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

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Abstract

The post-World War II International Military Tribunal at Nuremberg is commonly considered the first-ever international criminal tribunal. It is also often argued that the very idea of an international criminal tribunal emerged after World War I, when the first plans for such a tribunal were drawn up. This article, however, presents a very different account. It shows that international criminal tribunals did not have to wait for their conception until after World War I; nor did they come into being after World War II – they already operated during World War I and the preceding century. The article also demonstrates that the existence of such tribunals did influence the participants of the Paris Peace Conference, even though they portrayed them as novel.

1 Introduction

It is commonly accepted among scholars that the post-World War II International Military Tribunal at Nuremberg (Nuremberg tribunal) was 'the first-ever international criminal tribunal'[1] and that international criminal law (ICL) 'was born [at] … Nuremberg'.[2] According to this largely taken-for-granted narrative, the creators

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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.

of the Nuremberg tribunal were inspired by unimplemented plans for international criminal tribunals devised at the post-World War I Paris Peace Conference (1919–1920), a conflict out of which, presumably, the very idea of international criminal tribunals emerged.[3] In the present article, we aim to show that international criminal tribunals existed long before 1919. Indeed, even though the participants of the Paris Peace Conference maintained that international criminal tribunals were unprecedented, they were actually aware of – indeed, influenced by – earlier precedents. Consequently, neither 1945 nor 1919 can accurately be described as the beginning of ICL. Each of those moments was felt by many, in its time, as being such a starting point, but we contend that this was only because each was followed by an episode of active disremembrance, in the sense of a low-key, small-scale intentional forgetting or mis-portrayal.

More specifically, we hypothesize that the narrative was formed through a domino effect prompted by individuals editing the past to suit their personal agendas (to promote a certain personal image, to achieve a political goal and so on). We believe these disparate, unrelated agendas were not orchestrated but nevertheless culminated in layers of disremembering that eventually formed a new narrative that was coherent enough to be readily replicated. That is, the cumulative impact of individuals' deliberate disremembrance and partial misrepresentation to pursue their own small-scale agendas worked to tip the balance towards a new shared account of events that then became embedded. Significant elements of ICL history were lost through this process. As earlier research has already uncovered,[4] the history of international crimes other than piracy was forgotten after World War II, whereas – as we argue in the framework of the present study – the history of international criminal tribunals was forgotten after World War I. The 1919-conception/1945-birth narrative is the combined result of a dual disremembrance.

Our overall objectives in the present article are (i) to show that the elements of historical continuity that we uncover are of sufficient significance that it is conspicuous that no continuity narrative has been attempted by international lawyers and (ii) to offer an explanation as to why an antithetical narrative has emerged, denying ICL recognition of an earlier origin. In deconstructing this narrative, we provide evidence of the disremembrance at play. Here, we do not seek to designate a moment of conception or birth for international criminal tribunals or, indeed, ICL more broadly. In stating this caveat, we consider that, despite the elements of historical continuity that we expose, any historical account – including ours – is necessarily a simplification[5] of a transition that, like all transitions, contains simultaneous elements of continuity and discontinuity.[6] We thus aim to expose elements absent in existing accounts and present our hypothesized reasons for this absence.[7]

3 W.A. Schabas, *The Trial of the Kaiser* (2018), at 1–22, 298.

4 See the sources cited in section 2.B.

5 Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', 19 *Rechtsgeschichte* (2011) 152, at 176.

6 Alston, 'Does the Past Matter? On the Origins of Human Rights', 126 *Harvard Law Review* (*HLR*) (2013) 2043, at 2079.

7 Koskenniemi, *supra* note 5, at 176.

To position our research relative to what has been achieved to date, several directions of earlier research can be distinguished. First, for some ICL lawyers, the history of ICL and international criminal tribunals predates 1919.[8] These accounts, however, have been (justifiably) criticized, as they tend to provide insufficient evidence to back the proclaimed long historical continuity and disregard wide temporal gaps.[9] By contrast, while most ICL history literature is still '[w]ritten by lawyers writing as lawyers rather than historians',[10] a new wave of scholarship has demonstrated a deepened commitment to historical research methodologies.[11] Although much of that legal history scholarship exposes overlooked elements of historical discontinuity, the starting point of ICL is contended.[12] For example, based on previously neglected discontinuity elements, some scholars maintain that the tribunals in the 1990s mark the beginning of contemporary ICL.[13] Others hold that, despite such discontinuity elements, ICL history extends back to before the 1919-conception/1945-birth account because of historical continuity elements predating 1919.[14] This article builds upon the findings of the latter group, yet differs from those accounts.

Scholarship of the latter group has uncovered evidence irreconcilable with the narrative depicting traditional international law as rendering ICL impossible, even conceptually. Most important for our research, some of these scholars have uncovered: (i) two pre-1872[15] international criminal tribunal proposals[16] and (ii) four pre-World War I (1894–1904) cases of international criminal tribunals.[17]

[8] See, e.g., Fichtelberg, 'Criminal Tribunals', in *Oxford International Studies*, 30 June 2020, available at https://doi.org/10.1093/acrefore/9780190846626.013.42; Schwarzenberger, 'A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474', *Manchester Guardian* (28 September 1946).

[9] M.C. Bassiouni, *Introduction to International Criminal Law* (2nd edn, 2012), at 29; Lesaffer, 'International Law and Its History: The Story of an Unrequited Love', in M. Craven *et al.* (eds), *Time, History and International Law* (2007) 27, at 34–35.

[10] Mégret, 'International Criminal Justice History Writing as Anachronism', in I. Tallgren and T. Skouteris (eds), *New Histories of International Criminal Law* (2019) 72, at 72 (developing ideas first presented in Mégret, 'International Criminal Justice as a Peace Project', 29 *European Journal of International Law* (*EJIL*) (2018) 835).

[11] See Mégret, 'Anachronism', *supra* note 10, at 72.

[12] See, e.g., Mégret and Tallgren, 'Introduction', in F. Mégret and I. Tallgren (eds), *Dawn of a Discipline* (2020) 1, at 1–2; Schwöbel-Patel, 'The Core Crimes of International Criminal Law', in K. J. Heller *et al.*, *Oxford Handbook of International Criminal Law* (2020) 768, at 778.

[13] See, e.g., Schwöbel-Patel, *supra* note 12.

[14] See sources cited in notes 16–20 below.

[15] According to the dominant narrative, it was in 1872 that the idea of an international criminal tribunal was first even contemplated. See note 31 below and accompanying text.

[16] 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.

[17] 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

Nevertheless, few stray too far from the prevailing narrative concerning traditional international law, downplaying their findings as isolated '[late] nineteenth century [ICL] experiments'.[18] Only very few conclude, in light of these[19] or other[20] findings, that there exists a longer or less sporadic international criminal tribunal-related history prior to World War I. Yet, to date, little evidence has been presented connecting the various pre-World War I endeavours or relating them to events in the World War I era and to developments later in the 20th century.[21]

Cognisant of these elements and of significant continuity elements extending from 1919 onwards, many legal history scholars consider neither the 19th century nor the 1990s to mark the beginning of ICL, adopting a nuanced version of the 1919-conception/1945-birth account.[22] These scholars acknowledge, at most, only weak connections to earlier international criminal tribunal endeavours[23] and maintain that the ostensibly limited nature of such endeavours only proves that '[t]he ideological tenet of state sovereignty was [contemporaneously] dominant'.[24] We believe that the links between pre- and post-1919 endeavours are much more significant than presently acknowledged. We also dispute the premise that 'traditional' international law inhibited the establishment of international criminal tribunals. As we aim to show (and have extensively elaborated upon elsewhere),[25] such tribunals were featured throughout the century prior to World War I. In section 2 of this article, we confront evidence for the 1919-conception/1945-birth narrative with our

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Pre-Birth": The 1894–1900 Trials of the Siamese, Ottomans and Chinese', in Bergsmo *et al.*, *supra* note 16, 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.

18 Brockman-Hawe, 'Accountability', *supra* note 17, at 685; see also Lemnitzer, *supra* note 17, at 931; Pritchard, *supra* note 17, at 32, 80–83; Brockman-Hawe, 'Supranational', *supra* note 17, at 71; Gordon, *supra* note 17, at 120; Brockman-Hawe, 'Constructing', *supra* note 16, at 244–245; Brockman-Hawe, 'Punishing', *supra* note 16, at 259.

19 See Brockman-Hawe, 'Punishing', *supra* note 16, at 117.

20 On certain late 19th-century scholarly developments, see Segesser, 'Hugh H.L. Bellot', in Mégret and Tallgren, *supra* note 12, 24, at 48; Hetherington, 'The Highest Guardian of the Child', 43 *Russian History* (2016) 275. A few went further back in time, considering some early 19th-century international punitive (but non-criminal) action to be the inception of the international criminal tribunal idea. G. Bass, *Stay the Hand of Vengeance* (2000), at 39 (regarding the extralegal punitive action taken against Napoleon); J.S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2014), at 114–157 (regarding the mixed commission courts).

21 Regarding the six aforementioned cases, this weakness is admitted even by the scholars who uncovered them (see note 194 below). Regarding the mixed commission courts, see Drescher and Finkelman, 'Slavery', in B. Fassbender and A. Peters (eds), *Oxford Handbook of the History of International Law* (2012) 890, at 904. Regarding Napoleon, see Schabas, *supra* note 3, at 3–4.

22 See, e.g., Mégret and Tallgren, *supra* note 12, at 3, 16; M. Lewis, *Birth of the New Justice* (2014), at 27.

23 See, e.g., Mégret and Tallgren, *supra* note 12, at 3, 16.

24 Lewis, *supra* note 22, at 14.

25 Bohrer and Pirker, 'International Criminal Tribunals during the Long Nineteenth Century and Beyond' (draft paper, on file with the authors; containing a much more comprehensive presentation of the history of international criminal tribunals, covering the period from the 12th century to the 19th century).

initial evidence to dispute this account in its norm-oriented version. In section 3, we argue that, contrary to that narrative (in its tribunal-oriented version), international criminal tribunals existed during the 19th and early 20th centuries. In section 4, we identify similar international criminal tribunal endeavours made during World War I. Finally, in section 5, we show that the participants of the Paris Peace Conference were not only aware of earlier international criminal tribunal endeavours but also influenced by them. We also theorize on how the participants laid the groundwork for the narrative underlying the 1919 conception.

Before proceeding, we must explain our methodology in classifying past organs as international criminal tribunals. We realize that there have been, and continue to be, several understandings of what amounts to an 'international criminal tribunal'.[26] In this article, we are interested in the phenomenon of judicial panels jointly created by several sovereigns – having been given a mandate to determine individual criminal responsibility – for the purpose of having those found guilty punished. We rely on these particular attributes for several reasons. First and foremost, during World War I and in its wake, organs with such attributes were often considered international criminal tribunals. Admittedly, this understanding was not universally shared, but this very divergence in opinions is a key issue in our examination of post-World War I events. Second, the selected attributes rely on relatively accepted and long-standing understandings of 'international'[27] and of 'criminal tribunal'.[28] For each of the pre-1919 organs included in our survey that presented both kinds of features, a plausible case can thus be made that it was considered, in its time, to be both an international tribunal and a criminal tribunal. Indeed, many of those pre-1919 organs were even explicitly called 'international tribunals/courts', and each was also referred to by terminology that makes it clear that it was regarded as a criminal tribunal (for example, described as conducting 'trials'). Third, we did not rely on any narrower definition of 'international criminal tribunal' because, during the periods under examination, very broad notions of ICL were predominant. Specifically, we could not include only those past organs that addressed crimes that might be familiar to an observer of modern international criminal tribunals because doing so would have risked overlooking the implications of temporal transformations in the concept of ICL (discussed in section 2). Clearly, in current legal history scholarship, transformations in the meaning of the concept of ICL or in the common understanding of what constitutes an 'international criminal tribunal' are often regarded as primary elements of historical discontinuity. But we aim here to demonstrate the existence of elements of historical continuity complementary to this perspective, showing that, just as recent international criminal tribunals have been influenced by the Nuremberg tribunal, and Nuremberg's architects were influenced by the Paris Peace Conference, so too were Paris Peace Conference participants influenced by the endeavours of earlier international criminal tribunals.

[26] See, e.g., the positions mentioned in note 241 below.

[27] See, e.g., J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1996), at 296 (circa 1789).

[28] See, e.g., B. Duignan, *The Judicial Branch of the Federal Government* (2009), at 73; S.W. Jenkins Jr, *Plea Bargaining and Its Consequences* (1974), at 15; R. O'Keefe, *International Criminal Law* (2015), at 48.

2 The 1919-Conception/1945-Birth Narrative

This narrative exists in two forms: a tribunal-oriented and a norm-oriented version. According to either version, the Nuremberg tribunal was both the first tribunal of its kind and the birthplace of ICL. The tribunal-oriented version, which is at the focus of this article, further holds that it was the creation of the Nuremberg tribunal as the first-of-its-kind tribunal that constituted the birth of ICL.[29] Supposedly, pre-1945, the purview of international law extended little beyond the state; excluding pirates, individuals were not subject to its order. In this traditional-statist international legal order, which peaked during the century leading up to World War I, international criminal tribunals were unacceptable. Moreover, for most of this period, they were not even conceivable.[30] The first proposal for an international criminal tribunal was made in 1872 by Gustave Moynier, president of the International Committee of the Red Cross (ICRC). While, theoretically, the common narrative considers Moynier's proposal innovative, it tends not to regard it as being the moment of conception of the international criminal tribunal idea because it 'remained without any political resonance', in practice.[31] Calls from civil society for such tribunals arose again during World War I, but, this time, they were followed by reluctant state endorsements culminating in the Paris Peace Conference following World War I (1919–1920). Presumably, that was the first occasion when international criminal tribunals were considered by state officials internationally. Hence, several plans were devised at the conference that could each have feasibly led to 'the first genuinely international criminal tribunal'.[32] While those plans were not implemented, they provided the inspiration for the Nuremberg tribunal. Thus, so the widely accepted account goes, if ICL and international criminal tribunals were born in 1945, they were conceived in 1919.[33]

A *Evidence in Support of the 1919-Conception/1945-Birth Narrative*

Considerable evidence seemingly supports this conception-birth narrative. While the idea of an international criminal tribunal was undoubtedly being discussed in civil society early in the war, the relevant, publicly known government documents began to appear in 1918. These sources include: (i) pro-tribunal reports of the British Governmental Committee of Enquiry into Breaches of the Laws of War, formed in 1918;[34] (ii) a pro-tribunal memo authored by Albert de Lapradelle and Ferdinand

[29] See, e.g., R. Cryer, *Towards an Integrated Regime for the Prosecution of International Crimes* (2001) (PhD dissertation on file at the University of Nottingham), at 314–315, available at http://eprints.nottingham.ac.uk/11305/1/364444.pdf. By contrast, the norm-oriented version holds that international criminal law (ICL) was born at Nuremberg, for a different reason. See note 60 below and accompanying text.

[30] Schabas, *supra* note 3, at 3–4; Wright, 'Proposal for an International Criminal Court', 46 *AJIL* (1952) 60, at 61.

[31] K. Ambos, *Treatise on International Criminal Law*, vol. 1 (2013), at 2.

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

[33] *Ibid.*, at 1–22, 297–299; Bassiouni, *supra* note 9, at 28–29.

[34] Committee of Enquiry into Breaches of the Laws of War, 'First, Second, and Third Interim Reports with Appendices', 26 February 1920 (first interim report was released on 13 January 1919), UK National Archives.

Larnaude from 1918, endorsed by the French government;[35] and (iii) the report of the Inter-Allied Commission established at the Paris Peace Conference (known as the Commission on Responsibility), entitled *Responsibility of the Authors of the War and on Enforcement of Penalties*, which expressed divided views (a pro-tribunal majority opinion and American and Japanese dissenting opinions).[36] This commission was deadlocked between a pro-tribunal majority headed by British and French delegates, including Larnaude, co-author of the French memo, and a tribunal-sceptic minority spearheaded by American delegates Secretary of State Robert Lansing and James Brown Scott.[37]

Contemporary statements concerning the novelty of international criminal tribunals also abound. The dissent of the American Commission on Responsibility is famed for declaring that for 'an international criminal court … a precedent is lacking … unknown in the practice of nations'.[38] The Japanese dissent concurred.[39] Tribunal proponents also commonly made such statements. Indeed, the pro-tribunal British committee, the French memo and the majority of the Commission on Responsibility all maintained, using different wording, that World War I's unprecedented nature demanded 'a tribunal of a novel character'.[40]

The opposition to international criminal tribunals seems to align with dominant contemporary jurisprudential views. For example, Lansing is assumed to have categorically opposed international criminal tribunals because he was a devout statist positivist and, thus, either: (i) honestly believed they 'violated existing international law'[41] or (ii) maintained that power and politics, 'not law, governed international relations' (and, therefore, not only dismissed international criminal tribunals but also accepted cynical behaviour as internationally legitimate).[42] The former explanation (honest belief) attributes to Lansing a heavily formalistic mindset of contemporary positivism that exaggerated the significance of existing law and legal classifications.[43] This explanation also ascribes to him adherence to contemporary dualism, a statist-positivist view that rejected ICL and international criminal tribunals because it maintained that only domestic law could address individuals. The latter (cynical) explanation attributes to Lansing a different contemporary statist-positivist view, one dismissing international law as law altogether. Indeed, many contemporaries considered World War I to constitute proof that international law either never was 'law' or had ceased to

35 A.G. de Lapradelle and F. Larnaude, *Examen de la Responsabilité Pénale de L'Empereur Guillaume II* (*French Memo*) (1918).

36 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14 *AJIL* (1920) 95.

37 Schabas, *supra* note 3, at 110–118.

38 'Commission on Responsibility Report', *supra* note 36, at 135.

39 *Ibid.*, at 151–152.

40 Committee of Enquiry, *supra* note 34, at 25; see also 'Commission on Responsibility Report', *supra* note 36, at 120; *French Memo*, *supra* note 35, at 20.

41 Lewis, *supra* note 22, at 47 (quoting Walter Schwengler).

42 J. Willis, *Prologue to Nuremberg* (1982), at 74.

43 M.J. Horwitz, *The Transformation of American Law, 1870–1960* (1992), at 17–19.

be such ('buried forever … on the battlefields').[44] Some even maintained that international relations were necessarily regulated by power politics, deeming international law to be a mere façade.[45]

Following the divided report from the Commission on Responsibility, the allied leaders negotiated a compromise, agreeing on three kinds of international criminal tribunals. This subsequently became enshrined in several post-World War I peace treaties. Article 227 of the Versailles Peace Treaty with Germany prescribed a special international criminal tribunal for the trial of the former German kaiser.[46] Article 230 of the Sèvres Peace Treaty with Turkey prescribed another international criminal tribunal for the trial of the perpetrators of the Armenian massacre.[47] This article sought to implement the formal Russian-French-British protest of 1915,[48] which announced the intention to hold Turkish government agents criminally responsible for their involvement in those 1914 'crimes … against humanity'.[49] In addition, Articles 228–229 of the Versailles Treaty, and similar provisions in other post-World War I peace treaties, prescribed military international criminal tribunals for the trial of certain war criminals.[50]

Although all three plans failed to materialize, each is significant. Article 227 has enjoyed the most scholarly attention.[51] The Sèvres Peace Treaty came the closest to being implemented, with the suspects being arrested but released without a trial.[52] Furthermore, the Joint Protest of 1915 is celebrated for 'coin[ing] the famous phrase "crimes against humanity"'[53] or, at least, for using it for the first time in its current meaning of mass atrocities perpetrated as international crimes.[54] Lastly, of these three post-World War I tribunal plans, the international military tribunals that were planned for the prosecutions of war crimes had the greatest influence on the designers

[44] La Fontaine, 'International Law and War', 3 *American Bar Association Journal* (1917) 165, at 165–166.

[45] Orford, 'Positivism and the Power of International Law', 24 *Melbourne University Law Review* (2000) 502, at 505–506.

[46] Versailles Peace Treaty 1919, 225 Parry 188.

[47] Treaty of Sèvres 1920, UK Treaty Series No. 11 of 1920.

[48] Bass, *supra* note 20, at 118.

[49] 'Note du Département à l'Agence Havas', 24 May 1915, in A. Beylerian (ed.), *Les Grandes Puissances: L'Empire Ottoman et les Arméniens dans les Archives Françaises* (1983) 29, at 29.

[50] 'Appendix: War Crimes Clauses of Peace Treaties of the First World War', in Willis, *supra* note 42, 177, at 177–181.

[51] This excessive focus is probably based on assumptions that, out of the three tribunal plans, this one was the strongest inspiration for the Nuremberg tribunal and that, unlike 'Joint (or Mixed) Military Tribunal[s,] … [it was a] true International Criminal Court'. Glueck, 'By What Tribunal Shall War Offenders Be Tried', 56 *HLR* (1943) 1059, at 1074. But this assumption is based on a distinction between these two kinds of tribunals that their designers did not see. The pro-tribunal delegates at the Paris Peace Conference insisted both kinds of tribunals equally constituted true criminal courts, and the American delegates, by contrast, maintained neither were such courts, insisting both were mere political organs. Moreover, in truth, it was not the Article 227-planned tribunal but, rather, the international military tribunal (war crime prosecution) scheme that most inspired Nuremberg (see note 55 below).

[52] Bass, *supra* note 20, at 135–144.

[53] *Ibid.*, at 118.

[54] A. Cassese, *International Criminal Law* (2003), at 40.

of the Nuremberg tribunal, as evident in the fact that Nuremberg was a military tribunal. One influential American memorandum from 1944 stated: 'Precedent strongly supports the establishment of mixed inter-allied military courts … [in the international criminal tribunal provisions of] the Treaty of Versailles … [and in s]imilar provisions … in the other 1919 peace treaties.'[55]

Willard Cowles, the author of the memorandum, later wrote: 'During WWII, 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.'[56] In response, the World War II Allies advanced three legal bases on which the Nuremberg tribunal was to be created, which brings us back to the norm-oriented and tribunal-oriented versions of the narrative. First, as evident from Cowles' memorandum, they maintained that the post-World War I tribunal plans constituted legal precedents, notwithstanding their failure to materialize. Second, they argued (similarly to their World War I predecessors) that the unprecedented nature of World War II demanded the creation of a 'novel and experimental [tribunal]'.[57] Third, they pointed to the severity of the wrongs tried at the Nuremberg tribunal as grave international crimes. Their perpetrators, like those of piracy – the archetypical international crime – were deemed international outlaws and enemies of mankind, punishable, as such, by all.[58]

The tribunal-oriented version of the 1919-conception/1945-birth narrative rests on the first and second bases, maintaining that the creation of the Nuremberg tribunal constituted the birth of ICL, inspired by unimplemented post-World War I tribunal plans.[59] The piracy-analogy (norm-oriented) version hinges on the second and third bases, maintaining that it was not the creation of the first international criminal tribunal that constituted the birth of ICL but, rather, the emulation, at Nuremberg, of the enemies-of-mankind doctrine of piracy law and its application, for the first time, to wrongs that would come to be known as 'core international crimes' (war crimes, crimes against humanity, aggression and genocide).[60] Even under the norm-oriented (piracy-analogy) version, World War I is still commonly considered the moment of the conception of ICL. The horrors of World War I ostensibly contributed to the realization that the efficacy of the law of war depended on adding a mechanism to its state-targeted enforcement mechanisms that was equipped to hold individuals who violated these laws criminally responsible. That is, the law of war violations must become international crimes – war crimes. World War I also ostensibly marked the beginning of fledgling attempts to internationally criminalize not only war crimes but

[55] US Representatives, UN War Crimes Commission, 'Trial of War Criminal by Mixed Inter-Allied Military Tribunals' ('1944 Memo'), 31 August 1944, at 3–4, available at www.legal-tools.org/doc/e5f070/; see also Cowles, 'Trials of War Criminals (Non-Nuremberg)', 42 *AJIL* (1948) 299, at 312–313.

[56] Cowles, *supra* note 55, at 318.

[57] Jackson, 'Opening Statement (21 November 1945)', 2 *Trial of the Major War Criminals before the International Military Tribunal* (*TMWC*) (1947) 98, at 99.

[58] *Ibid.*, at 144–149; '1944 Memo', *supra* note 55, at 7.

[59] See, e.g., Cryer, *supra* note 29, at 314–315.

[60] See, e.g., G. Simpson, *Law, War and Crime* (2007), at 8, 162.

also all categories of acts currently considered core international crimes and to render such acts legal analogues of piracy.[61]

The legal concept of piracy had developed even earlier, as the first and possibly only pre-World War II international crime, because it served the interests of states.[62] Presumably, the enemies-of-mankind doctrine that transformed piracy into an international crime had developed in tandem with the 'birth' of the state (meaning both developments occurred either in the 17th or long 19th century, depending on whom you ask).[63] The lengthier legal history of piracy is reconcilable with the Nuremberg tribunal's constituting ICL's beginning because the norm-oriented version relies on a particular understanding of ICL, according to which 'ICL' (as opposed to a broader concept of 'transnational criminal law') is strictly defined as the corpus that addresses only core international crimes.[64] This core-international-crimes definition of ICL currently enjoys considerable popularity, despite the compelling criticism that some have voiced against it (questioning whether it has been a stable category)[65] and despite a plethora of alternative definitions of ICL.[66]

B *Evidence Contrary to the Narrative in Its Norm-Oriented Version*

Unlike the rest this article, which addresses the tribunal-oriented version of the 1919-conception/1945-birth narrative, this section and the subsequent one (that is, section 1.C) address its norm-oriented version. But this is not a deviation. The exposure of misconceptions embedded in this version allows us to present the normative universe that truly existed at the time when international law was supposedly averse to international criminal tribunals. Thus, it provides necessary information on the context in which the tribunals subsequently surveyed in the article operated. Additionally, it enables us to demonstrate where important elements of continuity existed between the tribunals surveyed here and later tribunals despite changes that occurred in the understanding of what constitutes ICL. Lastly, the discourse mechanisms that are shown in this examination to have played a key role in the development of the norm-oriented version of the 1919-conception/1945-birth narrative are shown later in the article to have also played a role in the development of the tribunal-oriented version of that narrative.

[61] *Ibid.*, at 8; see also Schabas, *supra* note 3, at 122.

[62] The slave-trading prohibition also possibly played a role in pre-World War II ICL history. *Cf.* Martinez, *supra* note 20, at 114–157; Schabas, *supra* note 3, at 121–122; G. Verdirame, *The UN and Human Rights* (2001), at 43.

[63] Schabas, *supra* note 3, at 121; Liss, 'Crimes against the Sovereign Order: Rethinking International Criminal Justice', 113 *AJIL* (2019) 727, at 758; see also A.P. Rubin, *The Law of Piracy* (1988), at 1–120; Benton, 'Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction', 23 *International Journal of Maritime History* (2011) 225, at 227–233.

[64] See Boister, 'Transnational Criminal Law'?, 14 *EJIL* (2003) 953, at 954.

[65] Schwöbel-Patel, *supra* note 12, at 769–773; Mégret, 'The Unity of International Criminal Law: A Socio-Legal View', in Heller, *supra* note 12, 811, at 812–831; Greenawalt, 'What Is an International Crime?', in Heller, *supra* note 12, 791, at 794–796; Guilfoyle, 'Transnational Crimes', in Heller, *supra* note 12, 791, at 791–810.

[66] R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2007), at 1.

The norm-oriented version of the 1919-conception/1945-birth narrative maintains that ICL, in its core-international-crime definition, was born at the Nuremberg tribunal as a result of the transplantation to that newly formed corpus of the enemies-of-mankind doctrine of piracy law. While this account is popular, criticism of it has been presented in recent years. Some argue that World War I, and not 1945, should be regarded as the birthdate of ICL (in its aforesaid definition), stressing the significance of sources from World War I in which the perpetrators of acts currently called core international crimes were deemed enemies of mankind or pirate-like.[67] Others push in the opposite direction: critics of the core-international-crime definition of ICL point out that this definition became popular in the mid-1990s under the influence of the adoption of the Rome Statute of the International Criminal Court and that, up until then, there had been considerable support for a broad positivist understanding of ICL as encompassing any crime that states considered a common concern.[68] Therefore, they conclude that the core-international-crimes definition of ICL had developed only in the mid-1990s and was 'backdated' to Nuremberg to fashion a pedigree.[69] Some individuals further conclude that there is discontinuity between what had been understood as 'ICL' until the mid-1990s and what has been understood as such since (that is, they conclude that current ICL was only born in the mid-1990s).[70]

We contend that a more nuanced account of the development and rise to prominence of the core-international-crimes definition of ICL should arguably best be described as a drawn-out, meandering process that remains unfinished to this day. In the trajectory of this definition, early signs of that newer understanding had already appeared during World War I, and the Nuremberg tribunal and the mid-1990s constituted important stepping stones along the way. In short, changes in dominant understandings of the concept of ICL have arguably been much more protracted, incomplete and non-linear than commonly thought.

The mid-1990s-birth conclusion neglects the fact that the broad positivist understanding of ICL still enjoys some support.[71] Furthermore, it does not take sufficient account of the fact that the proclaimed boundaries between international and transnational criminal law remain blurred.[72] Most importantly, it disregards the fact that the core-international-crimes definition of ICL had emerged out of a legal discourse in which the broader positivist understanding of ICL previously prevailed.[73] All of these circumstances suggest significant links between those divergent understandings of ICL.[74] In addition, note that, from the wake of World War II onwards, sources can be found that defined ICL as addressing only war crimes, crimes against

[67] See, e.g., Schabas, *supra* note 3, at 122.

[68] Rome Statute of the International Criminal Court 1998, 2187 UNTS 90; see sources cited in note 65 above.

[69] See, e.g., Schwöbel-Patel, *supra* note 12, at 776–783; Mégret, *supra* note 65, at 815–817.

[70] See, e.g., Schwöbel-Patel, *supra* note 12.

[71] See Mégret, 'Anachronism', *supra* note 10, at 78–79.

[72] See sources cited in note 65 above.

[73] Mégret, *supra* note 65, at 831; see also Guilfoyle, *supra* note 65, at 794–798.

[74] See sources cited in note 73 above.

humanity, aggression and genocide, while embracing the piracy-analogy account.[75] The existence of such earlier sources does not align well with the idea that both the international-crimes definition of ICL and the norm-oriented version of the 1919-conception/1945-birth narrative are mid-1990s innovations.

The 1919-conception/1945-birth narrative does not fair better. At the heart of this narrative, in its norm-oriented version, lies the premise that the enemies-of-mankind doctrine was, indeed, copied from piracy law. But post-World War II sources suggest that, at the time, the analogy to piracy merely sought to highlight that the enemies-of-mankind doctrine had also long been applied to war criminals. The aforementioned memo from 1944, 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'[76] and that 'for the past century at least war crim[inals] have been considered … "enemies of mankind" [and] … "outlaws"'.[77] Similarly, in 1950, Hersch Lauterpacht stated that 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'.[78] Such sources call into question not only the 1919-conception/1945-birth narrative but also the competing 1919 birth account.

The legal practice deeming pirates enemies of mankind and universal outlaws can actually be traced back to late mediaeval Europe.[79] Those proclaiming a later birthdate tend to be overly motivated to show a correlation between what was presumed to be the first international crime and an imagined birthdate of the state.[80] In reality, the rise of states in European and Western societies was a lengthy process stretching from the Late Middle Ages to the 19th century.[81] During that prolonged period, the jurisprudence made 'no sharp distinction between international and national law. Individuals possessed legal personality … under both'.[82] The law of nations was not perceived merely as a 'law between nations … but a law so instinctive … as to be found in every nation'.[83] Accordingly, alongside piracy, various other wrongful acts,

[75] See, e.g., Treves, 'Jurisdictional Aspects of the Eichmann Case', 47 *Minnesota Law Review* (1962–1963) 557, at 570; see also Wright, 'War Criminals', 39 *AJIL* (1945) 257, at 263–285; C.A. Pompe, *Aggressive War* (1953), at 338, 346, 355–356; Supreme Court (Israel) 336/61 *Eichmann v. Israel A.G.*, 15 P.D. (1962) 1033, paras 10–13 (Hebrew).

[76] '1944 Memo', *supra* note 55, at 7.

[77] *Ibid.*, at 4; see also Jackson, *supra* note 57, at 144–149.

[78] 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).

[79] Sohmer-Tai, 'Marking Water: Piracy and Property in the Pre-Modern West', in J. Bentley *et al.* (eds), *Seascapes, Littoral Cultures, and Trans-Oceanic Exchanges* (2007) 205, at 205–220.

[80] See, e.g., Schabas, *supra* note 3, at 121 (relying on the 17th-century-state-birth myth); Liss, *supra* note 63, at 758 (treating the 19th-century culmination of the rise of the state as its beginning).

[81] A. Phillips, *War, Religion and Empire* (2010), at 136–137; Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 17 *Quinnipiac Law Review* (1998) 99, at 119.

[82] J. Dunoff *et al.*, *International Law: Norms, Actors, Process* (2006), at 403.

[83] B. Jarrett, *Social Theories of the Middle-Ages 1200–1500* (1968), at 15; see also Goodrich, 'The International Signs Law', in A. Orford and F. Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (2016) 365, at 365–373.

including war crimes and *jus ad bellum* violations, were considered universal crimes ('crimes against the law of nations'), and their perpetrators were regarded as enemies of mankind, universal outlaws and disturbers of the public peace (all synonymous) that were subject, as such, to universal jurisdiction.[84] Even felonies, such as murder, arson and rape, were deemed 'crimes … against the law of nations'[85] (and, correspondingly, felons were '[e]nemies of Mankind').[86] Thus, in many European judicial systems, felonies were considered subject to universal jurisdiction.[87]

The jurisprudential justifications for this broad doctrine of universal crimes – the boundaries of its actual (versus imagined-universal) application – and the universality of specific crimes have all changed over time in a non-linear and not necessarily progressive trajectory. Nevertheless, a broad perception of universal crimes, reliant on the enemies-of-mankind doctrine, long persisted.[88] This view was likely necessary to facilitate joint or otherwise interwoven criminal justice systems[89] in a Europe that remained, from late mediaeval times until the early 19th century (albeit decreasingly so), a '"patchwork of overlapping and incomplete rights of government" … in which "different juridical instances were … interwoven"'.[90]

During the 19th century, most crimes previously considered to be universal ceased to be so after post-Napoleonic settlements diminished European 'overlapping and shared authorities'[91] and also as a consequence of the rise of statist-positivist jurisprudence, according to which criminal law, if not all law, must necessarily be domestic and formally legislated.[92] Yet jurists who wished to reconcile ICL with positivism developed a positivist substitute for the previously naturalist perspective, which, instead of viewing all crimes purportedly common among the nations as universal, treated ICL as a vehicle to address any crime that was actually of common concern between nations. This broad positivist definition of ICL became rather commonly endorsed in ICL

[84] Bohrer, 'International Criminal Law's Millennium of Forgotten History', 34 *Law and History Review* (2016) 393, at 422–429, 456–461; see also W. Rech, *Enemies of Mankind* (2013), at xiv; Draper, 'Modern Pattern of War Criminality', 6 *Israel Yearbook on Human Rights* (1976) 9, at 10–14.

[85] J. Elliot, *American Diplomatic Code*, vol. 2 (1834), at 402.

[86] Old Bailey, *Ordinary's Account*, 16 June 1731 (England), available at http://www.oldbaileyonline.org/browse.jsp?id=OA17310616&div=OA17310616#highlight.

[87] Bohrer, *supra* note 84, at 426–427; F.F. Martens, *Traité de Droit International*, vol. 3 (1883–1887) at 7–9; Akehurst, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (*BYBIL*) (1972–1973) 145, at 163; Voltaire, *Philosophical Dictionary* (1764), translated by W. Dugdale (1843), at 263. Western and European judicial systems not applying universal jurisdiction (see, e.g., English common law) still considered felonies universal crimes (see, e.g., notes 85–86) but considered their courts' jurisdiction to be territorially bound. See G. Duby, *Chivalrous Society* (1977) at 57, 124–126. Accordingly, in such systems, felons could be extradited without extradition treaties on the premise that such 'offences made the criminal a universal outlaw, and … enemy of mankind'. B. Miller, 'Emptying the Den of Thieves: International Fugitives and the Law in British North-America/Canada, 1819–1910' (2012) (PhD dissertation on file at the University of Toronto), at 49, available at https://tspace.library.utoronto.ca/bitstream/1807/32772/3/Miller_Bradley_J_201206_PhD_Thesis.pdf.

[88] Bohrer, *supra* note 84, at 404–418.

[89] For pre-19th-century joint criminal tribunals, see notes 146, 148, 160, 169 below.

[90] Ruggie, 'Territoriality and Beyond', 47 *International Organization* (1993) 139, at 149–150.

[91] J. Branch, *The Cartographic State* (2013), at 31–32.

[92] Bohrer, *supra* note 84, at 406–407.

discourse by the late 19th century (and continued to enjoy considerable popularity until the mid-1990s and still enjoys some support to this day).[93] Furthermore, the 19th-century 'shift from naturalism to positivism … [was] mess[y] and incomplet[e]'.[94] Accordingly, residual features of the naturalist understanding of ICL persisted: piracy and war crimes remained international crimes; a notable minority position insisted that aggression also remained such a crime and universalist perceptions even endured, in some circumstances, with regard to felonies.[95]

Just as there are significant elements of historical continuity between ICL as it existed when the broad positivist definition of it prevailed and ICL as it previously existed when the universalist-naturalist perspective prevailed, such elements are also present between present-day ICL (with a core-international-crimes understanding of it being dominant) and earlier ICL. Beyond the presently predominant definition of ICL as the result of a protracted, non-linear (and incomplete) process, the growing camp of jurists embracing the new understanding of ICL did not refashion it from scratch. Notably, as the core-international-crimes understanding of ICL began to develop during the period between World War I and the aftermath of World War II, much was drawn from norms originating from the initial naturalist understanding of ICL that persisted despite the rising influence of positivism. Regarding aggression, for example, '[a]lthough the … Versailles [Treaty] broke with existing … practice … it drew on a pre-existing conception of aggression as a[n international law] violation' that persisted 'during the 19th century … remain[ing] deeply rooted in the *jus ad bellum* of the early-modern age, which in turn had its roots in late-medieval scholarship'.[96] Likewise, there are elements of continuity, now largely forgotten, between the past perception of felonies as universal crimes and the current concept of crimes against humanity.[97] The legal rule deeming law-of-war violations to be international crimes (that is, 'war crimes') is the persistent norm of naturalist origins with the most significant influence on the initial stages of the new understanding of ICL. Statist positivists sought to abolish the positioning of war crimes as international crimes by (misleadingly) asserting that the relevant international law either applied only to states or was not truly law. Yet war crimes remained international crimes, mainly because they had long been enforced by European and Western military justice systems. That such systems were relatively autonomous and resistant to change helped shield them from statist positivism.[98] When, based on statist-positivist precepts, Nuremberg defendants argued they were not liable for violating the Hague Convention because it referred only to states and not individuals, as the judges responded: 'For many years past … military tribunals have tried and punished individuals guilty of violating the … [customary]

[93] Hetherington, *supra* note 20, at 277–278; Mégret, 'Anachronism', *supra* note 10, at 78–79.
[94] Miller, *supra* note 87, at 40.
[95] See subsection 3.B.
[96] Lesaffer, 'Aggression before Versailles', 29 *EJIL* (2018) 773, at 777.
[97] See subsection 3.B.
[98] Bohrer, *supra* note 84, at 464–465.

law of war.'[99] Statist-positivist claims regarding the nature of international law became widely misconceived as accurate depictions of pre-Nuremberg international law only sometime after World War II. Thus, we believe the Nuremberg tribunal was misconstrued as the first application of the enemies-of-mankind doctrine to war crimes, purportedly transplanted from piracy law after the failure of reliance solely on norms targeting states to enforce the law of war.[100]

C *Uncovering Reasons for Disremembrance*

How is it conceivable that all these significant elements could fall into oblivion? Various factors have contributed to the disremembrance of the pre-World War II history of international crimes other than piracy. Two significant reasons stem from how several proponents of ICL went about advocating for it after World War II, taking distinct approaches that can be termed novelty bolstering and see-saw reasoning. Recent historical research has shown that, post-World War II, some pro-ICL jurists avoided crediting, and actively discredited, earlier (pre-war) jurists 'to exaggerate the[ir own] novelty',[101] while others were 'often only inspired by the will to innovate rather than truly innovative'.[102] See-saw reasoning can be demonstrated in the ambivalence towards piracy conveyed by the present-day narrative. On the one hand, the current narrative relies on Piracy, which is presumed to be an earlier international crime, as a semi-precedent for present-day ICL (in the sense of core international crimes). The supposedly earlier application of the enemies-of-mankind doctrine to pirates is adduced as proof that the notion of international crime was not inconceivable even before 1945. On the other hand, the current narrative distinguishes piracy law from ICL. Purportedly, according to one of the most common versions of that narrative, while piracy became an international crime merely to protect state interests, present-day ICL prohibitions have become international crimes to protect universal values.[103] Such a form of reasoning has been observed elsewhere in ICL and was termed 'see-saw' by Janet Halley because of its simultaneous reliance on an earlier legal experience as a semi-precedent and distinction between the prior event and current action (often by negatively portraying the former).[104] As we will show, novelty bolstering, combined with see-saw reasoning, also played a key role in the post-World War I disremembrance of earlier international criminal tribunal history.

[99] 'Nuremberg Judgment, 1 October 1946', 1 *TMWC* (1947) 170, at 220–221. Hague Convention (No. VI) Respecting the Laws and Customs of War on Land and Annexed Regulations, 1907, 205 Parry 305

[100] Bohrer, *supra* note 84, at 470–480.

[101] Mamolea, 'Vespasian V. Pella', in Mégret and Tallgren, *supra* note 12, 49 at 82 (referring to Raphael Lemkin).

[102] Laguel and Scalia, 'Jean Graven', in Mégret and Tallgren, *supra* note 12, 358, at 373.

[103] Boister, *supra* note 64, at 965; Schabas, *supra* note 3, at 121–122.

[104] 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.

3 The 19th Century

This section aims to show that international criminal tribunals were conceivable throughout the century leading up to World War I. The first subsection surveys unimplemented 19th- and early 20th-century proposals for international criminal tribunals. Each subsequent subsection presents one of the main categories of actual contemporary international criminal tribunals. These categories are non-exclusive, so some tribunals are mentioned in more than one subsection.

A *Tribunal Proposals*

Various proposals for international criminal tribunals predate Moynier's proposal,[105] and more were formulated between 1872 and World War I.[106] We survey only a few of these proposals here, based on their links to World War I-era events.[107] Preceding Moynier's proposal by more than a decade, 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.[108] Initially, at least some of those involved envisioned that this commission would be what we can term an international commission of inquiry with international criminal tribunal authority (that is, an organ that serves as an international criminal tribunal in addition to, or instead of, being an international investigative organ).[109] But the parties eventually agreed that the Syrian commission would not serve as an international criminal tribunal and limited its authority accordingly. Consequently, we consider this case to be merely propositional. Nevertheless, the Syrian commission partook in the criminal investigation and wielded considerable influence over whom to prosecute and what punishment to impose on those convicted.[110] The 1860 international intervention in Syria was a pivotal stepping stone in the development of the modern understanding of the idea – itself, of older origins – that protecting 'humanity', in the sense of countering atrocities, justified military intervention.[111] The Syrian commission, specifically, served as an inspiration for the contemplation of responses to later atrocities,[112] including propositions for international criminal tribunals.[113]

[105] See, e.g., J. Mill, *Law of Nations* (1825), at 27–33; J. Sartorius, *Organon des vollkommenen Friedens* (1837), at 231–241; see also the scholarly proposals mentioned in note 116 below.

[106] See, e.g., Lorimer's 1877 proposal (see note 116 above) and Dumas's 1905 proposal (see note 117 below).

[107] These links are presented in sections 4 and 5.

[108] See *in extensor*, Brockman-Hawe, 'Constructing', *supra* note 16.

[109] Brockman-Hawe, 'Constructing', *supra* note 16, at 210–214, 232.

[110] *Ibid.*, at 215–229.

[111] 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, 22 October 1867', 10 *Archives Diplomatiques* (1868) 673, at 673–676.

[112] See, e.g., 'Le Baron de Prokesch, au Baron de Beust, 17 May 1867', 10 *Archives Diplomatiques* (1868) 493, at 493 (a proposed international commission of inquiry without criminal tribunal authority inspired by the Syrian commission, as part of a contemplated intervention in Crete).

[113] See, e.g., Brockman-Hawe, 'Constructing', *supra* note 16, at 246–247 (a proposal for an international commission of inquiry with international criminal tribunal authority, following the 1876 'Bulgarian horrors', inspired by the Syrian commission).

Another noteworthy proposal was put forward a decade after the Syrian commission and two years before Moynier's proposition. In 1870, German Chancellor Otto von Bismarck unsuccessfully called for the appointment of 'an International Court for the trial of all those who have instigated the [Franco–German] war'.[114] And other proposals were made. One important source for identifying such proposals was the influential 1881 book *Le Tribunal International*, by Leonid Kamarovsky, a leading figure in the campaign for a permanent international arbitration tribunal. While Kamarovsky opposed granting that tribunal criminal jurisdiction,[115] his book surveyed various earlier international tribunal ideas, including scholarly proposals for an international criminal tribunal.[116] An important proposal for an international criminal tribunal was made in the context of the decades-long campaign for a permanent international arbitration tribunal, by French jurist Jacques Dumas in 1905. Contrary to Kamarovsky, Dumas argued that, in the aspired-to international arbitration tribunal, 'it is necessary to institute criminal sanctions',[117] crediting Moynier's proposal as inspiration.[118] Dumas adapted his proposal during World War I, calling for its application against German war criminals, again relying explicitly on Moynier.[119]

B *Intervention-related Tribunals*

In some interventions, perpetrators were punished – at least occasionally – by international criminal tribunals.[120] We briefly recall the reasons for such interventions before discussing two such cases. The legal justification for various 19th-century interventions was not only the need to stop mass atrocities but also the need to punish perpetrators of, broadly conceived, crimes against humanity. The aforementioned 1860 Syrian atrocities were contemporaneously referenced as such,[121] demonstrating that neither that term nor its present atrocity-related meaning was born in 1915.[122] In fact, the term even appears much earlier than 1860. For centuries, it and similar terms were used to refer to universal crimes,[123] including war crimes[124] and piracy.[125]

[114] M. Busch, *Bismarck: Some Secret Pages of His History* (1898), at 189; see further Brockman-Hawe, 'Punishing', *supra* note 16.

[115] L. Kamarovsky, *Le Tribunal International* (1881), at 513–519.

[116] *Ibid.*, at 386 (Sartorius, 1837), 388–389 (Bara, 1849), 403–416 (Moynier, 1872), 391–393 (Lorimer, 1877).

[117] J. Dumas, *Les Sanctions de L'Arbitrage International* (1905), at 271, 287.

[118] *Ibid.*, at 271–272.

[119] J. Dumas, *Les Sanctions Pénales des Crimes Allemands* (1916), at 50–93.

[120] Bohrer, *supra* note 84, at 474.

[121] 'Communication Made by Abro Efendi to the Members of the Syrian Commission', 34(2) *Accounts and Papers of the House of Commons* (1861) 86, at 87; see further Brockman-Hawe, 'Constructing', *supra* note 16, at 182, 234–236.

[122] Bohrer, *supra* note 84, at 462, 472–473.

[123] *Ibid.*

[124] See, e.g., M. Kelly, *Cambrensis Eversus* (written in 1662), vol. 3.1 (1851), at 201; Voltaire, *supra* note 87, at 557.

[125] See, e.g., T. W. Williams, *The Whole Law Relative to the Duty and Office of a Justice of the Peace*, vol. 2 (1794), at 36.

Felonies, too, had long been termed crimes against humanity[126] and were also called common law crimes and common crimes, meaning crimes common to all nations.[127]

The present meaning of crimes against humanity developed along a drawn-out, circuitous trajectory, much of which had occurred within the context of 19th-century 'humanitarian' interventions.[128] As part of the messy transition from natural law to positivism, throughout that century, international lawyers preserved residual reliance on 'natural law [notions] … especially … in the case of humanitarian intervention'.[129] Atrocities comprise violent acts gravely harmful to life, limb and property, which are intuitively regarded as murder, theft, robbery, arson and rape – acts long considered felonies and war crimes by European-Western natural law jurisprudence and, thus, crimes against humanity in the sense of universal crimes. Because of the continued residual reliance on natural law reasoning in matters of 'humanitarian' intervention, the perception of felonies and war crimes as universal crimes persisted and provided the legal justification for interventions to punish their perpetrators.

As a first example case, in 1882, during a revolt against the Egyptian government (the Khedive), anti-Christian atrocities were committed and contemporaneously described as 'crimes against humanity'.[130] The atrocities, in combination with colonialist motivations, triggered a military intervention by British forces that subdued the revolt and subsequently remained in Egypt. Britain denied this was a military occupation, maintaining it had entered Egypt as an ally of the Khedive and intended to respect its sovereignty.[131] Consequently, various atrocity-perpetrating rebels were tried in proceedings expressing that (initial) proclamation of respect for Egyptian sovereignty. Some were tried by mixed British-Egyptian courts martial – that is, by international criminal tribunals.[132] For others, the Egyptian government instituted a procedure resembling the one implemented in Syria in 1860. It involved a criminal investigation and preliminary determination of culpability by international commissions of inquiry and a subsequent trial and sentencing by special Egyptian military tribunals.[133] The leader of the revolt, Ahmed Urabi (Arabi Pasha), was among those charged 'before a mixed court composed of British and Egyptian officials' (that is, an international criminal tribunal),[134] both for treason-related domestic crimes and for atrocity-related

[126] P. Ayrault, *Opuscules et Divers Traictez* (1598), at 250.

[127] K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2009), at 94.

[128] Bohrer, *supra* note 84, at 471–478.

[129] Heraclides, 'Humanitarian Intervention in International Law 1830–1939: The Debate', 16 *Journal of the History of International Law* (2014) 26, at 28.

[130] *Hansard House of Commons Debates*, 25 July 1882, at 1709.

[131] A.M. Genell, 'Empire by Law: Ottoman Sovereignty and the British Occupation of Egypt, 1882–1923' (2013) (PhD dissertation on file at Columbia University), at 41, available at https://academiccommons.columbia.edu/doi/10.7916/D8J67GH7.

[132] E. Baring, *Modern Egypt*, vol. 1 (1916), at 337–339; A. Haynes, *Man-Hunting in the Desert* (1894), at 227–235.

[133] 'Egyptian Decrees, 19 September 1882', 73 *British and Foreign State Papers* (1881–1882) 1125, at 1125–1127.

[134] *Newcastle Morning Herald* (16 October 1882), at 2; see also Labouchère, Truth, 19 October 1882 (discussing possible war-crime proceedings 'against Arabi by an International Court-Martial').

international ones ('against the laws of war and in violation of the right [that is, law] of nations').[135] But, after a renewed demand by the Egyptian government to have his trial conducted before domestic judges, it was agreed that Urabi would plead guilty to treason in a domestic Egyptian military court and be exiled.[136]

The second noteworthy tribunal case occurred during the intervention in the Boxer Rebellion (1900–1901). That event, rightly infamous for its colonial overtones and Western atrocities, was also a joint, eight-state military intervention intended to stop the massacre of 30,000 Chinese Christians and about 200 foreigners and to bring the perpetrators to justice.[137] In 1900 (15 years before the three-state Armenian Massacre Joint Protest), 11 states, including the intervening allies, dispatched a 'joint note' to China, demanding the punishment of the principal perpetrators of the Boxer atrocities, which they referred to as 'crimes against the law of nations, against the laws of humanity'.[138] Here, unlike after the Armenian massacre, an international criminal tribunal was created. At Pao-Ting-Fu, a British-German-Italian-French military commission of inquiry with international criminal tribunal authority tried and punished several atrocity perpetrators.[139] The commission, thus, served as an 'international court-martial'.[140] The intervening Allies also considered having the principal perpetrators tried by an international criminal tribunal, but, eventually, agreement with China was reached involving a commission of representatives of the powers in Peking. Although the autonomous punitive powers of that commission were considerable (greater even than those of the Syrian commission), contemporaries did not, to the best of our knowledge, consider it to be an international criminal tribunal. One likely reason is that the commission did not conduct any trial proceedings before determining culpability and punishment.[141]

During the 19th century, the view that felonies were universal crimes also continued to be applied to some circumstances other than interventions.[142] In World War I, as in some earlier conflicts, a legal position enjoying significant support relied on that view to maintain that wartime atrocities were 'crimes against … humanity' consisting of 'common law crimes' – 'punishable acts against property and persons provided for by the criminal laws of all countries'.[143] Subsequently, sources of this kind

[135] 'Trial of Arabi', *St. James Gazette* (21 November 1882).

[136] Baring, *supra* note 132, at 335–336.

[137] P. Tze Ming Ng, *Chinese Christianity* (2012), at 49; P.H. Clements, *The Boxer Rebellion* (1915), at 207–208.

[138] 'Joint Note, 24 December 1900', in Clements, *supra* note 137, at 207–208.

[139] This tribunal is extensively discussed in Brockman-Hawe, 'Accountability', *supra* note 17; Gordon, *supra* note 17.

[140] *Indianapolis Journal* (12 November 1900), at 1; see also Brockman-Hawe, 'Accountability', *supra* note 17, at 691 (citing various contemporary sources explicitly referring to that commission as an 'international [criminal] tribunal/court').

[141] Brockman-Hawe, 'Accountability', *supra* note 17, at 660–662.

[142] See, e.g., J. Garner, *International Law and the World War*, vol. 2 (1920), at 473–474.

[143] Mérignhac, 'De la Reponsabilité Pénale des Actes Criminels Commis au Cours de la Guerre de 1914-1918', 3(1) *Revue de Droit International et de Législation Comparée* (1920) 34, at 42, 48; see also Société Générale des Prisons discussions reprinted in *Revue Pénitentiaire et de Droit Pénal* (1915) 448, at 478–486; *Revue Pénitentiaire et de Droit Pénal* (1916) 13, at 18.

were relied upon in post-World War II proceedings.[144] Hence, according to prevalent post-World War II legal reasoning, 'common crime[s], punishable under municipal law [transformed] into … crime[s] against humanity, either by their magnitude [or] savagery'.[145]

C *Common Territory and Joint Occupation Tribunals*

Before and during the 19th century, joint criminal tribunals were occasionally created in regions that became, due to conquest or otherwise, shared territories.[146] During the 18th century, a legal distinction between occupied and conquered territory began to emerge as part of the protracted development of the law of occupation into a distinct corpus in international law.[147] Thus, we begin to find joint military tribunals with jurisdiction over local civilians created by ally co-occupiers of a territory.[148] Such international criminal tribunals[149] were also occasionally established throughout the 19th century.[150]

During the period from 1897 to 1914, joint military occupations surged as a result of a series of multinational 'humanitarian' interventions led by the Concert

[144] Donnedieu de Vabres, 'Le Procès de Nuremberg Devant les Principes Modernes du Droit Pénal International', 70 *Recueil des Cours* (*RC*) (1947) 477, at 505–528.

[145] Q. Wright, *History of the UN War Crimes Commission* (1948), at 179; see also de Menthon, 'Opening Argument', 3 *TMWC* (1947) 92, at 128.

[146] See, e.g., Kersting, 'Einleitung', in H. Kersting (ed.), *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).

[147] 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.

[148] See, e.g., *Regulations for the Subsistence of the Troops of the Allied Army during the Approaching Winter-Quarters in the Allied, Neutral and Occupied Provinces* (1762), Art. 7 (a Prussian-British-Hanoverian-Hessian-Brunswickian-Schaumburgian military commission).

[149] Note that joint occupation tribunals were considered so inherently international that tribunals created in a jointly occupied territory were commonly considered international criminal tribunals, even if they consisted of judges from only one of the occupying powers, when their creation was authorized by a joint decision of all occupying powers. See, e.g., *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949) (USA); Rear-Admiral Noel to Sir J. Hopkins, 14 October 1898, reprinted in H. Latter (ed.), *Précis Writing* (1903) 153, at 153–155 (regarding the Candia tribunal in jointly occupied Crate consisting only of British officers); H. Morse, *International Relations of the Chinese Empire*, vol. 3 (1918), at 292–293 (regarding the magistrate court of the 1900–1902 Russian-British-Japanese-French-American-German occupation of Tien-Tsin consisting only of American judges). Further note that military occupation tribunals did not address only 'universal' crimes because it was considered to be the inherent authority of a military occupation government to punish all sorts of crimes, including those clearly of a local nature, stemming from core customary international law concerning belligerent occupation. H.W. Halleck, *Elements of International Law and Laws of War* (1874), at 330–333.

[150] '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 (an 1839–1846 Prussian-Russian-Austrian Tribunal in jointly occupied Cracow); K. Cassel, *Grounds of Judgment* (2012), at 58 (French-British military tribunals in 1857–1861 jointly occupied Guangzhou/Canton).

of Europe, starting with the intervention in, and joint occupation of, Crete (1897–1909),[151] where an international criminal tribunal was created. The Military Commission for International Police at Canea consisted of one officer from each occupying power: six officers (from France, Russia, Italy, Britain, Germany and Austria) initially (1897–1898)[152] and four remaining after the German and Austrian forces left (1898–1909).[153]

Looking at some late 19th- and early 20th-century international criminal tribunals, and especially of the intervention-related and joint-occupation kinds, some scholars have concluded that, before the Nuremberg tribunal, international criminal tribunals were possible only in colonial contexts.[154] Likewise, the failure of the post-World War I international criminal tribunal initiatives seems to suggest that, in inter-Western and inter-European interactions (that is, non-colonial contexts), stark statism prevailed pre-Nuremberg, inhibiting the formation of such tribunals.[155] Indeed, demonstrable contemporary Western and European disregard of other sovereigns and peoples likely bolstered international criminal tribunal initiatives. Yet, at least in part, the relationship between colonialism and turn-of-the-century international criminal tribunals is one of correlation, not causation. Most international criminal tribunals arose in circumstances implicated by war (including interventions and occupations), and almost all conflicts between 1872 and 1914 in which Western and European powers participated were colonial.[156] Earlier in the 19th century, various international criminal tribunals resulted from inter-Western and inter-European interactions, including some carried out in the context of joint interventions and joint occupations within Europe.[157] Later, during World War I, as we show in the next section, international criminal tribunals were again founded in the context of such interactions. Furthermore, even at the turn of the century, an international criminal tribunal was created to address an incident between two European powers and was presided over by judges from European and Western powers.[158]

D *Joint Courts Martial*

During the 19th century, as before, allies occasionally created international criminal tribunals that could be called joint courts martial. According to our findings, some

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

[152] Admirals' Council Resolution no. 90, 14 August 1897; Admirals' Council Resolution no. 91, 20 August 1897, available at http://site.destelle.free.fr/seances/styled-6/aout%201897.html.

[153] See a 1909 picture of the commission (consisting of four officers) titled 'Crete: The International Military Court', *National Historical Museum*, available at https://www.nhmuseum.gr/en/departments/into-the-museum-s-collection/item/9192-cretetheinternationalmilitarycourtthemomentoftheannouncementofthedecisiononthelefttthefourinterpretersphotograph1909. Trials conducted in 1898 by the Canea commission and by its Candia offshoot are discussed extensively in Pritchard, *supra* note 17; Gordon, *supra* note 17.

[154] Gordon, *supra* note 17, at 120.

[155] *Ibid.*

[156] Willis, *supra* note 42, at 4.

[157] See, e.g., two of the tribunals listed in note 150 above.

[158] See subsection 3.E (regarding the Dogger Bank Commission).

cases indicate that such tribunals could conduct war crime trials of allied soldiers[159] and of captured enemy combatants.[160] The 1882 British-Egyptian courts and the 1900 Pao-Ting-Fu commission, for example, may be classified as joint courts martial. Because of their military nature and subject-matter jurisdiction over war crimes, joint courts martial are the pre-World War I international criminal tribunal genre with the greatest resemblance to the post-World War I tribunals planned for war crime prosecution and to the Nuremberg tribunal. Moreover, we found indications that cases related to this practice informed the US position at the Paris Peace Conference, and it, in turn, informed the shaping of the post-World War I tribunal agenda for the prosecution of war crimes.[161] But neither this likely link to subsequent developments in ICL nor the current focus on core international crimes should lead us to regard war crime prosecution as the primary subject matter of such tribunals. In practice, they were mainly created to address seemingly domestic military offences.[162]

The normative basis for such tribunals originated in the jurisprudence of late mediaeval Europe, across which military tribunals had sole jurisdiction over knightly issues and were regarded as belonging to a single transnational judicial network of the warrior guild.[163] Under this transnational affiliation, military tribunals were not considered part of the same judicial system as the civilian courts, even if they were created by the same ruler. Authority to form civilian courts derived from the ruler's role as a domestic sovereign, while the authority to form military tribunals derived from his position as a high-ranking knight.[164] The law regulating knights' activities (*jus militare*) was 'seen as an extension … of the natural law and the law of nations'.[165] Yet, 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.[166] Thus, in addition to laws of war, it incorporated laws regulating other warrior activities, including those presumed inherent to military discipline.[167] Although such discipline-related prohibitions generally did not give rise to universal jurisdiction, they were not considered domestic but, rather, common legal norms

[159] See, e.g., G. Bules, *Bolivar en el Per*, vol. 2 (1919), at 120–121 (an 1823 Peruvian-Colombian-Argentinian military tribunal trying soldiers of the allied forces for pillage).

[160] T. Luckman, *The Book of Martyrs* (1764), at 422 (the trial of Frenchman, Sieur de Granvale, for the perfidious assassination attempt against King William III of England, '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 (eds), *Die Basler Chroniken,* vol. 2 (1880) 1, at 83–84.

[161] See subsection 5.A.

[162] See, e.g., [Swedish-Russian] Treaty of Friendship and Amity 1799, 41 *Annual Register* (1799) 282, at 284, Art. IX; R. Stevenson, *Beatson's Mutiny* (2015), at 240 (an 1855 British-Turkish commission of inquiry, serving as a joint court martial).

[163] D. Whetham, *Just Wars and Moral Victories* (2009), at 72–73.

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

[165] Draper, 'Status of Combatants and the Question of Guerrilla Warfare', 45 *BYBIL* (1971) 173, at 173.

[166] Keen, *supra* note 164, at 14–21.

[167] *Ibid.*

inherent to soldierly activities.[168] That joint courts martial could be formed to address such crimes indicates they were not considered merely domestic crimes. Indeed, historians have deemed joint courts martial, from as early as the late mediaeval period and as late as the 18th century, as prime evidence of 'the [past] international nature of the customs and disciplines of war'.[169]

Even after the domestication of military law in Western and European states during the 19th century, a sentiment persisted that '[t]he term Military Law … relates, not to a mere body of [domestic] statutes, but to a system of jurisprudence, some of the provisions of which are common to … all civilized States, both ancient and modern'.[170] This sentiment may explain the continued creation of joint courts martial to adjudicate military offences. Another norm with a lingering influence was the perception of single-sovereign military tribunals as adjudicatory entities separate from the domestic judiciary. Such a view was rooted in the premise that the authority of rulers to form military tribunals derived from their role not as domestic sovereigns but, rather, as high-ranking members of the transnational guild of knights. Yet elements of this perception endured long after that premise was abandoned. Indeed, until the 19th century in Europe and well into the 20th century in the USA and the United Kingdom (UK), military justice systems were not considered part of the judicial branch but executive branch 'instruments'.[171] Nevertheless, they were widely acknowledged to be judicial bodies (although their executive affiliation permitted military trials to be conducted more summarily than civilian ones).[172] The persistence of this perception in US law would later prove significant at the Paris Peace Conference.

E *Incident-related Tribunals and Commissions as Tribunals*

As several of the cases surveyed here show, during the 19th and early 20th centuries, an incidence of alleged international criminality would occasionally trigger a trial or criminal investigation conducted by an international organ. When duly authorized, such an organ constituted an international criminal tribunal. The North Sea Incident (or Dogger Bank) International Commission of Inquiry is a good example.[173] In 1904, during the Russo-Japanese War, a Russian squadron fired at an English fishing fleet. In response, Russia and Britain jointly appointed a commission, consisting of five admirals (from Russia, Britain, France, Austria and the USA). It constituted an international criminal tribunal because it was authorized to determine not only state

[168] Originally, during late mediaeval times, at least a few of these prohibitions were considered subject to universal jurisdiction. See *ibid.*, at 46.

[169] 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.

[170] G.B. Davis, *A Treatise on the Military Law of the United States* (1915), at 1.

[171] *Ibid.*, at 16; O. Mudrik, *Military Justice* (1993), at 21 (in Hebrew).

[172] *Runkle v. US*, 122 US (1887) 543.

[173] This tribunal is discussed extensively in Lemnitzer, *supra* note 17, at 929–939.

responsibility but also individual criminal culpability for law of war violations (Russia only retained the authority to determine the punishment of those found guilty).[174]

The international criminal tribunal authority vested in this commission of inquiry was not unprecedented.[175] Certain earlier international criminal tribunals were also called 'commissions' or 'commissions of inquiry'. The concept originated in a flexible, ad hoc late mediaeval-early modern form of legal institution utilized across Europe. Such commissions 'were used, for centuries, as tribunals (to conduct hearings into legal guilt and innocence), [and] as organs of investigation'.[176] Unlike in some domestic systems, in international law, commissions and commissions of inquiry, especially military ones, retained potential criminal tribunal authority into the 19th and early 20th centuries. The idea that such international organs could enjoy the authority to serve as international criminal tribunals (and not only as international investigative organs) remained acceptable. This idea continued to play a role during World War I and in its aftermath.

4 World War I Tribunal Initiatives

World War I did little to suspend recourse to international criminal tribunals. We found that states made at least one attempt per year to operate an international criminal tribunal throughout the war. Some of those endeavours even bore fruit.

A *1914*

The beginning of the Great War correlates with two aborted international criminal tribunal endeavours. First, the war brought one operational international criminal tribunal to a premature end. As noted, between 1897 and 1914, a series of interventions led by the Concert of Europe had resulted in international military occupations. These began with the international occupation of Crete and ended with the British-Austrian-French-German-Italian occupation of Shkodra/Scutari in 1913–1914.[177] Similar to the international occupation government of Crete, the Shkodra/Scutari 'international [occupation] government'[178] established an international criminal tribunal. Its Supreme Court, with jurisdiction over criminal appeals, consisted of the Italian Armed Forces' commander, an Austrian officer and an English representative.[179] World War I ended this joint occupation.

Second, the beginning of World War I was marked by a failed international criminal tribunal initiative. The official Austrian *casus belli* for World War I was the alleged Serbian rejection of the ultimatum that Austria had issued after the assassination of Austrian Archduke Franz Ferdinand in Sarajevo in June 1914. The main condition

[174] *Ibid.*
[175] *Cf. ibid.*, at 932.
[176] A. Sitze, *The Impossible Machine* (2013), at 135.
[177] Robin, *supra* note 151, at 568.
[178] Von Dungern, 'Die Entstehung des Staates Albanien', 2 *Jahrbuch des Völkerrechts* (1913) 263, at 291.
[179] Muner, 'Kryeqyteti i Pamundur', 844 *Klan* (2013) 24, at 26.

not fully accepted by Serbia was a badly phrased provision[180] that actually demanded a 'joint [Austrian-Serbian] commission to investigate and *punish* those … responsible for organizing the assassination' (that is, an international commission of inquiry with international criminal tribunal authority).[181] This Austrian demand was not quickly forgotten. Some of the earliest World War I-era international criminal tribunal proposals suggested applying, in the post-war trials of German war criminals, a procedure similar to the one 'formulated in the Austrian ultimatum to Serbia and consisting of adding judges chosen by the countries concerned to the national judges. It is difficult to see how Germany could oppose a demand that it [had] approved for its ally'.[182]

B *1915*

In 1915, Russia, France and Britain issued the Armenian Massacre Joint Formal Protest to Turkey, announcing that they would 'hold personally responsible [for] these crimes all members of the Ottoman Government [involved]'.[183] The idea of attributing such criminal responsibility was inspired by the European response to the 1860 Syrian massacre. The initial Russian proposal '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 might recall in this communication reprisals adopted by Europe in 1860 following the massacres in Syria'.[184]

C *1916*

In 1916, France and Britain began secretly planning a post-war international criminal tribunal to try enemy war criminals, with France duly preparing a draft treaty.[185] Even before then, conducting war crime trials was acceptable: from the beginning of the war, 'captured enemy combatants were tried [by the capturing state] for … war [crimes.] … [But] [b]y mid-1916, both sides of the conflict had come to understand the … danger of escalating reprisals [that such trials could induce]'.[186] The belligerents, therefore, secretly agreed to postpone war crime trials until after the war, which prompted allied France and Britain to devise plans for a post-war international criminal tribunal.[187]

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

[181] 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 (emphasis added).

[182] Loubat, 'Les Sanctions Pénales du Droit de la Guerre', *Le Temps* (28 April 1915) (discussing an earlier proposal in the Russian newspaper *Novoye Vremya*).

[183] 'Note du Département', *supra* note 49, at 29.

[184] 'Communication de l'Ambassade de Russie au Département, 26 April 1915', in Beylerian, *supra* note 49, 14, at 15.

[185] 'Projet de Convention Entre Tous les Pays Alliés, Projet de Convention entre la France et la Grande Bretagne', 5 August 1916, Le Ministère de l'Europe et des Affaires Étrangères (France), Série A, Paix, 1914–1920, Tome 64, A-1025-3, Archives Diplomatiques (FMAE).

[186] Schabas, *supra* note 3, at 11–12.

[187] *Ibid.*, at 11–13.

D *1917*

In 1917, France prepared a revised version of the draft treaty providing for a post-war international criminal tribunal.[188] More importantly, actual international criminal tribunals were created. After the USA entered World War I, 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.[189] 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'.[190]

E *1918 and Beyond*

In 1918, during the Russian Revolution, the Allies deployed an intervention to support the White Russians, resulting in a joint American-British-French occupation of the 'Archangel' region (1918–1920). A local (White) Russian government, subordinate to the Allies, was formed alongside the allied occupation command. Subsequently, an international criminal tribunal ('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'.[191]

5 The Paris Peace Conference

After World War I ended in November 1918, the Paris Peace Conference convened for one year from January 1919. This section shows that conference participants were considerably more aware of, and influenced by, earlier international criminal tribunal endeavours than is presently acknowledged by the scholarship. To date, little evidence has been presented of the links between the participants and prior endeavours: only an internal memorandum of the American delegation stating that the 1900 Pao-Ting-Fu commission 'cannot … be regarded as a legal precedent'[192] and a post-conference comment by American delegate James Brown Scott that it was 'better for the world that the suggestion of Bismarck [for an international criminal tribunal] has not been followed'.[193] Even the scholars who preceded us in uncovering examples of

[188] 'Projet de Convention', *supra* note 185.

[189] Sims, 'The Influence of Modern Weapons upon Future Naval Warfare', 10 *Canadian Club Yearbook* (1922–1924) 53, at 57.

[190] *Ibid.*

[191] [Occupying Allied Forces Commander (British)] General F.C. Poole, to [Archangel (White Russian) President] N.V. Tchaikovsky, 13 September 1918, in И. Минц (Гл. ред.), Интервенция на севере в документах (1933), at 30 (in Russian).

[192] 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. Miller credits himself and Scott as the authors of the memo (Miller, *ibid.*, vol. 1, at 86, 88–89; vol. 3, at 458), but Finch credits himself as the author (Finch, 'Editorial Comment: Retribution for War Crimes', 37 *AJIL* (1943) 81, at 87). Probably, all three were involved. The fact that the Pao-Ting-Fu commission is discussed in that memo was uncovered in Brockman-Hawe, 'Accountability', *supra* note 17, at 687–690.

[193] Scott, 'The Trial of the Kaiser', in E. House and C. Seymour (eds), *What Really Happened at Paris* (1921) 231, at 247; Brockman-Hawe, 'Punishing', *supra* note 16, at 260 (who uncovered that comment).

pre-World War I endeavours felt compelled to concede that the impact, post-World War I, of such earlier endeavours was 'barely detectable [at most]'.[194] In this section, however, we present the additional links that we have identified.

A *The US Position*

Recall that the USA, soon after joining World War I in 1917 and onward throughout the war, participated in international criminal tribunals, such as the Archangel and the joint naval tribunals. This indicates that the US position expressed at the Paris Peace Conference – claiming to oppose international criminal tribunals out of a conviction that they were unprecedented – was unlikely to have been as sincere and formalistic as proclaimed. The evidence we present next further indicates that the US conference delegates knowingly dismissed pre-1919 international criminal tribunal endeavours. It also provides reasons to suspect that the USA sought to pre-emptively prepare counterarguments to potential pro-tribunal legal propositions that would rely on past endeavours, while restricting, as much as possible, the attention brought to them.

Consider the US delegates' treatment of Bismarck's 1870 proposal. They were not the only ones who knew about it. At a discussion of a subcommittee of the Commission on Responsibility, pro-tribunal French delegate Larnaude presented the proposal in support of creating an international criminal tribunal.[195] If Scott did not already know about Bismark's proposal, he learned about it then; but he did not respond to Larnaude, probably because pro-tribunal commission delegates sufficiently dismissed the case themselves.[196] James Brown Scott's post-conference comment, however, indicates that he did have a counterargument prepared.

A similar approach may explain his later, striking, change in attitude. In books published in 1909 and 1916, Scott had treated the Dogger Bank Commission of 1904 as a legal precedent for similar commissions, positively noting its international criminal tribunal authority.[197] It is thus improbable that he had no recollection of that tribunal in 1919. This conclusion is further supported by yet another twist: Scott also discussed the 1904 commission in a book published not long after the Paris Peace Conference:[198] 'In this [1922] book, Scott … treat[ed the commission] … mandate to determine individual guilt as unnecessary detail that was best omitted.'[199] This

[194] Brockman-Hawe, 'Accountability', *supra* note 17, at 698; see also Brockman-Hawe, 'Punishing', *supra* note 16, at 260–261; Pritchard, *supra* note 17, at 80; Brockman-Hawe, 'Supranational', *supra* note 17, at 76; Gordon, *supra* note 17, at 120; Brockman-Hawe, 'Constructing', *supra* note 16, 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.

[195] 'Sous-Commission II, 20 February 1919', in *La Documentation Internationale: La Paix de Versailles*, vol. 3 (1930) 278, at 283.

[196] *Ibid*.

[197] 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.

[198] J.B. Scott, *Cases on International Law* (1922), at 130–133.

[199] Lemnitzer, *supra* note 17, at 941 (Lemnitzer assumed this was always Scott's position).

change in attitude appears to have been conscious because the 1922 book states that its discussion of the 1904 commission relies on the 1916 book.[200] Note that, in the discussions of the Commission on Responsibility, the attitude of pro-tribunal delegates towards the earlier practice of creating commissions with international criminal tribunal authority was similar to their attitude towards Bismarck's proposal. Namely, during those discussions, Larnaude mentioned this earlier practice (both orally and by submitting the 1918 memo he had co-authored, which referred to it). Pro-tribunal delegates (including Larnaude) then downplayed its significance, such that the Americans did not even voice their opinion on the matter.[201] Therefore, there is evidence here, too, that Scott's dismissive attitude, albeit expressed only later, may have developed during the conference as an argument prepared to counter claims that this practice was a precedent for international criminal tribunals.

The fact that pro-tribunal commission delegates simultaneously addressed and downplayed the earlier practice of creating commissions with an international criminal tribunal authority may also explain how the Americans dismissed the Pao-Ting-Fu commission of 1900[202] in a brief section of a rather long internal memo prepared at the request of President Woodrow Wilson and of Robert Lansing and co-authored by Scott.[203] Assuming the Americans were the only ones who knew about that 1900 international criminal tribunal and opposed such tribunals, what could they gain by discussing it, only to state that it was not a precedent of an international criminal tribunal? Even if the memo was not made public, not mentioning the case would have been more logical than taking the risk that it would become known to the pro-tribunal Allies. One reasonable explanation is that the memo addressed this earlier international criminal tribunal as a pre-emptive response to an anticipated pro-tribunal use of that case.

Indeed, as one of the authors noted in his diary, this memo was written after the 1918 French memo co-authored by Larnaude was submitted to the Commission on Responsibility to prepare a view 'different from the French memorandum'.[204] The American memo does not acknowledge this aim, but, reading the two memos together, it appears to be an attempt to counter the main arguments of the French memo. So which part of the French memo compelled the Americans to address the Pao-Ting-Fu commission, given that this commission was not explicitly mentioned in it? The only possible candidate is a paragraph in the French memo alluding to some past international commissions having international criminal tribunal-like punitive authority.[205] There are additional indications that the American examination of the Pao-Ting-Fu commission was conducted in response to that paragraph. First, the

[200] Scott, *supra* note 198, at 130.

[201] This issue is further addressed in subsection 5.B.

[202] Miller and Scott, *supra* note 192.

[203] Miller, *supra* note 192, vol. 1, at 86.

[204] *Ibid.*; see also 'Annex to Minutes of the First [Commission on Responsibility] Meeting', in *British Documents on Foreign Affairs*, Part II, Series I, vol. 4 (1989), at 242.

[205] *French Memo*, *supra* note 35, at 21.

American memo does not scrutinize that commission in isolation but, rather, considers it to belong to the same practice as two other commission-like (non-tribunal) punitive international organs.[206] Second, it maintains that these three organs were not legal precedents for international criminal tribunals because they did not consist of judicial agents.[207] The French memo presents an identical argument regarding past international commissions in general.[208]

Another contemporaneous American internal memo examined the 1882 trial of Ahmed Urabi (Arabi Pasha). It begins with a quote from *Halleck's International Law*, which (inaccurately) states: '[T]he 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.'[209] It goes on to explain: 'Arabi was not convicted on such a charge … it was agreed that Arabi should plead guilty to … rebellion … a crime under … [the] Ottoman code.'[210] The memo then summarily concludes, failing to mention that Urabi was initially tried for war crimes by an international criminal tribunal (a mixed British-Egyptian court martial). This omission was likely intentional, as extensive research was clearly undertaken before the memo's drafting. 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 international criminal tribunal element? After all, the USA did not oppose domestic military trials of enemy war criminals. The suspicion that the memo was prepared as a pre-emptive response to an anticipated pro-tribunal argument is only strengthened by the realization that it was also prepared in response to the French memo.[211] That inference is further supported by the involvement of international commissions of inquiry in the punishment of perpetrators of atrocities in 1882.[212] Lastly, the succinct memo quotes the extract from Halleck without context, suggesting its author sought to avoid attracting attention to the case.

Despite how the Americans had treated past cases and the contradiction between their knowledge of those cases versus their public assertion that international criminal tribunals were unprecedented, the US position was not entirely cynical. Formalist mindsets also played a role. Furthermore, this position did not wholly oppose international criminal tribunals. The memo addressing the Pao-Ting-Fu commission illustrates this. Admittedly, the memo states that this commission, like the two other cases examined, '[could not] … be regarded as a legal precedent for the punishment

[206] Miller and Scott, *supra* note 192, at 470–476 (the others are: the post-Boxer-war commission of the representatives of the Allies in Peking and Napoleon's non-judicial punishment by the representatives of the victorious European powers).

[207] *Ibid.*, at 475.

[208] *French Memo*, *supra* note 35, at 21.

[209] Hudson, 'The Indictment of Arabi Pasha', in Miller, *supra* note 192, vol. 3, 525, at 525 (quoting G. Baker, *Halleck's International Law*, vol. 2 (4th edn, 1908), at 350–351).

[210] *Ibid.*, at 526.

[211] Miller, *supra* note 192, vol. 1, at 86.

[212] See note 133 above and accompanying text.

of crimes against international law'[213] and should be 'treated as an example of political punishment, rather than as a precedent for judicial or legal punishment'[214] because it was not composed of judicial agents and its proceedings lacked the 'usual safeguards of ordinary jurisprudence … [that] assure justice to accused persons'.[215] But those purported shortcomings are not used to produce an argument that such political punitive actions cannot be taken. On the contrary, the memo concludes that the three cases demonstrate that '[t]he competence of the Allied nations to take political actions to restrain a disturber of the public peace [that is, an enemy of mankind] is recognized by the authorities and would be justified by practice'[216] as 'joint political action as a punishment for "crimes against the law of nations, against the law of humanity"'.[217] Thus, the memo neither rejects international criminal tribunals nor deems them unprecedented in customary international law. It primarily insists that organs utilized to punish international criminals must be termed 'Political as Distinct from Legal Action'.[218]

Two other parts of the memo provide further support for these conclusions. One part states: '[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.'[219] Another part maintains that even trials of enemy war criminals by domestic (single-state) tribunals are political actions, yet it concludes that customary international law authorizes domestic military tribunals to try enemy war criminals.[220] As noted, contemporary US law considered military tribunals 'executive instruments' belonging to the executive (that is, the political branch), despite being judicial bodies.[221] The American reference to tribunals authorized to punish international crimes as 'political' forums likely stemmed, primarily, from that domestic doctrine. Indeed, at least some contemporary scholars understood the US position to have been deduced from that doctrine.[222]

Today, this terminological fixation may seem peculiar. But, as Felix Cohen observed, an exceedingly formalist mindset took hold at the time, driving many jurists to treat legal concepts as 'magic "solving words"' and to embrace odd 'metaphysical' interpretations rooted in 'transcendental nonsense'.[223] This mindset led jurists to believe that meanings intuitively derived from legal terminology (and not substantive

[213] Miller and Scott, *supra* note 192, at 475.
[214] *Ibid.*, at 474.
[215] *Ibid.*, at 475.
[216] *Ibid.*, at 470.
[217] *Ibid.*, at 471.
[218] *Ibid.*, at 470.
[219] *Ibid.*, at 506 (emphasis added).
[220] *Ibid.*, at 478–489.
[221] See subsection 3.D.
[222] Gregory, 'Criminal Responsibility of Sovereigns for Wilful Violations of the Laws of War', 6 *Virginia Law Review* (1920) 400, at 406.
[223] Cohen, 'Transcendental Nonsense and the Functional Approach', 35 *Columbia Law Review* (1935) 809, at 820, 831, 847.

considerations) should determine legal deliberations. In the case at hand, deliberations were not guided by a substantive premise that the culpability and punishment of individuals must be determined by organs incorporating safeguards to assure justice and defendants' rights. They were guided by an intuited terminological demand that the organs making such determinations without safeguards must not be considered 'judicial/legal punishments/actions' but, rather, 'political punishments/actions'. Thus, such organs could exist, provided they were 'properly' classified. Deliberations were also guided by a terminological premise that military tribunals were 'executive instruments' and therefore must be classified as 'political actions', irrespective of whether they maintained safeguards to assure justice and defendants' rights.

To clarify, the memo's position was neither fervently in favour of international criminal tribunals nor wholly steered by legalistic mindsets. It was informed by non-legal contingent preferences (likely an aversion to involving German and neutral judges, and doubts regarding the geopolitical benefits of post-war international proceedings, especially against the former kaiser). Based on the combination of positivist inclinations and non-legal contingent preferences, the memo: (i) insisted that international criminal tribunals be classified as political by being defined either explicitly as such or as military tribunals; (ii) supported including only judges from Allied states affected by the crimes of the specific defendants, opposing the involvement of judges from unaffected Allied, neutral and defendants' states; (iii) strongly disfavoured prosecuting heads of state but reluctantly conceded that they could be punished, provided such an action was defined as political; and (iv) was ready to accept trials by international criminal tribunals of certain enemy war criminals, provided that these were military tribunals with judges appointed only from affected Allied states. Conversely, the other Allies classified international criminal tribunals as legal-judicial organs, supported prosecuting heads of state and favoured the inclusion of civilian judges from both affected and unaffected Allied states.[224]

The US position remained relatively consistent. Like the aforementioned memo, the American Commission on Responsibility's dissent (after insisting a judicial body could not punish the former kaiser because of head-of-state immunity) admitted such immunity was not 'intended to apply to what may be called political offences and to political sanctions'.[225] Moreover, a subsequent influential letter by Lansing acknowledged that the former kaiser could be punished by an international tribunal. Lansing insisted, however, 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'.[226]

Likewise, concerning the trial of enemy war criminals, the Americans continued to oppose the inclusion of civilian judges and judges from unaffected Allied, neutral

[224] 'Commission on Responsibility Report', *supra* note 36, at 98–125.

[225] *Ibid.*, at 136.

[226] 'From Lansing [to Wilson], 8 April 1919', in A.S. Link (ed.), *The Papers of Woodrow Wilson*, vol. 57 (1987) 131, at 131.

or defendant states in their international trials.[227] This opposition was not only explicitly expressed in the dissent of the Commission on Responsibility; it also likely guided their treatment of earlier international criminal tribunal endeavours. A closer examination of the pre-World War I endeavours that the Americans dismissed shows that they did so only regarding international criminal tribunals that included judges from defendants' or unaffected states. Such were the bench compositions in the British-Egyptian courts martial, the Dogger Bank Commission, Bismarck's proposal and the Pao-Ting-Fu commission. Regarding the latter, however, arguably all the judges came from armies of states somewhat united in the relevant campaign, which may explain the Americans' ambiguous attitude towards it.

The tribunal plans eventually adopted were a compromise between the USA and its Allies. Consistent with the US position, Article 227 of the Versailles Treaty regards morality and policy, not law, as the normative ground for the charges, trial and punishment in the international criminal tribunal prescribed for the trial of the former kaiser. Yet, but for the other Allies, no international criminal tribunal would have been prescribed for him.[228] Furthermore, at the insistence of those Allies, it was clarified that the political sanctions for the former kaiser's political offences were to be imposed by an international political tribunal with all the procedural and defendant guarantees of 'a regularly constituted tribunal … in order that the judgment should be of the most solemn judicial character'.[229] Thus, the distinction between 'political' and 'legal' became – to recall the words of Felix Cohen – entirely a matter of transcendental nonsense. A similar compromise is clearly reflected in the international criminal tribunal scheme assumed for the prosecution of enemy war criminals. It was largely adopted because of the insistence of the other Allies, but the procedural details reflected the US position, permitting only trials by military judges from affected Allied states.[230] With regard to the requirement of military judges, these tribunals most closely resembled earlier international criminal tribunals, although the restrictions on judges' nationality rendered them more partisan than many of their predecessors.

B *The Pro-tribunal Delegates*

The position of the pro-tribunal delegates 'had incongruous origins in a complex interplay of disparate motives and influences'.[231] Evidence indicates that some pre-World War I international criminal tribunal endeavours were among those influences. One such indirect influence was the connection between the European response to the Syrian massacre in 1860 and the international criminal tribunal prescribed in the Sèvres Peace Treaty of 1920. Consider the following additional example of indirect influence. The pro-tribunal legal position of the delegates of the Paris Peace Conference

[227] 'Commission on Responsibility Report', *supra* note 36, at 142.
[228] Schabas, *supra* note 3, at 184–197.
[229] Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace (1919), at 31.
[230] See Schabas, *supra* note 3, at 184–197.
[231] Willis, *supra* note 42, at 4.

was strongly influenced by the position taken on international criminal tribunals in the 1918 memo by de Lapradelle and Larnaude. That memo drew on a few legal sources published earlier during the war, including an academic article published by Alexandre Mérignhac in 1917.[232] In turn, Mérignhac's pro-tribunal argument drew from a handful of legal sources published even earlier in the war, including Dumas' 1916 manuscript, notwithstanding the fact that Dumas supported the appointment of neutral judges, which was something Mérignhac had opposed.[233] Finally, Dumas' primary source of inspiration was Moynier's international criminal tribunal proposal, made long before World War I, in 1872.[234]

We identified examples of even more direct influence. Notably, Larnaude had presented three earlier international criminal tribunal endeavours before the Commission on Responsibility; although, intriguingly, he avoided claiming that they were legal precedents, treating them as mere imperfect sources of inspiration. First, during a subcommission's debate regarding 'aggression', Larnaude half-heartedly stated: 'Let me close with an observation that 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.'[235] Belgian delegate Edouard Rolin-Jaequemyns responded: 'This is not an example to follow.'[236] Thus concluded the discussion of Bismarck's proposal. Second, in another subcommission, Larnaude outlined the benefits of an international criminal tribunal:

> There are … practical difficulties [with relying on national (military) tribunals.] … 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 [that is, military tribunals] and will make the rulings. This Committee of Jurists will be … a small allied court, which can serve us not as a model, but as an indication of how immense is the idea of … an international [criminal] court.[237]

Note that the tribunal that Larnaude mentions differed from the Archangel tribunal in its composition. He was probably referencing another World War I-era joint occupation international criminal tribunal that we, not for want of trying, have been unable to identify.

Third, Larnaude continued: '[As] M. de Lapradelle and I [explained.] … We are at a moment when the great rules of international law must receive confirmation, not only from Commissions and Committees that do not have judicial character … [but from] a unique [international] tribunal … playing … the unparalleled role reserved

[232] *French Memo*, *supra* note 35, at 21.

[233] Mérignhac, 'De la Sanction aux Infractions au Droit des Gens Commises, au Cours de la Guerre Européenne, par les Empires du Centre', 24 *Revue Générale du Droit International Public* (1917) 5, at 30, 40, 47.

[234] Dumas, *supra* note 119, at 64.

[235] 'Sous-Commission II', *supra* note 195, at 283.

[236] *Ibid.*

[237] 'Sous-Commission III, 25 février 1919', in *La Documentation Internationale*, *supra* note 195, 312, at 314–315.

for it in the history of this war.'[238] Indeed, the aforementioned 1918 French memo submitted to the Commission on Responsibility addressed the earlier international commission practice: '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 … not be "a commission" like some under the old regime, but a court in the fullest sense of the word.'[239] In our view, Larnaude's reluctance to present these earlier endeavours as legal precedents was not an inevitable position for three primary reasons: (i) unlike Larnaude, various other contemporary scholars published articles during World War I in which they vigorously presented Bismarck's proposal as a precedent authorizing the creation of international criminal tribunals;[240] (ii) currently, the prevalent legal position, unlike that of Larnaude, considers an earlier joint occupation tribunal (Nuremberg) to be the legal precedent (not merely a source of inspiration) authorizing the formation of post-1990 international criminal tribunals, notwithstanding that the latter were not joint occupation tribunals;[241] and (iii) recalling the criterion that served as the basis for Larnaude's conclusion that earlier commissions had lacked judicial character, this was not a lack of criminal trial authority (which some of these commissions had) but, rather, the commission judges' lack of legal education. Yet, even in contemporary domestic military tribunals, judges were commonly not required to be jurists. Accordingly, other contemporaries concluded thus: 'A Commission of Inquiry is technically not arbitration. … The Dogger Bank Commission … [, for example,] delivered judgment as to [individual] responsibility and blame … [and] was composed of five naval officers; … it was therefore an International Court-Martial.'[242] These World War I-era scholars relied on Frederic Pollock who, in 1910, contrary to Larnaude, maintained: '[The Dogger Bank] mixed naval Commission [had] … enlarged powers of deciding on [individual] responsibility. … It is doubtful whether a formal tribunal of jurists or diplomatists could have handled this delicate affair so well, if at all.'[243]

Larnaude's attitude is probably partly explained by case-specific factors. He may have been reluctant to rely on Bismarck's proposal because contemporaries blamed Bismarck for 'fathering' the German militarism responsible for World War I.[244] Likewise, the reluctance to rely on the earlier commission practice may be explained, in part, by the 1914 Austrian ultimatum. Recall that the primary condition not fully accepted by Serbia was a demand to create an international (Serbian-Austrian)

[238] *Ibid.*

[239] 'Annex to Minutes', *supra* note 204, at 253; *French Memo*, *supra* note 35, at 21.

[240] Brockman-Hawe, 'Punishing', *supra* note 16, at 260.

[241] See, 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.

[242] L.S. Woolf, *International Government* (1916), at 73–74; see also R. Goldsmith, *A League to Enforce Peace* (1917), at 100.

[243] 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.

[244] M. MacMillan, *Peacemakers* (2001), at 173.

commission with international criminal tribunal authority. Accordingly, one main accusation of aggression levied against Austria (and Germany) was that the ultimatum 'imposed upon Serbia conditions which no sovereign state could possibly accept, such [as] … that Serbia should admit the right of Austro-Hungarian authorities to exercise judicial … jurisdiction on Serbian territory'.[245] Explicit reliance on the same legal practice as the one relied upon in the ultimatum would have weakened the accusation of aggression.

Furthermore, international commissions of inquiry tended to include representatives from both sides or from neutral parties. Indeed, the German delegation at the conference attempted to counter the Allies' international criminal tribunal initiatives by proposing a 'neutral inquiry into the responsibility for the war and culpable acts in its conduct … [by a]n impartial Commission'.[246] Eventually, the Germans even suggested Germany, and the Allies jointly appointed an international criminal tribunal comprising neutral judges, with the only punishment to be determined by 'national courts' (effectively proposing an international criminal tribunal similar to the Dogger Bank Commission).[247] But the German proposals were rejected because the Allies opposed the inclusion of German and neutral judges.[248] This position probably also motivated the Allies to distinguish between their proposed tribunals and the earlier commission practice.

Similar motivations also possibly explain the conspicuous absence of any reference to the Dogger Bank Commission during post-World War I discussions of international criminal tribunals. Even parties to those discussions who had previously addressed this commission, including Scott, President Wilson and the British Foreign Office undersecretary Charles Hardinge, made no reference to it during the deliberations.[249] And Pollock, somewhat contrary to his 1910 article, described the international criminal tribunal proposed by the 1918 British Committee as being 'without precedent' in a report of that committee.[250]

Yet such contingent reasons fail to explain Larnaude's insistence that the proposed international criminal tribunal was qualitatively different from the three earlier organs, and, to varying degrees, superior to them. Like in the American case, contemporary legal mindsets help to complete the picture. As noted, many statist positivists considered World War I proof that international law was not law or had ceased to be law, as did many contemporary internationalists,[251] however misguidedly: 'Any normative body of rules will invariably be broken … but this does not stop it from being a law in the sense of a prescription towards adopting a particular mode of behaviour.'[252] Unlike statist positivists, such internationalists concluded that World War

[245] 'Memorandum Submitted by the Serbian Delegate, 18 February 1919', in *BDFA*, *supra* note 204, at 287.
[246] Die Gegenvorschläge der Deutschen Regierung zu den Friedensbedingungen (1919), at 95.
[247] *Ibid.*, at 83.
[248] Reply of the Allied and Associated Powers, *supra* note 229, at 30.
[249] See note 197 above; Lemnitzer, *supra* note 194, at 94–96.
[250] Committee of Enquiry, *supra* note 34, at 53.
[251] Kennedy, *supra* note 81, at 110.
[252] Whetham, *supra* note 163, at 52.

I demonstrated an urgent need for a new and improved international law.[253] The post-World War I international criminal tribunal was considered a necessary first step towards that brighter future.[254]

Internationalists further blamed statist positivism, with its fixation on state sovereignty and dismissiveness towards international law, for contributing to the outbreak of World War I.[255] That blame exacerbated a tendency among internationalists to believe that statist-positivist accounts of international law – as either a law merely charged with coordinating interstate interactions or altogether not law – were accurate depictions of existing international law.[256] This belief fuelled the internationalist assertion that this law must be reformed. Yet it was misguided. Even during the 19th century, international law incorporated norms and positions incompatible with statist positivism, such as those facilitating international criminal tribunals. Nevertheless, post-World War I internationalists unreflectively 'reinterpret[ed] the traditions of nineteenth century international law as [their] alter egos'.[257] Indeed, various legal norms and positions that post-World War I internationalists advanced as part of their reform campaign already existed in international law. Hence, the retrospective disremembrance and reinterpretation of the legal past led to an account of pre-1919 international law that was the product of a distorted, overly statist, memory.[258]

The history of international criminal tribunals that we identify here indicates that disremembrance was not instantaneous but occurred in two intersecting stages. Only in the second stage did jurists become fully convinced by the assertions made by internationalists during the first stage that pre-1919 international law was starkly statist and that post-World War I internationalist initiatives were unprecedented. By contrast, during World War I and immediately after, when internationalists began formulating the legal mechanisms that they would advocate, many of them were influenced by similar earlier legal norms, organs and proposals and, yet, insisted their own endeavours were unlike those previous ones. Such distinctions, then, reconciled the awareness of earlier endeavours with the conviction that contemporary endeavours were novel responses to unprecedented events. Furthermore, the novelty bolstering of contemporary endeavours entailed more than the erasing of past attempts. Internationalists resorted to see-saw reasoning, simultaneously invoking earlier endeavours as support for the contemporary ones, yet distinguishing between them by portraying earlier attempts negatively or belittling their significance (as per the earlier commission practice and Bismarck's proposal). Depicting the earlier efforts as flawed only bolstered the claimed benefits of contemporary ones, without detracting from the utility of the former in validating the feasibility of the 'superior' contemporary idea.

[253] Kennedy, *supra* note 81, at 100–111, 131–138.
[254] See, e.g., *French Memo*, *supra* note 35, at 20.
[255] Kennedy, *supra* note 81, at 131–138.
[256] Hall, 'The Persistent Spectre: Natural, Law, International Order and the Limits of Legal Positivism', 12 *EJIL* (2001) 269, at 271; Kennedy, *supra* note 81, at 100–111.
[257] Kennedy, *supra* note 81, at 137.
[258] *Ibid.*, at 138.

To be clear, Larnaude was not alone. His novelty bolstering and see-saw reasoning were manifestations of a wider phenomenon. For example, in 1925, during the first-ever ICL course at the Hague Academy, jurist Quintiliano Saldaña stated: '[Although t]he idea of an international court of justice is by no means a modern invention… the idea of an international court of criminal justice belongs entirely to our times [that is, it had developed from 1914 onward].'[259] Saldaña's statement exemplifies see-saw reasoning as it relies on past international tribunal proposals while simultaneously rendering them inferior to contemporary ones for focusing merely on interstate tribunals and not on international criminal tribunals. Saldaña's statement also exhibits novelty bolstering, chronologizing mediaeval to modern scholars who allegedly proposed only non-criminal tribunals, concluding with 'Kamarovsky['s] … book, *Le Tribunal International*'.[260] While Saldaña accurately captures Kamarovsky's anti-international criminal tribunal stance, he relies on Kamarovsky's book to proclaim such tribunals had not been contemplated pre-1914. This is striking, as the book explicitly discusses several 19th-century proposals for such tribunals.

6 Conclusion

The influence of the 1919-conception/1945-birth narrative is unquestionably significant. Thinking otherwise is often dismissed as a mere wishful 'desire to give [ICL] historical substance'.[261] But, as we have sought to demonstrate in this article, disremembrance should also be taken into account in ICL history. We contend that post-World War I depictions of international criminal tribunals as unprecedented were not objective accounts but, rather, expressions of post-war sentiment. Contrary to such depictions and to the present overly statist recollection of the 19th century (itself also a byproduct of post-World War I sentiment), international criminal tribunals before World War I were neither absent nor novel. They were, in fact, rooted in long-standing traditions of legal practice that continued throughout World War I. After the war, at the Paris Peace Conference, despite delegates' awareness of earlier international criminal tribunal endeavours, they proclaimed that contemporary proposals (and such tribunals in general) were unprecedented. Nevertheless, their actions were informed by that past. Hence, we conclude that 1919 did not mark the point at which international criminal tribunals were conceived. Rather, 1919 witnessed the re-emergence of that idea from the ashes of its past – its phoenix moment.

[259] Saldaña, '*La Justice Pénale Internationale*', 20 *RC* (1925) 223, at 360–361.
[260] *Ibid.*, at 361.
[261] Bassiouni, *supra* note 9, at 29.