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Book Review Essay

The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law: Thoughts Following *The Trial of the Kaiser* by William A Schabas

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The conventional historic account maintains that international criminal law (ICL) was 'born' after the Second World War. This account is incomplete, as William Schabas's book, The Trial of the Kaiser *(2018), captivatingly shows by richly portraying the (aborted) First World War initiative to try the German Kaiser before an international tribunal. However, this article (after providing an overview of Schabas's book) argues that Schabas's account of a First World War ICL 'birth' is also incomplete. ICL during the First World War era was but one link in a much longer historical chain. The essay demonstrates this fact by presenting certain elements of the long (forgotten) history of ICL, which provide answers to questions that have been left unanswered, not only by the conventional account (of a Second World War ICL 'birth') but also by Schabas's account (of a First World War ICL 'birth'). As the article discusses, the unveiling of a greater ICL history indicates that international criminal tribunals are not a modern innovation, and reveals the origins of 'crimes against humanity', of 'aggression' and of the universal jurisdiction doctrine. The essay further discusses reasons for the non-remembrance of the long history of ICL, the importance of acknowledging that history, and the likelihood of it becoming widely acknowledged in the near future.*

Keywords: history of international criminal law, First World War, international criminal tribunals, crimes against humanity, aggression, war crimes, universal jurisdiction

1. Introduction

Conventional wisdom maintains that international criminal law (ICL) was 'born' after the Second World War, with the establishment of the International Military Tribunal at Nuremberg. This account is inaccurate, if only because those advancing ICL at Nuremberg relied considerably on an earlier (aborted) First World War initiative. William Schabas's book uncovers much of this earlier initiative by richly portraying the attempt to try the German Kaiser before an international tribunal, relying on numerous sources, many of them previously unexamined.[1]

My only major point of contention with the book, addressed in this essay, concerns its premise that the neglected First World War initiative was itself the first chapter of the history of ICL. In truth, it was but one link, admittedly significant, in a much longer historical chain. In this short essay, I am unable to provide a complete account of the long (forgotten) history of ICL. Instead,

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[1] William A Schabas, *The Trial of the Kaiser* (Oxford University Press 2018) 1–2.

I will briefly summarise certain elements of it that complement Schabas's book, addressing some questions that the book has left unanswered.

This essay is not a criticism of Schabas's outstanding research. Schabas plunged into a boundless sea of sources to uncover an illuminating account of a significant period in ICL history. During the First World War, despite the contemporary influence of earlier ICL experiences, many maintained that ICL was unprecedented. In time, the novelty myth became so strong that it obscured the influence of past ICL. This background influence is revealed only when the First World War actions are examined through a broader historical lens. Demanding Schabas to conduct such a broad historical examination on top of his herculean undertaking would be simply unrealistic. Put differently, acknowledging earlier ICL history is important, and it supplements Schabas's findings, but by no means does it diminish the fact that Schabas's book is a meticulously researched, grippingly written, important work.

This essay proceeds as follows. Part 2 provides an overview of Schabas's book. Part 3 demonstrates briefly that contrary to the prevalent account of a Second World War ICL 'birth', and to Schabas's account of a First World War ICL 'birth', the history of ICL goes back much further. That longer history, as the essay demonstrates, provides explanations to issues that both the prevalent historic account and Schabas's account fail to explain. Lastly, Part 4 briefly discusses the importance of acknowledging the significant pre-Second World War history of ICL and assesses the likelihood of that noteworthy history becoming widely recognised in the near future.

2. ARTICLE 227 AND THE KAISER

Schabas's book generally progresses chronologically, focusing mainly on events at the wake of the war (1918–20). Along the way, it elegantly moves back and forth between two interrelated storylines. The primary storyline concerns an essential element of First World War ICL history: the rise and fall of Article 227 of the Versailles Treaty.[2] This Article specifies the treatment that should have been accorded to the German (ex-) Kaiser, Wilhelm II; in accordance with the Article, Wilhelm should have been tried for universal wrongs at a rather peculiar international criminal tribunal, in which morality and policy would have served as the normative basis for Wilhelm's charges, trial and punishment. The secondary storyline, to which attention shifts every few chapters, is biographic, portraying Wilhelm's life as it was affected by the attempt to prosecute him.

This dual storyline format cleverly helps to counter a common bias. We tend to examine the past by comparing it with the present, which inevitably leads to exaggerated assumptions of similarities and differences between the two.[3] Usually, past mindsets neither simply resemble nor

[2] Treaty of Peace with Germany (entered into force 10 January 1920) (Versailles Treaty).
[3] Randall Lesaffer, 'International Law and Its History: The Story of an Unrequited Love' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 27, 34–38.

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plainly oppose our own. Rather, they are often unique in surprising ways that we cannot begin to imagine unless we examine the past on its own merits.[4] Awareness of contemporary mindsets is, therefore, essential for achieving a true understanding of the law of a given era. The book's biographical account serves to develop such awareness. For example, the strong influence that aristocratic notions of honour still had on many contemporaries, including the Kaiser, is rather surprising. Equally stupefying are the peculiarities of past statist positivism, most strongly expressed by US Secretary of State, Robert Lansing. One might also be somewhat taken aback by Wilhelm's blatant anti-semitism.

The secondary, biographic storyline also enhances the reading experience, making the already engaging account a fascinating one. Not to spoil this experience for prospective readers, I do not elaborate further on that storyline other than to note that it is told mainly in the following chapters: Chapter 3 ('Kaiserdammerung') depicts Wilhelm's flight to the Netherlands and his abdication. Chapter 7 ('Aborted Kidnap') uncovers the surreal rogue attempt to kidnap Wilhelm. Chapter 16 ('The Kaiser in Limbo') describes mainly Wilhelm's life in Holland and the anti-prosecution lobbying on his behalf mostly by European royals (many of them his kin). Much of the biographic storyline is also told in Chapter 6 ('The Dutch Are Divided'), Chapter 14 ('Implementing Article 227') and Chapter 17 ('Demand for Surrender'), which present the different stages of the Dutch refusal to extradite Wilhelm. This refusal was the main reason for the eventual failure to prosecute him. It ultimately led the Allies (led by the American, British, French and Italian heads of state) to agree that the Dutch would, instead, administratively sanction Wilhelm to an assigned restricted residence ('like Napoleon') in Doorn (Holland).

The main (normative) storyline of the book is appropriately further divided into two sub-storylines. As Maitland observed long ago, although lawyers and historians share a common interest in legal history, they tend to be driven by opposite motivations.[5] Lawyers generally seek to use the legal past as an authoritative basis for present law, which often leads them to exaggerate the similarities between the past and the present. Historians, by contrast, strive to accurately portray each period; therefore, their accounts tend to highlight dissimilarities between periods.[6] Lawyers writing legal history commonly find themselves torn between the conflicting motivations. They wish to avoid anachronism and over-simplification, but at the same time expound the potential present juridical usefulness of the uncovered past. The 'task of combining the results of deep historical research with luminous and accurate exposition of existing law—neither confounding the [current legal] dogma nor perverting the history … is difficult'.[7] Schabas excels at this task, by writing mostly from a historian's perspective, while designating certain parts for lawyer-oriented discussions concerning the potential present contributions of the First World War ICL experience.

Lawyer-oriented discussions are found mainly in the first and last chapters (Chapter 1 ('The Power of the Beaten Path') and Chapter 18 ('Was He Guilty?')). Discussions of this type are also

[4] ibid.
[5] Frederic Maitland, *Why the History of English Law Is Not Written* (Clay & Sons 1888) 14.
[6] ibid.
[7] ibid.

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found in segments of Chapter 9 ('Prosecuting Crimes against Peace'), Chapter 10 ('International Law and War Crimes') and Chapter 11 ('An International Criminal Court'), which review the main legal issues addressed by the expert Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission on Responsibilities), appointed by the Allies at the Paris Peace Conference.[8] Because of the lawyer-oriented discussions they contain, these five chapters, arguably, have the greatest potential practical use for jurists.[9] For the same reason, these are the only chapters with which historians might, possibly, find some difficulty. Nevertheless, these chapters also play an important role in portraying the history of ICL. Chapter 1 situates the events examined by the book in the context of some earlier and later factual and legal occurrences; Chapter 18 summarises the historical findings of the book; Chapters 9 to 11 contain the main analyses of ICL of the First World War era.

The chapters not yet mentioned contain the core of the book. They gradually portray the legal, political and diplomatic deliberations that succeeded, after much time and effort, in producing Article 227 of the Versailles Treaty, only to lead subsequently to its abandonment. Chapter 2 ('Hang the Kaiser') depicts the growing support over the course of the war generally for ICL, and specifically for prosecuting Wilhelm before an international tribunal. Chapter 4 ('Making the Case in International Law') and Chapter 5 ('Britain, France, and Italy Agree to Try the Kaiser') discuss mainly the legal reports and deliberations that had taken place prior to the Paris Peace Conference. Most notable are (i) those of the British expert Committee of Enquiry into the Breaches of the Laws of War,[10] and (ii) a memorandum, endorsed by the French government, written by Albert Geouffre de Lapradelle and Fernand Larnaude.[11] The two chapters also examine the contribution of these legal deliberations and reports to the consolidation of support by the Allied leaders for internationally prosecuting Wilhelm. Only US President Wilson remained sceptical about such a prosecution.[12]

Chapter 8 ('The Commission on Responsibilities') discusses mainly the creation of that commission and its deadlocked deliberations. The French and British commission members headed the pro-ICL majority camp; the Americans, led by Lansing, spearheaded the ICL-sceptical opposition.[13] Eventually, instead of a unanimous report, alongside a majority opinion, two dissenting opinions were published – one American, the other Japanese.[14] Unlike the majority, the dissenting opinions opposed Wilhelm's prosecution, both specifically in an international

[8] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14 *American Journal of International Law* 95 (Commission Report).
[9] But see Randall Lesaffer, 'Law Between Past and Present' in Bart van Klink and Sanne Taekema (eds), *Law and Method* (Mohr Siebeck 2011) 133, 143 ('There is no sound basis to hold that a truly historical approach to law makes legal history less relevant to the understanding of current law than the more "juridical" one').
[10] Committee of Enquiry into Breaches of the Laws of War, 'First, Second, and Third Interim Reports from the Committee of Enquiry into the Breaches of the Laws of War, with Appendices', 26 February 1920, TNA CAB 24/111/13 (British Committee Memorandum).
[11] Ministère de la Guerre (Albert Geouffre de Lapradelle and Fernand Larnaude), *Examen de la Responsabilité Pénale de L'Empereur Guillaume II* (Imprimerie Nationale 1918).
[12] Schabas (n 1) 67.
[13] ibid 110.
[14] ibid 116–18.

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tribunal (deeming such tribunals unprecedented) and generally (maintaining that Wilhelm enjoyed sovereign immunity).[15] The Commission Report is commonly considered to be evidence of an emerging international consensus on ICL, although, as Schabas argues in Chapter 8 and proves in Chapters 9 to 11, this is incorrect. In reality, the Commission did not reach an agreement on any of the key legal issues.

In Chapter 8, Schabas also argues that, contrary to prevailing belief, the Report is of little use in the interpretation of Article 227, because it was rather inconsequential in the formulation of the Article. Schabas then convincingly proves this argument in Chapter 12 ('The Council of Virgins').

In my opinion, Chapter 12 is the most important chapter in the book. It provides fresh, convincing answers to two age-old conundrums: (i) How did the Allies reach an agreement on Wilhelm's treatment (enshrined in Article 227), despite the non-resolvable disagreement on this matter between their representatives in the Commission on Responsibilities? (ii) What is the explanation for the odd phrasing of Article 227? Article 227 states:[16]

> The Allied and Associated Powers publicly arraign Wilhelm II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused … composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

On the one hand, the Article appears to be an expression of the Commission on Responsibilities majority position as it decrees the international trial of Wilhelm for universal wrongs. On the other hand, the Article clearly deems morality and policy (not law) as the normative basis for Wilhelm's charges, trial and punishment. As such, it appears to express the dissenting position in the Commission with regard to the absence of a *legal* basis for trying the Kaiser at the international level. Indeed, Lansing proclaimed Article 227 a victory.[17]

One might thus be tempted to conclude that Article 227 is one of Allen Sherman's 'camels', in the sense of being 'a horse designed by committee'.[18] Indeed, formally, the Article was adopted jointly by the heads of the leading allied powers (the Council of Virgins).[19]

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[15] Commission Report (n 8).

[16] Versailles Treaty (n 2).

[17] Robert Lansing, *Some Legal Questions of the Peace Conference* (US Government Printing Office 1919) 18; Schabas (n 1) 195.

[18] Allan Sherman, *Peter and the Commissar* (RCA Red Seal Record 1964), https://youtu.be/w9tnOWAillk (minute 3:18–3:23 of the recording: '… we have all heard the saying, which is true as well as witty that a camel is a horse designed by a committee'). Note that while the phrase is commonly attributed to Sherman, this recording implies that it is older.

[19] The council, consisting of the American, British, French and Italian heads of state, was unofficially referred to as the Conseil des Vièrges (the Council of Virgins). As Schabas explains: 'The inspiration [for that name] was a

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Moreover, the Article is a compromise and, as such, like Sherman's 'camels' (that is, similar to typical committee designs), it is gravely incoherent and inconsistent. Nevertheless, for the most part, Article 227 was not a committee design. It was primarily the work of President Wilson, who crafted it to break the deadlock, while being (physically) sick and (mentally) tired (of Lansing). Contrary to the prevailing belief, the main source of inspiration for Article 227 was not the Report of the Commission on Responsibilities. As Schabas reveals, Wilson, without conferring with Lansing, drew 'inspiration' from a letter Lansing had sent him earlier.[20] In that letter Lansing reiterated his opposition to trying Wilhelm but, being receptive to Wilson's desire for a compromise, he outlined a conjectural solution to the deadlock. As Schabas demonstrates, Wilson 'borrowed' extensively terminology from Lansing's proposal when formulating what would become Article 227. This is not to say that the adoption of this scheme was truly a victory for Lansing. According to Schabas, it was quite the contrary.[21] In short, in this important chapter Schabas sheds new light on the history and meaning of Article 227.

Chapter 13 ('Finalising the Treaty of Versailles') describes the slight changes that were made in Wilson's scheme as it morphed into Article 227. It also presents the German opposition to Article 227 and to a few additional articles. Only the threat of military force compelled Germany to sign the Treaty.

Along with Chapters 14, 16 and 17 (discussed above), Chapter 15 ('Readying the Case for Trial') addresses the failure to implement Article 227. Its most significant contribution is that it reveals that the Dutch extradition refusal was not the only reason for the failure. Another was that the Allies did not take trial preparation seriously.

Other than my main point of contention with the book (which is discussed in the next part), my only noteworthy critique of the book concerns the little attention it pays to the unimplemented initiative, also made at the 1919 Paris Conference and supported by the Commission on Responsibilities, to prosecute individuals other than Wilhelm for war crimes in international military tribunals (enshrined in Articles 228 and 229 of the Versailles Treaty and in several other treaties (each signed between the Allies and the various defeated states)).[22] The contribution of that initiative to ICL was equal to, if not greater than, the contribution of the initiative to try Wilhelm; certainly, the format of the Nuremberg tribunal was more influenced by this other initiative.[23] I do understand, however, the thematic rationale behind the limited attention

popular French novel, entitled *Les demi-vièrges*, by Marcel Prévost, published in 1894. It was premised on the preposterous idea that Heads of State had virgin minds': Schabas (n 1) 175.

[20] 'From Robert Lansing (Paris, 8 April 1919)', reproduced in Arthur S Link (ed), *The Papers of Woodrow Wilson* (Vol 57, Princeton University Press 1987) 131.

[21] cf Schabas (n 1) 195 ('Lansing put a brave face on what may have seemed a great personal humiliation'), with James Willis, *Prologue to Nuremberg* (Greenwood 1982) 81 ('Lansing, through his recommendations to Wilson, managed in the end to triumph').

[22] 'Appendix: War Crimes Clauses of Peace Treaties of the First World War' in Willis (n 21) 177–81.

[23] See Office of the US Representative to the UN War Crime Commission, 'Trial of War Criminals by Mixed Inter-Allied Military Tribunals', 31 August 1944, 3–4, http://www.legal-tools.org/doc/e5f070/ (1944 Memorandum).

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that the book pays to this other initiative; after all, that initiative was not concerned with trying the Kaiser (the subject of Schabas's book).

3. THE *FIRST* CHAPTER OF ICL HISTORY

Although Schabas presents an innovative account of the period under examination, he does not deviate considerably from the accepted general account of ICL history. The book's approach is summarised in its opening lines: 'It is often said that international criminal justice began with the great Nuremberg trial of 1945 … But this familiar narrative of the beginning of international justice is incomplete. The first chapter is missing'.[24]

The need to acknowledge the First World War chapter of ICL history is indisputable because that experience was a primary source of inspiration at Nuremberg.[25] The reluctance to acknowledge that ICL has a longer past similarly feels right. To consider otherwise, as Bassiouni maintained, is no more than wishful thinking, stemming from 'ICL's protagonists' desire to give historical substance to this discipline'.[26]

Nevertheless, as demonstrated below, ICL actually has a much longer history, which has relevance both to the ICL of the First World War era and to current ICL. The discussion in this part demonstrates this relevance by briefly examining each of the following core aspects of ICL history: (i) the history of the general development of ICL and of the prosecution of war crimes; (ii) the history of the international crime of aggression and of sovereign immunity; (iii) the history of crimes against humanity; and (iv) the history of international criminal tribunals. The examination of each core aspect consists of the following stages. First, the accepted history of the core aspect is briefly presented, followed by a presentation of Schabas's account of the history of that aspect. Questions that remain unanswered by these two rather similar accounts are then pointed out. Lastly, the examination presents the answers found to these questions in the long (forgotten) history of ICL.

3.1. GENERAL DEVELOPMENT OF ICL AND THE PROSECUTION OF WAR CRIMES

The prevalent historic account maintains that (generally speaking) until the end of the Second World War, international law did not address individuals, but only states. Piracy is the only recognised long-standing international crime because for centuries universal jurisdiction has extended over it, based on a doctrine that deems pirates to be 'outlaws' and 'enemies of mankind' (*hostes humani generis*).[27] This doctrine has also been applied subsequently to a few additional

[24] Schabas (n 1) 1.
[25] See ibid 2, 315.
[26] M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff 2013) 29.
[27] David McKay and Hersch Lauterpacht, *Oppenheim on International Law* (Vol 2, David McKay Company 1955) 609 ('[Even] [b]efore a Law of Nations in the modern sense of the term was in existence, a pirate was already considered an outlaw, a *hostis humani generis* … Piracy is a[n] … international crime … [because] the pirate … can be brought to justice anywhere').

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crimes that resemble piracy. Nevertheless, ICL was truly formed only after the Second World War, when the universal jurisdiction doctrine was copied from piracy law and applied to a new legal corpus (ICL) to combat acts known today as 'core international crimes' (war crimes, crimes against humanity, genocide and aggression/crimes against peace).[28]

Some versions of the aforesaid prevalent historic account do acknowledge that the practice of war crime prosecution (namely, of ascribing individual responsibility for violations of the law of war) has a centuries-long history, but the primary focus in such versions of the prevalent account is still placed on such prosecution attempts in modern times – from the late nineteenth century onwards. The claimed reason for that focus is that the late nineteenth century marks the beginning of the treaty codification of the international laws of war. Presumably, this treaty codification initiative began because the earlier customary laws of war were unclear and ineffective.[29] Some present-day jurists go as far as to dismiss the earlier customary laws of war as being mere (non-legal) rules of professional ethics[30] and earlier war crime trials as political,[31] sporadic,[32] or domestic.[33] The (non-penal) codifying law of war treaties are said to have also failed to generate sufficient compliance, which led to the idea of resorting to international criminal justice ('true' ICL) being implemented only after the Second World War.[34]

The book embraces the aforesaid prevalent account of the history of ICL. Its only notable deviation from this account concerns the deeming of the First rather than the Second World War as its starting point:[35]

[28] eg, Conway Henderson, *Understanding International Law* (John Wiley & Sons 2010) 43, 143, 248–50. See also Markus Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press 2014) 153 (stating that the application of universal jurisdiction to offences such as core international crimes constitutes 'turning the power of criminal punishment against the *hostis humani generis*, the enemy of mankind, the universal outlaw, expressions historically associated with the pirate').

[29] eg, Richard DiMeglio and others, *Law of Armed Conflict Deskbook* (US Army Judge Advocate General's Legal Center 2012) 13–14; Adam Roberts, 'Land Warfare: From Hague to Nuremberg' in Michael Howard, George J Andreopoulos and Mark R Shulmam (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale University Press 1994) 116, 116–20.

[30] eg, Grant Doty, 'The United States and the Development of the Laws of Land Warfare' (1998) 156 *Military Law Review* 224, 224 ('the period from 1856 to 1909 [was] the law of war's "epoch of highest repute." The defining aspect of this epoch was the establishment, by states, of a positive legal or legislative foundation superseding a regime based primarily on religion, chivalry, and customs'); Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 54 (stating that the adoption of the penalty clause in Article 3 of 1907 Hague Convention was, arguably, 'the first time … that rules of war became laws of war').

[31] eg, Devin O Pendas, 'Orientation War Crimes Trials in Theory and Practice from Middle Ages to the Present' in Jonathan Waterlow and Jacques Schuhmacher (eds), *War Crimes Trials and Investigations* (Palgrave 2018) 23, 28–29.

[32] ibid 31; Bassiouni (n 26) 28–29.

[33] eg, Devin O Pendas, '"The Magical Scent of the Savage": Colonial Violence, the Crisis of Civilization, and the Origins of the Legalist Paradigm of War' (2007) 30 *Boston College International & Comparative Law Review* 29, 31 ('Above all, regulating military conduct was either ad hoc, through Royal ordinances issued for specific campaigns, or customary and largely unenforceable … In either case, its promulgation and enforcement was national (or occasionally bilateral), rather than international in scope').

[34] eg, Roberts (n 29) 116–20; Pendas (n 31) 38–39; Ronald Slye and Beth Van-Schaack, *International Criminal Law: The Essentials* (Kluwer 2008) 12–38.

[35] Schabas (n 1) 121–22.

> Historically … [d]etermining which courts and which authority would exercise jurisdiction over any specific wrongful act was a straightforward exercise for which the main criteria were the location of the crime and the nationality or allegiance of the offender. The notion that there were international crimes seems to have originated at the time of the emergence of nation states, in the seventeenth century … [P]iracy was the first crime to be recognised as one of international concern. Pirates were *hostes humani generis*, that is, enemies of mankind … During the eighteenth and nineteenth centuries, the concept expanded to deal with [few] other threats … The focus of this early generation of international crimes was on crimes … that challenged th[e] [states'] commercial and political interests … True international crimes … consist of genocide, crimes against humanity, war crimes, and the crime of aggression … [These] crimes … concern the international community as a whole … [E]fforts to deal with this more contemporary generation of international crime can be traced as far back as the First World War.

The book also sticks to the accepted historic account of war crime prosecution, presented above. It briefly mentions the possible long existence of a 'warrior's code',[36] and notes that '[d]uring the early days and months of the First World War, captured enemy combatants were tried for various violations of the laws of war',[37] but it focuses primarily on formal-written legal sources. This is evident in its celebration of the Report of the Commission on Responsibilities as 'the first [ever] compilation of violations deemed to be punishable under international law'.[38] The focus on formal-written sources is further evident in the manner in which the author stresses the guidance taken from the codifying Hague Conventions, despite the fact that the actual basis for war crime prosecution was customary international law, because these conventions did not formally apply to the Great War.[39] The book further implies that even when it comes to war crimes, their conceptualisation as true international crimes, 'crimes that concern the international community as a whole … can be traced … [to] the First World War'.[40]

At first glance, this historical presentation seems unproblematic, but certain questions remain. What is the explanation for the belligerents' unhesitant war crime prosecution of enemy soldiers from the beginning of the war? What is the origin of the idea to apply the universal jurisdiction doctrine from piracy law to ICL? The long-(forgotten) history of ICL provides the answers.

In European jurisprudence, from late mediaeval times to the nineteenth century, 'there was no sharp distinction between international and national law. Individuals possessed legal personality … under both'.[41] 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 the world over'.[42] The typical criminal law prohibitions were unlegislated customary norms of the ostensibly universal

[36] ibid 139.
[37] ibid 11.
[38] ibid 143–44.
[39] ibid.
[40] ibid 122.
[41] Jeffrey Dunoff, Steven Ratner and David Wippman, *International Law: Norms, Actors, Process* (Aspen 2006) 403.
[42] Bede Jarrett, *Social Theories of the Middle-Ages 1200–1500* (Frank Cass & Co 1968) 15. See also Peter Goodrich, 'The International Signs Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 365, 365–73.

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natural law; criminal '[c]ase law and especially doctrine were … of an international character'.[43] Thus, not only piracy but also law of war violations (war crimes) and even felonies (murder, theft, arson, robbery, rape, etc) were considered crimes against the law of nations, the perpetrators of which were outlaws and enemies of mankind, subject in many European courts to universal jurisdiction.[44]

Contrary to Schabas's premise, the state did not emerge in the seventeenth century. Its rise was a protracted process that had already begun in late mediaeval Europe, yet culminated only deep into the nineteenth century[45] when the modern definition of the state was 'doctrinally consolidated'.[46] This modern concept was at that time backdated to the seventeenth century.[47] Aiming to strengthen state sovereignty, statist positivist jurists strongly contributed to the consolidation and backdating.[48]

In Europe, during late mediaeval times and to a gradually diminishing extent until the nineteenth century, alongside the territorial sovereign entity from which the modern state eventually emerged, there existed various other competing forms of sovereign entity (such as popes, emperors, orders, free cities and local nobility) as well as autonomous judicial systems not affiliated with any sovereign.[49] Europe was a '"patchwork of overlapping and incomplete rights of government"… in which "different juridical instances were … interwoven and stratified"'.[50]

Originally, sovereigns who proclaimed universal dominion (popes and emperors) developed the universal jurisdiction doctrine (by creative conflation of earlier Roman, Christian and Germanic doctrines) in an attempt to attain supreme legal authority.[51] Soon thereafter other sovereigns and judicial systems, including many territorial sovereigns, began to assert the authority to prosecute for universal crimes.[52] They did so both to resist their own subordination to popes and emperors, and to diminish the autonomous law enforcement authority of other entities and systems, aiming to either subordinate or abolish those competitors.[53] Therefore, it is not surprising that for as long as competition for the gradually emerging states still existed, the universal jurisdiction doctrine was applied widely to many crimes. This competition ended in Europe only in the nineteenth century after the post-Napoleonic settlements prompted 'the final termination of

[43] Marc Ancel, 'The Collection of European Penal Codes and the Study of Comparative Law' (1958) 106 *University of Pennsylvania Law Review* 329, 342.
[44] Ziv Bohrer, 'International Criminal Law's Millennium of Forgotten History' (2016) 34 *Law & History Review* 393, 426–27.
[45] Andrew Phillips, *War, Religion and Empire: The Transformation of International Orders* (Cambridge University Press 2010) 136–37.
[46] David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1998) 17 *Quinnipiac Law Review* 99, 119.
[47] Peter Wilson, *The Holy Roman Empire: A Thousand Years of Europe's History* (Allen Lane 2016) 683.
[48] Kennedy (n 46) 100.
[49] Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press 1994) 4; Marianne Constable, *The Law of Others* (University of Chicago Press 1994) 7–27.
[50] John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organization* 139, 149–50.
[51] Bohrer (n 44) 422–24.
[52] ibid 426–27.
[53] ibid.

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the complex overlapping and shared authorities'.[54] Only with the changes following the Napoleonic Wars, under the rising influence of statist positivist jurisprudence, had the Western domestic-civilian judicial system come to regard criminal law as being 'necessarily of a positive, local existence'.[55] As a result, most of these systems ceased to recognise unlegislated crimes and felonies were no longer considered international crimes.[56]

Unlike felonies, war crimes remained international crimes. Historically, military and civilian justice systems, even of the same ruler, were not viewed as belonging to a single ('domestic') legal system. Instead, the military tribunals originally were considered the judicial organs of the transnational mediaeval warrior guild; their 'domestication' had been a long-drawn process that was finalised only in the twentieth century. The military judicial systems had primary jurisdiction over penal enforcement of the laws of war (war crime prosecution).[57] 'These laws have displayed a remarkable continuity … Most of the actions today outlawed by … [current international humanitarian law] Conventions have been condemned in the West for … centuries'.[58] Furthermore, war crime prosecution was more common over the centuries than is presently assumed.[59] Like the unlegislated felonies of yore[60] and the still existing common law crimes of England,[61] the prohibitions of the customary laws of war were not mere moral rules but obligatory legal norms, enforceable by criminal justice, despite being unwritten.[62]

As in the case of felonies, during the nineteenth century, statist positivist claims were advanced against the classification of war crimes as international crimes.[63] However, Western military justice systems, then still considerably autonomous and change-resistant, were less affected by statist positivism and thus continued to consider customary international law as a legal basis for prosecuting war crimes.[64] This explains the relative ease with which military justice systems prosecuted captured enemy war criminals at the outbreak of the First World War, despite the era being the heyday of statist positivism.

In light of the continuity exhibited in the laws of war and the resistance to statist positivism by the military justice systems, it is not surprising that, in truth – as Lauterpacht noted in 1950 – regarding 'crimes against the laws of war … international law has always recognised the full jurisdiction … as in the case of piracy, of all nations'.[65] A US memorandum from 1944, which was highly influential in the creation of the Nuremberg Tribunal, similarly observed:[66]

[54] Jordan Branch, *The Cartographic State* (Cambridge University Press 2013) 31–32.
[55] John Goodenow, *Historical Sketches of the Principles and Maxims of American Jurisprudence* (Wilson 1819) 3.
[56] Bohrer (n 44) 475.
[57] ibid 428–30.
[58] Geoffrey Parker, *Empire, War and Faith in Early Modern Europe* (Allen Lane 2002) 167–68.
[59] ibid 159.
[60] Ancel (n 43) 341.
[61] Richard Card, *Card, Cross & Jones: Criminal Law* (Oxford University Press 2012) 14.
[62] Bohrer (n 44) 428–30.
[63] eg, James Stephen, *A History of the Criminal Law of England* (Vol 2, Macmillan 1883) 62–63.
[64] Bohrer (n 44) 464–71.
[65] Hersch Lauterpacht, 'International Law after the Second World War' in Eli Lauterpacht (ed), *International Law: Collected Papers – Vol 2(1)* (Cambridge University Press 1975) 159, 166.
[66] 1944 Memorandum (n 23) 7, 4.

> It 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;
> … for the past century at least war crim[inals] have been considered … 'enemies of mankind' … '*hostes humani generis*' … [and] 'outlaws'.

Indeed, from late mediaeval times onwards, sources can be found that deem war criminals outlaws, enemies of mankind and pirate-like,[67] which explains the presence of such sources during the First World War.[68] Simply put, the universal jurisdiction doctrine was never copied from piracy law to ICL.

War crime law was not, however, entirely unaffected by statist positivism. Jurists tend to assert that their *lex ferenda* is already the *lex lata* in an attempt to transform the former into the latter. This *lata-ferenda* conflation is not always conscious, as jurists often sincerely believe that their biased account of the law is true. Accordingly, during the nineteenth century, many statist positivists regarded the state and its law as having an almost ahistorical existence[69] and dismissed non-statist and non-positivist (past, present, and proposed) forms of law as obsolete,[70] non-legal,[71] wrong,[72] or unprecedented.[73] Their misleading account of law caught on; more and more people, positivists and others, came to believe that traditionally, if not essentially, criminal law was a state function and international law could not apply to individuals, only to states. Although ICL persisted (notably, war crimes remained international crimes), the spread of statist positivist beliefs affected the recollection of its past; ICL became widely perceived as novel, and its long history was forgotten.[74]

The trauma of the two World Wars cemented the narrative of the novelty of ICL. Understandably, many regarded the atrocities of these wars as proof that international law had always been ineffective and thus had never been truly positive law.[75] Psychologically, it is easier to believe that such horrors were the result of the absence of law than to acknowledge that they were perpetrated despite its existence. From a historical perspective, however, this conclusion is wrong:[76]

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

[67] Bohrer (n 44) *passim*.
[68] ibid 468–69.
[69] Benno Teschke, *The Myth of 1648* (Verso 2003) 2.
[70] eg, Henry Sumner Maine, *Ancient Law* (John Murray 1861) 1–20.
[71] eg, John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 208.
[72] eg, Goodenow (n 55) 3.
[73] eg, Charles Vergé, 'Le droit des gens avent et depuis 1789' in Georg Friedrich Martens, *Précis du droit des gens modernes de l'Europe, Vol 1* (Guillaumin et Cie 1864) I, XL.
[74] Bohrer (n 44) 406, 464–70.
[75] Kennedy (n 46) 110 (discussing the First World War).
[76] David Whetham, *Just Wars and Moral Victories* (Brill 2009) 52.

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Both the persistence of war crimes as international crimes and the proliferation of statist positivist beliefs are evident in a statement made by Italian Prime Minister, Vittorio Orlando, during the Paris Peace Conference (quoted in the book):[77]

> I named two delegates to the Commission on Responsibilities … Both are esteemed legal experts. I left them completely free. They agreed with the conclusions of the majority, with which I concur. But, if I must express my personal opinion, I don't think we have to hold trials. I repeat that I defer to my legal experts … But from my standpoint crime is essentially a violation of the domestic law of each entity, of the duty of the subject towards his sovereign. Creating a different precedent is a serious matter.

3.2. AGGRESSION AND SOVEREIGN IMMUNITY

The accepted historic account holds that grave breaches of *jus ad bellum* became international crimes (aggression/crimes against peace) only after the Second World War. The failed attempt to prosecute the Kaiser for such breaches and the outlawry of war treaty initiatives of the 1920s are often deemed the precursors of this development.[78] The action of the European powers, a century prior, in decreeing Napoleon an 'outlaw' and subsequently detaining him in perpetuity after he reinitiated war in violation of an earlier surrender treaty, is also mentioned occasionally. Napoleon's case, however, is commonly treated as a mere political (non-legal) action against an aggressor, which only a century later would inspire resorting to ICL.[79] After all (according to the accepted historic account), aggression could not have existed as an international crime at the time because, presumably, '[p]rior to World War II … [international] law had little to say about when States could go to war'[80] and 'the doctrine of absolute sovereign immunity prevailed'.[81] International law, the accepted account tells us, came to regard sovereigns as having unrestrained war-making discretion and to support absolute sovereign immunity by the eighteenth century (under absolute monarchism),[82] or by the nineteenth century (under statist-positivism) at the latest.[83]

The book embraces the aforesaid accepted historic account regarding pre-twentieth century endorsement by international law of (i) absolute sovereign immunity, (ii) unrestrained war-making discretion (namely, the absence of an international crime of aggression), (iii) the non-legal nature of Napoleon's case:[84]

[77] Schabas (n 1) 188–89.
[78] Sergey Sayapin, *The Crime of Aggression in International Criminal Law* (Springer 2014) xviii–xx.
[79] ibid; Gary Jonathan Bass, *Stay the Hand of Vengeance* (Princeton University Press 2000) 39 ('there were [in Napoleon's case] weak stirrings of some kind of … an embryotic preference to postwar trials').
[80] Douglas Guilfoyle, *International Criminal Law* (Oxford University Press 2016) 292.
[81] Christopher Joyner, *International Law in the 21st Century* (Rowman & Littlefield 2005) 51.
[82] Russell Weigley, *The Age of Battles* (Indiana University Press 2004) 46; Malcolm Shaw, *International Law* (Cambridge University Press 2008) 507.
[83] DiMeglio and others (n 29) 13–14; Curtis Bradley, *International Law in the US Legal System* (Oxford University Press 2015) 235.
[84] Schabas (n 1) 3–4.

> When it was suggested that the German Emperor be brought to trial for starting the First World War, there were no precedents … British lawmakers looked at the case of Napoleon … [But] [i]n 1815, it was unimaginable that the courts of another country might try France's former Emperor … And with what crime might Napoleon have been charged? In 1815, the only one the British lawyers could think of was treason against his own country.

'[C]oncerning the crime of aggression … the real start of the debate was in 1919 as delegates to the Paris Peace Conference considered at some length whether Wilhelm II could be brought to justice for having started the war'.[85] However, this accepted historical narrative leaves certain questions unanswered. Notably, what was the origin of the legal positions expressed during the First World War era that did regard 'aggression' and 'warring in breach of a treaty' as international crimes?

The prevailing belief that rulers have long enjoyed absolute sovereign immunity confuses the history of domestic and of international criminal justice. During late mediaeval and early modern times, rulers were immune from prosecution in their regular domestic courts, and generally for domestic crimes.[86] 'The king ha[d] no equal within his realm … [and even] equal can have no authority over equal'.[87] However, the prevailing view was that rulers were liable for international crimes.[88] Foreign rulers were among those considered authorised to punish a sovereign who committed an international crime.[89] The offending ruler could not claim 'that equal did not have power over equal … because by sinning he deprive[d] himself of his equality [to other rulers]'.[90] Admittedly, because of political reasons, trials of rulers were rare,[91] but they did occur.[92]

Moreover, several international crimes were aimed primarily at regulating the conduct of otherwise legitimate sovereign rulers. For example, from late mediaeval times to the early nineteenth century, 'tyranny' was an international crime, inspired by earlier Roman doctrine.[93] Otherwise legitimate rulers who committed mass atrocities were considered tyrants and, as

[85] ibid 6.
[86] Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 68.
[87] Henry de Bracton, *De Legibus et Consuetudinibus Angliæ* (Samuel Thorne tr, Vol 2, c1210–68) 33, http://ames-foundation.law.harvard.edu/Bracton/Unframed/English/v2/33.htm.
[88] Kenneth Pennington, *The Prince and the Law* (University of California Press 1993) 269–90.
[89] Shannon Brincat, 'Death to Tyrants: Self-Defence, Human Rights and Tyrannicide – Part I' (2008) 4 *Journal of International Political Theory* 212, 221–27; Bracton (n 87) 109–10; David Trim, 'Intervention in European History c.1520–1850' in Stefano Recchia and Jennifer Welsh (eds), *Just and Unjust Military Intervention* (Cambridge University Press 2013) 21, 26–27.
[90] Alberico Gentili, *De Iure Belli Libri Tres* (1612) (John Rolfe tr, Clarendon Press 1933) 323.
[91] ibid 325.
[92] eg, ibid 323 (noting the trial of King Conradin in 1268).
[93] Note that during the Reformation Era, the tyranny doctrine was gravely abused in numerous cases out of sectarian motivations. Yet, this abuse should not lead us to disregard that doctrine as a legal norm. The fact of the matter is that the doctrine was not abused in all cases. Moreover, the reasoning presented, when the doctrine was either used or abused, was increasingly non-sectarian, which gradually paved the way (along with many other factors) to more inclusive applications of the doctrine: see David Trim, '"If a Prince Use Tyrannie towards His People": Interventions on behalf of Foreign Populations in Early Modern Europe' in Brendan Simms and David Trim (eds), *Humanitarian Intervention: A History* (Cambridge University Press 2011) 29, 32, 38–65.

such, '*hostes humani generis*—international outlaws—who fall within the scope of "universal jurisdiction" … [like] pirates'.[94] In fact, the phrase *hostis humani generis* was first used in Roman law to refer to tyrants rather than pirates.[95]

Otherwise legitimate rulers were also the archetypical perpetrators of certain criminal violations of *jus ad bellum*. Among these crimes against peace were the initiation of war in violation of treaty commitments and the orchestration of war of mass atrocities/destruction (the two crimes that many later maintained that the Kaiser had committed).[96]

Even during the eighteenth century, considerable support still existed for the view that rulers could be held criminally responsible for *jus ad bellum* violations.[97] Several minor eighteenth century rulers were even tried for committing crimes against peace and for tyranny, which demonstrates that even then 'the notion … that some types of princely behavior were simply too extreme to be countenanced by other princes was widely accepted'.[98] There was also an initiative to

[94] Shannon Brincat, 'Death to Tyrants: Self-Defence, Human Rights and Tyrannicide – Part II' (2009) 5 *Journal of International Political Theory* 71, 78.

[95] Brincat (n 89) 217–19; Dan Edelstein, '*Hostis Humani Generis*: Devils, Natural Right, and Terror in the French Revolution' (2007) 141 *Telos* 57, 61–63.

[96] Bohrer (n 44) 458–61.

[97] Walter Rech, *Enemies of Mankind* (Brill 2013) 36, 78–79, 138–49.

[98] Trim (n 89) 40. One might argue that the actions taken against these minor eighteenth century rulers, and even those attempted against King Fredrick of Prussia, are unrelated to international law, because these rulers (Fredrick included) were subject to the Holy Roman Empire. Indeed, some scholars maintain that legal practices that existed within the Holy Roman Empire are irrelevant to the history of international law. Such scholars argue specifically that the Holy Roman mechanism for the punishment of tyrannical and aggressive estate rulers – especially its continued existence during the eighteenth century – demonstrates that the Holy Roman estates had never become distinct sovereigns and that the Holy Roman Empire remained to its very end (or, alternatively, gradually became) sufficiently centralised to be considered a single sovereign. The fact that the relevant substantive prohibitions (and not only the aforesaid institutional enforcement mechanism) were enshrined in formal Holy Roman constitutional edicts, presumably, further demonstrates that the punishment of individual Holy Roman estate rulers was an internal (non-international) matter: eg, Patrick Milton, 'Intervening Against Tyrannical Rule in the Holy Roman Empire during the Seventeenth and Eighteenth Centuries' (2015) 33 *German History* 1, 1–5. However, this position is flawed. First, it underrates the decentralised elements of the Holy Roman structure. The Holy Roman Empire never attained a monopoly in its realm either in war- and peace-making, or in criminal lawmaking and enforcement: Wilson (n 47) 4–15, 172. Second, this position provides an oversimplified account of the Empire. The structure of the Holy Roman Empire was chronically complex and (slowly and non-linearly) ever-changing. As a result, throughout the Empire's existence (as well as ever since) a dispute has persisted over its 'correct' definition. Alongside (and competing with) views that defined the Empire as a single (sufficiently centralised) sovereign entity, there have always been opinions that defined it as a supranational or international entity of one kind or another. In various periods, including the eighteenth century, an internationalist definition of the Empire was the dominant view: Rech (n 97) 135–36; Wilson (n 47) 4–15. Third, the aforesaid position suffers from anachronism because it assesses the Holy Roman Empire and its estates based on a sovereignty conception that had consolidated only during the late nineteenth century (nearly a century after the dissolution of the Holy Roman Empire), according to which 'sovereignty … could not be a matter of degree; it was an on/off affair': Kennedy (n 46) 123. By contrast, under the sovereignty conception that was prevalent until the late nineteenth century, 'there were many sovereigns and many types of sovereignty, which overlapped unproblematically': Kennedy (n 46) 122–23. Thus, under the contemporaneous sovereignty conception, each Holy Roman estate was commonly considered a distinct sovereign in the 'eyes' of the law of nations, irrespective of whether the Holy Roman Empire (as a whole) was also considered as such: see, eg, *Chisholm v Georgia* 2 US 419 (1793), para 14 (US Attorney-General: '[In the] Germanic Empire … [t]he Princes wage war without the consent of their paramount sovereign; they even wage war upon each other; nay upon the Emperor himself … they are distinct sovereignties'); Karl Gottlob Günther, *Europäisches Völkerrecht in Friedenszeiten nach Vernunft, Verträgen und Herkommen mit*

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conduct proceedings for 'crimes against peace' against a major ruler, King Fredrick II of Prussia, following his 1756 invasion of Saxony.[99] Fredrick was accused (like the case of the Kaiser) of initiating the war in violation of international commitments and of orchestrating a war of mass atrocities and destruction.[100] In a similar way to Napoleon, Frederick was declared an outlaw by the sovereign entities of the Holy Roman Empire, with later support from other European sovereigns.[101] Across Europe, Frederick's wrongs were 'considered to transcend all computation, and to mark him out for partition, for suppression and enchainment, as the *general enemy of mankind*'.[102] Fredrick eventually escaped punishment because the coalition against him abruptly disintegrated following the sudden death of the Russian Empress. Nevertheless, the wide consensus regarding his culpability demonstrates that there was no unanimity with regard to unlimited sovereign immunity and unlimited war-making discretion.[103]

Admittedly, during the nineteenth century, support increased for unlimited sovereign immunity and for unlimited war-making discretion, although, contrary to common belief, the support for such immunity and discretion was never unanimous. Many still considered aggression to be an

Anwendung auf die teutschen Reichsstände (Richtersche Buchhandlung 1792) 169 (stating that with regard both to the Holy Roman Empire 'as a whole, as well as its individual sovereigns … the principles of international law apply between them and others, unless their link and dependence to the higher State [ie the Holy Roman Empire] requires particular limitations'); see also Jan HW Verzijl, *International Law in Historical Perspective, Vol 1* (Sijthoff 1968) 404–05. Moreover, only with the late nineteenth century consolidation of the aforesaid new conception of 'sovereignty[,] would come a sharpening of distinctio[n] between … international and municipal or domestic law': Kennedy (n 46) 119. This sharp distinction did not exist earlier. Instead, local laws, especially of a penal nature, were commonly considered local manifestations of the universal law, adapting the universal law to the unique local conditions: see above notes 41–43 and accompanying text. Accordingly, even during the seventeenth and eighteenth centuries, the legal basis for the tyranny and aggression prohibitions applied to estate rulers was not only Holy Roman constitutional edicts but also the law of nations: see Rech (n 97) 135–36 (with regard to aggression); Werner Trossbach, 'Power and Good Governance – The Removal of Ruling Princes in the Holy Roman Empire 1680–1794' in Jason Philip Coy, Benjamin Marschke and David W Sabean (eds), *The Holy Roman Empire Reconsidered* (Berghahm Books 2010) 191, 192 (with regard to tyranny). Nevertheless, this is not to say that the Holy Roman law and law of nations fully converged: regarding some aspects of these prohibitions, the Holy Roman law added certain substantive constraints; even more significantly, the Holy Roman law established an institutional penal enforcement mechanism that did not exist elsewhere: see Robert von Friedeburg, 'Natural Law Jurisprudence, Arguments from History and Constitutional Struggle in the Early Enlightenment' in TJ Hochstrasser and Peter Schroder (eds), *Early Modern Natural Law Theories* (Kluwer 2003) 141, 142. Yet, irrespective of its unique attributes and of contemporary awareness of those distinct facets, the aforesaid Holy Roman law was still, to a considerable degree, considered an expression of the related law of nations: eg, Rech (n 97) 135–36; von Friedeburg, ibid 142. Furthermore, because the Holy Roman law was not regarded as unrelated to the law of nations, some of its originally unique aspects gradually expanded beyond the bounds of the Empire: see Henry Wheaton, *History of the Law of Nations in Europe and America* (Gould, Banks & Co 1845) 77 (quoting Hallam: 'The law of nations … grew out of the public law of the empire. To narrow, as far as possible, the rights of war and of conquest, was a natural principle of those who belonged to [most Holy Roman] States'); Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2002) 73 *British Yearbook of International Law* 103, 128–37.

[99] Bohrer (n 44) 482.

[100] ibid 457–58.

[101] ibid.

[102] Thomas Carlyle, *History of Friedrich the Second Called Frederick the Great, Vol 5* (Clarke & Co 1890) 82 (emphasis added).

[103] Bohrer (n 44) 458–61.

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international crime and rejected sovereign immunity, as manifested in some contemporary cases, notably that of Napoleon.[104]

In 1815 Napoleon was declared an outlaw for 'violating the convention which established him in the Island of Elba' and for 'reappearing in France with projects of disorder and destruction'.[105] In other words, he was outlawed for orchestrating a war of mass atrocities and destruction and for reinitiating war in violation of treaty commitments. A protocol, signed by the European powers in 1818 and later retracted, similarly proclaimed that 'Buonaparte was … deprived of all rights … by the fact of his conduct *hors-la-loi* [outside the law/as an outlaw] of nations'.[106] Declaring someone an outlaw was a legal procedure used as a law enforcement mechanism against criminals who evaded justice, authorising anyone to kill them on sight. In ICL, as well as in some Western domestic systems, decreeing outlawry remained legal until well into the twentieth century.[107] The British, who at the time somewhat opposed the international crime of aggression, eventually succeeded in having Napoleon's international outlawry retracted.[108] Nevertheless, the aforementioned treaties demonstrate that it is inaccurate to assume that no international crime existed at the time for which Napoleon could have been charged. The book is misled by certain First World War misinterpretations of Napoleon's case to conclude otherwise.[109]

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[104] ibid 461.

[105] Declaration of the Powers against Napoleon (entered into force 13 March 1815).

[106] Protocol (19 November 1818) (in French), quoted in H Hale Bellot, 'Memorandum on the Detention of Napoleon Buonaparte', appended to British Committee Memorandum (n 10) 364, 382 (translation for the author by Benji Grunbaum).

[107] Bohrer (n 44) 405–26.

[108] Bellot (n 106) 382.

[109] The inaccurate account of Napoleon's case that developed during the First World War, and which has become the prevalent narrative among international lawyers, originated (to a considerable degree) from two memorandums: one British and the other American (Schabas's account of Napoleon's case is clearly influenced by these, and related sources from the First World War era: Schabas (n 1) 3–4, 9, 20–22, 38–40, 62, 274–80). The (earlier) British memorandum was written, by H Hale Bellot, for the British Committee of Enquiry into the Breaches of the Laws of War: Bellot (n 106) 365–91. Its aim was to provide support for the Committee's position that '[a]ssuming that … [the ex-Kaiser] is to be dealt with, two courses might be taken—he might be treated summarily and administratively without any trial, in much the same manner as Napoleon was dealt with in 1815, or he might be tried before a Tribunal such as has been suggested above. One of several objections to the former mode of treatment is that it would slur over notable differences between the two cases. Napoleon was not charged with having during the Hundred Days carried on war contrary to the usages of civilised nations. His offence, if any, was either that he was a rebel to the lawful French Government or that he had violated the arrangement agreed to by him in 1814. The moral effect of confinement or internment of the ex-Kaiser without a trial would be much less than that of proceedings in which he would be heard and, if found guilty, punished accordingly. The opinion of the majority of the members of the Committee on the whole is in favour of the second course': British Committee Memorandum (n 10) 29–30.

Bellot's memorandum quotes sources that imply that during Napoleon's time some considered Napoleon's actions to be international crimes. Yet, the memorandum does not stress that position. Instead, it stresses the contemporary British position, which supported holding Napoleon in perpetual administrative detention (the course of action that was eventually taken). Furthermore, the memorandum does not mention the position (supported primarily, as will be discussed below, by some high-ranking Prussian officers) that Napoleon could have been tried legally in a non-French tribunal. These omissions are probably partly as a result of insufficient accessibility to sources. Notably, the memorandum's account of the contemporary Prussian position relies primarily on a book that only reproduced Gneisenau's letters to Müffling from 27 June and 29 June 1815 and not the letter written by

Even the British were less certain than is assumed in the book with regard to the absence of a relevant international criminal prohibition. Although they were reluctant to charge Napoleon with aggression, they did consider charging him with 'brigandage' (for being a 'bandit'/'land pirate'/'unlawful combatant'), the international crime that had existed for centuries of fighting without sovereign authorisation.[110] In 1815 the British Prime Minister maintained that:[111]

> [legally] you had your choice of considering him (Bonaparte) either as a French subject, or as a captain of freebooters [that is, pirates] or banditti, and consequently out of the pale of protection of nations. Before he quitted Elba, he enjoyed only a limited and conditional sovereignty, which ceased when

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Müffling to Gneisenau between those dates on 28 June. As will be discussed shortly, that letter of 28 June is significant as it discusses the possibility of trying Napoleon in a Prussian tribunal. It is also likely that the memorandum's omissions are, to some degree, as a result of its British orientation, which unconsciously influenced its writer, leading him to focus on the British position at the time. Moreover, there is a possible less innocent reason for the memorandum's inaccurate account (an account that stresses the differences between the Kaiser's case and that of Napoleon). Recall that although the British Committee acknowledged in its recommendations to the British government that the Kaiser could either be tried or treated administratively (like Napoleon), most committee members supported the trial option (pointing out sources other than Napoleon's case as legal bases for such a trial). Recall further that the British Committee in those recommendations stressed that '[o]ne of several objections to [treating the Kaiser administratively, like Napoleon] … is that it would slur over notable differences between the two cases': British Committee Memorandum (n 10) 29. Thus, it is possible that the memorandum's omissions were intentional, aiming to convince the British government that the Kaiser's case differed considerably from that of Napoleon, thereby steering it away from following in the footsteps of its predecessors of the Napoleonic era. The second influential memorandum from the First World War era to address Napoleon's case is an American memorandum submitted to the Commission on Responsibilities (David Hunter Miller and James Brown Scott, 'Observations on the Responsibility of the Authors of the War and for Crimes Committed in the War', reproduced in David Hunter Miller, *My Diary and the Conference of Paris, Vol 3* (1924) 458). The discussion of Napoleon's case in the American memorandum is much shorter than that of the British memorandum (1 page versus 26 pages) and, as mentioned, it is much less accurate. Here is that American account in its entirety: 'The treatment of Napoleon may be mentioned as the most prominent example of political action taken to restrain a monarch who may be regarded as a menace to the general peace. After Waterloo the Chamber of Deputies and the Senate deposed him and denied the right of succession to his son. He was compelled to leave Paris, and at Malmaison planned flight to America. But from June 25th the Allied generals made the delivery of Napoleon's person one of the first and most imperative terms of an armistice. In a note of July 1st, Austria, Russia and Prussia declared that for the peace of Europe Napoleon Bonaparte must be delivered up to their keeping. On July 15th the ex-Emperor surrendered himself to the English. The Convention of August 2, 1815, drawn up by the plenipotentiaries at Paris, contained the following clauses: 1. Napoleon Bonaparte was the prisoner of the Allies. 2. He was entrusted to the guardianship of Great Britain, and the King of England was empowered to choose the place where he should be interned. 3. Great Britain, Austria, Russia, Prussia, and France were to appoint commissioners, who without assuming the responsibilities of guards, should assure themselves of his presence. Napoleon's relatives were, in accordance with the protocol of August 27th, interned in various states of Europe. From England, whither he had been carried on the Bellerophon, Napoleon was sent by the British government to St. Helena. He forfeited the title of Emperor and was henceforth treated officially as a general. The remainder of his days were passed under the surveillance of the commissioners of the Allies': ibid 470–71.
Compared with the British memorandum, it is even far less likely that the reasons behind the inaccuracies in the American memorandum are entirely innocent. A main aim and primary objective of that memorandum was to assert that only political, and not legal, punitive actions could be taken against the Kaiser: ibid 456–57, 470, 476). The memorandum did so primarily by examining several cases (Napoleon's case included) and arguing that the punitive actions taken in each of these cases were not legal but political in nature. Thus, it is unsurprising that the memorandum depicted Napoleon's case as it did.

[110] Bohrer (n 44) 399, 420–44.

[111] 'Liverpool to Eldon (1 October 1815)' in Horace Twiss, *The Public and Private Life of Lord Chancellor Eldon with Selections from his Correspondence, Vol 1* (John Murray 1844) 413.

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> the condition on which he held it was violated. In which character, then, did he make war on the King of France, our ally? Not as an independent sovereign, for he had no such character … He must then revert either to his original character, of a French subject, or he has no character at all, and headed his expedition as an outlaw and an outcast; '*Hostis humani generis*'.

The book also inaccurately assumes that '[i]n 1815 it was unimaginable that the courts of another country might try France's former Emperor'.[112] Some high-ranking Prussian officers did, in fact, support such a trial.[113] Even the British Duke of Wellington, in a conversation with General von Müffling (a liaison of Prussian Prince Blücher), informally acknowledged that '[t]he [Prussian] Prince could have Napoleon executed in two ways, either *after a trial* or by shooting him without ceremony'.[114]

Bonaparte was not the only nineteenth century aggression case:[115]

> In 1864, Archduke Ferdinand Maximilian von Hapsburg was appointed monarch of Mexico by Napoleon III … [I]n 1867 … Maximilian was deposed and court-martialed by the Republican forces he had displaced. The charges against him included … 'having … disturb[ed] the peace of Mexico, by means of a war, unjust in its origin, illegal in its form, disloyal and barbarous in its execution'.

The basis for the charges was a Mexican law that covered, among other prohibitions, 'crimes against the laws of nations'.[116] A few years later, in 1870, German Chancellor Bismarck may have been inspired by Maximilian's trial[117] when he proposed 'to appoint an International Court for the trial of all those who have instigated the [Franco-German] war'.[118] Lesaffer has recently summarised the relations between aggression-related international law of the First World War era and that of international law in earlier times:[119]

> First, although international use of force law underwent important change during the 19th century, it remained deeply rooted in the *jus ad bellum* of the early modern age, which in turn had its roots in late medieval scholarship. Therefore, 19th-century doctrine and state practice cannot be fully appreciated without an awareness of the historical tradition on which they are built. Second, although it cannot be denied that 19th-century international law conceded to states the right to resort to force and war, this right was conditional and restricted. Third, both early modern as well as 19th-century

[112] Schabas (n 1) 3. Note that Schabas does not merely claim that at the time there was an overall lack of motivation for foreign rulers to charge a ruler of a different sovereignty; rather that there was a lack of a legal basis for doing so. This is evident from the fact that he goes on to argue that no relevant international crime existed.
[113] Walter Gorlitz, *History of the German General Staff* (Praeger 1953) 46.
[114] Reported in 'Müffling to Gneisenau' (28 June 1815)' in Ernest Henderson, *Side Lights on English History* (Bell & Sons 1900) 296 (emphasis added).
[115] Ben 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' (2017) 52 *Tulsa Law Review* 101, 108.
[116] ibid.
[117] ibid 109.
[118] Moritz Busch, *Bismarck: Some Secret Pages of His History* (Copp, Clark Company 1898) 189.
[119] Randall Lesaffer, 'Aggression before Versailles' (2018) 29 *European Journal of International Law* 773, 777.

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international lawyers referred to a concept of aggravated violation of *jus ad bellum*, which – at least in theory – triggered reaction and even sanction by the international society of states against the perpetrator. From the 18th century onwards, this was loosely and inconsequentially, but with increasing frequency, referred to as 'aggression' or 'aggressive war' both in diplomatic practice as well as in legal scholarship. Although the Peace of Versailles broke with existing peace-making practice and returned to a discriminatory conception of war by blaming the war on Germany and its allies and by sanctioning them, it drew on a pre-existing conception of aggression as a violation of use of force law.

3.3. Crimes against Humanity

The accepted history of crimes against humanity maintains that this category of international crime was created after the Second World War at Nuremberg.[120] This narrative, however, does acknowledge certain earlier relevant experiences. First, a broad consensus exists that *in its current meaning* the term was first used in 1915 in an official Joint Protest by France, Britain and Russia to Turkey against the Armenian Massacre.[121] Second, it is widely assumed that there is a historical connection between the term 'crimes against humanity' and the presumably older concept of 'war crimes'. The accepted historic narrative thus recalls that the 1919 Report of the Commission on Responsibilities used terms similar to 'crimes against humanity' when recommending international criminal responsibility, purportedly treating these terms as synonymous with 'war crimes'.[122] Similarly, the accepted historic narrative recognises earlier uses of the term 'laws of humanity' (from which the term 'crimes against humanity' emerged) in reference to the laws of war, notably in the Hague Conventions.[123]

Third, contradicting the premise that the term 'crimes against humanity' referred originally to war crimes, some versions of the accepted historic narrative note other early uses of that term. The earliest acknowledged mentions, noted by Schabas in an earlier book, are from the late eighteenth century, referring to crimes such as murder; presumably Voltaire coined the term.[124]

The book generally follows the accepted narrative. It notes that '"crimes against humanity" … [as] a distinct category of international crimes [was] first applied … at Nuremberg'.[125] It holds that the forerunning term, '"laws of humanity" originates from … the Hague Conventions'.[126] It mentions the use of 'crimes against humanity' in the context of the Armenian Massacre as an indication that the term, in its current meaning, was 'being considered at the time of the

[120] Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 40.
[121] ibid 67.
[122] ibid 68.
[123] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office 1948) 189.
[124] William A Schabas, *Unimaginable Atrocities* (Oxford University Press 2012) 51–53.
[125] Schabas (n 1) 152.
[126] ibid 148.

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First World War'.[127] In a slight deviation from the accepted historic narrative, however, the book points out that '[i]n 1918 and 1919 the term "crimes against humanity" was used not infrequently' and that those using it 'attached considerable significance to the term'.[128] Furthermore, although the book generally agrees with the prevalent narrative that the term 'crimes against humanity' was commonly treated as a synonym of 'war crimes', it notes that occasionally it was used in other ways, notably in referring to aggression.[129]

The book does not explain, however, why contemporaries attached considerable significance to the term 'crimes against humanity' and how the term came into use, nor how the use of the term in the First World War era relates to its earlier use that referred to seemingly domestic crimes. The actual history of 'crimes against humanity' is long and exceptionally complex;[130] therefore I limit myself to two short comments to clarify the above issues.

First, the term 'law of humanity' did not originate in the Hague Conventions; for centuries it indicated international law. Accordingly, 'crimes against humanity' (and similar terms) referred to international crimes.[131] Thus, it has been stated that the tyrant was a 'criminal against humanity';[132] 'pirates … have for ages defied the laws of … humanity';[133] war crimes 'trampl[ed] on the laws of humanity';[134] and 'wars of aggression … [were] atrocious crusades against humanity'.[135] Likewise, felonies such as murder, because they had been considered international crimes for centuries, were referred to as '*crimes contre l'humanité*' long before Voltaire[136] – who used that term, I should note, in referring to the application of universal jurisdiction to such crimes.[137] This explains the diverse uses of that term during the First World War, all of which were made to refer to international crimes.

Second, mass atrocities had been considered 'crimes against humanity' even before 1915. For example, although the Boxer War (1900–01)[138] is rightly infamous for its colonial undertones and Western atrocities, it was also a humanitarian intervention by a joint military force from

[127] ibid 154.
[128] ibid 153.
[129] ibid.
[130] See Bohrer (n 44) 471–78.
[131] ibid 472–73.
[132] Robespierre, Speech, 3 December 1792, http://chnm.gmu.edu/revolution/d/324.
[133] Sylvanus Urban, 'Abstracts of Foreign Occurrences' (1802) 72 *Gentleman's Magazine* 668, 672.
[134] Lynch John, *Cambrensis Eversus*, *Vol 3(1)* (1662) (Matthew Kelly ed, Celtic Society 1851) 201.
[135] James Chadwick, 'Reflections on Man in Society' (1847) 30 *Knickerbocke* 520, 521.
[136] eg, Pierre Ayraut, *Opuscules et Divers Traictez* (1598) 250.
[137] Voltaire, *The Philosophical Dictionary* (1764) (W Dugdale 1843) 263.
[138] The term 'Boxer War (1900–01)' refers here to the internationalised (later) part of the anti-colonialist and anti-Christian uprising that occurred in China between 1897 and 1901. In European and American sources this uprising is commonly known as the 'Boxer Rebellion'. The Chinese rebels were known, in English, as the Boxers because many of them were practitioners of Chinese martial arts, which in Europe were referred to as 'Chinese boxing'. The rebellion ended following military intervention by a multinational allied force (consisting of American, Austro-Hungarian, British, French, German, Italian, Japanese and Russian soldiers). The actions of many (if not all) of the allied states were not directed solely by a benevolent anti-atrocity motivation but also by colonialist, and even racist, motivations. Indeed, many atrocities were committed by members of the allied force: Paul Fontenoy, 'Boxer Rebellion' in Xiaobing Li (ed), *China at War: An Encyclopedia* (ABC-CLIO 2012) 24, 24–26.

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Germany, Austria-Hungary, the United States, France, Britain, Italy, Japan and Russia in response to atrocities in which 'more than 200 foreign missionaries and 30,000 Chinese Christians were killed'.[139] In 1900, 14 years before the Armenian massacre, a Joint Note to China, signed by 11 states (the joint force states, Belgium, Spain and Holland), demanded that the principal perpetrators of the atrocities be punished for their violent acts, which were deemed 'crimes against the law of nations, against the laws of humanity'.[140] Subsequently, unlike the Armenian case, some perpetrators were indeed tried and punished, including by the allies. Notably, at Paoting-Fu, an international military tribunal of British, German, Italian and French judges tried some of the perpetrators.[141] The Boxer War was not the first occasion on which mass atrocities were deemed punishable 'crimes against humanity'. In several earlier interventions the legal justification given for the intervention was similarly a need to prevent and punish mass atrocities, which were referred to as 'crimes against humanity'. In some of these interventions perpetrators of the atrocities were indeed prosecuted.[142]

To be clear, the present meaning of the term 'crimes against humanity' did *not* exist in the nineteenth century. The term underwent a complex process to acquire its current definition, but the process did not begin after the Second, nor the First World War.[143]

3.4. International Criminal Tribunals

The 1945 Nuremberg International Military Tribunal is widely considered to be the first international criminal tribunal. Some even maintain that its very creation (and not the application of universal jurisdiction) constituted the 'birth' of ICL.[144]

The book moderately backdates the history of international criminal tribunals to the First World War. It claims that nowhere '[p]rior to the outbreak of the First World War … do we find evidence suggesting that serious consideration was being given to the creation of an international criminal court'.[145] It further asserts that were the tribunal prescribed in Article 227 'actually established[,] it would undoubtedly be looked upon as the first genuinely international criminal tribunal'.[146]

Discussions of the Commission on Responsibilities concerning Wilhelm were deadlocked on the issue of establishing an international criminal tribunal. At one end of the spectrum stood Lansing, a hardline statist positivist, dictating the American position that 'an international

[139] Ziming Wu, *Chinese Christianity* (Brill 2012) 49.
[140] Reproduced in Paul Clements, *The Boxer Rebellion* (Columbia University Press 1915) 207.
[141] Ben Brockman-Hawe, 'Accountability for "Crimes Against the Laws of Humanity" in Boxer China: An Experiment with International Justice at Paoting-Fu' (2017) 38 *University of Pennsylvania Journal of International Law* 627, *passim*.
[142] Bohrer (n 44) 474.
[143] ibid 471–78.
[144] eg, Robert Cryer, 'Towards an Integrated Regime for the Prosecution of International Crimes', PhD thesis, University of Nottingham, 2001, 315.
[145] Schabas (n 1) 316.
[146] ibid 298.

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criminal court for the trial of individuals … appears to be unknown in the practice of nations'.[147] At the other end stood, among others, French representative Larnaude, a reform-oriented internationalist. Larnaude was *blasé* about the lack of precedent, asserting the need, in light of the war, for a 'new international law … This international [criminal] tribunal will be the first organ of the future society of nations'.[148] The only issue on which the opposing sides seemed to agree was the unprecedented nature of international criminal tribunals. This explains the book's conclusion regarding the absence of earlier tribunals.

Yet, I already mentioned one earlier international criminal tribunal: the 1900 Paoting-Fu tribunal, as well as an earlier initiative to create a tribunal in the form of Bismarck's 1870 proposal. How can that past be reconciled with the book's conclusion (and with statements from the First World War era, such as those of Larnaude and Lansing) regarding the novelty of international criminal tribunals?

The conundrum is even greater, because evidence suggests that both the Paoting-Fu tribunal and Bismarck's proposal were known about during the First World War deliberations. The Paoting-Fu tribunal was examined in an American memorandum written during the discussions of the Commission on Responsibilities.[149] Bismarck's proposal was likely to have been known at the time, because Scott (an American Commission member) discussed it not long afterwards in an essay on Wilhelm's trial.[150] Interestingly, the Americans did not present these past instances as precedents.[151] The American memorandum examined the Paoting-Fu tribunal, only to dismiss it as mere 'joint political action' that 'could not be regarded as a legal precedent for the punishment of crimes against international law'.[152] Scott similarly stated that '[i]t is better for the world that the suggestion of Bismarck has not been followed'.[153]

Even if the Americans sincerely believed that these tribunals were not precedents, mention of these cases still reveals some contemporary recollection of an earlier ICL tribunal experience. At the very least, the American treatment of these past cases serves as an example of the previously discussed statist positivist tendency to conflate *lex lata* with *lex ferenda* (attributing an historical

[147] Commission Report (n 8) 145.
[148] Lapradelle and Larnaude (n 11) 20.
[149] Miller and Scott (n 109) 458.
[150] James Brown Scott, 'The Trial of the Kaiser' in Edward Mandell House and Charles Seymour (eds), *What Really Happened at Paris* (Charles Scriber's Son 1921) 231.
[151] Note the incongruity in the fact that the only known First World War references by officials to earlier international criminal tribunals are these American sources, which mention them only to assert that they could not be regarded as legal precedents. If the Americans were (a) opposed to the idea of an international criminal tribunal and (b) the only ones who possessed knowledge of these earlier cases, what could they possibly have had to gain from presenting these cases to the other allies (who did support the tribunal idea)? Would it not be far more logical, under these conditions, for the Americans to keep such information hidden? To the best of my knowledge nobody has provided, thus far, a good answer to this question. One possibility is that these sources provide us with evidence of only one side of the debate: namely, that these American sources were written in response to opposing legal opinions, in which those earlier cases were presented as legal precedents for the creation of an international criminal tribunal, and these pro-tribunal sources simply became lost over time.
[152] Miller and Scott (n 109) 475.
[153] Scott (n 150) 247.

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existence to domestic law and dismissing non-statist experiences) and of the contribution of this tendency to the non-remembrance of ICL history.

In recent years researchers have uncovered the existence of a few late nineteenth and early twentieth century international criminal tribunals and initiatives to create such tribunals, including the Paoting-Fu tribunal and Bismarck's proposal.[154] These experiences are commonly considered, even by the researchers who uncovered them, as 'nascent'[155] ICL 'experiments'.[156] Research currently under way, however, indicates otherwise. Its preliminary survey has uncovered about 50 international criminal tribunals and tribunal creation initiatives (mostly actual tribunals) from late mediaeval times onwards, including more than 20 from the nineteenth and early twentieth centuries.[157] Although this research has just begun, its initial findings together with previous findings demonstrate that, contrary to the claim of the book, serious consideration was given to the creation of international criminal courts long before the First World War. Admittedly, it is still possible that the tribunal initiative of the First World War era was unrelated to similar past experiences, but these findings make it much more probable that connections existed between them.

4. Is the Pre-Second World War History of ICL Important?

One might be tempted to ask what could possibly be the significance of a forgotten legal history. Law is a precedent-prone (and accordingly past-oriented) professional culture.[158] Therefore, it is logical to assume that if in such a culture something was nonetheless forgotten, surely that neglected past could not have much relevance to the present. Nevertheless, as briefly demonstrated in this part, with regard to the history of ICL, historical research that uncovers a forgotten legal past can have contemporary significance.

[154] RJ 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 John Carey, William Dunlap and RJ Pritchard (eds), *International Humanitarian Law: Origins* (Brill 2003) 1; Ben Brockman-Hawe, 'A Supranational Criminal Tribunal for the Colonial Era: The Franco-Siamese Mixed Court' in Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013) 50; Gregory Gordon, 'International Criminal Law's "Oriental Pre-Birth": The 1894–1900 Trials of the Siamese, Ottomans and Chinese' in Morten Bergsmo and others (eds), *Historical Origins of International Criminal Law, Vol 3* (Torkel Opsahl 2015) 119; Brockman-Hawe (n 141); Jan Martin Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' (2017) 27 *European Journal of International Law* 923; Ben Brockman-Hawe, 'Constructing Humanity's Justice: Accountability for "Crimes Against Humanity" in the Wake of the Syria Crisis of 1860' in Bergsmo and others, ibid 181; Brockman-Hawe (n 115).

[155] Gordon (n 154) 120.

[156] Brockman-Hawe (n 141) 685.

[157] Ziv Bohrer and Benedikt Pirker, 'List of Tribunals Uncovered as a Result of Preliminary Research' app to *Project Proposal: Forgotten History of Pre-Nuremberg International Criminal Tribunals* (prepared for submission to the Swiss Network for International Studies) (on file with author).

[158] Anne Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166, 173.

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First, a forgotten legal past can help us to better understand the processes and concepts that gave rise to the legal present.[159] Schabas's book demonstrates this benefit in its discussions of various connections between the First World War era and present day ICL. Likewise, this essay demonstrates this benefit by showing that the long-forgotten history of ICL provides answers to a variety of questions that have been left unanswered both by the prevalent historic account (of a Second World War ICL 'birth') and by Schabas's account (of a First World War ICL 'birth').

The uncovering of a forgotten legal past potentially has an even deeper significance. 'No set of legal institutions or prescriptions exists apart from the narratives that … give it meaning'.[160] However, a narrative is rarely (if ever) an accurate reflection of reality; rather it is typically a simplified account 'that sharpens certain features and blurs others'.[161] Legal narratives are 'mechanisms of blindness and insight'.[162] In other words, law is not a culture that is simply oriented towards remembering the legal past, but a culture in which hidden mechanisms are continuously at work to ensure that certain elements of the past are remembered, while others are obscured. Therefore, the uncovering of a forgotten legal history – one that the prevalent narrative blinds us from seeing – can aid in exposing mechanisms that not only influence recollection of the past, but also clandestinely affect the legal present. A narrative 'shift … enables us to see things that were previously hidden'.[163]

In the remainder of this part, this benefit is demonstrated briefly in relation to one of the previously mentioned causes of the non-remembrance of ICL's long history: World War trauma.[164] As noted, the belief that ICL was born following the Second World War has, in part, developed because it helps us to reckon with the horrors of the World Wars. Simpson further explains:[165]

> Thus does international criminal law begin, with a reference to an unprecedented violence that finally provokes—must give rise—to the establishment of legal order … So, the slogan of international criminal law—'never again'—needs to be supplemented by the slogan: 'never before'. In this sense, international criminal law imagines itself to be constructed around one point in time, that is, the 'never before, never again' moment: the unprecedented atrocity, wretched from history, that ends atrocity. All this requires a screening out of previous atrocities in the name of unprecedenting. Humanity must be rendered innocent. And this unprecedenting [also] occurs in relation to … [earlier] trial precedents [, they] are forgotten or obscured.

[159] Brendan Simms and David Trim, 'Towards a History of Humanitarian Intervention' in Simms and Trim (n 93) 1, 3–4, 10–15.
[160] Robert Cover, 'Nomos and Narrative' (1983–84) 97 *Harvard Law Review* 4, 4–5.
[161] Richard Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Michigan Law Review* 843, 863.
[162] Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2019) 19 *Rechtsgeschichte* 152, 176.
[163] ibid.
[164] See above nn 75–76 and accompanying text.
[165] Garry Simpson, 'Unprecedents' in Immi Talligren and Thomas Skouteris (eds), *The New Histories of International Criminal Law* (Oxford University Press 2019) 12, 17.

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Yet, as already discussed, the narrative that the World War horrors must attest to the absence of past law (a 'never before' moment) – which fails to acknowledge that these horrors were perpetrated despite the existence of ICL – is based on a misconception. Sadly, the reality is that every legal system is bound occasionally to fail – at times, even on a large scale – yet, such a failure generally does not amount to system non-existence.[166]

The construction of the ICL ethos around a 'never before, never again moment' narrative is, therefore, rooted in denial – one regarding a core quality of legal systems: their inevitable occasional failure. This narrative, as a result, creates unrealistic expectations for ICL, setting it up for failure. The delegitimising side effect of this narrative is common and recurring: ICL is very quickly called into question whenever it fails to prevent impunity, regardless of the fact that such failures are simply bound to occur.[167] Ending impunity is a good aspiration, but it is hardly a realistic goal.[168]

By contrast, domestic legal systems are usually unburdened by a similar narrative. Instead, they are constructed around narratives that bestow upon them the core capability of generally 'producing and maintaining counter-factual expectations in spite of disappointments … (that is, [of leading community members] to refuse to learn from facts)'.[169] Accordingly, domestic criminal law systems are judged far less harshly than ICL for their (inevitable) failures:[170]

> Everybody knows that the criminal municipal law is constantly being violated and that in some cases the criminals escape punishment. But … [no] one [has] concluded that [domestic] criminal law is no law … [and very few have] proposed to abolish [domestic] criminal law, because it certainly will be violated and is therefore futile.

Ceasing to construct the ICL ethos around a 'never before, never again moment' narrative could, therefore, aid in enhancing ICL legitimacy by setting more realistic expectations for this legal system. This ethos can be abolished only once it becomes widely accepted that ICL has a significant history prior to its supposed 'never before, never again' moment, especially if that prior history consists of both past successes and past failures.

Note, however, that attaining wide acknowledgement of that long history is bound to be a lengthy and difficult task. The 'Birth at Nuremberg' myth and the related 'never before, never again moment' ethos are not likely to die out easily. Prevalent paradigms are firmly resistant

[166] Whetham (n 76) 52.
[167] See Mark Osiel, 'The Demise of International Criminal Law', *Humanity-Blog*, 16 November 2013, http://www.humanityjournal.org/blog/2013/11/demise-international-criminal-law/; see also Douglas Guilfoyle, 'Part I – This is not Fine: The International Court in Trouble', *EJIL: Talk!*, 21 March 2019, https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble.
[168] Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 17.
[169] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419, 1426.
[170] Josef Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision' (1951) 45 *American Journal of International Law* 37, 45.

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to change.[171] Nevertheless, there is hope; even the most persistent faulty paradigms ultimately collapse under the weight of refuting evidence.[172]

5. CONCLUSION

Historian John Fiske observed that 'the student of history gets accustomed to finding that the beginnings of things were earlier than had been supposed'.[173] This insight is also the message of this essay and of Schabas's book. Currently, there is consensus that ICL is a post-Second World War creation, whereas in reality, ICL has a significant earlier past.

William Schabas's book clearly exposes the inaccuracy of the consensual 'Birth at Nuremberg' account of ICL history, by turning an illuminating spotlight on the earlier, First World War-era, ICL initiative to try the German Kaiser in an international tribunal. As Schabas rightly noted:[174]

> [the prosecution at Nuremberg] did not set out on entirely unexplored land. Two and a half decades earlier, others had scouted the terrain, identifying welcoming contours and sometimes making prescient choices at forks in the road … [The] celebrated … contribution to justice at Nuremberg owes a debt to the early pioneers and explorers.

This essay further exposes the fallacy of the consensual 'Birth at Nuremberg' myth by demonstrating that ICL was far from an uncharted terrain, even before the First World War. The uncovering of that longer ICL history provides explanations to issues unexplained either by the prevalent historic account (of a Second World War ICL 'birth') or by Schabas's account (of a First World War ICL 'birth'). For example, as the essay demonstrates, the unveiling of a greater ICL history reveals the origins of the application of universal jurisdiction to international crimes, of the notion of 'crimes against humanity' and of the international crime of aggression.

There is, however, something discouraging in using Fiske's statement (as I did earlier) to convey the insight about the likely existence of an unrecognised earlier past. Contrary to popular belief, English explorer Henry Hudson (1565–1611) was not the first European to 'discover' the North American bay, straits and river that bear his name; other European explorers and fishermen had visited these places decades before him.[175] Some postulate that the latter used the area as secret fishing grounds, even before Columbus,[176] which confirms the proposition attributed to Oscar Wilde that 'America had often been discovered before Columbus, but it had always been hushed up'. Fiske made his observation to dispel the misconception about Hudson. Nevertheless, a century later, this misconception remains a common fallacy.[177]

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[171] Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962) 72–91.
[172] ibid.
[173] John Fiske, *Dutch and Quaker Colonies in America, Vol 1* (Houghton, Mifflin & Co 1903) 58.
[174] Schabas (n 1) 3–4.
[175] Fiske (n 173) 58; Allen Varasdi, *Myth Information* (Random House 1989) 131.
[176] Mark Kurlansky, *Basque History of the World* (Random House 2011) 56–57.
[177] Varasdi (n 175) 131.

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As the Hudson myth demonstrates, 'strongly held, but incorrect beliefs, are particularly difficult to change'.[178] As a tribute to Schabas, I simply chose a Canadian example to demonstrate this common problem. A narrative shift is therefore unlikely to follow Schabas's superb book (or my own historical research). The ICL 'Birth at Nuremberg' myth is here to stay at least for the time being; strong forces favour its persistence. As noted, we unreflectively regard this myth as the truth because it helps us to explain the unexplainable; it is easier for us to believe that World War horrors attest to the absence of past law than to acknowledge that they were perpetrated despite the existence of the latter. We also incorrectly regard the myth as the truth because the view of ICL as novel and extraordinary corresponds with our paradigmatic conception of law. According to this conception, criminal law is traditionally a state function, and international law traditionally addressed states, not individuals. Our unreflective embrace of this inaccurate conception of law is considerably as a result of the successful past propagation of the misbeliefs of statist-positivists. Indeed, as Varasdi observed, often 'misconceptions are … passed from one generation to the next … producing a barrier against the simple truth, which is nearly impossible to erase from the collective mind'.[179]

However, this should not make us abandon the effort to uncover the past of ICL. A core objective of historical research is to show that much of what we take for granted as natural is at least in part the product of historical processes.[180] Although paradigms resist change, as research increasingly uncovers refuting facts, they eventually collapse.[181] Schabas's exceptional book captivatingly reminds us of an important pre-Second World War chapter in ICL history. Therefore, it has great potential to be an important stepping stone on the way to dispelling the myth of the Nuremberg birth of ICL.

[178] Annette Kujawski Taylor and Patricia Kowalski, 'Naïve Psychological Science: The Prevalence, Strength and Sources of Misconceptions' (2004) 54 *Psychological Record* 15, 16.
[179] Varasdi (n 175) 2.
[180] Gaye Tuchman, 'Historical Social Science: Methodologies, Methods and Meanings' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage 1994) 306, 310.
[181] Kuhn (n 171) 72–91.