you look back in the sweep of history. Have these been effective?

*Gary Bass:* The argument about deterrence is the one that seems to have the least amount of historical evidence. Partially this is because war crimes tribunals have historically been fairly weak, so it's hard to imagine that the kind of weak prospect of prosecution would have a big impact on the behavior on sometimes quite determined war criminals who are committing their crimes with a good deal of forethought. It's something that they really want to do. They're not – it's not a minor part of their policy.

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*Gary Bass:* But when you look at British and French threats against the Ottoman government at the time of the Armenian Genocide, these were quite direct. These were quite explicit and seemed to have very little impact on the Ottoman government way back in 1915.

There weren't all that many direct threats from the United States government about war crimes prosecutions during World War II, but even so, those threats don't seem to have had a huge impact on Nazi policies. They may have had some smaller impact on collaborator states that were working with Nazi Germany and the extermination of the Jews. In the former Yugoslavia the threats that were made, the creation of the war crimes tribunal in 1993 seems to have had a pretty small effect in deterring war crimes in the former Yugoslavia.

It's obviously always hard to tell when war crimes are being deterred because you can't see the war crimes that didn't happen. We have to be a little bit cautious with concluding that they don't have any deterrent effect. But it does seem that in some ways, hanging the argument for international justice on deterrence makes that argument essentially hostage to the worst behavior of the worst war criminals, and that might not be the best way to phrase the argument.

*Interviewer:* What's a better way to phrase the argument, do you think?

0:06:39.4

*Gary Bass:* I think there's a stronger argument that the truth-telling function is important. You look at the contrast between Germany after World War II and the Ottoman Empire after World War I there's just much more denial about what happened to the Armenians in present day Turkey.

Whereas in Germany, although Nuremberg is only part of the reason for this, but it is a part of it there is much less denial. It's almost unthinkable for a German politician to try to deny the facts of the Holocaust. Nuremberg I think had the extraordinary documentary record that was accumulated from Nuremberg, the volumes upon volumes upon volumes of documentary evidence and testimony that was accumulated in the course of the Nuremberg trials, not only has it been a huge help to historians, but also really makes it much, much harder for anybody to, with any seriousness, question the facts of the Holocaust and the facts of the way the Nazi state operated.

*Interviewer:* Kind of an enduring criticism of these war tribunals, and not just from Göring or Tōjō, but also from other critics, is they're victors' justice. How far does that criticism go? How helpful is it to understand the international tribunals?

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*Gary Bass:* Well, the people who are on trial are always going to claim this is a form of victors' justice. There is a sense in that, yes, that's true. This is a form of victors' justice because if the allies hadn't won World War II, then there wouldn't have been any Nazis being put on trial. If not for the power of NATO in Europe, then it's much less likely that you would have seen Slobodan Milošević go on trial in The Hague.

So, in that sense, victory does have something to do with justice, but I think what Göring and Tōjō meant when they say victors' justice is that it's not really justice at all; that this is totally hypocritical, totally arbitrary, and that, I think, is less convincing. I think you actually do have some image of what it would have looked like if you had a non-liberal state putting on war crimes trials, which is the way the Soviet Union dealt with Nuremberg.

There you see victors' justice, but a very different kind of victors' justice from the victors' justice practiced by the U.S. government and by the British government. As far as the Soviet Union is concerned, the indictment is a statement of facts, rather than the way that we think about it in the United States, or in other liberal countries, where an indictment is a set of allegations by the government that is perceived to be untrue, and the prosecution needs to prove it's true. The Soviet Union is completely different in that the indictment is a statement of fact, and the Soviet – it's a decent from acquittals, the Soviet judge rather than being an independent judge exercising independent judgment, whenever there's a complicated issue comes up he says he has to call Moscow. So, it is a very different view. It's much more like the 1938 Soviet purge trials. The Soviets actually send Andrey Vyshinsky, the chief prosecutor of the Moscow purge trials to Nuremberg to try and make sure the prosecution in Nuremberg is unfolding as swiftly and as dramatically as the Moscow purge trials did.

But you really do see a quite sharp difference between the approach of the west and the approach from the Soviets. The American chief prosecutor at Nuremberg is Robert Jackson, who's a Supreme Court justice. This is a guy whose entire career is spent telling the White House what it can't do and telling Congress what

it can't do. So, he's a pretty independent-minded guy when he gets to Nuremberg. In contrast, the Soviets are sending along Vyshinsky, who's somebody who is an absolute tool of the Soviet state.

*Interviewer:*

And I want to get more into the details of Nuremberg later because I think that'll be a heavy focus of this segment. I'm just looking for kind of a general, thematic overview statement I guess to kind of begin the listener on understanding this. One of the things you pointed out, of course, was this tension between the idealism and the self-interest, and if you could describe how that dynamic has affected, just broadly speaking, these war tribunals.

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*Gary Bass:*

Right. So, even liberal governments I think are really torn when it comes to international justice. On the one hand, they have this sort of principled, idealistic commitment that atrocities deserve to be punished and that sort of distinctly legalistic-minded way of thinking about punishment. So, punishment doesn't just mean shooting the bad guys. Punishment means some kind of trial. That's kind of the good news.

The bad news is that even beyond that, liberal states are still – you know, they're still states. There's still a distinct selfishness to the way they make their foreign policy and they worry about paying too high a price for the pursuit of justice. In particular, they're very, very worried about the risk to their soldiers of policies of justice.

So, in the former Yugoslavia there was an extreme reluctance by, not just U.S. troops, who got to Bosnia early in 1996, but also on behalf of the British and French and Dutch and Canadian governments, who had peacekeepers on the ground much earlier than the United States did. A real reluctance to risk these troops in the name of hunting down war criminals or in the name of upholding indictments that are being handed down by the UN International Court sitting in The Hague.

It's one thing to say we're for international justice. It's another thing to put your soldiers' lives at risk. In fact, one of the reasons why Nuremberg was such a success was that the Allies had decided on a policy of unconditional surrender back in 1943. Well before the decision was made, which was sort of going into August/September of 1944, the decision was made to actually have war crimes trials for the German leadership. So, people have already decided, "We're going to Berlin. There's going to be

unconditional surrender. The flag is going to be run up over Germany," and that means there aren't extra risks to American troops by saying, "and on top of unconditional surrender, we're also going to have war crimes trials."

In the war on the Pacific, where again unconditional surrender is also the name of the game, the Japanese de facto get to impose one condition on an otherwise formally unconditional surrender. This is that the emperor, Hirohito, won't be put on trial. American officials thought that if there was such a massive humiliation, massive disrespect of putting the living god, the emperor, on trial that the Japanese wouldn't surrender and that would mean more fighting and more American casualties. It also would have meant more Japanese casualties. Therefore, the Americans kind of quietly dropped this demand that the emperor himself face war crimes charges.

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*Interviewer:* I'm curious, so you think –and what effect did that have on Tokyo? We're getting out of chronology, but I think it's a helpful difference between Tokyo and Nuremberg.

*Gary Bass:* Well, there's definitely Tokyo seems to be much more of a dud than Nuremberg. It's seen by a lot of Japanese as pretty high-handed, hypocritical, arrogant; that there's something colonial about the imposition at Tokyo that this is sort of white man's justice being imposed on East Asia. This is actually coming from imperial Japan. Imperial Japan might not be the exact best candidate to complain about the evils of colonialism in Asia, but you definitely hear this argument that there is a real skew, a real unfairness to the Tokyo tribunal.

One of the other complaints that people make about the Tokyo tribunal. There are some Japanese nationalists who complain that the tribunal was too strong. On the other hand, there are also people who complain that the tribunal was too weak; that it kind of left out the core of the Japanese state, which is the Emperor. Obviously imperial Japan revolved around Emperor Hirohito. He was a figure of enormous power. There have been – there are debates about exactly how influential he was in the making of Japanese foreign policy, but to just leave him out all together is something that really calls into question a lot of the judgments that come out of Tokyo.

*Interviewer:* That illustrates some helpful themes. I think few people know about the war tribunals after the First World War. So, I was

wondering if you could speak for a few moments about the Leipzig Trials and how that kind of came out of the Paris Peace Conference. What were the hopes of those framers in Paris in 1919?

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*Gary Bass:*

Generally when people talk about international justice, Nuremberg is always the example, that Nuremberg is the most important, the most spectacular, but also the most successful. People tend to forget about some earlier efforts at international justice that were really quite unsuccessful.

After World War I there was a huge drive to put German war criminals on trial. The British and the French were absolutely shocked by the scale of destruction that had fallen across Europe, and the French were particularly furious at the Scorched Earth campaign that the Germans had had as they were treated in the final days of World War I.

The combined Allied leaders came together and thought that there absolutely had to be some form of punishment. There was kind of a debate about whether or not it should be punishment through a war crimes trial or through something more political and less legal. Everybody thought that what Germany had done in World War I, both in starting the war and in the way that Germany fought the war that these were criminal, reprehensible, and had to be punished.

They write into the Treaty of Versailles provisions for trails of not only lower level German war criminals, but also for the Kaiser, Wilhelm II of Germany, that he is supposed to be held up as sort of the supreme war criminal of World War I. So, there's this moment of extraordinary pressure for war crimes trials. The problem is that Germany is not under the same kind of occupation, the same kind of complete occupation that it's under after World War II. German nationalists across the political spectrum – not just the far right, not just Junkers, not just Nazis, but also social democrats, people on the left, people in the German centers--some of the people who are the bedrock supporters of the Weimar Republic--really, really resent this Allied effort at putting German soldiers, officers, and the Kaiser on trail. So, there's enormous pushback from the German public and the Allies find it harder and harder to actually get a hold of any of these war criminals they would like to try.

Kaiser Wilhelm II himself fled to Holland, was hiding out there and being sheltered by the Dutch government. The Allies told the

Dutch, "You better turn this guy over." The Dutch said, "We don't think so," and then the Allies didn't really have any particular way of actually forcing him out.

So, it begins to slowly fall apart. Finally, as kind of a compromise measure, the Allies say, "Well, alright, we don't have the international trial that we had in mind, but we want to see a German court put these guys on trial." The German authorities take a handful of lower level suspects and put them on trial in front of a German high court at Leipzig. The result is that the court either acquits people, gives them a slap on the wrist, and in a bunch of cases the court accepts the defense that these guys were just following orders and that that's alright. The Allies are made even more furious at these six-month, one-year sentences or acquittals of a really small number of quite low-ranked, not-terribly-important war crime suspects.

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*Gary Bass:*

The Allies kind of walk away from it, and there's the sense that it's been, not only a failure in that they never got the Kaiser, that they never got serious people on trial, but also that it was very divisive between the British and the French. It was also an incredibly unpopular thing within the Weimar Republic. Some of the most moderate, the most important elements within the Weimar Republic, are outraged by this. So, all around it comes across as pretty much a total disaster.

*Interviewer:*

It's interesting because the failure actually has its own pernicious consequences. It's not like you go for it and you don't get it, oh well. There actually are consequences to failure as well.

*Gary Bass:*

If you had not tried at all, then at least you wouldn't have infuriated all these German social democrats, who are upset about it. You wouldn't have handed an issue to the German nationalist Reich, which they used to sort of bludgeon the Weimar Republic with. You wouldn't have poisoned relations between the British and the French. The French stick with the issue longer than the British do. The British haven't suffered as much in World War I. They've suffered horribly, but not as much as the French and the Belgians. So, the Brits find it a little bit easier domestically to walk away from it, whereas French leaders find it almost impossible to drop this issue.

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*Gary Bass:* There are real negative consequences. In a kind of broader sense, if you promise justice to victims, then there's an obligation to them to make good on that promise, and that was something that the British and French governments were unable to do. The attempts to try German war criminals cause a pretty nasty issue between the Europeans and the Americans. The Wilson administration is quite consistently uninterested in war crimes issues during World War I. They're afraid, until 1917 when the U.S. finally gets into World War I, that this is kind of Allied propaganda or European propaganda that it will drag the U.S. into World War I, which Woodrow Wilson very much is trying to avoid until 1917.

So, he's worried about that, and then after the war, the U.S. government takes a quite conservative reading of what international law would allow and say, "We think there can be war crimes trials for submarine warfare where American ships are getting sunk on high seas, like the Lusitania." That the United States says, "Okay, that's a war crime."

Then when it comes to the idea that aggression might be a war crime, which is something that the British and the French are saying that's starting World War I was a crime, the Americans say, "We just don't see it. Where's the law that says aggression is illegal?" So, even the Wilson administration, which we generally think of as crusading and really pushing a human rights agenda, the Wilson administration is quite uninterested in war crimes trials.

*Interviewer:* Right. That seems kind of dissonant with their ideas to project American values, liberty, and democracy, outwards in a lot of sense and this hesitance to project justice outwards. When does that hesitance to protect justice kind of fall away? When is there an embrace of this idea? Is there an explanation of this, or is this just kind of an evolving idea?

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*Gary Bass:* Some of the law in this area, in particular, the question of whether or not aggression is a crime, is up for grabs. Nuremberg tries very hard to set a strong precedent that aggression is the most important international crime, that all other war crimes flow from the initial crime of aggression. Without a war, you don't get war crimes people argue.

There is this big legal controversy, but there are also people who say that the definition of aggression is fuzzy. In a case like World War II it's clear that's an obvious case of Nazi aggression, but in a lot of other cases wars start in much more ambiguous ways.

There's a series of provocations and it becomes a very complicated historical exercise to decide who's really at fault for the war. So, there's that debate about whether or not aggression itself can properly be considered a war crime. It's both a legal debate but also a very heavily politicized debate.

But also, the U.S. government is sometimes more interested and sometimes less interested in trying to export its particular view of foreign policy. The Wilson Administration goes through its own phases, but sometimes they're very gung-ho and sometimes they're not. The Secretary of State, Robert Lansing, really doesn't want to get attached to this European project that he and Wilson seem to think that this is vindictive. They think that it's punitive and it's going to get the League of Nations off on a bad start. Rather than starting the League of Nations in a time and spirit of impartiality and with malice towards non – this seems like with a lot of malice towards the Germans. It seems like you're starting the League on a pretty low note and the Wilson Administration doesn't want to have anything to do with that.

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*Gary Bass:*

The Europeans keep saying that the trial of the Kaiser, the trial of East German war criminals, let's call that the first act of the League of Nations, so they're trying to dangle that in front of Wilson, and Wilson's not buying.

*Interviewer:*

Interesting. I just want to touch briefly on another trial after World War I in Constantinople. One of the things that I don't think many listeners probably realize is that common phrase, "crimes against humanity," comes out of that trial, which you pointed out. I was wondering if you could just describe quickly, what was the effort on that trial, and why didn't it get the legs and was successful like the British had hoped?

*Gary Bass:*

In May of 1915, early in the Armenian Genocide, the Allied governments, meaning the British, the French, and the Russians make a sort of formal threat to the Ottoman government saying, "You need to stop these" – what they call – "fresh outrages, fresh crimes against humanity." "If you don't, then there will be individual punishment for the Ottoman leadership for these atrocities." This is a powerful threat. It's arguably the first use of the phrase "crimes against humanity" in the context that we're most familiar with it today, meaning a widespread systematic attacks on civilian populations.

And in that sense, it looks kind of like a precursor to Nuremberg.

At the end of World War I there's a really impressive array of top Ottoman leaders who are captured, who are going to face trial on the sort of May 1915 accusations. The problem is that again the British government in particular and the French government to a lesser extent, don't have the kind of secure grip on the Ottoman Empire that would make it possible to impose this kind of foreign justice on these Ottoman leaders. There's a good deal of national resentment within the crumbling Ottoman Empire. There's a civil war going on within Turkey and there are Turkish nationalists led by Mustafa Kemal Atatürk, who would go on to be the founder of the present day Turkish Republic. Atatürk's nationalists are fighting against the sort of crumbling remains of the Ottoman Empire, and the nationalists are horrified by the idea that you're going to see Turks being put on trial by the Allies.

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*Gary Bass:*

The kind of compromise position that the Ottoman Empire comes up with is, we'll have our own court and it will put some of these leaders on trial. Some of the most important leaders have fled or are no longer within the Ottoman Empire, so they can't be put on trial. The first effort at having trials is of medium-ranked people. This results in a conviction and hanging. That hanging prompts a kind of nationalist riot. There are clearly a lot of Ottomans who are pretty upset about this and see it as a high handed and arrogant imposition of justice.

So, the Allies begin retreating from this pledge to punish war criminals, and eventually, the Brits start getting worried that some of these war crimes suspects are in Ottoman jails are escaping. They are worried that there might be prison breaks and these guys might be freed. So, the Brits whisk everybody off to Malta to be under British control where the Brits can kind of think and decide what they want to do with these guys. The problem is there are complaints from within Britain that say, "How can we just detain these guys indefinitely?" We ought to need to put them on trial or let them go." This includes Winston Churchill, who says, "Why are we holding onto these people? What exactly is it? Are we charging them? Do we say they're war criminals, or are they just people who we got on the wrong side of World War I from us, and we're holding onto them just for that reason?"

So, there's an argument within the British government. At the same time, Atatürk takes some British sailors hostage and turns around and says to the Brits, "You free the Ottoman prisoners, and we'll free these British prisoners," and the British government actually decides to go for this prisoner swap. So, a pretty

ignominious ending. what started out at the end of World War I as looking quite promising in that you have all these senior Ottoman leaders who could face trial, including ministers, including the Grand Vizier, during the Armenian Genocide. They didn't call it genocide then. The word genocide didn't exist then. People would have said the Armenian massacre.

What starts out at the end of World War I looking potentially quite promising ends up as, again, a debacle because there weren't been serious punishment and it didn't seem to have brought reconciliation. It inflamed nationalist sentiment. Some of these Ottoman leaders who have fled of the possibility of prosecution wound up getting hunted down and killed by Armenian assassins. So, where legal justice fails, you get instead a much cruder kind of vengeance.

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*Interviewer:*

We fast-forward from those two post-World War I trials to the midst of World War II when the allies are trying to figure out what to do with post-war Germany and Japan. I'm interested in hearing the different views at Tehran or some of the other conferences, about what was Stalin hoping for. What was Churchill hoping for, and what was the American government's position on this?

*Gary Bass:*

The crudest statement from the Soviets about what they're thinking about comes in 1943 at the Tehran Conference. It happens at a meeting of the big three of the Americans, the Brits, and the Soviets. Stalin gets up in front of Churchill and FDR and makes a toast, a toast to the Red Army, and also says while he's toasting, mentions what he thinks should be done with German war criminals, which is shoot between 50 and 100 thousand of them.

That's what Stalin is prepared to say publicly in front of Churchill and FDR. FDR says kind of – tries to make a joke out of it and says, "Marshal Stalin, don't you think that 49,000 would be enough?" And Churchill, who takes Stalin much more seriously storms out, says, "I'd rather be shot myself than listen to this."

So, you have a pretty clear statement from Stalin that he's not particularly interested in trials, that legal niceties are not exactly what Stalin is going to be most concerned with. The Soviets are at least quite clear on what they want done. The British and the Americans don't really know exactly what they want to do until, or the debate doesn't really get going until the summer of 1944. For a lot of the time, early in World War II, people aren't talking about what we're going to do with the German war criminals in part

because nobody is sure that we're actually going to win the war, so it seems kind of crazy to be making plans for post-war Germany. They might win. But after D-Day, planning really starts in earnest.

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*Gary Bass:*

There's a huge fight within the U.S. government about what should be done. On the one hand, you have the position from really most of New Dealers lead by Henry Morgenthau, Jr. who's FDR's Secretary of the Treasury. And Morgenthau says, "What the Nazis have done is so bad that it goes beyond any normal conception of law and the only way of dealing with this is just to have summary executions," that there's no way these people deserve trial. Why would you want to hand Hitler and Göring and Goebbels a microphone so that they can make their case to the world about why the Nazi cause was just and why the Allies are Jewish-controlled and fighting a war to destroy Germany. Why would we want to do that? Instead let's just shoot these guys, get it over with and then we'll get on with reconstructing Europe.

That's actually the dominant position among the New Dealers. FDR is very punitive against the Germans. Cordell Hull, the Secretary of State, is talking about summary execution. He knows that this is very popular with the Russians. The person who's really advocating that this is a terrible idea and that there need to be war crimes trials is Henry Stimson, who's one of two Republicans that FDR has within his cabinet. Stimson is himself a lawyer. As World War II is winding down, he's reading up on Bar Association journals. He's been a practicing lawyer in New York. He's been a prosecutor. He worked for Theodore Roosevelt as a prosecutor. And he insists there has to be a kind of legal solution.

He doesn't say it's going to look exactly like an American domestic court, but he does say that this idea of summary executions--and people at the Treasury are talking about something like two dozen, five hundred people being summarily shot--Stimson thinks this is crazy, that this is sort of a kind of democratic bloodlust, both I guess both capital D and small D democratic bloodlust because it's the New Dealers, it's the Democratic Party that's pushing this and also the American public is absolutely enraged. We have Gallup polls and the overwhelming majority of Americans would have agreed with the idea of summary execution for German and Japanese war criminals. You would have got actually slightly greater numbers of people calling for the extermination of all Japanese people, than you would have got people calling for war crimes trials. Democratic public opinion in

wartime gets incredibly angry. This has been a very long and very awful war.

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*Gary Bass:*

So, Stimson is fighting this lonely battle trying to convince people that the basics of the Bill of Rights ought to be applied to even to the Nazis. He finally wins through a variety of underhanded means, including a quite strategic leak to *The New York Times*, so the end result is that there is a decision that there will be war crimes trials.

It's a very narrow thing. The real achievement of Nuremberg is in some ways just the fact that it happened at all, I mean, there are many, many imperfections with the kind of justice that was delivered in Nuremberg. Lots of things wrong with the way the trial was held. But the most spectacular thing that's wrong with the way the trial is held is the presence of the Soviet judge on the bench alongside the British, French, and American judges.

*Interviewer:*

I was struck – you referenced George Kennan a couple of times and just to see the irony almost, the bitter irony of having a Soviet judge there, but how did they – was there a lot of friction between those judges, or how did that work out?

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*Gary Bass:*

Robert Jackson, the American Supreme Court Justice who goes over to Nuremberg to be the American chief prosecutor there—and Nuremberg is really an American show--Jackson has a pretty rough, tempestuous relationship with the Soviet judge and with the whole Soviet delegation. The Americans and the Brits really see the Soviets as being incredibly punitive. Given the extent of Soviet suffering during World War II, the Americans and the Brits understand why the Soviets are being so punitive, but also, they see the really monumental hypocrisy of having charges against the Nazis for aggression, totalitarianism, and crimes against humanity while having a Soviet judge sitting there representing a Soviet government that is also guilty of aggression in the Hitler-Stalin Pact and the conquest of Poland was done hand-in-glove between Nazi Germany and the Soviet Union.

As for crimes against humanity, you can think about it in the diffuse sense that obviously the Soviet Union committed crimes against humanity on a massive scale, but also even in more immediate ways, that the notorious massacre of the Polish officer corps in the Katyn Forest, there are charges at Nuremberg for that.

The charges are lodged by the Soviets against the Germans. The problem with this is it was actually the Soviets who massacred the Polish officer corps. The Soviets are using Nuremberg for their own propaganda purposes, and they're literally charging the Germans with things that the Soviets themselves actually did.

*Interviewer:*

One thing that I learned from your chapter on this was just how ahistorical our own recollection is of Nuremberg and the primary motive of Nuremberg. Can you talk a little bit about what the actual goal was for the Allies or what they really wanted to prove and then how our memories of that now differ?

*Gary Bass:*

I think today we have a tendency to remember Nuremberg as being really a trial for the Holocaust; that was the singular evil of Nazi Germany and that, therefore, the efforts of post-war justice were directed against that.

The reality is that Nuremberg was much more concerned with trying Nazi Germany for crimes of aggression. If you go back and look at the debate that the American government had about what Nuremberg was supposed to look like, if you look at how Justice Jackson handled his prosecution efforts at Nuremberg, the focus is overwhelmingly on the cardinal account of conspiracy to wage aggressive war. Crimes against humanity charges are a much smaller part of the American prosecution at Nuremberg. That's really left to the side, and this is in a way in keeping with the way that World War II was fought, that Americans are absolutely outraged at Pearl Harbor and at Germany's subsequent declaration of war against the United States. Americans, perfectly understandably, correctly see themselves as victims of German aggression, of Axis aggression, and are furious and want to see some kind of punishment for that.

The suffering of the Jews is a much smaller concern. The Roosevelt administration itself had not been much interested in preventing the Holocaust. The efforts of rescuing Jews from Europe are something that's only undertaken in a quite small way and quite late in the war. The War Refugee Board, which is the U.S. government agency that's trying to help rescue some of the European Jews, is only up and running in 1944. So, there have been Jews who'd been under direct Nazi persecution since '33, and the U.S. government is finally beginning to take real steps only in 1944, very, very late in World War II, very, very late in Nazi persecution of the Jews, and very, very late in the Holocaust.

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*Gary Bass:* So, at Nuremberg you really see overwhelmingly this focus on Nazi aggression and that's not at all how we remember it today.

*Interviewer:* And as you said, we kind of think about Nuremberg today as an unalloyed success, but like you said, there were many problems with it. Maybe just quickly, on balance, what is your own assessment of Nuremberg and what's the positive that comes out of it?

*Gary Bass:* Well, I think the negatives of Nuremberg are how close it came to being summary execution, the numerous mistakes in the way the prosecution was handled, and in particular, the presence of the Soviet judge on the panel. Those are things that really undermined its credibility, and also sort of lacked an interest in the Holocaust. These things I think really detract from Nuremberg's legacy, but it's still an extraordinary thing. This comes at the end of the worst war in human history at a time when American public opinion and British public opinion are viciously outraged against what Germany has done and are demanding incredibly harsh punishment, including summary execution. People are talking about deporting Germans to be slave labor in reconstructing the Soviet Union.

I think people tend to forget just how angry Americans were at the end of the Second World War. But the policy that's adopted is one that sticks with the rule of law as its guiding light, and that's something that I think is a remarkable achievement. I think people are absolutely right to look at the legal inconsistencies and the legal holes in Nuremberg, but you also have to look at what the real alternative was, which is the dominant position at first within the American government, which is on summary execution. It's really remarkable that the opposite position that the Nazis deserved to be treated with at least the rudimentary aspects of the Bill of Rights, that that position ultimately triumphs.

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*Interviewer:* And it seems after Nuremberg there's a certain momentum towards international justice. If you could talk about in 1948 there is the commission on genocide, and things like that, and then, all of a sudden, a screeching halt, and I'm wondering why.

*Gary Bass:* The pursuit of international justice like many, many forms of international cooperation just becomes much harder during the Cold War. That you have the United States and the Soviet Union at loggerheads and a major confrontation in Korea. There's some talk about applying the Nuremberg principles to Korea with trying

to have accusations of aggression being lodged against the North Koreans, but it was hard enough to get the U.S., the Brits and the Soviets to cooperate at Nuremberg. During the full-blown Cold War, that kind of tension between these two very, very different sets of government, these very different outlooks toward the world, makes it incredibly hard to pursue international justice.

You see there are lots of serious and well-meaning efforts by the lawyers, by activists to try and create the kinds of institutions that would help serve the cause of international justice, but with that political climate, it's very hard to make any of those plans into realities.

*Interviewer:* So, really, our story doesn't pick up again until I guess 1993 when the ICTY is created. And you called that, interestingly, an act of tokenism. I wonder if you could explain why?

0:48:27.7

*Gary Bass:* Well, the creation of the ex-Yugoslavia tribunal comes in 1993, but since 1991, you've had a crack up of what had been the old communist Yugoslavia with really quite vicious fighting between Serbia and Croatia. Then starting in April and May of 1992 there is a real onslaught by Serb nationalists against the non-Serb civilian population in Bosnia. There are horrible images of the camp in Omarska and of the siege of Sarajevo that are being beamed into western living rooms. And there's the sense that something needs to be done, but the United States, NATO is really worried about any military intervention in the former Yugoslavia. There's a real reluctance to actually go and impose a settlement that would bring to an end the war crimes that are being committed by the Serb nationalist forces.

Instead of actually stopping the war crimes, people are comfortable with talking about prosecution for the war crimes. Obviously, prosecuting war crimes seems great. That's a powerfully correct thing to do, but it looks a little bit less impressive when you're not actually stopping the crimes being committed, that in some ways, you know, it's a little bit like having Nuremberg without actually winning World War II first.

*Interviewer:* And not only an act of tokenism because it was in place of some ways of more infective action, but there wasn't a real big effort to get this thing going. Can you talk about kind of the early, very slow start of the ICTY?

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*Gary Bass:* In some ways the creation of the war crimes tribunal offers a way of letting the European and American governments say to their own publics, "Look, we're doing something. We may not be doing everything, but we are at least doing something about these war crimes."

So, the ex-Yugoslavia tribunal gets off to a very slow start. The American government is quite supportive, but not so supportive as to merit any kind of direct intervention in the former Yugoslavia, nothing that's going to help war crimes investigators get on the ground in Bosnia where the war is going on. It's very difficult to conduct any kind of investigations.

You also have a UN peacekeeping mission within Bosnia, and the UN peacekeepers, a lot of them are from Britain, France, Canada, the Netherlands, and there's a fear on behalf of the governments that have sent these peacekeepers into harm's way in Bosnia that efforts at international justice will put the peacekeepers at risk, that if you have a UN court sitting in The Hague handing down indictments against Serb nationalists that the Serb nationalists on the ground are going to take reprisals against the UN peacekeepers, and that makes a lot of the major European governments quite nervous about putting teeth into the idea of war crimes prosecutions.

So, people are prepared to create the court, but when it comes to, in some ways, more important questions, not whether you're going to have a court, but what kind of court it's going to be, how effective it's going to be and whether or not it will have real teeth, then there's some quite sustained, behind the scenes foot-dragging by the Europeans.

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*Gary Bass:* It takes 18 months for the tribunal to actually get a prosecutor, so the thing is created in 1993, but it can't begin to actually indict people until 18 months later because the UN Security Council is having these big fights about who's going to be the prosecutor. Anytime somebody aggressive comes along people say, "No, no, no. We need somebody who's going to go a little bit more softly."

*Interviewer:* Now we have a little bit of historical perspective from this, do you think the political goals of trying to bring peace, the Dayton Accords and afterwards and the goals of the ICTY, were in some tension, or do you think they helped each other?

*Gary Bass:*

There's always this debate about whether or not you will interfere with ending a war by insisting that some of the parties in the war are criminals and, therefore, you maybe can't deal with them. In the case of the war in Bosnia, which ranged from '92 until '95, this is dealt with in, I think a pretty skillful way, and in some ways I think it holds up a good model for people who have legitimate concerns about this possible tradeoff between justice and peace.

That the Serb nationalist leadership is a divided leadership, and on the one hand, you have Slobodan Milošević, leader of Serbia proper, who is sick of being under economic sanctions, is looking for some international legitimacy and is sort of more willing to admit to make a deal to try and bring the war to an end.

On the other hand, you have the Serb nationalist leaders within Bosnia, Radovan Karadžić and Ratko Mladić. And they're much more blatantly hard line.

So, the imperatives of peacemaking and the imperatives of prosecution actually line up reasonably well, that the war crimes tribunal doesn't indict Milošević at this point. Milošević is indicted later on for the Kosovo War and then after he's been indicted for Kosovo, the war crimes tribunal adds indictments against him for Bosnia and also for Croatia.

But initially, at the time of the Dayton Peace Talks in 1995, Milošević still isn't indicted. U.S. government officials talk about the good-Serb/bad-Serb game, but Milošević is the guy that the U.S. government can do business with.

Karadžić and Mladić are indicted. They're in fact indicted twice for genocide war crimes and crimes against humanity, and the result is that you have the UN tribunal saying these guys are really beyond the pale and American diplomats also saying, "We don't really know. We're not particularly interested in negotiating with them. We think Milošević is a much more helpful guy for us to do business with." The cooperation that goes on between the war crimes tribunal and the U.S. government is – it's not sort of explicit cooperation with the war crimes tribunal. It's a separate institution.

The prosecutor of the war crimes tribunal, Richard Goldstone, is an African judge, secretly checked in with Richard Holbrooke, the American diplomat, who's running the Dayton process. So, it's not a great deal of coordination, but there is a little bit of it. Overall it's a case, I think a quite skillful case of a prosecutor and a diplomat managing not to work across purposes from each other

but actually kind of moving in a unified way towards common goals.

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*Interviewer:*

The ICTY started with small fish, but now it's indicted all the big fish, and Milošević has been there, and indicted Mladić and Karadžić as well. I mean, do people view these trials now as a success or as a failure? I'm just wondering kind of what's the view among the scholars who look at this?

*Gary Bass:*

Well, there are complaints about the precise ways in which the trials are conducted. There are complaints about specific charges and uses of evidence. There are a lot of complaints about the witness protection programs, which people worry are not as good as they should be, and some of the earlier indictments are seen as being not very good, and the later ones are seen as better. Big debates about genocide convictions that it's always very hard to get a conviction on genocide charges; that there is – genocide goes to the state of mind. It goes to specific intent in a way that makes it quite hard for prosecutors.

With all of that, the tribunal I think has got much, much farther than anybody imagined that it would at the outset, that really the people who were most optimistic, most idealistic about its prospects at the beginning in some ways have been vindicated over people who were much more cautious, conservative. That it's done I think in many ways a lot better than anyone would have imagined. In 1993 I think nobody would have believed that Milošević and Karadžić would wind up in front of it.

There are still people who are indicted but have not yet been captured or surrendered by their home governments to The Hague. I think that you are still not going to be able to say the tribunal has really done what it was set up to do until Ratko Mladić. Mladić was a wartime military chief of the Serb Nationalist Army within Bosnia. He's the guy who personally led Srebrenica massacre in July of 1995 where 7,000 Bosnian-Muslim men and boys age 12 to 77 were systematically slaughtered, the worst war crime in Europe since 1945.

Mladić is still at large. Until Mladić is in The Hague, I don't think anybody can be able to say that the promise of international justice is being properly fulfilled.

*Interviewer:*

Why do you think those people who were being optimistic about it have been vindicated? Simply because they have gotten a lot of

the major perpetrators, or has there been also this kind of reconciliation effect and some of the other benefits that you talked about earlier that flow from war tribunals?

*Gary Bass:*

I mean that more in that the tribunal has got its hands open more major war crimes suspects than I think anybody would have expected. There were the initial indictments that the tribunal was handing out were quite low-level people, and it was quite a shock when the tribunal indicted Karadžić and Mladić. A lot of people were surprised by that, and there were some people who were very nervous about what that would actually mean on the ground.

So, some of the more dire predictions about how the tribunal could screw up the peace process were not born out. It just didn't happen that way. It's not that those were unrealistic arguments, but it didn't turn out that way. So, that – those I think count as successes for the people who were pushing for it.

1:00:37.4

*Interviewer:*

And some of the old news footage we've gotten for the archival stuff has Holbrooke trying to explain how NATO troops are going to arrest people when they find them but they're not going to go looking for them. So, I'm wondering about this kind of cooperation between the forces on the ground, but I know you've talked about this already. But in the specific case of the former Yugoslavia, what were the tensions like there? This is just another illustration of putting your soldiers in harm's way I guess.

*Gary Bass:*

The White House was very nervous about the prospect of sending out American troops to hunt down war criminals in Bosnia. The Clinton administration actually had Dick Morris, who was then the White House sort of political pollster, look into what the American government thought U.S. and NATO troops ought to be doing in Bosnia, and hunting war criminals was seen as one of the last things that they ought to do.

People had in mind the October 1993 raid in downtown Mogadishu to try and arrest the Somali warlord, Mohammed Farah Aidid, as an example, which led to 18 U.S. rankers getting killed. It was something that was seen as kind of a disaster. That made people much more nervous about the prospect of going out and hunting down war crimes suspects.

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*Gary Bass:* The language that comes out of the Dayton Accords, Holbrooke himself actually wanted much tougher language, but he's overruled. The language is that peacekeeping troops that encounter war crimes suspects in the course of their regular peacekeeping duties can, if they think it's a good idea, if it's sort of tactically safe, if they're ready to do it, they can make arrests, but they don't have to. That's a pretty weak mandate. If you bump into them, then you can do it, but people aren't really being sent out specifically to hunt them down until much later in the peacekeeping mission.

So, for the first critical months early in Bosnia, war criminals aren't being hunted down. Again, it has to do with this reluctance to put your soldiers in harm's way.

*Interviewer:* And the last question about the former Yugoslavia is just how big or how important was the indictment and arrest and prosecution of Slobodan Milošević and the fact that he died before sentencing, before the trial was complete, how big of a frustration was that?

*Gary Bass:* Well, it's an extraordinary thing that Milošević wound up in The Hague. That is a massive achievement for international justice. This was a major world leader. This was somebody who never, never imagine he would face justice, and part of the reason why he faces justice is because of his own people; that there's a revolution in Serbia that overthrows him, and then the new Serbian government, under a lot of pressure from the U.S. and from the West, decides, "Okay, we're going to send this guy off to The Hague." So, that's a huge achievement.

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*Gary Bass:* The downside, the fact that Milošević died before the trial could be concluded, will always taint it and will make it easier for Serb nationalists, who are very hostile towards the war crimes tribunal, who think that the court is set up to go in and nail Serbs, that think that the court is really biased against Serbs, Milošević's death and custody sparks all sorts of conspiracy theories that all sorts of people who say, "They had to kill him because he was winning," or "They had to kill him because he told the truth."

So, it's kind of the sort of truth-telling, historical accounting that is an important part of I think what tribunals at their best can do, that is really hurt by the death of Milošević.

*Interviewer:* On Rwanda, is this another case of Western tokenism, or is there something unique and different to understand from Rwanda than from the ICTY?

*Gary Bass:* In Rwanda, again, you have an effort at international justice without prevention in the first place. In Rwanda the genocide happened very, very quickly, but it's ultimately stopped after between half a million and 800,000 people have been exterminated. It's ended by the Tutsi-led rebel force, the RPF that you have a campaign go on by the Rwandan government of exterminating the Tutsi minority within Rwanda, and it's a Tutsi-led rebel force that ultimately stops it.

So, it's not the world. It's not the outside world that saves the Tutsi in Rwanda. It's the RPF. And that, I think, taints the overall effort at international justice. Obviously, international justice is the proper thing to be done, but it does weaken your moral position when you've let this massive extermination go on and now you're saying you're going to launch a prosecution.

1:07:05.3

*Interviewer:* And it seems like this is a time in the '90s of international ferment of justice, and you have this kind of growing movement for the ICC. Can you talk about kind of how that evolved and then, of course, 1998 in Rome?

*Gary Bass:* Well, there's the sense of frustration with the ex-Yugoslavia tribunal and the Rwanda tribunal because they're very limited in their scope. They're geographically limited; they only look at the Balkans and at Rwanda. They're also limited in time that they don't go back before the collapse of Yugoslavia and before the outbreak with the Rwandan Genocide. So, it puts sharp limits on what they're able to do, and there's the sense that it is a little bit bizarre that there is justice in these little bits of the world, that there's an effort of justice in these little bits of the world and not in the whole world. If human rights are human rights, then they apply equally in all times and in all places, in all countries everywhere, so a more logical form would be, of course, to have jurisdiction over all war crimes across the globe.

Out of that logic comes the push for the International Criminal Court. It's also a pragmatic and I think an important weighty pragmatic argument, which is that the creation of the ex-Yugoslavia tribunal was such a mess, that there was such – you know, there were these fights about the prosecutor and fights about the budget and fights about funding and fights about staff, and it

created so many opportunities for countries to play political games with the court that it really slowed down the case of justice.

In the former Yugoslavia it took 18 months to get a prosecutor, and people didn't want to have that same kind of debate for the next crisis that erupted. So, it would be better people thought, and I think this is a very good argument, to have in place a working, reliable institution already so that you don't have to set one up on the fly in the middle of the war or in the middle of genocide.

*Interviewer:*

And the Clinton administration's feeling on this is kind of schizophrenic. Can you take us through the Clinton administration's approach, and then later, how does that differ from the Bush administration when he comes in in 2001?

1:09:36.0

*Gary Bass:*

Well, the Clinton administration has its concerns about the International Criminal Court. Some of the time when they're asked about why they aren't more strongly supporting the ex-Yugoslavia tribunal, President Clinton will say, "Well, we support the idea of a permanent international criminal court," sort of pushing the issue a little bit, flirting on the line. But there is this fear that all U.S. administrations have that because the U.S. has troops deployed around the world in a more comprehensive, in a more extensive fashion than any other country that the International Criminal Court is potentially more of a headache for the U.S. that U.S. soldiers may be at greater risk.

So, there's some nervousness within the Clinton administration about this, but the Clinton administration ultimately is persuaded that it's going to be necessary to sign onto it. There's a lot of nervousness. They drag their heels a lot, but ultimately they do sign on.

With the Bush administration, it's a very different attitude. It's not just these sort of concerns about American troops being exposed, but also, a sense that international institutions are ways that weaker countries trap stronger countries and that the United States doesn't want to be a Gulliver or be constrained by all these Lilliputian countries that are using the ICC and other international institutions against the power of the United States.

Bush himself seems to be quite aware of the International Criminal Court and really doesn't like it, and as the – there's a kind of perverse dynamic that the more the Bush administration complains about the International Criminal Court, as well as pushes back

against a variety of international commitments like Kyoto, like the landmines ban, like child soldiers ban, the more the Bush administration pushes back against these international treaties, the more that provokes anti-Americanism that makes a lot of Europeans very nervous about what the United States is doing, and the more anti-Americanism there is, the more afraid the Bush Administration is that the ICC really will be used to single out Americans. So, it's this sort of very bad, dysfunctional dynamic between the Bush administration and the Europeans.

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*Interviewer:*

I think you had a nice question at the end, if not international justice, then what? I was wondering if you could kind of flesh out that kind of question and answer for us.

*Gary Bass:*

Sure. I think it's important to remember when you talk about the flaws of war crimes tribunals that these are things that are being talked about after some of the worst political failures you can imagine. When you try and set up a war crimes tribunal you're in the aftermath of incredible violence, anger, desire for revenge, and the reality is nothing is going to work very well in these situations. So, it shouldn't be a question of do these things work well, 'cause they won't work very well because nothing is going to work very well. It should be a question of do they work better than the alternatives, and when I think compared to vengeance, then there's a clear advantage to international tribunals. You know, compared to the original American position, shooting of Nazi war criminals, I think it's much better that we had Nuremberg. I think that's a real achievement.

The truth commissions, which have some of the benefits of war crimes tribunals, they establish a historical record, they give a sense to victims that there's been a recognition of their suffering, and those I think are very important functions. The downside with truth commissions is that they also allow a kind of impunity that, yes, you may know a lot of details about the regime or about the government that was committing war crimes or human rights violations, but you don't really see people punished.

There's some very clever synthesis models like the South African Truth Commission, which says that if you don't give proper testimony before the truth commission, then you expose yourself to the risk of trials. That I think is a very clever promising way to go, but always I think the question has to be not do war crimes tribunals work, but do they work compared to what. Compared to

impunity, compared to vengeance, and there, I think, the record of international justice looks much better.

1:15:22.6

*[End of Audio]* **\*This transcript has been edited for clarity.\***