

## **International Criminal Law's Millennium of Forgotten History**

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This article challenges the consensus that International Criminal Law (ICL) was “born” at Nuremberg, exposing ICL’s true history, which spans centuries. Jurists regard pre-WWII cases of penal enforcement of the laws of war as unrelated to present-day ICL, because, presumably, these cases are: (1) rare, (2) domestic measures that (3) lack a common doctrine. That is false. ICL’s development, from the late Middle-Ages until WWII, has been grounded on a transnational doctrine which considered as international “outlaws” (punishable by all) violators of the laws of war (war criminals) and of certain additional international laws (from which “crimes against humanity” and “crimes against peace” developed). Remnants of this doctrine are still present in ICL. Penal action against violators was non-negligible and the forums that executed it were not mere domestic organs. After presenting ICL’s centuries-long history and the causes of its pretermission, the article concludes that this forgotten past must be acknowledged. The current narrative falsely depicts ICL as an abnormal system, recently created in violation of basic principles of criminal justice. Furthermore, it encourages the disregard of most ICL cases (those conducted at the State level). Hence, this “false history” leads to unjustifiable questioning of ICL’s legitimacy and effectiveness.

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At the close of WWII, Churchill suggested summarily executing the remaining Nazi leadership. Roosevelt disagreed, insisting on prosecuting them in an international military tribunal. This is considered the “birth” of International Criminal Law (ICL),<sup>1</sup> following a consensus that “[t]he Nazi atrocities gave rise to the idea that some crimes are so grave as to concern the international community as a whole.”<sup>2</sup> Few earlier instances of penal action against

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<sup>1</sup> E.g., Allan A. Ryan, “Nuremberg’s Contributions to International Law,” Boston College International and Comparative Law Review 30 (2007): 59-66, 89.

<sup>2</sup> Margaret M. DeGuzman, “How Serious Are International Crimes? The Gravity Problem in International Criminal Law,” Columbia Journal of Transnational Law 51 (2012-13): 19.

violators of the laws of war are acknowledged. But, they are dismissed as unrelated to current ICL, because (presumably) they are sporadic domestic actions that lack a common doctrine.<sup>3</sup>

The present article challenges this construction of ICL history. Pre-WWII penal enforcement of the laws of war was: (a) non-negligible; (b) in all instances the same transnational doctrine (still part of ICL to some extent) was applied; and (c) the forums that tried the perpetrators were not merely domestic organs. Furthermore, “crimes against humanity” and “crimes against peace” (“aggression”) also have a long pre-WWII history. Simply put, notwithstanding the significance of post-WWII trials, ICL history stretches for nearly a millennium.

Part 1 discusses preliminary indications that pre-WWII penal enforcement of the laws of war was doctrinally related to post-WWII ICL, pointing to evidence of “outlawry” as a common doctrinal thread. Parts 2 and 3 discuss methodological issues. Parts 4 and 5 trace the origins of the outlawry doctrine and its relation to ICL. Part 6 discusses the pre-WWII history of Crimes Against Humanity. Part 7 explores key reasons for the predominance of the current narrative about ICL history. Part 8 exposes the harms caused by the current historical misperception.

### **1. Acknowledged Pre-WWII Cases**

When ICL’s history is currently described, only six pre-WWII events are typically noted: the medieval trials of Conradin, King of Jerusalem (1268), William Wallace (1305) and Peter von-Hagenbach (1474) for violating the “laws of God and man” (a term used for centuries to describe international law); the proposal to execute Napoleon for starting war in violation of international commitments (1815); the adoption (1863) and enforcement of the Lieber Code during the American Civil War (1861-1865); and the WWI proposals to prosecute the Kaiser and other German war criminals. Yet, after being briefly noted, these cases are usually deemed irrelevant to present-day ICL, mainly for being sporadic and lacking a common legal doctrine.<sup>4</sup>

Piracy is the only international crime with a recognized pedigree, due to the application of the same transnational doctrine for centuries across nations. According to this doctrine, universal jurisdiction applies because “a pirate [is] an outlaw [and] a ‘hostis humani generis’ [enemy of mankind]” for violating international law.<sup>5</sup> That doctrine contained, until recently, additional elements: (a) pirates were referred to by synonyms<sup>6</sup> of the term “outlaws”, such as “disturbers of

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<sup>3</sup> E.g. M. Cherif Bassiouni, *Introduction to International Criminal Law* (2012), 28-29, 138; Ronald C. Slye and Beth Van-Schaack, *International Criminal Law: The Essentials* (2008), 18-26.

<sup>4</sup> Ibid.

<sup>5</sup> David McKay and Hersch Lauterpacht, *Oppenheim on International Law* (1955), 2:609 (emphasis added).

<sup>6</sup> See below note 153 and accompanying text.

the peace”<sup>7</sup> and “enemies of peace”<sup>8</sup>; (b) death was the universal maximum sentence for piracy and it was executed summarily or following a military trial.<sup>9</sup>

Currently, universal jurisdiction applies also to perpetrators of “core international crimes” (“War Crimes,” “Crimes Against Humanity,” “Crimes Against Peace” (“Aggression”), and “Genocide”), which, presumably, turns “the power of criminal punishment against the hostis humani generis, the enemy of mankind, the universal outlaw, expressions historically associated with the pirate.”<sup>10</sup> Namely, the application of universal jurisdiction to such crimes is assumed to be a post-WWII development accomplished by adopting the international outlawry doctrine from piracy law. But, examination of the six pre-WWII cases reveals a recurring “outlawry format”, suggesting a centuries-long application of a transnational doctrine, similar to piracy law.

Contemporary jurists depict Conradin’s case (1268) as an ancient conviction for “crimes against peace”, as he was tried for instigating an unjust war (due to papal opposition) to become the King of Sicily.<sup>11</sup> This depiction ignores that Conradin was convicted by a panel of knights (military tribunal) and executed as “a disturber of the public peace [i.e. outlaw]... and the usurper of a kingdom, which the pope had granted to another.”<sup>12</sup> In some accounts, Conradin was further held “responsible for all the excesses [i.e. war crimes] of [his] German soldiery.”<sup>13</sup>



<sup>7</sup> E.g., Peace Treaty between England and the Netherlands, art. 8 (July 31, 1667).

<sup>8</sup> E.g., Matthew Sutcliffe, *The Practice, Proceedings, and Lawes of Armes* (1593), 3.

<sup>9</sup> “Draft Convention on Piracy,” *American Journal of International Law* 26 (Supplement, 1932): 853, 873.

<sup>10</sup> Markus Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (2014), 153.

<sup>11</sup> Bassiouni, *International Criminal Law*, 1047.

<sup>12</sup> Archibald Bower, *History of the Popes*, (1845), 3:14 (emphasis added).

<sup>13</sup> Pasquale Villari, *The Two First Centuries of Florentine History*, trans. Linda Vilari (1894), 248.

<sup>14</sup> Giovanni Villani (14th century), [Public-domain] via Wikimedia-Commons.

In what jurists commonly describe as “the earliest recorded trial... for war crimes,”<sup>16</sup> William Wallace was tried in 1305, for “sparing neither age nor sex, monk nor nun” in a Scottish campaign he led against England. Conradin’s earlier war crimes conviction refutes this. Moreover, an outlawry format has currently gone unnoticed: “Wallace was drawn for treason, hanged for robbery and homicide, disemboweled for sacrilege, beheaded as an outlaw and quartered for divers[e] depredations,”<sup>17</sup> after being convicted by a military tribunal.<sup>18</sup>

#### Wallace’s Trial<sup>19</sup>



King Edward in a letter to the Pope referred to Wallace and his men as “enemies of peace.”<sup>20</sup>

Peter von-Hagenbach was appointed governor of Breisach by the Duke of Burgundy, who had conquered it for ransom. As governor, von-Hagenbach orchestrated atrocities against locals. Current ICL scholarship describes that, in 1474, after the occupation ended, he was sentenced to death for murder, rape, and other crimes against the laws of God, by a tribunal comprised of judges from several princedoms. Some, therefore, consider this case the earliest trial by a

<sup>15</sup> Giovanni da-Legnano, *Tractatus de Bello*, trans. J.L. Brierly (1917) (c. 14th century), 254, 274.

<sup>16</sup> Slye, Van-Schaack, *Essentials*, 19.

<sup>17</sup> F. Pollock and F. Maitland, *The History of English Law before the Time of Edward I* (2010 reprint), 2:640 n.243.

<sup>18</sup> M. Keen, “Treason Trials under the Law of Arms,” *Transactions of the Royal Historical Society* 12 (1962): 98.

<sup>19</sup> Daniel Maclise, [Public-domain] via Wikimedia-Commons,.

<sup>20</sup> Joseph Stevenson, “Introductory Notice” to *Documents Illustrative of Sir William Wallace* (1841), ix, xxi.

transnational criminal tribunal and the only one before Nuremberg.<sup>21</sup> Contemporary jurists rarely mention that von-Hagenbach was tried by a military tribunal and convicted of tyranny.<sup>22</sup> The tyranny conviction is significant because for centuries, such charges rendered individuals “hostes humani generis--international outlaws--who fall within the scope of ‘universal jurisdiction’ and, as the way of pirates, were ‘to be hanged by the first persons into whose hands they fall.’”<sup>23</sup>

#### Von-Hagenbach’s Beheading<sup>24</sup>



Von-Hagenbach is still remembered as a tyrant. The French Moments tourism site, e.g., states that “a focal point [in Colmar’s Unterlinden Museum] is the mummified head of local tyrant, Peter von-Hagenbach.”<sup>25</sup>

Napoleon’s case (1815) is often presented as a failed attempt to punish a perpetrator of “crimes against peace”. The reality was more complex. In 1815, the Congress of Vienna, an international body representing most European countries, declared Napoleon “an Enemy and Disturber of the Tranquility of the World [i.e. outlaw], that he has incurred public vengeance,” for “violating the convention which established him in the Island of Elba” and “reappearing in

<sup>21</sup> See Bassiouni, International Criminal Law, 416 (discussing such views).

<sup>22</sup> Hans Knebel, “des Kaplans am Münster zu Basel, Tagebuch. Sept. 1473-Juni 1476,” in Die Basler Chroniken: ed. Wilhelm Vischer and Heinrich Boos (Leipzig: Hirtzel, 1880), 2:83-84.

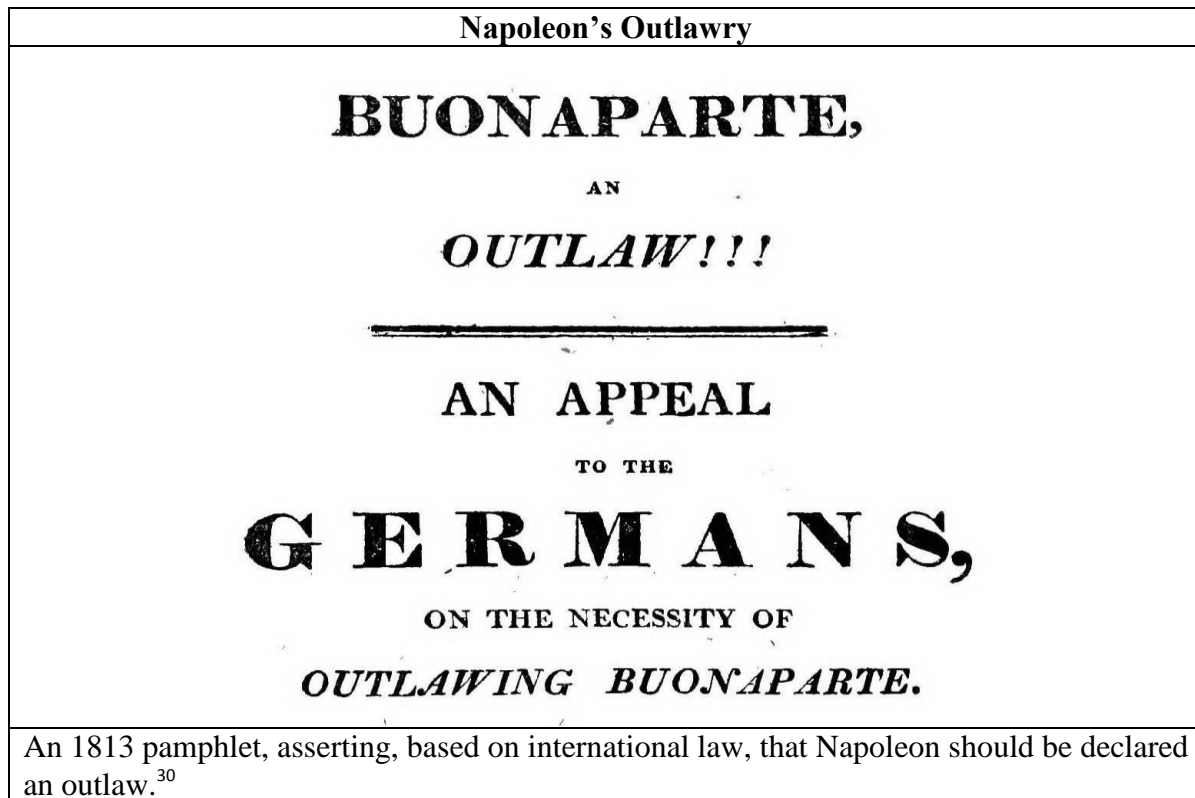
<sup>23</sup> Shannon Brincat, “Death to Tyrants: Self-Defence, Human Rights and Tyrannicide--Part II,” Journal of International Political Theory 5 (2009): 78. See also Carl Schmitt, The Nomos of the Earth in The International Law of the Jus Publicum Europaeum, trans. G.L. Ulmen (2003), 64-65.

<sup>24</sup> (1572), [Public-domain], via Wikimedia-Commons.

<sup>25</sup> <http://www.frenchmoments.eu/colmar-old-town/>.



France with projects of disorder and destruction”.<sup>26</sup> The British Prime Minister argued that Napoleon could be considered a “captain of freebooters or banditti and consequently out of the pale of protection of nations [that] headed his expedition as an outlaw and an outcast; hostis humani generis.”<sup>27</sup> Prussian Field-Marshal Blucher declared Napoleon an “outlaw,” wanted dead or alive.<sup>28</sup> Eventually, Napoleon was captured and perpetually detained without trial “for the Preservation of the Tranquility of Europe.”<sup>29</sup>



Notice that the British Prime Minister equated Napoleon to a pirate (“freebooter”) over a century before WWII. This contradicts the premise that the link between core international crimes and piracy is a recent development. Furthermore, by comparing Napoleon to a bandit, he was using a term then applied, together with “brigands” and “bush-whackers,” to unlawful combatants, toward whom an international outlawry doctrine had also been employed for centuries.<sup>31</sup> During the American Civil War, e.g., the Union routinely deemed Southern unlawful

<sup>26</sup> (Mar. 13, 1815), in British and Foreign State Papers: 1814-15 (1839), 663 (emphasis added).

<sup>27</sup> Letter (Oct. 1, 1815), in Horace Twiss, The Public and Private Life of Lord Chancellor Eldon (1844), 1:413.

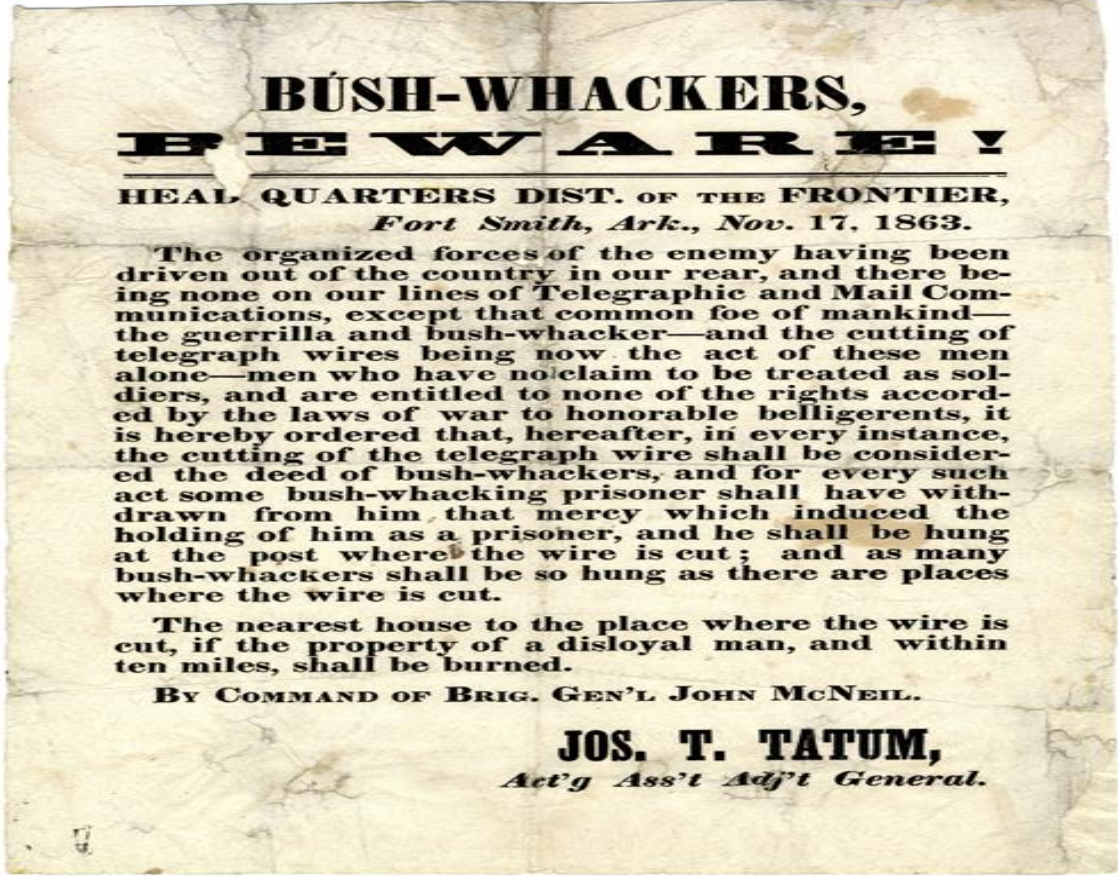
<sup>28</sup> J. Christopher Herold, The Age of Napoleon (New-York: Mariner Books, 2002), 415.

<sup>29</sup> 56 Geo. III, c. 22 (1816) (UK) (emphasis added).

<sup>30</sup> Lewis Goldsmith, Buonaparte, an Outlaw!!! An Appeal to the Germans, on the Necessity of Outlawing Buonaparte (1813), <http://google.co.il/books?id=8J5TAAAAcAAJ>.

<sup>31</sup> Willard B. Cowles, “Universality of Jurisdiction over War Crimes,” California Law Review 33 (1945): 194.

combatants “outlaws”/“enemies of mankind” and executed them summarily or following a military trial.<sup>32</sup>

<p style="text-align: center;"><b>The Union’s Outlawry of Confederate Irregulars</b></p>  <p style="text-align: center;">A Union military decree, referring to Confederate irregulars as the “common foe of mankind” and declaring that they would be hung upon capture as they are “entitled to none of the rights accorded by the laws of war to honorable belligerents.”<sup>33</sup></p>
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Outlawry was invoked by the Union also with regard to regular Southern soldiers who had violated the laws of war, as in the case of Confederate Captain Henry Wirz. Horrific atrocities were committed during Wirz’s command of the Andersonville POW camp. After the war, he was sentenced to death by a military commission for conspiring with others “to injure the health and destroy the lives of... prisoners of war... in violation of the law of war.”<sup>34</sup> At trial, the Judge-Advocate declared that the conspirators had “forfeited all rights... they are outlaws and criminals.”<sup>35</sup>

<sup>32</sup> James B. Martin, *Third War: Irregular Warfare on the Western Border 1861-1865* (2012), 55-59, 131-133.

<sup>33</sup> Original archived at Wofford College’s Sandor Teszler Library (Creative-Commons license)

<sup>34</sup> Trial of Captain Henry Wirz, *American State Trials* (1865), 671.

<sup>35</sup> Ibid, 785 (emphasis added).

### Wirz's Execution<sup>36</sup>



It is difficult to dismiss something as insignificant when it is carried out on Capitol Hill.

Similarly, the Confederates deemed Northern soldiers they accused of war crimes outlaws. For example, Confederate President, Jefferson Davis, accused Union General, Benjamin Butler, of violating the laws of war by executing certain Southern civilians, and declared that Butler would be summarily executed if captured, as “an outlaw and common enemy of mankind.”<sup>37</sup>

Outlawry was often invoked in reference to German WWI submariners for their attacks on civilian ships. For example, in his congressional declaration of war, President Wilson stated that because of their “wanton and wholesale destruction of the lives of non-combatants... [t]he present German submarine warfare against commerce is a warfare against mankind” and “[b]ecause [German] submarines are in effect outlaws... [i]t is... necessity indeed, to endeavour to destroy them before they have shown their own intention.”<sup>38</sup>

Outlawry was also applied in reference to the Kaiser. During a British War Cabinet meeting, in 1918, Lord Curzon reported that French Prime Minister Clemenceau had suggested “treating the Kaiser as a universal outlaw [for violating international law] so that there should be no land

<sup>36</sup>Alexander Gardner [Public-domain], via Wikimedia-Commons;.

<sup>37</sup>Reproduced in Thomas L. Wilson, Sufferings Endured for a Free Government (1864), 282.

<sup>38</sup>Reproduced in Source Records of the Great War, ed. Charles F. Horne (1923), 5:109-10 (emphasis added).



in which he could set his foot.”<sup>39</sup> Subsequently, the Cabinet appointed a legal commission, which concluded that international law authorized punishing the Kaiser either by trial or summarily “as Napoleon was treated.”<sup>40</sup>

WWI	
German Submariners' Outlawry	The Kaiser's Outlawry
<p><b>AGAINST SEA OUTLAWS</b></p> <p>—</p> <p><b>WARS FOUGHT BY U.S.</b></p> <p>—</p> <p><b>POLICED THE WEST INDIES.</b></p> <p>—</p> <p>If President Wilson appears before Congress some time this week (says the Springfield Republican of 1st March) to request authorisation for arming American merchant vessels and for the use of the armed forces of the United States to prevent aggressions on the part of the German naval authorities against American rights under the law of the seas, the event, while spectacular enough on account of its immense future significance, by no means sets any new policy for the Government. It's an old, old story, this use of the armed force of the United States to keep unconventional Powers in the straight and narrow paths of international law and regard for the privileges of Americans—so old, and so much an “all in the day's work” matter with those actively employed “armed forces” that almost everybody has forgotten about it.</p>	<p><b>AMERICA'S JUDGMENT-ON THE HOHENZOLLERNS</b></p> <p>—</p> <p>PRESIDENT WILSON in all his official statements makes a sharp distinction between the KAISER'S Government and the German people in the matter of responsibility for this criminal war now raging. He lays the blame entirely on the KAISER and his Junkers, acquits the German people, and represents them in his answer to the Pope's peace proposals as under a “ruthless master.” He goes further than this, and says, in effect, that the KAISER and his Government have so defiled themselves with crime and dishonour that they cannot be recognised as fit to negotiate peace terms with; their pledged word would be no bond in such a contract; the people must endorse the peace terms. Wilson's solemn reiterated declarations on this point amount to a call to the German people to rise in revolution. This line of condemnation must be a haunting horror to the KAISER and his War Lords, and they may well dream of disgrace, or banishment, or even of a felon's death. America, in effect, puts the brand of ISHMAEL or CAIN upon them and marks them as the outlaws of our civilisation.</p>
Part of a report from <u>The Evening Post</u> 13 (April 14, 1917). <sup>41</sup>	Part of a report from <u>The Dominion</u> 6 (Sep. 8, 1917): “the Kaiser and his War lords... may well dream of... banishment, or even a felon's death. America... marks them as the outlaws of our civilization.”

<sup>39</sup> David Lloyd George, Memoirs of the Peace Conference, 2 vols. (1939) 1:56.

<sup>40</sup> Ibid, 1:61.

<sup>41</sup> All news-reports in this Article are from “PapersPast”, <http://paperspast.natlib.govt.nz/cgi-bin/paperspast>.

WWII

SECRET

C-46  
31 August 1944

UNITED NATIONS WAR CRIMES COMMISSION

TRIAL OF WAR CRIMINALS BY MIXED INTER-ALLIED MILITARY TRIBUNALS

Memorandum by the Office of the United States  
Representative

b. Does this power extend to the trial and punishment of war criminals irrespective of where the crime was committed?

It is fundamental in considering this question to bear in mind that for the past century at least war crimes have been considered as "crimes against society" and war criminals as "enemies of mankind". Thus an Attorney General of the United States has spoken of them as "hostes humani generis" - (11 Opinions of the Attorney General 297, 307 (1865)); war criminals have been spoken of as "outlaws" by United States military commissions (United States v. Gumban, General Order No 197, Division of the Philippines, 27 July 1901; United

<sup>45</sup> (31 August 1944), 4, available at <http://www.legal-tools.org/doc/e5f070/> (emphasis added).

In sum, an outlawry format similar to that of piracy cases is present in all commonly recognized pre-WWII war crimes cases, challenging the premise that these were not part of the doctrinal evolution that produced current ICL.

## **2. The “Modern State Conception” and Nineteenth-Century Positivism**

It is intuitively assumed that criminal justice systems must have a centralized law-enforcement structure, because no such system “execute[s] the penal laws of another.”<sup>46</sup> Penal laws are also assumed to be generally aimed at protecting the interests of the legal system’s local community, which often places jurisdictional (usually territorial) limits on their enforcement. These laws are further expected to be formally legislated by an official body.<sup>47</sup> Put differently, it is intuitively assumed that: “Criminal justice presupposes sovereign States”.<sup>48</sup>

But, as Hathaway and Shapiro pointed out, this “Modern State Conception is both an excessively narrow and historically incomplete account of law. Legal systems can and have existed despite lacking the capacities of a modern state.”<sup>49</sup> In pre-State Germanic tribes, e.g., penal law was unlegislated and law-enforcement was outsourced by entitling everyone to extra-judicially kill criminals.<sup>50</sup> Moreover, not only obsolete legal systems are characterized by decentralization. Contemporary international law shares considerable attributes of decentralization with pre-State Germanic legal systems. Scholars have pointed out this fact to refute the claim of international law’s opponents that it is not truly a legal system due to dissimilarities between it and modern domestic legal systems.<sup>51</sup> Support for this unjustified delegitimation of international law is considerably due to the intuitive endorsement of the “Modern State Conception.”

The inaccuracy of this conception is further evident in the fact that even some contemporary domestic systems exhibit elements of decentralization. In Scotland, the legislative function is somewhat decentralized, as some crimes are unlegislated and judges have inherent “declaratory power” to “find” additional conduct to be criminal.<sup>52</sup> Many Continental European systems

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<sup>46</sup> *The Antelope*, 23 US (1825), 123.

<sup>47</sup> Morten Bergsmo and LING Yan, “On State Sovereignty and Individual Criminal Responsibility for Core International Crimes,” in *State Sovereignty and International Criminal Law*, ed. M. Bergsmo et. al. (2012), 4.

<sup>48</sup> *Ibid.*

<sup>49</sup> Oona Hathaway and Scott Shapiro, “Outcasting: Enforcement in Domestic and International Law,” *Yale Law Journal* 121 (2011): 258.

<sup>50</sup> *Ibid.*, 282-290.

<sup>51</sup> Hathaway, Shapiro, “Enforcement,” 299; Stanley Anderson, “Human Rights and the Structure of International Law,” *New-York Law School Journal of International and Comparative Law* 12 (1991): 2-5.

<sup>52</sup> *Grant v. Allen*, 1987 JC 71 (Scot.).

support some decentralization of law-enforcement through judex loci deprehensionis, a doctrine which allows, under certain conditions, prosecuting foreigners for committing acts defined as crimes by the foreign law of their place of commission, even if the prosecuting State and its citizens were not affected by these acts.<sup>53</sup>

It is not completely coincidental that these domestic systems exhibit attributes that partially resemble Germanic systems, as they have originated from such systems. Interestingly, the Germanic doctrine that served as the basis for the outsourcing of law-enforcement was outlawry, which originally permitted killing on-sight anyone deemed an “outlaw” for having committed a grave crime.<sup>54</sup> This doctrine’s conflation, during the late Middle-Ages, with somewhat similar Roman-Christian doctrines is recognized as pivotal to the development of domestic criminal justice, and more generally, to the rise of the modern State.<sup>55</sup> As this article reveals, international law’s resemblance to Germanic systems is similarly non-coincidental; ICL’s history, which is much longer than assumed, is also bound to the outlawry doctrine.

The intuitive endorsement of the “Modern State Conception” is a main cause for the disregard of ICL’s long history. Nineteenth-century positivism has propagated this flawed conception of legal systems, as many positivists maintained that penal law is “necessarily of a positive, local existence”.<sup>56</sup> Nineteenth-century positivism has motivated considerable reforms in domestic law. As a result, most criminal justice systems came to resemble the model many positivists supported, and they still maintain these qualities, despite the fact that positivism itself no longer supports the narrow perception of legal systems that nineteenth-century positivists commonly supported.<sup>57</sup> Individuals unconsciously tend to generalize from personal experiences and prevailing paradigms, and presently “the legal systems...most familiar [to us] are domestic [and] modern state regimes are the paradigm instances of law.”<sup>58</sup> This unconscious tendency and the contribution of nineteenth-century positivism to the shaping of contemporary domestic

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<sup>53</sup> Zhu Lijiang, The Principle of Complementarity in the Rome Statute and Universal Jurisdiction of States (University of Lund: LL.M. Thesis, 2005), 15.

<sup>54</sup> Maurice Keen, The Outlaws of Medieval Legend (1961), 9-10.

<sup>55</sup> Pollock, Maitland, History of English Law, 2:328; Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life, trans. Daniel Heller-Roazen (1998), 63.

<sup>56</sup> John M. Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence (1819), 3. See also, J.F. Stephen, A History of the Criminal Law of England (1883), 2:62-63.

<sup>57</sup> M. Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,” Virginia Journal of International Law 42 (2001): 99; Ronald Dworkin, “A New Philosophy for International Law,” Philosophy and Public Affairs 41 (2013): 3-4.

<sup>58</sup> Hathaway, Shapiro, “Enforcement,” 257.



systems jointly lead to the intuitive reliance on the “Modern State Conception.” Uncovering ICL’s long, outlawry-related history demands confronting this flawed conception. Therefore, I mention and refute various nineteenth-century positivist propositions throughout the article.

To clarify, nineteenth-century positivism was a diverse jurisprudential school, whose proponents’ positions regarding international law considerably varied.<sup>59</sup> This article is bound to fail to do full justice to this diversity due to space constraints, which necessitate focusing on anti-ICL, nineteenth-century positivist views, as these played a significant role in the pretermission of ICL history. Interestingly, even these positions varied in their attitude toward international law. Austin, the period’s leading positivist, defined “law” as a command backed by threats of sanctions issued by a sovereign. Based on this definition, he concluded that international law (not only ICL) is not “law” but mere “positive international morality.”<sup>60</sup> Others adopted a dualistic position that perceives domestic and international law as two substantially different legal systems, the former regulating individuals and the latter coordinating between States. This perspective still rejects ICL, because ICL is addressed to individuals.<sup>61</sup>

### **3. Genealogical Accounts**

This article gradually presents ICL’s long history and uncovers its persistent reliance on outlawry. But, some international legal historians are averse to such genealogical accounts of the origins of contemporary international norms and institutions, due to the teleological and anachronistic tendencies of such accounts.<sup>62</sup> Genealogical accounts also tend to mistakenly regard the original application of a doctrine as the explanation for each of its iterations, even though tracing back a doctrine’s iterations up to the first application does not provide such an explanation. It only raises the question: why was the same doctrine applied in all of the different instances?<sup>63</sup>

Some argue that in each instance a legal doctrine is applied because of the case-specific, non-legal interests of the powerful, and the pretense of applying a long-standing legal doctrine is used to conceal these non-legal interests.<sup>64</sup> Others argue that even if domestic law can affect the

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<sup>59</sup> Stephen Hall, “The Persistent Spectre: Natural, Law, International Order and the Limits of Legal Positivism,” European Journal of International Law 12 (2001): 271.

<sup>60</sup> John Austin, The Province of Jurisprudence Determined (1832), 208. See also, Stephen, Criminal Law, 2:62-63.

<sup>61</sup> See Tim Hillier, Sourcebook on Public International Law (1998), 35.

<sup>62</sup> Randall Lesaffer, “International Law and Its History: The Story of an Unrequited Love,” in Time, History and International Law, ed. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (2007), 34.

<sup>63</sup> Marc Bloch, The Historian’s Craft (Manchester: Manchester University Press, 1992), 24-32.

<sup>64</sup> Andrew Altman, Critical Legal Studies: A Liberal Critique (1993), 152.

behavior of the powerful, international law cannot.<sup>65</sup> If one of these views is correct, a genealogical account of ICL is uninteresting because each application of ICL is “truly” determined by the case-specific power balance.<sup>66</sup>

Yet, there is nothing necessarily anachronistic or teleological about a genealogical account,<sup>67</sup> especially when it concludes that “we are looking at a continuum, albeit not a linear one. While there have been important discontinuities along the way these do not lead to what might be termed a dis-continuum.”<sup>68</sup> As Bourdieu further pointed out, “[t]he social practices of the law are... the product of the functioning of a ‘field’ whose specific logic is determined by two factors:... the specific power relations [and] the internal logic of juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions.”<sup>69</sup> Although the pre-existence of a legal doctrine is usually not the sole reason for any of its iterations, it may provide a partial explanation for each such iteration, because such “past gives us vocabulary, and that vocabulary in turn shapes the very way we think of a problem”.<sup>70</sup> In ICL’s case, the relevant vocabulary depicts violators of certain international laws as enemies of mankind/outlaws. Laws, therefore, often have effects that go beyond concealing non-legal motivations and even the powerful are susceptible to such effects. This is true for both domestic and international law.<sup>71</sup> Thus, the history of the independent effect of international laws should be researched, and genealogical accounts are crucial for such research because the internal logic of the law relies “upon precedent, customs and patterns of argument stretching back [in time].”<sup>72</sup>

Admittedly, during power struggles, legal uncertainty often exists, as opponents tend to disagree on the interpretation of the relevant law. But the law still has some influence, forcing the sides to structure their claims in a certain manner and limiting the legitimate interpretational possibilities.<sup>73</sup> Jus ad bellum, for example, because of the strategic issues it addresses, has always been more exposed to power struggles than most other laws of war. Its norms, therefore, often

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<sup>65</sup> Samuel Moyn, “Of Deserts and Promised Lands: The Dream of Global Justice,” The Nation (Feb. 29, 2012) <http://www.thenation.com/article/166516/deserts-and-promised-lands-dream-global-justice>.

<sup>66</sup> *Ibid.*

<sup>67</sup> Lesaffer, “Unrequited Love,” 39-38

<sup>68</sup> Philip Alston, “Does the Past Matter? On the Origins of Human Rights,” Harvard Law Review 126 (2013): 2079.

<sup>69</sup> Pierre Bourdieu, “The Force of Law” Hasting Law Journal 38 (1987): 816.

<sup>70</sup> Jenny S. Martinez, “Human Rights and History,” Harvard Law Review 126 (2013): 237.

<sup>71</sup> Annette Freyberg-Inan, What Moves Man (2012), 111-112.

<sup>72</sup> Anne Orford, “On International Legal Method,” London Review of International Law 1 (2013):173.

<sup>73</sup> Bourdieu, “Force of Law,” 834-850.

suffer from uncertainty and political “abuse.” But historical research of various centuries has shown that even jus ad bellum often has independent influence.<sup>74</sup>

According to the genealogical account below, ICL continuously existed since the late Middle-Ages. This could raise another inaccuracy concern, because many international legal historians consider international law to be a late nineteenth-century innovation, pointing to several points of discontinuity with earlier transnational law.<sup>75</sup>

One such claimed point of discontinuity is the transition from the European jus gentium to the contemporary global system of international law.<sup>76</sup> But, this transition, in the context of ICL, did not occur in the form of a rupture. Originally, the European jus gentium (ICL included) was a trans-Christian/European/Western system whose members (egocentrically) regarded themselves as “mankind”/“humanity”,<sup>77</sup> and it was prescribed to wage total war, without any jus in bello restrictions, against non-Christian nations, which were referred to as “uncivilized”/“barbarians”/“savages” (and for several centuries “infidels”).<sup>78</sup>

But, in practice, even during the late Middle-Ages and Early Modern Times, in some wars between Christians/Europeans/Westerners and non-Christians/Europeans/Westerners, jus in bello restrictions were applied.<sup>79</sup> There are even such cross-cultural wars in which certain mutually-accepted applications of ICL can be detected.<sup>80</sup>

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<sup>74</sup> E.g. Theodor Meron, Bloody Constraint (1998), 23; Lesaffer, “Unrequited Love,” 37.

<sup>75</sup> Anne Orford, “The Past as Law or History: The Relevance of Imperialism for Modern International Law” (New-York University: International Law and Justice Working Papers, 2012), 1-3 (discussing such positions).

<sup>76</sup> See *ibid.*

<sup>77</sup> Jennifer Pitts, “Empire and Legal Universalisms in the Eighteenth Century,” American Historical Review 117 (2012): 92; Liliana Obregón, “The Civilized and the Uncivilized,” in Oxford Handbook of The History of International Law, ed. Bardo Fassbender and Anne Peters (2012), 930.

<sup>78</sup> Frederick Russell, The Just War in the Middle-Ages (1979), 7-8. Presumably, during Early Modern Times, “infidels” ceased to be a category of enemies against whom jus ad bellum permitted waging total, as a result of the secularization of international law. But, the reality is that some continued to support that doctrine long after we might tend to presume. See, e.g., Hew Strachan, “A General Typology of Transcultural Wars: The Modern-Ages,” in Transcultural Wars: From the Middle-Ages to the 21st Century, ed. Hans-Henning Kortum (2006), 87-89.

<sup>79</sup> Bernhard R. Kroener, “Antichrist, Archenemy, Disturber of the Peace: Forms and Means of Violent Conflicts in the Early Modern Ages,” in Transcultural Wars, 61, 80; James Drake, “Restraining Atrocity: The Conduct of King Philip’s War,” New England Quarterly 70 (1997): 34; Stephen Morillo, “A General Typology of Transcultural Wars: The Early Middle Ages and Beyond,” in Transcultural Wars, 36, 41; Matthew Strickland, “Rules of War or War Without Rules?,” in Transcultural Wars, 109, 128, 131-132, 137-139.

<sup>80</sup> E.g., José Enrique López, “Institutions on the Castilian-Granadan Border” in Medieval Frontier Societies, ed. R. Bartlett and A. Mackay (1989):127-150. See also the 17th- and 18th-century examples mentioned in note 531 below.

Case-specific political considerations explain, in part, the variation in conduct between different cross-cultural wars.<sup>81</sup> After all, determining that an enemy belonged to a category that justified waging total war was an ad bellum legal matter and thus especially susceptible in its application to the influence of such considerations.

Nevertheless, the law itself also had an influence in constraining war-time conduct in such cross-cultural wars. “European thought about the law governing interactions among states and peoples--ius gentium, law of nations, international law--has... always existed in a space of tension between the European and the universal.”<sup>82</sup> Due to this incoherent duality, throughout the history of international law, both sources that conceptualized it as universally applicable and sources that regarded it as only applicable to Christians/Europeans/Westerners existed; although, the extent of support for each position (universalist or exclusionary) varied between different periods.<sup>83</sup> The likelihood that a decision to wage total war would be made, was, mostly likely, influenced by the fluctuating support for universalist positions.<sup>84</sup> It should also be noted that, due to the influence of certain universalist positions, already before the late nineteenth century there were some cases where ICL was applied on the basis of a universalist, human-rights-oriented perspective.<sup>85</sup>

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<sup>81</sup> Martti Koskenniemi, “Histories of International Law: Dealing with Eurocentrism,” Rg 19 (2011): 171; Martin van Creveld, “A Tale of Two Wars,” in Transcultural Wars, 141; Krzysztof Wawrzyniak, Ottoman-Polish Relations in the Sixteenth Century (Bilkent University: MA Thesis, 2003), 35. See also sources mentioned in note 79 above.

<sup>82</sup> Pitts, “Empire and Legal Universalism,” 94-95.

<sup>83</sup> Ibid.

<sup>84</sup> Although, usually, universalist stances went hand in hand with opposition to the waging of total war against non-Christians/Europeans/Westerners, there was not necessarily a link between the two. The doctrine which justified waging total war against non-Christians/Europeans/Westerners was actually advanced by some based on the position that regarded (European) international law as universally applicable and by others based on a position that regarded that law as only applicable to Christians/Europeans/Westerners. In accordance with the former position, waging total war was justified in some sources as a punitive action against such enemies for not recognizing their duty to act in accordance with that law, and thus for systematically violating it. In accordance with the latter position, such a policy was justified based on the presumed inapplicability of international law to “uncivilized” nations. The difference between the two bases of justifications was of great significance in the context of ICL. Supporters of the latter justification simply assumed that international law (including, ICL) was inapplicable in such conflicts. Supporters of the former justification, by contrast, assumed that only the punishing side (i.e. the Christians/Europeans/Westerners) was unconstrained by international law (and, therefore, nothing that soldiers of that side committed could have been considered a war crime). But, they further assumed that the “punished” side is still duty-bound by international law (i.e. that the violations already committed, do not serve as license for the commission of additional violations of international law by the “punished”). Therefore, if a member of the “punished” was captured alive, the “just” side was able to choose between extra-judicially executing that member, or putting him on trial for various violations of jus in bello (or of other international law) he committed. Such trials, based on such a legal position, were occasionally conducted. See, Elbridge Colby, “How to Fight Savage Tribes,” American Journal of International Law 21 (1927): 285-287 (briefly mentioning both positions).

<sup>85</sup> See below notes 500-501, 508 and accompanying text.



A comparison of different accounts that depict the coming into being of the current global system as resulting from a rupture reveals considerable discrepancy regarding the time in which globalization has presumably occurred--with various dates, ranging from the late nineteenth century to the 1970s, being suggested.<sup>86</sup> As these issues are closely related,<sup>87</sup> it is unsurprising that a difficulty similarly exists in pin-pointing the time in which the ad bellum doctrine permitting waging total war against non-Christians/Europeans/Westerners was abandoned.<sup>88</sup> These difficulties are, at least in part, due to the fact that throughout this century-long period (as in previous times), in some conflicts, all parties--Westerners and non-Westerners alike--recognized the applicability of the (originally European) laws of war,<sup>89</sup> while in others, Western belligerents waged total war against their non-Western opponents (some of them, in fact, up until WWII, even explicitly justified their actions based on the horrid ad bellum doctrine regarding “uncivilized” nations).<sup>90</sup> Hence, the abandonment of the ad bellum doctrine regarding “uncivilized” nations was clearly not the result of a rupture, but of a nonlinear, long process.

Not only jus ad bellum influenced decisions whether to wage total war. At times, the conventional (originally European) jus in bello also had a moderating influence. Humanitarian considerations embedded in these norms influenced the decision of at least some commanders not to wage total war.<sup>91</sup> Furthermore, once a decision was made not to wage total war (for whatever reason), European forces often turned to the wartime legal code of conduct familiar to them; although, due to the reciprocal nature of warfare, often, the norms familiar to the other side also had an influence on the mutually adopted legal code of conduct.<sup>92</sup> Since the eighteenth century, however, as the power gap between European/Western forces and non-European/Western forces grew, increasingly, the European norms were simply imposed upon

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<sup>86</sup> Cf. Schmitt, Nomos of the Earth, 226 (suggesting 1875 to WWI); Liliana Obregón, “The Civilized and the Uncivilized,” 925 (the two world wars); Brett Bowden, “The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilization,” Journal of the History of International Law 7 (2005): 21-22 (the end of WWII); Martti Koskeniemi, The Gentle Civilizer of Nations (2001), 510-517 (suggesting the 1960s).

<sup>87</sup> Gerrit Gong, The Standard of “Civilization” in International Society (Oxford: Clarendon Press, 1984), 14-15.

<sup>88</sup> Strachan, “Typology,” 95, 101. See also, Frédéric Mégrét, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Law’s ‘Other,’” in International Law and its Others, ed. Anne Orford (2006), 266 (discussing residual influences of this doctrine).

<sup>89</sup> Strachan, “Typology,” 95-101; Wilhelm Grewe, The Epochs of International Law (2000), 263; Quincy Wright, “Bombardment of Damascus,” American Journal of International Law 20 (1926), 266; notes 426-432 below.

<sup>90</sup> Wright, “The Bombardment of Damascus,” 266; Colby, “How to Fight Savage Tribes,” 279-288; U.K. War Office, Manual of Military Law (1914), 235; Detlev Vaguet, “International Law in the Third Reich,” American Journal of International Law 84 (1990): 696; Strachan, “Typology,” 95, 101.

<sup>91</sup> See Drake, “Restraining Atrocity,” 34; Strickland, “Rules of War,” 131-132.

<sup>92</sup> Drake, “Restraining Atrocity,” 34; Strickland, “Rules of War,” 128-137; Morillo, “Typology,” 36, 41; Michael Prestwich, “Transcultural Warfare: The Later Middle-Ages,” in Transcultural Wars, 43-44, 56.

non-European forces.<sup>93</sup> The signing by non-Western countries on the nineteenth and twentieth centuries codifying treaties of the laws of war further contributed to these norms' globalization.<sup>94</sup>

The increasing adoption of the originally European jus in bello was not a linear process.<sup>95</sup> Also, contrary to the way many Western jurists still wrongly imagine it to be, this process was not the result of "civilization's" progression,<sup>96</sup> but of various factors, many of them coercive, such as: (a) forced acculturation; (b) the use of non-Western forces by Western/European colonialist nations; and (c) the adoption of these laws by non-Western/European nations to reduce Western/European nations' ability to justify waging total war against them.<sup>97</sup> The adoption of these originally European in bello laws by non-Western/European nations was further influenced by the fact that "military culture [is] possessed of its own imitative dynamics",<sup>98</sup> since "[w]ar is a competitive and reciprocal activity... [t]he common culture of armed forces... has a function, whose robustness frequently prevails over national and political differences."<sup>99</sup> As a result of the expanding adoption of these laws, most contemporary laws of war are identical to, or gradually developed from, the past European laws of war.<sup>100</sup> Thus, in the context of jus in bello as well, globalization did not occur in the form of a rupture.

**General Treaty with the Arab Chiefs for the cessation of plunder and piracy by land and sea, dated the 8th January 1820 .**

**ARTICLE 2.**

If any individual of the people of the Arabs contracting shall attack any that pass by land or sea of any nation whatsoever, in the way of plunder and piracy and not of acknowledged war, he shall be accounted an enemy of all mankind and shall be held to have forfeited both life and goods. And acknowledged war is that which is proclaimed, avowed, and ordered by government against government; and the killing of men and taking of goods without proclamation, avowal, and the order of a government, is plunder and piracy.

**ARTICLE 8.**

The putting men to death after they have given up their arms is an act of piracy and not of acknowledged war; and if any tribe shall put to death any persons, either Mahomedans or others, after they have given up their arms, such tribe shall be held to have broken the peace; and the friendly Arabs shall act against them in conjunction with the British, and, God willing, the war against them shall not cease until the surrender of those who performed the act and of those who ordered it.

It is agreed in the treaty that both pirates and killers of hors de combat "shall be accounted... enem[ies] of all mankind" (implicitly regarding the latter by deeming the act a form of piracy).<sup>101</sup>

<sup>93</sup> Morillo, "Typology," 32 n. 9; Kroener, "Antichrist," 59; Strachan, "Typology," 85-95.

<sup>94</sup> Grewe, The Epochs of International Law, 263; Mégret, "From 'Savages' to 'Unlawful Combatants'," 287.

<sup>95</sup> See, e.g., Kinji Akashi, "Japan-Europe," in The Oxford Handbook, 738-741.

<sup>96</sup> See, Chris Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," Harvard International Law Journal 35 (1994): 59-60 (criticizing this narrative).

<sup>97</sup> Morillo, "Typology," 32 n. 9; Kroener, "Antichrist," 59; Strachan, "Typology," 85-95.

<sup>98</sup> Strachan, "Typology," 103.

<sup>99</sup> Ibid, 86. See also, Morillo, "Typology," 32 n. 9;

<sup>100</sup> Geoffrey Parker, Empire, War and Faith in Early Modern Europe (2002), 167-168.

<sup>101</sup> Reproduced in Collection of Treaties, Engagements, and Sanads Relating to India and Neighboring Countries, ed. C. U. Aitchison (1892), 10:127-128.

Some international legal historians argue that international law was born only in the nineteenth century due to the shift experienced from natural law jurisprudence to positivism, which, presumably, rationalized international law.<sup>102</sup> This claim is inaccurate. Positivism was not the first jurisprudential school to claim to rationalize international law; secular natural law preceded it, albeit claiming to attain this aim in a different manner.<sup>103</sup> Furthermore, in nearly all periods, including the nineteenth century, various jurisprudential schools existed, as well as many positions within each school regarding obedience to international law. Moreover, jurists who mainly followed a certain jurisprudential school often accepted elements of other schools.<sup>104</sup>

Because of the absence of jurisprudential uniformity, many international legal historians no longer focus on theories of law to characterize different periods but examine each “period’s legal consciousness, understood as the ensemble of categories, concepts, typical arguments, argumentative techniques, and so forth, that characterize the work of [practitioners] and scholars of that period.”<sup>105</sup> Interestingly, many legal historians who adopt such a basis for periodization still conclude that a rupture occurred during the nineteenth century; according to their position, it occurred due to the rise of the modern international legal profession.<sup>106</sup> In this aspect, however, the laws of war, including ICL, differ from other areas of international law. For centuries, this body of law was enforced predominantly by a discrete military subculture,<sup>107</sup> which moderated the effect of nineteenth-century transformations (as well as earlier ones).<sup>108</sup>

The exact extent of penal enforcement of the laws of war (ICL) is unverifiable because the relevant historical evidence is partial and usually in the form of brief secondary reports.<sup>109</sup> But, the abundance of such reports leads many historians that examine military practices to conclude that during the late Middle-Ages penal enforcement of the laws of war was non-negligible and at least in some aspects “the laws of war in the Age of Chivalry are the direct ancestors of the

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<sup>102</sup> Luigi Nuzzo and Miloš Vec, “The Birth of International Law as a Legal Discipline,” in Constructing International Law: The Birth of a Discipline, ed. Luigi Nuzzo and Miloš Vec (2012): XII, IX.

<sup>103</sup> Martti Koskenniemi, “Legal Fragmentation(s): An Essay on Fluidity and Form,” in Soziologische Jurisprudenz, ed. Graf-Peter Calliess et al. (2009), 802-805.

<sup>104</sup> Janelle Greenberg and Michael J. Sechler, “Constitutionalism Ancient and Early Modern: The Contributions of Roman Law, Canon Law, and English Common Law,” Cardozo Law Journal 34 (2012-13): 1026-1043; Hall, “The Persistent Spectre,” 271; Lesaffer, “Unrequited Love,” 37; Russell, The Just War, passim.

<sup>105</sup> Duncan Kennedy, “Legal History: Introduction,” (2012), [http://duncankennedy.net/legal\\_history/index.html#LC](http://duncankennedy.net/legal_history/index.html#LC).

<sup>106</sup> E.g., Koskenniemi, The Gentle Civilizer, 179-209, 274-302.

<sup>107</sup> Terry Gill, “Chivalry: A Principle of the Law of Armed-Conflict?,” in Armed-Conflict and International Law, ed. Mariëlle Matthee, Brigit Toebe and Marcel Brus (2013), 36-37.

<sup>108</sup> See below Section 5(c).

<sup>109</sup> Parker, Empire, War and Faith, 340n.37; Georges Duby, The Chivalrous Society (1980), 16.

Geneva Conventions.”<sup>110</sup> Regarding subsequent periods, Parker explains, historical evidence leads many historians to conclude:<sup>111</sup>

The rules of war followed by most European societies both at home and abroad have thus displayed a remarkable continuity since the sixteenth century. This stems in part from the relative stability of human nature--the advantages of cooperation and the danger of total collapse were apparent to Renaissance soldiers as they are today--in part from the lasting influence of the Bible, the Church Fathers and Roman Law on Western Civilization. But both of these considerations received reinforcement from the weight of practice and precedent--by frequent appeal to custom in assessing military conduct. It is true that the theoretical restrictions of the jus in bello have multiplied; it is also true that those restrictions have been breached at regular intervals. But almost every excess, from the sixteenth century onward, has been subject by contemporaries to detailed scrutiny... And if no excuses were available, moral condemnation and then legal sanctions ensued. Most of the actions today outlawed by the Geneva Conventions have been condemned in the West for at least four centuries; only the degree and the extent of enforcement has changed over time.

And:<sup>112</sup>

[I]n most of the wars waged in Europe since the sixteenth century, breaches of the norms for military conduct laid down in treaties... have been condemned and chastised with increasing rigor. Individual soldiers faced trial and punishment by special military tribunals for crimes committed against either fellow soldiers or civilians.

Furthermore, “modern armies (perhaps from as early as the late 18th century) shared a culture of war that gave their formal wars an intercultural character even when the broader cultures were different”.<sup>113</sup> Hence, “many aspects of the eighteenth-century norm also survived the two world wars of the twentieth century [and are currently shared] not only [by] those which have eighteenth-century antecedents but also [by] more recent creations [that were] persuaded that such patterns of behavior are the foundations of military culture... modern armies behave as though they are bound by a common culture”.<sup>114</sup>

Thus, despite the undeniable elements of discontinuity (militaries, norms and jurisprudence changed, the spatial applicability of the law varied, and enforcement levels fluctuated), considerable continuity exists both in the content of the laws of war and in their social acceptance and penal enforcement (ICL).

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<sup>110</sup> Robert Stacey, “The Age of Chivalry,” in The Laws of War, ed. George Andreopoulos and Mark Shulman (1994), 38. See also David Whetham, Just Wars and Moral Victories (2009), 52.

<sup>111</sup> Parker, Empire, War and Faith, 167-68.

<sup>112</sup> Ibid, 159.

<sup>113</sup> Morillo, “Typology,” 32 n. 9.

<sup>114</sup> Strachan, “Typology,” 85.



The disparity between the aforementioned continuity findings and the prevalent rupture depiction among international legal historians may also be resulting from another issue. According to Lesaffer, “[o]ften international legal historians consider [jurisprudential writing] to be convenient shorthand of what the international law of a certain period was”.<sup>115</sup> This is problematic. Such sources are often biased and “[i]n most eras of history... practices and customary law constituted a more important source for the law of nations”.<sup>116</sup> Trying to determine the continued existence of a legal system by examining jurisprudential writings may also result, as hereinafter explained, in misdirected research.

No consensual definition exists for a “legal system.”<sup>117</sup> Still, many believe that a legal system exists, in the sociological sense, when the bulk of community members or officials have come to accept, as a social convention, certain norms as obligatory.<sup>118</sup> Such acceptance can exist even when individuals disagree about the jurisprudential basis for their duty to abide by these laws.<sup>119</sup> Disagreements may also exist on whether specific norms are part of the system.<sup>120</sup> Also, often, the contours of the community are undefined and changing.<sup>121</sup> The normative force of a legal system can, therefore, fluctuate across time, places, and issues.

Such normative force should be distinguished from adherence and enforcement because even individuals who recognize a certain norm as binding may nevertheless decide not to follow it.<sup>122</sup> Admittedly, a legal system cannot exist over time if it continuously fails to have behavioral effects. But occasional unpunished violations do not render it meaningless. Indeed, the core “function of the legal system may be defined as producing and maintaining counter-factual expectations in spite of disappointments.”<sup>123</sup>

This sociological definition of a legal system helps identify a dis-continuum in its history. Considerable aspects of discontinuity are bound to be experienced by a legal system over time in: (a) community contours; (b) the amount and identity of community-members or officials

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<sup>115</sup> Lesaffer, “Unrequited Love,” 36.

<sup>116</sup> *Ibid.*, 37.

<sup>117</sup> Javier Treviño, *The Sociology of Law* (2001), 5-6.

<sup>118</sup> Andrei Marmor, “The Nature of Law,” *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2011), <http://plato.stanford.edu/archives/win2011/entries/lawphil-nature/>.

<sup>119</sup> Ruth Gavison, “Natural Law, Positivism and the Limits of Jurisprudence,” *Yale Law Journal* 91 (1982): 1279.

<sup>120</sup> Raimo Tuomela, *The Philosophy of Sociality* (2007), 31.

<sup>121</sup> Morillo, “Typology,” 30.

<sup>122</sup> Oren Perez, “Fuzzy Law,” *Canadian Journal of Law and Jurisprudence* (2015; forthcoming), 14.

<sup>123</sup> Niklas Luhmann, “Operational Closure and Structural Coupling: The Differentiation of the Legal System,” *Cardozo Law Review* 13 (1992): 1426.

committed to its norms; (c) acceptance level and content of various norms; (d) members' jurisprudential beliefs; and (e) obedience and enforcement levels. Nevertheless, a dis-continuum should not be declared, as long as a social convention--generally regarding the system's norms as obligatory--persists among most community-members/officials.

This definition of a dis-continuum lends support to historians' conclusion that evidence regarding military practices indicates a centuries-long continuity in ICL history. International jurists, however, impose additional conditions for acknowledging such continuity--holding pre-WWII cases of penal enforcement of the laws of war to be irrelevant to present-day ICL, for presumably being: (a) rare (and thus insignificant); (b) domestic; and (3) bereft of a common doctrine.<sup>124</sup> The aforementioned abundant historical evidence refutes the rarity presumption. The two other presumptions are refuted below.

Two brief clarifications are in order. First, this article exposes the continuous reliance of ICL cases over the centuries on the international outlawry doctrine to refute the premise that past cases lack a shared doctrine. There is no intent here to imply that other factors (such as political interests) did not also influence the parties' actions. Second, because of the pivotal role war crime prosecutions played in ICL history, the terms "penal enforcement of the laws of war" and "ICL" are often used interchangeably. Such use does not suggest that all other core international crimes are post-WWII innovations; their pre-WWII history is addressed below.

#### **4. Outlawry's Origins**

##### *a. Germanic Law*

Under Germanic law, individuals were deemed outlaws for wronging the entire community, making it "the right... of every man... to hunt [them] down... and slay [them]."<sup>125</sup> Outlaws were not necessarily executed. Society was granted control over their lives and this perspective gradually gave rise to additional forms of punishment, such as indefinite imprisonment and exile. Individuals referred to as "banned"/"exiled"/"banished" were, from a legal perspective, outlaws whose lives had been spared.<sup>126</sup> This evolution of punishments, which occurred during the late Middle-Ages, played a pivotal role in the development of criminal law: "many of the pure punishments... have their root in outlawry."<sup>127</sup>

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<sup>124</sup> Bassiouni, *International Criminal Law*, 28-29, 138; Slye, Van-Schaack, *Essentials*, 18-26.

<sup>125</sup> Pollock, Maitland, *History of English Law*, 2:320.

<sup>126</sup> Carlo Calisse, *A History of Italian Law* (2001) 1:301; Keen, *Outlaws*, 9-10.

<sup>127</sup> Pollock, Maitland, *History of English Law*, 2:328.

Originally, two forms of outlawry existed: “decreed” outlawry and outlawry of “manifest criminality.” The former refers to actions requiring a semi-judicial decree after their commission, declaring the perpetrators “outlaws.” This procedure was applied primarily to individuals who had prevented the administration of justice.<sup>128</sup> Manifest criminality refers to acts that instantly reveal individuals’ “true” outlaw nature, allowing immediate execution without a prior decree when such an outlaw is caught red-handed. Insidious stealing and killing (at night or using poison), as well as arson, were regarded as exhibiting manifest criminality.<sup>129</sup> Few acts, however, were considered as exhibiting manifest criminality; even robbery and diurnal murder were not considered as such.<sup>130</sup>

Infractions that were not outlawry-deeming were considered wrongs inflicted strictly on the victims and their kin, who alone could seek justice--mostly through “blood feud,” which was the (bloody) equivalent of a civil suit.<sup>131</sup> Although each side could harm any individual or property belonging to the other side, “rather than complete destruction of the enemy, the goal of the feud was to get the other party to accept the challenger’s view of what was right thus restoring the peaceful state.”<sup>132</sup> Hence, in contrast to the legal treatment of outlaws: (a) procedural regulations governed conduct in feuds; (b) the wrongdoing was regarded as unverified; and (c) only the victims and their kin were considered to have been (allegedly) wronged.<sup>133</sup>

Germanic jurisprudence described a social obligation as “peace” and many “peaces” existed. “Personal” wrongs were regarded as breaches of the peace between the wrongdoers’ and the victims’ kin, whereas outlaws were enemies/disturbers of the peace of the entire community.<sup>134</sup>

#### *b. Roman Law*

In Roman jurisprudence, the three main categories of law were the laws of nature, laws of men, and customary laws. Some laws of men were regarded as universally applicable (jus gentium or “law of nations”), as were some laws of nature.<sup>135</sup>

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<sup>128</sup> Whetham, Just Wars, 75; L. Von-Bar, A History of Continental Criminal Law, trans. T.S. Bell (1916), 62-63.

<sup>129</sup> Pollock, Maitland, History of English Law, 2:338-349, 2:670 n.129.

<sup>130</sup> John H. Wigmore, “Editorial Preface” to Von-Bar, Continental Criminal Law, xxx; Frederick Pollock, “The King’s Peace in the Middle-Ages,” Harvard Law Review 13 (1899): 177-78.

<sup>131</sup> Whetham, Just Wars, 75-76.

<sup>132</sup> *Ibid*, 84.

<sup>133</sup> *Ibid*, 75-76, 84-86.

<sup>134</sup> Von-Bar, Continental Criminal Law, 61-67, 112, 142, 300.

<sup>135</sup> Andrew Stephenson, A History of Roman Law (1912), 11; Dan Edelstein, “War and Terror: The Law of Nations from Grotius to the French Revolution,” French Historical Studies 31 (2008): 232.

Roman law also sanctioned extrajudicial execution of certain wrongdoers. For example, the Romans believed that the laws of nature require rulers to act for the benefit of their public's good (commonwealth). The term "tyrant" was attached to a ruler who violated this duty, and Roman law deemed tyrants "enemies of mankind," to be killed by anyone. In fact, the phrase hostis humani generis was first used in reference to tyrants, not pirates.<sup>136</sup>

The extrajudicial execution of violators of certain laws of nations was also permitted. Notably, armed-forces operating within the boundaries of the Roman Empire that refused to submit to Roman rule--i.e., brigands and pirates--were deemed enemies of all nations, executable by anyone, for violating (according to the Romans) a law of nations that prohibited warring without legitimate authorization.<sup>137</sup> Somewhat similar legal treatment applied to "barbarians," external enemies considered "uncivilized" because they were beyond the pale of Roman influence.<sup>138</sup>

Roman legislation also permitted the extrajudicial execution of "nocturnal" thieves/murderers and regular soldiers who attacked civilians or pillaged without authorization, by equating them to "latrones", a term that became understood (by late-medieval times) as referring to both brigands and robbers.<sup>139</sup> This permission had limits. If the person's identity or wrongdoing were in doubt, certain summary proceedings had to be conducted before execution, and extrajudicial execution was prohibited when judicial recourse was available.<sup>140</sup>

Roman law maintained two notions of treason, both of which allowed extrajudicial execution. The first referred to treason committed against the Roman people, whose perpetrators were "public enemies". The second related to treason against the ruler (lèse-majesté).<sup>141</sup>

Roman law did not treat all wrongdoers whose extrajudicial execution it allowed as regulated by a single doctrine.<sup>142</sup> This began to change in the fourth century when Christianity became the Empire's official religion, causing Christian and Roman jurisprudence to gradually

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<sup>136</sup> Dan Edelstein, "Hostis Humani Generis: Devils, Natural Right, and Terror in the French Revolution," Telos 141 (2007): 61-63; Shannon Brincat, "Death to Tyrants: Self-Defence, Human Rights and Tyrannicide--Part I," Journal of International Political Theory 4 (2008): 217-19.

<sup>137</sup> Edelstein, "Hostis," 61-63; Russell, The Just War, 7-8.

<sup>138</sup> Russell, The Just War, 7-8.

<sup>139</sup> Justinian Code, III, title 27; Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, trans. W. Kelsey (1925), 487; Thomas Heebøll-Holm, Ports, Piracy and Maritime War (2013), 235.

<sup>140</sup> Russell, The Just War, 40; Justinian Code, XLVII, titles 2.2-2.13.

<sup>141</sup> Judy Gaughan, Murder Was Not a Crime: Homicide and Power in the Roman Republic (2010), 108-10, 127-29; C.W. Chilton, "The Roman Law of Treason under the Early Principate," Journal of Roman Studies 45 (1955): 75.

<sup>142</sup> Edelstein, "Hostis," 62-63.



merge. Consequently (through a process that culminated only during the late Middle-Ages), the status of the Church's internal and external enemies (heretics and infidels) became equated with that of the Empire's enemies (pirates, brigands, rebels, traitors, and barbarians), and perpetrators of other acts considered grave crimes by Christian or Roman law (e.g., robbers). All these categories of wrongdoers were regarded equally as enemies of the Church, the Roman public, and even mankind (to be killed by anyone).<sup>143</sup>

Despite some similarities between Roman-Christian and Germanic extrajudicial execution doctrines, there were considerable differences. Notably, whereas Germanic law relied heavily on self-enforcement, Roman-Christian jurisprudence considered it an exception.<sup>144</sup> Formally, Roman-Christian jurisprudence, generally regarded harming even enemies and criminals as a grave crime and permitted doing so only when it was aimed at enforcing justice. Furthermore, the enforcement of justice (namely, both war-making and the punishment of criminals) was the prerogative of rulers (originally, Roman Emperors), because they were divinely chosen. Others were primarily permitted to kill criminals and enemies under the direction of a ruler or God. Gradually, the extrajudicial killings of criminals without such directions became permissible only when recourse to the ruler's courts was unavailable.<sup>145</sup>

*c. The Medieval Jurisprudential Revolution*

At the turn of the first millennium, different authorities competed to fill the power void created by the decline of the Carolingian Empire.<sup>146</sup> Despite Europe's institutional fragmentation, medieval jurisprudence adhered to a broad transnational concept of "public good" rooted in Roman law, redefining the "Roman public" to include "all who obeyed the mother church."<sup>147</sup> This public was referred to as republica Christiana and even as "humanity"/"mankind".<sup>148</sup> In quest for dominance, the Church revived the Roman-Christian doctrines that centuries earlier centralized war-making and criminal justice authorities in the hands of divinely-chosen rulers--claiming dominance over all Christian rulers by asserting that

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<sup>143</sup> Russell, The Just War, 7-19, 45; Edelstein, "Hostis," 62-63.

<sup>144</sup> Clarence Ray Jeffery, "The Development of Crime in Early English Society," Journal of Criminal Law, Criminology and Police Science 47 (1956-57): 654-65.

<sup>145</sup> Whetham, Just Wars, 37-45; Russell, The Just War, 10-22, 40-41.

<sup>146</sup> Duby, The Chivalrous Society, 15-46.

<sup>147</sup> Maurice Keen, The Laws of War in the Late Middle-Ages (1965), 14.

<sup>148</sup> Schmitt, Nomos of the Earth, 58-65.

the Pope inherited the Roman Emperors' supreme authority to enforce justice and protect the commonwealth of Christendom/humanity.<sup>149</sup>

Papal dominance was also propounded based on Germanic jurisprudence, mainly based on the tenets of the Peace of God movement, which held that infringement of certain norms violated a universal peace that supersedes all localized peaces.<sup>150</sup> Such violations authorized the Church to decree the religious version of outlawry: excommunication.<sup>151</sup>

Use of both Germanic and Roman-Christian doctrines caused these bodies of law to gradually merge.<sup>152</sup> Evidence of this conflation is found in the various terms, some Roman-Christian in origin and others Germanic, that became synonymous with "outlaw," including "enemy of peace," "disturber of peace," "enemy of mankind," "common criminal," "banned," "exiled," "banished" and "public enemy."<sup>153</sup>

Several European rulers who, for historical reasons (e.g. being Charlemagne's descendants), had competing claims to the title of Emperor--notably, the head of the entity known as the "Holy Roman Empire"--also advanced transnational jurisprudential positions similar to that taken by Popes. But, each claimed that he--not the Pope (or anyone else)--was the true heir of Roman imperial authority.<sup>154</sup>

The rise of modern States was a slow process that began in the late Middle-Ages, when European Kings gradually centralized lawmaking and judicial powers in royal hands by subordinating local lords and judicial systems, and freeing themselves from subordination to Popes and "Emperors".<sup>155</sup> Ironically, these Kings, originally, made their bid for power and autonomy based on the same doctrines as the Church, simply interpreting them differently: (a) they declared that "every king is an emperor within his kingdom" and (b) reconstructed the

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<sup>149</sup> Greenberg, Sechler, "Constitutionalism," 1026-30.

<sup>150</sup> Geoffrey Hosking, Trust: A History (2014), 70-72; Duby, The Chivalrous Society, 55-57, 124-26.

<sup>151</sup> Duby, The Chivalrous Society, 49, 53; John Fry, A Short History of the Church of Christ (1825), 197.

<sup>152</sup> Keen, Laws, 8-19; Russell, The Just War, 45.

<sup>153</sup> Pollock, Maitland, History of English Law, 2:300; Calisse, Italian Law, 2:311. Also see above notes 126, 134, 143 and accompanying text. The term "public enemy" (and even "enemy") was used only in some sources as a synonym of "outlaw", while in others it was used to refer to legitimate belligerents; compare, Charles' case (below note 333) with Butler's case (above note 61). These contradictory uses probably resulted from a misunderstanding of certain Roman doctrines; see Gil Anidjar, The Jew, the Arab: A History of the Enemy (2003), 180.

<sup>154</sup> Schmitt, Nomos of the Earth, 58-65.

<sup>155</sup> Stéphane Beaulac, "The Westphalian Model in Defining International Law: Challenging the Myth," Australian Journal of Legal History 8 (2004): 182-83.

Germanic communal peace notion into the “King’s peace” doctrine.<sup>156</sup> Moreover, the jurisprudence (originally advanced by the Church) that merged Roman-Christian and Germanic law, by equating disturbances of the “Peace of God” with threats to the “Roman” (Christian) “public good”, enabled Kings to apply Roman doctrines restricting extrajudicial executions so as to limit the Germanic authorization of self-enforcement against outlaws and assert their courts’ exclusive authority to punish breaches of their subjects’ communal “peace”/“public good”. This jurisprudence also enabled Kings to expand their courts’ substantive jurisdiction by adding to the acts considered communal wrongs those prohibited under Roman-Christian jurisprudence, even though not originally outlawry-deeming in Germanic law.<sup>157</sup> The name given to the class of acts criminalized based on this “expanded” outlawry jurisprudence was felonies; the prototypical felonies were murder, robbery, theft, treason, arson, and rape.<sup>158</sup>

Royal consolidation of judicial powers was incomplete in the late Middle-Ages. Three types of penal proceedings still existed: (a) general permission to extrajudicially execute the perpetrator was authorized in certain cases of manifest criminality or when the perpetrator had been decreed an outlaw; (b) semi-judicial, summary proceedings were conducted by local, non-jurist officials for some felons; and (c) full-fledged judicial proceedings were conducted by the King’s judges for others.<sup>159</sup>

A similar enforcement structure existed in the military justice system for violators of the laws of war (and other war-related international law): (a) enemy and compatriot soldiers caught red-handed were often punished extrajudicially; (b) most other cases were handled by “courts martial”/“military commissions” (semi-judicial, summary proceedings conducted by non-jurists); and (c) some cases were tried by full-fledged judicial tribunals with expert judges.<sup>160</sup>

The correlation between that enforcement structure and the enforcement structure of medieval domestic penal enforcement is compelling evidence of the outlawry origins of ICL, given the accepted outlawry origins of domestic criminal law. One of the types of penal proceedings used (commonly) to enforce the laws of war, extrajudicial executions, is in itself

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<sup>156</sup> Duby, The Chivalrous Society, 29-57; Von-Bar, Continental Criminal Law, 66-67, 142-43; Greenberg, Sechler, “Constitutionalism,” 1026-31.

<sup>157</sup> Mia Korpiola, “People of Sweden Shall Have Peace: Peace Legislation and Royal Power in Later Medieval Sweden,” in Expectations of the Law in the Middle-Ages (2001), 35-38, 48-50; Pollock, Maitland, History of English Law, 2:328-52, 2:622-23 n.66; D.H. Green, Language and History in the Early Germanic World (2000), 43.

<sup>158</sup> Pollock, Maitland, History of English Law, 2:330-351.

<sup>159</sup> Ibid; Korpiola, “Sweden,” 35-38, 48-50.

<sup>160</sup> Keen, Laws, 23-44.

strongly indicative of the outlawry pedigree, given outlawry's original implication (permission to extrajudicially execute perpetrators). Indeed, the connection between ICL and the medieval outlawry doctrine was still recognized in the early twentieth century.<sup>161</sup> Only sometime after WWII was this connection completely forgotten, and past summary executions of war criminals inaccurately interpreted as acts of vengeance or reprisal, not the enforcement of criminal justice.<sup>162</sup> Even if occasionally abused, a legal authority to summarily execute war criminals was invoked throughout the centuries. Furthermore, it was utilized against both enemy and compatriot soldiers, which supports the conclusion that it was not mere vengeance or reprisal.<sup>163</sup>

In the context of domestic legal history, the outlawry doctrine's normative power has also been questioned by claims that outlawry is not a juridical concept. Agamben argues that the outlawry-based prerogative to place a person beyond the pale of the law is still embedded in State sovereignty, in the mechanisms that grant the State control over individuals' lives. Agamben claims that acknowledging that persistent embedding reveals the falsehood of the belief that the law can constrain those in power.<sup>164</sup> Butler agrees with Agamben regarding the inaptitude of law, but criticizes him for making overly general claims about the persistent use of outlawry by those in power, which "do not yet tell us how this power functions differently" in different times and contexts.<sup>165</sup>

If Agamben's position is applicable to ICL, we must conclude that ICL's outlawry doctrine has always been a mere disguise for oppression. If Butler's position is true, a genealogical account of that doctrine is uninteresting. But, as many have noted, Agamben's and Butler's positions are based on inaccurate understanding of the law.<sup>166</sup> Laws can constrain the use of power.<sup>167</sup>

It should be noted that a common response to claims that outlawry was not a juridical concept underestimates outlawry's contribution to criminal law. In most Western domestic legal systems, over time, outlawry drastically changed and subsequently faded. This is especially true

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<sup>161</sup> A.H.F. Lefroy, "By the Way," Canadian Law Times 38 (1918): 546-47.

<sup>162</sup> E.g., Everette Don Stumbaugh, Jurisdiction to Try Individuals for Violations of the Law of War: Theory and Practice (George Washington University: LL.M thesis, 1973), 7, <https://archive.org/details/jurisdictiontotr00stum>.

<sup>163</sup> Keen, Laws, 30-44; Stumbaugh, Jurisdiction to Try Individuals, 7-8.

<sup>164</sup> Agamben's thesis relies not only on the Roman homo sacer doctrine but also on other similar doctrines such as the Germanic outlawry doctrine, see, Agamben, Homo Sacer, 63.

<sup>165</sup> Judith Butler, Precarious Life: The Powers of Mourning and Violence (2006), 68.

<sup>166</sup> Leila Brännström, "How I learned to Stop Worrying and Use the Legal Argument: A Critique of Giorgio Agamben's Conception of Law," NoFo 5 (2008): 23.

<sup>167</sup> See above note 69-71 and accompanying text.

for outlawry decreeing, after that authority passed from royal to judicial hands. Therefore, it has been argued that, with the exception of the name, the original outlawry and the later, judicial outlawry are patently distinct, and whereas the former was not a juridical concept the latter was,<sup>168</sup> which means that the elements of discontinuity overshadow those of continuity.<sup>169</sup>

But, the claim that the original outlawry doctrine was not a juridical concept is actually an expression of the flawed “Modern State Conception,” which disregards the means used by criminal justice systems that lack centralized law-enforcement organs. Also, in most domestic systems, outlawry changed gradually, making rupture claims inaccurate.<sup>170</sup> More importantly, this reasoning fails to acknowledge outlawry’s full influence on domestic criminal law. As noted, the original basis for the penalization of felonies was their perception as grave wrongs, whose perpetrators were outlaws. That legal perception had various long-lasting effects (one of them is discussed in the next section).

The elements of continuity in ICL regarding outlawry are even greater. Unlike its (generally speaking) long-abolished domestic counterpart,<sup>171</sup> the outlawry-based authority to extrajudicially execute war criminals remained part of the law until 1949.<sup>172</sup> Moreover, even today, considering wrongdoers enemies of mankind constitutes the conceptual basis for universal jurisdiction.<sup>173</sup>

#### *d. Military Justice as a Transnational System*

We intuitively assume that States and their laws (criminal and otherwise) came first, followed by international law that was developed by the States as a means of coordinating their interactions and moreover, ICL was created only very recently. Yet this description is inaccurate.

Kings originally relied on the same transnational doctrines as did Popes and “Emperors” and although a localized notion of public/peace began to emerge already during medieval times, the process that detached it from its transnational origins was extremely drawn-out.<sup>174</sup> As late as the nineteenth century, in most European domestic criminal justice systems the prevailing

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<sup>168</sup> Jane Y. Chong, “Targeting the Twenty-First-Century Outlaw,” *Yale Law Journal* 122 (2012), 743; Michael Eburn, “Outlawry in Colonial Australia: The Felons Apprehension Acts 1865-1899,” *ANZLH E-Journal* [2005], 93.

<sup>169</sup> Different contemporary courts have further asserted that even judicial outlawry has no place in modern law, which one might interpret as signifying another rupture; e.g., *Hirst v UK*, ECrHR (2005).

<sup>170</sup> William Riddell, “Introduction,” to A. Esmein, *A History of Continental Criminal Procedure* (1913), xliii.

<sup>171</sup> Von-Bar, *Continental Criminal Law*, 291-93, 503-11. In few domestic systems, outlawry-decreed extrajudicial killing remained legal until recently; see Eburn, “Outlawry in Colonial Australia,” 85 (discussing New South Wales); Chong, “Twenty-First-Century Outlaw,” 749-750 (discussing North-Carolina).

<sup>172</sup> See Common Article 3 to the Geneva Conventions of Aug. 12, 1949.

<sup>173</sup> Dubber, Hörnle, *Criminal Law*, 153.

<sup>174</sup> See Hosking, *Trust*, 127-28; Russell, *The Just War*, 259-69, 295-304; Marc Ancel, “The Collection of European Penal Codes and the Study of Comparative Law,” *University of Pennsylvania Law Review* 106 (1958): 342.

jurisprudential basis for the criminalization of many felonies classified today as domestic (e.g., murder, robbery, arson, theft, and rape) continued to be perceived as infringement of universal natural law. “[C]ase law and especially doctrine [had thus remained] of an international character.”<sup>175</sup> Such felonies were deemed “crime[s]... contra jus gentium... against the law of nations”,<sup>176</sup> and their perpetrators “enemies of mankind.”<sup>177</sup> Many but not all European judicial systems even applied the universal jurisdiction doctrine to such felonies.<sup>178</sup> Moreover, in judicial systems that did not apply that doctrine (e.g., English Common law) the perception of such felonies as violations of universal law also remained. Their courts were simply perceived as having jurisdiction only when the universal natural law was violated in a manner that breached the relevant King’s “peace”.<sup>179</sup>

Domestic crimes--namely, acts considered crimes only in a specific kingdom--existed alongside universal crimes.<sup>180</sup> The distinction between the two was not always clear, as certain domestic crimes came into existence through a local interpretation of a universal crime.<sup>181</sup>

Only in the nineteenth century, under the influence of positivism, support for the application of universal jurisdiction to felonies diminished considerably.<sup>182</sup> In some countries it transformed into the judex loci deprehensionis doctrine, which permits the prosecution of certain foreign-domestic criminals.<sup>183</sup>

Currently, many jurists characterize pre-WWII cases of war crime prosecution as purely domestic legal measures, and therefore not ICL precedent, because they were adjudicated by the military tribunals of various European powers and not by transnational tribunals.<sup>184</sup> This position is mistaken because, as explained, in the past “there was no sharp distinction between international and national law”.<sup>185</sup>

This position is further mistaken because until the nineteenth century military and civilian justice systems were not branches of a single (domestic) system, and military justice had

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<sup>175</sup> Ancel, “European Penal Codes,” 342.

<sup>176</sup> Jonathan Elliot, American Diplomatic Code (1834), 2:402.

<sup>177</sup> E.g., Ordinary’s Account, Old Bailey (16 June 1731) (England), <http://www.oldbaileyonline.org/browse.jsp?id=OA17310616&div=OA17310616#highlight>.

<sup>178</sup> F.F. Martens, Traité de Droit International (1883-1887), 3:7-9; Voltaire, Philosophical Dictionary (1843), 263.

<sup>179</sup> Duby, The Chivalrous Society, 57, 124-26; English sources cited above notes 176-177.

<sup>180</sup> Voltaire, Philosophical Dictionary, 263.

<sup>181</sup> See, e.g., In re Piracy Jure Gentium [1934] A.C. 586, 589-91.

<sup>182</sup> Bassiouni, “Universal Jurisdiction”, 99.

<sup>183</sup> Martens, Traité de Droit International, 3:7-9 (this transition had begun already prior to the nineteenth century).

<sup>184</sup> E.g., Robert Cryer, Prosecuting International Crimes (2005), 25.

<sup>185</sup> Jeffrey L. Dunoff et. al., International Law: Norms, Actors, Process (2006), 441.



considerable transnational attributes. In medieval times, knightly issues, including the laws of war, were outside the jurisdiction of royal civilian courts and were adjudicated by a separate judicial system. Other guild-oriented transnational judicial system also existed.<sup>186</sup> Members of the knightly guild considered themselves defenders of all “Romans” (Christians),<sup>187</sup> and “[t]he law of arms was [regarded as an] extension of the natural law and the law of nations.”<sup>188</sup> When it came to enforcing such laws, all medieval military judicial forums regarded themselves as belonging to a single transnational network aimed at regulating a given social sphere (war), monopolized by a specific transnational guild (knights). Thus, the same law was “applied and enforced by all military tribunals in Christendom, whether of the enemy prince or of the prince upon whom a knight or man-at-arms depended.”<sup>189</sup> That transnational soldierly ethos persisted far beyond the Middle-Ages.<sup>190</sup> Therefore, legal doctrines adjudicated in military forums were even less susceptible to “domestication” pressures than those adjudicated in civilian courts.<sup>191</sup>

Because the same transnational doctrines were applied in military forums of various armies, individuals were often tried for infringing norms not enshrined in any formal domestic legislation.<sup>192</sup> The current understanding of the principle of nullum crimen sine lege, after all, was adopted by domestic law only in the nineteenth century as part of a positivism-driven codification trend that swept across Europe.<sup>193</sup> ICL, which was not influenced as much as domestic penal law by nineteenth century positivism, never fully accepted this principle.<sup>194</sup>

Admittedly, the codification trend did have some influence on ICL, contributing to the treaty codification of the laws of war. Some contemporary jurists even posit that the “rules of war became laws of war” only following that treaty codification, as gradually, penalties were explicitly assigned in such treaties to violations of codified norms.<sup>195</sup> But this is inaccurate. In

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<sup>186</sup> Whetham, Just Wars, 72-73; J.C. Hearnshaw, “Legal Literature,” in Cambridge History of English and American Literature, ed. A.W. Ward and A.R. Waller (1907), 7:362-36.

<sup>187</sup> Keen, Laws, 14-18, 50-59.

<sup>188</sup> G.I.A.D. Draper, “The Status of Combatants and the Question of Guerilla Warfare,” British Yearbook of International Law 45 (1971): 174.

<sup>189</sup> *Ibid.*

<sup>190</sup> Parker, Empire, War and Faith, 167-68.

<sup>191</sup> Henry W. Halleck, “Military Tribunals and Their Jurisdiction,” American Journal of International Law 5 (1911): 958-966; below Section 5(c).

<sup>192</sup> Draper, “Status,” 173-74.

<sup>193</sup> Bassiouni, “Universal Jurisdiction,” 99.

<sup>194</sup> See below Sec. 5(c); International Covenant on Civil and Political Rights, 999 UNTS 171, Art. 15(2) (1966).

<sup>195</sup> Gary D. Solis, The Law of Armed-Conflict: International Humanitarian Law in War (2010), 54.

the past, the terms “rules of war” and “laws of war” were often used interchangeably.<sup>196</sup> Moreover, these norms were not mere professional rules of ethics before their codification, just as the prohibitions against rape and theft are not merely ethical recommendations in contemporary Scotland because they are unlegislated crimes. As discussed, most laws of war were considerably enforced against both enemy and compatriot soldiers (with the maximum penalty being death). The misleading depiction of the uncoded laws of war as ineffective can be traced back to attempts by some nineteenth-century positivists to undermine these laws.<sup>197</sup>

Military tribunals always had a mixed domestic-transnational function. Their chief “municipal” role was to enforce norms currently considered domestic military law (e.g., disobeying an order). These norms were often enshrined in positive military legislation known as “Articles of War,” which also included provisions forbidding compatriot soldiers from committing certain acts barred under the laws of war.<sup>198</sup> But even such positive war crime prohibitions should not be viewed as entirely domestic legal norms. First, until the nineteenth century, European military penal codes were usually not acts of parliament, but rather executive decrees issued by Kings or military commanders based on an inherent prerogative. That prerogative was originally anchored in the convention that Kings and commanders were not only domestic agents but also high-ranking members of the transnational guild of warriors--duty-bound, as such, to enforce international law and maintain their forces’ discipline.<sup>199</sup> Second, pre-nineteenth-century European jurisprudence commonly viewed unwritten natural law as obligatory. Domestic legislations were generally expected to reflect that law and they were often considered written clarifications of it.<sup>200</sup> Third, for centuries, even when a certain war crime was not explicitly noted in the Articles of War, soldiers could still be punished for violating the unlegislated, transnational laws of war.<sup>201</sup> As the 1643 Scottish Articles of War stated, “[m]atters, that are clear by the light and law of nature, are presupposed... other things may be judged by the common customs and constitutions of war; or may, upon new emergents, be expressed afterward.”<sup>202</sup>

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<sup>196</sup> E.g., Emer de-Vattel, *The Law of Nations* (1797), 425.

<sup>197</sup> E.g., Stephen, *Criminal Law*, 2:62-63.

<sup>198</sup> Parker, *Empire, War and Faith*, 147; Keen, *Laws*, 56.

<sup>199</sup> Oded Mudrik, *Military Justice* (1993), 17-21 [Hebrew].

<sup>200</sup> Bassiouni, “Universal Jurisdiction,” 99; Whetham, *Just Wars*, 73-74.

<sup>201</sup> Parker, *Empire, War and Faith*, 147; James Turner, *Pallas Armata* (1683), 206.

<sup>202</sup> Reproduced in Francis Grose, *Military Antiquities* (1788), 2:137 (emphasis added).

During the nineteenth century, many European States began to rely on conscription-based national armies, which weakened combatants' commitment to the transnational soldierly ethos.<sup>203</sup> Legislative reforms further increased military courts' subordination to domestic/civilian legislative and judicial bodies.<sup>204</sup> But even through this period, ICL considerably resisted domestication pressures.<sup>205</sup>

The gradual rise of modern States and the transnational nature of military justice are illustrated below in two contexts: the Holy Roman Empire's princedoms, and England.

*e. When Did the Holy Roman Empire's princedoms Become States?*

Until recently, the Peace of Westphalia (1648), which ended the Thirty Years' War, was commonly viewed as the inception of the modern State, mainly because as a result of it the princedoms of the Holy Roman Empire--the predecessors of most European States--attained autonomy over the key functions associated with sovereignty: law-, war-, and peace-making.<sup>206</sup> International law's birth presumably followed: "The idea of authority or organization above the states [was] no longer [and the] new system rest[e]d on international law... operating between, rather than above states."<sup>207</sup> Note that this narrative undermines international law by depicting it as a more recent creation than States which does not supersede State authority and was only created by the States to aid in coordinating their interactions.

This Westphalian narrative has been refuted in recent decades.<sup>208</sup> The rise of modern States in Europe was a gradual process that began in the late Middle-Ages and peaked only during the nineteenth century. The lengthiness of this process is evident in the context of the Holy Roman Empire's princedoms. Although these princedoms were considerably autonomous already centuries before 1648, the Peace of Westphalia significantly constrained their sovereignty, imposing restrictions that remained in force until the Empire's abolishment in 1806. According to these restrictions, in exercising their law-, war-, and peace-making powers, the princedoms were prohibited from infringing various transnational legal norms, including certain unwritten norms considered universal natural law.<sup>209</sup> Two imperial tribunals, the Imperial Chamber Court and the Aulic Council, were further authorized to void laws, domestic court

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<sup>203</sup> Gill, "Chivalry," 36-37.

<sup>204</sup> Mudrik, *Military Justice*, 20-21.

<sup>205</sup> See below Section 5(c).

<sup>206</sup> Leo Gross, "The Peace of Westphalia, 1648-1948," *American Journal of International Law* 42 (1948): 27-29.

<sup>207</sup> Gross, "Westphalia," 29.

<sup>208</sup> Andrew Phillips, *War, Religion and Empire: The Transformation of International Orders* (2010), 136-37.

<sup>209</sup> Beaulac, "Westphalian Model," 195-204.

decisions, treaties signed by princedoms, and other government actions of the princedoms if they violated these transnational norms.<sup>210</sup> As the princedoms gained sovereign powers, the Empire's "structure transformed... into a relationship of international law",<sup>211</sup> which gradually transformed these tribunals into "international court[s]".<sup>212</sup> Thus, contrary to the "Westphalian Myth", even after 1648, and until the nineteenth century, both transnational organs and international law remained above these emerging States.

As exposed in recent decades, the Westphalian Myth was created in the nineteenth century and there is considerable convergence between central catalysts of it and some catalysts of modern positivism. First, a jurisprudential turn to the social sciences contributed to the rise of both. Gradually, the claim of secular natural law jurisprudence to rationalize jurisprudential thinking by drawing analogies from the natural sciences and logical reasoning lost its appeal. Instead, much of jurisprudential thinking turned to attempting to draw analogies from the social sciences. Positivism was amongst the most prominent of these attempts.<sup>213</sup> Also as part of this transition, many turned to "what amounted to some kind of historical sociology", which gave rise to the Westphalian Myth.<sup>214</sup> Second, both legal positivism and the Westphalian Myth did not merely reflect the culmination of modern States' rise; these views were considerably advanced by those attempting to strengthen State sovereignty.<sup>215</sup> Positivists, accordingly, were among those that strongly contributed to the propagation of the Westphalian Myth. While positivist conceptualizations of States and of international law were "doctrinally consolidated [only] in the final decades of the nineteenth century",<sup>216</sup> soon thereafter, with the aid of the Westphalian Myth, such conceptualizations were "projected back as the screen memory over an otherwise forgotten past."<sup>217</sup> The Westphalian Myth was especially advanced by positivist opponents of international law. Some such opponents eventually broke off from international jurists to create a

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<sup>210</sup> Francisco Forrest Martin, The Constitution as Treaty (2007), 27-29.

<sup>211</sup> F. J. Berber, "The International Aspects of the Holy Roman Empire after the Treaty of Westphalia," Indian Yearbook of International Law 13 (1964): 175.

<sup>212</sup> H.C.L. Merillat, "Book Review," American Journal of International Law 61 (1967): 1083; *Ibid*, 181.

<sup>213</sup> See, Koskeniemi, "Legal Fragmentation(s)", 803-806; Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation (2002), 62.

<sup>214</sup> Peter Stirk, "The Westphalian Model and Sovereign Equality," Review of International Studies 38 (2012): 652.

<sup>215</sup> Benno Teschke, The Myth of 1648 (2003), 2; Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," International Organization 55 (2001): 264-66.

<sup>216</sup> Kennedy, "International Law," 119.

<sup>217</sup> *Ibid*, 100.

new discipline: International Relations.<sup>218</sup> That discipline was premised, originally, on the belief that power and politics, not law, regulate behavior at the international level. It was also premised on the Westphalian Myth, holding that a world order consisting of fully autonomous States is a longstanding social contract.<sup>219</sup>

International law is, sometimes, said to have been born not subsequent to the Westphalian inception of States, but as a result of Hugo Grotius's jurisprudence, written during the Thirty Years' War. This is false. Continuity exists between Grotius's work and earlier jurisprudence.<sup>220</sup> This narrative also has its origin in the nineteenth century, as a person-oriented version of the Westphalian Myth.<sup>221</sup>

*f. England*

The English Kings were among the first rulers to free themselves from papal and imperial rule. Furthermore, already around the twelfth century, England started developing a distinct domestic legal system: the Common Law.<sup>222</sup> But, for many centuries the Common Law was not the only legal system in England, and it vied for jurisdiction and predominance with other systems such as the military, admiralty, and equity systems. Unlike Common Law courts, most competing judicial systems adjudicated cases mainly based on the norms considered universal, natural law across Europe.<sup>223</sup>

Because prohibitions in military and civilian European legal systems shared their jurisprudential origin, it was common to find two different crimes--transnational (adjudicated in military courts, English military courts included) versus domestic (adjudicated in civilian courts, such as the Common Law courts)--bearing the same name.<sup>224</sup> For example, as demonstrated below, two different crimes of treason existed.

Today treason is considered the archetypical domestic crime, which should never fall under the jurisdiction of ICL.<sup>225</sup> In the late Middle-Ages and later, however, because Christian Kings were believed to be divinely-anointed, "rebellion [was] a breach of the faith that held Christian

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<sup>218</sup> Anne Orford, "Review Essay: Positivism and the Power of International Law," Melbourne University Law Review 24 (2000): 505-506.

<sup>219</sup> Ibid; Teschke, The Myth of 1648, 2.

<sup>220</sup> Lesaffer, "Unrequited Love," 36-37

<sup>221</sup> Nicholas Onuf, "'Tainted by Contingency': Retelling the Story of International Law," in Reframing the International, ed. Richard Falk and R.B.J. Walker (2013), 27.

<sup>222</sup> Beaulac, "Westphalian Model," 192-94.

<sup>223</sup> Hearnshaw, "Legal Literature," 7:362-36.

<sup>224</sup> E.g., In re Piracy Jure Gentium, 589-91.

<sup>225</sup> George Fletcher, "Parochial Versus Universal Criminal Law," J of International Criminal Justice 3 (2005): 22-26.

society together [and rebels were, accordingly, viewed as having] placed themselves beyond the pale of peaceful Christian society and were now no more than brigands and thieves.”<sup>226</sup> Put differently, treason was an international crime and traitors/rebels international outlaws.

Although Kings benefited from this transnational doctrine, they preferred to vest much of the authority to adjudicate treason against them in their civilian (domestic) courts. Consequently, for centuries, the military and civilian systems had parallel authority to try combat-related treason.<sup>227</sup> Gradually, the (transnational) military and (domestic) civilian crimes of treason became distinct, as illustrated by the case of Perkin Warbeck (1499). Warbeck, a Fleming, invaded England, laying claim to the English throne by pretending to be the son of Edward IV. After failing, he was prosecuted for treason in a Common Law court, which ruled that it lacked jurisdiction because enemy aliens acting in the course of war were not bound to uphold the King’s peace. Warbeck was then retried by a military tribunal, which convicted him of treason (by many accounts) and sentenced him to death. The military tribunal’s jurisdiction and ruling was, most likely, based on a contemporaneous law of war that deemed usurpation to be a tyrannical, traitorous act.<sup>228</sup> Other medieval cases reveal that, unlike domestic courts, military tribunals prosecuted even foreigners for certain wartime acts of betrayal of allegiance (treason) owed to their (foreign) King.<sup>229</sup> Thus, the jurisprudence of military justice diverged considerably from domestic jurisprudence.

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<sup>226</sup> Russell, The Just War, 142.

<sup>227</sup> Pollock, Maitland, History of English Law, 2:350-55; S.H. Cuttler, The Law of Treason and Treason Trials in Later Medieval France (1981), 4-10, 62.

<sup>228</sup> Edward Coke, Selected Writings, ed. Steve Sheppard (2003), 1:612 (written in 1608). Contemporaneous reports on Warbeck’s military trial are brief and contradictory: some state he was punished for “treason,” some that he was punished “as an enemy”. See, Perkin Warbeck’s Case, Port 125 (1499); Perkin Warbeck’s Case, I Caryll 383 (1499); Perkin Warbeck’s Case, I Dyer 206 (1499). See above note 153 for a likely explanation for this confusion. See also Conrad Van-Dijk, John Gower and the Limits of the Law (2013), 74-78 (discussing the usurpation doctrine).

<sup>229</sup> See Keen, Laws, 45-48.



### Perkin Warbeck<sup>230</sup>



According to eighteenth-century historian John Barrow, when Warbeck was (prior to his capture) under Archduke Philip's protection, the English King sent ambassadors to the Archduke "and demanded that Perkin might be delivered into their hands as a pirate, or common enemy to mankind, who ought not be protected by the law of nations."<sup>231</sup>

The military and other legal systems continued to exist in England long after the Middle-Ages. Only in the seventeenth century did Common Law jurists effectively try to abolish the competing systems, with partial success.<sup>232</sup> Many systems, including the military system, however, survived. They remained relatively autonomous well into the nineteenth century, when, owing to a cultural trend that led to the eventual merger of Common Law and Equity, Common Law doctrines began to enjoy broad application in the courts of the other systems.<sup>233</sup>

Reliance on the unwritten laws of war for trying both compatriot and captured enemy soldiers continued even later, and regarding the latter it remained the main legal basis for prosecutions of war crimes even after WWII. These unlegislated norms and the military tribunals that apply them still regulate some war crimes cases in England regarding both kinds of soldiers,<sup>234</sup> and, even today, these military tribunals stand "wholly outside the [English] civilian

<sup>230</sup> Perkin Warbeck in the pillory (1884), Henry Marriott Paget [Public-domain], via Wikimedia-Commons.

<sup>231</sup> J. Barrow, *A New and Impartial History of England* (1763), 5:23 (emphasis added).

<sup>232</sup> E.g., Star Chamber Abolition Act of 1641, 16 Charles I, c. 10 (Eng.).

<sup>233</sup> Eugene Fidell, "The Culture of Change in Military Law," in *Evolving Military Justice* (2002), 165-166.

<sup>234</sup> E. Gunter, *Outlines of Military Law and Customs of War* (1897), 15-18; Jeffrey Blackett et al., *Manual of the Law of Armed-Conflict* (2004), 430. But see, U.K. MOD, "Manual of the LOAC--Amendment No. 7" (2013), art. 49 (discussing a planned reform).

court system, in the same way that the regular courts-martial... stand outside it; and the law they appl[y] [is] not English law but... the customary international laws of war, as a sui generis applicable law.”<sup>235</sup>

In sum, as both the cases of England and the Holy Roman Empire’s princedoms demonstrate, it is a mistake to assume that States predated or created international law. State sovereignty is the result of a protracted process that has peaked only in recent times. Additionally, the military and civilian justice systems have distinct institutional and normative histories, and throughout the centuries, reliance on transnational jurisprudence persisted more strongly in the military justice forums. For these reasons, pre-WWII war crime prosecution cases should rightfully be regarded as precedents of ICL.

## **5. The Outlawry Basis of ICL**

### *a. Medieval ICL*

Medieval jus ad bellum divided armed-conflicts into several categories that mirrored those of contemporaneous criminal law. The two primary categories were feud-like wars and wars intended to punish enemies deemed international outlaws by jus ad bellum.<sup>236</sup>

The law applicable in wars waged against outlawed enemies conceptually mimicked the municipal process of punishing outlaws: the unjust nature of the enemies’ actions was predetermined, and because the wrong was against universal peace (the commonwealth of Christendom/mankind/humanity) all were duty-bound to join in the war and punish the international outlaws. “Total War” could be waged against outlawed enemies (no jus in bello restrictions applied). Therefore, all captured enemy combatants--not only war criminals--could be executed.<sup>237</sup>

Influenced by Roman-Christian jurisprudence, medieval jus ad bellum considered the following belligerents to be outlawed enemies: pirates, brigands, rebels, traitors, tyrants, barbarians/savages, infidels, and heretics.<sup>238</sup> Otherwise-legitimate belligerents (Christian rulers) fighting without just cause were also outlawed enemies.<sup>239</sup> Based on the last category, contemporary jurists presume that each side generally declared the other to lack just cause, so that all medieval wars were fought without jus in bello restrictions and therefore cases in which

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<sup>235</sup> Roger O’Keefe, “The Doctrine of Incorporation Revisited,” British Yearbook of International Law 79 (2008): 33.

<sup>236</sup> Whetham, Just Wars, 40-41, 75-83.

<sup>237</sup> Russell, The Just War, 2, 69, 76, 84, 305; Whetham, Just Wars, 109, 235.

<sup>238</sup> Russell, The Just War, 7-19; Edelstein, “Hostis,” 62-63.

<sup>239</sup> Whetham, Just Wars, 80-83, 183, 196, 246.

individuals were held personally responsible for violating jus in bello (i.e., war crime prosecutions) were rare.<sup>240</sup> Many historians, however, consider this an exaggeration, because “war to the death [between Christian rulers] was uncommon.”<sup>241</sup>

Wars between Christian rulers were mostly limited conflicts, equivalent to large-scale blood feuds. Similarly to feuds, (a) opponents were considered the enemies of only a given community; (b) the identity of the wrongdoer was to be determined by the war; and (c) in bello conduct was subject to legal restrictions (including a duty to grant POW status to captured enemy knights).<sup>242</sup> As demonstrated below, otherwise-legitimate combatants who violated jus in bello in feud-like wars were individually considered international outlaws.

The shaping of medieval ICL was influenced by the aforementioned Roman-Christian doctrine which permitted harming even enemies and criminals only for the enforcement of justice, and granted rulers the primary justice enforcement authority. Based on this doctrine, acts generally considered outlawry-deeming, such as harming lives or property, were considered legal when committed by rulers or combatants acting under their authority during feud-like wars.<sup>243</sup> But because the wartime legality of such acts depended on royal authorization, committing them without such license remained outlawry-deeming; as Jamieson explains:<sup>244</sup>

serious persistent crimes could result in an individual being branded as an outlaw. Offences of murder... arson and theft were regarded as heinous crimes which would put a person beyond the laws of society [However,] soldiers were given, in effect, a license to commit them... provided they fought with the sanctions of an appropriate authority. Problems arose when that authority was absent and soldiers were seen to be fighting illegitimately for their own interests. In such a situation... [t]hey could find themselves treated as outlaws, against whom lethal force could be legitimately used by those in authority.

War criminals were often referred to as “robbers,” “murderers,” “arsonists” etcetera.<sup>245</sup> These were not references to domestic crimes, as evident by the fact that the combatants who committed them were “regarded as criminals... who were beyond the normal laws of God and men” (i.e., as international outlaws for violating international law).<sup>246</sup> These references were, most likely, a way to convey these combatants’ international outlaw status, alternate to referring

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<sup>240</sup> E.g., Richard P. DiMeglio et al., Law of Armed-Conflict Deskbook (2012), 13.

<sup>241</sup> Keen, Laws, 22-23, 105, 241.

<sup>242</sup> Whetham, Just Wars, 42, 69-86, 112.

<sup>243</sup> Ibid, 42-45, 88, 259.

<sup>244</sup> Neil Jamieson, “‘Sons of Iniquity’: The Problem of Unlawfulness and Criminality amongst Professional Soldiers in the Middle-Ages,” Outlaws in Medieval and Early Modern England, ed. J.C. Appleby and P. Dalton (2009), 91.

<sup>245</sup> See, Keen, Laws, 96-100; Russell, The Just War, 160.

<sup>246</sup> Jamieson, “‘Sons of Iniquity’,” 100.

to them as “outlaws”. After all, the prohibitions against harming property and lives (felonies such as arson, robbery, murder) were outlawry-deeming natural laws to which the permission given to combatants to take lives and property by royal authorization was a legal exception.

The view of regular combatants who violated the laws of war as international outlaws is also evident in the practice of equating such war criminals with pirates and brigands. Sohmer-Tai uncovered hundreds of cases that were adjudicated in various courts around the Mediterranean between approximately 1200 and 1410, in which soldiers of conventional navy forces were accused “of robbing... in modo piratico (in a piratical fashion or manner) despite conditions of... pre-existing treaty, or alliance.”<sup>247</sup> Similarly, Rowe reported that in 1431, during a war in France, a captured (otherwise-legitimate) enemy combatant was executed for violating the laws of war, and his captor was paid “as though he had caught a brigand”.<sup>248</sup>

The prohibition against deceitful taking of life/property (originating from both Germanic and Roman-Christian law) was also adapted to feud-like wars, serving as the basis for various in bello laws. The main wartime acts criminalized under this prohibition were breaches of obligations toward an enemy, including violations of truce/peace agreements, terms of surrender, and POW parole conditions.<sup>249</sup>

Although medieval sources are secondary and brief, they nonetheless contain reports explicitly referring to perpetrators of such acts as outlaws. A twelfth century chronicle of a case from 1098 describes how enemy knights captured as POWs by King Rufus of England were granted, upon their request, parole every evening. In response to his courtiers’ concerns that the prisoners might escape, Rufus answered: “Far be it from me to think that a brave knight will forfeit his word! If he did so, he would become a contemptible outlaw all his life.”<sup>250</sup>

Cases related to the assassination, in 1419, of John the Fearless, Duke of Burgundy, also prove that perfidious violations of the laws of war were outlawry-deeming. During Charles VI’s reign in France, a baron war erupted between his son (the Dauphin) and John the Fearless. The Dauphin requested a meeting with John to negotiate a truce, but at the meeting he and his men

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<sup>247</sup> Emily Sohmer-Tai, “Marking Water: Piracy and Property in the Pre-Modern West” (paper presented at Seascapes, Littoral Cultures, and Trans-Oceanic Exchanges, Feb. 12-15, 2003).

<sup>248</sup> B.J.H. Rowe, “John Duke of Bedford and the Norman ‘Brigands’,” English History Review 47 (1932): 596 (noting that war crime prosecution was rare during that war).

<sup>249</sup> Whetham, Just Wars, 4, 17-18, 45, 66; Keen, Laws, 51-59, 96-100, 130-31, 162-173.

<sup>250</sup> Ordericus Vitalis, The Ecclesiastical History of England, trans. T. Forester (1853), 3:233 (c. 1075-1143).

assassinated John, violating safe-conduct assurances he had given John.<sup>251</sup> This assassination (an act considered a war crime to this day<sup>252</sup>) was explicitly described at the time as an act “against... the law of nations” (“contra... jus gentium”),<sup>253</sup> and its perpetrators were declared “disturbers of the peace” (“les infracteurs de la paix”) and “enemies of the peace” (“des ennemis de la paix”).<sup>254</sup> Charles even disowned his son and signed a treaty with Henry V, King of England (a supporter of the Duke of Burgundy), whereby the French throne would pass to Henry after his death.<sup>255</sup> Although the Dauphin escaped further punishment, many of his accessories were sentenced to death, some by a French military tribunal and others by King Henry.<sup>256</sup> Because the crime was committed before Henry’s active involvement in the war and because Henry punished perpetrators when Charles ruled France, these cases can be seen as early instances of reliance on universal jurisdiction in prosecuting war crimes.<sup>257</sup>

**The Assassination of John the Fearless<sup>258</sup>**



Similarly to how a Latin chronicle referred to the act as “contra fidem & jus gentium” (“against the faith and the law of nations”), an English chronicler called it a murder in violation of a promise and “against both God’s lawes and man’s lawes.”<sup>259</sup>

<sup>251</sup> Tracy Adams, *The Life and Afterlife of Isabeau of Bavaria* (2010), 34-36; Rachel Gibbons, “Isabeau of Bavaria Queen of France: The Creation of a Historical Villainess,” *Transactions of the Royal History Society* 6 (1996): 71.

<sup>252</sup> Jean-Marie Henckaerts et al., *Customary International Humanitarian Law*, 2 vols. (2005), 1:219-220, 1:228.

<sup>253</sup> Titus Livius, *Vita Henrici Quinti, Regis Angliae*, ed. Thomas Hearne 1716), 78 (written in the 15th century).

<sup>254</sup> Urbain Plancher, *Histoire générale et particulière de Bourgogne*, 3 vols. (1748), 3:529-530.

<sup>255</sup> Gibbons, “Isabeau,” 70-71.

<sup>256</sup> Keen, *Laws*, 48; Anonymous, *First English Life of Henry V*, ed. C.L. Kinsford (1911) 169-72 (written in 1513).

<sup>257</sup> See G.I.A.D. Draper, “The Modern Pattern of War Criminality,” *Israel Yearbook on Human Rights* 6 (1976): 12.

<sup>258</sup> Louis de-Gruuthuse (1470-80) [Public-domain], via Wikimedia-Commons,

Occasionally, perfidious violations of the laws of war were referred to as treason.<sup>260</sup> That is because the international crime of treason was much broader than its contemporary domestic successor: in addition to betrayal of one's sovereign, violations of many other obligations and acts of deceitful taking of life or property were also considered treason. All these forms of treason were regarded as outlawry-deeming violations of universal, natural law.<sup>261</sup> Hence, such treason references were probably intended to convey the perpetrators' outlaw status. Some of these acts are still described as "treacherous" in modern ICL.<sup>262</sup>

Attempts were also made to incorporate non-combatant protections into medieval jus in bello. Although not all non-combatants were legally protected, pillage, rape, and harming of women, children, the elderly, priests, churches, and members of several professions were considered violations of universal, natural law.<sup>263</sup> We find reliance on the international outlawry doctrine to this end in the "Truce of God" decreed by Holy Roman Emperor, Henry IV, in 1085. In addition to placing those fighting during certain religious dates under a ban as "violators of the holy peace" (deeming them outlaws), Henry decreed that: "Merchants... rustics... other similar occupations... [w]omen... and all those ordained to sacred orders, shall enjoy continual peace" (namely, harming them was always outlawry-deeming).<sup>264</sup>

Similarly, Canon 27 of the Third Lateran Council (1179), excommunicated (outlawed) members of six mercenary forces because they: "practice[d] such cruelty upon Christians that they respect[ed] neither churches nor monasteries, and spare[d] neither widows, orphans, old or young nor any age or sex."<sup>265</sup> These mercenaries were internationally outlawed, as the Canon called "on all the faithful [to] oppose [them] with all their might and by arms protect the Christian people against them."<sup>266</sup>

Some claim that these medieval non-combatant protections were not enforced because knights, who generally practiced and enforced the laws of war, cared only about themselves.<sup>267</sup> This is an exaggeration.<sup>268</sup> A knight could be stripped of his honors (chivalry's unique

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<sup>259</sup> Anonymous, First English Life, 151.

<sup>260</sup> Keen, Laws, 51-59, 130-31, 162-173.

<sup>261</sup> Cuttler, Law of Treason, 4-10.

<sup>262</sup> Art. 8(2)(b)(xi), Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9.

<sup>263</sup> Parker, Empire, War and Faith, 146, 151-152; Keen, Laws, 193.

<sup>264</sup> Truce of God Decree (1085), English translation available at, <http://avalon.law.yale.edu/medieval/dechenry.asp>.

<sup>265</sup> English translation available at, <http://www.papalencyclicals.net/Councils/ecum11.htm>.

<sup>266</sup> Ibid (emphasis added).

<sup>267</sup> Russell, The Just War, 161, 308.

<sup>268</sup> Michael Prestwich, Armies and Warfare in the Middle-Ages: The English Experience (1999), 241.

expression of outlawry) for the “sacking of churches... rape [or] arson”, because these were “breaches of the knightly faith”.<sup>269</sup> As the cases of Conradin and von-Hagenbach demonstrate, even some high-ranking knights were actually punished by their adversaries for violating non-combatant protections. Some lower-ranking knights are known to have been punished even by their own side for violating these prohibitions.<sup>270</sup> Furthermore, certain non-combatant protections were more adhered to than others; particularly, the law protecting priests<sup>271</sup> and women.<sup>272</sup> Non-combatant legal protections were even more strictly enforced against non-knightly soldiers.<sup>273</sup>

The “tyranny” doctrine was also used to protect civilians. In Roman law, sovereigns who violated their duty to act for the “public good” were deemed tyrants. Because all Christians were regarded as belonging to the Roman public, in the late Middle-Ages and centuries thereafter a ruler could be deemed a tyrant for acting against the commonwealth of his subjects or of foreign Christians.<sup>274</sup> Four main subcategories of tyrants existed: (a) rulers who committed atrocities against their subjects; (b) rulers who conducted aggressive wars, in which extensive atrocities were committed against Christians; (c) rulers who systematically failed to punish their subjects who committed atrocities against compatriot or foreign Christians; and (d) individuals who usurped a throne (because God determines such entitlements).<sup>275</sup>

The tyranny doctrine was originally an ad bellum law, allowing total war to be waged against all those on the tyrant’s side.<sup>276</sup> But, despite the original permission to kill not only the tyrant, this doctrine is strongly related to ICL history. Since medieval thought shifted with great ease from individual culpability to collective responsibility and vice versa, the tyranny doctrine regulated not only interactions between collective entities, but was also a penal norm that treated the relevant individual ruler and his close associates as international outlaws. This is demonstrated by the prosecution of von-Hagenbach for tyranny and of King Conradin, along with a few of his men, for usurpation (a subcategory of tyranny). Gradually, the doctrine’s ICL

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<sup>269</sup> Stacey, “The Age of Chivalry,” 37.

<sup>270</sup> Ibid, 30; Prestwich, Armies and Warfare, 242.

<sup>271</sup> Keen, Laws, 191.

<sup>272</sup> John Gillingham, “Women, Children and the Profits of War,” in Gender and Historiography, ed. J. Nelson et. al. (2012), 61-74.

<sup>273</sup> Keen, Laws, 192.

<sup>274</sup> David Trim, “Intervention in European History c. 1520-1850,” in Just and Unjust Military Intervention, ed. Stefano Recchia and Jennifer Welsh (2013), 26.

<sup>275</sup> Ibid; Van-Dijk, John Gower, 74-78; Brincat, “Tyrants--Part I,” 214; Voltaire, Philosophical Dictionary, 557.

<sup>276</sup> See above note 238 and accompanying text; John Parker, A History of Popery (1838), 125.



element became increasingly pronounced: the masses were no longer executed and only culpable high-ranking individuals, including rulers, were prosecuted for tyranny.<sup>277</sup>

Since tyranny authorized deposing the ruler, when a King was accused of tyranny, the accusation was usually made by those wishing to depose him.<sup>278</sup> Tyranny was also commonly used by rulers to justify intervention in foreign conflicts.<sup>279</sup> These two politically motivated applications are neither surprising (as tyranny was an ad bellum law), nor should they lead us to disregard the tyranny doctrine (because even ad bellum laws often have normative force).<sup>280</sup>

Especially noteworthy is the application of tyranny in the context of baron wars. Kings held that only rulers not subservient to other rulers were authorized to wage war, but local lords claimed to have autonomous authority to make war. During much of late-medieval times, a legal compromise was reached that permitted baron wars, but with uniquely restrictive jus in bello. Notably, causing extensive harm to non-combatants was a war crime in such wars.<sup>281</sup> Local lords who violated that jus in bello were considered tyrants (and murderers, outlaws, etc.).

The case of Thomas of Marle (1111-14), which occurred during King Louis VI's reign in France, demonstrates this issue. The chronicler Abbot Suger of Saint-Denis (1081-1151) accused Thomas of "ferocious tyranny" for unjustly warring with neighboring lords.<sup>282</sup> After King Louis intervened, Thomas promised to cease fighting but reneged on his promise and committed acts of massacre, rapine, and arson, "not [even] spar[ing] the clergy out of fear of excommunication nor the people out of any humanity."<sup>283</sup> In response, Church leaders condemned him as an "enem[y] of Christ's true bride," and "struck at Thomas's tyranny [by] strip[ping] him of all honours as an infamous criminal, enemy to the name of Christian."<sup>284</sup> The King then<sup>285</sup>

gathered an army against Thomas [and] turned towards... castle of Crécy ... seized [it and] confounded the criminals; piously massacred the impious and mercilessly beheaded those who had showed no mercy... the king then set out against [the] wicked castle [of Novions] in pardoning the innocent and severely punishing the guilty... Thirsting for justice, he condemned all the detestable murderers he found to be hanged [and] abolished in perpetuity the lordship of that infamous Thomas and his heirs over that city.

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<sup>277</sup> See the tyranny cases discussed below section 5(b).

<sup>278</sup> E.g., Helene Wieruszowski, Politics and Culture in Medieval Spain and Italy (1971), 62-6;.

<sup>279</sup> Trim, "Intervention," 26.

<sup>280</sup> See above note 73 and accompanying text.

<sup>281</sup> Whetham, Just Wars, 56-63, 81-88.

<sup>282</sup> Abbot Suger, Life of King Louis the Fat, trans. J. Dunbabin (1999), Ch. VII,.

<sup>283</sup> Ibid., Ch. XXIV (emphasis added).

<sup>284</sup> Ibid (emphasis added).

<sup>285</sup> Ibid.

### The Execution of Thomas of Marle<sup>286</sup>



The transition from medieval to Early Modern Times is marked by royal triumph in the debate concerning the illegality of baron wars. Participants in such wars were henceforth considered rebels/traitors/brigands.<sup>287</sup> At about the same time, various prohibitions that first applied only to baron wars became applicable to wars between sovereigns.<sup>288</sup>

#### *b. Early Modern Times (Approximately 1500-1799)*

When contemporary jurists outline ICL history, cases from Early Modern Times of penal enforcement of the laws of war are hardly ever acknowledged (unlike medieval and nineteenth-century cases, of which, at least a few are mentioned and only then dismissed as unrelated to contemporary ICL).<sup>289</sup> But historians uncovered many such cases from Early Modern Times.<sup>290</sup> The discrepancy is caused by two misconceptions.

First, many sixteenth and seventeenth century wars were either conflicts between Catholics and Protestants (who considered each other heretics) or rebellions, and jus ad bellum still permitted waging total war against heretics and rebels. Therefore, jurists assume that wartime conduct was not legally regulated. The most horrific of these conflicts was the Thirty Years' War (1618-1648). Its trauma is credited for motivating Grotius (and subsequent jurists) to develop doctrines mandating belligerents to abide by jus in bello regardless of their views about their

<sup>286</sup> (14th century), [Public-domain], via Wikimedia-Commons,

<sup>287</sup> Parker, Empire, War and Faith, 147.

<sup>288</sup> See, e.g., *ibid*, 146-47, 151-52.

<sup>289</sup> See above Section 1.

<sup>290</sup> Parker, Empire, War and Faith, 143-68.

opponent's cause. Thus, jus in bello is considered to be predominantly a post-1648 development.<sup>291</sup>

Second, in the second half of Early Modern Times, most conflicts were interstate wars in which a total war policy was generally prohibited. Still, jurists do not consider war crime prosecution cases from these wars as precedents of ICL, but purely domestic measures--each taken by the State whose military tribunal adjudicated it--because there is "difficulty in grounding an international criminal law in a decentralized legal order."<sup>292</sup>

This account is incorrect. Indeed, many sixteenth- and seventeenth-century conflicts were religious wars and rebellions in which, during the initial period of conflict, at least one side adopted a total war approach, usually reciprocated by the adversary. Counter-intuitively, however, the adversary's total war reprisal often did not precipitate the war into unrestrained bloodshed. The harm suffered by the first side from such reprisal often caused it to renounce its total war approach, and both sides would agree to conduct themselves as-if they considered the other side a legitimate belligerent. This meant that the sides obligated themselves to adhere to jus in bello, to punish violators of these laws, and to accord POW status to captured enemy soldiers who had not committed such violations. Although many wartime atrocities went unpunished during these times, there was far more ICL enforcement than the no-enforcement jurists assume.<sup>293</sup>

Depiction of late-seventeenth and eighteenth century cases of war crime prosecution as merely domestic measures is also inaccurate. First, as explained, the conclusion that a legal system did not exist only because it relied on a decentralized enforcement mechanism is based on an overly-narrow and historically incomplete conception of legal systems. Second, the various European military judicial forums continued to regard themselves as part of a single transnational network, obligated to uphold the international laws of war.<sup>294</sup> Third, during this period pirates were also punished mainly by the military tribunals of European forces, and still, jurists acknowledge that piracy was already an international crime at the time because of the application of a similar transnational doctrine in all piracy cases. The same reasoning should apply also to war crime prosecutions.

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<sup>291</sup> DiMeglio, Law of Armed-Conflict, 12-13; Frits Kalshoven and Liesbeth Zegveld, Constraints on the Waging of War (2001), 13-14.

<sup>292</sup> Cryer, Prosecuting International Crimes, 25.

<sup>293</sup> Parker, Empire, War and Faith, 150-68.

<sup>294</sup> See above notes 188-189 and accompanying text.

Based on the aforementioned misconceptions, the narrative of the history of the laws of war prevalent among contemporary jurists is that: (a) before the second half of Early Modern Times there was no effective international law regulating wartime conduct and (b) although such a body of law did subsequently exist, it addressed only States and not individuals until the end of WWII.<sup>295</sup> This account is simply the application of the Westphalian Myth to the laws of war. Historians, by contrast, have shown that the laws of war existed throughout the period, and although they were occasionally violated, “legal sanctions [often] ensued” in the form of “trial and punishment by special military tribunals” (scilicet, ICL also existed).<sup>296</sup> Thus, current ICL proponents unknowingly support an inaccurate narrative, originally commonly propagated to delegitimize international law, although a more accurate account serves their cause better.

Jurists’ historical account of public international law in general also divides Early Modern Times in half, although, the declared guiding rationale here usually has to do with jurisprudential shifts. First, the transition from the Middle-Ages to Early Modern Times is said to be marked by the triumph of the “Divine Right of Kings” jurisprudence, which proclaimed Kings to be superior princes, unsubordinated to anyone, who alone have authority to make war and punish criminals. A second transition allegedly began with Grotius’s jurisprudence. That transition gradually changed the presumed foundation of the duty to abide by international law, from a belief in its divineness to a secular belief that natural law can be deduced through logical reasoning. This secular perspective induced the premise that certain natural laws, including core human rights, existed even in a “state of nature,” before the formation of a social-contract-based society. Because belligerents are in a state of nature in relation to one another, they must abide by these natural laws.<sup>297</sup>

This is, however, an oversimplified account. First, early social-contract jurisprudence existed, and was influential, already in the sixteenth century,<sup>298</sup> and divine-right jurisprudence still had support in the eighteenth- and early nineteenth-century.<sup>299</sup> Second, each of these two schools included scholars both dismissive and supportive of international law.<sup>300</sup> Third, many

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<sup>295</sup> E.g., DiMeglio, Law of Armed-Conflict, 11-16.

<sup>296</sup> Parker, Empire, War and Faith, 159, 168.

<sup>297</sup> E.g., Ernest K. Bankas, The State Immunity Controversy in International Law (2005), 1-9.

<sup>298</sup> Raymond Kubben, Regeneration and Hegemony (2011), 233.

<sup>299</sup> Jackson Spielvogel, Western Civilization: A Brief History (2013), 397; Grewe, Epochs of International Law, 432.

<sup>300</sup> Randall Lesaffer, “The Grotian Tradition Revisited: Change and Continuity in the History of International Law,” British Yearbook of International Law, 73 (2002): 108-109, 137; Malcolm N. Shaw, International Law (2008), 21.

more schools existed throughout Early Modern Times, a plurality resulting from the Reformation, which shattered earlier jurisprudential consensus.<sup>301</sup>

The lack of consensus further caused jurisprudential writings to lose much of their authority. Although they still exercised some influence (divine-right jurisprudence aided Kings to triumph in the struggle over sovereign power and social-contract jurisprudence contributed to international law's secularization), customary law and practices were more important legal sources. As a result, actual international law exhibited greater continuity than is conveyed by early-modern jurisprudential works.<sup>302</sup> Accordingly, although armies, wars, and jurisprudence experienced considerable changes during these centuries, the laws of war and their penal enforcement "displayed a remarkable continuity [due to, among other reasons] the weight [of] practice and precedent".<sup>303</sup> Therefore, the current tendency in jurists' historical accounts to divide Early Modern Times is inaccurate and is probably a lingering effect of the Westphalian Myth. The remainder of this part examines cases from various early-modern wars, to demonstrate that despite considerable jurisprudential and societal changes, ICL continued to be enforced and its doctrinal reliance on the international outlawry doctrine persisted.

1) *The French Wars of Religion (1562-1598)*

In addition to the period's religious wars, jurists also consider the "end of chivalry" as a cause for discontinuity between medieval and early-modern laws of war, because the community to which the laws of war applied changed to mercenaries that presumably disregard these laws.<sup>304</sup> The French Wars of Religion were civil wars between Catholics and Protestants in which all sides relied on mercenaries. Therefore, had the Reformation or the end of chivalry caused a discontinuity in the laws of war, conduct during these wars would have exhibited that rupture.<sup>305</sup> This is not the case.

Penal enforcement of jus in bello during these religious civil wars is illustrated in a case described in the autobiography of Marshal Blaise de-Monluc, who served in the French military from 1521 to 1574. After a victory near a certain town, two commissioners (military judges) were appointed, but additional commissioners soon had to be assigned because the first two

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<sup>301</sup> Lesaffer, "Unrequited Love," 36-37

<sup>302</sup> Ibid.

<sup>303</sup> Parker, *Empire, War and Faith*, 167-168.

<sup>304</sup> Gill, "Chivalry," 36.

<sup>305</sup> Cathal J. Nolan, *The Age of Wars of Religion, 1000-1650* (2006), 1:316.

“execute[d] Justice upon the Catholics only”.<sup>306</sup> Meanwhile, Monluc arrived in town and after failing to convince the commissioners to punish two prisoners, despite strong evidence that they committed infinite “Rapines and Violations,” he directly ordered these prisoners’ hanging.<sup>307</sup> For such actions, Monluc was described by some as an unbiased commander who “hung disturbers of the peace from either side.”<sup>308</sup>

The transition from knight-led to mercenary forces also did not result in complete disregard of the laws of war, among other reasons, because it was gradual.<sup>309</sup> French noblemen, accordingly “continued to exhibit chivalric courtesy on the battlefield during both the Wars of Religion and the Thirty Years’ War.”<sup>310</sup> Moreover, describing early-modern mercenaries as lacking commitment to the laws of war is an exaggeration. Mercenaries generally upheld POW-related prohibitions.<sup>311</sup> This signifies an important legal development. Originally only knights were eligible for POW status, and other captured enemy combatants could be executed even without committing a crime. Only in Early Modern Times was eligibility for POW status expanded.<sup>312</sup> Thus, the transformation that armies experienced caused “[t]he knightly practices of warfare... to spread out and bec[o]me... the customs of the ordinary soldier, even if a mercenary and un-mounted”.<sup>313</sup> Even violations of civilian protections were often not motivated by disregard of the laws of war. Because of the rapid increase in the size of armies, belligerents were unable to properly fund and supply their troops. Many atrocities were perpetrated by hungry soldiers who rampaged for survival.<sup>314</sup>

To prevent such atrocities, European rulers attempted to improve military law-enforcement, often adopting new, extensive articles of war.<sup>315</sup> Currently, the Swedish articles of war from 1621, issued during the Thirty Years’ War, are often marked as the turning point in this regard and therefore revered as “the basis of... modern international humanitarian law.”<sup>316</sup> In truth,

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<sup>306</sup> Blaise de-Monluc, Commentaires, trans. Charles Cotton (1674), 230-31 (written in 1592).

<sup>307</sup> Ibid.

<sup>308</sup> Edward Armstrong, French Wars of Religion (1892), 93-94 (emphasis added).

<sup>309</sup> Christopher Coker, The Future of War (2004), 62-63.

<sup>310</sup> Ryan Anders Pederson, Noble Violence and the Survival of Chivalry in France: 1560-1660 (Binghamton University: Phd Thesis, 2007), 365.

<sup>311</sup> Frank Tallett, War and Society in Early-Modern Europe: 1495-1715 (1997), 129.

<sup>312</sup> Parker, Empire, War and Faith, 160

<sup>313</sup> G.I.A.D. Draper, “The Interaction of Christianity and Chivalry in the Historical Development of the Law of War,” International Review of the Red Cross 5 (1965): 21.

<sup>314</sup> Tallett, War and Society, 55-56, 163.

<sup>315</sup> Ibid, 125.

<sup>316</sup> David M. Crowe, War Crimes, Genocide, and Justice: A Global History (2014), 34.

many such attempts and articles have been drafted earlier, including during the French Wars of Religion.<sup>317</sup> Neither 1621 nor 1648 were turning points, because although penal enforcement of the laws of war gradually improved during Early Modern Times, “amelioration was not linear and even”.<sup>318</sup> The current marking of a Thirty Years’ War-related event as the watershed is simply another example of the Westphalian Myth’s lingering effect.

The French Wars of Religion ended with the regal Edict of Nantes, which referenced the international crime of truce/peace breaching, in declaring that whoever resumed fighting would be punished as “disturbers of peace” (“infracteurs de paix”).<sup>319</sup> It further decreed certain “disturbanc[es]” committed during the wars as being too grave for amnesty. These included “rape, burning, murder, theft committed by treachery, ambushade out of the line of regular warfare to gratify private revenge, contrary to the laws of war” (“contre le devoir de la guerre”).<sup>320</sup> War-crime trials were subsequently conducted in accordance with the Edict.<sup>321</sup>

Similar legislation can be found elsewhere. “The Act for the Pacification between England and Scotland of 1640” decreed that those who would resume fighting “ought to be punished as breakers of the peace” and that amnesty “shall not... extend to... theeves, robbers, murtherers, broaken-men [and] outlawers.”<sup>322</sup> Seventeenth-century Scottish jurist, George Mackenzie, explained that “the Pacification only secure[d] against acts of hostility which were done in furor belli [fury of war]”, therefore its amnesty applied to killings “warrantable by the Law of Arms,” but not to “privet murder” (e.g. unauthorized execution of POWs) or “Rap[e] upon a Woman”.<sup>323</sup>

## 2) *The Eighty Years’ War (1568-1648) and the Thirty Years’ War (1618-1648)*

The Eighty Years’ War was a rebellion of the Protestant Dutch against Catholic Spain, culminating in Dutch independence. Its later period blended with the Thirty Years’ War. In the initial stages of the Eighty Years’ War, Spain waged total war against the Dutch, but Dutch reprisals led the Spanish to recant and most of the conflict was conducted as between legitimate belligerents.<sup>324</sup> Spain’s adherence to jus in bello is evident in King Philip II’s appointment, in

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<sup>317</sup> E.g., Raimond de Beccarie de Pavie, Instructions for the Warres, trans. Paule Iue (1589), 246-248.

<sup>318</sup> John Lynn, Giant of the Grand Siecle: The French Army 1610-1715 (1997), 398.

<sup>319</sup> Art. 2, Édît de Nantes (1598). English translation from James Fontaine, Memoirs of a Huguenot Family, trans. Ann Maury (1872), 452.

<sup>320</sup> Ibid, Art. 86.

<sup>321</sup> Diane Claire Margolf, Religion and Royal Justice in Early Modern France (2003), 79.

<sup>322</sup> Available at, <http://www.british-history.ac.uk/statutes-realm/vol5/pp120-128#anchorn15> (emphasis added).

<sup>323</sup> George Mackenzie, The Laws and Customs of Scotland in Matters Criminal (1699), 216.

<sup>324</sup> Parker, Empire, War and Faith, 152-53, 160-64.



1574, of a judicial inquiry into accusations that the Duke of Alba, commander of the Spanish forces, and his soldiers had violated the laws of war by causing disproportionate harm to the civilian population. The Duke was acquitted, but “several of his senior officials were banished.”<sup>325</sup> The fact that the Spanish officers’ punishment took the form of banishment indicates that the legal basis was outlawry-related, because the “banished” were outlaws whose lives had been spared.<sup>326</sup>

Since the Eighty Years’ War was a religious rebellion, however, it is not surprising that when a Dutchman was accused of war crimes by Spain (and thereby deemed an international outlaw), his status as an ad bellum outlawed enemy was also claimed. This was the case with King Philip’s 1580 decree outlawing William of Orange. Philip’s decree accused William of treason, as William had originally served Spain. But William switched sides fourteen years before the decree and therefore this was probably not Spain’s primary reason for the decree. Indeed, the decree also accused William of more recent war-related wrongs, such as “persecuting all the good pastors, preachers, monks, and upright persons [and having] a number massacred.”<sup>327</sup> Philip condemned William: “[F]or his evil doing: as chief disturber of the public peace... outlaw[ed] him forever [and] declare[d] him an enemy of the human race” and “to remove... his tyranny and oppression” promised a reward to anyone who would kill him.<sup>328</sup> William was subsequently assassinated by a Catholic Frenchman.<sup>329</sup>

The following statement by contemporaneous Dutch jurist, Johannes Voet reveals that the Dutch also enforced ICL during that war:<sup>330</sup>

[Soldiers sometimes] deprive [enemy soldiers] who surrendered of their lives in an abominable, spontaneous act against the accepted laws of war. Since today’s wars between civilized peoples do not permit such bestial conduct, and universal Christian charity and the gentleness due to the other oppose it, it was decreed that whoever committed an infamous act of this kind was to be banished from the allied provinces, after having been expelled from [military] service. Indeed, a soldier was [even] executed on July 10, 1638, because he had wounded two enemies, whom he knew well to be captives, to the extent that they both died, not long after, from the injuries. Almost the same punishment is set for those who, after a captive has paid off the ransom due according to the laws of war, release him without the permission of the commander of

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<sup>325</sup> Ibid, 160.

<sup>326</sup> See above note 126 and accompanying text.

<sup>327</sup> English translation at <http://personal.ashland.edu/~jmoser1/philipii.htm>.

<sup>328</sup> Ibid.

<sup>329</sup> William Russell, *The History of Modern Europe*, 3 vols. (1836), 1:483.

<sup>330</sup> Johannes Voet, *De Jure Militari Liber Singularis* (1670), 248-49 (translated for this article by Benedikt Pirker).

the camp. For it may happen, that such captives are... guilty of [a grave] crime, whose punishment with adequate sanctions is of interest to the Republic and is amongst the duties of the commander...

This brief report is extremely telling. First, although most of the passage refers to penal actions taken by the Dutch against their own soldiers, these soldiers' wrong is described as an "act against the accepted laws of war [and] universal Christian charity". This indicates that the Dutch applied a transnational doctrine (i.e. these penal actions should not be regarded as purely domestic measures). Second, as explained, the fact that the punishment was either banishment or death indicates that the wrong was considered outlawry-deeming. Third, there are not many historical records of proceedings against low-ranking soldiers that reveal the doctrinal basis for the punishment they received, because these were usually dispatched summarily. The case mentioned by Voet is, therefore, rare evidence of the application of the outlawry doctrine in such cases, suggesting that treating war criminals as outlaws was not simply political propaganda. Fourth, the last sentence refers to the duty of commanders to punish captured belligerent soldiers, pointing to a practice of punishing also enemy war criminals.

Finally, the case mentioned by Voet was from 1638, during the Thirty Years' War. Jurists currently regard that war as the archetypical total war.<sup>331</sup> But despite the many unpunished atrocities of that war, current historical research shows that portraying it as entirely lawless is an exaggeration.<sup>332</sup> Some enemy and compatriot war criminals were even prosecuted during that war.<sup>333</sup> The period's leading international jurist, Dutchman Hugo Grotius, accordingly noted that it is "the usage of all Nations" to punish, on the basis of unwritten natural law, wartime enemy violators of such law.<sup>334</sup> This statement is further evidence for ICL's existence at the time. It also aids to refute the depiction of Grotius as the father of jus in bello, strengthening the conclusion that that depiction is a lingering effect of the Westphalian Myth.

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<sup>331</sup> Kalshoven, Zegveld, Waging of War, 13.

<sup>332</sup> Geoff Mortimer, Eyewitness Accounts of the Thirty Years War 1618-48 (2002), 1-5, 164-78.

<sup>333</sup> E.g., Eva Berger, Dem Frieden die Zukunft 1648-1998 (1998), 53-56; Voet, De Jure Militari, 248-49.

<sup>334</sup> Grotius, De Jure Belli, 506.

## The Thirty Years' War

### Crime



*Ces courages brutaux dans les hosteleries,  
Du beau nom de butin couvrent leurs voleries ;*

*Ils querellent express ennemis du repos,  
Pour ne payer leur hôte, et prennent jusqu'aux pots.*

*Israël ex. cum Privil. Reg.  
Ainsi du bien d'autrui leur humeur s'accommode  
Quand on les a soulez, et servis à leur mode.* 4

### Punishment



*Israël ex. cum Privil. Reg.  
Ceux qui pour obéir à leur mauvais Genie  
Manquent à leur devoir, font de tyrannie ;*

*Ne se plaignent qu'au mal violent la raison ;  
Et dont les actions pleines de trahison*

*Produisent dans le Camp mil sanglants vacarmes  
Sont ainsi châtiés, et passés par les armes.* 12

In 1633, during the Thirty Years' War, French artist Jacques Callot made a series of etchings (each accompanied by a short poem) entitled The Miseries and Misfortunes of War.<sup>335</sup> Callot attempted to realistically depict the War, describing first the descent of a group of soldiers into a life of (war) crime and, then, surprisingly, their punishment for their crimes (death by firing squad, e.g., in etching twelve). The poem accompanying the first etching depicting war crimes (etching four) describes, “The pretty name of booty their thieveries carry/They start fights intentionally as enemies of tranquility.” Namely, immediately after they had committed their first war crime (theft/pillage), they were deemed “enemies of tranquility” (outlaws). The poem accompanying etching thirteen further refers to them as “enemies of the Heavens who sinned [a] thousand times/Against the secret ordinances and divine laws.”

<sup>335</sup>

[Public domain], via Wikimedia Commons,  
[http://commons.wikimedia.org/wiki/File%3ALes\\_mis%C3%A8res\\_et\\_les\\_malheurs\\_de\\_la\\_guerre\\_-\\_04\\_-\\_La\\_maraude.png](http://commons.wikimedia.org/wiki/File%3ALes_mis%C3%A8res_et_les_malheurs_de_la_guerre_-_04_-_La_maraude.png). Translated by Benedikt Pirker. I intend to further discuss these etchings in a future article.

### 3) The English Civil War (1642-1651)

The English Civil War was a religious war. Still, ICL was enforced during much of it: “[i]ntra-army offenses were governed by processes of trial and punishment set out in articles of war, while treatment of soldiers who fell into enemy hands was regulated by the [unwritten] laws of war [and] an enemy who had offended against them was liable to punishment.”<sup>336</sup>

The trial of King Charles I (1649), following his defeat in this war, is another example of ICL’s pervasive reliance on the international outlawry doctrine. It also illustrates the reasons for the mistaken characterization of many past ICL cases as domestic legal measure. Since this was a non-international conflict, and Charles was tried for treason against his own country, it is clear why the ruling in his matter could be mistaken for a domestic case.

But, the legal ground for trying Charles, advanced by the Parliamentary army, was an authority to prosecute “public officers [for] offence[s]... against the [unwritten] general law of reason or nations.”<sup>337</sup> He was tried not by a Common Law court, but by a special tribunal of commissioners from the army and Parliament,<sup>338</sup> which “adjudge[d], That the said Charles Stuart, as a Tyrant, Traitor, Murderer, and a Public Enemy, shall be put to Death.”<sup>339</sup> At trial, he was also declared a “grand Disturber of the Peace”.<sup>340</sup>

Charles was convicted of international crimes. Even his conviction for treason cannot be construed as the domestic form of treason because “king [Charles,] though imprisoned, was still nominally sovereign.”<sup>341</sup> Two international norms underpinned the accusations that Charles had “traitorously and maliciously levied war against the present Parliament and the people therein represented.”<sup>342</sup> The first was a non-monarchical variation of the transnational predecessor of the current domestic crime of treason.<sup>343</sup> The second was the perfidious international crime of reinitiating fighting in violation of a truce/peace treaty (in Charles’s case, with Parliament).<sup>344</sup>

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<sup>336</sup> Barbara Donagan, “Atrocity, War Crime, and Treason in the English Civil War,” American History Review 99 (1994): 1148.

<sup>337</sup> “Extracts from a Remonstrance of Fairfax and the Council of Officers (Nov. 16, 1648),” reproduced in The Clarke Manuscripts with Supplementary Documents, ed. A.S.P. Woodhouse, (1951), 457-58 (emphasis added).

<sup>338</sup> Samuel Rawson Gardiner, History of the Great Civil War 1642-1649, 4 vols. (1905), 4:322.

<sup>339</sup> Charles I’s Case, State Trials-Political and Social 75, 118 (1649) (Ibid, 112, Charles is accused of being “Public Enemy to the Commonwealth of England,” indicating that domestic and international law were not fully distinct).

<sup>340</sup> Ibid, 111.

<sup>341</sup> Donagan, “Atrocity,” 1148.

<sup>342</sup> “The Sentence of the High Court of Justice against the King,” reproduced in Richard Baker, A Chronicle of the Kings of England (1684), 573.

<sup>343</sup> Gardiner, Great Civil War, 4:252.

<sup>344</sup> Ibid, 4:205, 4:251-53; Donagan, “Atrocity,” 1161.



Charles's murder conviction could not have been based on the common law crime of murder, because breaching the "king's peace" was an element of that domestic crime, and Charles was King during the war.<sup>345</sup> Charles was accused of murder for having engaged in "unnatural, cruel and bloody wars"<sup>346</sup> and convicted on the grounds that the prohibition against murder "is universal... God's law forbids it; Man's law forbids it."<sup>347</sup>

Charles's tyranny conviction was a manifestation of post-medieval reinterpretation of this international crime, reinstating the original Roman understanding of it as allowing the tyrant's subjects to rebel against him, but maintaining tyranny's perception as an international crime (fully consolidated only in late-medieval times).<sup>348</sup> The tribunal's Lord President, accordingly, ruled that Roman law (regarded as international law) was the basis for the tyranny charge against Charles, together with "precedents almost of all nations."<sup>349</sup>

### King Charles' Execution<sup>350</sup>



Thomas Wilson lamented in a sermon, thirty-two years after Charles' execution, that as a result of the trial, "much more then hath the Seven Years' War, not Deposed him only, but Outlawed him, and defined him as an Alien, a Rebel to Law, an Enemy to the State."<sup>351</sup>

<sup>345</sup> Edward Coke, *The Third Part of the Institutions of the Law of England* (1669), 47.

<sup>346</sup> Baker, *Kings of England*, 574.

<sup>347</sup> Charles I's Case, *State Trials*, 114.

<sup>348</sup> Brincat, "Tyrants--Part I," 221-27.

<sup>349</sup> Charles I's Case, *State Trials*, 108.

<sup>350</sup> [public-domain], via Wikimedia-Commons.

#### 4) The Seven Years' War (1756-1763) and Crimes Against Peace

Jus in bello was generally honored in eighteenth-century Western wars, mainly due to: reforms in military justice (which, as discussed, begun earlier), the trauma of the Thirty Years' War (whose horrors were exaggerated in the collective memory already in the seventeenth century), and the formation of properly-funded, professional, standing armies (which gradually replaced the poorly-supplied mercenary forces). "The officer class of these armies largely comprised [of] nobility [that] saw themselves as the heirs of the knightly tradition and [thus] generally conducted warfare... in accordance with the... law of warfare."<sup>352</sup> "There were, of course, instances of crime, rioting, rape, and pillage... but military codes provided harsh sanctions for these abuses [and] they were enforced".<sup>353</sup>

The transnational nature of the period's penal enforcement of the laws of war is apparent in the common practice of contemporaneous belligerents to sign during wars treaties with their enemies, whereby, if soldiers unaccompanied by an officer and less than an agreed-upon number were captured, they could be "refused the treatment due to lawful enemies, and... punished as... banditti"<sup>354</sup> and "freebooters. By such steps [they] prevented a multitude of disorders and enormities which entail ruin on the people".<sup>355</sup> Notice that the above-quoted, eighteenth-century sources equate suspected war criminals to pirates ("freebooters") and brigands ("banditti"), demonstrating reliance on the international outlawry doctrine.

The Seven Years' War (1756-1763) was a large-scale conflict. Because most European powers participated in it and because it was fought across the globe (in Europe, America, Africa, and Southeast Asia), it is sometimes referred to as truly the "first world war."<sup>356</sup> Despite its large scale, jus in bello was considerably enforced. For example, the military regulations of the Prussian King, Fredrick II, considered to be the model handbook of European officers at the time, prescribed corporeal punishment for "all [illegal] acts of violence, on whomsoever they are committed, by soldiers" and as soon "as a complaint of this kind is made against any soldier, he must be confined, examined, tried by a court-martial and sentenced."<sup>357</sup> Many war-crime trials

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<sup>351</sup> Thomas Wilson, A Sermon on the Martyrdom of King Charles I Preached January 30, 1681 (1682), 20-21.

<sup>352</sup> Gill, "Chivalry," 36

<sup>353</sup> Armstrong Starkey, War in the Age of Enlightenment: 1700-1789 (2003), 24.

<sup>354</sup> Georg Friedrich von Martens, Summary of the law of Nations (1795), 297.

<sup>355</sup> Vattel, The Law of Nations, 366.

<sup>356</sup> Gordon Kerr, A Short History of the First World War (2014).

<sup>357</sup> Cited in John Grenier, The First Way of War: American War Making on the Frontier, 1607-1814 (2005), 92.

were conducted during this war.<sup>358</sup> Furthermore, this war is a significant event in ICL's gradual transformation into a global system, because the resources invested into it enabled imposing "European norms of military conduct on North-American warfare."<sup>359</sup>

It is currently often claimed that, unlike jus in bello, jus ad bellum was paid no more than a lip service in the eighteenth century, and rulers were considered to have unrestrained war-making discretion.<sup>360</sup> It is also claimed that during that century the doctrine of absolute sovereign immunity had solidified.<sup>361</sup> But these are oversimplifications that fail to account for opposite eighteenth-century views and actions,<sup>362</sup> and most notably, disregard the wide contemporaneous perception of Prussian King Fredrick II as an aggressor for invading Saxony in 1756.<sup>363</sup> Nineteenth-century historian, Thomas Carlyle, used a non-coincidental vocabulary to describe this consensus, which existed "over all Europe, England alone excepted," stating that "[t]he extent of [Fredrick's] sin... was at that time considered to transcend all computation, and to mark him out for partition, for suppression and enchainment, as the general enemy of mankind".<sup>364</sup>

Before that invasion, Fredrick drafted a manifesto listing several pretexts, but did not even wait for the ultimatum he gave the Saxons to expire before attacking. In response, Fredrick was declared an outlaw by the Protestant and Catholic princedoms of the Holy Roman Empire (who rarely agreed), with the support of other European powers.<sup>365</sup> Although the coalition against Fredrick disintegrated before punishing him (due to the Russian Empress' sudden death), the consensus regarding his culpability shows that sovereigns did not enjoy immunity from prosecution or unlimited discretion to initiate war.

Fredrick's outlawry was not a domestic measure because the Holy Roman Empire was not a single State. Moreover, as Emmerich de Vattel (the leading contemporaneous international jurist) elucidated, the law of nations was the basis for that outlawry--issued by the Holy Roman Empire's princedoms with the support of "the most respectable powers of Europe", as an action

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<sup>358</sup> E.g., Ibid, 91-93.

<sup>359</sup> Harold E. Selesky, "Colonial America," in The Laws of War, 74. See also, Kroener, "Antichrist," 59.

<sup>360</sup> Russell F. Weigley, The Age of Battles (2004), 46.

<sup>361</sup> Shaw, International Law, 507.

<sup>362</sup> Walter Rech, Enemies of Mankind: Vattel's Theory of Collective Security (2013), 36, 78-79, 138-149.

<sup>363</sup> Ibid, 138-139.

<sup>364</sup> Thomas Carlyle, History of Friedrich the Second Called Frederick the Great (1890), 5:82.

<sup>365</sup> Rech, Enemies of Mankind, 142-144.

“recommended for the interest and safety of nations to repress he who tramples on rules [i.e. rules of the law of nations] which constitute the unique foundation of their tranquility.”<sup>366</sup>

Note that Vattel referred to Fredrick as a disturber of international peace. Indeed, throughout his work synonyms of “international outlaws” (such as, enemies of mankind) are used in reference to violators of international laws including war criminals,<sup>367</sup> career felons,<sup>368</sup> and rulers who violate ad bellum laws.<sup>369</sup>

The following are among the rulers Vattel considered enemies of mankind for violating jus ad bellum: (a) warmongers<sup>370</sup> and rulers who otherwise “tak[e] up arms without a lawful cause”<sup>371</sup> or “without necessity”;<sup>372</sup> (b) rulers who conduct a war of destruction or commit atrocities on a large scale;<sup>373</sup> and (c) rulers who violate their treaty commitments.<sup>374</sup> All three categories were raised as the basis for Fredrick’s outlawry.<sup>375</sup>

As briefly demonstrated below, this combined accusation format has likely played a significant role in the history of the international crime of “aggression” (“crime against peace”).<sup>376</sup> In jurisprudential writing, as Vattel’s work demonstrates, these were considered three distinct international crimes. The first is currently considered the origin of “aggression”. The second, rooted in tyranny, is what post-WWII jurists usually referred to by “aggression.”<sup>377</sup> The third originated from the medieval war crime of breaching a truce/peace treaty.<sup>378</sup>

It is currently assumed that all three charges, when made prior to Nuremberg, were political cheap talk. But Lesaffer, based on an examination of early-modern State practice related to peace treaties, rejected this account, at least regarding the third charge: “loyalty towards... treaties was based on natural law and therefore offered a strong basis for positive international law.”<sup>379</sup> For early-modern jurists, “natural law was far more ‘law’ than natural law or even the law of nations

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<sup>366</sup> Ibid, 147-148 (trans. of Vattel’s letter (Feb. 28, 1757); the bracketed text was added by Rech) (emphasis added).

<sup>367</sup> Vattel, Law of Nations, 359-361, 368, 374-375 (and see also pages: lvii-lviii, 347-348, 352, 367, 370).

<sup>368</sup> Ibid, 108-109.

<sup>369</sup> E.g., Ibid, 156-157, 164, 195.

<sup>370</sup> Ibid, 305, 431.

<sup>371</sup> Ibid, 378-379.

<sup>372</sup> Ibid, 289.

<sup>373</sup> Ibid, 367.

<sup>374</sup> Ibid, 230.

<sup>375</sup> Rech, Enemies of Mankind, 142-149.

<sup>376</sup> A detailed account of aggression’s distinct legal history cannot be made herein due to space considerations.

<sup>377</sup> E.g., Quincy Wright, History of the UN War Crimes Commission (1948), 180-185, 254-255.

<sup>378</sup> See above note 249 and accompanying text.

<sup>379</sup> Lesaffer, “Grotian,” 127.



was to the nineteenth century deniers of the legal character of international law,”<sup>380</sup> to the extent that violations of some natural laws were “punishable by sovereigns, even if not committed against themselves.”<sup>381</sup> Lesaffer concluded that the Westphalian Myth’s lingering effect is the cause of the false contemporary historical account.<sup>382</sup>

The charge of warring without a “just cause” became unreliable already in medieval times.<sup>383</sup> It is likely that those wishing to make a more credible “unjust cause” charge began using the two other, more credible, charges. As a result, although in jurisprudential writing the three charges remained distinct, in practice they had merged considerably. Such a combined accusation is already found in Thomas of Marle’s case (1111-14), who was accused of (a) violating his commitment to cease fighting; (b) provoking wars; and (c) “massacring and destroying everything.”<sup>384</sup> It is present in King Charles’s case where (a) the treason charge was partly for reinitiating fighting in violation of his treaty commitment, and (b) the murder charge was for engaging in cruel and bloody wars.<sup>385</sup> It is present, as mentioned, in King Fredrick’s case. It is also present in subsequent cases. Napoleon, e.g., was accused of “violating the convention which established him in the Island of Elba” and of “reappearing in France with projects of disorder and destruction.”<sup>386</sup> A similar format was initially advanced against the Kaiser,<sup>387</sup> but because of opposition by positivist jurists,<sup>388</sup> the Treaty of Versailles accused him only of “a supreme offence against international morality and the sanctity of treaties.”<sup>389</sup> At the wake of WWII, the combined format was readopted; the Nuremberg Charter defined “Crimes Against Peace [as] planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances”<sup>390</sup> and the Nuremberg tribunal

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<sup>380</sup> Ibid, 137.

<sup>381</sup> Ibid.

<sup>382</sup> Lesaffer, “Unrequited Love,” 37.

<sup>383</sup> Stacey, “The Age of Chivalry,” 31.

<sup>384</sup> Suger, King Louis the Fat, Ch. VII, XXIV.

<sup>385</sup> See above notes 344-346 and accompanying text.

<sup>386</sup> Declaration of the Powers, 663.

<sup>387</sup> Reports from the Committee of Enquiry into Breaches of the Laws of War (1920), 97.

<sup>388</sup> “Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties,” American Journal of International Law 14 (1920), 118-120, 138-139; James Willis, Prologue to Nuremberg (1982), 72-77.

<sup>389</sup> Art. 227, Treaty of Versailles (June 28, 1919).

<sup>390</sup> Charter of the International Military Tribunal at Nuremberg, art. 6(a), 83 UNTC 279 (1945).

amalgamated these charges.<sup>391</sup> In “the Ministries Trial”, Frederick’s and Napoleon’s cases were even explicitly regarded as precedents:<sup>392</sup>

Is there personal responsibility for those who plan, prepare, and initiate aggressive wars and invasions? The defendants have ably and earnestly urged that heads of states and officials thereof cannot be held personally responsible for initiating or waging aggressive wars and invasions because no penalty had been previously prescribed for such acts. History, however, reveals that this view is fallacious. Frederick the Great was summoned by the Imperial Council to appear at Regensburg and answer, under threat of banishment, for his alleged breach of the public peace in invading Saxony. When Napoleon, in alleged violation of his international agreement, sailed from Elba to regain by force the Imperial Crown of France, the nations of Europe, including many German princes in solemn conclave, denounced him, outlawing him as an enemy and disturber of the peace, mustered their armies, and on the battlefield of Waterloo, enforced their decree, and applied the sentence by banishing him to St. Helena. By these actions they recognized and declared that personal punishment could be properly inflicted upon a head of state who violated an international agreement and resorted to aggressive war.

Additional “cases [exist where] chiefs, or other high officers, of state were tried... for initiating... aggressive war [both] in the middle-ages [and] in modern times.”<sup>393</sup> Other criminal cases, not against rulers, also demonstrate that it is “assumed, wrongly, that crimes against the peace were not recognized violations of international law until the post-World War II trials.”<sup>394</sup>

Lesaffer concluded: “The continuity between the [early] modern era and the twentieth century seems to be greater than is normally accepted... Of course, the eighteenth and nineteenth centuries saw the high days of State voluntarism in practice and of positivism in doctrine, but that does not mean that there was no countercurrent.”<sup>395</sup> This conclusion applies to the history of crimes against peace.

##### 5) The American Revolution (1775-1783)

In the initial stages of the American Revolution, the British deemed the American forces outlaws (as rebels) and waged total war against them.<sup>396</sup> In response, the American Founding Fathers framed the Declaration of Independence as an indictment against King George III for tyranny. The legal basis of the declaration was the “Laws of Nature and of Nature’s God,” and George was declared a tyrant for “refus[ing] [his] Assent to Laws, the most wholesome and

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<sup>391</sup> Patrycja Grzebyk, Criminal Responsibility for the Crime of Aggression (2013), 96.

<sup>392</sup> US v. Weizsäcker, Trials of the War Criminals before the NMT 14 (1949), 321 (emphasis added).

<sup>393</sup> Quincy Wright, “The Law of the Nuremberg Trial,” American Journal of International Law 41 (1947): 63.

<sup>394</sup> Jordan Paust et al., International Criminal Law: Cases and Materials (2007), 561.

<sup>395</sup> Lesaffer, “Grotian,” 137.

<sup>396</sup> John Frost, Pictorial Life of George Washington (1847), 394.

necessary for the public good” and for waging a war of destruction, as he “plundered our seas, ravaged our coasts, burned our towns [and] transport[ed] large armies of foreign mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of cruelty and perfidy... totally unworthy of the head of a civilized nation.”<sup>397</sup> Although these are political statements, they demonstrate contemporaneous legal and political mindset and should not be dismissed. Furthermore, after the war’s initial stages, the sides agreed to treat each other as civilized nations. Subsequently, actions “against prisoners of war and enemy civilians were... regarded as crimes, and were often punished [and these practices] were too consistent and far too frequently repeated not to have some significance beyond internal control of one’s troops.”<sup>398</sup>

The American Revolution	
<p>SIR, New-York, Apr. 25, 1782.</p> <p>Your letter of the 21st instant, with the enclosed testimonials respecting Captain Huddy's execution, was delivered to me yesterday; though I am extremely concerned for the cause, I cannot conceal my surprise and displeasure at the very improper language you have made use of, which you could not but be sensible was totally unnecessary.</p> <p>The mildness of the British Government does not admit of acts of cruelty or persecuting violence, and as they are notoriously contrary to the tenor of my own conduct and disposition (having never yet stained my hands with innocent blood) I must claim the justice of having it believed, that, if such have been committed by any person under my command, they could not have been warranted by my authority, nor can they ever have the sanction of my approbation. My personal feelings, therefore, required no such incitements to urge me to take every proper notice of the barbarous outrage against humanity (which you have represented to me) the moment it came to my knowledge;</p>	<p>and accordingly, when I heard of Captain Huddy's death (which was only four days before I received your letter) I instantly ordered a strict enquiry to be made in all its circumstances, and shall bring the perpetrators of it to an immediate trial.</p> <p>To sacrifice innocence under the notion of preventing guilt, in place of suppressing, would be adopting barbarity, and raising it to the greatest height. Whereas, if the violators of the laws of war are punished by the Generals under whose power they act, the horrors, which those laws were formed to prevent, will be avoided, and every degree of humanity, war is capable of, maintained.</p> <p>Could violations of humanity be justified by example, many from the parts where your power prevails, that exceed, and probably gave rise to this in question, could be provoked. I hope that the mode I mean to pursue will be adopted by you, and prevent all future enormities.</p> <p>I remain, Sir, &amp;c.</p> <p>(Signed) H. CLINTON.</p>

Captain Lippincott was a royalist who executed an American POW. In response, Washington sent a letter to British General Clinton, implicitly threatening to execute British POWs in reprisal if Lippincott were not turned over to be tried by the Americans. Clinton replied (in his letter above<sup>399</sup>) by referring to Lippincott’s act as an “outrage against humanity”. He also did not deny the Americans’ authority to prosecute Lippincott, but stated it was preferable that “violators of the law of war [were to be] punished by the Generals under whose power they act.”

<sup>397</sup> Reprinted in Sources of Our Liberties, ed. R. Perry and J. Cooper (1959), 318-319, 321 (emphasis added).

<sup>398</sup> George L. Coil, “War Crimes of the American Revolution,” Military Law Review 82 (1978): 171.

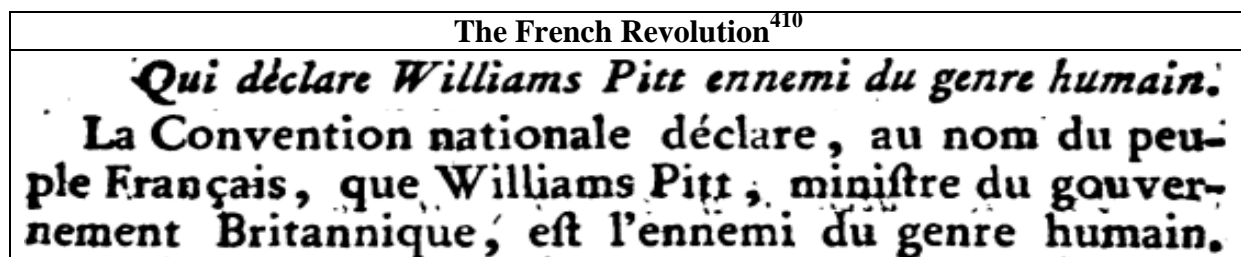
<sup>399</sup> Reproduced in The Remembrancer, 2 parts (London: J. Debrett, 1782), 2:155.

## 6) The French Revolution (1789-1799)

The French and American revolutions are commonly depicted as marking the end of the eighteenth century era of limited warfare because armed-forces became conscripted national armies with diminished commitment to the laws of war.<sup>400</sup> But the effect of this transition should not be exaggerated: military characteristics changed gradually, and the commitment to the laws of war was not abandoned.<sup>401</sup> Accordingly, cases of penal enforcement of the laws of war can be found during the French Revolution<sup>402</sup> and subsequent wars.<sup>403</sup>

The French Revolution was not merely an internal conflict; British and other European forces fought alongside the French King. The Revolutionary Convention declared the British Prime Minister, William Pitt, “an enemy of mankind”, so that “everyone [would] have the right to assassinate him” because he was a “tyrant.”<sup>404</sup> Specifically, the revolutionists contended that Pitt was responsible for the persistent violation of the laws of nations by British forces.<sup>405</sup> This declaration and similar actions indicate reliance on the international outlawry doctrine.<sup>406</sup>

French King Louis XVI was tried by the Convention for tyranny and treason, and was convicted of treason. The basis for that trial was the law of nations and not domestic French law.<sup>407</sup> During his trial, based on the “state of nature” conception, many revolutionaries advocated that human rights are inherent in the law of nature.<sup>408</sup> They later abused this lofty idea, erecting upon it a doctrine whereby all who opposed equal rights--namely, all Royalists and their foreign and domestic supporters--were “enemies of humanity,” and outlaws (“hors-la-loi”), who could be tried and executed by summary military proceedings.<sup>409</sup>



<sup>400</sup> Jeremy Black, “Eighteenth-Century Warfare Reconsidered,” War in History 1 (1994): 215-217.

<sup>401</sup> Gill, “Chivalry,” 37; Peter Browning, The Changing Nature of Warfare (2002), 47.

<sup>402</sup> Ian Germani, “The Military Culture of the French Revolution,” in Warrior’s Dishonour, (2006), 41-57.

<sup>403</sup> E.g., Browning, Nature of Warfare, 47.

<sup>404</sup> Dan Edelstein, The Terror of Natural Right (Chicago: University of Chicago Press, 2009), 153.

<sup>405</sup> Edelstein, “War,” 248.

<sup>406</sup> E.g., M. Robespierre, Speech Given from the Tribune of the Convention; 7 Prairial, Year II (May 26, 1794).

<sup>407</sup> Edelstein, The Terror, 147-152.

<sup>408</sup> Edelstein, “War,” 251-254.

<sup>409</sup> Ibid, 229, 249-262; Edelstein, “Hostis,” 76-81.

<sup>410</sup> Published in IV Collection Complete des Décrets de la Convention Nationale (1794), 233.

*c. The Nineteenth and Twentieth Centuries*

In the nineteenth century, ICL's legitimacy was challenged by the rise of modern Positivism. As discussed, many positivists opposed punishment for violating norms not formally prescribed by domestic legislation. Some further rejected ICL either because they considered international law inapplicable to individuals or because they altogether dismissed the validity of international law.<sup>411</sup> Despite such challenges, ICL persevered.

One reason for positivism's limited effect is its tendency to attribute significance to prevailing legal practice.<sup>412</sup> For centuries, captured enemy violators of the laws of war were predominantly prosecuted by military tribunals. Due to that State practice, many nineteenth-century positivists--while asserting that domestic civilian courts did not have authority to prosecute enemy war criminals--acknowledged, as customary law, the military tribunals' authority to do so.<sup>413</sup> For example, in *Coleman v. Tennessee*--concerning a Union soldier that murdered a Southern civilian during the American Civil War--the American Supreme Court ruled that, while the enemy's domestic courts lacked jurisdiction, had that Union soldier "been caught by the forces of the enemy after committing the offense, he might have been subjected to a summary trial and punishment by order of their commander, and there would have been no just ground of complaint, for the marauder and the assassin are not protected by any usages of civilized warfare."<sup>414</sup> This position indicates an ICL-related practice before and during the nineteenth century. Other jurists, one should note, opposed this position, arguing that any court (military or civilian) is authorized to punish war criminals.<sup>415</sup>

Another reason for nineteenth-century positivism's limited impact on ICL was the persistence of a divide between military and civilian societies. As a result of the codification of domestic law, by the end of the nineteenth century, positivism supplanted natural law jurisprudence in domestic legal discourse.<sup>416</sup> In contrast, throughout the nineteenth century and in the first half of the twentieth century, the laws of war remained predominantly the domain of

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<sup>411</sup> See above Section 2.

<sup>412</sup> Turan Kayaoglu, *Legal Imperialism* (2010), 27-28.

<sup>413</sup> E.g., George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Law of War," *American Journal of International Law* 37 (1943): 407, 419-25, 434.

<sup>414</sup> *Coleman v. Tennessee*, 97 U.S. 509, 519 (1878).

<sup>415</sup> E.g., C. A. Hereshoff Bartlett, "Liability for Official War Crimes," *Law Quarterly Review* 35 (1919): 185.

<sup>416</sup> Bassiouni, "Universal Jurisdiction," 99 (overstating the effect of this reform on ICL).

the military subculture and of its autonomous justice system.<sup>417</sup> This subculture was conservative and tended to resist legal reform.<sup>418</sup> Hence, the unwritten laws of war continued serving as its predominant basis for punishing war criminals.<sup>419</sup>

Arguably, the main influence of nineteenth-century positivism on the laws of war was the role it played in advancing their codification.<sup>420</sup> Codifying treaties were not, however, premised exclusively on positivism. The Martens Clause of the Hague Convention even implied that States and their agents were subordinate to unwritten, universal natural law.<sup>421</sup>

In many respects, ICL expanded in the nineteenth century. Notably, slave-trading became an international crime, following an international effort to declare it “a form of piracy in the hopes of making slave traders, like pirates, hostis humani generis... subject to capture and trial in the court of any nation.”<sup>422</sup> Slave-traders were also referred to as “piratical outlaws.”<sup>423</sup> The analogy with piracy was not attributed only to similar practical difficulties of condemning the perpetrators’ ships; rather, it also derived considerably from viewing slave-traders as the enemies of mankind because of their violation of natural law (natural human rights).<sup>424</sup>

Cases of penal enforcement of the laws of war exist not only from the first half of the nineteenth century,<sup>425</sup> but also from conflicts during its second half and at the turn of the century, including the Crimean War (1853-1856);<sup>426</sup> American Civil War (1861-1865),<sup>427</sup> Franco-German War (1870-1871),<sup>428</sup> Russian-Turkish War (1877-1878),<sup>429</sup> Boer Wars (1880-1881, 1899-

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<sup>417</sup> Louis Renault, “War and the Law of Nations in the Twentieth Century,” American Journal of International Law 9 (1915): 3-5.

<sup>418</sup> Fidell, “Culture,” 163; U. Frevert, “War,” in A Companion to 19th-Century Europe, ed. S. Berger (2006), 424.

<sup>419</sup> James Garner, International Law and the World War, 2 vols. (1920), 2:473; William Winthrop, Digest of Opinions of the Judge Advocate General of the Army (1865), 132-33.

<sup>420</sup> Shaw, International Law, 28.

<sup>421</sup> Convention (II) with Respect to the Laws and Customs of War on Land, pmbl., 205 CTS 277 (July 29, 1899).

<sup>422</sup> Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law (2012), 114.

<sup>423</sup> *Ibid.*, 131.

<sup>424</sup> *Ibid.* 125-26, 135.

<sup>425</sup> See above note 402.

<sup>426</sup> M. Bernard, “Growth of Laws and Usages of War,” Oxford Essays 2 (1856): 114 (“When a Russian officer at Inkermann... stab[ed] disabled men... his captors... assert[ed] their right to punish him as a felon”).

<sup>427</sup> “Myth: Henry Wirz Was the Only Person Tried for War Crimes in the Civil War,” <http://www.nps.gov/ande/historyculture/wirztribunal.htm>.

<sup>428</sup> Louis Renault, “De l’application du droit pénal aux faits de guerre,” Revue Générale de Droit International Public 25 (1918): 18; Moritz Busch, Bismarck in the Franco German War 1870-1871: Abridged Edition (1879), 136-38.

<sup>429</sup> Peter Holquist, “The Russian Empire as a ‘Civilized State’: International Law as Principle and Practice in Imperial Russia, 1874-1878,” (N.C.E.E.R. Research Paper, 2004), 15-16, 22-25.

1902),<sup>430</sup> Spanish/Philippines-American Wars (1898-1902),<sup>431</sup> and Russian-Japanese War (1904-1905).<sup>432</sup> Ergo, the practice of punishing individual violators of the laws of war clearly persisted long after the rise of positivism.

Evidence suggests that ICL continued to rest on an outlawry doctrine. This emerges from: the rationale underlying the outlawing of slave-trading, the attempt to punish Napoleon, the war crime prosecutions of the American Civil War and additional nineteenth-century cases.<sup>433</sup>

Only at the turn of the twentieth century did ICL begin to be compromised because of growing endorsement even within the armed-forces of doctrines aimed at nullifying it. The Kriegsraison doctrine, whereby a State could disregard the laws of war if mandated by national necessity, gained increasing support, particularly in Germany.<sup>434</sup> Support for the “Act of State” and “Respondeat Superior” doctrines also grew; the former barred the prosecution of war criminals if their crime had been endorsed by their State, and the latter prohibited prosecution when their crime was ordered by their commanders.<sup>435</sup> British and American military law manuals adopted both doctrines shortly before WWI, and they remained there until nearly the end of WWII, sparking claims that they had become customary law.<sup>436</sup>

Closer examination of State practice reveals that although weakened, ICL was never abandoned. Admittedly, during WWI, some German submariners who had participated in attacks against civilian ships were not tried by their British captors, and some British officials argued that international law demanded refraining from such prosecution.<sup>437</sup> But after deliberation, the British government adopted an opposite position<sup>438</sup> and punished other German soldiers for their war crimes.<sup>439</sup> France, Russia, and Austria-Hungary also punished enemy war criminals, without

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<sup>430</sup> J.R. Baker and H.G. Crocker, The Laws of Land War (1919), 125 (reporting that three Boer combatants were sentenced to death for the war crime of attacking after raising their hands as a sign of surrender); Nick Bleszynski, Shoot Straight, You Bastards! The Truth Behind the Killing of “Breaker” Morant (2003), 324 (discussing the court-martial of Australian soldiers for illegally executing captured Boer combatants).

<sup>431</sup> Donald Wells, Laws of Land Warfare: A Guide to the U.S. Army Manuals (1992), 117 (describing four cases).

<sup>432</sup> J.M. Spaight, War Rights on Land (1911), 111 (“Two Japanese officers [who] were captured, disguised as Chinamen, trying to dynamite a railway bridge in Manchuria... were condemned to death by court-martial”).

<sup>433</sup> See, e.g., Charles Jacobs Peterson, A History of the Wars of the United States (1859), 77. See also note 45 above.

<sup>434</sup> Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,” Virginia Journal of International Law 50 (2010): 796-797.

<sup>435</sup> Gary D. Solis, “Obedience of Orders and the Law of War: Judicial Application in American Forums,” American University International Law Review 15 (2000): 495-96, 510.

<sup>436</sup> Manner, “Legal Nature,” 416-17.

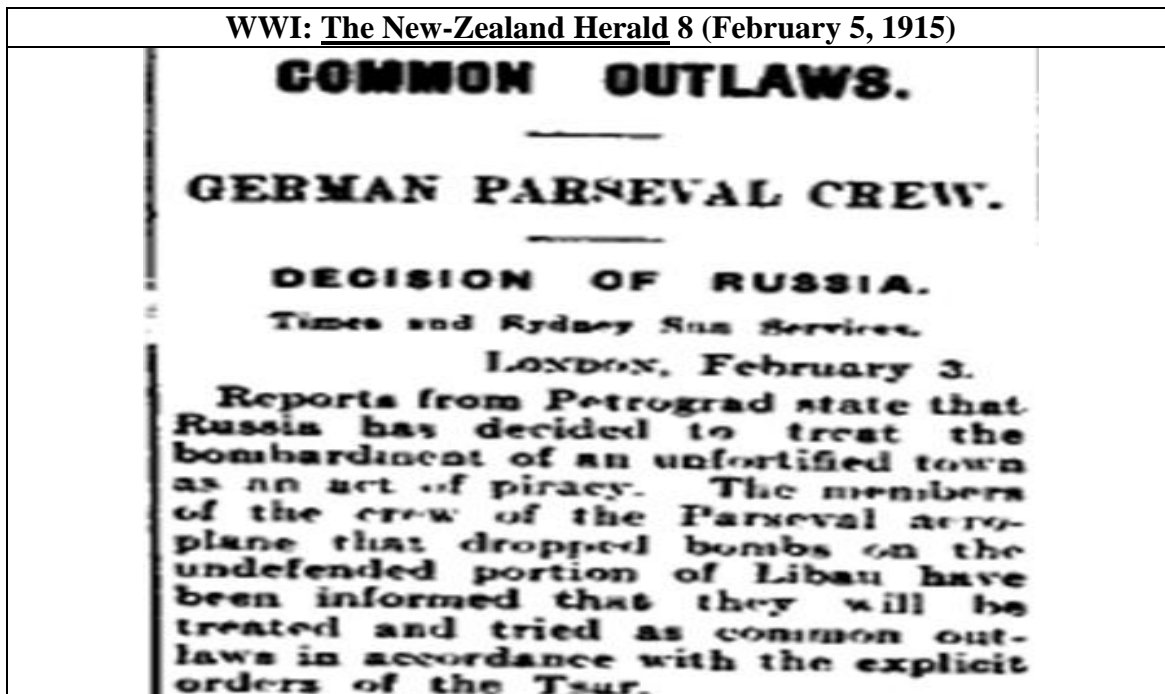
<sup>437</sup> G. Bower, “Law of War: Prisoners of War and Reprisals,” Papers Read Before the Grotius Society 1 (1915): 22.

<sup>438</sup> Lloyd George, Memoirs of the Peace Conference, 1:65.

<sup>439</sup> Manner, “Legal Nature,” 422.

applying the Act of State and Respondeat Superior doctrines.<sup>440</sup> Even Germany, after initial reluctance, punished enemy war criminals.<sup>441</sup>

Outlawry was often explicitly cited as the basis for punishing war criminals during WWI. Phillipson, e.g., reported: “captured soldiers or sailors who have violated the laws of war are not entitled to be treated as prisoners of war; they are, on the contrary, liable to be tried by court-martial as war criminals [Accordingly, in 1915, a] number of German airmen, who fell into the hands of the Russians after they had dropped bombs on the open town of Libau... were informed that on account of their illegitimate conduct they would be treated as common outlaws.”<sup>442</sup>



Germans were not the only nationals to be declared international outlaws. In response to an attack against the British Embassy in Petrograd, in 1918, the British government sent an official dispatch to the Soviet government stating that unless those responsible for the attack were punished, Britain would hold the Bolshevik leaders individually responsible and “use every endeavour to have them treated as outlaws by the Governments of all civilized nations, and that no place of refuge shall be left to them.”<sup>443</sup> In his legal analysis of this case, Lefroy stated: “[i]n the absence of any international court with power at its disposal to hale offending members of

<sup>440</sup> Antonio Cassese, *International Criminal Law* (2003), 232; H.H.L. Bellot, “War Crimes: Their Prevention and Punishment,” *Papers Read Before the Grotius Society* 2 (1916): 31, 49.

<sup>441</sup> Robert K. Woetzel, *The Nuremberg Trials in International Law* (1960), 26-27.

<sup>442</sup> Coleman Phillipson, *International Law and the Great War* (1915), 179, 259 (emphasis added).

<sup>443</sup> Cited in Lefroy, “By the Way,” 546-47 (emphasis added).



foreign governments before it, and administer punishment, the last resort is outlawry, just as outlawry was the last weapon of ancient law... To pursue the outlaw, to knock him on the head... is the right and duty of every law-abiding man.”<sup>444</sup>

WWI sources also reveal that “conventional” war criminals were equated with pirates and brigands. The underlying rationale was that soldiers who violate the laws of war place themselves “on a level with bandits and outlaws,” and therefore can “be summarily tried, condemned, and shot” or punished “by judicial tribunals.”<sup>445</sup>

WWI: <u>The Fielding Star</u> (November 2, 1918)	
<p style="text-align: center;"><b>TO SAVE BRITONS</b></p> <p style="text-align: center;"><b>A WARNING TO RUSSIA</b></p> <p style="text-align: center;">London, October 31.</p> <p>Lord Robert Cecil states that the Government is endeavouring to ameliorate the conditions of the British held up in Russia. It had warned the Bolshevik leaders that they would be held individually responsible for any future acts of violence against Britishers. Every endeavour would be made to have those responsible treated as outlaws by all civilised nations.</p>	

ICL was therefore not abandoned. The legal upheavals at the turn of the twentieth century should be more accurately understood as the product of a struggle between supporters of certain brands of positivism, seeking to restrict or abolish ICL, and ICL supporters.

Admittedly, the Kaiser was ultimately not prosecuted (Holland refused to extradite him) and after the war German soldiers were prosecuted by a German tribunal for violating domestic German law in Leipzig.<sup>446</sup> But by signing the Treaty of Versailles, the “German Government recogni[z]ed the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war,”<sup>447</sup> and the authority of an international tribunal to prosecute the Kaiser “for a supreme offence against

<sup>444</sup> Ibid.

<sup>445</sup> Bartlett, “Liability for Official War Crimes,” 178-79.

<sup>446</sup> Willis, Prologue to Nuremberg, 126-46.

<sup>447</sup> Treaty of Versailles, art. 228.

international morality and the sanctity of treaties.”<sup>448</sup> Similar provisions existed in the treaties of surrender signed with other States, and, in some of these States war crimes trials were conducted.<sup>449</sup> Also, as a compromise between the allies and Holland, “Queen Wilhelmina interned the Kaiser in the province of Utrecht as ‘alien dangerous to the public tranquility’.”<sup>450</sup> Thus, formally, the Kaiser was, in fact, treated summarily like Napoleon.<sup>451</sup>

The outlawry doctrine was also applied during WWII and, in its aftermath, supporters of both summary executions and judicial proceedings invoked that doctrine.<sup>452</sup> In fact, the contrast between the two positions was not as sharp as currently portrayed, as seen in a report from 1945 by U.S. Supreme Court Justice Robert Jackson to President Truman, “on the legal basis for the trial of war criminals.” Although Jackson supported the trial of arch-war-criminals (deeming them “international brigands” for violating international law), regarding low-ranking enemy war criminals he argued that “field forces from time immemorial have dealt with such offenses on the spot” and suggested the “prompt resumption of summary dealing with this type of case.”<sup>453</sup>

Understandably, many regarded the atrocities of the two world wars as proof that international law had always been ineffective and thus had never been truly positive law.<sup>454</sup> From a historical perspective, however, this conclusion is wrong: “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.”<sup>455</sup> Many of those involved in post-WWII war crime prosecutions did not consider them to be a break with the past. The Nuremberg Tribunal, e.g., rejected defendant claims (echoing positivist opponents of ICL) that it lacked authority to prosecute them for violating the Hague Regulations because these addressed only States,<sup>456</sup> by stating that: “For many years past... military tribunals have tried and punished individuals guilty of violating the rules of land warfare... The law of war is to be found not only

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<sup>448</sup> Ibid, art. 227.

<sup>449</sup> Willis, Prologue to Nuremberg, 149-61, 178-81.

<sup>450</sup> Ibid, 111 (emphasis added).

<sup>451</sup> See above notes 29, 40 and accompanying text.

<sup>452</sup> See above notes 42-45 and accompanying text.

<sup>453</sup> Robert H. Jackson, “Report to President Truman on the Legal Basis for Trial of War Criminals (May 6, 1945),” reprinted in Temple Law Quarterly 19 (1945-46): 144, 148, 151-153.

<sup>454</sup> David Kennedy, “International Law and the Nineteenth Century: History of an Illusion,” Quinnipiac Law Review 17 (1998): 110 (discussing WWI).

<sup>455</sup> Whetham, Just Wars, 52.

<sup>456</sup> Trial of the Major War Criminals before the IMT (1947), 1:220-221.

in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts.”<sup>457</sup> Note that this ruling reveals that the contemporary narrative, which views ICL as a post-WWII creation, gained complete acceptance only sometime after WWII.

## **6. Crimes against Humanity**

Some contemporary jurists acknowledge that war crimes were prosecuted even before WWII, usually assuming that this “category of international crimes gradually emerged in the second half of the nineteenth century”.<sup>458</sup> But they still regard Nuremberg as a “crucial turning point [because] two new categories of crimes were envisioned: crimes against peace and crimes against humanity.”<sup>459</sup> As already shown, the former were recognized before Nuremberg. As briefly shown below crimes against humanity were not a post-WWII innovation, either.<sup>460</sup>

Jurists assume that the term “crimes against humanity” was first used in its current meaning in 1915, in an official Joint Protest by France, Britain, and Russia to Turkey, against the Armenian Massacre, which these States called the “new crimes of Turkey against humanity [and] announce[d]... that they will hold personally responsible [for] these crimes all members of the Ottoman Government... implicated in such massacres.”<sup>461</sup> In 1919, the majority in a post-WWI allied legal commission employed synonyms of the term “crimes against humanity” when recommending criminal responsibility for “offences”, “outrages”, “violations” and “breaches” of “the laws of humanity”.<sup>462</sup> These two failed initiatives to internationally criminalize “crimes against humanity” presumably inspired the post-WWII success.

Earlier “references to ‘humanity’” are acknowledged with regard to violations of the laws of war. But they are dismissed for lacking the intention to indicate “a set of norms different from ‘the laws and customs of war.’”<sup>463</sup> References to humanity are also acknowledged in the context of nineteenth-century humanitarian interventions. But, it is claimed to be “a leap of faith to take from such interventions evidence of an international crime [because] the doctrine of humanitarian intervention was... not any rule for trying foreign nationals.”<sup>464</sup>

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<sup>457</sup> Ibid, 221.

<sup>458</sup> Cassese, International Criminal Law, 38.

<sup>459</sup> Ibid, 40.

<sup>460</sup> Prior to 1948, “genocide” was a sub-category of crimes against humanity.

<sup>461</sup> Cited in Cassese, International Criminal Law, 67.

<sup>462</sup> Paust, 703; Cassese, International Criminal Law, 68.

<sup>463</sup> Wright, War Crimes Commission, 189.

<sup>464</sup> Robert Dubler, “A Theory of Crimes Against Humanity,” Australian International Law Journal 15 (2008): 88.

Even pre-1915 uses of the explicit term “crimes against humanity” are acknowledged. Presumably “Voltaire coined the term”, in the late-eighteenth century, in reference to crimes such as murder and it was used, subsequently, in such a context. But a clear explanation for the connection between the term’s contemporary meaning and its use in reference to seemingly domestic crimes is currently not provided.<sup>465</sup> The term “crimes against humanity” is also known to have been used in nineteenth-century statements condemning war crimes, slave-trading, and colonial atrocities. But, these statements are considered mere moral condemnations.<sup>466</sup>

ICL’s long history helps to connect the dots. The term “law of humanity” originally indicated international law, and “crimes against humanity,” and similar terms, meant international crimes. Accordingly, it was stated that: war crimes were acts “tramp[ing] on the laws of humanity,”<sup>467</sup> “pirates... have for ages defied the laws of... humanity,”<sup>468</sup> and slavery was a “crime against humanity.”<sup>469</sup> Felonies, such as murder, since they were considered international crimes, were referred to as “crimes contre l’humanité” long before Voltaire.<sup>470</sup> Felonies were also called “common law crimes,” (namely common to the laws of all States).<sup>471</sup>

Atrocities had been referred to as “crimes against humanity” before 1915. Although the Boxer War (1900-1901) is rightly infamous for its colonial undertones, it was also a humanitarian intervention by a joint military force from Germany, Austria-Hungary, US, France, Britain, Italy, Japan, and Russia in response to atrocities in which “more than 200 foreign missionaries and 30,000 Chinese Christians were killed.”<sup>472</sup> In 1900, a “Joint Note” to China, signed by eleven States (the States of the joint force, Belgium, Spain, and Holland), demanded the punishment of the principal perpetrators, whose actions were deemed “crimes against the law of nations, against the laws of humanity.”<sup>473</sup> Subsequently, unlike in the Armenian case, many perpetrators were tried and punished, including by the allies.<sup>474</sup>

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<sup>465</sup> William Schabas, Unimaginable Atrocities (2012), 51-53.

<sup>466</sup> Ibid.

<sup>467</sup> Lynch John, Cambrensis Eversus, ed. Matthew Kelly (1851) 3(1):201 (written in 1662).

<sup>468</sup> Sylvanus Urban, “Abstracts of Foreign Occurrences,” Gentleman’s Magazine 72(2) (1802): 672.

<sup>469</sup> Sources cited in Martinez, The Slave Trade, 114-116.

<sup>470</sup> E.g., Pierre Ayrault, Opusculs et Divers Traictes (1598), 250.

<sup>471</sup> Kenneth Gallant, The Principle of Legality in International and Comparative Criminal Law (2009), 94.

<sup>472</sup> Ziming Wu, Chinese Christianity (2012), 49.

<sup>473</sup> Reproduced in Paul H. Clements, The Boxer Rebellion (1915), 207.

<sup>474</sup> James Hevia, English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China (2003), 224-229.

The Boxer War

## THE CHINESE QUESTION:

### WHAT THE POWERS DEMAND.

The following is a text of the Joint Note handed by the Foreign Ministers to the Chinese Peace Plenipotentiaries:—

In the course of the months of May, June, July, and August of this year disturbances first broke out in the northern provinces of China, and crimes were committed under peculiarly outrageous circumstances, which have no parallel in the history of the world—crimes against the laws of humanity and against civilization. The

the Powers have decided to give effect to her desires upon the following detailed irrevocable conditions, which they regard as essential for the expiation of the crimes committed and the prevention of their repetition:—

The infliction of the severest punishment applicable to their crimes upon the parties mentioned in the Imperial Edict of the 25th September, 1900, as well as upon those persons whom the representatives of the Powers may later indicate by name.

Segments of the 1900 “Joint Note”, as published in The Oamaru Mail (13 February, 1901).<sup>475</sup>

In various nineteenth-century interventions, we also find contemporaneous references to atrocities as crimes against humanity.<sup>476</sup> Contrary to present-day belief, during such interventions the perpetrators of the atrocities were often prosecuted<sup>477</sup>--occasionally by military tribunals of the intervening powers.<sup>478</sup> Some such interventions and subsequent trials were even in response to “peacetime” atrocities, which contradicts the Nuremberg Tribunal’s premise that such prosecutions were unprecedented.<sup>479</sup> That ruling of the Nuremberg tribunal was probably influenced by a popular moderate positivist position that recognized only the authority to prosecute foreigners for wartime violations of international law (and for piracy).<sup>480</sup>

<sup>475</sup> Notice that the phrasing here is a bit different than that in the version reproduced in Clement, 207.

<sup>476</sup> E.g., “Communication Made by Abro Efendi to the Syrian Commission,” Accounts and Papers of the House of Commons xxxv(ii) (1861): 87 (Syrian atrocities); North-China Herald Supp. (9 Aug. 1895) (the Kucheng massacre).

<sup>477</sup> E.g., Gordon Llewellyn Iseminger, Britain’s Eastern Policy and the Ottoman Christians, 1856-1877 (University of Oklahoma: Ph.D. thesis, 1965), 123-138 (1860 Syria).

<sup>478</sup> E.g., Hevia, 224-229 (discussing the Boxer War).

<sup>479</sup> E.g., W. Palmer, Hazell’s Annual (1896), 103 (regarding the response to the Sichuan massacre (1895)).

<sup>480</sup> E.g., Manner, “Legal Nature”, 407, 420-425, 434

Perpetrators of Boxer atrocities were referred to as “disturbers of the peace,”<sup>481</sup> Likewise, in a list from 1918, the principal perpetrators of the Armenian Massacre were referred to as “outlaws of civilization.”<sup>482</sup> Such references demonstrate that the international outlawry doctrine was applied in such cases.

Until the nineteenth century, the legal basis for military intervention was tyranny. As an ad bellum doctrine, it granted universal permission to fight the tyrant and his men. In the context of such interventions, rulers were, usually, declared tyrants for committing or condoning atrocities (namely, mass war crimes or felonies).<sup>483</sup>

From the nineteenth century onward, the legal basis justifying military interventions was usually protecting humanity, not tyranny.<sup>484</sup> But, the transition was not abrupt: we find pre-nineteenth century sources referencing commitment to humanity<sup>485</sup> and nineteenth century sources citing tyranny<sup>486</sup> to justify intervention.

In the nineteenth century, under the influence of positivism, support for universal jurisdiction diminished, together with support for prosecution based on unlegislated norms and for considering felonies international crimes.<sup>487</sup> Some even opposed the prosecution of war crimes because they were unlegislated prohibitions.<sup>488</sup> But, even among continental civilian jurists, a minority still supported universal jurisdiction for “common law crimes” (felonies).<sup>489</sup> Many more jurists asserted that States had authority to prosecute war crimes, despite these prohibitions being unlegislated. Their legal reasoning was that the different acts of war “contain all the essentials of criminal acts” such as “pillage, theft, incendiarism, violence, rape, robbery, assassination, maltreatment of prisoners and the like” and “[w]hat deprives [them] of the element of criminality is their conformity to the rules of international law”; therefore, when they are committed in violation of “the law of nations, they are analogous to ordinary crimes and may be punished as such”--namely, as “crimes under the common criminal law.”<sup>490</sup> This position echoes

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<sup>481</sup> Clements, Boxer Rebellion, 100.

<sup>482</sup> Cited in Vahakn N. Dadrian, The History of the Armenian Genocide (2003), 314 n. 23.

<sup>483</sup> Voltaire, Philosophical Dictionary, 557; Trim, “Intervention,” 21-47.

<sup>484</sup> Trim, “Intervention,” 22.

<sup>485</sup> Ibid, 38.

<sup>486</sup> E.g., Sheldon Amos, Political and Legal Remedies for War (1880), 79.

<sup>487</sup> Bassiouni, “Universal Jurisdiction”, 99.

<sup>488</sup> Garner, International Law, 473-474.

<sup>489</sup> “Jurisdiction with Respect to Crime,” 29 American Journal of International Law Supplement (1935): 571-579.

<sup>490</sup> Garner, International Law, 473 (emphasis added).

the medieval doctrine that considered unauthorized wartime taking of life or property (war crimes) as felonies.

After WWII a nearly identical doctrine was advanced to justify prosecuting crimes against humanity. According to that doctrine, the prosecution of such crimes was not punishment based on retroactive law, because the acts listed as crimes against humanity were “common law crimes such as theft, looting, ill-treatment, enslavement, murders and assassinations, crimes provided for and punishable under the penal laws of all civilized States” (including Germany).<sup>491</sup> In proceedings after Nuremberg, this doctrine became the basis for the post-WWII criminalization of both peacetime and wartime crimes against humanity.<sup>492</sup>

Thus, the contemporary prohibition of crimes against humanity is not a post-WWII innovation. It gradually emerged, in the context of military interventions, based on the historical perception of the wrongs that comprise atrocities (murder, theft, robbery, arson, and rape) as international crimes, or crimes against humanity.<sup>493</sup>

Nevertheless, there have been changes. Currently, a connection between the prohibition of crimes against humanity and human rights is considered essential.<sup>494</sup> This connection did not always exist, but neither was it invented at Nuremberg. Post-WWII proceedings “had little to do with individual human rights,” and only the current human-rights-orientation of ICL has led to a “retrospective reinterpretation of [these proceedings’] impetus.”<sup>495</sup> The difference between post-WWII and contemporary ICL is most evident when the corresponding colloquial definitions of crimes against humanity are compared. According to their post-WWII colloquial definition, crimes against humanity were “common crime[s], punishable under municipal law [that transformed] into... crime[s] against humanity, [because] either by their magnitude [or] savagery [they] shocked the conscience of mankind”.<sup>496</sup> By contrast, according to the current colloquial

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<sup>491</sup> Trial of the Major War Criminals, 3:92, 3:128 (French Prosecutor’s Opening Argument).

<sup>492</sup> Gallant, 96.

<sup>493</sup> While the nineteenth-century cases from which the contemporary understanding of crimes against humanity emerged were mainly cases against non-Christians/Europeans/Westerners, the two doctrines from which it developed were never consensually deemed to be inapplicable to Christians/Europeans/Westerners. Namely, (a) as mentioned, the perception of felonies as universal crimes (“common law crimes”) still had some applications even within Europe, and (b) the doctrine of humanitarian intervention was regarded by most jurists that supported it as applicable to Christian/European/Western nations and not only to non-Christians/Europeans/Westerners; see Grewe, The Epochs of International Law, 287-295; Ellery Stowell, Intervention in International Law (1921), 64-65.

<sup>494</sup> See Cassese, International Criminal Law, 65.

<sup>495</sup> David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law,” in Philosophy of International Law, ed. Samantha Besson and John Tasioulas (2010), 574.

<sup>496</sup> Wright, War Crimes Commission, 179 (emphasis added).

definition, “[c]rimes against humanity are extreme, systematic or widespread violations of international human rights law that shock the human conscience.”<sup>497</sup>

Three additional factors must be mentioned. First, unlike its colloquial definition, the formal definition of crimes against humanity (the acts listed as prohibited crimes against humanity), based on which individuals have been prosecuted, has not changed dramatically since the Nuremberg Charter.<sup>498</sup> This means that the continuity is greater than the aforementioned compression of colloquial definitions conveys.

Second, although most ICL applications even in the nineteenth and early-twentieth centuries were not human-rights-oriented,<sup>499</sup> human-rights-oriented conceptualizations of crimes against humanity had been applied already during the French Revolution,<sup>500</sup> in nineteenth century interventions,<sup>501</sup> and regarding the slave trade.<sup>502</sup> Namely, that change was the result of a nonlinear process.

Third, contemporary jurists, when referring to the Joint Protest against the Armenian Massacre, usually make it a point to mention that the Russians initially offered using the term “crimes against Christianity”, but the French proposed the more inclusive term “crimes against humanity” instead. Such jurists wish through this mentioning to allude to international law’s globalization (which presumably occurred only in recent times).<sup>503</sup> But, this occurrence actually demonstrates something else. Originally, ICL was a trans-Christian criminal justice system, whose community viewed itself as “mankind”/“humanity”. Therefore, cases, such as that of Thomas of Marle, exist where the terms “humanity” and “Christians” were used interchangeably and the term “enemy to the name of Christian” was used as a synonym of “enemy of mankind”.<sup>504</sup> As ICL secularized during Early Modern Times, the term “Europe” gradually substituted Christendom as the term used--alongside “mankind”/“humanity”--in reference to the transnational community addressed by international law.<sup>505</sup> Cases, accordingly, exist, such as

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<sup>497</sup> Alette Smeulers and Fred Grünfeld, International Crimes and Other Gross Human Rights Violations (2007), 85.

<sup>498</sup> Cf. Nuremberg Charter, art. 6(c) with Rome Statute, art. 7.

<sup>499</sup> See Alston, “On the Origins of Human Rights,” 2066-2068.

<sup>500</sup> Edelstein, Terror, 18.

<sup>501</sup> Gary J. Bass, Freedom’s Battle: The Origins of Humanitarian Intervention (2008), 6.

<sup>502</sup> Martinez, The Slave Trade, 114-116.

<sup>503</sup> Cassese, International Criminal Law, 67-68.

<sup>504</sup> Suger, King Louis the Fat, Ch. XXIV.

<sup>505</sup> Derek Croxton, “The Peace of Westphalia of 1648 and the Origins of Sovereignty,” International History Review 21 (1999): 582-84.



Napoleon's case, where both the term "the Tranquility of the World"<sup>506</sup> and the term "the Tranquility of Europe"<sup>507</sup> were used. But, the Russian suggestion to use the term "crimes against Christianity" reveals that that substitution was not fully adopted even in 1915. Thus, it only demonstrates the protracted nature of ICL's transition into a global system. This transition was also nonlinear, as evident in the existence of pre-1915 references to atrocities committed against non-Christians as crimes against humanity.<sup>508</sup> In sum, over the course of the legal history of crimes against humanity changes often occurred in a protracted and nonlinear manner, and our recollection of that history differs considerably from reality.

## **7. Current Historical Narrative**

Several factors that contributed to the pretermission of ICL's long history have been mentioned thus far. First, the horrors of the Thirty Years' War were exaggerated. Second, the Peace of Westphalia was an important milestone in the history of modern States. Third, the two preceding occurrences were relied upon in the nineteenth century to construct the Westphalian Myth, and with its aid, positivist conceptualizations of States and of international law were retroactively committed to memory. Fourth, by the turn of the twentieth century, anti-ICL positivist positions were accepted even within armed-forces. Fifth, the horrors of the world wars led many opponents and supporters of ICL alike to the exaggerated conclusion that international law had never been effective positive law.

Two more recent factors also contributed to that pretermission. One was the Cold War, during which there was considerable loss of confidence in international law and a near-termination of its application, including that of ICL.<sup>509</sup> Another is the change in the legal background of jurists engaging in ICL. Western military law has been undergoing a process of "civilianization" since WWII.<sup>510</sup> Also, when ICL resurfaced in the 1990s, it was no longer dominated by military jurists--civilian human-rights-oriented lawyers took the lead.<sup>511</sup> Thus, the legal background of most military and civilian jurists currently engaged in ICL is primarily domestic jurisprudence. Individuals have an unconscious tendency to extrapolate from personal

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<sup>506</sup> Declaration of the Powers, 663.

<sup>507</sup> 56 Geo. III, c. 22 (1816) (UK).

<sup>508</sup> E.g., "Trial of Warren Hastings (28th May, 1794)," in The Works of Edmund Burke (1839), 8:65; Martinez, The Slave Trade, 114-116.

<sup>509</sup> Stephen C. Neff, "A Short History of International Law," in International Law, ed. M.D. Evans (2006), 48-50.

<sup>510</sup> Gary Solis, "Courts Martial," in Oxford Companion to International Criminal Justice, ed. A. Cassese (2009): 284.

<sup>511</sup> Allison Danner and Erik Voeten, "Who Is Running the International Criminal Justice System?," in Who Governs the Globe?, ed. Deborah D. Avant, Martha Finnemore and Susan K. Sell (2010), 37.

experience and prevailing paradigms. This tendency, as mentioned, has led to the “Modern State Conception,” resulting in the misguided assumption that criminal justice is by nature a State function. This tendency also often leads individuals to project current paradigms and personal experiences onto the past.<sup>512</sup> Contemporary jurists, accordingly, mistakenly assume that: (a) non-domestic criminal law has long been an exceptional or non-existent phenomenon, (b) military justice was always a branch of the domestic legal system, and (c) a clear jurisprudential divide has long separated domestic from international law. Therefore, although ICL emerged triumphant at the end of the Cold War, the pre-WWII historical narrative of its opponents became the consensus.

One clarification is in order, however. The change in jurists’ legal background was gradual. The horrors of modern warfare led to some civilian involvement in the development of the laws of war already during the late nineteenth century,<sup>513</sup> and civilian involvement intensified with each world war.<sup>514</sup> This involvement was influenced by the nineteenth-century rise of the modern international legal profession. By the early twentieth century, this mostly civilian profession held predominantly positivist views. But, unlike supporters of previously discussed brands of positivism, many members of this profession reinterpreted positivist premises, or incorporated natural law elements into their positions, to reclaim international law.<sup>515</sup> Accordingly, although some such jurists accepted the positivist account of international law unquestioningly, unlike positivist opponents of ICL, they argued that the horrors of war affirmed the need to reform this law, to include individual responsibility for violations of the laws of war. Thus, already in the nineteenth century some pro-ICL jurists considered it non-existent.<sup>516</sup> Other pro-ICL jurists, by contrast, who more aware of military practices, acknowledged ICL’s long history even after WWII.<sup>517</sup> In sum, the rise of the contemporary narrative was a long, disorderly process, resulting from the actions of both opponents and proponents of ICL.

## **8. The Harms of the Current Narrative**

Contemporary jurists do not blindly accept all nineteenth-century positivist narratives. Although historical inaccuracy alone warrants the debunking of the Westphalian Myth, it is no

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<sup>512</sup> Quentin Skinner, “Meaning and Understanding in the History of Ideas,” History and Theory 8 (1969), 6-7.

<sup>513</sup> DiMeglio, Law of Armed-Conflict, 14.

<sup>514</sup> Kennedy, “International Law,” 110.

<sup>515</sup> Hall, “The Persistent Spectre,” 271; Koskenniemi, The Gentle Civilizer, 179-209, 274-302.

<sup>516</sup> E.g., ICRC President, Gustave Moynier, “Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève,” Bulletin International 11 (April 1872): 125-26.

<sup>517</sup> E.g., Trial of the Major War Criminals, 1:221.

coincidence that this occurred in parallel with the post-Cold War reawakening of international law. Those refuting the myth sought to strengthen the legitimacy of international law by showing that adherence to transnational legal norms and institutions was a longstanding social practice, and that a State with unlimited sovereignty never existed.<sup>518</sup>

Nevertheless, ICL's pre-Nuremberg history remains unacknowledged, and both opponents and supporters of ICL continue to assume that it was created only after WWII to punish individuals based on retroactive law, and thereby in violation of core principles of justice. ICL supporters are, thus, forced to justify ICL's supposed past injustices and persuade skeptics that today ICL is far more just than it was at its "birth."<sup>519</sup> But legitimizing a system with an allegedly questionable track record is a difficult task,<sup>520</sup> especially when opponents exploit the accepted narrative to assert that what was "born in sin" can never become just.<sup>521</sup>

Two misguided assumptions with positivist origins explain why debunking the Westphalian myth has had little effect on ICL. One is the premise that criminal justice is by nature a State function; the other the belief that there is a longstanding clear jurisprudential divide between domestic and international law. Based on these assumptions, jurists tend to focus on the actions of international tribunals.<sup>522</sup> Many even adopt an institution-oriented definition of ICL, as opposed to a broader, norms-oriented one. Under the broader definition, any case in which ICL norms are enforced should be regarded as an action of the international criminal justice system, even if adjudicated by a municipal court. By contrast, under the narrower institution-oriented definition, war crimes prosecuted in municipal courts are considered to be domestic actions. Only rulings rendered by tribunals that cannot be considered domestic organs (e.g., because judges are not all subject to a single sovereign) are regarded as ICL actions.<sup>523</sup> Based on the institution-oriented definition, many jurists conclude that, regardless of any pre-WWII war crimes prosecution, ICL was born at Nuremberg, supposedly the first transnational criminal tribunal (or the second, for those who remember von-Hagenbach).<sup>524</sup> ICL opponents further point

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<sup>518</sup> Osiander, "Sovereignty," 283.

<sup>519</sup> E.g., Luban, "Fairness to Rightness," 569.

<sup>520</sup> The reference here is to sociological legitimacy (perceptions of justified authority); See, Nienke Grossman, "Legitimacy and International Adjudicative Bodies," George Washington International Law Review 41 (2009): 116.

<sup>521</sup> E.g., Makau Mutua, "From Nuremberg to the Rwanda Tribunal: Justice or Retribution?," Buffalo Human Rights Law Review 8 (2000): 79-82.

<sup>522</sup> Alexander Greenawalt, "The Pluralism of International Criminal Law," Indiana Law Journal 86 (2011): 1111.

<sup>523</sup> See Peter Wismer, "Bringing Down the Walls! On the Ever-Increasing Dynamic Between the National and International Domains," Chinese Journal of International Law 5 (2006): 549.

<sup>524</sup> Antonio Cassese, "The Rationale for International Criminal Justice," in Oxford Companion, 128.

to such tribunals' alleged novelty to support their claim that these tribunals, and ICL in general, are anomalies, placing on ICL supporters the heavy burden of justifying what is considered a deviation from the general norm.<sup>525</sup>

But, the institution-oriented definition of ICL is flawed because it rests on false premises (already refuted in this article). First, until the nineteenth century there was generally no sharp distinction between international and domestic criminal law. Second, for centuries, when enforcing international laws, armed-forces considered their penal forums to be organs of a transnational criminal justice network.<sup>526</sup> Thus, pre-WWII cases adjudicated by these military forums should be regarded as ICL precedents.

An overlooked expression of the transnational network ethos is the fairly common, centuries-long practice of military powers to form transnational criminal tribunals to punish war-related and intervention-related violations of international law. Scilicet, Nuremberg was not the first, neither only the second, transnational criminal tribunal. Prominent examples of such overlooked tribunals are the Imperial Chamber Court and Aulic Council (1490s-1806), which gradually transformed into international tribunals, as princedoms of the Holy Roman Empire became sovereign States.<sup>527</sup> Their jurisdiction went beyond the non-penal, post-Westphalian authority, previously mentioned. These tribunals were originally created to punish "disturbers of the peace," in the sense of individuals who initiated illegal wars (committed aggression) within the Holy Roman Empire's realm, and they also had jurisdiction over the international crime of tyranny when it was committed by rulers of the Holy Roman Empire's princedoms.<sup>528</sup> Prussian King Fredrick's outlawry was, actually, a sentence rendered by the Aulic Council, subsequently confirmed by the empire's princedoms and supported by other European powers.<sup>529</sup> Although efforts to punish Fredrick failed, other sentences were successfully enforced, as Trim notes:<sup>530</sup>

[T]he Imperial Aulic Council... had its composition altered at Westphalia, making it both a more representative and a far more consensual body. In consequence, in the late seventeenth century and throughout the eighteenth century it was more active and assertive, intervening [to] constrain tyrannical rulers. On numerous occasions over the

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<sup>525</sup> See Beaulac, "Westphalian Model," 185, 206-13.

<sup>526</sup> See above Section 4(d).

<sup>527</sup> See above notes 210-211 and accompanying text; *Chisholm v. Georgia*, U.S. Lexis 249, 14 (1793) (U.S. Attorney-General: "The Princes... are distinct sovereignties. And, yet, both the Imperial Chamber and the Aulic Council hear and determine the complaints of individuals against Princes").

<sup>528</sup> Trim, "Intervention," 39-40.

<sup>529</sup> John Almon, *An Impartial History of the Late War* (London: Johnson, 1763), 175.

<sup>530</sup> Trim, "Intervention," 39-40.

century following Westphalia, ruling princes were deposed, or suspended from power, by the Council, ‘for... disturbing the peace... and abuse of power.’ They included... William-Hyacinth of Nassau-Siegen [who] ‘was sanctioned in 1709 for mistreating his Protestant subjects’ [and] [t]he ‘tyrannical Duke Karl Leopold of Mecklenburg’ [who was] ‘eventually deposed in 1728’ on the grounds of his repeated attempts, using harsh measures, to deprive his subjects ‘of their age-old privileges, freedoms and rights.’ ...[T]hese interventions... show that the notion... that some types of princely behavior were simply too extreme to be countenanced by other princes was widely accepted. Despite the Westphalian ‘myth,’ this remained true in the century after Westphalia.

The Imperial Chamber Court and Aulic Council are only two examples of transnational criminal tribunals. Such (usually ad hoc) tribunals existed in every century, from the late Middle-Ages onward.<sup>531</sup> I avoided discussing the history of such tribunals at length, mainly because focusing on them would lend legitimacy to the flawed institution-oriented definition of ICL, which this article challenges.

The narrow, institution-oriented definition reflects jurisprudential shortsightedness, even regarding current ICL. Even contemporary positivists acknowledge that occasionally more than one legal system applies to the same group of people. In these situations the competing legal systems often reach a compromise, whereby both systems agree on the content of the legal arrangement to be applied, but “agree to disagree” on the origins of individuals’ duty to abide by this legal arrangement, each one asserting that the obligatory force of its own laws is the source of that duty.<sup>532</sup> A quintessential example of such a compromise is the relationship between the EU legal system and domestic European legal systems. Are the rulings of domestic courts enforcing EU directives considered the judicial action of the domestic legal system, or of the transnational (EU) system? The answer depends on who is being asked. Constitutional courts of member-States insist that domestic courts’ duty to apply EU law derives from domestic law that gives force to EU norms. The European Court of Justice maintains that these courts are duty-bound to apply EU law because that transnational law supersedes the members’ domestic laws.<sup>533</sup> Domestic rulings enforcing EU law should therefore be objectively labeled as

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<sup>531</sup> E.g., (1) Keen, *Laws*, 32-40, 48-50 (fourteenth and fifteenth centuries tribunals); (2) J. Keith Cheetham, *On the Trial of Mary Queen of Scots* (1999), 120 (a 16th century tribunal); (3) Treaty Concluded between Salim Agah and Hetman Stanislaw Koniecpolski (Aug. 19, 1634), Art. 1, English translation in Dariusz Kolodziejczyk, *Ottoman-Polish Diplomatic Relations* (2000), 496 (a 17th-century tribunal); (4) U.S. Treaty with the Delawares, 7 Stat. 13 (Sept. 17, 1778) (a bipartisan tribunal agreed upon in the 18th-century); (5) Palmer, *Hazell’s Annual*, 103 (the British-American tribunal at Sichuan (1895)). I intend to discuss these and other tribunals in a future article.

<sup>532</sup> Itzhak Engelrad *Introduction to Jurisprudence* (1991), 75; Joseph Raz, *Practical Reason and Norms* (1999), 151.

<sup>533</sup> Margaret McCown, “Judicial Law-Making and European Integration: The European Court of Justice,” in *European Union: Power and Policy-Making*, ed. J.J. Richardson (2006), 173-76.

simultaneously the case-law of both the transnational and domestic legal systems. The same observation applies to ICL. Namely, even today, prosecution of core international crimes conducted at the State level should be considered the case-law of both the domestic and international criminal justice systems.

The myopic view of ICL that overemphasizes the proceedings of international tribunals not only reinforces the disregard for its pre-WWII history, but also leads to the underestimation of ICL's current effectiveness, in discounting the majority of ICL cases for not having been tried by international tribunals. For example, the prosecution of a few high-ranking officials at Nuremberg and Tokyo is a minor chapter in the saga of post-WWII prosecutions, the subsequent prosecution, in various countries, of tens of thousands of WWII perpetrators of core international crimes is simply usually overlooked.<sup>534</sup> Similarly, current criticism of ICL's effectiveness is often based on the fact that only a few cases have been prosecuted in recent decades by international tribunals.<sup>535</sup> But, a survey revealed that the international pressure applied during 1993-2008 to involved States to end impunity--through the conviction of 112 perpetrators of core international crimes, based on universal jurisdiction, mainly by international tribunals--resulted in, "[m]ore than 10,000 perpetrators [being] brought to justice in [involved] countries."<sup>536</sup> Thus, the excessive attention directed at international tribunals leads to an underestimation of ICL's effectiveness, resulting, again, in an unjustified questioning of its legitimacy.

## **Conclusion**

Myths are a powerful, persistent social force. Some can even be harmful, as they shape our outlook on important issues based on false information. Because myths can subconsciously affect even the behavior of those who are aware of their falsehood, it is often necessary to consciously combat their effect.<sup>537</sup>

In recent decades, scholars showed that international law had suffered from the harmful effect of the Westphalian Myth. Exposing its fallacy aided to legitimize the now-flourishing international law: State sovereignty ceased to be conceived as a longstanding social fact, and international law is no longer viewed as a recent assault on that sovereignty.

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<sup>534</sup> Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes (2008), 104-113.

<sup>535</sup> E.g., Jeremy Rabkin, "Global Criminal Justice: An Idea Whose Time Has Passed," Cornell International Law Journal 38 (2005): 767-768.

<sup>536</sup> Joseph Rikhof, "Fewer Places to Hide? The Impact of Domestic War Criminals Prosecution on International Impunity," Criminal Law Forum 20 (2009): 51.

<sup>537</sup> Ashley Montagu, Man's Most Dangerous Myth (1997), 41; Beaulac, "Westphalian Model," 186-188.

But, the Westphalian Myth has had stronger ramifications than commonly acknowledged. Aided by other factors, it generated the “Nuremberg Myth,” according to which ICL is a post-WWII creation, dismissing the relevance of pre-WWII cases to present-day ICL. This article refuted the claims currently presented as bases for that dismissal. It showed that ICL has developed in a process spanning centuries, continuously anchored in the same transnational doctrine and that throughout its long history ICL enforcement was far from negligible. The current fixation on international tribunals was also shown to be misguided.

The article does not intend to belittle the significance of the international criminal tribunals created since WWII. Nevertheless, the Nuremberg Myth’s harmful effects cannot be ignored. It leads to the disregard of most ICL cases (those adjudicated at the State level), which results in a grave underestimation of ICL’s effectiveness, past and present. Furthermore, the related mistaken view that ICL was born in sin cast doubt about its capacity for justice. For all these reasons, and for historical accuracy, the Nuremberg Myth must be set aside and the true, centuries-long history of ICL acknowledged.