# World War I:
# A Phoenix Moment in the History of International Criminal Tribunals

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**Abstract:**

The post-WW2 International Military Tribunal at Nuremberg ('Nuremberg') is widely considered the first-ever international criminal tribunal (ICT), and the 'birthplace' of International Criminal Law (ICL). Nuremberg was inspired by unimplemented ICT plans devised at the post-WW1 Paris Peace Conference. Thus, WW1's wake is considered ICTs' 'conception moment'.

The present Article reveals otherwise. Contrary to the prevalent (1919 'conception', 1945 'birth') narrative, ICTs existed during WW1 as well as throughout the prior century. Although Paris Peace Conference participants portrayed ICTs as novel, they were actually aware of, and influenced by, earlier ICT-related experiences. Thus, 1919 was not the 'conception moment' of ICTs, but rather their 'phoenix moment', during which the ICT concept began arising from the ashes of its own past existence. The Article further demonstrates that the dis-remembrance of earlier ICL history is an expression of a larger (understudied) phenomenon. International lawyers' reformist self-image causes various norms to be recurrently perceived as novel.

## Introduction

According to accepted wisdom, the post-WW2 International Military Tribunal at Nuremberg ('Nuremberg') was 'the first-ever international criminal tribunal' (ICT).[1] International Criminal Law (ICL) 'was born [at] … Nuremberg'.[2] Nuremberg, itself,

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[1] P. J. Zwier, *Peacemaking, Religious Belief and the Rule of Law* (2018), at 77.

[2] Van-Schaack, 'Book-Review – Historical Origins of International Criminal Law: Volumes 1-5', 112 *American Journal of International Law (AJIL)* (2018) 142, at 143.

was inspired by unimplemented ICT plans, formulated at the post-WW1 Paris Peace Conference. Thus, ICL and ICTs were 'born' in 1945, after a 1919 'conception'.[3]

This Article reveals otherwise. Prior to 1919, ICTs already long existed. Paris Peace Conference participants were aware of, and influenced by, such earlier ICT-related experiences. However, for various reasons (discussed in the Article), they favoured portraying ICTs as novel. 1919 was, thus, not ICTs' 'conception moment', but rather their 'phoenix moment', during which the ICT idea began to arise from the ashes of its own past existence.

Part 1 presents evidence seemingly supportive of the accepted narrative as well as initial contesting evidence. Part 2, as a prelude to the Article's 1914-1920 focus, succinctly shows that contrary to common belief, ICTs did exist during the 'Long Nineteenth Century' (c. 1790s-WW1).[4] Part 3 reveals that ICT practices continued during WW1. Part 4 uncovers that Paris Peace Conference participants were influenced by earlier ICT-related experiences. Furthermore, it attempts to explain their peculiar treatment of that past, which seeded the present ('1919 conception') narrative. Part 5 illustrates that such treatment is a manifestation of a larger (understudied) phenomenon. International lawyers' reformist self-image tends to cause various norms to be anew perceived as novel.

## 1. The Accepted Narrative

According to the accepted narrative, during WW1 calls for ICTs first arose in civil society. Reluctant state endorsement of the idea had only begun late into the war. That endorsement culminated at the 1919-1920 Paris Peace Conference with the adoption of several ICT schemes in post-WW1 peace treaties. Those ICT plans were never implemented. Nonetheless, they were a primary source of inspiration for the Nuremberg creators.[5]

Considerable evidence seemingly supports this narrative. Firstly, the widely-known ICT-related official sources date from 1918 onwards. These sources are: (1) pro-ICT reports of the 1918 British Governmental Committee of Enquiry into Breaches of

[3] W. A. Schabas, *The Trial of the Kaiser* (2018), at 2; M. C. Bassiouni, *Introduction to International Criminal Law* (2nd edn., 2012), at 28-29.
[4] We extensively examine that era elsewhere: XXX and XXX, 'International Criminal Tribunals during the Long Nineteenth Century and Beyond' (draft paper, on file with the authors).
[5] E.g., G. Niemann, *Foundations of International Criminal Law* (2014), at 123-127; Schabas, *supra* note 3, at 1-22, 297-299.

the Laws of War;[6] (2) a pro-ICT 1918 memo by de Lapradelle and Larnaude, endorsed by the French government;[7] and (3) the divided report of the inter-allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (COR), jointly appointed at the Paris Peace Conference.[8] The COR was deadlocked between two camps. A pro-ICL majority was headed by the British and French delegates, including French memo coauthor Larnaude. An ICT-reluctant minority was spearheaded by the American delegates, the US Secretary of State, Robert Lansing and James Brown Scott. Thus, the eventual COR report consisted of a pro-ICT majority opinion and two dissenting opinions (one American, the other Japanese).[9]

Furthermore, contemporary assertions of ICT novelty are abundant. The American COR dissent is famed for asserting that for 'an international criminal court … a precedent is lacking … [it] appears to be unknown in the practice of nations'.[10] The Japanese dissent claimed likewise.[11] Meanwhile, the ICT-proponents — the British Committee, the French memo and the COR majority — all maintained (using one wording or another) that WW1's unprecedented nature demanded 'a tribunal of a novel character'.[12]

Following the divided COR report, the Allied leaders negotiated a compromise that was subsequently enshrined in post-WW1 peace treaties: (i) Article 227 of the Versailles Peace Treaty with Germany prescribed a special ICT for the trial of the German (ex-)Kaiser.[13] (ii) Article 230 of the 1920 Sèvres Peace Treaty with Turkey prescribed another ICT for the trial of Armenian Massacre perpetrators.[14] This article aimed to implement the 1915 joint Russian-French-British formal protest,[15] which announced the intention to hold criminally responsible Turkish government agents

[6] Committee of Enquiry into Breaches of the Laws of War, 'First, Second, and Third Interim Reports with Appendices' (26 February 1920) (first interim report: 13 January 1919), *UK National Archives (UKNA), CAB/24/111* (British Committee).
[7] A. G. de Lapradelle and F. Larnaude, *Examen de la Responsabilité Pénale de L'Empereur Guillaume II* (1918) (French Memo).
[8] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14 (1920) *AJIL* 95 (COR-Report).
[9] Schabas, *supra* note 3, at 110-118.
[10] COR-Report, *supra* note 8, at 135.
[11] *Ibid.*, at 151-152.
[12] British Committee, *supra* note 6, at 25. See also: COR-Report, *supra* note 8, at 120; French Memo, *supra* note 7, at 20.
[13] Treaty of Versailles (28 June 1919).
[14] Treaty of Sèvres (10 August 1920).
[15] G. J. Bass, *Stay the Hand of Vengeance* (2000), at 118.

involved in those 1914 'crimes … against humanity'.[16] (iii) Versailles Treaty Articles 228-229 and similar provisions in other post-WW1 peace treaties prescribed *military* ICTs for the trial of certain war criminals.[17]

All three aforesaid ICT schemes were unimplemented. Still, each is significant. (i) Article 227 presently enjoys the most scholarly attention. (ii) The Sèvres Peace Treaty got the closest to being implemented; some suspects were actually arrested (although, subsequently, released without a trial).[18] Furthermore, the 1915 Joint Protest is celebrated for either 'coin[ing] the famous phrase "crimes against humanity"',[19] or (at the very least) being its first use in its *current meaning* (of a legal term, referring to mass atrocities as international crimes).[20] (iii) The war crime prosecution military-ICT scheme had the strongest influence on the Nuremberg creators, as evident in Nuremberg being a *military* ICT; a 1944 American memorandum by Cowles, highly influential in the legal discussion leading up to Nuremberg, asserted:[21]

> Precedent strongly supports the establishment of mixed inter-allied military courts … [in the ICT provisions of] the Treaty of Versailles … [and in s]imilar provisions … in the other 1919 peace treaties …

Cowles would later admit that:[22]

> During World War II, when thinking began about an inter-Allied tribunal to try Hitler, *et al*, there was some concern among Allied military law officers when researches failed to turn up a precedent where a mixed inter-Allied military tribunal had actually functioned.

As a response to this concern, the WW2 Allies advanced the assertion (above-quoted from Cowles' 1944 memorandum) that the post-WW1 ICT schemes constituted ICT-authorizing legal precedents despite lack of implementation.

This was not their only response to that concern. As a second legal basis for creating Nuremberg, the WW2 Allies argued (like their WW1 predecessors) that WW2's unprecedented nature demanded creating a tribunal so 'novel and

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[16] 'Note du Département à l'Agence Havas' (24 mai 1915), A. Beylerian (ed.), *Les Grandes Puissances: L'Empire Ottoman et les Arméniens dans les Archives Françaises* (1983) 29, at 29.
[17] 'Appendix: War Crimes Clauses of Peace Treaties of the First World War', in J. Willis, *Prologue to Nuremberg* (1982), at 177-181.
[18] Bass, *supra* note 15, at 135-144.
[19] *Ibid*., at 118.
[20] A. Cassese, *International Criminal Law* (2003), at 40.
[21] US Representatives, UN War Crimes Commission, 'Trial of War Criminal by Mixed Inter-Allied Military Tribunals' (31 August 1944), at 3-4, available at http://www.legal-tools.org/doc/e5f070/ (1944 Memo). See also, Cowles, 'Trials of War Criminals (Non-Nuremberg)', 42 *AJIL* (1948) 299, at 312-313.
[22] Cowles, *ibid.*, at 318.

experimental'.[23] As a third legal basis, they maintained that the wrongs tried at Nuremberg were grave international crimes and, therefore, their culprits, like pirates (i.e., the archetypical international crime perpetrators), were international outlaws and enemies of mankind, punishable, as such, by all.[24]

These three legal bases served as the bedrock for the current (1945 'birth', 1919 'conception') narrative. Accordingly, this narrative has two versions. One version stems from the first and second aforesaid legal bases. It maintains that the very creation of Nuremberg (the first-ever ICT) constituted the 'birth' of ICL while noting that Nuremberg's creation was inspired by the unimplemented post-WW1 ICT plans.[25] The other version is rooted in the second and third aforementioned legal bases. It holds that it was not the creation of the first ICT that constituted ICL's 'birth', but rather the copying, at Nuremberg, of the enemies-of-mankind doctrine from piracy-law and its application (for the first time) to the wrongs that would become known as Core International Crimes (war crimes, crimes against humanity, aggression and genocide).[26] Even under this version, WW1 is still commonly considered ICL's 'conception moment'. Presumably, WW1: (i) saw the beginning of fledgling attempts to develop the piracy analogy and to internationally criminalize the acts presently called Core International Crimes; and (ii) led to the realization that even treaty-codified law of war would be ineffective as long as only state-addressing enforcement means are internationally relied upon.[27]

Nevertheless, the accepted narrative is incorrect. To demonstrate its inaccuracy, let us reconsider its piracy analogy version. Contemporary sources that made that analogy reveal a different story than the one presently told. The aforementioned influential 1944 memo, for example, maintained that '[i]t is not generally appreciated that the military jurisdiction which has been exercised over war crimes has been of the same non-territorial nature as that exercised in the case of the pirate';[28] 'for the past century at least war crim[inals] have been considered … as "enemies of mankind" … "*hostes humani generis*" … "outlaws"'.[29] Similarly, in 1950, Lauterpacht stated that

[23] Jackson, 'Opening Statement' (21 November 1945), 2 *Trial of the Major War Criminals before the International Military Tribunal* (*TMWC)* (1947) 98, at 99.
[24] *Ibid.*, at 144-149; 1944 Memo, *supra* note 21, at 7.
[25] E.g., R. Cryer, *Towards an Integrated Regime for the Prosecution of International Crimes* (2001), at 314-315 (PhD thesis, available at http://eprints.nottingham.ac.uk/11305/1/364444.pdf).
[26] E.g., G. Simpson, *Law, War and Crime* (2007) at 8, 162.
[27] *Ibid*., at 8; Schabas, *supra* note 3, at 122.
[28] 1944 Memo, *supra* note 21, at 7.
[29] *Ibid.*, at 4. See, also, Jackson, *supra* note 23, at 144-149.

most Nuremberg defendants 'were sentenced … for crimes against the laws of war … with regard to which international law has always recognized the full jurisdiction … as in the case of piracy, of all nations.'[30] In other words, the aforesaid doctrine was not copied from piracy-law. The piracy analogy merely intended to point out that just like in the more widely known case of pirates, the enemies-of-mankind doctrine was also already long applied to war criminals.

These post-WW2 sources are correct. In European/Western jurisprudence, from the Late Middle-Ages to the 19th century, international and domestic law were considerably intertwined. Much of the law of nature and nations applied to individuals, and much of criminal law was considered international/universal. Accordingly, various wrongs (not only piracy) were considered international crimes that deemed their perpetrators 'enemies of mankind', universal 'outlaws', and 'disturbers of the public peace' (all synonyms). Among these wrongs were war crimes (law of war violations) and, surprisingly, felonies (i.e., acts presently considered typical domestic crimes, such as murder, robbery, arson, theft and rape).[31] During the 19th century, most wrongs previously considered international crimes ceased to be regarded as such. This change was considerably due to the rise of statist-positivist jurisprudence asserting that criminal law (if not all law) must necessarily be domestic and formally legislated.[32]

Statist-positivists attempted to abolish war crimes as international crimes by misleadingly asserting (as they did, more successfully, regarding other prohibitions) that the relevant international law either only applied to states or was not truly law. But, war crimes persisted, mainly because they were long enforced by Western/European *military* justice systems. These systems were less affected by statist-positivism as they were considerably autonomous and change-resistant.[33] Accordingly, when Nuremberg defendants relied on statist-positivist precepts to maintain nonliability for violating the state-addressing Hague Convention, the judges responded: 'For many years past … military tribunals have tried and punished individuals guilty of violating the … [customary] law of war'.[34] The past statist-positivist claims regarding the nature of international law have become consensually (mis)conceived as accurate depictions of

[30] Lauterpacht, 'International Law after the Second World War', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht,* vol. 2(1) (1975) 159, at 166 (a 1950 speech).
[31] Bohrer, 'International Criminal Law's Millennium of Forgotten History', 34 *Law and History Review* (2016) 393, at 422-427.
[32] *Ibid.*, at 406-407.
[33] *Ibid*., at 464-465.
[34] Nuremberg Judgment (1 October 1946), 1 *TMWC* (1947) 170, at 220-221.

pre-Nuremberg law, only sometime after WW2. Nuremberg, thus, was misconstrued as the first application of the enemies-of-mankind doctrine to war crimes, purportedly copied from piracy-law after the failure of sole reliance on state-addressing law of war.[35]

Note the ambivalence towards piracy. On the one hand, the current narrative relies on that (presumably) earlier international crime as a semi-precedent for present-day ICL (i.e., for core international crimes). That is, the (supposed) earlier application of the enemies-of-mankind doctrine to pirates is presented as proof that the notion of international crimes was not inconceivable even before 1945. On the other hand, the current narrative distinguishes between piracy-law and ICL (said to be 'born' only in 1945). Purportedly, piracy became an international crime merely to protect state interests; present-day ICL prohibitions have become international crimes to protect universal values.[36] Such 'see-saw' reasoning, which simultaneously relies upon and distinguishes/belittles the same earlier legal experience, has also been observed elsewhere in ICL.[37] We shall encounter it later regarding ICTs.

### 2. The Long Nineteenth Century

Presumably, traditional (i.e., pre-1945) international law addressed states; except for pirates, individuals were not its subjects. This starkly-statist world-order peaked during the Long Nineteenth Century, and in it, ICTs were impossible, if not inconceivable.[38] Even civil society idealists began contemplating ICTs only late into this era; ICRC president Gustave Moynier's 1872 ICT scheme was '[t]he first proposal for an international criminal court'.[39] States began considering ICTs only late into WW1; were any of the state-planned post-WW1 ICTs 'actually established[,] it would undoubtedly be looked upon as the first genuinely international criminal tribunal'.[40]

However, in recent years, a few scholars have uncovered some evidence irreconcilable with that accepted narrative; notably, they uncovered (a) two pre-1872

[35] Bohrer, *supra* note 31, at 470-480.
[36] E.g., Schabas, *supra* note 3, at 121-22.
[37] Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (2008) 1, at 43.
[38] Schabas, *supra* note 3, at 3-4; Wright, 'Proposal for an International Criminal Court', 46 *AJIL* (1952) 60, at 61.
[39] O. Quirico, *International 'Criminal' Responsibility: Antinomies* (2019), at 202.
[40] Schabas, *supra* note 3, at 298.

(late-19th-century) ICT proposals[41] and (b) four pre-WW1 (1894-1904) cases of actual ICTs.[42] Nevertheless, these scholars did not deviate far from the accepted narrative, deeming their findings unprecedented 'nineteenth century [ICL] experiments'.[43]

However, as we extensively uncovered elsewhere and succinctly presented in this Part, during the Long Nineteenth Century, ICTs not only existed, they far from novel.[44] Each subpart below presents one of the main (mutually non-excluding) categories of Long Nineteenth Century ICTs. Due to limited space, we focus on cases with subsequent WW1-era relevance.

### A. *ICT Proposals*

Various ICT proposals predate Moynier's proposal.[45] But, for reasons explained, we shall only present two.

In 1870, German Chancellor Bismarck unsuccessfully called 'to appoint an International Court [composed of judges or a jury from neutral states or both Germany and France] for the trial of all those who have instigated the [Franco-German] war'.[46]

Even earlier, in 1860, following cross-communal atrocities in (then) Syria, the European Concert Powers (Austria, Britain, France, Prussia and Russia) pressured Turkey to concede to a joint European military intervention and an international commission of inquiry.[47] Initially, at least some of those involved envisioned that

[41] Brockman-Hawe, 'Constructing Humanity's Justice: Accountability for "Crimes Against Humanity" in the Wake of the Syria Crisis of 1860', in M. Bergsmo *et al*. (eds), *Historical Origins of International Criminal Law*, vol. 3 (2015) 181; Brockman-Hawe, 'Punishing Warmongers for Their "Mad and Criminal Projects": Bismarck's Proposal for an International Criminal Court to Assign Responsibility for the Franco-Prussian War', 52 *Tulsa Law Review* (2016) 241.

[42] Pritchard, 'International Humanitarian Intervention and Establishment of an International Jurisdiction over Crimes Against Humanity: The National and International Military Trials in Crete in 1898', in J. Carey *et al*. (eds), *International Humanitarian Law*, vol. 1 (2003) 1; Brockman-Hawe, 'A Supranational Criminal Tribunal for the Colonial Era: The Franco-Siamese Mixed Court', in K.J. Heller and G. Simpson (eds), *Hidden Histories of War Crimes Trials* (2013) 50; Gordon, 'International Criminal Law's "Oriental Pre-Birth": The 1894-1900 Trials of the Siamese, Ottomans and Chinese', in Bergsmo, *ibid*., 119; Brockman-Hawe, 'Accountability for "Crimes Against the Laws of Humanity" in Boxer China: An Experiment with International Justice at Paoting-Fu', 38 *University of Pennsylvania Journal of International Law* (2017) 627; Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?', 27 *EJIL* (2017) 923.

[43] Brockman-Hawe, *Accountability*, *ibid.*, at 685. See also, Lemnitzer, *ibid.*, at 931; Pritchard, *ibid*., at 32, 80-83; Brockman-Hawe, *Supranational*, *ibid.*, at 71; Gordon, *ibid*., at 120; Brockman-Hawe, *Syria*, *supra* note 41, at 244-245; Brockman-Hawe, *Bismarck*, *supra* note 41, at 259.

[44] XXX and XXX, *supra* note 4.

[45] E.g., J. Mill, *Law of Nations* (1825), at 27-33; J. B. Sartorius, *Organon des Vollkommenen Friedens* (1837), at 231-241.

[46] M. Busch, *Bismarck: Some Secret Pages of His History* (1898), 189. See also, *The North-German Correspondent* (22 October 1870). The proposal is extensively discussed in: Brockman-Hawe, *Bismarck*, *supra* note 41.

[47] The case is extensively discussed in: Brockman-Hawe, *Syria*, *supra* note 41.

commission as having ICT authority (hence it was a pre-1872 ICT initiative).[48] But, eventually, commission authorities were limited. Nevertheless, it still both partook in the criminal investigation and considerably influenced the decisions whom to prosecute and what punishment to accord to those convicted.[49] The 1860 international intervention in Syria was a pivotal steppingstone in the development of the modern understanding of the idea (itself of an older origin) that protecting 'humanity' (in the sense of countering atrocities) justifies military intervention.[50] Furthermore, the Syrian commission served as a source of inspiration for contemplated international responses to later atrocities,[51] including for ICT proposals.[52]

### B. *Intervention-Related ICTs*

The 1860 Syrian atrocities were contemporaneously called 'crimes against humanity'.[53] This demonstrates that neither that term nor its present (atrocity-related) meaning were 'born' in 1915. Indeed, this term was used for centuries in reference to international crimes (such as war crimes, piracy, and felonies).[54] As for its present meaning, it had developed through a protracted, non-linear process that began long before 1915. Much of that process had occurred in the context of Long Nineteenth Century humanitarian interventions.[55] In various Long Nineteenth Century interventions, the legal justification for intervention was not only the need to stop mass atrocities but also the need to punish atrocity perpetrators based on a conceptualization of atrocities as international crimes: 'crimes against humanity'. In some of these interventions, atrocity perpetrators were indeed punished, occasionally even by ICTs.[56] Let us present two such cases.

In 1882, during a revolt against the Egyptian government ('Khedive'), anti-Christian atrocities were committed, which were contemporaneously described as

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[48] *Ibid.*, at 210-214, 232.
[49] *Ibid.*, 215-229.
[50] See, L. Tarazi-Fawaz, *An Occasion for War* (1994), at 115; D. Rodogno, *Against Massacre* (2011), at 130; 'Le Prince Gortchakoff aux Ambassades et légations Impériales de Russie à l'Étranger' (10/22 octobre 1867), [1868(X)] *Archives Diplomatiques* 673, at 673-676.
[51] E.g., 'Le Baron de Prokesch, au Baron de Beust' (17 mai 1867), [1868(X)] *Archives Diplomatiques* 493, at 493 (a Syrian-commission-inspired non-ICT international commission of inquiry proposal, made as part of a contemplated intervention in Crete).
[52] E.g., Brockman-Hawe, *Syria*, *supra* note 41, at 246-247 (a Syrian-commission-inspired proposal for an international commission of inquiry with ICT authority, following the 1876 'Bulgarian Horrors').
[53] E.g., 'Communication Made by Abro Efendi to the Members of the Syrian Commission', [1861 (XXXV(ii))] *Accounts and Papers of the House of Commons* 86, at 87. See further Brockman-Hawe, *Syria*, *supra* note 41, at 182, 234-236.
[54] Bohrer, *supra* note 31, at 472-473.
[55] *Ibid.*, at 471-478.
[56] *Ibid.*, at 474.

'crimes against humanity'.[57] These atrocities (coupled with colonialist motivations) drew military intervention by British forces that subdued the revolt and subsequently remained in Egypt. But Britain denied this was a military occupation, and it long maintained that it entered Egypt as an ally.[58] Accordingly, various atrocity-perpetrating rebels were not tried by British military occupation tribunals. Some were tried by mixed British-Egyptian courts-martial.[59] Regarding others, the Egyptian government instituted a procedure (somewhat like the one implemented in 1860 Syria), involving international commissions of inquiry and a special Egyptian tribunal.[60] The revolt leader, Ahmed Urabi ('Arabi Pasha'), was also charged 'before a mixed court composed of British and Egyptian officials',[61] both for treason-related domestic crimes and for atrocity-related international crimes ('against the laws of war and in violation of the right [i.e., law] of nations').[62] However, after a renewed Egyptian demand to conduct his trial alone, it was agreed that Urabi would plead guilty to treason in a domestic-Egyptian military court and be exiled.[63]

In 1900, an ICT was created during the international intervention in the Boxer Rebellion (1900-1901). That intervention is rightly infamous for its colonial undertones and Western atrocities. But, it was also a joint, eight-state military intervention aimed at stopping the massacre of 30,000 Chinese Christians and of about 200 foreigners, as well as at bringing atrocity perpetrators to justice.[64] In 1900 (15 years before the three-state Armenian Massacre Joint Protest), eleven states (the intervening allies included) dispatched a 'Joint Note' to China, demanding the punishment of principal atrocity perpetrators and deeming Boxer atrocities 'crimes against the law of nations, against the laws of humanity'.[65] Moreover, unlike after the Armenian Massacre, here, an ICT was indeed created. At Pao-Ting-Fu, an international (British-German-Italian-French)

[57] E.g., *Hansard House of Commons Debates* (25 July 1882), at 1709.
[58] A. M. Genell, *Empire by Law: Ottoman Sovereignty and the British Occupation of Egypt, 1882-1923* (2013), at 41 (PhD Thesis, available at https://academiccommons.columbia.edu/doi/10.7916/D8J67GH7).
[59] E. Baring, *Modern Egypt*, vol. 1 (1916), at 337-339; A. Haynes, *Man-Hunting in the Desert* (1894), at 227-235.
[60] 'Egyptian Decrees' (19 September 1882), 73 *British and Foreign State Papers* (1881-1882) 1125, at 1125-1127.
[61] *Sydney Mail* (21 October 1882).
[62] 'Trial of Arabi', *St. James Gazette* (21 November 1882).
[63] Baring, *supra* note 59, at 335-336.
[64] P. Tze-Ming-Ng, *Chinese Christianity* (2012), at 49; P. H. Clements, *The Boxer Rebellion* (1915), at 207-208.
[65] 'Joint Note' (24 December 1900), in Clements, *ibid.*, at 207-8.

military commission of inquiry actually tried and punished several atrocity perpetrators.[66]

The intervening Allies also considered having the principal atrocity perpetrators tried by an ICT. But eventually, they and China agreed on an arrangement involving a commission of the Powers' representatives in Peking. That commission had greater punitive powers than the Syrian commission, but it was nevertheless not an ICT.[67]

### C. *Common Territory and Joint Occupation ICTs*

Both before and during the Long Nineteenth Century, cases had occurred in which, for various reasons (e.g., conquest), an area would become a shared, or common, territory. In some such territories, joint criminal tribunals were created.[68] During the 18th century, the distinction between occupied and conquered territories had begun to develop (i.e., the protracted development of the law of occupation into a distinct international law corpus had begun).[69] Accordingly, we begin to find joint military tribunals with jurisdiction over local civilians that were created by allies that together had occupied a territory.[70] Such joint occupation ICTs were also occasionally created throughout the 19th century.[71]

During 1897-1914, joint military occupations surged due to a series of European Concert-led, multinational, 'humanitarian' interventions starting with the intervention and occupation at Crete (1897-1909).[72] On that occupied island, an ICT was created (the Military Commission for International Police at Canea), consisting of one officer from each occupying power; namely, it initially (1897-1898) consisted of six officers

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[66] This ICT is extensively discussed in: Gordon, *supra* note 42; Brockman-Hawe, *Accountability*, *supra* note 42.

[67] Brockman-Hawe, *Accountability*, *supra* note 42, at 660-662.

[68] E.g., Kersting, 'Einleitung', in H. Kersting (Hg.), *Die Sonderrechte im Kurfürstenthume Hessen* (1857), at XXX-XXXIV (19th century Bavarian-Hessian, and earlier multi-sovereign, criminal justice systems in Obersinn, Mittelsinn, and Güntersbach).

[69] Carl, 'Restricted Violence? Military Occupation during the Eighteenth Century', in E. Charters *et al*. (eds), *Civilians and War in Europe, 1618-1815* (2012) 118, at 118-128.

[70] E.g., Art. 7, *Regulations for the Subsistence of the Troops of the Allied Army During the Approaching Winter-Quarters in the Allied, Neutral and Occupied Provinces* (1762) (a Seven Year War-time Prussian-British-Hanoverian-Hessian-Brunswickian-Schaumburgian military commission).

[71] E.g.: 'Verordnung über die Ausübung der administrativen Justiz' (19 September 1814), in *Amtsblatt der K.K.-Österreichischen und K.-Baierischen Gemeinschaftlichen Landes-Administrations-Commission zu Kreuznach* (1814) 113, at 113-114 (a joint military commission in the Austrian-Bavarian occupied Rhine region); M. Ydit, *Internationalised Territories* (1961), at 95-107 (a Prussian-Russian-Austrian Tribunal (1839-1846) in jointly occupied Cracow); K. Cassel, *Grounds of Judgment* (2012), at 58 (French-British military tribunals in 1857-1861 jointly occupied Guangzhou/Canton).

[72] R. Robin, *Des Occupations Militaires en Dehors des Occupations de Guerre* (1913), at 568.

(from France, Russia, Italy, Britain, Germany, and Austria),[73] but four remained after the German and Austrian forces left (1898-1909).[74]

### D. *Joint Courts-Martial*

During the 19th century, as in earlier times, allies had occasionally created ICTs that could be called Joint Courts-Martial. In some cases, such ICTs tried the allies' soldiers for war crimes.[75] Few pre-19th century cases indicate that they could have also tried captured enemy fighters for such crimes.[76] But, most commonly, they addressed *seemingly*-domestic military offences.[77]

The normative basis for such ICTs originated in late-medieval jurisprudence. At that time in Europe, knightly issues were adjudicated by separate military tribunals that were all regarded as belonging to a single transnational, warrior-guild-oriented judicial network.[78] Even military and civilian tribunals of the same ruler were not considered parts of a single (domestic) judicial system. Instead, the military tribunals were founded on the premise that rulers were not only domestic agents, but also high-ranking knights, duty-bound, as such, to enforce the international law regulating knight-dominated activities and to discipline their subordinate warriors.[79] Residuals of this divide long persisted: until the 19th-century in Europe – and even deep into the twentieth century in the US and the UK – military justice systems were not considered part of the judicial branch, but rather 'instruments' of the executive branch.[80]

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[73] Admirals' Council Resolutions: No. 90 (14 août 1897) & No. 91 (20 août 1897), available at http://site.destelle.free.fr/seances/styled-6/aout%201897.html.

[74] See, e.g., a 1909 picture of the commission (consisting of four officers) titled: '*Crete: The International Military Court*', available at http://www.nhmuseum.gr/en/fakelos-syllogon/antikeimena/26380_en/. Currently, scholars have focused on trials conducted by the commission and by an offshoot of it (consisting only of British officers) in 1898 (Pritchard, *supra* note 42; Gordon, *supra* note 42). It has even been postulated that the commission consisted only of British officers; Gordon, *supra* note 42, at 148.

[75] E.g., G. Bules, *Bolivar en el Peru*, vol. 2 (1919), at 120-121 (an 1823 Peruvian-Colombian-Argentinian military tribunal for the trial of allied soldiers' pillage).

[76] E.g., T. Luckman, *The Book Of Martyrs* (1764), at 422 (trial of Frenchman, Sieur de Granvale, for the perfidious assassination attempt against English King William III, 'by a court-martial of English, Dutch, and [exiled Huguenot] French commanders'). Arguably, von Hagenbach's trial was also such a case; see, Knebels, 'Des Kaplans am Münster zu Basel Tagebuch (September 1473–Juni 1476)', in W. Vischer and H. Boos (Hg.), *Die Basler Chroniken*, vol. 2 (1880) 1, at 83-84.

[77] E.g., Article IX, [Swedish-Russian] Treaty of Friendship and Amity (1799), [1799] *Annual Register* 282, at 284; R. Stevenson, *Beatson's Mutiny* (2015) 240 (a 1855 British-Turkish commission of inquiry, serving as a joint court-martial).

[78] D. Whetham, *Just Wars and Moral Victories* (2009), at 72-73; G. Duby, *The Chivalrous Society* (1977), at 23, 43-57, 124-126.

[79] M. Keen, *The Laws of War in the Late Middle-Ages* (1965), at 17-18, 50-59.

[80] O. Mudrik, *Military Justice* (1993), at 21 [in Hebrew]; W. Winthrop, *Military Law and Precedent* (2nd ed, 1920), at 49, 835.

Nevertheless, they were judicial bodies (although that executive branch affiliation did permit conducting military trials more summarily than civilian proceedings).[81]

The aforesaid transnational, guild-oriented perspective facilitated both the creation of joint courts-martial and their jurisdiction over seemingly domestic military offences. The law regulating knight-dominated activities ('*jus militare*') was 'seen as an extension … of the natural law and the law of nations'.[82] However, unlike modern international law, it was not considered inter-sovereign law, but rather customary and natural law regulating activities dominated by the transnational warrior guild.[83] Accordingly, in addition to laws of war, it also incorporated legal norms that regulated other warrior activities, including norms presumed inherent to maintaining military discipline.[84] Although violations of such norms generally did not give rise to universal jurisdiction, they were not considered domestic either, but rather common legal norms inherent to soldierly activities. In fact, joint courts-martial, both late-medieval and 18th-century ones, have been deemed by present-day historians as prime evidence for 'the international nature of the [contemporary] customs and disciplines of war'.[85]

### E. *Incident-Arising ICTs and Commissions as ICTs*

As various above-surveyed cases demonstrate, during the Long Nineteenth Century, an incident of alleged international crimes would occasionally lead to an initiative aimed at having the trial (and/or the criminal investigation) conducted by an international organ. One such (yet to be mentioned) incident-arising ICT is the North Sea Incident (AKA Dogger Bank) International Commission of Inquiry.[86] In 1904, during the Russo-Japanese War, a Russian squadron fired upon an English fishing fleet. In response, Russia and Britain jointly appointed the aforesaid commission, consisting of five admirals (from Russia, Britain, France, Austria, and the US). The commission was authorized to determine not only state responsibility but also individual criminal culpability for law of war violations during the incident (Russia only maintained the authority to determine the punishment of those found guilty).[87] Thus, it was an ICT.

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[81] *Runkle v. US*, 122 US (1887) 543.
[82] Draper, 'Status of Combatants and the Question of Guerilla Warfare,' 45 *British Yearbook of International Law (BYBIL)* (1971) 173, at 173.
[83] Keen, *supra* note 79, at 14-21.
[84] *Ibid.*
[85] Hendrix, 'Customs of War', in P. Karsten (ed.), *Encyclopedia of War and American Society* (2005) 205, at 206. See also, Curry, 'Disciplinary Ordinances for English and Franco-Scottish Armies in 1385: An International Code?', 37 *Journal of Medieval History* (2011) 269, at 269.
[86] This ICT is extensively discussed in: Lemnitzer, *supra* note 42, at 929-939.
[87] *Ibid.*

The ICT authority of this commission of inquiry was recently hailed as 'unprecedented'.[88] But (as one may have already noticed), in actuality, various earlier ICTs were also called 'commission of inquiry', and even more were called 'commissions'. Indeed, the 'commission'/'commission of inquiry' concept has a long history. It originated from the late-medieval-early-modern cross-European legal institute of the 'commission'/'commissioners'. That institute was a flexible ad-hoc governmental tool; among other things, 'commissions were used, for centuries, as tribunals (to conduct hearings into legal guilt and innocence), [and] as organs of investigation'.[89] Unlike in some domestic systems,[90] in international law, as the above-surveyed cases demonstrate, 'commissions'/'commissions of inquiry', especially military ones, still retained in the Long Nineteenth Century much of the original wide scope of potential authorities, including the potential criminal tribunal authority.[91]

### 3. WWI ICT Initiatives

As mentioned, the accepted narrative maintains that states had begun to (reluctantly) endorse the ICT idea only late into WW1. Yet, in truth, as demonstrated below, states actually made at least one ICT-related initiative, during each year throughout the war.

#### A. *1914*

To begin with, WW1 ended one existing ICT. As mentioned, during 1897-1914, a series of European Concert-led interventions had resulted in international military occupations; the first in that series was the international occupation of Crete, which had an ICT (1897-1909). The last in that series was the 1913-1914 British-Austrian-French-German-Italian occupation of Shkodra/Scutari.[92] There, like in Crete, a joint judiciary was established; the first instance consisted of a French officer and 'the Supreme Court … [consisted of the] Italian Armed-Forces' Commander[,]… an Austrian officer and an Englishman.'[93] WW1 ended that joint occupation.

WW1 also derailed two serious ICT-related initiatives: (1) During the early 1910s, multilateral negotiations were conducted regarding Svalbard/Spitzbergen

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[88] *Ibid.*, at 932.
[89] A. Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (2013), at 135. See also, e.g., K. Weidenfeld, *Histoire du Droit Administratif* (2010), at 24-27.
[90] Sitze, *ibid.*, at 137-138.
[91] See, further: Hull, 'An International Humanitarian Commission in War Time', 38 *The Survey* (1917) 454, at 454-455; L. S. Woolf, *International Government* (1916), at 73-74.
[92] Robin, *supra* note 72, at 568.
[93] Muner, 'Kryeqyteti i Pamundur', 844 *Klan* (15 nëntor 2013) 24, at 26 (translated from Albanian for this article by Greta Balliu).

(Santa's home according to legend), an island that was considered common territory (belonging to all states, or none). In these negotiations, support had garnered for according the judicial authority over non-grave crimes (those with up to approximately three-month maximum imprisonment penalty) to an agent of the international commission that would govern the island (i.e., to an ICT). But WW1 halted the negotiations before everything could be resolved.[94] (2) After being elected, in 1913:[95]

> [US] President Woodrow Wilson … [began advancing an international arbitration plan] clearly inspired by the precedent of the North Sea Incident Commission … The initial response … was very positive … but the timing could not have been more unfortunate…. [Austrian] Archduke Franz Ferdinand [was assassinated] in Sarajevo on 28 June 1914 …

Most importantly, WW1's very beginning was marked by a failed ICT initiative. The official Austrian *casus belli* for WW1 was an alleged Serbian rejection of the ultimatum Austria issued after the aforementioned assassination. Interestingly, the main provision Serbia did not fully accept was a vague condition[96] that actually demanded establishing a 'joint [Austrian-Serbian] commission to investigate and punish those … responsible for organizing the assassination' (i.e., an international commission of inquiry with *ICT authority*).[97]

That Austrian ultimatum ICT demand was not subsequently forgotten. Some of the earliest WW1-era ICT proposals suggested applying in post-war trials of German war criminals a procedure resembling the one:[98]

> formulated in the Austrian ultimatum to Serbia and consisting of the adding of judges chosen by the countries concerned to the national judges. It is difficult to see how Germany could oppose a demand which it has approved for its ally.

**B. *1915***

In 1915, as mentioned, Russia, France and Britain issued Turkey the Armenian Massacre Joint Formal Protest, announcing they would 'hold personally responsible [for] these crimes all members of the Ottoman Government [involved]'.[99] A neglected

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[94] Singh and Saguirian, 'The Svalbard Archipelago: The Role of Surrogate Negotiations', in O. Young and G. Osherenko (eds), *Polar Politics* (1993) 56, at 56-65, 85; Anon., 'Norvège, Russie et Suède - La Question du Spitzberg', 20 *Revue Générale de Droit International Public* (1913) 277, at 277-297.

[95] Lemnitzer, supra note 42, at 942.

[96] Condition 6, 'Österreich-Ungarns Ultimatum an Serbien' (22 Juli 1914), available at http://wk1.staatsarchiv.at/diplomatie-zwischen-krieg-und-frieden/oesterreich-ungarns-ultimatum-an-serbien-1914/.

[97] McNeil, 'History of The Balkans (The Balkans After 1914)', in M.J. Adler *et al.* (eds), *The New Encyclopedia Britannica: Macropaedia*, vol. 2 (15th edn., 1974) 631, at 631.

[98] Loubat, 'Les Sanctions Pénales du Droit de la Guerre', *Le Temps* (28 avril 1915) (discussing a proposal made even earlier in the prominent Russian newspaper: Novoye Vremya).

[99] Note du Département, *supra* note 16, at 29.

fact is that this criminal responsibility attribution idea was inspired by the European response to the 1860 Syrian massacre; Russia's initial proposal:[100]

> suggest[ed] that the French, English and Russian governments publish a joint communication … making all … Ottoman … officials implicated in these acts personally responsible for the abuses against the Armenians. We could recall in this communication the measures of reprisal adopted by Europe in 1860 following the massacres in Syria.

a. 1916

Already in 1916 (long before WW1 ended), France and Britain began secretly planning together a post-war ICT for the trial of enemy war criminals. France even prepared a draft treaty extensively detailing the planned ICT.[101] These ICT discussions began 'only' in 1916, not because of any previous war crime trial aversion. On the contrary, earlier, 'captured enemy combatants were tried [by the capturing state] for various … war [crimes] … [But] [b]y mid-1916, both sides of the conflict had come to understand the … danger of escalating reprisals [such trials could induce]'.[102] The belligerents, therefore, secretly agreed to postpone such war crime trials until after the war. That agreement, in turn, prompted allied France and Britain to begin planning a post-war ICT.[103]

**C. *1917***

In 1917, the aforesaid secret planning continued. France, accordingly, prepared a revised ICT-prescribing draft treaty.[104]

More importantly, actual ICTs were created that year. After the US entered WW1, the US and UK naval forces operating from Britain created joint commissions of inquiry that served as inter-allied courts-martial to address crimes resulting in inter-force collisions.[105] Subsequently, this 'was imitated throughout all the Allied navies. There were instances of joint courts-martial of seven to nine men, with four different nationalities on them'.[106]

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[100] 'Communication de l'Ambassade de Russie au Département' (26 avril 1915), in Beylerian, *supra* note 16, 14 at 15.
[101] 'Projet de Convention Entre Tous les Pays Alliés, Projet de Convention entre la France et la Grande Bretagne' (5 août 1916), *Le Ministère de l'Europe et des Affaires Étrangères (France) - Archives Diplomatiques (FMAE), Série A. Paix, 1914-1920, Tome 64, A-1025-3*.
[102] Schabas, *supra* note 3, at 11-12.
[103] *Ibid.*, at 11-13.
[104] 'Projet de Convention Pour Assurer le Châtiment des Crimes Ennemis' (2 mai 1917), *FMAE, Série A. Paix, 1914-1920, Tome 64, A-1025-3*.
[105] Sims, 'The Influence of Modern Weapons Upon Future Naval Warfare', [1922-1924] *Canadian Club Yearbook* 53, at 57.
[106] *Ibid*.

### D. *1918 and Beyond*

In 1918, during the Russian Revolution, the Allies deployed a military intervention to support the White Russians. The intervention resulted in a joint American-British-French occupation of the 'Archangel' region (1918-1920). A local (White) Russian government, subordinate to the Allies, was also formed. Soon after this occupation had begun, an ICT ('a special military court') was established, consisting of 'four [White Russian] members… [and three] representatives of the allied armies: a British one, a French one and an American one.'[107]

WW1 ended in November 1918. The Paris Peace Conference transpired between January 1919 and January 1920.

Additionally, from November 1918 to October 1923, Constantinople/Istanbul was held by the Allied forces. Some historians maintain that in that city existed, then, 'Inter-Allied Police Courts',[108] 'consisting of French, British, Italian, and American authorities'.[109] We are less sure; although, it is certain that during 1919-1922, France, Italy and Britain did seriously consider creating a joint occupation ICT there.[110]

## 4. The Paris Peace Conference

Presumably, the Paris Peace Conference was the first time ICT creation was truly considered at the official level.[111] Contrastingly, as mentioned, some scholars have uncovered a few pre-WW1 ICT-related cases. Still, very little was found regarding Paris Peace Conference participants' awareness of these earlier experiences. Only the following were found: (1) An American memorandum asserting that the 1900 Pao-Ting-Fu commission 'cannot … be regarded as a legal precedent'.[112] (2) A post-

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[107] '[Occupying Allied forces Commander (British)] General F. C. Poole, to [Archangel (White Russian) President] N. V. Tchaikovsky' (13 September 1918), Russian version in И. Минц (Гл. ред.), *Интервенция на севере в документах* (1933), at 30. See also, L. Strakhovsky, *Intervention at Archangel* (1944), at 46.

[108] N. Bilge Criss, *Istanbul Under Allied Occupation: 1918-1923* (1999), at 74.

[109] Woodall, 'Decadent Nights: A Cocaine-Filled Reading of 1920s Post-Ottoman Istanbul', in M. Ardizzoni and V. Ferme (eds), *Mediterranean Encounters in the City* (2015) 17, at 31.

[110] See 'Allied Army of Occupation: Inter-Allied Tribunal (Constantinople) Establishment: Correspondence' (September 1919-November 1921), *UKNA WO/158/778*. Based on these documents, we suspect the aforesaid historians conflated the authorities of the contemplated ICT with those of the officers of the Constantinople/Istanbul international police.

[111] Schabas, *supra* note 3, at 298.

[112] Miller and Scott, 'Memorandum Regarding the Responsibility of the Authors of the War and for Crimes Committed in the War', in D. H. Miller, *My Diary and the Conference of Paris*, vol. 3 (1924), 458, at 475 ('Scott-Miller-[Finch] Memo'); Finch, 'Memorandum Regarding the Responsibility of the Authors of the War and for Crimes Committed in the War', at 17, *James Brown Scott Papers, Georgetown University Archival Resources, GTM-660503, Box 30.3b*. Miller credits himself and Scott as the memo authors (Miller, *ibid*., vol. 1, at 86, 88-89, vol. 3, at 458). But Finch credits himself as the

conference lecture comment by American delegate Scott that: 'It is better for the world that the [ICT] suggestion of Bismarck has not been followed'.[113] Uncovering scholars, therefore, felt compelled to concede that the post-WW1 impact of pre-WW1 ICT-related experiences was, at best, 'barely detectable.'[114] This Part reveals otherwise.

### A. *US Position*

Purportedly, the post-WW1 ICT schemes were only agreed upon after a sudden American attitude reversal.[115] Lansing directed the US ICL-related positions at the Paris Peace Conference until Wilson took the lead at the final stages of the negotiations.[116] Lansing, presumably, categorically opposed ICTs because he was a devout statist-positivist and, as such, he either (i) honestly believed ICTs 'violated existing international law',[117] or (ii) maintained that power and politics, 'not law, governed international relations' (and, therefore, not only dismissed ICTs but also considered cynical behaviour internationally legitimate).[118]

The first (honest belief) explanation attributes to Lansing the heavily-formalistic mindset of contemporary positivism, which exaggerated the significance of existing law and of legal classifications.[119] That explanation also ascribes to him adherence to contemporary dualism, a statist-positivist view which rejected ICL and ICTs because it maintained that only domestic law could address individuals.[120]

The second (cynical) explanation attributes a different contemporary statist-positivist view to Lansing. That view altogether dismissed international law as not truly being 'law.'[121] Indeed, many contemporaries considered WW1 evident proof that international law either never was 'law' or ceased being such ('buried forever … on the

author (Finch, 'Editorial Comment: Retribution for War Crimes', 37 *AJIL* (1943) 81, at 87), and so does the archive. Probably, all three were involved.
Brockman-Hawe, *Accountability*, *supra* note 42, at 687-690, uncovered the memo's discussion of the Pao-Ting-Fu commission.

[113] Scott, 'The Trial of the Kaiser', in E. House and C. Seymour (eds), *What Really Happened at Paris* (1921) 231, at 247. Brockman-Hawe, *Bismarck*, *supra* note 41, at 260, uncovered that comment.

[114] Brockman-Hawe, *Accountability*, *supra* note 42, at 698. See also, Brockman-Hawe, *Bismarck*, *supra* note 41, at 260-261; Pritchard, *supra* note 42, at 80; Brockman-Hawe, *Supranational*, *supra* note 42, at 76; Gordon, *supra* note 42, at 120; Brockman-Hawe, *Syria*, *supra* note 41, at 245; Lemnitzer, 'How to Prevent a War and Alienate Lawyers: The Peculiar Case of the 1905 North Sea Incident Commission', in I. de la Rasilla and J. E. Viñuales (eds), *Experiments in International Adjudication* (2019) 76, at 96.

[115] E. A. Weinstein, *Woodrow Wilson* (1981), at 342-343.

[116] See, Schabas, *supra* note 3, at 184-197.

[117] M. Lewis, *The Birth of the New Justice* (2014), at 47 (quoting Schwengler).

[118] Willis, *supra* note 17, at 74.

[119] M. J. Horwitz, *The Transformation of American Law*, 1870-1960 (1992), at 17-19.

[120] Bohrer, *supra* note 31, at 407.

[121] *Ibid.*

battlefields').[122] Some even asserted that international relations are, necessarily, regulated by power-politics and not by law (deeming international law a mere façade).[123]

US WW1 participation in several ICTs (such as the Archangel ICT and joint naval courts-martial) indicates that its 1919 ICT-averse position was not as honest-formalistic as proclaimed. Another such indication comes from Svalbard/Spitzbergen. During pre-WW1 negotiations, the US supported that '[c]riminal jurisdiction [over non-grave crimes] shall be exercised by the Judge of the [Spitzbergen] International Court' (the envisioned international-commission-appointed Spitzbergen chief executive was to serve as that judge, in addition to his executive capacities).[124] Surprisingly, this ICT plan was formulated by Lansing.[125] In a 1917 academic paper, Lansing further implicitly reiterated his support for the aforesaid ICT by stating that in Spitzbergen, an 'international agent [should be delegated some] authority over persons … in relation to public order';[126] although he also speculated that '[p]ossibly … after the Great War … [, instead of] an international government … [, the relevant] nations … will prefer … a neutral Scandinavian Power to assume territorial sovereignty'.[127] Svalbard/Spitzbergen was not a distant memory in 1919; it was settled at the Paris Peace Conference. But, at the Conference, the US, guided by Lansing, advanced the aforesaid speculated alternative, and Norway was given sovereignty over Svalbard/Spitzbergen.[128] This case questions the honesty of the 1919 assertion that ICTs were illegitimate for being unprecedented. In fact, in his 1917 paper, Lansing maintained that a solution could be found (in Svalbard/Spitzbergen), by according (limited) governmental authorities to international organs,[129] even though that legal situation was 'entirely novel … [without] precedents.'[130]

[122] La Fontaine, 'International Law and War', 3 *American Bar Association Journal* (1917) 165, at 165-166. See, also, Bohrer, *supra* note 31, at 470.
[123] Orford, 'Positivism and the Power of International Law', 24 *Melbourne University Law Review* (2000) 502, at 505-506.
[124] Art. 2, Chapter IV, 'Plan of International Convention Relative to the Establishment of Government in Spitsbergen' (17 February 1911), *Longyear Spitsbergen Collection, Michigan Tech Archives, MS-031, box 4A, folder 24*.
[125] Singh and Saguirian, *supra* note 94, at 63.
[126] Lansing, 'A Unique International Problem', 11 *AJIL* (1917) 763, at 769.
[127] *Ibid.*
[128] Singh and Saguirian, *supra* note 94, at 56-74.
[129] Lansing, *supra* note 127, at 765.
[130] *Ibid.*, at 768-769.

As demonstrated below, evidence indicates that American conference participants also knowingly obscured and dismissed various (more than two) earlier pre-1919 ICT-related experiences. Suspicions further arise that they did so to preempt pro-ICT uses of those earlier experiences while attempting not to draw further attention to that past. Such behaviour is clearly incompatible with the honest-belief explanation.

Consider the American treatment of Bismarck's 1870 ICT proposal. A presently neglected fact is that pro-ICT French delegate, Larnaude, presented this past case in support of ICT creation during a COR subcommittee discussion.[131] Scott had learned about that case then (unless he already knew about it).[132] But he did not respond to Larnaude; pro-ICT COR delegates sufficiently dismissed the case themselves.[133] His post-Conference comment, however, indicates that he did have a counterargument prepared.

A similar approach likely explains a rather suspicious attitude change. Scott, in his 1909 and 1916 books, treated the 1904 Dogger Bank Commission as a legal precedent for similar commissions, while positively noting its ICT authority.[134] This, in and of itself, makes it improbable that Scott in 1919 lacked recollection of that 1904 ICT. But there is yet another twist. Scott also discussed the 1904 commission in a book he published not long after the Peace Conference.[135] 'In this [1922] book, Scott … treat[ed its] … mandate to determine individual guilt as unnecessary detail that was best omitted', expressing a 'view of the future of international law … [in which that] case was an irritant.'[136] This attitude change was likely conscious as the 1922 book states that its discussion of the 1904 commission relies on the 1916 book.[137] As extensively discussed in the next section, like Bismarck's proposal: (a) the earlier practice of commissions with ICT authority was mentioned by Larnaude during COR discussions (both orally and by submitting the 1918 memo he coauthored, which referred to it); and (b) pro-ICT COR delegates, themselves, sufficiently downplayed the significance of that past practice. Therefore, here as well, it is reasonable to assume that although it

[131] 'Sous-Commission II' (20 février 1919), *La Documentation Internationale: La Paix de Versailles*, vol. 3 (1930) 278, at 283 ('COR-French-Minutes').
[132] *Cf.* Brockman-Hawe, *Bismarck*, *supra* note 41, at 260.
[133] 'Sous-Commission II', *supra* note 131, at 283.
[134] J. B. Scott, *The Hague Peace Conferences*, vol. 1 (1909), at 265-273; J. B. Scott, *The Hague Court Reports* (1916), at 405-412, 609-615.
[135] J. B. Scott, *Cases on International Law* (1922), at 130-133.
[136] Lemnitzer, *supra* note 42, at 941 (Lemnitzer assumes that this was always Scott's position).
[137] Scott, *supra* note 135, at 130.

was publicly expressed only later, Scott's dismissive attitude developed during the Conference.

ICT-proponents' simultaneous mentioning and obscuring of the aforesaid commission practice also likely explains the (earlier-mentioned) American dismissal of the 1900 Pao-Ting-Fu commission, which was made in a short section of a rather long internal memo.[138] That memo was prepared at Wilson's and Lansing's request and coauthored by Scott.[139] Note an oddity in that memo: assuming that the Americans were the only ones who knew about that 1900 ICT and that they opposed such ICTs, what could they possibly have had to gain from discussing this case only in order to assert it was not an ICT precedent? Even if the memo was not made public, not mentioning the case would still have been more logical than taking the risk that it would become known to the pro-ICT Allies.[140] A reasonable explanation is that the memo addressed this earlier ICT as a preemptive response to an anticipated pro-ICT use of that case.

Indeed, as one of the memo authors admitted in his diary, this memo was written, after the 1918 French memo (coauthored by Larnaude) was submitted to the COR, to prepare a view 'different from the French memorandum.'[141] The American memo itself does not acknowledge that aim. Nevertheless, one simply needs to read the two memos consecutively to realize that it was an attempt to systematically counter the main arguments of the French memo. Yet, if so, what part of the French memo made the Americans feel a need to address the Pao-Ting-Fu commission that is not explicitly mentioned in the French memo? The only possible suspect is a paragraph (further analyzed in the next section) in which the French memo alludes that some past international commissions had ICT-like, punitive authority.[142]

There are additional indications that the American examination of the 1900 commission was made in response to that paragraph. First, the American memo does not examine that commission alone, but rather considers it as belonging to the same

[138] Scott-Miller-[Finch] Memo, *supra* note 112.
[139] Miller, *supra* note 112, vol. 1, at 86.
[140] *Cf.* Brockman-Hawe, *Accountability*, *supra* note 42, at 687 ('[the Americans] shared with the Allies … [the] memo'), with Schabas, *supra* note 3, at 50 ('[the memo] was not circulated publicly'). We think Schabas is correct.
[141] Miller, *supra* note 112, vol. 1, at 86. See also, 'Annex to Minutes of the First [COR] Meeting', *British Documents on Foreign Affairs*, Part II, Series I, vol. 4 (1989), at 242 (*BDFA*).
[142] French Memo, *supra* note 7, at 21.

practice as two other past commission-like (non-ICT) punitive organs.[143] Second, it determines that these three organs were not legal precedents for ICTs because they did not consist of judicial agents.[144] The French memo presents an identical argument generally regarding past international commissions.[145] Third, the American memo's executive brief explicitly uses the terminology: 'Enemy individuals['] … responsibility … adjudged by a Commission or Commissions instituted by the Allie[s]'.[146]

Another (short) internal American memo, contemporaneously prepared, was dedicated to the 1882 trial of Ahmed Urabi ('Arabi Pasha'). That memo begins with a quote from 'Halleck's International Law', which inaccurately states: 'the charges against Arabi … [were for actions] against the laws of war and in violation of the right of nations'; '[f]or these offences Arabi was brought to trial by the Egyptian Government and condemned, with the full approval of the Government of Great Britain.'[147] The memo then explains: 'Arabi was not convicted on such a charge as that quoted. After some weeks of investigation, it was agreed that Arabi should plead guilty to … rebellion … a crime under … Ottoman code.'[148] Afterwards, the memo concludes without ever explicitly mentioning that Urabi was initially tried for war crimes by an English-Egyptian military ICT, or that others were tried by such ICTs. These omissions were likely intentional, as it is clear from the memo that extensive research was done before writing it. Moreover, what incentive could the Americans have had to write a memo dismissing Urabi's case as a non-precedent for war crime trials other than its ICT element? After all, the US did not oppose domestic military trials of enemy war criminals. The memo's briefness and odd format (starting as if from the middle, by quoting the extract from Halleck, without providing any context) further raise the suspicion that it was prepared as a preemptive response to an anticipated pro-ICT argument; one that was written in a manner that attempted to avoid attracting pro-ICT attention to the case. The suspicion grows even stronger once we (a) realize that this

[143] Scott-Miller-[Finch] Memo, *supra* note 112, at 470-476 (the others are: the post-Boxer-war Allied Peking representatives' commission and Napoleon's nonjudicial punishment by the European Powers' representatives).
[144] *Ibid*., at 475
[145] French Memo, *supra* note 7, at 21.
[146] Miller and Scott, 'Observations on the Responsibility of the Authors of the War and for Crimes Committed in the War', in Miller, *supra* note 112, vol. 3, 456, at 457.
[147] Hudson, 'The Indictment of Arabi Pasha', in Miller, *supra* note 112, vol. 3, 525, at 525 (quoting G. Baker, *Halleck's International Law*, vol. 2 (4th edn, 1908), at 350-351).
[148] *Ibid.*, at 526.

memo was also prepared in response to the French memo[149] and (b) recall the involvement of international commissions of inquiry in the punishment of 1882 atrocity perpetrators.[150]

Despite all of the above, the US position was not wholly cynical; formalist mindsets did play a role. Plus, this position was less anti-ICT than assumed. These issues are demonstrated in the memo addressing the Pao-Ting-Fu commission. Admittedly, the memo does assert that the above commission, like the two other examined cases, 'cannot … be regarded as a legal precedent for the punishment of crimes against international law'[151] and should be 'treated as an example of political punishment, rather than as a precedent for judicial or legal punishment.'[152] These three organs dispensed mere political (and not judicial-legal) punishment, because: (i) they did not consist of judicial agents, and (ii) their proceedings lacked the 'usual safeguards of ordinary jurisprudence … [that] assure justice to accused persons'.[153] But, surprisingly, these claimed flaws do not lead the memo to assert that such political punishment actions should not be taken. Instead, it concludes that these three cases demonstrate that '[t]he competence of the Allied nations to take political actions to restrain a disturber of the public peace [i.e., an enemy of mankind] is recognized by the authorities and would be justified by practice',[154] as a 'joint political action as a punishment for "crimes against the law of nations, against the law of humanity"'.[155] Thus, the memo actually does not categorically reject ICTs or regard them unprecedented in state practice (i.e., in customary international law). Instead, its assertions are primarily terminological, insisting that punishing international criminals must be *termed* '*Political as Distinct from Legal Action*'.[156]

Two other parts of the memo provide further support for these conclusions. One part explicitly states: [157]

> [I]t would be more in accordance with *previous practice* … to constitute separate tribunals for each nation or *each group of nations* whose armies were actually united in the campaign …

[149] Miller, *supra* note 112, vol. 1, at 86.
[150] Egyptian Decrees, *supra* note 60, at 1125-1127.
[151] Scott-Miller-[Finch] Memo, *supra* note 112, at 475.
[152] *Ibid.*, at 474.
[153] *Ibid.*, at 475.
[154] *Ibid*., at 470.
[155] *Ibid.*, at 471.
[156] *Ibid.*, at 470.
[157] *Ibid.*, at 506 (emphasis added).

The other part maintains that even trials of enemy war criminals by domestic (single-state) tribunals are political actions. Yet, it still concludes that customary international law authorizes domestic military tribunals to try enemy war criminals.[158]

As mentioned, contemporary US constitutional law considered military tribunals as belonging to the executive (political) branch ('executive instruments') despite being judicial bodies. The American reference to tribunals authorized to punish international crimes as 'political' forums likely stemmed, to a considerable degree, from that domestic constitutional doctrine. Indeed, (at least some) contemporary scholars understood that 1919 US position as deduced from this domestic doctrine.[159] Although, the use of the term 'political actions', and not 'executive instruments', indicates that the Americans conflated that domestic doctrine with a starkly-formalistic understanding of the statist-positivist idea that politics, not law, regulates international relations.

Such terminological fixations may seem odd to us. But during that period, as Felix Cohen observed, an exceedingly formalist mindset took hold. That mindset drove many jurists to treat legal concepts as 'magic "solving words"' and to embrace odd 'metaphysical' interpretations and distinctions rooted in 'transcendental nonsense'.[160]

To clarify, the position expressed in the aforesaid memo was not ICT enthusiastic, nor was it wholly directed by legalistic mindsets. Rather, it was also influenced by nonlegal-contingent preferences (likely, an aversion to involving German judges in the ICTs, and doubts regarding the geopolitical benefits of post-war trials and especially of trying the (ex-)Kaiser). Based on that combination of positivist inclinations and nonlegal-contingent preferences, the memo: (a) insisted ICTs would be classified as political (i.e., would either be explicitly defined as such, or be military tribunals); (b) supported including, in ICT proceedings, only judges from Allied states affected by the crimes of the specific defendants (i.e., it opposed judges from unaffected-Allied, neutral, and defendants' states); (c) strongly disfavoured prosecuting heads of state, but did reluctantly concede that they could be punished (as long as such an action was defined as a political action); and (d) was ready to accept trial by ICTs of certain enemy war criminals (as long as these were *military* ICTs with judges only from

[158] *Ibid.*, at 478-489.
[159] Gregory, 'Criminal Responsibility of Sovereigns for Willful Violations of the Laws of War', 6 *Virginia Law Review* (1920) 400, at 406.
[160] Cohen, 'Transcendental Nonsense and the Functional Approach', 35 *Columbia Law Review* (1935) 809, at 820, 831, 847.

*affected Allied* states). Contrastingly, the other Allies classified ICTs as legal-judicial organs, strongly supported prosecuting heads of state, and favored including civilian judges in ICTs from both affected and unaffected Allied states.[161]

The US position remained relatively consistent (there was no sudden attitude reversal). Similarly to aforementioned memo, the American COR dissent, after asserting that a judicial body could not punish the (ex-)Kaiser given heads of state immunity, admitted that that immunity was not 'intended to apply to what may be called political offences and to political sanctions'.[162] Moreover, a subsequent influential letter by Lansing explicitly, although reluctantly, acknowledged that the (ex-)Kaiser could be punished by an international tribunal, while terminologically insisting that: such an 'extraordinary tribunal is of political origins though adopting a procedure similar to judicial tribunals'; its 'punishment, penalty or sanction is determined upon as a political measure'; and the 'offence[s] … cannot be described as … violation[s] of criminal law … [, but rather] of international morality'.[163] Likewise, regarding enemy war criminals, the US continued to oppose including in their ICT trials civilian judges and judges from unaffected-Allied, neutral, or defendants' states.[164] Indeed, if one goes over the earlier ICT-related cases that the Americans dismissed/obscured, one realizes that they only did so regarding ICTs with judges from: the defendant's state (the English-Egyptian tribunals), unaffected states (the Svalbard/Spitzbergen Court), or both (the Dogger Bank Commission and Bismarck's proposal). The Pao-Ting-Fu commission did, arguably, include judges from unaffected states and, yet, all were still from armies somewhat united in that campaign; this may explain the ambiguous treatment of that case.

The ICT schemes eventually adopted expressed a compromise between the US and its Allies. In line with the US position, Versailles Treaty Article 227, if read closely, actually deems morality and policy (not law) as the normative basis for the charges, trial, and punishment in the (ex-)Kaiser's ICT proceedings. Yet, if it were not for the other Allies, no ICT scheme would have been set for the (ex-)Kaiser.[165] Furthermore, at their demand, it was clarified that the political sanctions for the (ex-)Kaiser's political

[161] COR-Report, *supra* note 8, at 98-125.
[162] *Ibid.*, at 136.
[163] 'From Lansing, [to Wilson]' (8 April 1919), in A.S. Link (ed.), *The Papers of Woodrow Wilson*, vol. 57 (1987), at 131. For the letter's significance, see, Schabas, *supra* note 3, at 180-195.
[164] COR-Report, *supra* note 8, at 142.
[165] Appendix, *supra* note 17, at 177-181; Schabas, *supra* note 3, at 184-197.

offences were to be imposed by an international political tribunal with *all* the procedures and defendant guarantees of 'a regularly constituted tribunal … in order that the judgment should be of the most solemn judicial character.'[166] Thus, the distinction between the 'political' and the 'legal' was wholly transformed into mere transcendental nonsense. The enemy war crime trial ICT scheme expressed a similar compromise. It was adopted considerably due to the other Allies' insistence. But in its details, it resembled the US position, only permitting ICT trials by *military* judges from *affected* Allied states.[167] The military demand made these ICTs resemble most earlier ones (although the judges' nationality limitation made them more partisan than many predecessors).

### B. *The Pro-ICT Delegates*

Contrary to current beliefs, earlier ICT-related experiences were neither unknown to, nor wholly downplayed by, pro-ICT conference participants.[168] Notably, Larnaude presented three such experiences during COR discussions; intriguingly, however, he did not claim they were legal precedents, but rather mere (imperfect) sources of inspiration.

First, during a COR sub-commission debate, regarding aggression as an international crime, Larnaude halfheartedly stated:[169]

> Let me close with an observation which may constitute a digression, but I would like to remind you that in 1870 Bismarck was less timid than us, because he proposed an international tribunal to try Napoleon III.

Belgian delegate Rolin-Jaequemyns responded: 'This is not an example to follow.'[170] Thus concluded the discussion of Bismarck's proposal.

Second, a few days later, in another sub-commission, Larnaude gave a long speech on the benefits of an ICT; in it, he stated:[171]

> There are … practical difficulties [with relying on national (military) tribunals],… I give this information, which is very recent. In the regions occupied by the American, English and French armies … [due to such] difficulties … we have just set up a Committee of Jurists which will concentrate all the proceedings which were previously brought before the American, English and French councils of war [i.e. military tribunals] and will make the rulings. This Committee of

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[166] *Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace* (1919), at 31.
[167] See, Schabas, *supra* note 3, at 184-197.
[168] *Cf.* Brockman-Hawe, *Supranational*, *supra* note 42, at 76; Pritchard, *supra* note 42, at 81; Lemnitzer, *supra* note 114, at 96.
[169] 'Sous-Commission II', *supra* note 131, at 283.
[170] *Ibid*.
[171] 'Sous-Commission III' (25 février 1919), in *COR-French-Minutes*, *supra* note 131, 312, at 314-315.

> Jurists will be nothing other than a small allied court, which can serve us not as a model, but as an indication of how immense the idea of concentration in an international court is.

Note that the aforesaid ICT differs from the Archangel ICT in its composition. Therefore, Larnaude likely referred to another WW1-era joint occupation ICT (one that we have failed to locate, not for lack of trying).

Third, in the same speech, Larnaude also stated:[172]

> [As] M. de Lapradelle and I [explained], in the examination submitted to you … We are at a moment when the great rules of international law must receive confirmation, not only from Commissions and Committees which do not have judicial character … [but from] a unique [international] tribunal … playing … the unparalleled role reserved to it in the history of this war.

Indeed, as mentioned, the 1918 French memo, which was submitted to the COR, addressed the earlier international commission practice:[173]

> *As to the mode of composition of the [international criminal] tribunal* … A tribunal does not deserve its name unless it is composed of magistrates or at least of men whose profession is law … [T]he tribunal should be truly superior both in character and in knowledge and experience of those who compose it. It will not be 'a commission' like some under the old regime, but a court in the fullest sense of the word.

Larnaude's reluctance to present these past experiences as legal precedents was not inexorable. (i) During WW1, different articles did strongly present Bismarck's proposal as a pro-ICT precedent.[174] (ii) Presently, the prevalent legal position does consider an earlier joint occupation ICT (Nuremberg) the legal precedent (and not merely a source of inspiration) that authorized forming the later (1990s and onwards) ICTs, even though the latter have not been joint occupation ICTs.[175] (iii) Notice that Larnaude's criterion (as evident in the memo) for distinguishing earlier commissions from the proposed ICT (i.e., for dismissing earlier commissions as lacking judicial character) was judges' legal education and not lack of criminal trial authority. Yet, even in contemporary domestic military tribunals, judges were commonly not required to be jurists. Accordingly, other contemporaries concluded:[176]

> A Commission of Inquiry is technically not arbitration … The Dogger Bank Commission … [e.g.,] delivered judgment as to responsibility and blame … [and]

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[172] *Ibid.*
[173] 'Annex to Minutes', *supra* note 141, at 253; French Memo, *supra* note 7, at 21.
[174] See, Brockman-Hawe, *Bismarck*, *supra* note 41, at 260.
[175] E.g., Y. Beigbeder, *International Justice Against Impunity* (2005), at 232. For the minority that thinks otherwise, see, e.g., Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed', 38 *Cornell International Law Journal* (2005) 753, at 756.
[176] Woolf, *supra* note 91, at 73-74. See also, R. Goldsmith, *A League to Enforce Peace* (1917), at 100.

> was composed of five naval officers …; it was therefore an International Court-Martial ...

Such WW1-era scholars relied on Frederic Pollock, who, in 1910 (unlike Larnaude), maintained:[177]

> [The Dogger Bank] mixed naval Commission [had] … enlarged powers of deciding on [individual] responsibility … [P]roceedings were carried through with becoming judicial dignity … It is doubtful whether a formal tribunal of jurists or diplomatists could have handled this delicate affair so well, if at all; and from this point of view the example is especially instructive.

Case-specific reasons partly explain Larnaude's attitude. For example, the reluctance to rely on Bismarck's proposal was likely partly because contemporaries blamed Bismarck for 'fathering' German militarism responsible for WW1.[178]

Likewise, the reluctance to rely on the earlier commission practice is probably partly explained by the 1914 Austrian ultimatum. Recall that the primary ultimatum condition Serbia did not fully accept was a demand to create an international (Serbian-Austrian) commission with ICT authority. Accordingly, a main aggression accusation against Austria (and Germany) was that the ultimatum:[179]

> imposed upon Serbia conditions which no sovereign state could possibly accept, such, for example, as that Serbia should admit the right of Austro-Hungarian authorities to exercise judicial … jurisdiction on Serbian territory …

Reliance on the same legal practice as the one relied upon in the Austrian ultimatum would have considerably weakened that aggression accusation. Avoiding that result was, therefore, likely partly the motivation behind the attempt to distinguish the proposed ICT from that earlier practice.

Furthermore, international commissions of inquiry tended to include representatives from both sides or from neutral parties. Indeed, the German Peace Conference delegates attempted to counter the Allies' ICT initiatives by proposing 'a neutral inquiry into the responsibility for the war and culpable acts in its conduct … [by a]n impartial Commission'.[180] Eventually, they even went as far as to propose that Germany and the Allies would jointly appoint an ICT composed of neutral judges to determine alleged German war criminals' culpability, only insisting that the punishment would be determined by 'the national courts' (i.e., they proposed an ICT

[177] Pollock, 'The Modern Law of Nations and the Prevention of War', in A. Ward *et al*. (eds), *Cambridge Modern History*, vol. 12 (1910) 703, at 724.
[178] See, M. MacMillan, *Peacemakers* (2001), at 173.
[179] 'Memorandum Submitted by the Serbian Delegate' (18 February 1919), in *BDFA*, *supra* note 141, at 287. See also, Reply, *supra* note 166, at 27.
[180] *Die Gegenvorschläge der Deutschen Regierung zu den Friedensbedingungen* (1919), at 95.

similar to the Dogger Bank Commission).[181] But the Allies opposed including German and neutral judges in post-war ICTs.[182] This position probably also motivated them to distinguish between the proposed ICTs and the earlier commission practice.

Similar motivations also possibly explain the suspicious nonreference to the Dogger Bank Commission during post-WW1 ICT-related discussion by various participants who did address that commission earlier, including: Scott, President Wilson, and British Foreign Office Undersecretary Charles Hardinge.[183] Pollock, somewhat contrary to his 1910 article, in an annex to the 1918 British Committee report, described the committee-proposed ICT as 'without precedent'.[184]

But such contingent (rather cynical) reasons fail to explain Larnaude's insistence that the proposed ICT was qualitatively different from, and (to a varying degree) better than, each of the three earlier experiences. As in the American case, contemporary legal mindsets aid to complete the picture. Notably, as mentioned, many statist-positivists considered WW1 evident proof that international law was not, or ceased being, 'law'. Many contemporary internationalists also embraced that belief,[185] even though it was misguided:[186]

> Any normative body of rules will invariably be broken, perhaps on a small scale or perhaps even on a much larger one, but this does not stop it from being a law in the sense of a prescription towards adopting a particular mode of behaviour …

Unlike statist-positivists, such internationalists concluded that WW1 demonstrated an urgent need for a new-improved international law system.[187] The post-WW1 ICT was considered the necessary first step towards that brighter future.[188]

Internationalists further blamed (sovereignty-fixated, international-law-belittling) statist-positivism for contributing to WW1's outbreak.[189] That blame and the aforesaid legal-reform zeal exacerbated an already growing tendency among internationalists: the tendency to believe that statist-positivist accounts of international law (as merely inter-state-coordinating, or as non-law) accurately depicted *existing*

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[181] *Ibid.*, at 83.
[182] Reply, *supra* note 166, at 30.
[183] See *supra* note 134; Lemnitzer, *supra* note 114, at 94-96.
[184] British Committee, *supra* note 6, at 53.
[185] Kennedy, 'International Law and the Nineteenth Century: History of an Illusion,' 17 *Quinnipiac Law Review* (1997) 99, at 110.
[186] Whetham, *supra* note 78, at 52.
[187] Kennedy, *supra* note 185, at 100-111, 131-138.
[188] E.g., French Memo, *supra* note 7, at 20.
[189] Kennedy, *supra* note 185, at 131-138.

international law (which internationalists concluded must be reformed).[190] These statist-positivist accounts were actually gravely inaccurate; even during the Long Nineteenth Century, international law incorporated various norms and positions incompatible with statist-positivism (such as those that facilitated ICTs). Nevertheless, post-WW1 internationalists unreflectively 'reinterpret[ed] the traditions of nineteenth century international law as [their] alter egos'.[191] Indeed, various legal norms and positions advocated by post-WW1 internationalists were actually preexisting in international law; but, the aforesaid reinterpretation erased recollection of their prior history. The pre-1919 international law henceforth remembered is an overly-statist distorted memory ('the memory of an illusion').[192]

Larnaude's treatment of earlier ICT-related experiences indicates that the actual legal past was not instantaneously forgotten. At the first stage, contemporary internationalist positions were distinguished from similar earlier legal experiences. Such distinctions reconciled the awareness to resembling earlier experiences, with the belief that contemporary legal positions were novel responses to an unprecedented event. But past experiences were not simply discarded. Even when negatively depicted (e.g., the earlier commission practice and Bismarck's proposal), they were still treated as indications of the conceivability of the (purportedly better) contemporary idea. Indeed, depicting the earlier experiences as flawed only bolstered the claimed benefits of contemporary proposals without diminishing the assertion that the former served as an indication for the conceivability of the latter. As mentioned, such 'see-saw' reasoning, which simultaneously relies upon and distinguishes/belittles the same earlier experience, has also been observed elsewhere in ICL.[193]

Only at a second stage (i.e., over time), jurists became fully convinced by the assertions (commonly made during the first stage) that pre-1919 international law was starkly-statist and that various post-WW1 internationalist initiatives were unprecedented. The past was forgotten.

## 5. Discontinuity Narratives

Simpson recently observed:[194]

[190] Hall, 'The Persistent Specter: Natural, Law, International Order and the Limits of Legal Positivism', 12 *EJIL* (2001) 269, at 271; Kennedy, *supra* note 185, at 100-111.
[191] Kennedy, *supra* note 185, at 137.
[192] *Ibid.*, at 138.
[193] See *supra* note 37 and accompanying text.
[194] Simpson, 'Unprecedents', in I. Talligren and T. Skouteris (eds), *New Histories of International Criminal Law* (2019) 12, at 17.

> [I]nternational criminal justice beg[a]n, with a reference to an unprecedented violence that finally provokes—must give rise to—the establishment of legal order … [ICL, thus,] imagines itself to be constructed around one point in time, that is, the 'never before, never again' moment … [T]his requires a screening out of previous atrocities in the name of unprecedenting … [Certain] trial precedents are [also] forgotten or obscured.

This perceptive observation applies to both WW1 and WW2.[195] Although neither could be facilely described as ICL's beginning, each, at its wake, was felt as such – as a 'never before, never again' moment. Moreover, each of these two post-war collective sentiments had led to the dis-remembrance of significant elements of earlier ICL history. ICT history was forgotten after WW1; the history of international crimes other than piracy was fully forgotten after WW2. The current (1919 'conception', 1945 'birth') narrative is the combined result of both dis-remembrance episodes.

Recurring dis-remembrance has also been observed elsewhere in international law. But, presently, this phenomenon is understudied.[196] That neglect is somewhat understandable due to an opposite phenomenon. International law jurists tend to perceive themselves as members of a reformist community. This self-image commonly causes them to exaggerate historical continuity, linearity and progress by interpreting historical processes as evermore leading 'to the increasing "perfection" of international law'.[197] Furthermore, jurists generally tend to overfocus on legal vocabulary persistence (i.e., on the continued use of the same legal concepts). This leads to the exaggeration of historical continuity as it disregards the ever-plural and everchanging nature of legal meanings. In reality, different people, contemporaneously and (more so) at different times, vary in the meaning they attribute to the same concept, or law.[198] Disparate understandings of the concept/law influence various legal rulings/actions and can even, simultaneously, influence the same one.[199] Such vocabulary overfocus also leads jurists to underrate the influence of contingent political interests, ascribing 'to the law a much

[195] Simpson conflates the two moments and assumes only 'awkward' trials are forgotten; *ibid.*, 17-21.
[196] The notable exception is Kennedy's work: Kennedy, 'When Renewal Repeats: Thinking against the Box', 32 *New-York University Journal of International Law and Politics* (2000) 335; Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow,' 4 *Transnational Law and Contemporary Problems* (1994) 329. See also, Mégret, 'International Criminal Justice History Writing as Anachronism', in Talligren and Skouteris, *supra* note 194, 72, at 73-74 (passingly observing that this phenomenon exists in ICL).
[197] Tzouvala, 'New Approaches to International Law: The History of a Project', 27 *EJIL* (2016) 215, at 225. See further, T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).
[198] See, Koselleck, 'Some Reflections on the Temporal Structure of Conceptual Change', in W. Melching and W. Velema, *Main Trends in Cultural History* (1994) 7, at 10.
[199] Mégret, *supra* note 196, at 73-76.

more casual role than it has had'.[200] This is problematic. Certain elements of reality are often obscured in dominant narratives due to unacknowledged biases and interests; the vocabulary overfocus could, therefore, fail to expose, if not serve, these biases and interests. Leading international law historians, such as Koskenniemi, therefore, advise us that a better 'study of international law's past … would focus on discontinuities rather than continuities, [and on] the relationship between narratives and power'.[201] Such better historical accounts would expose unacknowledged biases and interests that dominant narratives obscure because:[202]

> Narrative vocabularies are, to use Paul de Man's familiar image, mechanisms of blindness and insight. A shift of vocabulary enables us to see things that were previously hidden …

Nevertheless, there is nothing necessarily historiographically unsound about continuity accounts.[203] Admittedly, every continuity account is bound to be imperfect, yet the same holds true for discontinuity accounts. Because of reality complexness, all historical accounts are inevitably imperfect.[204] Indeed, for any historical process, various sound accounts can be presented, and each (despite being methodologically sound) could still be legitimately criticized for starting too early, or late.[205]

Furthermore, a discontinuity focus has drawbacks too. The meanings of a legal concept/law tend to result from a multi-partisan, dialectic, *continuous* social discourse.[206] Thus, often, despite the ever-plural and everchanging nature of legal meanings, the legal past, still to some degree, 'gives us vocabulary … [that] shapes the very way we think of a problem'.[207] A concept's existing meanings also tend to have a constraining effect; because concepts remain embedded in their existing linguistic setting, their meanings do not change with every new situation and usually only change 'within limits'.[208] This constraining effect is especially strong in law, because legal

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[200] *Ibid.*, at 74.
[201] M. Koskenniemi, *The Gentle Civilizer of Nations* (2004), at 9.
[202] Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', 19 *Rechtsgeschichte* (2011) 152, at 176.
[203] Lesaffer, 'International Law and Its History: The Story of an Unrequited Love', in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds), *Time, History and International Law* (2007) 27, at 38-39.
[204] Koskenniemi, *supra* note 202, at 176. Nevertheless, contrary to some relativist claims, historiographically sound accounts are, generally, less inaccurate than other narratives; A. Koschorke, *Fact and Fiction* (2018), at 275-276.
[205] Alston, 'Does the Past Matter? On the Origins of Human Rights', 126 *Harvard Law Review* (2013) 2043, at 2079.
[206] See, Reisman, 'Assessing Claims to Revise the Laws of War', 97 AJIL (2003) 82, at 82.
[207] Martinez, 'Human Rights and History', 126 *Harvard Law Review* (2013) 221, at 237.
[208] Koselleck, 'Introduction and Prefaces to the *Geschichtliche Grundbegriffe*', 6 *Contributions to the History of Concepts* (2011) 1, at 31.

discourse tends to rely upon 'patterns of argument stretching back [in time]',[209] and so 'change is [often] effected by adapting existing legal concepts'.[210] Due to all of the above, the present meanings of existing laws/concepts tend to be 'an independent factor that … [influences] future developments.'[211] That independent factor is not necessarily voided by contingent political influences on legal positions and actions, because such political influences usually do not bar legal factors from also having an influence.[212] Consider the concept of an 'International Criminal Tribunal'. Presently, disputes exist regarding its exact definition[213] and, resultingly, on whether certain organs are ICTs.[214] Such disputes, as the Article demonstrated, also existed after WW1. Furthermore, the concept's current array of meanings is unidentical to its 1919 array of meanings, and both are unidentical to even earlier arrays.[215] Nevertheless, despite the ever-plural and everchanging nature of the ICT concept's meanings, and despite contingent political influences on ICT-related legal actions in each period, as shown in the Article: Paris Peace Conference participants were influenced by earlier ICT-related experiences, Nuremberg creators were influenced by the Paris Peace Conference experience, and the creators of subsequent ICTs were influenced by the Nuremberg experience. In short, a discontinuity overfocus might underrate the role played by law, overlooking that legal actions are usually influenced both by contingent 'power relations [and by] … the internal logic of juridical functioning which constantly constrains the range of possible actions'.[216]

Note further that dominant narratives are not necessarily continuity accounts. As Paul de Man noted:[217]

> [T]he best historians … point out that what was considered a crisis in the past often turns out to be a mere ripple, that changes first experienced as upheavals

[209] Orford, 'On International Legal Method', 1 *London Review of International Law* (2013) 166, at 173.
[210] G. McCormack, *The Harmonisation of Law* (2011), at 49.
[211] *Ibid.*
[212] A. Freyberg-Inan, *What Moves Man* (2012), at 111-112.
[213] A. Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (2018), at 153-164.
[214] See, e.g., the sources in *supra* note 175.
[215] For example, we would probably be even more receptive, than post-WW1 jurists, to claims, like those made by Larnaude and by the Americans, dismissing commissions such as those of yore as non-ICTs due to judges' lack of legal education. Prior to WWI, there would had been, probably, even less receptiveness to such claims. See, Sherman, 'The Civilianization of Military Law', 22 *Maine Law Review* (1970) 3, at 10-28. To give an opposite example: we would probably be less receptive, than post-WW1 jurists, to a claim, like the one the Americans made, dismissing the (ex)Kaiser's tribunal as non-judicial for starkly-positivist reasons.
[216] Bourdieu, 'The Force of Law', 38 *Hastings Law Journal* (1987) 814, at 816.
[217] P. de Man, *Blindness and Insight* (2013), at 5-6.

tend to become absorbed in the continuity of much slower movements as soon as temporal perspective broadens.

The construction of exaggerated discontinuity narratives is a significant phenomenon in international law (the opposite phenomenon notwithstanding). As Kennedy observed, 'international law … [has a] reformist orientation … Successive generations can intone … familiar ideas as "new" … precisely because they retain their power to mobilize, to define a group of believers.'[218] '[A]rgument[s] common in the discipline for more than a century will … [in different] moment[s,] be experienced as novel.'[219] In other words, just as international law jurists' reformist self-image can induce narratives of exaggerated, linear, progressive continuity, it can also induce (dis-remembrance-causing) narratives of exaggerated discontinuity. Admittedly, the fact that the same self-image can induce both opposite kinds of narratives seems illogical. But, as soon explains, counterintuitively, in international law, these two kinds narratives actually reinforce one another.

International law discontinuity narratives often depict a certain event as a crisis-induced break from the past.[220] As already discussed, often, a law simultaneously has several meanings. Usually, jurists attempt to advance their position (their preferred legal meaning), by asserting that it is already the existing law (i.e., already the 'correct' meaning of the law). But, when propagating a legal crisis narrative, jurists tend to do the opposite, constructing an account that deems: (a) a certain *competing* legal position as the existing law, and (b) a certain recent event as a crisis that demands changing that 'existing' law.[221] Admittedly, not all circumstances can serve as a basis for a crisis narrative, and often those who support such a narrative honestly believe it. Nevertheless, most facts can be, consciously or subconsciously, interpreted in numerous ways.[222]

In international law, wars have been especially used as the basis for crisis narratives.[223] Once every few decades, a sentiment prevails that deems a certain significant contemporary conflict an 'unprecedented war' that renders obsolete much

[218] Kennedy, *World Order*, *supra* note 196, at 335-336.
[219] Kennedy, *Renewal*, *supra* note 196, at 338.
[220] Katzenstein, 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century', 55 *Harvard International Law Journal* (2014) 151, at 153.
[221] See, *ibid.*, at 153.
[222] A. MacIntyre, *Whose Justice? Which Rationality?* (1988), at 1-11.
[223] Bohrer, 'Divisions over Distinctions', in Z. Bohrer, J. Dill, and H. Duffy, *Law Applicable to Armed Conflict*, vol. 2 of A. Peters and C. Marxsen (eds), *Max Planck Trialogues on the Law of Peace and War* (2020) 106, at 118.

of existing international law.[224] Such a narrative is often shared by both statists and internationalists: the former wish, based on it, to release states from existing international law constraints; the latter assert, based on it, a need for a more robust 'new' international law.[225]

Surprisingly, internationalist narratives of exaggerated continuity and of exaggerated discontinuity complement one another. First, the crisis narrative of an internationalist reform campaign is commonly constructed on the backdrop of an existing meta-narrative of exaggerated linear progressive continuity.[226] Therefore, such narratives often tell the following tale: (a) there used to be (nearly) nothing; then (b) previous generations made advances in international law; (c) these advances, though significant, were insufficient to address the present crisis (if not generally); therefore, (d) we, like our forebears, must strive, once more, to reform-rebuild-revive-advance international law.[227] Second, if the crisis-based legal reform campaign succeeds, this latest triumph is henceforth recalled alongside earlier ones to sustain the meta-narrative. Accordingly, such a meta-narrative commonly depicts a series of post-crisis historical events as falling along an inevitable line of progress, 'each bringing us closer to the ideal'.[228]

However, this tends to be a distorted sensation of progress. The need to depict a *competing* legal position as the existing law, and the background meta-narrative of progressive continuity, tend to lead reform-motivated internationalist crisis narratives to overly cede, to statist positions, too much of the legal present and even more of the legal past (in the hope of a brighter legal future).[229] Thus, as part of the construction of such narratives, as ICL history demonstrates, significant earlier related experiences are, initially, belittled/distinguished (while simultaneously relied upon) and, subsequently, forgotten. To compensate (i.e. to sustain the meta-narrative of exaggerated progressive continuity despite such dis-remembrance), the recollection of links to adjacent fields of international law is also altered. Thus, for example, piracy-law and state-addressing law of war enforcement came to be recalled as ICL's 'pre-history'. Due to such alterations,

[224] *Ibid.*, at 118, 133-139.
[225] *Ibid.*, at 118.
[226] See, Skouteris, *supra* note 197, at 1.
[227] The most famous narrative of this kind was constructed in: Lauterpacht, 'The Grotian Tradition in International Law', 23 *BYBIL* (1946) 1. Usually, however, such narratives point to more recent inspirational forerunners; for a WW1 example, see, La Fontaine, *supra* note 122, at 165-168.
[228] Koller, '… and New-York and the Hague and Tokyo and Geneva and Nuremberg and … The Geographies of International Law', 23 *EJIL* (2012) 97, at 98.
[229] See, Kennedy, *supra* note 185, at 136.

dis-remembrance episodes only aid to maintain the meta-narrative, by assuring that the past is evermore recalled as less 'internationalist' than it had been. Meditate on the following, as an example: we hail Nuremberg and subsequent ICTs as marking the beginning and continuation of the shift away from the 'traditional' starkly-statist world-order (in which ICTs were impossible). But, in actuality, there were more ICTs 1819-1919, than 1919-2019.

## 6. Conclusion

The present hold of the prevalent (1919 'conception', 1945 'birth') narrative is extremely strong. Thinking otherwise is commonly dismissed as a mere wishful 'desire to give [ICL] historical substance'.[230] Even scholars who uncovered late-19th-early-20th century evidence irreconcilable with that narrative felt compelled to both celebrate their findings as 'nascent [ICL] stabs',[231] and lament them as barely having a post-WW1 impact (if any).[232]

But, as the Article uncovered, neither 1945 nor 1919 could be facilely described as the beginning of ICL, even though each was contemporaneously felt as such (as a 'never before, never again' moment) and, subsequently, became recalled as such (due to an ensuing dis-remembrance episode). The current narrative is the combined result of both dis-remembrance episodes.

Post-WW1 depictions of ICTs as unprecedented were not objective-factual accounts, but rather expressions of the aforesaid post-war sentiment. Contrary to such depictions, as well as to our own overly-statist recollection of the Long Nineteenth Century (itself a byproduct of that sentiment), during that era, ICTs were neither nonexistent nor novel, but rooted in longstanding practices. These practices continued onto WW1. Paris Peace Conference participants were aware of earlier ICT-related experiences. But, for various reasons (presented in Article), they favored proclaiming that contemporary ICT proposals (and ICTs generally) were unprecedented and distinguished them from those earlier experiences. Nevertheless, they were considerably influenced by that past. Thus, 1919 was ICTs' 'phoenix moment' (not their 'conception moment'), during which the ICT idea began arising from the ashes of its own past existence.

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[230] Bassiouni, *supra* note 3, at 29.
[231] Gordon, *supra* note 42, at 120.
[232] See *supra* note 114 and accompanying text.

Such dis-remembrance also occurs elsewhere in international law. This understudied phenomenon is largely due to international law jurists' tendency to perceive themselves as a community of reformers. In part, this self-image is justified. But, in part, it is sustained by (and sustains) a cocktail of exaggerated-continuity and exaggerated-discontinuity narratives. Exaggerated-discontinuity narratives are commonly constructed during a felt crisis (usually, a significant war). Such narratives motivate legal reform and, subsequently, tend to cause dis-remembrance episodes. Counterintuitively, the exaggerated-continuity and exaggerated-discontinuity narratives reinforce one another, and both sustain internationalists' reformist self-image. Exaggerated-discontinuity narratives partly do so by assuring an under-favorable recollection of the past.

Provocatively stated, we internationalists are prone to a recurring, manic-depressive-amnesic hero-complex. Manic: for persistently celebrating ourselves and our predecessors as reformers. Depressive: for repeatedly, once every few decades, experiencing reality as (nearly) obliterating the normative world we so cherish. Amnesic: for recurrently forgetting past achievements. Hero complex: for evermore believing in our ability to advance humanity through international law, despite (or even because) of aforesaid depression and amnesia. ICL history demonstrates this pattern.