The Capture of International Criminal Law:

Politics, Struggle, and Expertise

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Abstract

There is widespread agreement that International Criminal Law (ICL) should be practiced within a courtroom by independent, apolitical legal experts—international lawyers—who pursue justice in the name of humanity. This "common sense" vision dominates contemporary understandings of legitimate ICL, to the extent that both critics and supporters of the ICL project speak in the same idiom. However, this hegemonic vision is a recent construction. ICL was once a sphere of "high politics" and vengeance, rather than expert judicial procedure. How and why did modern ICL come to take this form? Where do the field's defining assumptions and practices come from? How and why was ICL transformed from a state-run field defined by the norms of "high politics" and diplomacy to one characterized by de-politicized judicial expert rule in the name of individual human rights?

Drawing on insights from historical institutionalism, sociology, and studies of legitimation in international politics, this dissertation argues that the ICL field has been subject to a phenomenon that I label "expert capture." This refers to the process through which legal experts have gained power to shape the "common-sense" norms, membership, practices, and goals of ICL, often in defiance of states. Furthermore, I argue that ICL's expert capture was enabled by specific patterns of legitimation and institution-building that characterized ICL in the nineteenth and twentieth centuries. These patterns contributed to a dynamic that I refer to as the "expert legitimation trap," in which states' initial reliance on expert advice as a source of legitimacy unintentionally opened the door for expert legal practitioners to claim authority in later institutions. By relying on experts to legitimate and operationalize their favoured policies during critical moments of ICL practice, powerful states helped to establish legal experts as the authoritative ICL actors *par excellence*. This strategy helped establish such experts as powerful actors in their own right, making it increasingly difficult for states to reclaim exclusive authority. Such experts could then (re)shape the field in their own (rhetorically apolitical) image. In this way, powerful states unintentionally empowered expert practitioners to innovate, defy and exclude states, and expand ICL's goals and practices.

This dissertation outlines the constitutive elements of modern ICL "common sense." Then, the dissertation examines four critical junctures in the history of modern ICL institution-building and practice: the 1815 exile of Napoleon Bonaparte, the 1919 attempt to prosecute Kaiser Wilhelm II, the 1940s' Nuremberg and Tokyo Tribunals, and the 1990s' International Criminal Tribunals for the former Yugoslavia and Rwanda. Drawing upon extensive archival research, I demonstrate how these episodes were crucibles for change in ICL common sense, as states, legal practitioners, and other actors struggled to articulate, legitimate, and defend different visions of the field. These episodes reveal how ICL's legalization, judicialization, and expert capture unfolded in fits and starts. In addition to these critical junctures, this dissertation considers the apparently "quiet" periods of equilibrium between major ICL episodes. This highlights the legacies of each critical juncture and illuminates how ICL continued to evolve during periods when powerful states turned their backs on the field, but practitioners remained engaged. Its contributions include introducing the concept of expert capture and exploring the dynamics of the expert legitimation trap. The project also contributes to scholarship on the history of ICL; critical approaches to ICL; and legitimation and change in international practices and global governance.

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Acronyms

ACN	Advisory Committee on Nominations to the International Criminal Court
AIDP	International Association of Penal Law ("Association Internationale de Droit Pénal")
ASIL	American Society of International Law
DO	Dominions Office (UK)
EU	European Union
FEC	Far Eastern Commission
FEICC	Foundation for the Establishment of an International Criminal Court
FO	Foreign Office (UK)
FRUS	Foreign Relations of the United States series (US State Department Archives)
ICC	International Criminal Court
ICJ	International Commission of Jurists
ICL	International Criminal Law
ICLC	International Criminal Law Commission
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IL	International Law
ILC	International Law Commission
IMT	International Military Tribunal ("The Nuremberg Tribunal")
IMTFE	International Military Tribunal for the Far East ("The Tokyo Tribunal")
IO(s)	International Organization(s)
IR	International Relations
LCO	Lord Chancellor's Office (UK)
NGO(s)	Non-Governmental Organization(s)
OTP	Office of the Prosecutor (of the ICTY)
RPE	Rules of Procedure and Evidence
SCAP	Supreme Commander for the Allied Powers (Japan)
TNA	The National Archives, United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series

Introduction: The Capture of International Criminal Law

When the International Criminal Court (ICC) issued arrest warrants against Vladimir Putin and Maria Alekseyevna Lvova-Belova in 2023, Russia argued the charges were "obviously illegal" and politically motivated.[1] Three days after the ICC announcement, the Russian Investigative Committee opened a criminal case against Karim Khan, the ICC's Chief Prosecutor, and some ICC judges for "knowingly" accusing "an innocent person" of a "grave crime" and for "assault on… persons enjoying international protection… for the purpose of provoking war or of complicating international relations," which are criminalized under the Russian Criminal Code.[2][3] Russia's actions triggered outraged accusations of politicized justice. The European Union (EU) "deplored" Russia's accusations as "retaliatory" and "unacceptable."[4] The EU expressed its commitment to defend the ICC "from any outside interference aimed at obstructing… and undermining the international system of criminal justice;" to lead "the fight against impunity," the ICC needed freedom to work "independently and impartially."[5] This language mirrored the way Khan and his ICC colleagues had spoken about the Situation in Ukraine since opening an investigation in 2022. Khan frequently reiterated his commitment to "ensuring… investigations… are conducted objectively and independently."[6] In April 2022, Khan told the United Nations Security Council (UNSC): "this is a time when we need to mobilize the law and send it into battle, not on the side of Ukraine against the Russian Federation or… [vice versa], but on the side of humanity to protect, to preserve, to shield people."[7] Khan told the Russian delegate: "my Office and myself have no agenda, *no political agenda* other than to get to the truth."[8]

Despite their mutual hostility, Russia, the EU, and the ICC agree on one fundamental point: International Criminal Law (ICL)—and international justice more generally—should be independent and apolitical. If ICL is "infected" by politics, it becomes something that is not meaningfully legal, just, or legitimate. These actors share this foundational expectation and normative vocabulary, along with a constellation of related ideas. This was not always the case; just over one hundred years ago, in 1919, plans to prosecute Kaiser Wilhelm II for war crimes were celebrated as a "high political" project where law and judicial processes might play a supportive role at most. Later, in the 1940s, the Nuremberg tribunal was acknowledged as a "quasi-judicial" (and therefore quasi-political) enterprise, where politics and law would be mutually-reinforcing, rather than inherently at odds.[9] Today, this conception of the relationship between the "political" and the "legal" has disappeared from "common-sense" understandings about what is appropriate in ICL. The expectation that ICL be apolitical or even anti-political is widely shared, although actors do not all agree on what such impartiality should look like in practice or when it is obtained. To borrow from Nouwen and Werner: contemporary ICL institutions are expected to "steer clear

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[1] Trevelyan 2023.

[2] Jochecova 2023.

[3] *The Criminal Code of the Russian Federation,* 1996, Articles 299 and 360.

[4] Stano 2023.

[5] Stano 2023.

[6] Khan 2022a, 2022c.

[7] Khan 2022b.

[8] Khan 2022b.

[9] Flournoy to Hackworth, 14 April 1945, quoted in Sellars 2013, 82.

of politics, to subordinate politics to law, and to speak law to power."[10] This thesis asks: where did this vision of ICL come from, and how did it come to dominate? How did the International Criminal Law field come to look this way?

The Puzzle: Apolitical, Impartial, Expert, Humanitarian Justice

Is International Criminal Law a political matter, a legal one, or some combination of the two? Should ICL be practiced and enforced by legal experts, diplomats, or national politicians? For many civil society groups, journalists, members of the public, academics, practitioners, and supporters of the "international criminal justice project," the answers are so obvious that these questions may seem absurd.[11] Although there is widespread acknowledgment that existing ICL institutions are imperfect, there is also widespread agreement that ICL is ideally a matter for independent and apolitical legal experts—international criminal lawyers—who pursue justice in the name of humanity and human rights. Most critiques of existing ICL institutions are geared towards making ICL more closely align with this ideal.[12] Many other global governance institutions are subject to similar expectations. Rhetorically apolitical "expert" international institutions play key roles in modern global governance across diverse fields, including international law, public health, and economic governance.[13] The idea that technical expertise is or ought to be separate from politics is a cornerstone of contemporary discourse about international order. However, as a growing body of scholarship has demonstrated, all global governance is inherently political, even as practitioners at expert International Organizations (IOs) deny or minimize—or, to quote Louis and Maertens, actively "depoliticize"—the political dimensions of their actions.[14]

According to contemporary "common sense" about ICL, the ideal characteristics of an ICL institution are as follows: it is a court; it is independent and apolitical in that it is insulated from state interference; it is staffed by legal experts committed to the ICL project, adaptability, and collegiality; and it protects human rights and engages in outreach to victims and affected communities.[15] These are the conventional understandings of *how* ICL should be practiced; *who* should practice it; and *what* it should be about. These are key features of the hegemonic ideal in the field today, although alternate visions and critical voices exist, usually in the field's periphery.[16]

Each of these constitutive aspects of contemporary ICL was hotly contested or unheard of a century ago, and most remained controversial into the twentieth century. For example, the idea that international criminal justice should take place in an international courtroom was debated even during the Nuremberg and Tokyo trials; the idea that practitioners at such courts should not receive direct instructions from their home governments took even longer to gain widespread adherence, as did the idea that ICL ought to foreground individual human rights. Indeed, to cite one example, the proposal that ICL judges should be impartial did not gain widespread acceptance

[10] Nouwen and Werner 2011, 942.
[11] Mégret 2014, 17.
[12] Baars 2014, 197; Mégret 2014, 18.
[13] Eijking 2022a; Diane Stone 2017; Barnett and Finnemore 2004; Kennedy 2005.
[14] Louis and Maertens 2021; Sending 2015; Kennedy 2016.
[15] Schwöbel 2014b.
[16] Nouwen and Werner 2011; Schwöbel 2014a; Moyn 2013.

until the 1990s. Famously, one judge at the post-World War II Tokyo Tribunal had been a victim of the alleged crimes of the accused; another had investigated Japanese war crimes before being appointed to the bench.[17] It is safe to say that neither would be well-received in the modern ICC. Today, these "common-sense" expectations underpin international and national jurisprudence, institutions, legal education, and global trends.[18] Many appear to be timeless, yet they crystallized relatively recently. The ICL field as it exists today would have been almost unrecognizable to the statesmen and lawyers of 1919 or even 1949, to say nothing of the statesmen of 1815, who held very different ideas about the nature of international justice and institutions.

The practices, actors, and discourse of international criminal justice as we know them today are products of significant and ongoing transformations. For much of its history, ICL was considered a matter of "high politics," the domain of policymakers and diplomats. Far from acting as independent trustees, decision-makers, or judges, the lawyers involved in early ICL attempts were expected merely to justify national governments' decisions or provide advice, and later to serve as representatives of their home states. Today, ICL practitioners are expected to act as independent trustees and wield significant normative and decision-making power in global governance. Modern ICL is also practiced by a particular kind of professional, with specific professional and ideological credentials that were unattainable or unnecessary in earlier eras. Although today ICL is understood to protect the innocent from war crimes and abuses, for most of its history, the field was animated by the outspoken desire to avenge abuses and protect the international hierarchy and *status quo*.[19] Similar shifts have taken place in other dimensions of ICL. Current understandings of *who* can legitimately practice ICL, *what* ICL is about, and *how* it is practiced should not be taken as natural or preordained; although justice is often framed as a timeless concept, the form of justice that contemporary ICL is expected to embody is a recent construction.[20]

The "invention" of this critical aspect of modern international order and global governance prompts the questions: how did ICL become defined by this constellation of factors, rather than some alternative? How and why did ICL go from being a state-run field defined by the norms of "high politics" and diplomacy to being characterized by de-politicized judicial expert rule in the name of individual human rights? These are the questions that drive this inquiry.

The Argument: Theorizing the Development of International Criminal Law

I make two interrelated arguments about ICL's transformation. First, I argue that ICL has undergone a process which I refer to as "expert capture." Through expert capture, professional "expert" practitioners have gained and consolidated authority and dominance over key constitutive aspects of the ICL field and discourse. Such practitioners shape norms of appropriate behaviour within ICL institutions; appropriate credentials for ICL practitioners; expected goals and ethos;

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[17] Delfin Jaranilla of the Philippines was a victim of the "Bataan Death March." William Webb of Australia reported on "Japanese Atrocities and Breaches of the rules of Warfare" before his appointment.

[18] Sikkink 2011; Moyn 2014, 2013; Raimondo 2010.

[19] Sellars 2013, ix-x and 12-13; 2016b, 27.

[20] Moyn 2014, 54.

and relationships between ICL institutions, states, and other stakeholders.[21] Such experts play a dominant role in ICL and thereby shape and defend its "rules of the game." In acting as gatekeepers of legitimate action and actor-hood, they wield power. Put another way, ICL has been rationalized and expertized, as ICL professionals have become an "un-ignorable" force in the field.[22] This process has transformed ICL into a domain defined by legal expertise. I draw upon scholarship relating to expertise, discursive practice, and global governance to flesh out this phenomenon and its implications. I also leverage concepts borrowed from the sociology of Pierre Bourdieu, historical institutionalism, practice theory, and studies of legitimation to examine the process of expert capture and the change that it engenders.

Second, I argue that the expert capture of ICL was enabled by a mechanism that I label the "expert legitimation trap." In brief, by relying on experts and expert knowledge to legitimate, justify, and operationalize state policies during critical moments of ICL practice, states gradually and often unintentionally enabled legal experts to become *the* authoritative ICL actors *par excellence*. In an effort to legitimize their ICL-related policies and institutions, states repeatedly cited legal expertise as an authoritative source. However, over time, this strategy helped establish experts as powerful actors in their own right. Once established, this delegation proved difficult to reverse, both due to the potential legitimacy cost associated with overt political intrusion into an increasingly expertized field and due to the actions of legal practitioners, especially actions aimed at insulating and disciplining the field from within.

This made it increasingly difficult for states to control the actions of such experts or reclaim authority over ICL's common-sense practices and ideas.[23] In this way, the ICL field and institutions gained discursive and institutional autonomy from conventional state and multilateral politics. Thus, expert capture was enabled by powerful states and can be seen as an unintended long-term consequence of the rhetorical legitimation strategies they deployed in short-term institution-building contexts. If experts are the only actors who can credibly claim legitimacy and authority in ICL, then any state wishing to curtail or influence experts' actions confronts a significant dilemma. Such a state risks undermining both the legitimacy of those experts and the state's own standing, along with the credibility of modern ICL in general.

This "trap" was generated and reinforced by the patterns of legitimation, contestation, and institution-building that characterized ICL throughout most of its history. The process by which apolitical judicial expertise came to define the field was locked in not only by decisions and arguments made (by implicated states and experts) during critical moments of ICL institution-building and practice but also by developments during the apparently quiet periods in between. The "boom-and-bust" of state interest in international criminal law was significant. Although powerful states periodically lost interest in the practice of ICL, legal experts did not. For instance,

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[21] I refer to these aspects as ICL's "common sense" or "rules of the game." ICL common sense is further discussed in Chapter One.

[22] Weber, 958 and 1001-1002

[23] I refer to this dynamic as a "trap" in partial reference to "rhetorical entrapment;" the expert legitimation trap includes forms of both rhetorical entrapment and structural and institutional "stickiness." See Schimmelfennig 2001; Petrova 2016. The "trap" language is not intended to make a claim about the intentions of the actors involved.

the periods of great power disengagement during the Cold War and the Interwar period left expert practitioners and scholars alone in the field, giving them latitude to refine and consolidate innovations and practices introduced in earlier institutions. Although prominent states remained key institution-builders, they relinquished control over ICL's common-sense practices and ideas by elevating experts as authoritative actors and then leaving them to their own devices.

I now turn to elaborating these two arguments, including their relationship to cognate concepts, in greater theoretical detail.

Argument One: Expert Capture

Legal experts and expertise have played an increasingly prominent role in narrowing and defining constitutive elements of ICL, including by asserting autonomy from powerful states. Intuitively, many other fields of modern global governance have also been subject to "expert capture." This refers to the process by which a largely self-defined group of experts (in this case, legal professionals) gains dominance over the common-sense ideas of a field or institution. Such experts are thereby able to shape and defend the "rules of the game" of their field or institution, including its membership, boundaries, and standards of legitimate practice. Experts function not only as practitioners but as gatekeepers of legitimate action and actorhood. These actors shape discourse and regulate access to the core of the field, determining who may speak and act in its name, what counts as legitimate action, and which arguments are considered (un)persuasive or (im)proper. Practically, such capture may manifest in experts' power to make decisions, set and judge credentials for entry into institutions, and identify (in)appropriate behaviour. Crucially, expert capture entails expert dominance over a field but does not imply that such dominance is uncontested. Expert capture is continuously re-produced and subject to destabilization. Likewise, expert capture does not entail perfect internal unity. Intra-field heterogeneity is a crucial driver of struggle, compromise, and change, even (or perhaps especially) within a captured field.[24] Instead, expert capture marks a condition in which expert authority is the most valuable and legibly legitimate form of capital in a field.

In a "captured" field, claims to expert authority are understood to be more legitimate than claims to other forms of knowledge and authority, such as moral authority or delegated authority.[25] In contemporary ICL, expert authority is deemed the most valuable source of legitimacy. This is evident in contemporary practice. When applying for arrest warrants in the situation in Israel and Palestine, ICC Prosecutor Karim Khan noted his "independent" investigation was supported by (other) "impartial" experts of "immense standing."[26] He did *not* appeal to the ICC's delegated authority under the Rome Statute or his own election by ICC States Parties to justify the warrants; such arguments are rarely used as grounds for legitimacy in ICL.[27] Nor did he dwell solely on the moral dimensions of the ICC's work, framing alleged offenses primarily as international crimes

[24] Intra-field differences can be crippling or generative (or both), depending on how coherent or consolidated the field is with respect to shared behavioural norms and goals. The contrast between Chapters Five and Seven illustrates this difference.

[25] Barnett and Finnemore 2004, 25.

[26] Khan 2024.

[27] Mégret 2014, 27.

rather than only as violations of universal morality. Khan emphasized that "starvation" and "the denial of humanitarian relief constitute Rome Statute offences."[28] Other arguments one might advance about such acts—that they are contrary to natural law and just war theory or condemned by human conscience, religious leaders, humanist values, and scripture—went uncited. The idiom of impartial legal expertise is the most prominent tool deployed by the modern ICC and its supporters. This vernacular is even invoked by ICL institutions' critics, who denounce such institutions as overly political.[29] Similar dynamics are evident in the discourse surrounding the ICC's issuance of arrest warrants for Putin and Lvova-Belova, as described in the early part of this Introduction.[30]

Mégret assesses the situation bluntly, arguing that the field's current discourse indicates:

> the only real legitimacy of international criminal justice is the one that it manages to build for itself as a result of its particular power as a field and its ability to claim a certain degree of expertise… or pose as the arbiter of different forms of knowledge about crime, international relations and justice.[31]

Mégret identifies a major pitfall of this focus on expertise: modern ICL "tends naturally towards a self-referential and elite legitimacy, one driven by the needs of the discipline within which it is embedded."[32] The practice of ICL, especially within central institutions of the field, entails not only the interpretation and application of international law, but also adherence to and maintenance of elite expert standards (which also form part of ICL common sense). In this sense, to competently practice ICL is to participate in disciplining the field.

As Sending summarizes, authority may be viewed as a question of "on what grounds recognition is sought and accorded from others and… how some actors are able to impose the evaluative criteria in accordance with which others are compelled to seek recognition."[33] Through expert capture, professional and expert communities and practitioners gain the power to shape the evaluative criteria for practice in a given field, and expertise becomes a key determinant of recognition and power. In one example of this phenomenon in ICL, consider the role of the Advisory Committee on the Nominations of Judges to the ICC (ACN), which has vetted and evaluated all nominees to the ICC bench since 2013. The ACN is composed of "independent members with knowledge and vast experience in relevant areas of international justice" and was created to function as an "independent organism" with the "legitimacy" and technical knowledge to assess judicial candidates' professional and ideological credentials.[34] The ACN's evaluations have become increasingly detailed over time, as have its reports about candidates' suitability.[35] The ACN examines candidates' education and professional experience, subjective ideas about ICL and

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[28] Khan 2024.
[29] Krever 2014, 117-118.
[30] Trevelyan 2023.
[31] Mégret 2014, 28.
[32] Mégret 2014, 28.
[33] Sending 2015, 7.
[34] ICC-ASP/10/36, 2-3.
[35] For example: ICC-ASP/10/36; ICC-ASP/12/23; ICC-ASP/12/47; ICC-ASP/19/11; ICC-ASP/22/4.

the ICC, and commitment to ideological tenets valued by the ACN. The ACN does not nominate candidates but plays an increasingly significant role in UN states' evaluations of which candidates are (under)qualified or (in)appropriate choices when casting their votes.

This is not to say that other actors, such as states, play no role in attributing expertise. Rather, first, the ability to credibly claim a particular form of international legal expertise is generally viewed as foundational to the legitimacy of modern ICL. Second, professional communities and organizations play crucial roles in adjudicating such claims. Scholarship on the politics of expertise in domestic and international societies reminds us that expertise is a politically attributed label, rather than an inherent quality of individuals.[36] The question of what credentials are necessary for a particular individual to "count" as an expert in international law is a political one; the answer to which varies over time and between societies. The story of the evolution of ICL is also the story of the professionalization and standardization of ICL as a field, and of the ways governments and international bodies have viewed the question of what characteristics are necessary for an individual to be acknowledged as an "expert."[37] Today, the "invisible college" of ICL academics and professionals plays a central role in delineating and evaluating such credentials.[38] As a result, individuals appointed to core modern ICL institutions bear certain similarities (in education, philosophy, and background). This was not the case in earlier eras, when individual states attributed expert status on an *ad hoc* basis with limited advice from legal practitioners.

The observation that expertise in general and legal expertise in particular are increasingly important in modern international politics is not new.[39] However, the concept of "expert capture" is, and it has analytical purchase for examining the ICL's development. As Edward Keene writes, "[n]ew concepts and methods are valuable in so far as they promise deeper understanding, and hence greater theoretical insight."[40] The concept of expert capture is intended to provide greater theoretical insight into the complicated process of ICL's development, and hopefully into similar phenomena in other fields. The concept "adds value" and enables a deeper understanding of the shifts in ICL in several ways.

First, this concept allows me to identify, systematically examine, and theorize historical change in the discourse and practice of international criminal justice. This illuminates significant but under-explored actors and dynamics in ICL, particularly the ongoing "struggle over the field;" this focus, in turn, allows us to turn away from a view of ICL's development as part of the harmonious "unfolding of law's master plan."[41] The label of "expert capture" brings several related but apparently disparate phenomena together under one conceptual umbrella. Rather than attempting to fully separate key constitutive elements of the ICL field—such as its practices, membership, forms of capital, and norms of behaviour—the concept of expert capture enables a holistic approach to these interconnected issues.

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[36] Sending 2015; Kennedy 2016, 2005.
[37] Dezalay and Madsen 2012, 437 and 440.
[38] Schachter 1977.
[39] Kennedy 2005.
[40] Keene 2014, 672.
[41] Mégret 2002, 1262; Schiff 2008; Sikkink 2011.

Second, the notion of "capture" foregrounds the power dynamics and struggle that characterize any field and moves away from a view of ICL's development as pre-determined. The modern ICL field has been and continues to be "captured" and dominated by one group of actors—experts—who uphold and impose a particular body of norms and ideas—the "international criminal justice project."[42] As part of this capture, other actors, norms, and ideas are marginalized, excluded, or stigmatized. The appearance of broad agreement about ICL's goals, means, and ethos should not blind us to the "roads not taken" and the disciplining and ordering which is inherent in the creation of a coherent discipline or mainstream orthodoxy.

In referring to "expert capture," I do not intend to import concepts that have similar names—such as "expert closure," "state capture," or "institutional capture"—but describe different phenomena. These concepts bear limited resemblance to "expert capture" as understood here, although "expert closure" is most similar.

Hellman, Jones, and Kaufmann understand "state capture" as a detrimental form of relationship between the state and firms. These scholars define "state capture" as firms' efforts to turn the state to their advantage by "*shaping the formation of the basic rules of the game* (i.e. laws, rules, decrees and regulations) through *illicit* and non-transparent private payments to public officials."[43] Lazega and Mounier build on this in their investigation of the French banking industry's "institutional capture" of the Commercial Court of Paris. Lazega and Mounier broaden Hellman et al.'s definition to "involve corporatist efforts to design or redesign institutions, to influence decision making… and to obtain collective gains for interest groups… A court can thus be captured inasmuch as interest groups are successful in using their influence to benefit systematically from its decisions."[44]

In contrast, I am reluctant to construct a definition of "expert capture" which pre-supposes either the motives driving this phenomenon (such as a desire for "collective gains" or financial advantage) or the means through which such capture is achieved (such as "illicit payments"). Instead, I investigate the processes that enable and contribute to expert capture as a structural outcome, and some possible effects of expert capture. As this thesis' empirics demonstrate, the drivers of ICL's expert capture were varied and are difficult to untangle empirically. It is reasonable to expect that the actors who have driven the "expert capture" of ICL were motivated by a combination of logics of appropriateness, consequences, and practicality.[45] The desire for personal and professional advancement, position, and prestige are undoubtedly as important for ICL scholars and practitioners as they are in other disciplines.[46] Likewise, the desire to behave appropriately (and, one might add, morally) looms large as a driver of actors' behaviour in the episodes examined by this thesis. Furthermore, the application and replication of pre-existing knowledge and habits of mind (or *habitus*) is a strong force in ICL, especially in its more recent

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[42] Mégret 2014, 17.

[43] Joel Hellman, Jones, and Kaufmann 2003, 756, emphasis added.

[44] Lazega and Mounier 2012, 125.

[45] Pouliot 2008.

[46] Mégret 2014, 45.

history.[47] In any case, it should be emphasized that I do not isolate any one motive for expert capture; I also do not argue that practitioners actively seek to capture a field over the long term. Regardless of actors' motives, I am concerned with the outcomes enabled by legitimation strategies and other ICL practices. In this respect, I take inspiration from Pouliot's investigation of how "webs of practices" and other aspects of the social environment enable certain kinds of action and change.[48]

Nevertheless, the concepts of "state capture" and "institutional capture" bear a resemblance to "expert capture" in that they refer to relationships or ongoing processes in which a particular group or class of actors holds the power to "shape the formation of the basic rules of the game."[49] Importantly, in all these forms of capture, the hegemony of one class of actors necessarily entails and depends on the marginalization and disciplining of others.

The most relevant related concept is "expert closure," which is most famously associated with Bruno Latour's *Science in Action*. For Latour, "expert closure" occurs when expert knowledge—which is always political and politically attributed—is invoked to "close" controversies in discussions of science and technology.[50] For Latour, this trump card—the claim to scientific expertise—functions to stunt or end debate about the nature of science itself. Scholars of participatory democracy import this concept to describe the phenomenon of technical experts claiming ownership over policy- and decision-making processes and preventing participation from other groups with other claims to knowledge or authority—such as democratic representativeness.[51] Similar struggles over legitimate authority, actorhood, and practices can also be seen in the process of expert capture. As contemporary expert-led ICL common sense has come to dominate, other forms of argument, capital, and legitimation have been marginalized and excluded. However, while Latour's "expert closure" ends debate and establishes "black boxes" of accepted fact, expert capture (re)orders the space of possible contestation—reshaping which arguments are legible, which practices are legitimate, which claims to knowledge are accepted, and which actors are qualified to speak. While "expert closure" can be "achieved," expert capture is a more dynamic and continuous process.

As Wacquant notes, in any field of practice:

> participants vie to establish monopoly over the species of capital effective in it—cultural authority in the artistic field, scientific authority in the scientific field…and the power to decree the hierarchy and 'conversion rates' between all forms of authority… In …these struggles, the very shape and divisions of the field become a central stake.[52]

A field which has been subject to expert capture is one in which experts have (momentarily) established a monopoly over dominant forms of capital and legitimate authority. More broadly,

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[47] Stappert 2018; Dezalay and Madsen 2012, 2017; Mistry 2017.

[48] Pouliot 2020.

[49] Joel Hellman, Jones, and Kaufmann 2003, 756.

[50] Latour 1987, 103.

[51] Baiocchi and Ganuza 2017; Baiocchi and Summers 2017.

[52] Bourdieu and Wacquant 1992, 17-18.

we might also think of a captured field as one which has become autonomous from other, related fields, in which other forms of capital are the currency of power. ICL has become autonomous from the (geo)political or diplomatic field, at least insofar as its ethos, purpose, membership, and legitimating discourses are distinct from those of such other fields. Empirically, ICL's history can be read as a long process of decoupling international criminal justice from international politics and national policymaking, in which the process of autonomization included the elevation of legal expertise and the drawing and maintenance of boundaries within the field and between the field and other spheres. I refer to these boundary-drawing dynamics as "disciplining" and "insulation," and return to them in the following section. This mirrors Swartz's summary of fields' development, in which "the driving force of… autonomous development… is the rise of corps specialists who are progressively able to develop, transmit, and control their own particular status culture."[53]

This raises the question: how does expert capture occur in general? And how did it unfold in ICL? As the empirical chapters of this thesis contend, the outcomes of historical discursive struggles over ICL facilitated the gradual expert capture of the field. Such struggles enabled experts to gain first a voice in ICL, and then increased legitimacy, influence, and decision-making power. Expert practitioners used these assets to further define and enforce internal norms and boundaries of the field (a process I refer to as "disciplining"), while also working to "insulate" ICL institutions from certain forms of external (state) interference. These mechanisms, combined with the normative tensions involved in any attempt to "re-politicize" an increasingly "depoliticized" field, made it more difficult for powerful states to undo their turn to expertise. Once expert capture was largely consolidated, the resulting dominance of a particular type of legal expertise shaped outcomes of later struggles. After gaining, and then defending and consolidating, power and authority in ICL, legal experts played central roles in (re)forming and defending ICL's mainstream "common sense" and adjudicating between different visions of justice. This brings us to my second argument.

Argument Two: Expert Legitimation Trap

The expert capture of ICL was enabled and reinforced by a mechanism that I label the "expert legitimation trap." During critical junctures of ICL institution-building and practice, powerful states appealed to legal professionals to legitimate and operationalize their favoured policies. This often served to render controversial policies more palatable, neutralize and discredit critics, stabilize coalitions, or signal impartiality. In the process, this reliance on expert legitimation endorsed legal professionals as authoritative actors. Powerful states elevated potential challengers to state control of the field. Once established in institutional roles, granted a voice in ICL, and armed with a legitimating idiom which transcended national interests or geopolitics, experts became ICL's authoritative actors *par excellence*. This dynamic made it increasingly difficult for states to control the actions of such experts or reassert full ownership over ICL's common sense. Citing expert advice can be a powerful tool to legitimate states' choices, but it can also be constraining. By inviting advice and putting experts in prominent institutional positions, powerful states empowered a class of actors who could challenge, reinterpret, or resist states' visions of ICL.

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[53] Swartz 1997, 127.

The expert legitimation trap illuminates how ICL's expert capture unfolded gradually and often indirectly. The field's capture was rarely a matter of deliberate and calculated usurpation but of contingent, path-dependent interactions between states' strategies of legitimation, experts' claims to and interpretations of authority, and other practices. The trap arose from and was reinforced by the patterns of legitimation, contestation, and institution-building which characterized the history of the field. In ICL, legal expertise quickly became a popular frame for statesmen seeking to legitimate or discredit proposed policies (even before legal professionals were widely involved in ICL decision-making), meaning that contestation over such policies referenced legal correctness, advice, and concepts (although often in a hazy or esoteric way). As a result, legal professionals (especially those in the increasingly influential IL profession) were well-positioned to claim authority, adjudicate between competing arguments, and translate ideas from their profession into the emerging ICL field. As legal professionals gained autonomy, they also began to contest and define the internal and external boundaries of the ICL field, through the processes of disciplining and insulation, respectively. As a result, powerful states' attempts to directly intervene in ICL institutions and treat the field as an extension of the geopolitical diplomatic sphere were frequently repelled and discredited. The "boom-and-bust" pattern of ICL institution-building and state attention furthered this process, as during the "bust" periods, IL professionals were largely unconstrained by states. In short, the expert legitimation trap illuminates how legitimation can backfire or have unforeseen consequences. In seeking to justify favoured outcomes through appeals to legal authority, states elevated a new group of actors. They also generated new constraints on their own future agency and permitted the creation of a discursive and institutional field of play which they could no longer fully control.

The dynamic of the expert legitimation trap resonates with broader IR scholarship on legitimation and discourse, enhancing our understanding of the "manifest political consequences of adopting one mode of representation over another."[54] Stacie Goddard has examined the unintended structural consequences of actors' legitimation strategies, including how such strategies can produce lock-in effects and construct issues in ways that constrain actors' autonomy and ability to resolve conflicts later. Goddard argues that issue indivisibility (including the indivisibility of territories like Jerusalem) is a "constructed phenomenon" which "depends on how actors legitimate their claims to territory during the bargaining process."[55] Such legitimation strategies' "unintended consequences" include "locking actors into bargaining positions" which produce stalemates and suboptimal outcomes.[56]

Studying Expert Capture and the Expert Legitimation Trap

To understand how the expert legitimation trap unfolded, we must pay attention to contests over legitimacy in ICL, including attempts to frame certain practices, actors, and concepts as legitimate while dismissing others. In examining contestation over ICL, I include discursive struggles over the framing and narration of ICL. By advocating for and seeking to justify favoured policy choices, powerful states, lawyers, and other actors have represented international criminal

[54] David Campbell 1992, 7.
[55] Goddard 2006, 36.
[56] Goddard 2006, 36-37.

law in particular ways, articulating "theories of ICL." Such theories rest on spoken or unspoken assumptions about who is qualified to practice ICL, the ways in which it should be practiced, and what its goals and audiences should be. Contestation over such policies and theories (re)shapes the *status quo* orthodoxy of ICL. The argument that Nazi officials should be summarily shot rests on a different understanding of the nature and purpose of international criminal justice than the argument that they should be put on trial. Likewise, prosecutorial decisions to eschew witness testimony in favour of documentary evidence, or to indict "mid-level" war criminals rather than "big fish" reflect and are justified through appeals to specific visions of international justice.[57] These representations constitute and produce ICL and legitimate or discredit particular practices and hierarchies. Such efforts have had real political consequences for the scope and common sense of ICL, including the current hegemony of the apolitical expert trustee model of ICL governance.

Practices, institutional configurations, actors, and policies once regarded as uncontroversial or acceptable in international criminal justice are now widely regarded as illegitimate, while others have appeared seemingly "out of nowhere" and come to dominate. For example, the idea that an ICL judge should receive instructions from his or her home state is no longer understood to be legitimate, while the idea that an ICL institution should engage directly with victims and witnesses is one of the most recent additions to ICL "common sense." This directs our attention to discursive practices of legitimation in international criminal law. While accepting that what is "obvious" in ICL has changed dramatically over time and is historically contingent and constructed, it is fruitful to examine the processes of such construction. Fortunately, there is a rich body of scholarship concerning discursive practices of legitimation and struggles over framing, which are central to political action. The work of David Campbell, and of so-called "thick constructivists," including Goddard, Adler-Nissen and Gammeltoft-Hansen, Krebs and Jackson, Pouliot, and Beaumont provides significant inspiration for this study.[58] This literature examines the discursive tools actors deploy to frame and narrate the world, legitimate their preferred actions, and delegitimate the preferences of their opponents. It also examines the structural and political consequences of deploying such tools. To chronicle the gradual expert capture of ICL and the development of modern ICL common sense I consider the visions—or *theories* of international criminal justice—which have been invoked to "do things" in ICL. In particular, I focus on the role of legal expertise and legal experts in such contests—both in terms of the role that experts have played as actors deploying discursive tools and in terms of the ways that experts and expertise have been invoked and characterized in ICL discourse. Notably, I find that expert authority has been invoked as a source of legitimacy in ICL for far longer than experts have had decision-making roles in the field.

In this vein, this project investigates the "manifest political consequences of adopting one mode of representation over another."[59] I examine the gradual ascendance—with modifications and challenges—of a particular vision of international criminal justice: the vision of independent judicial expertise, humanitarianism, and exceptionalism. This vision has been used to legitimate

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[57] Levi, Hagan, and Dezalay 2016.

[58] Adler-Nissen and Gammeltoft-Hansen 2008; Krebs and Jackson 2007; David Campbell 1992; Goddard 2006; Beaumont 2024, 18; Pouliot 2020.

[59] David Campbell 1992, 7.

some political choices and render others off-limits; appeals to expert authority have frequently been deployed by powerful states seeking to justify chosen policies. But this vision also enables actions that were unanticipated by the states who initially championed it—including the ability of modern ICL institutions to expand the scope of their mandates and introduce procedures that may undermine those states' power in ICL.

In addition to patterns of legitimation and contestation, I direct attention to episodic "boom and bust" patterns of ICL institution-building and practice, which furthered the expert capture of the field. Put simply, until the creation of the ICC at the end of the twentieth century, ICL was characterized by brief periods of practice and state interest, notably after the traumas of the Napoleonic war and the two world wars, followed by far longer periods of state inaction. By withdrawing from the field during these hiatuses, states left legal academics and practitioners to their own devices. While ICL was taken off states' policy agendas, legal professional associations, journals, and academic communities continued to debate, develop, and interpret ICL precedents and common sense. Experts were unintentionally given significant latitude to refine, consolidate, and contest the choices and innovations of previous ICL institutions. Consequently, by the time interested states returned to ICL during subsequent institution-building "booms," they generally found legal experts to be more autonomous, authoritative, and capable of capturing the field than they had been before. Thus, counterintuitively, crucial structuring conditions which enabled change in ICL's dominant narratives and practices were laid during quiet periods when it was impossible to enact ICL in practice, but possible to "play" without state interference.[60]

This brings me back to one of the major insights provided by this project's empirical analysis—that by "using" expertise to legitimate their political choices, powerful states may lay a "trap" for themselves later, hence why I refer to this as the "expert legitimation trap." Paradoxically, by elevating and deploying expertise as a source of legitimacy and authority, concerned states help create a form of authority (or capital) which may be "cashed-in" by other actors later, especially when such states do not control the attribution of expert status. Experts were initially, in early ICL episodes, empowered by western allied states to serve and justify state control of ICL. By inviting expert involvement and citing expertise to legitimate policymaking, these states established legal expertise as a source of authority in ICL. These states found it difficult to credibly withdraw their support later.

Delegation to legal experts proved difficult to reverse due to both positive feedback mechanisms and specific actions taken by legal experts. First, by embracing expert authority—a form of authority which rests on claims of objectivity and apoliticization—and specifically expert legal authority—with its strong moral connotations—powerful states set up a situation in which attempts to de-center expertise and reclaim control might draw accusations of cynical manipulation. Any attempt to reclaim sole power for states might undermine the perceived legitimacy of those states and the legitimacy of the ICL project as a whole. Second, as ICL began to be enacted in practice and the field became more consolidated, practitioners worked to discipline and insulate the field from within. "Insulation" refers to attempts to narrate and enforce a boundary between ICL institutions and their political principals and between ICL and other

[60] Krebs notes a similar dynamic driving narrative change in foreign policy narratives. Krebs 2015, 53 and 187.

fields, including that of international diplomacy. During the 1940s and 1990s, practitioners erected a semi-permeable membrane between tribunals and states, in which tribunals were protected from direct state interference. "Disciplining" refers to practitioners' efforts to shape and "discipline" the emerging "community" of ICL practice, including by establishing shared norms, ideologies, practices, knowledge, and resources for negotiating and resolving internal disagreements. In other words, by working to discipline the field, expert ICL practitioners began forging their own common sense and something like a "community of practice;" by insulating the field, they defined and enforced a boundary between states and certain areas of ICL practice. This boundary would be difficult for powerful states to cross without incurring significant costs, further illustrating the potential consequences of those states' embrace of legal expertise and legitimacy.

In seeking to gain the legitimacy that accompanies judicial institutions and empowering legal practitioners, states including the United States, Britain, and their allies "let the genie out of the bottle" and surrendered sole control of ICL's inner workings. These states' embrace of legal practitioners and ideas, particularly during the twentieth century, when international expertise was gaining prominence across many fields, played a crucial role in setting the stage for expert capture. The erstwhile great powers' subsequent decisions to reject or withdraw from ICL at various points during its early history then opened opportunities for recently (re)empowered legal practitioners to further develop their role in ICL without being directly answerable to states.

I develop this argument by focusing on four critical junctures: moments when the pressure to create ICL institutions or enact ICL forced practitioners and policymakers to articulate and contest different visions of their work to justify or discredit decisions. Such contestation often had transformative results. I consider one episode in ICL's pre-history—the 1815 attempt to punish Napoleon Bonaparte for his actions during the 'Hundred Days'—and three pivotal periods of ICL institution-building—the attempt to prosecute Kaiser Wilhelm II in 1919; the international military tribunals at Nuremberg and Tokyo in the 1940s; and the international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) in the 1990s. I examine the discursive moves and representations made by influential states, lawyers, and other actors during these episodes as they sought to support or block political and institutional choices and uphold their favoured vision of the field. I then chronicle how such choices and representations came to shape later episodes and modern ICL in general.

Broader Significance and Empirical Overview

An analysis of these episodes sheds light on a dynamic frequently neglected in ICL histories: the birth and rise of ICL expertise. Fundamental shifts in ICL cannot be understood without appreciating the power wielded by ICL practitioners and experts over the contours of their field, and the relative newness of that power. Although states create ICL institutions, the professional norms, credentials, and practices of the ICL field have, over time, frequently escaped the control of states. Judges at the Nuremberg and Tokyo tribunals, for example, openly defied or contested the expectations of the Allies.[61] Similarly, the ICTY defied its UNSC principals by creating unwanted procedures before the court opened its doors and then continued to expand its mandate

[61] Von Lingen 2018; Smith 1977.

in unforeseen directions.[62] While in 1815, national governments were "the only game in town"—the only ICL decision-makers—today, a strong and growing group of legal experts has a significant voice. In stark contrast to early efforts, and not always to the delight of powerful states, judicial independence, depoliticized expertise, and inventiveness have become the obvious foundations of a more autonomous ICL field. Indeed, in certain areas of contemporary ICL—such as the evaluation of practitioners' professional and ideological credentials for appointment to international courts—expert groups function as "symbolic hegemons." Groups like the ACN generate and uphold status markers and credentials in the field, playing a decisive role in determining who is elected to ICL institutions. As the strength, legitimacy, and membership of an ICL expert class have grown, even the most powerful states have relinquished or lost some of their freedom to shape, police, and define international criminal justice. Much of that power has been delegated to or claimed by experts, whose involvement has furthered the current—rhetorically apolitical, expert, judicial, and humanitarian—shape of the field. In tracing the history and development of ICL, this dissertation gives an account of how expert capture occurred—and continues to operate—in ICL.

When examining these critical junctures, I consider contestation over constitutive aspects of ICL, such as the credentials and goals of legitimate practitioners and the relationship between ICL and other fields. I consider changing answers to three interrelated questions: *how* should ICL be practiced; *who* should practice ICL; and *what* is ICL about? Relatedly, I examine the role that the concept of "legal expertise" played in each historical episode, how it was framed, and what actors sought to "do" with it. I return to these questions in Chapter One, which sketches ICL common sense. These questions illuminate how—and in what sequence—expert capture unfolded, with certain questions being more contentious in early episodes and others rising to prominence later. Overall, debates over the borders and behavioural norms of ICL—the *how* of the field—were more salient in earlier episodes. The early (legitimated) answers to these questions—and the vision of ICL on which they were premised—shaped ICL's *status quo* orthodoxy.

Insights derived from historical institutionalist literatures—including those relating to path dependence, punctuated equilibrium, and historical change—are highly relevant to this dissertation's account of change in the ICL field.[63] Practice theory also offers significant inspiration, especially accounts of how existing social environments and "webs of practices" shape action and enable or curtail particular innovations.[64] As the empirical cases examined in this dissertation demonstrate, early outcomes of struggles over ICL became locked in and difficult to alter later; in this way, the scope of ICL contestation has narrowed over time. While some ideas—such as the notion that ICL is a matter for courts—have become hegemonic, questions about which practitioners were welcome in the core of the field—the *who* of ICL—and the concepts, practices, and ethos of their work—the *what*—remained unsettled until later. In other words, expert capture in ICL has unfolded in rough stages, with legal practitioners first gaining entrée and a voice in international criminal justice, before asserting ownership of and power over the field, and then eventually imposing internal discipline on the field and expanding its scope. In examining

[62] Bass 2000.

[63] Pierson 2004.

[64] Pouliot 2020.

this process of path-dependent change in "fits-and-starts," this thesis contributes to literatures on change in international practices.[65]

Key Terms

To understand the expert capture of ICL, I suggest it is necessary to examine discursive struggles over visions of the field—which can also be understood as contests over legitimation and "common sense." It is reasonable to ask what these concepts—including "struggle," "field," and "common sense"—capture and how they interrelate. In this section, I explain key choices made in this project and consider what they illuminate and obscure. I draw on the work of Pierre Bourdieu and other scholars of (international) practices, including David Campbell, Vincent Pouliot, and scholars of discursive practice. I do not "apply" Bourdieu's (or any other scholar's) theories wholesale but leverage their concepts to think through my questions of interest. Concepts are useful insofar as they enhance our understanding or ability to describe a phenomenon of interest; it is in this spirit that they are adopted here.

The ICL Field

I characterize International Criminal Law as a "field," eschewing alternatives including "discourse," "discipline," or "community." I examine the foundational understandings that define and constrain ICL. This requires a concept that encompasses more than institutions, jurisprudence, academic debate, or states' preferences. The field concept allows me to consider ICL as a discourse and a practice, and appreciate its underlying tensions, power dynamics, and institutional sites. This concept also directs attention to struggles and rules of the game, which are important conceptual tools for this study. Characterizing ICL as a field foregrounds power, struggles, and contestation; such struggles have been central to ICL's transformation and have shaped the common sense of the contemporary field.

Characterizing ICL as a discipline would focus attention on one aspect of ICL—that which takes place in academic journals, universities, and research conferences—but obscure other forms of knowledge production. To borrow from Zunino, "the knowledge related" to ICL "is not limited to an academic pursuit; it includes the activity of policymakers, judges, and international organizations. Moreover, people from different disciplines participate in" the ICL "conversation."[66] To skirt this limitation, Zunino characterizes his topic of interest—Transitional Justice—as a "discourse," which encompasses "all kinds of knowledge referring to" a given social practice, including academic, journalistic, and critical voices.[67] I widen the aperture and embrace the field concept, which also encompasses practice, hierarchy, and norms of appropriate

[65] Ringmar 2014; Hopf 2017.
[66] Zunino 2019, 8.
[67] Zunino 2019, 6.

behaviour.[68] The field concept is "broader and more fluid than the concept of 'discipline'… Moreover, [it] covers both scholarship and practice."[69]

In comparison to the "community of practice" concept widely used in studies of international courts and organizations, the field concept more readily captures struggles and disagreements. This contrasts with the sense of shared knowledge, in-group cohesion, and purpose sometimes conveyed by the concept of community.[70] Given that one of the aims of this dissertation is to investigate changes in the conventional "common sense" of ICL, I eschew the community concept, which often presumes pre-existing shared "background knowledge" and practices. Although specific ICL institutions—such as the modern ICC—may fit the definition of a community of practice, it is misleading to apply this label to many historical ICL institutions, or to the inchoate groups of policymakers, lawyers, and others who debated and formed such institutions.[71]

Struggle and contestation are key features of any field; indeed, Bourdieu "forged" the field concept to "break away from the irenic vision of the social world conveyed by the notion of community" and "explode" harmonious and "vacuous" visions of societies.[72] Wacquant explains: "a differentiated society is… an ensemble of relatively autonomous spheres of 'play' that cannot be collapsed under an overall societal logic."[73] These "spheres of "play"" are fields. Scholars consider many different fields, including the academic, the scientific, the judicial, the artistic, and the religious, each of which has unique characteristics.[74] Wacquant continues:

> Each field prescribes… values and… principles [which]… delimit… space in which agents struggle… either to change or to preserve its boundaries and form… A field is simultaneously a *space of conflict and competition*, the analogy here being the battlefield, in which participants vie to establish monopoly over the species of capital effective in it—cultural authority in the artistic field, scientific authority in the scientific field… and the power to decree the hierarchy and 'conversion rates' between all forms of authority… In… these struggles, the very shape and divisions of the field become a central stake.[75]

Fields have been analogized to magnetic fields, sports fields, atomic fields, and battlefields. Each analogy highlights different characteristics, but all emphasize dynamism and competitiveness, including competition over authority. Like-mindedness is an exception to be explained, rather than a rule to be assumed or taken as axiomatic. Similarly, this characterization encompasses not only

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[68] Some scholars (Beaumont 2020) reject the distinction between "practice" and "discourse." Others (Neumann 2002) argue that discourse and practices should be considered together. I nevertheless find the field concept useful, especially since it provides a "way in" to considering struggles, contestation, and "play" by practitioners.

[69] Zunino 2019, 8.

[70] Adler and Pouliot 2011, 18.

[71] Early efforts generally lacked mutual engagement, joint enterprises, or shared repertoires. Wenger 1999, 49.

[72] Martin-Mazé 2017, 209; Bourdieu and Wacquant 1992, 16.

[73] Bourdieu and Wacquant 1992, 16-17.

[74] Bourdieu 1994, 1975; Bourdieu and Terdiman 1986.

[75] Bourdieu and Wacquant 1992, 17-18.

actors and institutions in the core or mainstream, but also those relegated to peripheral roles or contesting the *status quo*.

Although each field prescribes values and principles, agents do not necessarily share *moral* values. Contrary to the "joint enterprise" characterizing a "community of practice," agents in a field might have a shared understanding of the "rules of the game" but do not necessarily play on the same team.[76] This provides a promising lens through which to view change in practices in general, and changes in ICL in particular, since struggles to define goals, governance objects, and concepts are a key feature of modern global governance.[77] Discursive struggles over the rules, membership, and boundaries of ICL have defined and often driven change in ICL; characterizing ICL as a "field" puts such struggle front and center.

Struggles over Common Sense and Legitimation

I use the terms "rules of the game" and "common sense" to capture the underlying assumptions, norms, and concepts that constitute ICL. This includes representations of international criminal law and understandings of legitimate actor-hood, practices, hierarchy, and boundaries. As noted, contemporary "common sense" about ICL dictates that an ideal ICL institution is an independent and apolitical court staffed by legal experts committed to the ICL project, adaptability, collegiality, and human rights protection and outreach. This constellation of assumptions, concepts, and ideas form the *explanandum* of this thesis. These features are examined in more depth in Chapter One.

"Struggles" include not only contestation conforming to established norms of communicative action (as examined by scholars of "interpretive communities") but also contestation over deeper questions about the content of such norms and the boundaries and membership of a given field.[78] Such contestation is necessarily discursive, in that it concerns "discourse, the social processes and the systems of knowledge through which meaning is produced, fixed, lived, experienced, and transformed."[79] Discourse defines "the (im)possible, the (im)probable, the natural, the normal, what counts as a 'problem'."[80] In other words, it defines and delimits taken-for-granted common sense, and thereby produces and defines social identities and "the social fields of action" that actors view as imaginable, possible, and legitimate. Thus, it also forms part of the structure within which agents act, and which affords certain actions or innovations while rendering others more difficult or less visible.[81] An examination of struggles over ICL common sense therefore lends itself to the examination of struggles over the framing and legitimation of action in the ICL field. To use one example, the post-war Tokyo and Nuremberg tribunals were characterized by internal contestation over the meaning and relative value of different professional backgrounds, in addition to over the appropriate relationship between great power diplomacy and ICL.

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[76] Wenger 1999, 49.

[77] Avant, Finnemore, and Sell 2010; Barnett and Duvall 2005a; Barnett and Finnemore 2004.

[78] Johnstone 2005, 2003; Stappert 2020.

[79] Barnett and Duvall 2005b, 55.

[80] Hayward 2000, 35.

[81] Pouliot 2020, 749.

Practitioners regularly engage in contestation *according to* established norms of communicative action; debates in academic journals are one example of this, as is an MP's speech in parliament or a prosecutor's argument in an adversarial criminal trial. Such practices are anticipated by the norms of each institution and do not represent an existential challenge. IR and sociological scholarship on interpretive communities identifies many examples of contestation adhering to existing rules.[82] Likewise, Wenger's original conception of a "community of practice" notes practitioners' "shared repertoire" of practices and vocabulary can be "very heterogeneous," and contain "resources for *negotiating* meaning," including "routines, words, tools, ways of doing things…[and] discourse."[83] In such contexts "actors tacitly agree on the value of the capitals that are relevant to the field" and "compete" for symbolic resources.[84] For example, Johnstone has noted the importance of legal arguments for "justificatory discourse" and "discursive interaction" at the UNSC; in such a context, legal arguments are generally viewed as more legitimate than other forms of argument and reasoning.[85]

However, deeper struggles are also observable. As Bourdieu states, agents:

> constantly struggle, according to… the rules constitutive of this space of play (and, *in given conjunctures, over the rules themselves*), with various degrees of strength and… probabilities of success… Those who dominate in a given field are in a position to make it function to their advantage but… must always contend with the resistance, the claims, the contention, 'political' or otherwise, of the dominated.[86]

I view contests over framing and legitimation as frequently constituting or implicating struggles "over the rules," in that such contests see actors dispute the concepts, power, and authority relationships of the field.[87] In such struggles, actors may contest or defend the relative value of different forms of authority, capital, and status—including knowledge, credentials, and expertise. Such deep disputes may be quarrels over "justice and injustice," or over how "worth" is established; actors "quarrel over the justifications of their actions" and may "dispute how to test reality."[88] To return to the UNSC example, we can imagine that some actors might contest the hegemonic dominance of legal arguments in that forum, and seek to shore up the legitimacy of other forms of argument and authority—including humanitarian, moral, or economic ones—instead. Contests over rhetorical frames and legitimate authority represent one of the practical manifestations of such struggle. Indeed, since discursive practice constitutes the social world, it is through discursive contestation that change may occur.

Every historical attempt to create an ICL institution, practice ICL, or develop the field has seen contestation over the common-sense rules of ICL—over what "counts" as social capital and over the hegemonic actors, practices, concepts, and goals of ICL. In addition, later institutions,

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[82] Johnstone 2005, 2003; Martin-Mazé 2017, 214.
[83] Wenger 1999, 82-83.
[84] Martin-Mazé 2017, 213-214.
[85] Johnstone 2003.
[86] Bourdieu and Wacquant 1992, 102.
[87] Bourdieu and Wacquant 1992, 102.
[88] Martin-Mazé 2017, 213.

such as the ICTY and ICTR, also saw more mundane contests within the accepted boundaries and norms of the field (once those norms had been established in the wake of earlier episodes). Both kinds of contestation have had far-reaching consequences, whether by reinforcing a *status quo,* sending ICL off in a new direction, or introducing new jurisprudence and practices. The gradual narrowing of the scope of conflicts within ICL institutions over time also demonstrates the gradual expert capture of the field, as the hierarchies, social capital, and rules of the ICL field have become more strictly defined and consolidated and one form of legitimation has come to dominate.

Status Quo and Path Dependence

Such contestation does not begin "from scratch" every time. Choices made and legitimated—or de-legitimated—in one moment have downstream effects on actors' imagination, vocabulary, and range of possible action in subsequent moments. This is one of the many ways in which "history matters." As Skinner notes, "every revolutionary is…obliged to march backwards into battle."[89] The task of any "innovating ideologist" is "by definition… to legitimate a new range of social actions which… [his society's] existing… moral vocabulary… [frames as]… illegitimate."[90] He has "no option" but to attempt the difficult trick of demonstrating "that at least some of the terms" used to legitimate the existing approved *status quo* can be "applied to include and thus to legitimate" his own untoward revolutionary behaviour.[91] Likewise, as John Campbell notes, actors often draw on "a repertoire of already existing institutional principles and practices" to "innovate" and create "new institutions which differ from but resemble old ones."[92] To move forward into the future, and to constitute the present, we are obliged to reference, narrate, and draw on the past. Likewise, constructivist scholarship on norm localization, grafting, and framing illustrates the importance of referencing and creating linkages between the accepted *status quo* and more revolutionary ideas in international politics.[93]

Contestation often takes the form of actors seeking to defend or dismantle the dominant orthodoxy or *status quo*; many fields are riven by at least one—if not more—"orthodox v. revisionist" or "orthodox v. heretic" debate.[94] Agents "struggle…either to *change* or to *preserve* [the] boundaries and form" of their field.[95] Often, such contestation is won by the dominant actors within the field: by the group with the greatest power, legitimacy, and social capital. It is reasonable to ask, as this thesis attempts to do, where the orthodoxy, internal hierarchy, and dominant form of capital of a given field "came from" and how they were established, maintained, and potentially challenged and re-made. It is also relevant to note that, however inchoate early forms of institution-building may seem to contemporary eyes (the plan to prosecute Kaiser Wilhelm II, for example, was never put into practice and left many central questions of ICL un-answered), they nonetheless left legacies—precedents, arguments, and visions of the field—behind. These legacies then formed part of the *status quo,* which was contested, reified, or re-evaluated (but seldom fully ignored) at

[89] Skinner 2002, 149-150.
[90] Skinner 2002, 149.
[91] Skinner 2002, 150.
[92] John Campbell 2004.
[93] Checkel 1998; Acharya 2004; Price 1998; Finnemore and Sikkink 1998.
[94] Bourdieu and Wacquant 1992, 117.
[95] Bourdieu and Wacquant 1992, 17.

later times. In other words, discursive struggles and the changes they engender are path dependent.[96]

Indeed, to understand how and why ICL went from being a state-led "high political" field to a field defined by expert-led trustee governance, I draw on insights from historical institutionalist literature.[97] Although this study takes a broad view of "institutions," in that it is concerned with changes in the ICL *field*, rather than solely in formal ICL *organizations*, historical institutionalism is an important inspiration.[98] In particular, Pierson's examination of how "attention to a long-term sequence of causes," rather than a purely "cross-sectional approach," enhances our understandings of social phenomena provides a strong grounding.[99] Pierson advocates for constructing "moving pictures," rather than "snapshots" of social and political dynamics.[100] Like Pierson, I am interested in the role that sequencing, path dependence, unintended consequences, and power asymmetries play in political outcomes.

Time, timing, and sequencing matter. Transformative contestation over legitimate action and common sense may be more possible at certain times—certain *conjunctures*. *Prima facie*, moments of upheaval or uncertainty are likely to trigger existential struggles over a field; likewise, periods of field-formation, when the "rules of the game" are inchoate or unclear, may lend themselves to struggles of this kind. Bourdieu is criticized for having no detailed "theory of the emergence of fields" beyond noting "fields are born of historical contingency."[101] Nevertheless, the early history of a given field is likely to see struggles over boundaries and definitions. It is also likely that struggles over the "rules of the game" would persist, even if only weakly, in established fields.

Second, patterns of institution-building and contestation matter. This thesis' empirical analysis is structured around a narrative account of ICL history.[102] This account is complicated but enriched by the pattern of ICL's growth, enactment, and change by "fits and starts," rather than through a steady linear process of incremental development, over time.[103] The "boom and bust" cycle which defined international criminal justice efforts until after the Cold War influenced the ability of experts to capture the field and the development of ICL in general. These insights guide the empirical strategy of this study and provide conceptual tools for its account of change.

Although each empirical chapter focuses on a different ICL episode or institution, these are not intended solely as comparative case studies. Instead, each episode represents a "critical juncture" in the field. Each episode represents a key moment of conflict and decision-making,

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[96] Pierson 2004; Carpenter 2002; Peter Hall and Taylor 1996; Streeck and Thelen 2005; Mahoney and Thelen 2009a.

[97] Peter Hall and Taylor 1996.

[98] This primary "institution"—the ICL field—resembles the way some scholars of "sociological institutionalism" conceptualize institutions. Peter Hall and Taylor 1996.

[99] Pierson 2004, 2-3.

[100] Pierson 2004, 2.

[101] Accominotti 2015, 435.

[102] For considerations of the use of narrative in explanations in IR and Social Science, see: Geoffrey Roberts 2006; Rosenberg 1994.

[103] For a comparison of "punctuated equilibrium" and "incremental" models of change, see Goertz 2003, 136.

where the pressure to establish an institution, respond to an apparent international crime, or enact ICL in practice forced politicians and, later, IL experts, to articulate and adjudicate between different visions of ICL. These moments of struggle and decision have been drivers for change, including changes contributing to the narrowing and expert capture of the field. As Campbell notes, "social and political life comprises a set of practices in which things are constituted in the process of dealing with them."[104] In attempting to "deal with" horrific conflicts, states, lawyers, and other actors identified and sought to legitimate their preferred policies and to de-legitimate alternatives. In the process, they put forward, struggled over, and ratified theories of the nature and goals of international criminal justice. They thereby (re)constituted the common sense of ICL. Each critical juncture was shaped by the events that preceded it and, in turn, shaped those that followed. I do not argue, however, that ICL was static during the periods between institution-building episodes. For this reason, I provide an overview of the apparently quiet periods between critical junctures, during which the changes and precedents of each juncture were consolidated, contested, or further entrenched.[105] The story of ICL innovation and operationalization did not "start from scratch" with each new attempt to create an ICL institution; rather, each episode reflected what had come before and set the stage for what could follow.

Thus, this thesis draws on historical institutionalist concepts to examine uneven processes of change. ICL's expert capture was characterized by periods of intense contestation, followed by periods of relative stability. The concept of "punctuated equilibrium"—in which relative equilibrium is occasionally "punctuated" by "critical junctures" which permit large-scale change—is useful for understanding this pattern. Pierson summarizes this dynamic: on occasion, "opportunities for major institutional reform appear, followed by long stretches of institutional stability. Junctures are 'critical' because they place institutional arrangements on paths or trajectories, which are then very difficult to alter."[106] In ICL these "critical junctures" emerged at moments of intense pressure to respond to the horrors and abuses of war and conflict, when powerful states attempted to "deal with" such abuses, often by creating new international institutions.

The concept of "critical junctures" also directs attention to moments of conjuncture, when processes and actors' different trajectories intersect and influence each other. This illuminates a key dynamic in ICL's development. Critical episodes in ICL represent moments when International Law as a discipline and profession intersected with state-led institution-building and diplomacy. Over the past two centuries, these two forms of ordering have played crucial roles in driving the development of ICL, although involvement from one group of actors—states—has been much more sporadic. From the perspective of states, ICL's development was characterized by sporadic "fits and starts" (or "booms and busts"), as each early attempt at ICL failed or was abandoned, to be followed by years or decades of state disinterest or hostility. Academic and professional engagement was much more gradual and stable. Although the modern IL profession was not founded until the mid-nineteenth century and never had the power to unilaterally establish ICL institutions, academic and professional debate around ICL never "died." The sporadic nature

[104] David Campbell 1992, 5.
[105] Mahoney and Thelen 2009b.
[106] Pierson 2004, 135.

of state interest, coupled with the more minor but steady engagement of IL professionals, helped to facilitate the expert capture of the field. This is discussed in greater detail in Chapter One and in the empirical sections of this thesis.

As noted, the notion of "path dependence" is relevant. The precedents, norms, and power dynamics established or reinforced at critical junctures of ICL decision-making had downstream consequences. Indeed, the empirical section of this thesis demonstrates that the expert capture of ICL was contingent on initial choices made by states—in the Napoleonic and especially the post-First World War eras—to allow expert practitioners a limited "supportive" role in ICL. These early choices were reinforced later, eventually creating opportunities for IL professionals to increase their influence, prominence, and authority. Powerful states were then constrained by the (often unintended) consequences of their actions; having elevated experts in a bid to legitimate state decisions, states inadvertently empowered those experts to question and undercut their principals. Having let the "genie out of the bottle," they could not readily call it back and reclaim sole control of ICL. The importance of path dependence and unintended consequences in the development of the ICL field can most readily be seen in Chapter Five and Chapter Seven, which examine the Nuremberg and Tokyo Trials and the Rwandan and Yugoslav Tribunals, respectively. Having initially sought to involve legal experts in an *advisory* capacity to benefit from their expertise and bolster the legitimacy of ICL policies in the nineteenth and early twentieth centuries, states were forced to "reap what they had sown," and tolerate, defer to, and re-enforce expert *decision-making* in ICL. I refer to this dynamic as the "expert legitimation trap."

We might think about the contingent and path-dependent process of expert capture in ICL as unfolding within a funnel, which narrowed over time. While in the earliest ICL episodes there was very little widely accepted common sense, and contestation was broad and varied, in later periods certain key questions were more settled. By the 1940s and especially the 1990s, for example, there was a *status quo* answer to the question of whether legal knowledge was relevant to the practice of ICL and a growing understanding of the credentials relevant to its practice. These shared understandings formed a foundation for contestation and innovation relating to more minor but still consequential questions of procedure, jurisprudence, and institutional decision-making.

The empirical section of this thesis focuses on: the 1815 attempt to punish Napoleon; the 1919 struggle to prosecute Kaiser Wilhelm II; the post-Second World War Nuremberg and Tokyo trials; and the post-Cold War International Criminal Tribunals for the former Yugoslavia and Rwanda. I investigate these episodes' interconnections and down-stream effects. I therefore also consider the apparently "quiet" periods of equilibrium between major ICL episodes, to sketch the legacies of each episode, and the "state of play" at each critical juncture, working chronologically to examine the evolving common sense of international criminal justice since the Napoleonic wars. The most important of these "quiet" periods are explored in the final section of Chapter Two and in two short "hinge" chapters, Chapters Four and Six; these sketch key developments during the nineteenth century, the interwar period, and the Cold War, respectively.

Contributions

This project builds upon and contributes to a range of literatures in International Relations and related disciplines. It augments our theoretical and conceptual toolkit for describing and

understanding international politics and international courts; in so doing, it enhances or offers constructive challenges to existing literatures. This section outlines some major contributions, which are further discussed in the Conclusion.

The first contribution is the introduction of the concept of "expert capture" and the exploration of the conditions under which such capture may occur. The concept provides theoretical insight into the complicated process of historical change in the discourse and practice in ICL, and hopefully into similar phenomena in other fields. The concept directs our gaze to aspects of ICL's development that have, until now, been underappreciated and under-explored, including ongoing struggle over the foundational assumptions of the field and the ascendance of experts as a group with power in ICL. In addition to contributing to the literature on the history of international law, this conceptual move also contributes to literatures on international institutions and ordering, especially on global expert governance and international expertise.[107]

Second, this study draws attention to the "expert legitimation trap." While scholars of Principal-Agent and Principal-Trustee dynamics, and of bureaucratic pathologies in global governance, have examined many costs and externalities incurred by states that create technical international institutions or delegate governance to experts, this study reveals another cost states may incur by "using" expertise.[108] Legal professionals in ICL did not merely act beyond the control of their principals; they reshaped the normative structure of the field in which legitimacy is claimed and contested. By rhetorically appealing to expert authority and invoking expertise to legitimate their favoured policies in ICL, states popularized a vision of ICL which later served, paradoxically, to legitimate expert capture and erode state hegemony in the field. In other words, this project reveals the unintended downstream consequences of states' choices around how to narrate, represent, and legitimate their ICL-related policies. In this way, this project also contributes to scholarship that considers the unintended structural and political consequences of adopting certain legitimation strategies over others, including the work of Stacie Goddard.[109]

Third, the empirical work and substantive insights of this thesis contribute to scholarship on the history of ICL and self-proclaimed "critical approaches to International Criminal Law." This project's analysis of extensive archival and other empirical material contributes to scholarship on the history of international (criminal) law, especially in relation to contestation within ICL institutions and connections between the most famous moments in that history (such as the Nuremberg Tribunal) and those which are comparatively forgotten. In addition, recent agenda-setting work highlights a "gap" in ICL scholarship: a dearth of "meaningful critique of the tremendously successful international criminal law" project.[110] In particular, Schwöbel, Mégret, Tallgren, Baars, and others note the need for "assumptions critique" in ICL.[111] The nature of assumptions critique is captured by Foucault's declaration: "a critique is not a matter of saying that

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[107] Sending 2015; Kennedy 2005; Barnett and Finnemore 2004.

[108] Rudolph 2001, 658–660; Posner and Yoo 2005; Helfer 2006; Alter 2008; Barnett and Finnemore 2004; Hawkins et al. 2006.

[109] Goddard 2006.

[110] Schwöbel 2014a, 3.

[111] Baars 2014; Mégret 2002, 2014; Schwöbel 2014b.

things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of unfamiliar, unchallenged, unconsidered modes of thought the practices that we accept rest."[112] This stands in contrast to the more mundane "effectiveness critique" or "accompaniment critique" which is most common in existing ICL scholarship. While an "effectiveness critique" centers "strengthening… existing structures… an assumptions critique questions who benefits in the existing parameters, who loses through the given legal structures, and why."[113] This dissertation aims to examine the contingent origins of some foundational assumptions of ICL, the political struggles that have shaped them, and the alternatives that have been marginalized in the process. It therefore contributes to scholarship on the history and foundational assumptions of ICL.

This project may be considered a partial "history of the present" of the "common sense" of ICL.[114] As Campbell summarizes, "beginning with an incitement from the present—an acute manifestation of a ritual power… [a history of the present] seeks to trace how such rituals of power arose, took shape, gained importance, and effected politics."[115] As such, I do not attempt to give a full history of past eras, and I seek to avoid the traps of presentism and teleological argument. Rather, I trace recurring struggles and debates in the history of ICL and the development of the field's foundational assumptions, while also noting "roads not taken." I do not treat the current state of ICL as pre-determined or inevitable, and I do not argue that the "expert capture" of the field has been fully achieved or is immune to challenge.

This project draws on, questions, and enriches existing histories of ICL. Examining the constitutive elements of modern ICL and the circumstances under which they came into being grants insight into the power dynamics of the field—including into what concepts and actors are privileged and marginalized—and the political dimensions of what is generally portrayed as an apolitical or anti-political project.[116] In addition, to quote Zunino, "knowing how historical conditions influence current scholarly debate and policy choices can lead to questioning assumptions and moving beyond the most constraining aspects" of ICL.[117] Therefore, this exercise augments and complicates dominant narratives of ICL's history, while opening doors for change.

Finally, this dissertation contributes to scholarship on change in international practices and organizations by highlighting the importance of struggle in such change, and by producing an account that considers discursive framing and "punctuated equilibrium" as drivers of institutional change. By drawing out the contested and conflictual nature of ICL "common sense" and the many different perspectives which coexist within a given ICL institution, this thesis contests the notion that practitioners in a given field or institution necessarily share deep background knowledge about their work. In this way, this dissertation contributes to scholarship on

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[112] Foucault 1988, 154.
[113] Schwöbel 2014a, 4.
[114] Dreyfus and Rabinow 1982, 118-120.
[115] David Campbell 1992, 5-6.
[116] Nouwen and Werner 2011.
[117] Zunino 2019, 2.

international practices and the internal politics and innovations of expert IOs.[118] In the Conclusion of this dissertation, I return to these contributions and consider avenues for further research.

Empirical Strategy and the Road Ahead

The rest of this dissertation extends this theoretical and conceptual discussion before turning to a conceptually guided empirical exploration of critical junctures in ICL's history. Finally, the concluding chapter recaps contributions and sketches the implications and avenues for future research revealed by this project.

Chapter One offers a more detailed account of the *explanandum* of this project—the constellation of factors and ideas that constitute the ICL's "common sense." I consider key features of the vision of ICL which dominates contemporary discourse—including answers to the questions of *who* ought to practice ICL, *how* they should conduct themselves, and *what* its goals, audience, and ethos should be.

Chapters Two, Three, Five, and Seven delve into critical junctures in the history of ICL, tracing struggles over and developments in the ICL common sense. These episodes demonstrate the gradual unfolding of "expert capture" in the field and the changing landscape of legitimate ICL action. Chapters Four and Six function as "hinge" chapters, providing details about ICL's continued development during two important interludes—the interwar era and the Cold War—when powerful states abandoned ICL, but IL professionals remained engaged.

Chapter Two examines a pivotal episode in the "pre-history" of modern ICL: the 1815 exile of Napoleon Bonaparte to St. Helena. This episode provides a point of historical departure and demonstrates the extent to which international criminal justice was initially framed as a national political issue in which law was expected to play a minimal role at most. This episode introduces conflicts that persisted in later critical junctures, including questions about the appropriate forum, audiences, and role of legal practitioners in international justice efforts, and the nature of international criminality. The Napoleonic episode saw embryonic efforts to establish a role for legal practitioners in international criminal justice, although these efforts were hampered by the lack of a modern IL profession. With no fellow practitioners to support his efforts or engage in field-defining debate, the primary lawyer involved in this case, Lord Eldon, saw limited success. However, Eldon eventually convinced the British government and its allies that legal expert advice could provide *ex post facto* justification for their favoured policy. Legal experts were not invited to be decision-makers or even advisors, but were allowed to play a justificatory role, gaining a minor voice in this episode. Chapter Two concludes by considering the short- and medium-term legacies of the Napoleonic exile and subsequent developments during the "long nineteenth century."

Chapter Three examines the post-First World War attempt to punish Kaiser Wilhelm II. This is the first recognizably modern critical juncture investigated by this thesis. This episode saw significant steps towards the expert capture of ICL, in that both states and legal professionals began to articulate a vision of international criminal justice as a legal and judicial issue. The

[118] Louis and Maertens 2021; Barnett and Finnemore 2004; Ringmar 2014.

Wilhelmine episode saw early attempts to frame ICL as a sphere of *judicial* practice, and the first time when expert legal advice was sought at all stages of states' policy process. Chapter Three considers contestation over the contours of ICL, including over the appropriate role of lawyers, the appropriate forum for justice efforts, and the relationship between international justice and political aims. It also considers how stakeholders invoked the Napoleonic precedent to legitimate their preferred visions and discredit alternatives. The question of *how* ICL ought to be practiced was the most salient constitutive question in this period, with legal professionals and politicians divided over the role of lawyers in international criminal justice efforts. This is followed by Chapter Four, the first "hinge" chapter, which excavates the salient struggles of Interwar ICL, sketching their legacies and impacts on later ICL episodes. In particular, I note how IL professionals worked to advance the codification of ICL and the definition of its master concepts and ideologies during the apparently "dead" interwar period, reshaping ICL despite great power neglect.

Chapter Five focuses on the period that has received the most attention in histories of ICL—the late 1940s—but investigates not only the eternally popular (as a subject of scholarship) Nuremberg Tribunal but also its relatively neglected sister institution—the Tokyo Tribunal. Although these tribunals are often cited as precursors of institutions like the ICC, many aspects of the tribunals appear foreign to modern eyes. The tribunals were explicitly quasi-political, quasi-judicial institutions in which legal experts were expected to function as state representatives first and judicial professionals second. As the first institutions that fully enacted ICL, these tribunals were riven by significant disagreements about every aspect of ICL practice, including the appropriate interpretation of the Napoleonic and Wilhelmine episodes, the relationship between ICL and domestic law, the relationship between the tribunals and states, the goals of ICL, and appropriate standards of evidence and judicial interpretation. It is instructive to consider the many roads not taken by these tribunals and the perspectives that were viable in the 1940s but have since been marginalized. While earlier episodes were characterized by debates about the "how" of ICL, major struggles during this period were focused on the "who" and the "what" of the field. Having gained a foothold and voice in ICL efforts, IL professionals began to internally discipline and externally defend their role in the field. In so doing, they advanced expert capture. In addition, the post-war tribunals exhibited the first glimmers of collegiality and common cause among legal professionals from different states, indicating that the ICL profession was becoming a more autonomous stakeholder in the field. It was at Nuremberg and especially Tokyo that legal practitioners began to use their ever-stronger expert authority in the field to defy and contest their principals' expectations. States were confronted with the first incontrovertible signs of the expert legitimation trap at work.

Chapter Six is the second "hinge" chapter and offers an overview of how the IL profession continued to debate and develop ICL throughout the Cold War, during a time when powerful states again abandoned ICL. Chapter Six focuses on IL professionals' efforts to further codify ICL, evaluate the meaning of ICL precedents, and establish new professional standards. These developments further solidified expert dominance in ICL, ensuring that, by the time the UNSC began building new institutions in the 1990s, legal professionals would be an un-ignorable and even more autonomous force in the field.

Chapter Seven examines the immediate post-Cold War period, focusing on the creation and early operation of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. This chapter investigates the initial expectations for the tribunals. It then explores how those expectations were revised, challenged, entrenched, or exploded as the tribunals took shape and began operationalizing their (initially ambiguous) mandates. The ICTY and ICTR saw the consolidation of expert capture, as tribunal officials began to function as autonomous decision-makers and trustees rather than advisors or state representatives. From the outset, tribunal officials proved willing and able to defy the expectations and instructions of even the most powerful states, and to expand the scope and audience of ICL. By the 1990s, the expert legitimation trap had been "sprung," and expert capture was well-advanced in ICL. Although practitioners at the ICTY and ICTR continued to debate ICL questions amongst themselves, including questions of what professional roles, procedures, goals, and audiences were appropriate for the tribunals, such debates were far more contained than in earlier eras. ICTY and ICTR practitioners settled such disputes internally, through the prism of increasingly well-established "rules of the game," and zealously defended their autonomy from states in the process.

For this analysis, I rely on primary archival sources, interview transcripts, memoirs, organizational records, newspaper sources, public speeches, and official documents, many of which have been neglected by IR and historical IL literatures. Most notably, archival materials held at the Bodleian Library, the (UK) National Archives at Kew, the UK Parliamentary Archives, and the (US) National Archives and Records Administration were invaluable. This includes court and state officials' journals, memoirs, and correspondence, and documentary evidence of the US, UK, and other states' attempts to direct the work of ICL institutions. This includes archival records of international conferences such as the Paris Peace Conference and the London Conference, of international institutions including the Congress of Vienna and the UNSC, and of national government departments and groups including the British Cabinet, the Imperial War Cabinet, and the US State Department.[119] It also includes published and unpublished correspondence and accounts written by actors including international lawyers and military personnel, as well as newspaper archives. This research also leverages documentary histories of major war crimes trials and international law professional associations, as well as the archives of such organizations. Such records provide invaluable insight into the articulation and contestation of ICL common sense over time, and into how legal professionals continued to develop and capture the field during periods of state neglect. Furthermore, I draw extensively on transcripts of interviews with prominent statesmen and ICL practitioners, many of which are surprisingly candid. Most notably, I examine transcripts from Brandeis University's *Ad Hoc Tribunals Oral History Project* and the University of Washington's *Voices from the Rwanda Tribunal* project. These interviews with high-profile and long-serving ICL policymakers and ICTY, ICTR, and ICC officials were an invaluable resource and inspiration for this study and feature most prominently in Chapter Seven.[120] These interview projects are rich and under-utilized resources for the study of international law,

[119] Where possible, archival sources are cited in footnotes using official document codes and/or file numbers. Full citations are in the bibliography.

[120] The projects' interviews are cited in footnotes as: "Oral History Interview [interviewee's last name] [year]." The bibliography includes full citations.

organizations, practice, and expertise. Finally, in addition to records of historical speeches, addresses, meetings, and court proceedings, I reference speeches and events which took place as this thesis was being researched.[121] Contestation over ICL common sense continues today, as this Introduction's prefatory discussion of discourse surrounding the ICC's investigation of the situation in Ukraine demonstrates.

The concluding chapter revisits this project's main argument, findings, and contributions. It highlights the importance of contestation and path dependence in the expert capture of ICL and the entrapment of implicated states. It also revisits the current state of ICL common sense before pondering how it may develop in the future. Finally, the conclusion considers the portability and implications of this thesis' contributions, before suggesting avenues for future research.

[121] I am grateful to the British Columbia Law Society for allowing me to attend and reference their annual Rule of Law lecture. (Cited in footnotes as: "Law Society of British Columbia 2022.")

Chapter One: Explanandum: ICL Common Sense

This chapter provides an overview of the *explanandum* of this project—the constellation of factors and ideas that constitute the "common sense" of contemporary ICL. I draw on empirical examples from contemporary ICL institutions, historical episodes, and the views of scholars and practitioners. This exercise reveals general understandings and trends, consensus and dissent, and "the pulse of the discourse."[1] This chapter sets the bearings for the empirical chronology that follows, which traces the rise and evolution of many components of modern ICL common sense.

Constitutive Elements of ICL

Contemporary ICL is defined by norms, hierarchies, goals, concepts, and credentials, which I refer to collectively as its "common sense" or "rules of the game." According to this common sense, an ideal (legitimate) ICL institution is an *independent, impartial,* and *apolitical court* staffed by *legal experts* committed to the *international criminal justice project*, *collegiality*, *adaptability*, and *human rights* protection and outreach. Each of these factors is a recent construction. Put simply, the substantive question examined by this thesis is: how did ICL come to look the way it does today? Before providing an account of this process, it is necessary to further describe "how ICL looks today."

Many actors engaged in ICL—including judges, lawyers, states, journalists, civil society organizations, international bureaucrats, and academics—have a shared sense of what is appropriate, inappropriate, desirable, or risky in the field. Such actors are conversant in a shared discourse, in which certain concepts, sites, and practitioners are framed as legitimate while others are liminal or beyond the pale. Aspects of this shared common sense or "background knowledge" have been documented by scholars of International Relations, International Courts, and International Law, although such scholars deploy a range of conceptual labels and do not link all these aspects together.[2] Likewise, such scholarship does not always examine how this shared common sense is constituted. For example, the "core argument" of Gary Bass' seminal *Stay the Hand of Vengeance* is that concerned states and statesmen create and support war crimes tribunals because they "are in the grip of a principled *idea*… legalism."[3] Bass argues liberal states create and support international tribunals out of a belief "that it is *right* for war crimes criminals to be put on *trial*," which occasionally overrides their inherent "selfishness."[4] Bass does not separate out the component parts of this particular form of legalism, or examine the processes through which this "idea" of "the right" came to dominate over alternative visions of international (criminal) justice. Likewise, Nouwen and Werner chronicle the common understanding that the ICC operates "outside of" and even against "politics."[5] Nouwen and Werner contest and de-naturalize this assumption, showing ICL is, in fact, *always* political, even if its political dimension is rhetorically

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[1] Zunino, 23.

[2] Stappert 2020; Mégret 2014; Mistry 2017; Levi, Hagan, and Dezalay 2016; Meierhenrich 2013; Whiting 2013; Struett 2012.

[3] Bass 2000, 7. On legalism, see: Shklar 1964.

[4] Bass 2000, 8, emphasis added.

[5] Nouwen and Werner 2011.

denied.[6] However, Nouwen and Werner leave the question of where this assumption (of anti-politicization) comes from to one side.

On a more granular level, scholars have documented how shared understandings shape daily practices of ICL inside and outside the courtroom. For example, Stappert examines norms of citation and argument in international tribunals. [7] Stappert notes, "legal reasoning is practical reasoning, so that the ways in which international lawyers interpret legal provisions can be understood as… social practices."[8] Similarly, Mistry argues the modern ICC is characterized by a strong "culture of collegiality" among judges. Mistry worries that such a culture might be waning and argues that a renewal of collegiality would allow the ICC to "maximise its credibility as a permanent authority on the international legal and political landscape."[9] Likewise, others have noted the humanitarian and human rights-related focus of modern ICL.[10] There is also a clear norm that practitioners within ICL institutions should be committed to the "international criminal justice project" of seeking individual accountability for international crimes, combatting impunity, and supporting existing ICL institutions.[11] It is understood that lawyers, administrators, and other members of institutions like the ICC ought to *believe in* what they are doing, and that there is no "fifth column" within such institutions. This focus on common ideology is also a recent development. Such norms of citation, argument, interpretation, collaboration, humanitarianism, and practice can be understood as constitutive of contemporary ICL "common sense." The question of how such shared understandings came to be and are maintained remains compelling.

Samuel Moyn invites us to reflect on why and how the current model of global justice—which is focused on international courts and international criminal accountability—eclipsed "prior schemes of global justice" which were more ambitious and emancipatory.[12] Moyn contests the implication, found in the work of Sikkink, Martinez, and others, that the rise of institutions like the ICC represents the culmination of a centuries-long (in Martinez's telling) rise of moral sentiment and march towards justice.[13] Moyn reveals the contingent nature of the judicial model of international criminal justice which we often take for granted. Moyn invites us to consider "the darker reasons why morality can shine forth, and why some moralities succeed in attracting powerful backing while others do not."[14] Power should not be treated as "something that can only deter justice;" instead, it is worth asking "how power determines which vision of justice prevails."[15] A similar sentiment is articulated in Shklar's *Legalism,* which contests the artificial separation between the legal and political. Shklar addresses some of the moral objections that one might make to a project (like this dissertation) which is interested in uncovering the logistics and politics behind a field steeped in the expectation of being apolitical. Shklar argues "to show that justice has its

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[6] The seminal discussion of the political nature of (international criminal) law is in Shklar 1964.
[7] Stappert 2018.
[8] Stappert 2020, 34.
[9] Mistry 2017, 705.
[10] Douglas 2019, 2012; Meron 2021; Shapiro 2015.
[11] Mégret 2014, 17.
[12] Moyn 2014, 69.
[13] Martinez 2007, 2012; Blackburn 2011; Sikkink 2011.
[14] Moyn 2014, 79.
[15] Moyn 2014, 79.

practical and ideological limits is not to slight it" and that justice's place is actually "not above the political world but in its very midst."[16] Revealing the inescapably political face of justice is worthwhile and potentially transformative, rather than inherently threatening.

So, ICL common sense expects the contemporary field to be judicial, apolitical, independent, humanitarian, inventive, and collegial, among other virtues. Baars notes similar tendencies in the field, arguing: "in… mainstream scholarship constructing the foundational narrative ('dominant knowledge') of ICL four main strands are distinguished: the humanitarian, the institutional, the positivist and the pragmatist perspective… together these four form the mutually reinforcing building blocks of dominant 'ICL knowledge.'"[17] Baars' "dominant knowledge" encompasses many elements of what I refer to as ICL "common sense." Baars' four narrative strands structure knowledge and conventional critique in modern ICL. Such spoken and unspoken ideas shape actors' understanding of ICL and define (im)possible, (il)legitimate, and (un)imaginable actors, institutions, and practices. In other words, they delimit actors' imagination about ICL and the discursive space within which actors "play" and act, thereby constituting the field. I now turn to unpack the current common sense of ICL and some of the ways it differs from that of past eras.

Mapping Common Sense's Common Questions

As a first cut towards mapping these constitutive ideas and how they have crystallized as the field has been captured, ICL "common sense" can be loosely divided into three ideal-typical dimensions that have been subject to struggle over time. These define hegemonic expectations about "how" ICL should be practiced; "who" should practice it; and "what" it is about. This division ("who," "how," and "what") is intended as an analytical tool and features most prominently in this chapter. These questions are intertwined in practice and discourse. Therefore, they are not used to rigidly structure this dissertation's empirical analysis, although they are referenced when they help illuminate how ICL's expert capture evolved. During certain periods, the dominant answer to one or more of these question(s) has appeared settled, while struggle has continued over others. Over time, the accepted conventional answers to these questions have been increasingly shaped and dominated by professional IL experts, solidifying into the common sense of ICL as it exists today. This dynamic can most clearly be seen in changing expectations about the role of "the lawyer" in ICL. The figure of the lawyer has, over time, moved from the outer reaches of the field into a dominant and increasingly autonomous position at its core.

The "how" of ICL encompasses dominant understandings of legitimate ICL institutions, norms of behaviour, and the appropriate relationship between practitioners and states or other actors. Contemporary ICL is defined by expectations that institutions will be independent international or hybrid courts, free from state influence and guided by widely accepted legal and judicial standards. The "who" of ICL encompasses expectations about the appropriate credentials of practitioners, the institutions that confer or acknowledge such credentials, and the internal hierarchy of the field. In other words, this question delimits the forms of capital that confer power or status. Contemporary ICL is highly professionalized and standardized. The pool of legitimate

[16] Shklar 1964, 122-123.
[17] Baars 2014, 197.

practitioners has become more homogenous than in the past, as the backgrounds, educations, and philosophical commitments required to claim expertise have been defined, policed, and disseminated. The "what" of ICL refers to hegemonic understandings of the subject matter, goals, and purpose of ICL. This dimension encompasses questions about the audience and reference groups of international law, including who is being protected or punished and why their protection or punishment is legitimate. It also encompasses understandings of the ethos and philosophy of ICL—whether it be one of utopian progress and inventiveness, rigid legal formalism, lively existential debate, or something else. Contemporary ICL is defined by a pragmatic "atrocity paradigm" of international criminality, where "humanity" is protected from atrocities like genocide and war crimes, victims are stakeholders, and an ethos of inventiveness and collegiality is actively cultivated. Together, these features constitute ICL's common sense.

I now turn to unpack these features and consider different visions of ICL which have been contested throughout its history.

Independent and Impartial Judicial Action

Contemporary ICL's most foundational assumption is so widely accepted that it is easily overlooked: we expect international justice for war crimes and other atrocities to be sought in a courtroom through judicial action. Moyn puts it bluntly: "judges and courts have become our fixation," but the "judicial vision of global justice" is "radically new."[18] Moyn argues "the rise of [judicial] international criminal accountability has occurred alongside the eclipse of prior schemes of global justice, which promoted not retributive punishment but social renovation to achieve liberty and equality."[19] As Chapters Two and Three discuss, other, less revolutionary, schemes were also eclipsed, including ideas that great power management, inter-state diplomacy, and summary justice should extend to the punishment of wartime atrocities.

Furthermore, hegemonic common sense dictates that these international courts cannot be "kangaroo courts."[20] We expect that judges in ICL courtrooms will uphold standards of judicial independence, impartiality, and apoliticism. By doing so, such judges are understood to safeguard the legitimacy and integrity of the judicial process and ICL more broadly.[21] In 2020, the Advisory Committee on the Nominations of Judges to the ICC (ACN), which vets candidates for election as ICC judges, requested that nominees respond to a standardized questionnaire regarding their qualifications.[22] The ACN queried candidates' competence, experience, perception of the court, and conflicts of interest. Some sections of the questionnaire focused on candidates' understanding of judicial independence and impartiality.[23] Question C.1 asks: "What in your view should be the relationship between a Judge and the authorities of his or her country of origin?" and "how do you envisage your future relationship with bodies such as universities, courts or non-governmental

[18] Moyn 2014, 69-70.
[19] Moyn 2014, 69-70.
[20] Krever 2014, 126.
[21] Struett 2012.
[22] Questionnaires replaced the earlier system (since 2013) of collecting "statements of qualification."
[23] Section C. is entitled "Judicial Independence." Section E. is entitled "Deontology."

organizations… if elected to the ICC?"[24] All twenty nominees responded in a manner similar to the UK nominee, Joanna Korner: "There is no 'relationship' between a judge of the ICC and the authorities of his/her country of origin… judges must be independent, and be seen to be independent, of the authorities of their countries of origin."[25] Although candidates reflected on "knowledge-sharing" and maintaining respectful relationships with states, judicial independence and impartiality were unequivocally supported.[26] Belgium's Laurence Massart's response is typical: "With regard to an upcoming case, a current case or a closed case, a judge communicates with no one, apart from colleagues… It is *obviously unacceptable* for a judge to be given any sort of external 'instruction.'"[27] These responses were viewed favourably by the ACN and taken to demonstrate nominees' competent performance of their professional roles.

However, this taboo against communication and external "instruction" of ICL officials has not always been "obvious." In the 1940s, for example, the Allies worked to maintain deep relationships with ICL officials. The British Foreign Office received detailed accounts of the dynamics and daily proceedings at the Tokyo tribunal from the British judge and others; they circulated these reports to other governments and received other judicial reports in return. The Australian, Soviet, British, New Zealand, Chinese, and other judges also regularly communicated with their home governments about the political and legal dynamics of the trial. When the Canadian judge suggested to Webb, the Australian President of the Tokyo Tribunal, that he should take measures to prevent and investigate "leaks" to the press, Webb dismissed the concern, disclosing that he personally "frequently told persons outside the Tribunal, that is to say, my own Government… and others interested, when the Judgment might be expected."[28]

Furthermore, Allied governments attempted to directly intervene in the proceedings of both the Tokyo Tribunal and its sister tribunal at Nuremberg, including by seeking to remove certain tribunal officials and influence others.[29] In one episode, Whitehall was sent into a delighted frenzy by a report from Foreign Office official who believed he had found a new pathway to influence a stubborn judge at Tokyo. He reported to London: "apparently there is a commission of four jurists at The Hague responsible for controlling the activities of the Dutch judge… [the Dutch government] assured me… they were unlikely to allow the Dutch judge to challenge [the Tokyo Charter] in his judgment. It is to be hoped, therefore, that the Dutch judge will conform when the time comes."[30] This understanding and desire to ensure judges "conform" to powerful states' preferences, which were widely shared and embraced throughout the Allied governments, would scandalize the modern ACN or ICC. As Chapter Five describes, these attempts to meddle were frustrated by tribunal judges who resisted overt state intervention, contesting the expected *status quo* and contributing to the perception that judicial independence and impartiality were central to

[24] ICC-ASP/28/08/2020.
[25] Korner Questionnaire, 4 in ICC-ASP/28/08/2020.
[26] ICC-ASP/28/08/2020.
[27] Massart Questionnaire, 6 in ICC-ASP/28/08/2020, emphasis added.
[28] Webb to McDougall, October 13, 1948, quoted in Takatori 2018, 159.
[29] Generally: LCO 2/2992, TNA.
[30] Foreign Office Minute from Denning to Sargent (U689), 21 May 1947: FO 371/66553, TNA.

legitimate ICL. In the 1940s, the line between "the state delegate" and "the independent judge" was contested, as was the importance and meaning of judicial impartiality.

Going back further still, earlier attempts at ICL evidenced no separation between "the policymaker" and "the lawyer." During the nineteenth and early twentieth centuries, common wisdom dictated that international criminality was a matter of high politics, in which political decisions might be supported, but not challenged, by legal advice. Efforts to punish Napoleon in 1815 and Kaiser Wilhelm in 1918-1919 were entirely managed by national governments, with legal experts offering advice or justification, but not making decisions. Over time, the expected role of ICL practitioners has shifted from that of "justifiers" for national policy, to national policy advisors, to that of mere conduits of states' interests, to, finally, that of independent "experts from nowhere." In parallel, the site of ICL has shifted from domestic and multilateral political and diplomatic fora to quasi-political tribunals to, finally, independent "trustee" courts. The field has been legalized, judicialized, and expertized.

Judicial independence and depoliticized expertise have become the obvious answer to the question of "how" ICL should be practiced. The legitimacy and reputation of the modern ICC depend on its ability to claim insulation from external political pressure.[31] This enables ICC officials to bolster the institution's claim to both expert authority and the moral authority associated with justice and the rule of law.[32] Indeed, academic and journalistic critiques of the ICC reveal a popular understanding that ICL ought to be impartial and separate from politics.[33]

There is widespread understanding that ICL is a field of *legal* and *judicial* practice, in which correct practice ought to be governed by widely accepted principles of legality and procedural justice. Chief among these are the principles of judicial independence and impartiality, which are foundational for other principles of legality. Such principles define many domestic legal systems and have gradually been imported and translated into the international (criminal) legal sphere—a field that was initially viewed as more closely associated with geopolitical diplomacy than judicial procedure.[34] This expectation of legality and judicial action defines the dominant understanding of "how" (and "where") ICL should be practiced and, thereby, shapes the field.

The most famous overview of these formal principles comes in Fuller's criteria of legality, which are common across legal cultures and foundational to "the presence of a (modern) legal system."[35] Fuller's criteria constitute the "internal morality of law" and include: generality, promulgation, non-retroactivity, clarity, non-contradiction, not requiring the impossible, constancy, and congruence between laws and officials' behaviour.[36] A failure to adhere to any of these criteria does "not simply result in a bad system of law; it results in something that is not

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[31] Nouwen and Werner 2011.

[32] Avant, Finnemore, and Sell refer to these forms of authority as Expert (or Expertise-based) Authority and Principled (or Principle-based) Authority. Avant, Finnemore, and Sell 2010, 12-13; Struett 2012.

[33] Daisley 2021; Amnesty International 2022.

[34] Mégret 2014, 17. On "translations," see: Langer 2004.

[35] Brunnée and Toope 2010, 28; Marshall Cohen 1965, 648; Brunnée and Toope 2011, 114.

[36] Fuller 1969, 4 and 39; Brunnée and Toope 2011, 114 and 110.

properly called a legal system at all."[37] These principles are accompanied by procedural expectations and what Brunnée and Toope call "practices of legality."[38] Judicial independence, impartiality, and due process are considered fundamental to procedural justice. Subsequent chapters demonstrate that the question of whether procedural justice, independence, impartiality, and principles of legality were relevant to the nascent ICL field was contested until at least the mid-twentieth century. Likewise, the idea that non-retroactivity was important for ICL was struggled over for decades. The fact that such principles are now hegemonic is thanks to the work of legal practitioners within ICL institutions. This thesis does not aim to chart the history of "judicial independence" as a normative idea, but rather to consider the process by which attempts to punish alleged international crimes became defined by principles of procedural justice, migrated from the political to the legal realm, and became the responsibility of apolitical expert legal institutions.

The ability to claim and uphold independence and judicial integrity is a crucial component of the legitimacy and governance authority of modern ICL and of how ICL practitioners understand themselves and their work.[39] However, early attempts at ICL were explicitly political, and practitioners understood them as such. The binary distinction between "politics" and "law" which pervades contemporary discussions of ICL is relatively new, as is the understanding that a courtroom is its most legitimate setting. Likewise, the contemporary expectation that a "firewall" should exist between international judges or prosecutors and their home governments is a recent development. Early (controversial) attempts at ICL envisioned institutions in which political and moral principles would trump legal and procedural considerations. In just over two hundred years, the pendulum has swung from a common-sense view that international abuses require purely political responses, to an understanding that only apolitical, impartial judicial responses are appropriate. In the process, the expected role of "the lawyer" in ICL and the practitioner-state relationship were repeatedly redefined.

A Depoliticized Trustee Model of Legal Expertise

The importance of principles of legality is intertwined with the expectation that ICL institutions will be apolitical and distanced from powerful states. Modern ICL institutions are often characterized as "global governance" institutions and grouped together with technical "expert" IOs.[40] "Global governance" refers to the project of "managing" and "regulating" the world.[41] "Expert" international institutions and international organizations participate in modern global governance in many fields. "Expert" IOs empower practitioners to make decisions themselves, rather than merely provide advice or legitimacy to states. The decisions of such IOs are often legitimated based on technical expertise and "taken-for-granted apolitical claims."[42] In other

[37] Fuller 1969, 39.

[38] Brunnée and Toope 2011, 109–110

[39] Meron 2005; Law Society of British Columbia 2022.

[40] "Expert" IOs are IOs whose authority rests on claims of technical expertise.

[41] Mazower 2012.

[42] Louis and Maertens 2021, 1.

words, the claim that "we don't do politics!" is foundational to the authority and self-identity of many contemporary IOs, including international courts.[43]

Contemporary ICL practitioners are expected to be apolitical expert "trustees," but their historical predecessors were not. The first attempt at ICL took place within national policy-making institutions, where lawyers justified political decisions after the fact. Later, legal practitioners advised decision-makers during the policy process but wielded no decision-making power and saw many of their suggestions rejected. I use the terms "justification model" and "advice model" to refer to these earlier configurations of the legal expert-state relationship (which characterized the Napoleonic and Wilhelmine eras, respectively). Practitioners at the Nuremberg and Tokyo Tribunals were expected (by the Allies) to adhere to a "delegation model" of expertise. I use the term "delegation model" to describe forms of multilateralism in which practitioners act as "diplomats" or "delegates," who represent the interests and policy goals of their national governments, even as they "apply" their expert knowledge. These three historical models contrast sharply with today's "trustee model" of legal expertise, where legal experts are expected to act independently and make decisions autonomously to safeguard de-politicized international justice.

Practitioners in early ICL institutions had far closer relationships with their national governments than their twenty-first-century counterparts have. Legal experts were permitted only to provide *ex post facto* justification for pre-determined policies in 1815, and to provide justification and non-binding advice in 1919. Officials at the 1940s tribunals were expected to represent and advocate for the policy preferences of their home state—to serve as diplomats as well as, or sometimes instead of, independent experts. These expected roles illustrate the extent to which early ICL efforts were entangled with—rather than deliberately insulated from—power politics and multilateral diplomacy. In contrast, under the current "trustee-model," court officials' roles are ideally defined by their apolitical "application" of legal expertise.[44] Alter argues for a view of contemporary international courts as trustees which are "selected because of their personal reputation or professional norms… given independent authority to make decisions according to their best judgment or professional criteria, and… empowered to act on behalf of a beneficiary."[45]

Over time, ICL has transitioned from an area of national policy-making in which legal practitioners justify political decisions or provide advice, to a delegation-model of multilateralism, in which practitioners represent states' interests, to a trustee-model, in which practitioners are technical governors.[46] ICL was a national project which became "legalized," "internationalized," "judicialized," "insulated," and, finally, "de-politicized." Throughout this process, legal experts have moved to the center of the field. In parallel, states' ability to monopolize legitimate action and decision-making in ICL has been undermined. The process by which ICL practitioners—especially judges and prosecutors—have become insulated from national governments is a crucial part of the story of how it developed into a distinct and autonomous field of practice. After all,

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[43] Louis and Maertens 2021.

[44] On "application" vs. "interpretation," see: Twining 1997.

[45] Alter 2008, 33.

[46] Consider the different approaches to multilateralism at the UNGA and the World Health Organization. The former is defined by a delegate-model of multilateralism; the latter is closer to a trustee-model.

essential questions for any field include: where do the boundaries lie, who (and what) is "inside" or "outside," and what is the relationship between the field and other, related but distinct, arenas of practice?

The shifting role of the ICL practitioner—from *ex-post facto* rationalizer to national policy advisor to international delegate to expert trustee—is made apparent by the changing institutional form of ICL efforts. This shift can also be seen in the changing discourse about international justice and changes in how practitioners conceptualize their roles. I understand these shifts as the products of ongoing struggles to define and characterize international criminal justice and explore them in the empirical chapters of this study. Figure 1 summarizes the different models of legal expertise that have dominated ICL throughout the period examined by this dissertation

Model of legal expertise	**Justification**	**Advice**	**Delegation**	**Trusteeship**
Idealized Role of Legal Experts	National policy Advisors and Representatives	National policy Advisors	Delegates or Diplomats	Trustees
Institutional home of legal experts involved	National Policy-making institutions	National Policy-making institutions, diplomatic conferences	International (Multilateral) Institutions	International Expert Institutions
Expected "Service" provided	Political advice and *ex post facto* legal arguments	Legal and political advice	"Quasi-judicial" (political/legal) decision-making and diplomatic advocacy	Technical legal expert decision-making
Audience and Stakeholders	Domestic Political Audiences	Domestic Political Audiences and International Conferences	States and national groups	States, National groups, victims, and others
Example	1815: Napoleon	1919: Kaiser Wilhelm	1945-7: Nuremberg and Tokyo	1993-Present: ICTY to ICC

Figure 1

The observation that contemporary ICL is defined by a "trustee" model of expert governance raises the questions: "who are the experts, how are they identified, and who decides?" This brings us to another component of ICL common sense: its elevation of a particular subset of legal experts as ICL's practitioners *par excellence*.

Professional Credentialism

Changing ideas about who is permitted to practice ICL highlight the development of the field's internal cohesion and borders with other spheres. Contemporary common sense dictates that ICL institutions ought to be insulated from overt state interference, as discussed above. ICL common

sense also encompasses a range of ideas that discipline the internal boundaries of the field, including membership and voice within its institutions.

As noted, the ACN wields significant power in attributing expert status; the ACN vets and makes recommendations, which UNGA states frequently follow, about ICC nominations. Yet the ACN is the tip of the iceberg when it comes to defining the modern ICL profession. Professional associations, academic institutions, journals, and networks play crucial roles in determining who is eligible to participate in and access the practice of ICL, and who is disqualified. The profile of practitioners appointed to ICL institutions has grown more uniform over time; for example, fewer academics are appointed to the bench now than in the 1990s.[47] Likewise, military personnel, who were prominent at Nuremberg and Tokyo, are absent from the ICC. All candidates to the modern ICC are vetted via the same set of questions, are elected, and have broadly similar academic and professional backgrounds, often in Western educational institutions.[48]

Anthea Roberts has demonstrated that the global "invisible college" of international law professionals is far more diverse than conventional accounts expect.[49] This finding also applies, with some qualifications, to the subset of the "invisible college" that staffs ICL institutions. Indeed, representation in terms of nationality, ethnicity, and gender has only increased in such institutions over time.[50] Due to this diversity, and the range of legal systems and cultures ICL practitioners represent, those practitioners often disagree on key questions of precedent, procedure, and judicial roles—a point of difference whose consequences for ICL common sense are explored in Chapters Five and Seven. Yet, at the same time, the range of professional, academic, and ideological backgrounds represented in the core of ICL has narrowed. For example, practitioners within historical ICL institutions did not agree on how to interpret the relative value of their credentials and institutional positions (or on who was qualified to speak with authority over colleagues). Even questions as simple as "what is the appropriate relationship between an ICL tribunal's president and the other members of the bench?" were contested until at least the 1990s. Likewise, internalized expectations about appropriate procedures and applicable law have sparked tension (and innovation).

As Chapters Two to Five of this dissertation reveal, the ICL of earlier eras was defined by a heterogeneous *ad hoc* understanding of credentials and expertise. Early ICL institutions lacked formalized educational or professional training, leading to greater variance in practitioner backgrounds and few disqualifications for bias or conflicts of interest. At the Nuremberg and Tokyo trials, for example, understandings of appropriate credentials varied wildly from (Allied) state to (Allied) state and were informed by each state's understanding of ICL, justice, and post-war goals. Prior to the 1990s and to the ACN's advent in the mid-2010s, states determined qualifications inconsistently, prioritizing logistical or political concerns. Today, states have the final say, but the ACN and other professional and expert bodies narrow the field.

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[47] Danner and Voeten 2010.

[48] ICC-ASP/28/08/2020.

[49] Anthea Roberts 2017; Anthea Roberts et al. 2015.

[50] Danner and Voeten 2010.

Credentialism was initially limited by the dearth of formal educational or professional training in ICL as such. While today, almost any aspiring lawyer may take a course in international law or international criminal law (to say nothing of advanced legal education), their predecessors could not. As a result, there were few commonalities between practitioners in pre-1990s ICL institutions. Likewise, there were few disqualifying factors; experiences and characteristics which would now be understood as clear conflicts of interest, including explicit bias, experience as a victim of the alleged crimes of the accused, and experience investigating those alleged crimes, were tolerated or even welcomed. This "wild west" era is now past, and the range acceptable credentials is narrower and more rigid, even as more national backgrounds and genders are represented. Military personnel, politicians, and even academics feature less prominently than they once did, and victims are effectively barred from the bench. Likewise, experience administering show trials, which was valued as the most important credential for Soviet officials at Nuremberg or Tokyo, is unlikely to be viewed favourably by the modern ACN, ICC, or UNGA. In other words, a particular kind of legal professional has come to dominate understandings of *who* may legitimately practice ICL.

In tandem with this shift, there has been a shift in who can legitimately attribute or judge ICL expertise. Today, it is generally accepted that professional bodies and associations like the ACN, the American Society of International Law (ASIL), or high-profile academics are the most qualified and legitimate entities to assess the credentials of nominees to central ICL institutions. In this respect, such arbiters function as "symbolic hegemons" and wield symbolic power, further demonstrating ICL's expert capture.[51] In Bourdieu's sociology, the state "imposes cognitive classifications of the social world that encourage taken-for-granted acceptance of the social order;" in domestic societies, "state monopoly over the legitimate exercise of symbolic power is never complete but always contested," but Bourdieu devotes little attention to "bottom-up" contestation or generation of dominant categories.[52] The absence of an overarching state in the international realm renders the domination of symbolic power in ICL much more difficult, yet, in several important respects, contemporary ICL is dominated by the symbolic power and authority of international legal experts.

Kauppi argues that all fields are organized "around two opposite poles: the protagonists of change and the apostles of law and order, the progressives and the conservatives, the heterodox and the orthodox, or the challengers and the incumbents."[53] The characteristics or credentials (the *capital*) which define these poles—who are "the challengers" and who are "the incumbents"—are not given but are established and reinforced. The internal structure and hierarchies that define ICL practitioners' understandings of their work and their relationships with each other are the historically contingent result of struggle within the field. It is worth considering how the internal hierarchy, credentials, and ethos, of ICL have been defined. Who is "allowed a seat at the table;" who is the "most powerful person in the room;" and what forms of critique are acceptable? All these questions have been subject to contestation. Over time, the "protagonists" and "antagonists" of ICL have become more rigidly defined and clear—true apostasy is less tolerated in the core of

[51] Swartz 2013, 4, 98 and 137.
[52] Swartz 2013, 137
[53] Kauppi 2003, 778.

ICL in 2025 than it was in 1946—just as mechanisms for dispute-resolution between practitioners have been established.

The narrowing of common-sense understandings of who can legitimately practice ICL and adjudicate expertise points to the development of a more autonomous ICL field. As a given field of social action becomes more autonomous (from other spheres of action and forms of social capital), it is subject to greater internal discipline and becomes more rigidly defined. Particular groups gain a monopoly over legitimate action. Kauppi's summary of Bourdieu's understanding of "the relationship between political professionals and amateurs" in the French political field sheds further light on the gradual disciplining and rationalization of the ICL field and the attendant narrowing of acceptable ICL credentials. Kauppi summarizes:

> As the political field gains in autonomy, the profanes [amateurs] become increasingly dispossessed of the properly political means of production. For instance, professional politicians that have gone through elite French schools like the Instituts d'études politiques… or the École nationale d'administration… gradually replace amateur political activists or citizen-legislators. This way the criteria that regulate entry into the political field also change. Bourdieu does not theorize the levels of autonomy, but as the field becomes more autonomous its internal mechanisms play a more central role in political activity. Struggles are sedimented and institutionalized, eventually forming part of the objectified and materialized social unconscious. In this historical process, each political organization develops its own esoteric culture that is alien to outsiders.[54]

As the following chapters illustrate, "profanes," radicals, and cowboys who were welcomed into, or at least tolerated in, early institutions have disappeared from ICL's core. While the relative social and professional value of given credentials, training, or positions was ambiguous in the Napoleonic, Wilhelmine, and post-Second World War eras, the internal hierarchy of the field is now clearer. Likewise, the definition, legitimation, and maintenance of this internal hierarchy is largely managed by "internal mechanisms" such as professional associations and groupings of practitioners, rather than imposed *ad hoc* by non-practitioners. In parallel, the dominant ideology and ethos of the field, which define ideas about "what" ICL is about—have been disciplined and defined by the same group of symbolic hegemons, furthering ICL's expert capture.

Pragmatism, Collegiality, and Collective Commitment

Contemporary ICL values inventiveness, collegiality, legal pragmatism, and a commitment to the "international criminal justice project" among practitioners.[55] As with educational credentials, the ideological profile of practitioners welcomed into the core of the ICL field has narrowed, shaping norms of acceptable critique, dissent, and conduct. For example, while it can now be taken as given that legal professionals at the ICC support the "international criminal justice project" and view the ICC as a legitimate and legal institution, earlier institutions were riven by internal contestation over the legitimacy, legality, and desirability of judicial action. Most famously, Justice

[54] Kauppi 2003, 779.
[55] Mégret 2014.

Radhabinod Pal of the Tokyo Tribunal arrived in Tokyo determined to dissent from and reject the tribunal as "an imperialist instrument" and site of "imperial law making and 'authorization.'"[56] Pal is hailed as a forefather of modern "Third World approaches to International Law," but his most radical intellectual successors are unlikely to be appointed to the ICC bench.[57] Instead, such critiques are now levelled from outside. Dissenting voices persist in contemporary ICL but are essentially absent from central institutions like the ICC.

Likewise, in earlier periods, the creators of and practitioners at such institutions represented diverse ideological perspectives on ICL's goals, subject matter, and procedural norms. They also had divergent understandings of how such diversity could be managed or adjudicated, including the mutually intelligible unspoken rules which Wenger refers to as "resources for *negotiating* meaning."[58] Such rules structure day-to-day contestation "according to the rules" of a field, as discussed in this dissertation's introduction, and structure decision-making and interactions within institutions.

ICL values inventiveness, flexibility, and pragmatism among its practitioners. Broadly speaking, the history of this facet of ICL might be understood as a history of debates over three understandings of international law and its sources, which align with what Koskenniemi refers to as the "rule-approaches" of natural law or formalism on one hand, and the "idealist" approach of legal pragmatism on the other.[59] These understandings also interrelate with ideas about the appropriate role of lawyers and judges. "Rule-approaches" are associated with a view of "law as rules, identifiable by reference to an objective test of… sources."[60] A rule-approach encourages legal practitioners to identify "objective" sources of law and then interpret and faithfully apply the legal rules articulated therein. Historically, rule approach lawyers' understanding of correct sources runs the gamut, from "the more positivistically [sic] oriented lawyer emphasizing treaties and custom, [to] the more naturalistically inclined lawyer stressing general principles, systemic values, etc."[61] From such a standpoint, practitioners perceive a strict distinction between law and non-law and between legal and political procedures. Within the universe of rule-approaches, two legal philosophies feature prominently in this dissertation's account of ICL: a broad "formalist" position and a broad "natural law" position. The former sees actors embrace the strict "application" of positive law (including treaties and customary law) above all other considerations; the latter sees practitioners elevate allegedly universal moral principles as the source of that international law which must be "applied." Crucially, both rule-approaches conceptualize the primary role of the lawyer or judge as being to identify, interpret, and apply pre-existing sources of law, rather than invent new law or re-formulate existing law.

In contrast, "idealist" approaches tend to reject "rules-approaches" as conservative and restrictive, taking a broader view of both the sources of law and its relationship to international

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[56] Sen and Raman 2020, 232.
[57] Sen and Raman 2020; Xavier 2022; Varadarajan 2015.
[58] Wenger 1999, 82-83.
[59] Koskenniemi 2005, 189-218.
[60] Koskenniemi 2005, 189.
[61] Koskenniemi 2005, 190.

society. Crucially, idealist arguments embrace law as an instrument of change.[62] According to this position, International Law both "reflects the changes in the international society and is critical of that society;" this critical bent opens the door for law to be transformative and hasten the birth of a new international society.[63] "Idealist" actors in ICL tend to present arguments consider existing sources of law (broadly defined), the goals of ICL, and the needs or demands of international society or humanity. The lack of a clearly applicable legal rule need not deter such thinkers; they are comfortable "inventing," rather than merely "applying" law. One form of "idealism" looms large in the history of ICL's development and expert capture: that of legal "pragmatism." This philosophy rejects the idea that law is an objective science and instead views law as "a dynamic process" which may be used "for the advancement of… society as a whole."[64]

The legal philosophies sketched above are used as loose ideal-typical analytical tools throughout this dissertation. I do not attempt to identify "perfect" formalists, pragmatists, or natural law thinkers within historical ICL institutions or to identify coherent transhistorical "traditions" or "schools" of "rules-based" or "idealist—or pragmatic, formalist, or naturalist—thought. Rather, these labels are used to highlight persistent and recurring distinctions between actors' different visions of ICL. These labels demonstrate typical ways in which claims about what is "correct" and commonsensical in ICL are legitimated and narrated. In practice, any given actor in the ICL field may blend multiple legal positions. Yet the history of the field reveals a gradual trend towards progressive pragmatism in ICL institutions. The range of legal philosophies represented and articulated in the core of the field has narrowed over time—one would be hard-pressed to identify a natural law aficionado at the ICC, and strict formalism is likewise rare—although diversity remains. To return to a point made in the Introduction, this is one reason why I do not refer to ICL as a "community." These intra-field and intra-institutional differences are engines of change; struggle and compromise between groups leads to change, new practices, and new common sense.

Debates over the appropriate philosophy and ethos of ICL re-surfaced at every critical juncture examined by this dissertation; practitioners have been historically divided over whether ICL institutions are meant to strictly interpret and "apply" existing positive law, to enact supposedly "universal" natural law or morality, or to "invent" and "adapt" new law. Relatedly, debates over the sources of international law regularly resurfaced. These divisions, coupled with the differences arising from different national, educational, and professional backgrounds, contributed to friction and deadlock. For example, in 1919 the framers of the Wilhelmine Tribunal could not agree whether broadly acceptable principles of domestic law, including the principle of *nullum crimen sine lege*, were internationally applicable or should be abandoned. Likewise, the Tokyo Tribunal saw significant disagreements over the sources of international law and the acceptability of retroactive law-making. The first moderately successful efforts by ICL practitioners to forge a shared commitment to one ICL ethos—the ethos of pragmatic "inventiveness"—did not take shape until the 1990s. Likewise, the idea that officials in ICL institutions were members of a shared community

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[62] Koskenniemi 2005, 212.

[63] Koskenniemi 2005, 212.

[64] Wang 2005, 264.

and should be committed to collegiality and collaboration according to certain shared standards of decision-making did not gain real traction until the 1990s.

Contemporary ICL common sense dictates that practitioners should be committed to collegiality and pragmatic inventiveness in the name of advancing justice and human rights.[65] The reflections of one contemporary ICC judge (and former ICTY judge) on working with colleagues from different legal systems and backgrounds illustrate the importance of these shared norms. According to Canadian Justice Kimberly Prost, such differences pose:

> one of the greatest challenges of working as a judge in [international courts]… and at the same time it is… one of the most fascinating… parts of the job… one of the most important features… if you're going to… navigate those differences is… to come to the court without carrying the baggage of your legal system and your legal tradition and your culture. You have to come knowing things from that and be willing to share that with your colleagues, but you have to be open to other legal systems, other traditions, and other perspectives. And you have to be able to listen, which judges are supposed to be very good at, but it's not always the case, and be prepared to… compromise… I always tell this story: when I was at ICTY, I sat with a fabulous bench: [a] judge from South Korea, [a] judge from Malta, a reserve judge from Norway. We had the greatest discussions, but it was particularly hilarious between Judge [O-Gon] Kwon from South Korea and myself, who's a dear friend and we love to argue. We argued all the time. We drove the others crazy, but we were always listening to those arguments, and the interesting thing was that by about halfway through, it was clear that Judge Kwan, who comes from primarily a civil law tradition, was the biggest fan of the common law. And I couldn't stand the common law… precepts and was always advocating for the other side. So that, to me, is the spirit in which we can navigate through all of these… situations and… I'm happy to say that… we have a lot of that now at the ICC.[66]

Hemi Mistry argues that the contemporary ICC is, and ought to be, defined by a culture of "collegiality," as evidenced by Justice Prost's comments.[67] Mistry draws on Max Weber's work to argue that the importance of this norm of collegiality is "premised upon the… perception that processes of decision-making operating within a collegial culture are more legitimate, and thus authoritative, than processes governed by other norms."[68]

Indeed, collegiality is so well-established in modern ICL common sense that ICC candidates are explicitly vetted based on their commitment to collaboration and creative compromise. The ACN assesses "practical skills such as the ability to work collegially; knowledge of different legal systems; and exposure to and understanding of regional and sub-regional political, social, and cultural environments."[69] The ACN's 2020 report praised candidates for virtues including "good

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[65] Interview in Stuart and Simons 2010, 47; Mistry 2017.
[66] Law Society of British Columbia 2022, at 00:58:05.
[67] Mistry 2017, 705.
[68] Mistry 2017, 706.
[69] ICC-ASP/19/11, 8.

judicial 'instincts' and a clear understanding of the need for collegiality," for "a collegial approach… a constructive attitude; and… a marked passion of international criminal justice;" for "very good knowledge of other legal systems… a constructive attitude, [and] a clear collegial approach," and for "think[ing] imaginatively in the application of international law."[70] In other words, within contemporary ICL, the norms of collegiality, inventiveness, and compromise function as the "rules of the game." These norms also provide tools for productively managing the inevitable disagreements that arise in multi-national, multi-cultural courts. It is difficult to emphasize just how new this emphasis on collegiality, compromise, and shared commitment to tribunal colleagues is within ICL. Until the 1990s, such norms remained a topic of bitter debate and friction. Even in the post-Cold War ICTY and ICTR, judges and prosecutors clashed over the appropriate ethos, behavioural norms, and decision-making procedures for ICL institutions.

Together with the credentialism of modern ICL, the field's emphasis on ideological legal pragmatism and collegial decision-making function as something akin to a "diversity regime." Reus-Smit defines diversity regimes as "institutional norms and practices that define legitimate units of political authority, authorize certain forms of cultural difference, and relate the two."[71] The internal disciplining and boundary drawing which delimits legitimate action and actorhood in ICL allows the diverse (on certain metrics) officials within ICL institutions to express, adjudicate between, and tolerate in-group difference without allowing such difference to paralyze their work. Earlier efforts at ICL, during periods when such underpinning norms were absent, suffered from the lack.

Human Rights and Progress

Questions of who or what ICL was meant to protect and be answerable to were contested for much of the field's history. Mégret notes, "the power of international criminal justice… is the power to designate the criminal."[72] This includes the power to designate the crime and the referent object or victim, crucial elements of "what" ICL is "about." In domestic societies, crimes are understood to be offenses against society at large, and against the state's positive law, rather than only against individual victims. Criminal acts are understood to threaten the shared norms and order of society; criminal justice defends and upholds the *status quo* upon which the existence of a society and the security of its members depend. Douglas paraphrases Hobbes' *Leviathan* to explore how the notion of criminality presupposes the existence of a sovereign, or a higher authority: "with the advent of the sovereign… the enemy [is] transformed into the *criminal*, the violator of the state's positive law… The sovereign secures internal order and peace."[73] With no international sovereign and in cases where a sovereign state is itself "the very agent of criminality" (Nazi Germany is a prime example), the power to designate the enemy or criminal may be contested, and is likely to rest with the most authoritative actor(s) or symbolic hegemon within the field.[74] As with other dimensions of ICL common sense, the gradual ascendence of legal professionals in the

[70] ICC-ASP/19/11, 17, 18, 20, and 14.
[71] Reus-Smit 2017, 851.
[72] Mégret 2014, 23.
[73] Douglas 2019, 56.
[74] Douglas 2019, 55.

field and the workings of the expert legitimation trap empowered ICL practitioners to join or supplant powerful states in defining international crimes and victims. Such practitioners have increasingly embraced the promotion and vindication of individual human rights as a core goal; in the process, they have helped put human rights and humanitarianism at the center of the field, supplanting the focus on crimes of aggression which dominated earlier eras.

Contemporary ICL is defined by an "atrocity paradigm:" a framework that defines international crimes in terms of violations of human rights and humanitarian norms.[75] This paradigm casts the individual victim—and, by extension, "humanity"—as the core referent object of ICL. The Rome Statute (which established the ICC) recognizes "that during this century millions… have been victims of unimaginable atrocities that deeply shock the conscience of humanity" and makes it clear that the ICC's mission is to ensure that such acts cannot go "unpunished."[76] The "atrocity paradigm's" moral vocabulary draws on the language of trauma, dignity, and moral progress, and its practical ambition is to protect vulnerable populations from "atrocity crimes"—genocide, war crimes, and crimes against humanity—through legal accountability. In the contemporary field, genocide is understood to be the supreme international evil and crime: the "problem from hell" which, more than any other act, necessitates an international criminal justice regime.[77] Mégret observes that appeals to humanity and humanitarianism are central to contemporary ICL, noting:

> grounding international criminal justice in some higher demand of humanity… remains a strategy that is resorted to regularly, even if not… explicitly. It was evident… in the tendency for some judges to engage in broad teleological jurisprudence that seemed to assume that we knew unproblematically what the *telos* of international criminal justice was. Certainly, the international community has never seemed as close to holding something to be an absolute truth [as the idea] that genocide is prohibited and is the gravest international crime today.[78]

The primacy of this "atrocity paradigm" is also reflected in the routine invocation of victims' rights and outreach obligations in the mandate of modern tribunals. The ICC is expected to make "provisions for victims to be recognised, protected, to participate, and to claim reparations," as well as to provide "justice to victims beyond [ICC] courtrooms."[79] The ICC is expected to communicate with impacted communities, offer symbolic redress to survivors, and integrate victim participation into its procedures; failure to do so is understood to threaten the court's legitimacy and effectiveness. Spurred by the embrace of judicial mechanisms for Transitional Justice in domestic societies, ICL is imagined (from its hegemonic core) as an instrument of not only legal judgment but also moral healing and human rights education.[80] As one ICC prosecutor said in 2013, ICL should "endeavour to seal the primacy of the rule of law, due process and human rights

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[75] Douglas 2019, 2012; Meron 2021; Shapiro 2015.
[76] A/CONF.183/9, preamble.
[77] Power 2013.
[78] Mégret 2014, 27.
[79] Moffett 2012, 245-246.
[80] Clapham 2016, 31; Tallgren 2014, 73-74; Zunino 2019, 138-140.

for future generations."[81] As with many aspects of ICL common sense, critical scholars and more peripheral actors often note the tensions inherent in this linkage.[82]

This focus on individual human rights, victims, and atrocities contrasts with the "aggression paradigm" that dominated ICL's formative episodes. The aggression paradigm emphasized violations of sovereignty and challenges to geopolitical stability; key referents included great powers, peace treaties, and the international *status quo*. Efforts to punish Napoleon Bonaparte and Kaiser Wilhelm II were premised on an understanding that aggression, "violation of treaties" and "disrupting the tranquillity of the world"— crimes against international order and the *status quo* of the society of states—were the worst offences.[83] The Treaty of Versailles explicitly accused the former Kaiser of a "supreme offence against international morality," which the great powers of the time understood to mean aggression, not war crimes or violations of human rights.[84] Indeed, even the framing of the Nuremberg and Tokyo Tribunals focused on crimes against states and international order, with war crimes and crimes against humanity relegated to a lesser role. To a large extent, our cultural understanding that the Nuremberg Tribunal was primarily focused on crimes against humanity and the Holocaust projects the current "atrocity paradigm" back in time.[85] Both tribunals focused on aggression as the primary crime of the Axis powers; the Nuremberg judgement labelled aggression the "supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[86] This focus also cast individual victims in a more minor role than we see them today; prosecutors at the post-war tribunals eschewed presenting witness and victim testimony and did not view the tribunals as fora for victims to seek closure or reparations.[87]

Although aggression remains an international crime, its status as the obvious "supreme international crime" and the focus of international prosecutions has faded.[88] The Rome Statute grants the ICC jurisdiction over four crimes: genocide, crimes against humanity, war crimes, and aggression (in that order). Famously, the Rome Statute included no definition of aggression until 2010 (eight years after the Statute's effective date), and then only an "antiquated" and unwieldly one.[89] This jurisdiction was not "activated" until 2018, and the ICC has yet to prosecute any individuals for aggression.[90] The "atrocity paradigm" remains paramount (at least for now).

This paradigm shift signals a change in the common-sense imagined purpose of ICL. Where earlier institutions were intended to punish breaches of the peace and *status quo*, contemporary ICL institutions are legitimated as agents of moral progress and humanitarian protection. This transformation in ICL common sense was shaped by expert actors—especially in the post-Cold

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[81] Quoted in Tallgren 2014, 73.
[82] Branch 2011, 179-215; Schwöbel 2014b.
[83] Bellot 1923, 170-171; Wellington and Gurwood 1837, 352-353.
[84] *Treaty of Versailles*, Article 227, reproduced in Marrus 1997b, 10-11.
[85] Douglas 2019, 2012; Bloxham 2013.
[86] "Judgement," in International Military Tribunal 1947a, 422.
[87] Moffett 2012; Levi, Hagan, and Dezalay 2016.
[88] "Judgement," in International Military Tribunal 1947a, 422.
[89] Scheffer 2017, 84.
[90] A/CONF.183/9, Article 8 *bis*. Activated Via: RC/Res.6.

War ICTY and ICTR—who harnessed their increased prominence and authority to promote human rights framings, highlight victims, and institutionalize outreach mandates. The rise of the "atrocity paradigm" and tribunals' mission creep into human rights-focused work owes a great deal to ICL's expert capture and tribunal officials' resulting freedom to innovate.

Sequencing Expert Capture and Transformations in Common Sense

The next chapters of this dissertation trace how these shifts unfolded, and how new "theories" of ICL's purpose, concepts, ethos, and membership came to dominate. This analysis reveals the role of expert capture and the expert legitimation trap in this process. It demonstrates how powerful states' initial embrace of legal expertise as a source of legitimacy in ICL, coupled with contestation during both critical junctures of institution-building and apparently latent periods of relative calm and ambiguity, laid the foundation for the transformation of ICL. These patterns of legitimation and institution-building enabled legal practitioners to expand their normative authority, define new rules of the game, and reorient the field around values including collegiality, pragmatism, humanitarianism, and judicial independence. In so doing, they redefined what it means to "do" international criminal law.

The result is a contemporary ICL field that appears self-evident and natural—where international lawyers speak not only for the law but for "humanity" and where states are not the only (or even the most) legitimate actors. Yet the contemporary common-sense vision of legitimate ICL, centred around the ideal of an *independent, impartial,* and *apolitical court* staffed by *legal experts* committed to the *international criminal justice project*, *collegiality*, *adaptability*, and *human rights* protection and outreach, is a recent construction. Contemporary ICL common sense is the product of layered contestation, sporadic institution-building, and strategic legitimation. Understanding how it came to be is essential not only for historical reasons but also for considering future possibilities. ICL common sense remains subject to renovation.

The evolution of modern ICL was a messy process, in which multiple constitutive questions were contested simultaneously, were not necessarily resolved, and were often resurrected and re-adjudicated in later eras. Yet, the empirical record reveals a loose chronology of how the range of ICL contestation narrowed over time.

The first historical episode examined by this project—the 1815 decision to exile Napoleon Bonaparte to St. Helena—saw tentative steps towards the *legalization* of the field, including early efforts by legal professionals to gain a (justificatory) voice. Next, post-World War One efforts to punish the former Kaiser saw the ratification of ICL's *legalization*, the further embrace of legal expertise as a source of legitimacy, and tentative steps towards *judicializing* the field. Statesmen and lawyers (this time in an advisory role) began to frame international trials as legitimate venues for post-war punishment, even as this framing remained contested and intimately intertwined with matters of "high politics."

The framing and operations of the post-World War Two international military tribunals at Nuremberg and Tokyo saw states further embrace the framing of ICL as a field of quasi-political *judicial* (and *legal)* action, this time through experts expected to act as state representatives and delegates. Crucially, the 1940s tribunals were also sites of contestation between expert practitioners

and between practitioners and Allied states. Such experts leveraged ICL's legal framing and their newfound institutional authority to contest and forge shared common sense with tribunal colleagues while also tangling with states over the correct interpretation and application of legal concepts. As a result, the 1940s tribunals saw practitioners begin to impose internal *discipline* on the field while also working to *insulate* the tribunals from overt state intervention. In seeking to discipline the field, practitioners struggled over ICL's dominant ethos, legal philosophy, and professional norms (including ideas about legal pragmatism and collegiality). By seeking to insulate the tribunals, practitioners at Nuremberg and Tokyo contested the Allies' quasi-political framing of the field and the delegation model of international criminal law expertise, curtailed states' actions, and translated ideas about judicial independence, impartiality, and other principles of legality into the field. Finally, the post-Cold War tribunals saw the expert legitimation trap be further "sprung" on states, as practitioners embraced and defended a trustee model of legal expertise. The ICTY and ICTR became sites where the expert capture of ICL was consolidated and expanded, as practitioners articulated and defended additional aspects of contemporary ICL, including the field's depoliticization and focus on human rights and outreach.

Having outlined the core dimensions of ICL's common sense, the remainder of this dissertation traces how this common sense came to be. The following empirical chapters examine the historical struggles and contingencies through which legal professionals gained authority, disciplined and insulated institutions, and forged a new common-sense vision of the field. At the same time, powerful states became ensnared in the very legitimation strategies which empowered legal experts.

Chapter Two: Napoleonic Pre-History: Legalization, Justification, and Law at the Service of Policy

Efforts to capture International Criminal Law are at least as old as the field itself. Attempts to define ICL as the domain of lawyers predated the advent of both the term "International Criminal Law" and the International Law (IL) profession.[1] This chapter explores how policymakers and others understood the project of punishing Napoleon Bonaparte after his defeat at Waterloo in 1815, when he was exiled to the remote island of St. Helena, and how the role of legal expertise evolved throughout the episode.[2] It then considers the Napoleonic episode's legacy and the development of the IL profession during the rest of the "long nineteenth century." Crucially, the Napoleonic episode saw the first strides towards the *legalization* of ICL and laid initial groundwork for the expert legitimation trap which would constrain and shape the field in later eras. The Napoleonic episode saw the first efforts by legal experts to gain a voice in the nascent field and the first time when political elites embraced (or tolerated) the legitimizing potential of legal expertise as a justification for policy in this sphere.

In addition to excavating early strides towards legalization and capture, this account reveals how far modern ICL has come and how the international criminal justice project has been subject to struggle between legal practitioners and other actors. Many questions that surfaced during the Napoleonic episode resurfaced later. Therefore, this chapter offers a first glimpse into themes and dynamics that recurred later, including debates over the relationship between law and politics and the kinds of crimes that are subject to international justice—the *how* and *what* of the field. These issues were not resolved in 1815 - 1816, but this episode marked a critical juncture in the emerging debate over field-defining questions, and in setting the stage for the eventual dominance of legal experts. The Napoleonic episode represents an early attempt to assert the relevance of legal expertise to international criminal justice, and specifically its usefulness as a source of legitimacy for state policymaking. The episode also underlines the importance of the modern IL profession's networks for ICL's eventual expert capture. Lord Eldon, the British Lord Chancellor and most prominent British lawyer at the time, saw his attempts to gain a voice in decision-making stifled by the lack of a supportive professional network. Practitioners in later critical junctures were not hampered by the same dearth of colleagues and were able to do more as a result.

Overall, this episode provides a first glimpse into themes that recurred in later junctures and into the dynamics that created the expert legitimation trap in ICL. This can most clearly be seen by considering Eldon, whose efforts to bring the law into discussions of Napoleon's fate highlighted questions that his political colleagues had not yet considered and that proved helpful to the British government. Thanks to Eldon's persistence, British decision-makers were exposed to the legitimating potential of legal expertise for state policymaking in international justice. Furthermore, paradoxically, after granting legal expertise a foothold in international criminal justice, the great powers turned away from ICL, yet lawyers continued to debate and advance the ICL project. This dynamic recurred throughout the subsequent two centuries, with legal experts

[1] Koskenniemi 2002; Van Schaack and Slye 2020.

[2] Bonaparte died on St. Helena in 1821.

continuing to engage with and develop ICL "in the shadows," even when states turned away from the field.

The most salient field-defining question during the Napoleonic episode was: *how* should international criminal justice be practiced? Practitioners struggled to define norms and language relevant to Napoleon's fate after Waterloo. Policymakers initially assumed that national and international law were irrelevant: the Napoleonic question was a matter of national policy and geopolitical diplomacy, not law. Eventually, lawyers—led by Eldon—carved out a "justificatory" role in the policy process. As discussed in Chapter One, under a justificatory model of legal expertise, the lawyer is expected to provide political advice and *ex post facto* justification for policy decisions. Although policymakers were sceptical, Eldon's legal justifications proved useful to the British government. The unexpected utility of Eldon's argument furthered the legalization of ICL, as the Liverpool government cautiously added legal expertise to their rhetorical arsenal for legitimating Napoleon's second exile. Thus, law became the handmaid of the British national policy apparatus that exiled Napoleon. In 1815 – 1816, ICL was far from being decoupled from politics and diplomacy, yet law had gained a foothold in the field. This episode laid the groundwork for ICL's eventual expert capture and saw concerned states (primarily Britain) rely on legal arguments to justify and legitimate policies. Crudely, the Napoleonic episode was the "thin end of the wedge" for expert capture.

This episode demonstrates the tangled relationship between "law" and "politics," and the relative newness of a distinct, professionalized field of ICL practice. Before international criminal justice became depoliticized, it first had to be professionalized, internationalized, and legalized. This chapter illustrates how early attempts at articulating and applying international criminal justice fell firmly within the realm of national politics, rather than international legal practice or multilateral expert decision-making. Initial answers to the question of how international criminal justice should be practiced focused on political and logistical considerations, revealing how international criminal justice was framed as a purely (geo)political matter during this period.

This understanding was challenged and re-shaped through the efforts of the most powerful lawyer in the British Cabinet—Lord Eldon—who leveraged his institutional position to convince colleagues that it was politically desirable to craft a legal justification for their policies. Thus, Eldon launched a centuries-long contest over the norms and considerations relevant to international criminal justice. Although Eldon was unable establish one single coherent legal justification, he carved out space to frame international criminal justice as a legal endeavour. Eldon's persistence worked in the government's favour, since he correctly predicted that the government would need to respond to legal questions and criticism. This re-framing had downstream effects on future attempts to hold heads of state responsible for aggression and atrocities committed in wartime, as legal arguments and expertise became tools that statesmen would reach for to legitimate choices. Thus, Eldon laid an early foundation for the consolidation of ICL as a field of autonomous professionalized practice, helped generate a new *status quo,* and set the stage for expert capture.

In the Beginning: Napoleon the Political Outlaw

Far from being entrapped by legal expertise, the initial attitude of Napoleon's enemies reflected a widespread sense among European and especially British elites that international justice—in this

case, "vengeance" against Bonaparte—was an essentially political undertaking that could be legitimated on a political basis. Napoleon escaped from exile on Elba in February 1815. The Congress of Vienna, Europe's newest political institution, promptly declared him an "outlaw." After his first defeat in 1814, the Sixth Coalition powers had negotiated with Napoleon to secure his abdication to Elba under the Treaty of Fontainebleau; in contrast, this time there would be no treaty.[3] But there would be no trial either; a judicial form of international punishment was not contemplated. On March 13, 1815, while the fugitive Napoleon was making his way to Paris, the Congress of Vienna issued a declaration stating:

> by violating the Convention which had established him in… Elba, Buonaparté [sic] destroys the only legal title on which his existence depended; by appearing again in France with projects of confusion and disorder, he has deprived himself of the protection of the law, and has manifested to the universe that there can be neither truce nor peace with him.[4]

The Congress declared that, by breaking the Treaty of Fontainebleau, Bonaparte had rendered himself "outside of civil and social relations."[5] As an "enemy and disruptor of the tranquillity of the world," he was liable to "public justice" (or, alternatively, "public vengeance").[6] The declaration made no reference to atrocities which today would be labelled "war crimes" or "crimes against humanity;" the "disruption of the tranquillity of the world" and Bonaparte's assault on the pre-existing international *status quo* were the Congress' primary concerns. Thus, the declaration underscored, as many of the Congress' actions did, the essential conservatism and political aims of that institution. As Van Hulle and Lesaffer summarize, the Congress generally "attempted to suppress many of the disruptive ideas of the French Revolution [and other contemporary events] and designed an order for Europe to restore the old, pre-revolutionary system as much as possible."[7] The Napoleonic declaration made it clear that the Congress viewed Bonaparte's alleged crimes and his punishment in a conservative light. Napoleon's primary offense was framed as an act of treason against European and global stability; the Congress hoped to restore this stability.

Although this declaration used legal language, it was a distinctly political document crafted by a political organization. The declaration relied on what was, even at the time, an esoteric understanding of international law. It made no clear legal argument in support of the decision to "outlaw" Bonaparte. The intended meaning, specific text, and correct English translation of this statement were debated at the time and remain ambiguous.[8] What does it mean to be "outside of the protection of the law" and subject to "public justice" or "public vengeance?" What legal basis was there for the Congress of Vienna to declare another sovereign a universal outlaw, a label which, at the time, applied in a strict legal sense only to pirates?[9] Was breaching an international treaty really a criminal act for which an individual sovereign could be held legally responsible and

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[3] Van Hulle and Lesaffer 2019, 8-10.

[4] House of Commons Debate, 7 April 1815, Hansard Volume 30, column 373, my translation.

[5] House of Commons Debate, 7 April 1815, Hansard Volume 30, column 373, my translation.

[6] Bellot 1923, 170-171 ; Wellington and Gurwood 1837, 352-353.

[7] Van Hulle and Lesaffer 2019, viii.

[8] Bellot 1923, 170-171 ; Wellington and Gurwood 1837, 352-353.

[9] Heller-Roazen 2009.

punished?[10] Surely not, since this was not the first time a treaty had been violated, and would undoubtedly not be the last. Indeed, this was not even the first time that the Treaty of Fontainebleau had been violated.[11] Some of these questions were considered by various political and military officials at the time but not satisfactorily resolved. Eventually, these questions were referred to legal professionals before being debated in the British House of Commons.[12]

The prevailing sentiment was that such legal details were beside the point; imprisoning Bonaparte was necessary for the peace and security of Europe and the world. It therefore had to be achieved. The Congress of Vienna's declaration appealed to a general sense among policymakers of what international law *ought* to have been but was untethered from *existing* positive international law. The discursive act of declaring Bonaparte an "outlaw" was not supported or justified by detailed legal arguments or precedent but was instead legitimated on the basis of political necessity. The Congress justified the declaration based on a desire to defend "their own dignity and the interests of the social order," pledging to "employ all their means" to ensure that "the general peace, the object of the wishes of Europe, and the constant purpose of their labours, may not again be troubled, and to guard themselves against every attempt which shall threaten to re-plunge the world in the disorders and miseries of revolution."[13] Based on these interests, it was necessary to declare that the man who had, until 1813, been "recognized by the dynastic powers… of Europe as the French head of state" had become essentially *hostis humani generis*.[14]

Thus, the Congress of Vienna's response to Napoleon's escape clearly demonstrated their understanding of the situation as a political problem requiring a political solution and justification rather than legal ones. This understanding was further reflected in discussions of how to respond to and characterize Bonaparte's escape and his subsequent "projects of confusion." The Congress' characterisation of Bonaparte's alleged crimes did not draw a distinction between so-called "moral crimes" and "legal crimes," or between natural law and positive law; they did not put forward a monolithic vision of the scope, goals, and sources of international criminal justice in general, focusing on Bonaparte's fate alone. The Congress' vision did not reflect any coherent legal narrative of international criminal justice, but was, at the outset, confined to geopolitical terms. Legal expert advice and broader arguments would not be (cautiously) embraced as a source of legitimacy for the second Napoleonic exile until later.

The Deliberative Process: Political Decision-making on a Political Issue

Despite the Congress' consensus that imprisoning or punishing Napoleon was a political necessity, there was no clear consensus over what specific action should be taken. Likewise, there was no hegemonic understanding of which (political, moral, or legal) precedents, sources, or values were relevant beyond the value of protecting "the peace and tranquillity of the world." The

[10] The Treaty of Fontainebleau established Napoleon as the sovereign (Emperor) of Elba. That sovereignty was not made conditional upon his remaining in Elba.

[11] Other parties to the Treaty of Fontainebleau also failed to fulfil their treaty obligations. For example, King Louis XVIII failed to pay the promised stipend to Empress Marie-Louise.

[12] Wellington and Gurwood 1837, 352-353.

[13] House of Commons Debate, 7 April 1815, Hansard Volume 30, columns 374-375.

[14] "Enemy of all mankind." Crawford 2019, 4.

question of what punishment was possible and appropriate—of how the Congress' declaration could be put into practice—remained unsettled for some time. In keeping with their understanding of this as a matter of high politics, the Coalition powers did not immediately ask legal experts to weigh in. Instead, several military and political figures offered their—often legally hazy—views. The Prussian Field-Marshal Blucher made it known that "as the Congress of Vienna has declared Napoleon outlawed, it was his intention to have him shot whenever he caught him."[15] This interpretation—which was shared and decried by some members of Britain's parliament—"astonished" the Duke of Wellington.[16] Wellington had been a signatory to the declaration but maintained that "the declaration of outlawry… was never meant to incite the assassination of Napoleon" and did not confer "any right to order Napoleon to be shot, should they succeed in making him a prisoner of war."[17] Wellington also objected to the suggestion that war heroes such as Blucher or himself should "hand down our names to history stained by a crime," and a "useless" crime at that.[18] The "correct… interpretation of the… declaration of outlawry" was not clear, even to those who had signed it.[19]

Meanwhile, the delegation representing Napoleon attempted to negotiate an armistice, a second abdication, and a guarantee of Napoleon's safe passage to America.[20] In other words, they focused their energies on negotiating a favourable diplomatic solution rather than on putting forward legal arguments in Bonaparte's defence. The delegation accepted the Congress' framing of Napoleon's fate as a political question and did not seize upon legal expert arguments as potential weapons for contesting the exile. The Napoleonic delegation's proposal was rejected by British Prime Minister Lord Liverpool in late June 1815; the Prussian proposal that Napoleon be shot was abandoned around the same time.[21] Therefore, the first phase of decision-making about Napoleon's fate was defined by political negotiations and non-lawyers' instincts about the meaning of the manifestly political Viennese declaration.

By July 1815, the British Cabinet had belatedly begun to solicit actual legal advice on the question "What is to become of Buonaparte?"[22] Liverpool consulted unnamed English "men of law" who were, according to the Russian Ambassador, "generally of the opinion that [the French King] would have every right… to have [Bonaparte] tried and convicted."[23] These legal practitioners did not initially consider the matter as an *international* legal issue but instead focused

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15 Müffling and Yorke 1853, 252-253.

16 Following the parliamentary debate, Wellington wrote to his brother: "the declaration has never been accurately translated; and the meaning of the words *vindicate publique* is not 'public vengeance,' but 'public justice.' But even if the meaning was 'public vengeance,' the declaration does not deliver Buonaparte over to the dagger of the assassin. When did the dagger of the assassin execute the vengeance of the public?" Wellington to Wellesley-Pole, May 5, 1815, quoted in Wellington and Gurwood 1837, 352; Müffling and Yorke 1853, 252.

17 Müffling and Yorke 1853, 252-253.

18 Müffling and Yorke 1853, 253.

19 Müffling and Yorke 1853, 252.

20 Bellot 1923, 171.

21 Bellot 1923, 171.

22 Bellot 1923, 172 ; Castlereagh 1850b, 416-417.

23 Martens 1874, 239. Quoted in Bellot 1923, 172-173. My translation.

on more well-trodden spheres of legal precedent. As Liverpool summarized to Viscount Castlereagh, the Foreign Secretary, the easiest solution:

> would be to deliver [Napoleon] up to the King of France, but then we must be quite certain that he would be tried and have no chance of escape… the civilian [lawyers]… are of the opinion that this would be… the least objectionable course. We should have a right to consider him as a French prisoner and, as such, to give him up to the French Government. They think likewise that the King of France would have a clear right to consider him as a rebel and to deal with him accordingly.[24]

The lack of any precedent for individual criminal accountability or codification of "outlawry" under international law was troublesome for these "men of law." They were likely also puzzled by how the Congress would be able to legally justify imprisoning Bonaparte after a peace treaty was signed, since international law dictated that prisoners of war be released following an armistice. These obstacles made relying on domestic French law appealing, although Napoleon's legal status as the sovereign ruler of Elba (established by the Treaty of Fontainebleau), rather than a French subject (or an "outlaw," despite what the declaration claimed), could have complicated matters. In the end, this complication was irrelevant since the "men of law's" preferred solution was politically impossible. Events overtook their deliberations, preventing them from considering these thorny questions in detail.

Despite these suggestions, Bourbon France refused to prosecute and imprison Napoleon as a "simple criminal" or traitor.[25] The Russian Tsar then asked Britain to "undertake the charge" of imprisoning Bonaparte on behalf of the Congress of Vienna.[26] Liverpool agreed, on the condition that Britain have "complete discretion" in the matter.[27] In the meantime, Napoleon surrendered to Captain Maitland on July 15, 1815, and the great powers agreed that "as a trophy," Bonaparte "seem[ed] to belong to" Britain.[28] Therefore, the international political question became a national one, but the questions of what to do and how to justify holding a foreign sovereign prisoner after an armistice remained.

Castlereagh, the British Foreign Secretary, suggested Bonaparte be imprisoned in England, where he would be "less exposed… to any sudden change in European politics," again highlighting the critical importance of geopolitical considerations.[29] This suggestion was swiftly rejected by the cabinet since, as Liverpool wrote on July 20, 1815, "very nice legal questions might arise upon the subject, which would be particularly embarrassing."[30] Liverpool also feared that "the feeling of [the British] people" would turn Bonaparte into "an object of curiosity… and… compassion."[31] Notably, the cabinet worried that "embarrassing" questions would arise in *English* law—not

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[24] Wellington and Wellington 1858, 677.
[25] Martens 1874, 239 ; Bellot 1923, 173.
[26] Bellot 1923, 174.
[27] Castlereagh 1850a, 430.
[28] Quoted in Bellot 1923, 179.
[29] Castlereagh 1850b.
[30] Wellington and Wellington 1858, 47.
[31] Wellington and Wellington 1858, 47.

international law. The cabinet feared opposition in Parliament and the possibility that Bonaparte might be the "object of a writ of *habeas corpus*" if imprisoned in Britain.[32] Senior military officials shared this concern. According to McNair, Napoleon told Lord Keith, the commander-in-chief of the Channel Fleet, that "he was not a prisoner of war but a guest of England and referred to the writ of habeas corpus."[33] McNair relates Keith's reaction: "So hallowed is the name of habeas corpus that it alarmed Lord Keith much more than the French had ever done, and in a note to Captain Maitland… he said: 'I have been chased all day by a lawyer with a *Habeas Corpus*!'"[34] It turned out that the lawyer was actually "chasing" Keith about another matter, but this episode illustrates the level of concern which Keith and his colleagues had about the domestic legal implications of holding Napoleon.[35]

The concern over *habeas corpus* illustrates, if further illustration were needed, the cabinet's relative lack of concern and awareness about international law. Having framed the Napoleonic question as a political and security matter, any international legal implications were less relevant. Domestic legal implications were relevant to the extent that every political decision made by the cabinet might be subject to domestic legal questions in the press, in parliament, or perhaps in the courts. For example, while the cabinet feared a writ of *habeas corpus* if Bonaparte was imprisoned in England, based on the available evidence, the cabinet did not discuss whether they could legally imprison an enemy commander after concluding a peace treaty, or whether a foreign sovereign could be imprisoned indefinitely. Likewise, they did not consider whether there was international precedent for declaring a sovereign an "outlaw."

In addition to worrying about public opinion and *habeas corpus*, the cabinet worried keeping Bonaparte in Europe might further destabilize France. Accordingly, they decided on St. Helena, an island in the remote South Atlantic administered by the British East India Company, to be Bonaparte's prison. On July 21, 1815, Liverpool summarized their rationale:

> We wish… the King of France would hang or shoot Buonaparte… but if this is impracticable, and the Allies are desirous that we should have the custody of him… we should be allowed to judge… [how] that custody can be made effectual.[36]

Liverpool eschewed referring to international or domestic law or precedent, instead framing his argument for British control over Bonaparte's fate as a purely political and logistical issue. The Allied powers and France agreed, on the condition that Britain would "not… turn [Bonaparte] loose without their consent."[37] The British cabinet made its final decision on July 28, 1815; it agreed to label Bonaparte a "common prisoner" of the Allies under British control, and the matter was, as far as most cabinet members were concerned, closed.[38] An in-depth discussion of the national and international legal issues raised by this policy decision was not attempted, either within

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[32] Melikan 1999, 351-352.
[33] McNair 1956, 105.
[34] McNair 1956, 105-106..
[35] McNair 1956, 105-106.
[36] Wellington and Wellington 1858, 47.
[37] Castlereagh 1850a, 436-437.
[38] Melikan 1999, 351.

the cabinet or between Britain and its allies. Likewise, no further attempts were made at this stage to justify or legitimate the exile to any audience other than the Congress of Vienna. And those justifications began and ended with the argument that Britain controlled Bonaparte's fate. Napoleon was informed of the decision on July 31, 1815 and, despite formal and informal protests, was sent to St. Helena on August 8.

It is worth pausing to consider the state of ICL common sense—such as it was—in August 1815, and the extent to which it differed from the common sense of the contemporary field. Bonaparte had been summarily declared a political outlaw by the Congress of Vienna in a declaration whose meaning was not agreed upon even by the individuals who had signed it. It was understood that "dealing with" Bonaparte was a political necessity and an unprecedented practical and logistical challenge. Considerations of the potential legal obstacles to such a task were confined to discussions of domestic *habeas corpus*. Legal advice was not sought until the later stages of the decision-making process and only with reference to French domestic law, not international law. After abandoning the idea of Bonaparte being put on trial in France as a French traitor, the possibility of seeking judicial redress, and the advice of "men of law" was abandoned. A decision was made, after which the Liverpool cabinet and the Congress of Vienna regarded the matter as closed. Political decision-makers had made no significant effort to justify their favoured policy (exile to St. Helena) by referencing expert legal advice, general legal principles, or international legal precedent.

Advocating for a Legal Vision: An Entrée for Experts

Despite this unpromising beginning, legal expertise eventually gained a minor foothold in discourse and decision-making regarding the Napoleonic exile, as one prominent British lawyer laid groundwork for the legalization and expert capture of the ICL field. The most remarkable aspect of this story so far is the conspicuous lack of legal consultation. Beyond recommending that Bourbon France try Napoleon as a traitor or rebel under domestic law, legal scholars and professionals provided no input into decision-making. Evidently, the Napoleonic issue was not conceptualized as a legal one, and legal knowledge and expertise were not seen as particularly relevant to its resolution. In other words, the legal framing that is so readily applied to issues of international criminal justice today was far from commonsensical to decision-makers and commentators.

However, after the decision to exile Bonaparte was made in summer 1815, one member of the British cabinet—the Lord High Chancellor—was dissatisfied. John Scott, Lord Eldon, was a noted jurist and technically a member of the cabinet, although "judicial commitments" and health problems restricted his attendance at cabinet meetings.[39] As Melikan notes, "precisely what role Eldon had played in previous discussions of Bonaparte's status… is not clear," but he apparently spent most of the summer of 1815 in Dorset, far from decision-making in London.[40] Eldon received news of the cabinet's decision after the fact. He immediately spotted a range of legal issues which had been neglected by his cabinet colleagues and which he believed "require[d] very serious

[39] Melikan 1999, 351, note 12.

[40] Melikan 1999, 351.

consideration."[41] Eldon used his status within the cabinet to push for *ex post facto* legal justification of the exile. Thus, in addition to contesting the cabinet's methods, Eldon also contested the framing of the Napoleonic question as a solely political one. In other words, Eldon began to articulate and promote a vision of international criminal justice as an issue in which legal reasoning, precedent, and expertise had a role. In doing so, Eldon laid tentative foundations for the expert capture of ICL over a century later; he developed arguments which soon proved useful to the Liverpool government (and the Congress of Vienna) as they sought to legitimate Bonaparte's exile to wider audiences.

Drawing on his reputation as a respected jurist, Eldon worked to convince Liverpool and the other cabinet colleagues that considering the legal dimensions of the Napoleonic question would strengthen the cabinet's position and the legitimacy of the exile. Eldon explicitly framed law as supportive of, rather than antithetical to, the government's political aims. He was far from being able to "capture" the Napoleonic issue and exclude other forms of decision-making, but was eager to "plant the flag" for law and demonstrate the utility of doing so. He thereby pioneered the "justificatory" model of legal expertise in the field.

In reacting to the cabinet's decision, Eldon seized upon two questions. The first concerned domestic English law and parliamentary procedure. Eldon objected to the cabinet's intention to enact the St. Helena exile using international treaties without Parliamentary approval. He informed the cabinet that they could use a treaty to "engage to recommend" the St. Helena plan to Parliament, but that Parliament would have to decide the matter.[42] Eldon convinced Liverpool that it was "desirable to have an act of Parliament to settle any doubts which may arise," and was confident that he would be able to find "one good ground to found it on, if not two."[43]Accordingly, Eldon began building a legal case to present to Parliament, seeking to overcome a domestic legal and political obstacle by marshalling international legal arguments. This required him to grapple with *positive* international law for the first time; it was not enough to rely on the hazy sensibilities of men like Wellington.

Eldon's second question concerned Bonaparte's international status and the legality of holding him prisoner indefinitely when international law required that prisoners of war be released following a peace treaty. Eldon criticized his colleagues' loose interpretation of international law. He explained to Earl Bathurst, the Secretary of War and the Colonies:

> it does not appear to me to be a matter without very great difficulty to make out the power of OUR *Crown* to stipulate with other Crowns for the detention in this manner of even such persons as Napoleon. The case is quite anomalous… I really must have further time to consider it.[44]

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[41] Eldon to Bathurst, 1 September 1815, in Bickley and Bathurst 1923, 375.
[42] Eldon to Bathurst, 1 September 1815, in Bickley and Bathurst 1923, 375.
[43] Liverpool to Eldon, 1 October 1815, in Twiss 1844, 271.
[44] Eldon to Bathurst, 1 September 1815, in Bickley and Bathurst 1923, 375-376, emphasis in original.

Distressed by the *prima facie* lack of international legal support for the Cabinet's attempt to indefinitely imprison a foreign sovereign and defeated enemy combatant, Eldon dug more deeply into applicable legal theories. Eldon asked Bathurst to send him whatever "opinions of the Law Officers" the cabinet had considered and began pondering legal justifications for Bonaparte's imprisonment.[45]

It is important to be explicit about Eldon's goals and conception of his role in this process. Although Eldon was a respected jurist, he approached his role in the St. Helena exile primarily from the perspective of a national policymaker. His goal was to craft a justification for the exile, rather than to independently evaluate and verify (or refute) the legality of that decision. As Eldon told Bathurst: "I am studying how to make the Law of Nations *justify* that imprisonment, *which must be ordained*."[46] In other words, Eldon explicitly understood his role as being to legitimate and uphold the Cabinet's political decision, rather than critique or assess it for legal correctness. Eldon embraced the opportunity to serve as a "justifier" rather than an advisor or decision-maker.

Eldon wanted first to justify the Liverpool government's decision to Parliament and secondly not contradict the political statements made by Britain and its allies, including the decision to label Bonaparte an "outlaw." He believed it was important to uphold the legality of all the pronouncements and decisions made by Britain and her allies, and was frustrated by the difficulties inherent in this task. Eldon complained to his brother that the Congress of Vienna had labelled Napoleon an outlaw "without knowing very well what they mean by that word."[47] So he set himself the task of creating a legal justification for both the label and the exile. Although he spotted several legal issues with the St. Helena decision, he was committed to the idea as a necessity. Eldon wrote: "Whatever may be the difficulties in the Law of Nations in such a case of stipulated imprisonment for *life after peace*… Be those difficulties… what they may, if the safety of the world requires it, they must be got over. In what form is to be considered."[48]

Eldon's can-do attitude was likely central to the cabinet's willingness to belatedly "let law in" to national policy-making discussion about Napoleon. Eldon positioned himself and his expertise as supportive of the government's aims; the law was a tool that could bolster the legitimacy of the exile and shield the government from legal challenge, parliamentary scrutiny, and international questions. Eldon enlisted other senior Crown lawyers for this task, including Lord Ellenborough, the Lord Chief Justice.[49] Together, they toyed with many possibilities for surmounting the difficulties Eldon identified but never settled (and were never *forced* to settle) on one.

Scraping the barrel of positive international law, Eldon considered characterizing Bonaparte as a pirate, a French traitor, a perpetual prisoner of war (with whom peace would never be formally made), an illegal immigrant, and an independent belligerent. Ellenborough observed that there was "nothing in Vattel, &c., upon this sort of case" and favoured the perpetual prisoner of war

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45 Eldon to Bathurst, 1 September 1815, in Bickley and Bathurst 1923, 376.

46 Eldon to Bathurst, [undated] September 1815, in Bickley and Bathurst 1923, 377, emphasis Added.

47 Eldon to Scott, Undated Fragment, in Twiss 1844, 279.

48 Eldon to Bathurst, 1 September 1815, in Bickley and Bathurst 1923, 377.

49 Eldon to Scott, Undated Fragment, in Twiss 1844, 273.

framing.[50] He advocated for characterizing Bonaparte as one member of the French nation (with whom Britain had been at war), but excluding Bonaparte from the peace treaty, constructing a legal scenario in which Britain could make peace with France but remain forever at war with Napoleon, and therefore hold him as a prisoner of war forever. Eldon objected to this "false pretence," noting that the Congress had never referred to Bonaparte as a French subject or rebel.[51] Eldon leaned briefly towards characterizing Bonaparte as an independent belligerent, noting "Vattel certainly has passages… in which he considers, very much in the same way as the Allies did, a fellow whom no treaty could bind, and who respects none that he enters into."[52] Perhaps Britain could claim that Bonaparte had been "subdued in a legitimate war against *him"* (Bonaparte) alone.[53] But in the end, this position was also deemed imperfect.

Eldon found issues with all possible characterizations, predicting, "If you can't make this a *casus exceptions* or *omissions* in the law of nations, founded upon necessity, you will not really know what to say upon it."[54] After grappling with the available justifications and the "Principles of the Law of Nations," Eldon told Liverpool:

> if Buonaparte [sic] is to be considered as a *French Subject,* his Imprisonment after Peace is rather to be justified upon his Case forming an Exception to general rules of the Law of Nations than by any stated Rule of that Law… we have got beyond these *general* Truths: we… the Parliament, as I conceive, has determined that *this is a* Case of Exception, because the safety of every other Country requires [Bonaparte's imprisonment].[55]

In the same letter, Eldon was adamant that "this *Imprisonment* is of *absolute necessity* to the future *internal* peace & welfare of *ourselves* & of our *Allies*."[56] Thus, Eldon took an early—although private—stand on a tension that persists in ICL today—the question of whether the practice of ICL should involve the invention of new legal rules or strict fidelity to existing ones. Eldon considered and then jettisoned a "rule-approach" to the question, concluding that extant sources of international law (whether found in natural law or positive law) were not fit for purpose. Thereafter, he resorted to what Koskenniemi might recognize as a "proto-idealist" approach, acknowledging that new law would need to be developed to respond to the pressures of the moment. Eldon's preferred legal argument—the argument of *necessity*—represented a legal innovation and an explicit departure from the "general rules of the Law of Nations." Eldon's argument was born of his desire to "get over" any legal obstacles to justify the imprisonment "which must be ordained." If no applicable law existed, it would have to be invented. This tension between the spirit and the letter of the law, between "rule-approaches" and "idealism," or between the more modern concepts of legal pragmatism and legal formalism, runs through all the cases examined by this thesis. In adopting the position that the second Napoleonic exile would need to be justified, legitimated, and achieved regardless of legal or political objections, Eldon implicitly

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[50] Eldon to Scott, Undated Fragment, in Twiss 1844, 273-274.
[51] Eldon to Scott, Undated Fragment, in Twiss 1844, 280.
[52] Eldon to Scott, Undated Fragment, in Twiss 1844, 279; Crawford 2019, 8.
[53] Eldon to Scott, Undated Fragment, in Twiss 1844, 279.
[54] Eldon to Scott, 4 October 1815, in Twiss 1844, 272.
[55] Quoted in Stewart 1951, 574-575.
[56] Stewart 1951, 575.

advanced a vision of ICL as a field where legal expertise was relevant (to support political decision-making) and inventiveness in service of international order was required.

Having identified and stitched together several possible legal justifications, Eldon had done what he could to address the legal issues arising from the Napoleonic exile. It was up to Liverpool, Castlereagh, and the rest of the government to decide what to do next: should they publicize Eldon's opinion, advance one coherent legal argument for Napoleon's exile—such as the argument of necessity, piracy, independent belligerency, or perpetual warfare—or wait before committing themselves to one course of action? They decided to hedge their bets.

Resolution and a New *Status Quo*?

There was little domestic or international scrutiny of the Liverpool Cabinet's decision-making on the Napoleonic question and, therefore, little immediate need to rhetorically present or legitimate the St. Helena exile. In other words, there was little external pressure on Eldon, the cabinet, or the Allies, to choose any single legal argument to justify the imprisonment of Napoleon. So they made no choice. There was likewise little public discourse regarding the legality of the exile. This lack of pressure is revealing and speaks to the low value placed on legal arguments as a source of legitimacy in the field at the time. Things eventually changed when, on Eldon's advice, the Liverpool government put itself in the firing line by seeking parliamentary assent to the exile.

On November 20, 1815, the Allies signed the Treaty of the Quadruple Alliance and the Second Treaty of Paris, concluding the war; Parliament assented to both treaties in early 1816.[57] In March 1816, on Eldon's advice, the government brought forward two bills to gain parliamentary consent to the exile—the first outlining and sanctioning Bonaparte's detention and the second regulating relations with St. Helena and the status of Napoleon's jailers.[58] As Melikan explains, neither document makes it clear which legal characterization of Napoleon was chosen—pirate, belligerent, traitor, prisoner of war, or something else; "on the contrary, elements of all [characterizations] were discernible."[59] Likewise, when asked to justify the bills in parliament, Castlereagh straddled two legal justifications, saying: "whether regarded as a sovereign prince, or a prisoner of war, [Bonaparte's] detention was justifiable in a technical view, according to the law of nations, and that detention was imperiously called for by a due consideration for public safety and general peace."[60] Notably, rather than justifying the imprisonment with any specific legal precedent, Castlereagh cited "technical" legal expertise and necessity; the *idea* of legal expertise, rather than any specific legal analysis, was used as a source of legitimacy. The assurance that the exile was "technically" legally valid was enough to gain the approval of the Commons. The Members of Parliament did not probe into potential contradictions. Castlereagh "failed to explain *when* the British government had begun to consider Bonaparte a 'sovereign prince', or *why*, if the King of France had no wish to punish his rebellious subject, a foreign government had the authority to do so," but this "did

[57] Melikan 1999, 358.

[58] House of Lords Debate, 8 April 1816, Hansard Volume 33, columns 1012-1015.

[59] Melikan 1999, 358.

[60] Quoted in Melikan 1999, 359.

not trouble MPs."[61] It was in this context that the value of expert legal advice as a source of legitimacy, and the related framing of the Napoleonic exile as a legal issue, began to be embraced by the Liverpool government.

The bills were subject to more aggressive questioning in the House of Lords, where Lord Holland (a member of the official opposition) raised the exact concerns that Eldon had foreseen. Holland "complained that he did not understand whether the authority to detain [Bonaparte] existed, or whether it… must be enacted. He wanted to delay consideration of the [first] bill until the judges could resolve the matter."[62] Holland was eager to probe the tension between the formalistic and pragmatist tendencies in the government's legal arguments and arrive at a definitive answer on whether the exile was supported by existing law or was indeed a *casus exceptions*, as Eldon had privately proposed to the cabinet. In the House of Lords, Eldon smiled at the concerns raised by Holland and other opponents and gave a vague answer asserting that the bill had been subject to sufficient legal scrutiny.[63] Likewise, Bathurst asserted that passing the bill in question would clear "all [legal] doubt" on the question (implying that Parliament would indeed be enacting new law) but did not provide a direct answer to Holland.[64] Notably, Holland—a fervent opponent of the government—opposed the bills on many grounds, but focused on legal questions (as Eldon had foreseen and the rest of the cabinet had not). Holland and his colleagues implicitly accepted the framing of the Napoleonic issue as a matter in which international legal knowledge and expertise were relevant. However, Holland did not marshal legal opinions or enlist legal experts to support his arguments. In 1816, expert legal advice was monopolized by the Liverpool government.

These parliamentary challenges were the first test of the cabinet's decision-making. The Liverpool government cautiously embraced Eldon's legal analysis and expertise as rhetorical tools that might neutralize their opponents' objections and legitimate their own choices. This marked an important stage in the dynamic leading to the expert legitimation trap, wherein empowered actors (in this case, the British Government) relied on, cited, and elevated expert advice in a bid to legitimate their preferred policies. This dynamic reappears in other guises in all the episodes explored in this dissertation. Perhaps surprisingly, despite their initial lack of interest in seeking legal advice, the Liverpool government came to rely heavily on the legitimacy provided by expert legal consultation when justifying the bills to the House of Commons and especially to the House of Lords. Eldon had been right; legal advice and expertise were useful tools.

These reassurances helped secure parliamentary approval of the *Act for the more effectually detaining in Custody Napoleon Buonaparte* ("the Act"), which asserted:

> Whereas it is necessary for the preservation of the tranquillity of Europe, and for the general safety, that Napoleon Buonaparte should be detained and kept in custody as is hereafter provided: Be it therefore enacted; and it is hereby enacted, that it shall and may

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[61] Melikan 1999, 359.

[62] House of Lords Debate, 8 April 1816, Hansard Volume 33, columns 1012-1015.

[63] Melikan 1999, 360.

[64] House of Lords Debate, 8 April 1816, Hansard Volume 33, columns 1016-1017.

be lawful for his Majesty, his heirs and successors, to detain and keep the said Napoleon Buonaparte in the custody.[65]

In this way, Eldon, the cabinet, and parliament skirted the question of what precisely international criminal justice was "about" and what sources and legal philosophy were most relevant to its practice. In passing the Act, Parliament made Bonaparte's imprisonment legal under British law. However, the Act took no position on the exile's legality under international law. To formally settle on one characterization of Napoleon—as a pirate, traitor, warlord, or anything else—would fix a certain definition of his alleged crimes and the treatment he ought to receive under extant positive law. This would constrain the government's freedom of action, argument, and legitimation. For example, even in 1816, prisoners of war had certain rights under international law, including the right to be released following a peace settlement. Since there was no public or parliamentary push to adopt a single coherent legal justification for the exile at the time, the Liverpool government chose not to do so.

Parliament approved the Napoleonic exile and Eldon was content (although Holland was not). Eldon's self-appointed task of clothing the cabinet's political decision in legal language succeeded and he faithfully discharged the self-appointed role of lawyer-as-justifier. In doing so, he also demonstrated the utility of such a role to his cabinet colleagues. Eldon's understanding of the relationship between law, policymaking, and international criminal justice was eventually accepted by the cabinet, as legal expertise proved to be a useful tool for supporting the government's position and discrediting critics. Indeed, the legal framing was also adopted by Holland and the other critics of the government. Eldon's institutional position allowed him to advocate for a legal justification to support—rather than challenge—the exile. Law was thus framed and ratified as an adjunct to policy. As Melikan notes, the question of Napoleon's fate "became a legal one only after it had become a political one. Either the lawyers were brought in after the politicians had concluded that Bonaparte must be detained, or it was generally recognised that legal considerations must take second place to practical ones."[66] This episode demonstrates an understanding of international criminal justice as a primarily political question, in which lawyers could, at most, play a limited supportive role. Yet the unexpected (for everyone except Eldon) utility of legal expertise for the Liverpool government helped promote the idea that such expertise was relevant to post-war justice efforts, planting the first seeds for the eventual legalization and capture of the field.

Ratification and Delayed Reception

There was little immediate scholarly response to the Napoleonic exile. This gap illustrates the crucial importance of the modern IL profession for the capture and evolution of modern ICL from the twentieth century onwards. Such a profession had not yet been established in 1816, making scholarly reception and interpretation of the Napoleonic precedent unlikely. That void stilted the further development of ICL common sense during this period; the Napoleonic exile did not immediately generate clear precedents in international law. While Eldon "collected" legal

[65] Public General Act, 56 George III, c. 22, "An Act for the more effectually detaining in Custody Napoleon Buonaparte," UK Parliamentary Archives.

[66] Melikan 1999, 361.

opinions from British colleagues, he did not encourage debate over such opinions, either nationally or internationally. Likewise, as noted, Lord Holland and the official opposition did not solicit legal advice or counterarguments in parliament. Initially, there was no public contest to define the legally correct interpretation of the Napoleonic question.[67] The tensions and ambiguities of Eldon's arguments were not immediately debated or resolved.

This is in keeping with the justificatory role of legal expertise in this episode; decision-making power was squarely in the hands of the British and allied political elites, and therefore, it was conducted according to the norms and procedures of diplomatic and cabinet decision-making. To the extent that legal expertise was relevant, it was an asset that the government leveraged to legitimate its chosen course of action. Furthermore, since Eldon carved out a new role in the policy process, he was not confronted by any legal professionals with opposing views. Rowe argues "in confronting Napoleon's sovereignty and trying to remove him, the allies were forced to make a highly pragmatic, improvisational, and incoherent use of international law."[68] This incoherence speaks not only to the proto-pragmatism of Eldon's justification but also to the lack of a professional IL community or interested audience to receive, contest, challenge, or develop Eldon's arguments. Indeed, as Koskenniemi notes, there was little professional or intellectual engagement with international law during and for many decades after the Napoleonic episode: "in France international law existed as a somewhat exotic branch of natural law… [while] in England there was virtually no university teaching in the subject at all in the first half of the [nineteenth] century."[69] Even by 1842 "aside from translations of Grotius, Bynkershoek, and Vattel, a systematic treatment of [international law] 'appeared to be still a desideratum in the legal or juridical literature of Great Britain.'" [70] This is a key difference between this episode and the later critical junctures this dissertation considers. Absent a professional, academic, or expert community to receive, interpret, and contest the outputs of the Napoleonic episode, the decisions made in 1815 - 1816 did not trigger a sustained discussion of the Napoleonic precedent international justice. They therefore could not (yet) trigger further steps towards ICL's expert capture.

Despite the lack of a professional community to receive and interpret Eldon's arguments, subsequent events further demonstrated the utility of Eldon's involvement and reinforced the idea that legal expertise might have a role to play in the Napoleonic question. By 1817, the Napoleonic exile had "become a topic of public discourse" and more widespread criticism, especially in Britain.[71] Most controversies focused on Napoleon's treatment in exile, rather than the legality of his detention. For example, by 1818, two members of Bonaparte's entourage had published memoirs and treatises directed at British and French audiences and decrying alleged abuses Bonaparte endured in exile.[72] These accounts attacked Hudson Lowe, Bonaparte's gaoler in St. Helena, as a "personification of British misconduct" and garnered support among radical and liberal groups who were concerned about "the conservative government's supposedly capricious

[67] Stappert 2020; Johnstone 2005, 2003.
[68] Rowe 2023, 495.
[69] Koskenniemi 2002, 33.
[70] Koskenniemi 2002, 33.
[71] Marquart 2018, 70.
[72] de Las Cases 1818; Santini 1817.

and dangerous dealings with the law."[73] The Liverpool government came under pressure from a broad coalition of opponents, both in Britain and elsewhere. In responding to this pressure, the government once again found Eldon's legal advice and expertise to be a valuable tool to legitimate their policies and neutralize critics.

Protests and debates about Bonaparte's treatment and attendant legal issues created pressure to re-open the question of his exile. This was done at the Congress of Aix-la-Chappelle in the autumn of 1818. At Aix-la-Chappelle, led by Britain, the Congress signed a *Separate Protocol in Relation to Bonaparte* (the "Protocol"), ratifying his continued imprisonment. The Protocol characterizes Bonaparte as:

> the leader of an unformed force, without recognized political character and, consequently, without any right to claim the advantages and considerations due to public power by civilized nations… Bonaparte, before the Battle of Waterloo, was a formidable rebel; after his defeat, he was an adventurer whose fortune had betrayed his plans, a fugitive… and dependent on the justice of Europe. In this situation, his destiny was subject to the prudence of those governments who he had offended, and there was nothing in his favour (except the inseparable rights of humanity)—no positive law, no salutary maxim which was applicable to him… The condition of a prisoner [in general] is subject to the general rules of the Law of Nations, but the case of Bonaparte is an exception… everything that was particular about him needed to be fixed by stipulations and special laws.[74]

This characterization—including its description of Napoleon as a leader of an unofficial armed force and especially its labelling of his exile as an exceptional case in international law—mirrors Eldon's thought process of three years earlier. The Protocol formally ratified a revised version of Eldon's proto-pragmatist *casus exceptions* argument. The Protocol acknowledged that positive law had little to offer on the Napoleonic question, but maintained that his exile was nonetheless necessary and legally possible.

The Protocol did not adopt Eldon's preferred arguments wholesale but showed a marked departure from earlier pronouncements from the Congress of Vienna and the Liverpool government. The Protocol mentioned international law, settled on a specific characterization of Bonaparte, and acknowledged that, by exiling Bonaparte, the Congress was making new law. The Protocol affirmed that, despite the Congress' initial position in 1815, legal expertise was indeed relevant to the Napoleonic issue. The vague assertions of 1815 were replaced by a more deliberate and focused legal idiom. Indeed, Castlereagh had deliberately softened the language of an earlier draft protocol, removing references to Napoleon having rendered himself entirely "outside the laws of nations." Castlereagh explicitly stated that this change was intended to address accusations that Britain had violated international law, explaining the Protocol's new language was written "that in our defence we should not appear to blink a main part of the charge, namely, that in *accepting* his surrender we owed him better treatment."[75] This represents a shift in thinking from

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[73] Marquart 2018, 70.

[74] "Protocole Separé relative à Bonaparte," quoted in Bellot 1923, 191. The translation is my own.

[75] Quoted in Bellot 1923, 192, emphasis in original.

the Liverpool cabinet's earlier assertion that Bonaparte's exile was a purely political matter. Eldon's advocacy had catalysed change; his framing of the matter as a legal issue, in which legal arguments could be a useful source of legitimacy and justification, was accepted. Thus, the Congress officially asserted that the Napoleonic case was an exception in international law. As Rowe summarizes, the Coalition powers "drew pragmatically upon whatever legal tools they could find to… articulate [the] situation and to facilitate" their desired outcome of "caging" Bonaparte.[76] They adopted an idealist proto-pragmatist approach, acknowledging that existing law did not perfectly apply, and new law could be and had been created. The ability to rely on legal advice and arguments once again helped the Liverpool government (and the Congress of Vienna) justify and legitimate Napoleon's imprisonment.

While Eldon and Liverpool had failed to settle upon a coherent legal justification for exile in 1816, by 1818 the Congress of Vienna responded to public pressure by adopting a more coherent—albeit imperfect—narrative. However, this episode took place before the birth of international law as a modern profession; as a result, there was no community to contest, ratify, or deepen the tentative new legal orthodoxy established by Eldon and his colleagues.[77] With no journals, interpretive communities, conferences, professional institutions, or IL textbooks to immediately respond, this early attempt at international criminal justice fell on infertile ground. However, later attempts to punish individuals for alleged international crimes saw a renewal of interest in the Napoleonic precedent and, eventually, the ratification of the idea that legal expertise was relevant to international criminal justice. The next attempt to practice ICL, in 1919, re-opened the debate over whether international penal justice was a legal issue, a political issue, or both. The legal framing of 1816 was accepted quickly in 1919, and practitioners' focus shifted to debates over the judicialization of ICL and other constitutive questions. Subsequent critical junctures saw debates over further questions. Meanwhile, in the interim period from 1816 to 1919, several important developments reshaped the broader IL field and laid further foundations for expert capture in ICL. It is to these developments that I now turn.

Interlude: The Long Nineteenth Century

After exiling Napoleon, it took more than a hundred years for the European great powers to return to questions of international criminal justice. However, developments during the late nineteenth and early twentieth centuries had a profound impact on future attempts to enact ICL and on its eventual expert capture. Although these developments occurred outside the critical junctures that form the empirical backbone of this dissertation, they shed light on the process of expert capture. Thanks to the sporadic "boom and bust" pattern of state-led institution-building in ICL, the field has experienced several periods of latent development. During these periods, lawyers and other non-state actors have been left relatively free to debate and develop ICL common sense without pressure to enact ICL or respond to states' policy agendas. The most important developments during this period were the birth of professional IL and the codification of the laws of war. The birth of the IL profession was a crucial pre-condition for the field's eventual capture. In addition, the nineteenth and early twentieth centuries saw a handful of abortive and

[76] Rowe 2023, 497.

[77] Mazower 2012; Koskenniemi 2002; Mégret and Tallgren 2020.

now forgotten calls for international legal accountability, often from the press or individual states. Together, these changes created a new constituency for ICL efforts, formalized key concepts, and reshaped public discourse about international justice, softening the ground for ICL's further legalization following the First World War.

The Birth of the IL Profession

The founding of the modern IL profession generated a community that could (attempt to) claim authority and expertise in questions of international law and justice. Whereas Eldon acted essentially alone in 1815 - 1816, his successors had a larger community of colleagues and body of discourse on which to draw. The profession (or "invisible college") of international lawyers became a new stakeholder in later international criminal justice debates. IL professionals battled with states over the appropriate form and goals of ICL and served as a source of legitimacy for the great powers' decision-making, even as internal debates wracked the IL discipline. This development was a necessary precondition for the eventual expert capture of the ICL field and filled the gap that had prevented the reception and further development of the Napoleonic precedent in the early nineteenth century.

Koskenniemi's *The Gentle Civilizer of Nations* chronicles the "radical… break in the [international law] field between the first half of the nineteenth century and the emergence of a new professional self-awareness and enthusiasm between 1869 and 1885."[78] Koskenniemi charts the "rise" and "fall" of the modern IL profession "in its prime," from its European liberal origins in the late nineteenth-century to its "end" around 1960, due to "the emergence of a depoliticized legal pragmatism… [and] the colonization of the profession by imperial policy agendas," at which point the profession took on a less utopian form.[79] International *criminal* law was not a primary focus of the burgeoning IL discipline; however, this period saw the creation of professional journals and associations where international legal issues could be discussed, debated, and defined by members of the emerging profession.

From the mid-1800s, a "transnational elite emerged" and began to form "a new discipline with its own institutions, worldviews, and sense of history."[80] Many members of this emerging elite believed the "legal school of International Jurists" might one day "prevail over the diplomatic school" in shaping international order and politics.[81] The first international law journal—the *Revue de droit international et de legislation compare*—appeared in 1868 and began to promote liberal legislative reform in Europe, and the "civilized conscience of peoples"—as expressed in public opinion and mediated through enlightened liberal jurists—as the source of international law.[82] This was quickly followed by other IL institutions, including the famous Institut de Droit International, whose mission was to "favour the progress of international law, striving to become the organ of the

[78] Koskenniemi 2002, 3-4.
[79] Koskenniemi 2002, 4.
[80] Mazower 2012, 66.
[81] Mazower 2012, 66.
[82] Koskenniemi 2002, 16-17.

juridical conscience of the civilized world."[83] These professionals and institutions became a crucial constituency in shaping subsequent ICL efforts.

This utopian vision broke from the visions of international law that defined the Napoleonic episode. Both the sketchy assertions of the Congress of Vienna and Eldon's thoughtful deliberations had been geared towards an idea of international law as malleable and subordinate to geopolitics. Far from transforming international order, Eldon, the Congress, and the Liverpool government were eager to re-establish antebellum international society and punish Bonaparte's "projects of confusion and disorder." To the extent that these positions were founded on a coherent legal philosophy, it was a proto-pragmatist position that prioritized the maintenance of the international *status quo*. The proposal that the IL project could be liberated from, and perhaps one day transform and triumph over, national policy and great power diplomacy was vastly different. Many members of the emerging IL profession adopted a "pragmatic and eclectic spirit," interweaving naturalism, rationalism, and positivism in their approach to their field.[84] As such, the profession provided opportunities for debate and reflection over different visions of IL's purpose, sources, and ethos.

The advent of the IL profession also ushered in new approaches to international diplomacy and institution-building, which proved important for the role and influence of legal experts in future ICL institution-building junctures. States soon began trying to "harness" the IL movement for their own goals. Mazower summarizes: "even the most skeptical [sic] Great Powers brought legal advisers into their negotiating teams" at the "major diplomatic conferences of the late nineteenth century."[85] This shift carved out new roles for international lawyers in European states' policymaking and diplomacy, even as it "tamed" international law and enlisted some international lawyers to support states' aims.[86] The peripheral role played by Eldon in 1815 was a thing of the past, but the utopian vision of "international jurists" triumphing over "the diplomatic school" was yet to be realized.[87] By 1919, European states included international lawyers in international conferences as a matter of routine.[88] The nineteenth-century turn to lawyers as advisors and diplomats would shape efforts to prosecute defeated state officials in 1919 and 1945, where lawyers provided advice to diplomats, and later served as quasi-diplomats, but were not given free rein to shape international justice.

The Development of the Laws of War

One crucial achievement of the IL profession during this period was the codification of the laws of war and war crimes with legal instruments including the Lieber Code, the first Geneva Convention, the Declaration of St. Petersburg, and the Hague Conventions.[89] These instruments

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[83] Segesser 2007, 217.

[84] Koskenniemi 2002, 92.

[85] Mazower 2012, 67.

[86] Van Hulle and Lesaffer 2019, viii.

[87] Mazower 2012, 66.

[88] House and Seymour 1921, 2.

[89] *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* ("Geneva Convention 1864"), 22 August 1864; *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field* ("Geneva

defined and sought to curtail many inhumane and offensive wartime practices, laid out protections for soldiers, medics, prisoners, and civilians, and outlawed certain weaponry. States agreed to update national "military penal laws" to reflect new treaties, accepting that punishment for war crimes and other violations could take place in domestic courts-martial and thereby drawing a link between inhumane conduct in war and judicial punishment.[90] This linkage would prove crucial in shaping state, professional, and civil society actors' expectations regarding international justice in future ICL critical institution-building junctures.

However, these treaties were silent on key questions raised by the Napoleonic case, which re-surfaced in later ICL efforts. First, commanders-in-chief were instructed to "arrange" for the implementation of the Conventions, but no suggestion was made that commanders-in-chief or heads of state were personally criminally liable for violations.[91] The 1907 Hague Convention provided "the belligerent party which violates the… [Convention] shall… be liable to pay compensation" and "responsible for all acts committed by persons forming part of its armed forces," but was silent on other forms of liability or punishments.[92] To the extent that "command responsibility" was acknowledged, it did not encompass criminal liability of individual superiors or heads of state; it also failed to encompass liability through omission. Furthermore, no nineteenth-century treaty envisions the creation of an international judicial organ. Any judicial action would be undertaken on a state-by-state basis.

Second, while the codification of *jus in bello* exploded during the nineteenth century, *jus ad bellum*, was left to "wither on the bough."[93] Scholars, lawyers, and statesmen made significant strides in defining and seeking to ameliorate conduct in wartime but neglected questions about the legality of waging war in the first place. Indeed, David Kennedy finds that the very conceptual labels of *jus in bello* and *jus ad bellum* fell out of use during this period. Kennedy summarizes:

> the law governing the decision to go to war languished for a century… until it was revived by the United Nations Charter as the modern 'law of force.' Although humanitarian voices launched numerous efforts to constrain war in the intervening years, they were political, religious, or diplomatic rather than legal.[94]

Although the burgeoning IL profession enthusiastically participated in the (newly established) International Committee of the Red Cross (ICRC), the Hague and Geneva Conferences, and other codification efforts, it was less engaged in questions about the criminality of aggression or aggressive war. In this way, the emerging IL profession, unconstrained for the time being by state demands to enact wartime justice, forged a separate path from any immediate need to punish aggressors. This departed from the debates of 1815 - 1818. The Napoleonic case had focused on

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Convention 1906"), 6 July 1906; *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight,* 29 November / 11 December 1868; *Final Act of the International Peace Conference* ("First Hague Convention"), 29 July 1899; *Final Act of the Second Peace Conference*, ("Second Hague Convention") 18 October 1907.

[90] Geneva Convention 1906, Articles 27 and 28.

[91] Geneva Convention 1864, Article 8.

[92] Second Hague Convention, Article 3.

[93] Best 1994, 20.

[94] Kennedy 2004, 242.

accusations of Bonaparte's aggressive threats to international order; such questions fell through the cracks of late nineteenth-century institution-building and codification. Yet, despite these limitations, the flurry of nineteenth-century lawmaking provided significant grist for the mill of future ICL efforts and for expert capture.

Public Discourse and Development

In addition to the birth of modern professional IL and the codification of *jus in bello*, other nineteenth-century social and political developments re-shaped public discourse on international justice. Although there was no coordinated effort to seek high-level justice for alleged crimes until 1919, some statesmen, lawyers, and journalists unsuccessfully called for such measures. Such calls contributed to greater social awareness and expectations regarding conduct in war, prosecutions for violations, and the legitimating potential of legal knowledge in regulating conflict.

Famously, the Battle of Solferino, with its many violations of the laws of war, inspired Gustave Moynier (a Swiss jurist and eventual founding member of the Institut de Droit International), Henry Dunant, and others to found the International Committee for Relief of the Wounded (which later became the ICRC) in 1863. The ICRC contributed to the codification of the laws of war (especially the Geneva Conventions) and intensified public concern about human suffering in war. The ICRC's national relief societies were prominent examples of the voluntary aid and civil society organizations that appeared during this period.[95] Such societies were visible manifestations of public concern and organization around wartime abuses and suffering and helped ensure that future efforts at ICL would be subject to much greater public scrutiny than in 1815.

The brutalities of the Franco-Prussian War (1870 - 1871) motivated Moynier to call for "international rules for the *punishment* of violations of the laws of war," even going so far as to argue for "an impartial and international tribunal to judge violations."[96] Moynier was met with pessimism from legal colleagues, disinterest from national societies of the ICRC, and apathy from states.[97] Although Moynier's proposal was one of the factors which inspired him to co-found the Institut de Droit International, his vision of a not only legalized but judicialized ICL gained little traction, and "faded away" by 1908.[98]

Moynier's lawyerly proposal for an independent international tribunal to punish codified crimes is of particular interest because it had a mirror-image twin: a proposal for a highly political and politicized tribunal to punish nebulous and uncodified moral violations. These two proposals foreshadowed future contestation over judicialized ICL. In 1870 - 1871, Otto von Bismark called for the creation of an "International Court" to prosecute "all those who have instigated the [Franco-Prussian] war," including "newspaper writers, deputies, senators, and ministers." [99] Bismark suggested "the Great Powers… appoint… judges …[and] prosecutors" but, if necessary, the Court might "be composed of the two nations [France and Germany] who… suffered most

[95] Dromi 2020, 61.
[96] Segesser 2007, 216-217.
[97] Segesser 2007, 216-217.
[98] Segesser 2007, 216-217.
[99] Busch 1898, 189.

from the war."[100] Bismark had his proposal published in the press, where it reached international audiences.[101] This proposal mirrored many of the concerns expressed by the Congress of Vienna in 1815 - 1816, argued that an absence of positive law should not render the international community unable to seek revenge, and directly referenced the Napoleonic precedent. Bismark suggested:

> If a universally acknowledged and codified system of international law existed, it would…. [enable] adequate punishment of… [individuals who] originated or instigated an aggressive war…[a court must condemn] all who, moved by a mere inordinate passion for war or love of strife, or urged by a thirst for universal empire, should assail peaceful nations in furtherance of their own mad and criminal projects… no country has ever suffered more than Germany from the injustice and rapacity of other nations… yet… [only Napoleon] paid the penalty of his crimes in being relegated, like another Prometheus, to a solitary and distant rock.
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> The necessity and justice of making the authors of a war… responsible… before the world… [suggest the] originators and instigators of the present war shall not escape with impunity. Among the responsible parties are included the entire Executive which devised the invasion of Germany: the statesmen… Ministers… orators… [and] journalists… an international jury for the punishment of peace-breakers… [would] guarantee… the future peace of Europe.[102]

This proposal aimed to incentivize French surrender, shape the narrative of the war, consolidate Prussian authority, and seek retribution.[103]

Brockman-Hawe argues Bismark was inspired by the highly publicized 1867 trial and execution of Archduke Ferdinand Maximilian von Hapsburg, Emperor of Mexico. Mexican Republican forces charged Maximilian with acting "as the principal instrument of the French Intervention…to disturb the peace of Mexico, by means of war, unjust in its origin, illegal in its form, disloyal and barbarous in its execution," and usurping the Sovereignty of the Mexican people.[104] This case of a (national-level) trial for aggression was closely followed by Bismark, the public, and international lawyers.[105]

Bismark's proposal was also influential. It gained little political traction outside Prussia, but garnered significant public attention in Europe and North America.[106] There is little evidence that Bismark actively sought legal advice. Yet, responses to his proposal implicitly demonstrated a growing understanding that legal knowledge was a legitimate source of authority on the question of post-war justice—an understanding that had been absent in 1815. For example, the *Bristol Times*

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[100] Busch 1898, 189.
[101] Brockman-Hawe 2017, 245.
[102] "Untitled Article" 1870, 1.
[103] Brockman-Hawe 2017, 252.
[104] Frederic Hall 1868, 216-223.
[105] Brockman-Hawe 2017, 248.
[106] Brockman-Hawe 2017, 255.

and Mirror raised several legal objections, arguing if "carried out," the "novel" proposal would be "effective in discouraging war," but was legally impossible.[107] Bismark's proposal was unlikely to produce an "impartial trial," undermining the project from the outset. Likewise, even if France was to blame for instigating the war, that "did not confer an exclusive right to [Prussia] to prefer indictment against France" and "the Germans are… not entirely without blame." They denounced the plan's hypocrisy, noting "the King of Prussia, a believer in the Divine rights of rulers, would be the last to entertain or submit to an international jury for the trial of peace-breakers." The *Bristol Times and Mirror* observed "the suggestion of an international tribunal opens…delicate and dangerous" questions, including:

> supposing the guilty parties were tried, what would be the nature and object of the punishment? Would they be exiled, and would the treatment of the offenders be reformatory or retributive?… Where the authority is to come from capable of enforcing the execution of the sentences pronounced is another thing to be considered… for when nations have so far agreed to discourage war, it is reasonable to believe that such extraneous machinery as an international tribunal will not be required.[108]

The clarity and specificity of these questions speaks to a growing understanding of post-war punishment as necessarily raising potentially unanswerable legal challenges and of legal expertise and precedent as key determinants of the legitimacy of post-war punishment.

Moynier and Bismark's proposals were unsuccessful. They gained no political traction and sparked no critical juncture of institution-building. Yet they helped further solidify the tentative steps towards legalization instituted by the Napoleonic episode, and the discursive link between wartime abuses and judicial action established by nineteenth-century codification. Like the Napoleonic exile, Bismark's and Moynier's plans were invoked and examined by scholars, journalists, and politicians throughout the rest of the nineteenth century and into the twentieth.[109] As with the Napoleonic precedent, the Bismark proposal was invoked as "a catalyst for inspiration, an ironic precedent, or a metric for gauging the wisdom" by journalists, statesmen, and legal professionals considering other proposals for international retribution, including during the First and Second World Wars.[110]

Together, these nineteenth-century developments ensured that the topography of international criminal justice was vastly different when the Allies began to consider prosecuting Kaiser Wilhelm II in 1919 than it had been in 1815. In addition to creating new positive international law, the Hague and Geneva Conventions and other codification efforts provided governments, the public, journalists, and lawyers with a new language and framing to use when discussing the horrors of war and re-shaped expectations about conduct in war. This new idiom also linked such horrors with courts-martial and judicial punishment. This linkage was reinforced by prominent proposals

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107 "A New Peace Preservation Scheme" 1870, 2.

108 "A New Peace Preservation Scheme" 1870, 2.

109 Brockman-Hawe 2017. Notable examples include proposals to prosecute various abuses in Bulgaria, Crete, and China later in the century.

110 Brockman-Hawe 2017, 259.

for international courts to prosecute war crimes (for Moynier) or aggression (for Bismark). The period also saw the advent of new actors and audiences in ICL, including the idealistic and diplomatically savvy IL profession, civil society groups like the ICRC, and an increasingly interested international press. When the time came, these groups (especially the IL profession) were ready to receive, respond to, and shape future ICL efforts and even re-assess the legacy of the Napoleonic episode.

Conclusion

The Napoleonic exile is a neglected episode in ICL's pre-history. An exploration of this episode reveals both how far ICL has developed in just over two hundred years and several questions and dynamics that would become increasingly important over time. Britain and the Congress of Vienna initially understood Bonaparte's second exile as a purely political solution to a political issue. Eldon led a successful effort to introduce legal arguments and expertise as resources to legitimate the exile. Eldon's advocacy and framing of legal expertise as supportive of the Congress' desire to restore Europe's *status quo ante* encouraged Britain and its allies to embrace legalization and grant legal experts a voice in the nascent ICL field, opening the door for future expert autonomy, authority, and eventual capture.

The post-Napoleonic period saw the foundation of a professional community that would prove influential and increasingly difficult to ignore in later ICL episodes. The birth of the IL profession also created space for practitioners and scholars to discuss and debate international criminal justice even during periods when powerful states had no interest in enacting ICL. Additionally, the codification of the laws of war provided a language for speaking about atrocities and created a new model for procedural justice—that is, justice by military trial rather than summary execution or imprisonment. Furthermore, other high-profile institutions and abortive proposals furthered the discourse of legalization and expertise in legitimate post-war justice. These developments contributed to the understanding that legal scholarship, arguments, and norms were relevant to questions of international justice and wartime atrocities.

By the time the Allies began to consider prosecuting or executing Kaiser Wilhelm II in 1919, the international political and legal landscape was profoundly different than it had been in 1815. Eldon had carved out a justificatory role for legal expertise in international criminal justice. New actors—in the form of professional international lawyers—had emerged and taken on new roles in national and international politics. The codification of the laws of war and other social and political developments provided new language and heuristics for thinking about international justice. However, the introduction of these new stakeholders and legal frameworks did not provide a clear roadmap for enacting international criminal justice in practice, or for defining the balance of power between stakeholders. The aftermath of the First World War would provide an opportunity for policymakers and international lawyers to contest these questions, while also revisiting and revising the Napoleonic precedent.

Chapter Three: The Wilhelmine Trial Plan: Entangled Law and Politics

The next attempt to enact ICL occurred in 1919, when the Allies responded to the First World War by designing an international tribunal to prosecute the former Kaiser Wilhelm II for alleged crimes. The Wilhelmine trial plan was negotiated at the Paris Peace Conference (the "Conference") and articulated in the Treaty of Versailles (the "Treaty"). The vision of ICL narrated in the Treaty was convoluted and contradictory, reflecting contentious origins and the lack of a hegemonic ICL common sense. However, the most important feature of the Wilhelmine trial plan was that it was indeed a *trial* plan; 1919 marked the first attempt to hold alleged war criminals and aggressors individually responsible through an international judicial process. Whereas the Napoleonic episode had seen a moderately successful attempt to frame ICL as a *legal* issue, 1919 saw the ratification of this legal framing and formal multinational endorsement of the idea that *judicial* practices and institutions were relevant to the field.

At the same time, this episode saw legal practitioners gain a greater voice in the field; they were empowered to provide advice during the decision-making process for the first time, inaugurating an "advice model" of legal expertise in ICL. As part of this shift, the Allies established the first multinational expert body concerned with international criminal justice.[1] Within this institution, legal practitioners contested ICL and exercised a degree of autonomy from the Allies that those states had not anticipated. These dynamics—contestation over common sense and increased expert autonomy—recurred in later critical junctures.

Although other constitutive questions remained unresolved, the judicialization of the field and the promotion of legal experts into advisory roles were the most important developments arising from the Wilhelmine episode. These developments reinforced nineteenth-century changes and furthered expert capture by elevating expert advice as a source of legitimacy and prompting IL professionals to consider practical questions of international justice. This sparked unexpected recommendations and conversations that would continue unmediated by states during the interwar period. This chapter explores the contestation that shaped the Wilhelmine trial plan and summarizes some of its legacies, including how actors during this period laid further foundations for the expert legitimation trap.

This chapter proceeds as follows: first, I sketch the Wilhelmine trial plan articulated in the Treaty of Versailles. Next, I chronicle how that plan came to be and what it reveals about the dynamics of expert capture and the expert legitimation trap. I begin by examining wartime discussions of post-war justice, considering political, journalistic, and public discourse on one hand, and debates within Anglo-American academic and professional IL on the other. Next, I chronicle how, as the war ended, these actors struggled over plans for post-war justice. I highlight the European Allies' desire for expert support, and the visions of international justice advanced by statesmen and lawyers during this period. I also consider the heretical position of Woodrow Wilson's government, which strongly opposed the legalization and judicialization of the field. I then examine dynamics within the Paris Peace Conference, foregrounding struggles between lawyers within the "Commission on Responsibility," and between such experts and political

[1] The Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties.

decision-makers. I then recap the trial plan, before considering the legacies of this critical juncture and offering concluding thoughts.

The Wilhelmine Trial Plan

What were the component parts of the vision outlined at Paris? The Treaty of Versailles envisioned a "special" international tribunal of judges appointed by the five principal Entente powers—a victor's tribunal—to prosecute Wilhelm II for "a supreme offence against international morality and the sanctity of treaties."[2] Articles 227 – 230 of the Treaty outlined the plan. Article 227 framed international justice for war crimes, aggression, and atrocities as a legal and judicial issue for the first time and detailed the design of the "special tribunal."[3] Articles 228 and 229 envisioned augmenting this international tribunal with proceedings in national-level military tribunals and affirmed that all national or international trials would enforce "punishments laid down by law."[4] Article 230 committed the German government to cooperate.

The plan is recognizably modern. However, the institution proposed in Article 227 bears little resemblance to the modern ICTY, ICTR, or ICC. The Wilhelmine Tribunal was meant to be quasi-judicial and quasi-political. The tribunal was intended to have broad powers to interpret and set legal punishment while being "guided by the highest motives of international policy" and "international morality," not law.[5] The plan mixes legal language and procedures (arraignment and trials) with moral, political, and even religious ideas (international morality, international policy, and the sanctity of treaties). It combines appeals to broad universalism with specific victors' justice, by suggesting a tribunal composed of Allied representatives should be the arbiter of international justice. It is also notable that Article 227 proposed a "special tribunal" of appointed judges, rather than an adaptation of existing criminal or military courts, and blended the idea of a moral crime with that of a legal crime. Finally, the tribunal was intended to be explicitly political.[6] The judges were expected to have a close relationship with national governments and given power to define punishments.

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[2] *Treaty of Versailles*, Article 227-230, reproduced in Marrus 1997b, 10-11. The principal powers were: the United States, Britain, France, Italy, and Japan. This tribunal would be augmented by proceedings in national military tribunals to prosecute lower-ranked criminals.

[3] Article 227 reads: "The… Powers publicly arraign William II… for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial."

[4] *Treaty of Versailles*, Articles 228 and 229, reproduced in Marrus 1997b, 10-11.

[5] *Treaty of Versailles*, Article 227, reproduced in Marrus 1997b, 10-11.

[6] Document 47, "Annex B to ICP-20: Note to the Queen of Holland Demanding the Delivery of the Kaiser for Trial:" Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume IX, FRUS.

Although a judge at the modern ICC might see something familiar in the Wilhelmine tribunal plan, she would also find much to question as illegitimate. Likewise, a strong proponent of the idea that international criminal justice was a strictly political and diplomatic matter would find much to aggravate him in the Treaty of Versailles; indeed, Woodrow Wilson was one such opponent and was deeply dissatisfied. Yet, despite imperfections, the Wilhelmine trial plan clearly envisioned an international judicial response to high-level war crimes and aggression, thereby positing a new *status quo* in ICL common sense. I now consider how the Wilhelmine trial plan came to be, what it reveals about the state of ICL at the time, and the debates from which it arose.

The Road to Paris: Moving Towards a Judicial Vision

The post-World War One era marked the first attempt to seek international criminal justice using tribunals—a clear sign of the legalization and gradual judicialization of ICL and of the growing importance of legal knowledge and practitioners in the field. However, this move into the courtroom was not a foregone conclusion. Initially, policymakers and legal professionals disagreed about whether legal experts should be allowed a voice and about whether alleged war criminals—most notably Kaiser Wilhelm II—should be put on trial. The proponents of trials were further divided over what kind of trials were appropriate, how international crimes could be defined and punished, and appropriate legal philosophy and procedures. Throughout the war, governments, publics, journalists, and legal practitioners debated many visions of legitimate ICL. These struggles encompassed crucial constitutive questions, including questions of what ICL was about and how (and where) it could be legitimately practiced. This section examines archival sources from Allied governments, professional associations, and decision-makers, as well as contemporary newspaper accounts and secondary sources to chronicle these disputes and the positions that practitioners and decision-makers eventually brought to the Paris Peace Conference.

Public Expectations and Political Rhetoric

Calls to punish German soldiers and officials for war crimes and aggression began soon after Germany invaded Belgium in August 1914. There was public debate over punishments, relevant institutions, and historical precedents. As early as October 1914, the British press noted Kaiser Wilhelm had become a modern-day "Bonaparte" in the "popular imagination" and reported widespread public "desire for personal vengeance."[7] The "Napoleonic precedent" was mentioned "frequently in the early days of the war" on both sides of the Atlantic.[8] On August 6, 1914,[9] the French Ambassador to Russia inspected a light infantry regiment on its way to the Eastern Front; the regiment's war cry was "William at St. Helena!"[10] The historical analogy was intuitive, yet calls for summary exile or imprisonment soon gave way to talk of international military or criminal trials, for which there was no precedent. Despite the dearth of state-led ICL institution-building during the nineteenth century, expectations around ICL had evolved. This was thanks, in part, to

[7] "The Kaiser" 1914.

[8] Willis 1982, 10; Coates 2016.

[9] Russia and Germany had been at war since August 1, 1914.

[10] Paléologue 1925, 65-66.

nineteenth-century developments, including the birth of professional IL and the codification of the Laws of War, as discussed in Chapter Two.

Despite few legal precedents, commentators found historical analogies for how to punish the Kaiser, including the Napoleonic precedent. The British lawyer, writer, and admirer of Clemenceau, Frederic Harrison, encouraged the allies to "submit" the Kaiser "to the degradation inflicted on poor Dreyfus…let his bloodstained sword be broken on his craven back…and…St. Helena or Devil's Island might be his prison and his grave."[11] Harrison's impassioned proposal appealed to the Napoleonic precedent while underscoring Harrison's discomfort with a summary exile akin to that imposed on Napoleon. As Willis explains, according to the prevailing narrative at the time, the Napoleonic exile was "an executive action, a matter of high policy; it did not employ judicial institutions or generally explain policy in terms of criminal law."[12] That such executive action was met with suspicion is a mark of the impact that nineteenth-century social and political changes had had on the European public. The infamous Dreyfus affair of the late 1890s, in contrast, involved some (poor and antisemitic) semblance of a judicial process. By invoking this comparison, Harrison called for a summary show trial of the Kaiser without specifying the venue for such a trial. Harrison did not question the Kaiser's guilt but implicitly argued that the correct forms of legal process ought to be symbolically observed, even for "the modern Attila, the new scourge of God."[13] Similarly, Balfour, the British Foreign Secretary, observed that if "action against the ex-Kaiser were taken by administrative action, as in the case of Napoleon, it would be… simple… but it would lose the advantages of a legal trial."[14] One such advantage would be the "appearance of impartiality," and consequent "moral effect before the world."[15]

Overall, public discourse and political decision-making in Europe at the time indicate that punishment of war criminals and elites was still framed as a *political* issue. Nevertheless, there was a growing sense that this political issue could be addressed through *judicial* means. The Allies were not alone in this perception. The Geneva and Hague Conventions, in combination with other nineteenth-century legal instruments including the Lieber Code, raised the possibility of prosecutions in national military tribunals. Both sides of the war quickly seized upon this possibility. They pushed the limits of the Geneva and Hague Conventions by arguing that heads of state should be tried for war crimes; this form of individual command responsibility and liability had not been established by the Conventions. Here we see again the state-led impulse towards proto-pragmatism in ICL; European states and audiences were at theoretically comfortable with inventing ICL *ex post facto* to suit the moment and respond to apparent moral crimes. Likewise, public opinion in the United States "supported 'the judicial trial and punishment of the Kaiser'" and "a *new* precedent to *create a basis* for future proceedings."[16]

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[11] Harrison 1914; Hanks 2002.
[12] Willis 1982, 10.
[13] Harrison 1914.
[14] Lloyd George 1939, 84.
[15] Lloyd George 1939, 84.
[16] Willis 1982, 77, emphasis added.

In May 1916, Berlin announced its intention to prosecute Romania's "monarch… and political leaders…[for] launching war against Austria and Germany… in violation of an international agreement."[17] As in 1815, it remained unclear whether waging war or violating international agreements were crimes for which individuals were legally responsible. Certainly, the Hague and Geneva Conventions had not codified this. Nevertheless, this limitation and the accompanying need to "invent" ICL did not trouble German policymakers. One politician warned the Reichstag that pursuing trials might encourage the Entente to prosecute German officials, should Germany lose the war; this warning went unheeded.[18] Scholars have speculated: "had the Germans won the war, they might well have insisted on charging French and British leaders, and perhaps even King George V, with provoking the conflict."[19] Germany never had the chance to act on this impulse, but the Entente did. When they did so, they turned first to prominent members of the emerging IL profession for analysis and advice. Those professionals had also spent the war debating the nature, sources, and appropriate forms of international justice, but they did not share the sentiments of the public or the European political class.

Anglo- American Professional and Academic International Law

Journalists, publics, and politicians in America and Europe called for the exile, trial, or execution of the Kaiser and other war criminals. Such calls were justified with unspecific arguments about natural law, conscience, and necessity. Meanwhile, the burgeoning IL profession explored deeper legal questions, eventually arriving at a loose scholarly consensus that diverged from public and political rhetoric, focusing on long-term plans to develop the laws of war and aggression instead of short-term punishments. This mismatch proved consequential once professional IL intersected with political decision-making, first when the Allies pressured legal professionals to provide actionable short-term advice and again during the Paris Peace Conference.

There was initially no consensus among legal experts about what kinds of policies and intuitional arrangements were possible under positive law. Insofar as the IL professionals of the time could agree on anything, they agreed only that there was a significant gap in the law's ability to punish or deter war crimes and aggression. Professional debates in Britain and the Americas focused on how the laws of war could be adapted and strengthened in the future, since the lack of pre-existing enforcement mechanisms meant any attempt to punish the Kaiser would be founded on impossibly tenuous legal grounds. In contrast to the proto-pragmatism dominating political circles, Anglo-American lawyers embraced a "rule-approach" and were eager to ensure post-war plans did not exceed positive law.

IL professionals spent the war debating legal issues surrounding the conflict and proposing long-term institutional responses to atrocities. These debates focused both on positive law—such as the Hague and Geneva Conventions—and on enforcement gaps. This included questions of *jus ad bellum* which, as Chapter Two discussed, were neglected during the nineteenth century. The 1906 edition of Lassa Oppenheim's seminal *International Law* reveals the lack of pre-war consensus

[17] Willis 1982, 49; Schabas 2018, 12.
[18] Willis 1982, 50.
[19] Schabas 2018, 12; Willis 1982, 50.

and positive law, noting, "Writers on the law of nations have hitherto not systematically treated on the question of war crimes and their punishment."[20] Likewise, in a separate category from war crimes, legal thought at the time recognized only two "international crimes"—piracy and slavery—both of which were primarily addressed through state-level legal mechanisms.[21] Illegal acts committed by states against each other, including aggression, were labelled "international delinquencies" and could incur reprisals, but were not conceptualized as crimes for which individuals could be prosecuted.[22] Oppenheim's 1912 edition affirms "an international delinquency is not a crime… the delinquent State, as a Sovereign, cannot be punished."[23] Put simply, "aggression" was not uncontroversially an "international crime." During the war, legal professionals in Europe and the Americas began grappling with these voids. Many of their proposed measures focused on future codification, rather than immediate responses to the war.

The proceedings of the American Society of International Law (ASIL) reveal a lack of consensus regarding the punishment of aggression or war crimes. The press was content to label the German invasion of Belgium a crime for which the Kaiser was personally liable, but the ASIL was not. The question of whether aggression was indeed a legal crime (rather than only a moral crime) was not clearly established. Likewise, the possibility of prosecuting violations of *jus in bello* outside of national courts-martial was not supported by extant law, nor was the legality of pursuing individual accountability of sovereigns. Noting these voids, the ASIL prioritized strengthening the laws of war over punishing contemporary atrocities.

This reluctance to contemplate retroactive judicial action reflected the "legalist project for world order" embraced by the American IL profession during this period. As Coates notes, late-nineteenth and early-twentieth century American IL was dominated by "a commitment to expanding the use of legal techniques and institutions to resolve international problems" and a view of "moral conduct" as being a "matter of rule-following."[24] This philosophy is congruent with a "rule-approach," as defined by Koskenniemi, and conflicts with the cavalier inventiveness favoured by European governments.[25] According to Coates, by the 1910s, American IL's legalism had crystallized into a "judicialist" sensibility. This sensibility "imagined international law as self-reinforcing and promoted the creation of a [politically neutral] international court above all."[26] Thus, while the American IL profession was not opposed to the idea that ICL should one day be an area of judicial practice, the profession was reluctant to put the "cart" (trials) before the "horse" (further codification and the creation of an international court). Accordingly, their wartime discussions focused on the latter project.

In December 1915, Theodore Woolsey, a former professor of international law at Yale, addressed the ASIL, outlining two possible routes to "punishment of…offenses against the laws

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[20] Oppenheim 1906.
[21] Holthoefer 2017, 721.
[22] Oppenheim 1912, 209; Peaslee 1916.
[23] Oppenheim 1912, 209.
[24] Coates 2016, 3.
[25] Coates 2016, 3.
[26] Coates 2016, 3 note 16.

of war… retaliation and [judicial] punishment."[27] Although he regarded such offenses as "criminal" acts, he noted that international law "authorized" retaliation but not prosecution or indefinite imprisonment, saying: "if your enemy does certain things to you, you may do the same to him."[28] Woolsey did not personally support reprisals as a means of enforcement but maintained reprisals were supported by "vague…[but] operative" law, whereas trials were unprecedented.[29]

Having established that there was no positive legal basis for trials, Woolsey advocated creating such a legal basis, which could be operationalized to punish atrocities committed in future wars, even if useless for the time being. His vision of future enforcement was innovative and idealistic; Woolsey favoured referring punishment to "the judicial attitude" and "the judicial mind."[30] He argued, "trying and punishing war crimes should… be placed in neutral hands… An international court… through *its own* referees and assessors, in accordance with a system *previously agreed to in treaty form*, should… investigate, judge, and affix the penalty."[31] Woolsey thus articulated a long-term vision of future ICL, which would involve post-war codification and treaty-making. This was a vision of relatively impartial and independent judicial authority; no mention was made of states playing an active role beyond signing onto a treaty to create a court. Woolsey envisioned an institution governed by similar principles and "practices of legality" as were expected in American courts at the time, and as sketched in Chapter One of this dissertation, including the principle of judicial independence.[32] ASIL members received this proposal with scepticism on the grounds that it was impossibly optimistic but, notably, not on the grounds that it was inappropriate or that it sought to introduce judicial procedures where they did not belong. At the same ASIL meeting, another member agreed "the means… for determining whether an international agreement or a rule of international law has been violated should be a court, and the procedure… should be judicial procedure," but argued such a "tribunal" was "out of the question" at the time.[33]

In 1916, David Hill, former US Ambassador to Germany, told the ASIL the idea of a "world court and a world police" was appealing but politically and legally impossible.[34] It would be first necessary to "exterminate from the minds of men this false and pernicious dogma of absolute sovereignty, which [has no]… foundation in the principles of jurisprudence."[35] In Hill's telling, the modern state system needed to be refashioned before an international tribunal could emerge. Thus, in keeping with the utopian ideals of the IL profession, the ASIL focused on shaping international law through a multinational, rhetorically apolitical, and neutral "world court." Crucially, the ASIL did not seriously consider creating a tribunal to prosecute crimes perpetrated during the ongoing First World War. Even Woolsey did not support creating an international tribunal *ex post facto* of

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[27] Woolsey 1915, 62.
[28] Woolsey 1915, 62.
[29] Woolsey 1915, 63.
[30] Woolsey 1915, 67.
[31] Woolsey 1915, 67-68, emphasis added.
[32] Brunnée and Toope 2010; Fuller 1969.
[33] Harriman 1915, 69 and 71.
[34] Hill 1916, 14-15.
[35] Hill 1916, 14-15.

the war; to do so would be to invent retroactive law and to violate the legal principles and legalism of American lawyers.

In Britain, the Grotius Society spent the war discussing the definitions and legality of "the doctrine of reprisals" and other potential forms of enforcement of the laws of war.[36] Possibilities included financial compensation, prosecution by domestic military tribunals, prosecution by foreign domestic courts, and the reintroduction of the Roman Law concept of *infamia* (by which an individual lost the rights and privileges of an alien under international law).[37] Hugh Bellot, the influential president of the Grotius Society, a father of ICL, and a prominent scholar of the Napoleonic exile, favoured prosecuting war criminals and elites in foreign (ie: British) courts-martial.[38] Bellot justified this proposal with the "rules-based" argument that the Hague and Geneva Conventions would support such prosecutions. Bellot considered setting up a "Hague Court of criminal appeal" to review the decisions of national courts but ultimately did not support such innovation.[39] Bellot certainly did not envision an unprecedented international tribunal.

These professional societies' reluctance to contemplate a tribunal was congruent with the legal philosophies dominating Anglo-American international legal circles during this period and with commonly accepted legal norms in common law and civil law systems. As Chapter One notes, "non-retroactivity" is a central principle of legality. Such principles constitute the "internal morality of law" and are foundational to "a (modern) legal system."[40] The concept of non-retroactivity is encapsulated by the legal principle of *nullum crimen sine lege* or *nulla poena sine lege*. This translates as "no crime without law" or "no punishment without law" and refers to the principle that a person should not face criminal punishment for an act that was not criminalized before he or she performed the act. This ideal is clearly consistent with "rule-approaches" such as legal formalism.

Anglo-American international lawyers focused on future criminalization of atrocities and the creation of future international tribunals because of their internalized understanding that an act that is not criminalized at the time of commission cannot incur punishment after the fact. Thus, the proposal that the Kaiser be prosecuted for previously uncodified "crimes" like aggression, the violation of treaties, or premeditated war did not sit comfortably. An act may be morally reprehensible (a moral crime) but, in the absence of positive law, it is not a legal crime. As Fuller summarized, a failure to adhere to the criteria of legality—including the principle of non-retroactivity—does "not simply result in a bad system of law; it results in something that is not properly called a legal system at all."[41] Professional IL societies in Britain and America were eager to create and maintain IL, but not at the expense of this fundamental principle, which they—unconsciously and without significant debate—attempted to "translate" or "import" from the national legal sphere. As subsequent sections of this chapter discuss, this unconscious desire to

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[36] Bellot 1916, 34.

[37] Bellot 1916.

[38] Bellot 1923.

[39] Bellot 1916, 49.

[40] Brunnée and Toope 2010, 28; Marshall Cohen 1965, 648; Brunnée and Toope 2011, 114 and 110; Fuller 1969, 4 and 39.

[41] Fuller 1969, 39.

translate domestic legal principles to the international realm was not shared by policymakers or legal professionals from other allied states, especially France.

Other professional associations engaged in similar debates.[42] Anglo-American IL professionals during this period generally agreed that wartime atrocities required a *legal* response—such as the creation of new institutions and legal arrangements to deter and respond to future atrocities—but not that they required an *ex post facto judicial* response. However, as we shall see, prominent French lawyers embraced a more activist approach than their Anglo-American colleagues. Political decision-makers also supported ambitious action. The war catalyzed debates within the IL profession about future enforcement and codification but did not give rise to many expert-backed policy proposals. However, as post-war diplomacy progressed, IL experts came under pressure from governments seeking expert advice and were forced to consider short-term action.

European Politico- Legal Intersections and the Tense Embrace of Expertise

As the war ended, these parallel (public and legal professional) discourses clashed, as the Allies involved IL professionals in post-war planning. Despite Anglo-American lawyers' reluctance to contemplate post-war vengeance, European Entente governments, spurred by changing public discourse about legitimate justice, embraced the idea of pursuing justice through legal (judicial) channels with experts' assistance. These governments were eventually supported by French international lawyers, who broke with their Anglo-American colleagues. During the war, the Entente assembled expert committees to gather information—and, implicitly, to legitimate their claims—about war crimes. As the armistice approached, experts were asked not only to gather information but also to provide policy recommendations; they reluctantly complied. Meanwhile, removed from European machinations, the American political establishment was unconvinced.

Expert Evidence- Collection

Initially, legal expertise was marshalled to lead and legitimate data collection, rather than policy. By early 1915, Belgium, Britain, France, and Russia had all established expert commissions to investigate alleged atrocities.[43] Each commission was chaired by men with legal experience, and charged with collecting accurate "evidence relating to breaches of the rules and usages of war and acts of inhumanity."[44] For example, the British "Committee on Alleged German Outrages," led by Viscount Bryce (the "Bryce Committee") enlisted lawyers with extensive "legal knowledge and experience," including the Director of Public Prosecutions, to depose witnesses and evaluate evidence.[45] Alleged atrocities were highly publicized, enflaming public "demands for… retribution…[or] vengeance," often centered "on the person of the Kaiser."[46] The reports took no position on whether such "vengeance" should occur via a (military or civilian, national or international) trial, or about the legalities of prosecuting the Kaiser.

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[42] Garibian 2025.

[43] Foltz 1978, 12; Commission d'enquête 1915; Payelle et al. 1915; Bryce 1915.

[44] Bryce 1915, 8.

[45] Bryce 1915, 3-4.

[46] Foltz, 1978, 14.

The Bryce Committee felt it was outside their remit to recommend policy, but nevertheless called for legal recourse, writing:

> we have stated what the evidence establishes, but [this evidence must]… rouse the conscience of mankind, and we… hope [after the war]… the nations of the *world in council* will consider what means can be provided and sanctions devised to *prevent the recurrence* of such horrors.[47]

Although the Bryce Committee compiled evidence of war crimes, it was not yet asked to recommend a particular form (judicial or otherwise) of punishment. Indeed, committee members explicitly avoided such questions. They remained focused on measures to prevent the *recurrence* of abuses, in contrast to the inventiveness of the press and politicians. The Bryce Committee's position mirrored the dominant position in the ASIL and the Grotius Society. Seeing no positive international law that would allow for holding a head of state or other official personally responsible for war crimes or aggression, they focused on documenting crimes and on opportunities to create such laws for future generations.

However, the Bryce Committee's avoidance of post-war vengeance was not successful for long. As the war ended, Entente governments began seeking expert approval for their quasi-judicial vision of immediate punishment.

The Push for Short-Term Policy: Embracing and Ignoring Expertise

Despite the cautious formalism of Anglo-American IL, Entente governments remained enthusiastic. They were eager to seek advice from legal experts (even though, in its purest form, as with the Bryce Committee, such advice did not endorse the Entente's preferences). Legal advice was increasingly understood to be a source of legitimacy for many areas of state policymaking; to deliberately ignore it would be impolitic, and citing it was understood as a strength. Yet the Entente continued to favour post-war trials, despite the advice of many lawyers. The *fact* of legal input was a valuable resource, yet its *content*, when inconvenient, was ignored.

The Congress of Vienna had been content to declare Bonaparte an "outlaw" whose exile was a "necessity," and leave Eldon to "get over" obstacles. With the Kaiser, it was more difficult; legally-minded elites, including government lawyers and members of the IL discipline, were not as eager to "get over" issues. Yet, some were more supportive of post-war judicial action than others. The resultant conflict within the IL profession and between professionals and decision-makers forced these actors to address the tension between rhetorically calling for Wilhelm II's trial and adhering to (or furthering) positive law.

At the request of the British War Cabinet, Attorney General F.E. Smith, established a national "Committee of Enquiry into Breaches of the Law of War" (the "Committee of Enquiry") in early November 1918. The Committee of Enquiry was staffed by influential jurists including Hugh

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[47] Bryce 1915, 61, emphasis added.

Bellot.[48] In a similar (but more expansive) vein to the earlier Bryce Committee, the Committee of Enquiry examined "the facts with respect to 'breaches of the laws and customs of war."[49] Crucially, the Committee of Enquiry was also tasked with evaluating "the degree of responsibility of German military officials and leaders, and asked to consider creating a tribunal. [50]

At its first meeting, Smith was explicit about his understanding of the Committee's task. According to Smith: "Germany had challenged International Law…[and] had definitely failed;" the Committee would consider "what steps ought to be taken…to re-establish the authority of International Law."[51] However, reflecting the formalist consensus of Anglo-American IL, Smith argued some questions were *political* and therefore outside the Committee's expert remit, saying:

> many great crimes against International Law had been committed. The very origin of the war… would be… remembered as one of the greatest crimes against civilization. [However] it would not be possible to consider how far a given individual could be made responsible for the highest of all crimes against civilization.[52]

Despite the cabinet's expectations, Smith made it clear that aggression and war guilt were not matters on which international lawyers should provide advice. The Committee of Enquiry asserted that international law had nothing to say about individual liability for the moral crime of aggressive war. Such transgressions "necessarily raised questions of the highest and most delicate politics," so the Committee of Enquiry could "at the most" only compile evidence and refer "the great questions of policy…raised" to political "councils in which all the Allies would be represented."[53] Thus, Smith drew a distinction between moral crimes and legal crimes. In his view, the former (including acts of aggression) were not a matter for judicial action. This contrasts with Eldon's approach to the Napoleonic case, where he attempted to bring his legal knowledge to bear on and legitimate even those matters he knew to be outside the law. The Committee of Enquiry sought autonomy and distance from questions of war guilt and aggression, despite the preferences of political decisionmakers. However, developments in France and the persistence of the Imperial War Cabinet soon forced Smith and his colleagues to relent.

French International Law to the Rescue?

Meanwhile, France commissioned two prominent academics, Ferdinand Larnaude and Albert de Lapradelle, to report on the "penal responsibility" of the Kaiser.[54] Larnaude and de Lapradelle, influential figures in the burgeoning IL profession, considered the Kaiser's liability for "multiple

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[48] The Chairman, John Macdonnell was the King's Remembrancer, an ancient judicial post. J. H. Morgan, a military lawyer, was Vice-Chairman. Other notable committee members included Frederick Pollock, who was later senior British representative on the "Commission on the responsibility of the Authors of the War and Enforcement of Penalties" at the Paris Peace Conference. See: "German Crimes, Responsibility and Punishment" 1918.

[49] "German Crimes, Responsibility and Punishment" 1918; Schabas 2018, 13.

[50] "German Crimes, Responsibility and Punishment" 1918.

[51] "German Crimes, Responsibility and Punishment" 1918.

[52] "German Crimes, Responsibility and Punishment" 1918.

[53] "German Crimes, Responsibility and Punishment" 1918.

[54] Larnaude and de Lapradelle 1918.

attacks on the law of nations" and whether he could be judged by either state-level military tribunals or an international tribunal.[55] Larnaude and de Lapradelle did not share Smith's reluctance to supply an expert legal opinion on moral crimes. Indeed, they argued "it would be *anti-juridical*…to free the Emperor from responsibility."[56] They concluded that any legal obstacles could be overcome and that an international tribunal would be a foundation for a utopian League of Nations: "the law of nations requires that the Emperor be judged; that the judgement, issued by an *ad hoc* High Court of International Criminal Justice, have the universal value of *res judicata*…. The life or death of international law… [and] the future of the League of Nations… is at stake."[57] As Eldon had been in 1815, Larnaude and de Lapradelle believed legal issues should be "got over," to further international security and peace. In keeping with the progressive impulse of nineteenth-century IL, they pushed further than Eldon by arguing that the utopian future of international law was at risk, in addition to the *status quo* of international society. Most Anglo-American IL professionals assumed international order could be re-established through strict adherence to positive law and the creation of future institutions, but Larnaude and de Lapradelle believed the salvation of international law and order required short-term pragmatism and inventiveness.

Larnaude and de Lapradelle's vision of ICL was highly influential and controversial at the time, yet appears foreign today. Their "thoroughly researched and elegantly argued" report endorsed retroactive judicial action and painted a picture of ICL as a field which was only loosely tethered to domestic judicial norms or principles of legality.[58] For example, many Anglo-American IL professionals took it for granted that the domestic legal principle of *nulla poena sine lege* would apply to the nascent ICL field. Larnaude and de Lapradelle opposed importing this concept to ICL. They envisioned an international victors' "High Tribunal," empowered to apply retroactive law. The report addressed objections head-on, noting: "It remains to be determined how this court will judge… where it will find the law… the penalty… [and] the procedure to be followed… [One might ask] Isn't the rule of *non-retroactivity of criminal law* going to *stop* us? *No.*"[59]

Larnaude and de Lapradelle drew on rule-based arguments and an expansive view of legal sources to contend "the crimes committed by" the Kaiser were criminalized under extant law.[60] They asserted Wilhelm's alleged crimes were established "in international custom and even in specific texts [including] the Hague conventions" or were "written in the conscience of honest people."[61] Furthermore, they "resurrected" the "natural law concept of just and unjust wars from an earlier tradition in international law" to bolster their argument.[62] They cited the legal custom of *pacta sunt servanda* ("promises must be kept") to argue "the silence of [the Hague] conventions on the consequences" of violation "does not mean that we wanted to leave them without sanction."[63]

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[55] Larnaude and de Lapradelle 1918, 1. My translation.

[56] Larnaude and de Lapradelle 1918, 14, emphasis added. My translation.

[57] Larnaude and de Lapradelle 1918, 25-26. My translation. *Res judicata* is a "judged matter" or "a thing adjudicated."

[58] Holthoefer 2017, 723

[59] Larnaude and de Lapradelle 1918, 22, emphasis added. My translation.

[60] Larnaude and de Lapradelle 1918, 22. My translation.

[61] Larnaude and de Lapradelle 1918, 22. My translation.

[62] Willis 1982, 72.

[63] Larnaude and de Lapradelle 1918, 22. My translation.

In other words, they drew on both "rules-based" and "idealist" arguments to argue that the absence of positive law need not prevent judicial punishment. The French report espoused a pragmatic and expansive philosophy of IL and cited an esoteric range of ICL sources on the grounds that expansiveness was politically necessary.

Crucially, Larnaude and de Lapradelle opposed translating domestic legal principles into the international sphere. They asserted that retroactive punishment was acceptable in ICL and, implicitly, that the field need not conform to the practices and principles of legality constraining domestic legal systems. They argued:

> *nulla poena sine lege* only fully applies to the *internal* criminal law applicable to a common law crime. It necessarily bends to adapt to exceptional circumstances of public law, causes of political law, for example… in France the Court of Justice in a recent case was able to proclaim its sovereignty and… choose the applicable penalty… Now, if this right belongs to the High Courts in major political cases… it must be granted to the jurisdictions of the international order in major international trials.[64]

In addition to analogizing to domestic "political" trials, Larnaude and de Lapradelle asserted that the development of ICL was substantively different from that of domestic law. They continued:

> Domestic legal disciplines and international law are at a different stage in their development. Internal criminal law has reached the final stage of codification. The law of nations… is… in its infancy. International criminal law is still at this first stage of its evolution where the law is formed by *reaction against the fact*, where *the penalty is based only on the conscience of the judge*, where the judge himself only appears to *save the criminal from revenge*.[65]

A dearth of positive international law need not prevent judicial action, despite the Anglo-American squeamishness.

The French narrated a legal "wild west," in which alleged criminals ought to have fewer legal protections than in most European societies. They views the Entente as "*de facto* international society," arguing the allies had the right to create international government and law: "just as the… Entente formed the first nucleus of the League of Nations, their act of common justice will provide the first foundation of a society where law… will find all the sanctions, even criminal sanctions, against major international crimes."[66] This bold vision conflicted with Anglo-American international lawyers' desire to separate "legal" and "political" or "moral" crimes and punishment and embraced the opportunity to develop law in the courtroom. The authors eschewed the formalism of their colleagues, marshalling arguments about natural law and the progressive future of international society.

Entente politicians were delighted. The French report enabled French and British decision-makers to pursue judicial action with the blessing of legal experts. Clemenceau of France and Lloyd

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[64] Larnaude and de Lapradelle 1918, 22-23. My translation.

[65] Larnaude and de Lapradelle 1918, 23, emphasis added. My translation.

[66] Larnaude and de Lapradelle 1918, 23, emphasis added. My translation.

George and Curzon[67] of Britain were particularly enthusiastic, championing the plan to their colleagues and publics.[68] According to Schabas, the French report marked the birth of the trial plan as such: "the trial… was really a French initiative, developed by French academics and embraced by Clemenceau, who then persuaded Curzon during their tête-à-tête [meeting] following the armistice."[69] Curzon then persuaded Lloyd George, who was emboldened to propose the plan to the Imperial War Cabinet, where it became a subject of debate. Larnaude and de Lapradelle were the first IL professionals to sketch an expert-approved judicial plan; this endorsement was leveraged by political elites to support their preferred form of post-war vengeance.

Nevertheless, the French proposal met resistance in political circles. Importantly, the primary grounds on which these political actors objected to the trial plan was precisely that it might not have *sufficient* legal expert support. They did *not* argue that legal expertise was irrelevant to post-war justice, as the Liverpool cabinet might have done in 1815. Instead, recognizing the value of legal advice as a source of legitimacy, they feared Larnaude and de Lapradelle's advice was not good enough. Influential members of the British Imperial War Cabinet baulked. The Australian Prime Minister protested "you cannot indict a man for making war" and Winston Churchill, the munitions minister, took a formalist line, predicting the plan would come to an "impasse" as "lawyers all over the world would begin to see that the indictment was not… sustain[able]."[70] The British Ambassador to the US pushed the cabinet to solicit even more expert advice, arguing:

> the Government should know exactly what it proposes to do, and whether it is feasible to prosecute the ex-Kaiser at all… Legal opinion should be taken as to the charges on which he could be indicted, the procedure that should be followed, and the possibility of his being handed over by… Holland for trial.[71]

Whereas the cabinet of 1815 had been concerned only about *habeas corpus*, political necessity, and general instincts about international law, this was a new world in which legal considerations and expertise were paramount. The key debate among decision-makers was about the legality of proposed measures, not their political desirability. Far from being trapped on the margins of the field, Eldon's successors had a voice in ICL. Therefore, they had power, which they would eventually use to assert autonomy.

Pressure to Provide Advice and Justification

Finally, the British Cabinet directed Attorney General Smith to provide a British legal opinion on the proposed trial of the Kaiser for war crimes, aggression, and the violation of treaties. Smith was no longer able to skirt the issue as falling outside the remit of legal expertise. In late 1918, he returned to his Committee of Enquiry and established a "Special Sub-committee on Law," to consider the matter. The special sub-committee viewed its role in a similar light as Eldon had viewed his position in 1815. The sub-committee was aware of the War Cabinet's discussions and

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[67] Curzon was Leader of the House of Lords and a member of the Imperial War Cabinet.

[68] Schabas 2018, 17-18.

[69] Schabas 2018, 18.

[70] Imperial War Cabinet 37, 20 November 1918, 7-8: CAB 23/43, TNA; Sellars 2013, 2.

[71] Quoted in Schabas 2018, 21.

of Lloyd George's preference for trials. They understood that they were expected to find legal *support* for those views, rather than subject them to rigorous legal scrutiny. Frederick Pollock, one of the jurists on the sub-committee and an alumnus of the Bryce Committee, told his friend (US Supreme Court Justice) Oliver Wendell Holmes that the task was to "expand 'Hang the Kaiser' in rational [legalized] terms."[72]

Under pressure, the sub-committee worked to cloak Lloyd George's preferred policy in legal language. Unlike in 1815, however, the sub-committee did not fully endorse the most radical aspects of the Government's plan. As Sellars argues, "hemmed in by… political constraints, [the sub-committee's] report occupied the middle ground, [on] the one hand *endorsing* the idea of trying Wilhelm II for war crimes, and on the other, *raising doubts* about Lloyd George's most subversive proposal – prosecuting him for embarking on war."[73] Larnaude and de Lapradelle's confidence that the Kaiser was morally and legally liable for aggression and the violation of treaties did not sit well with the sub-committee. Despite these reservations, the sub-committee eventually (by the narrowest of margins) agreed to recommend charging the Kaiser for aggressive war, thereby lending their cautious approval to the Entente's preferred strategy. However, in further opposition to their French colleagues and the War Cabinet, the sub-committee recommended creating a neutral international tribunal—not just a tribunal of the victors— which "would be free from national bias, produce authoritative decisions and fortify international law."[74] In this way, the sub-committee exercised more autonomy than their 1815 counterparts; although they sought to "get over" legal obstacles, they nevertheless contested and even formally rejected extreme elements of the government's favoured policy.

Using Expertise as a Source of Political Legitimacy

Undeterred, Lloyd George leveraged the special sub-committee's "highly expert" report, along with France's report, to legitimate and seek support for post-war judicial action.[75] He pressured the French and Italians to call for the Kaiser's surrender to an international court, even reading extracts from the Smith report to his interlocutors. The French, armed with their own report and scarred by the war, agreed. Italian officials were "impressed," but feared a trial might transform Wilhelm into "a 'patriotic martyr' just as the exile to St. Helena had provided the Bonapartists with a *cause celèbre*."[76] The Italians "went… to the extreme limit" to "prevent" what they feared might become "a grave error" of retroactive law-making but eventually acquiesced, with Orlando, the Prime Minister, taking comfort in the notion that a trial would vindicate "the universal conscience of mankind" and "the highest moral laws."[77]

Lloyd George also leveraged this expert endorsement to legitimate the trial plan to domestic audiences eager to "hang the Kaiser."[78] While campaigning for re-election in 1918, he spoke about

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[72] Pollock to Holmes, 30 January 1919. Reproduced in Howe 1941, 4.

[73] Sellars 2016a, 23, emphasis added.

[74] Sellars 2016a, 23.

[75] Lloyd George 1939, 81.

[76] Foltz 1978, 50.

[77] Orlando 2007, 1024.

[78] Lloyd George may never have uttered this phrase, but it is taken to encapsulate his re-election promises.

the necessity of judicial action and the support of legal experts, while validating popular instincts about moral crimes, saying: "If a man takes another's life the law… demands life for life… somebody has been responsible for this war that has taken the lives of millions… Is no one to be made responsible… [for these] undoubted offences against the law of nations?"[79] Calling for a court, he told voters, "the investigation should be… impartial… fair [and]… stern."[80] Elsewhere, Lloyd George was explicit, saying the Kaiser "ought to stand his trial.… [Regarding] international law, well, *we are making international law*, and all we can claim is that international law should be based on justice." [81] Lloyd George was comfortable with inventing law in the name of trans-historical justice. He was explicit that such justice should take place in a court, not within the political forum of the new League of Nations, writing, "this ought to be a judicial tribunal… set up by the Allies. Germany ought to be invited to join it, and… judge the ex-Kaiser very impartially. There is a sense of justice in the world which will not be satisfied [while he] is at large."[82]

In articulating this vision, Lloyd George appealed to legal authority and expertise as a source of legitimacy, foregrounding the role of legal advisors in cabinet decision-making. He proudly reminded voters his government had "asked the Attorney-General to refer the question" of "responsibility for the invasion of Belgium and the conduct of the war" to "the greatest jurists in this country. They have investigated it, and… unanimously [concluded] that in their judgment the Kaiser was guilty of an indictable offence for which he ought to be held responsible."[83] The fact that Lloyd George mischaracterized British lawyers' (actually far more cautious) position in this way further demonstrates his understanding that expert legal advice was a source of legitimacy. By alleging that "great jurists" "unanimously" supported his proposals, Lloyd George strengthened his claims to the moral and legal high ground while also speaking to public demand for a trial.[84] Lloyd George rode these promises to electoral victory in December 1918. He arrived in Paris in January 1919 with a mandate to carry them out, clearly demonstrating and reinforcing the political utility of claiming legal expert support for post-war proposals (at least in Europe).

American Visions and Revisionism

In Paris, the trial plan met staunch American opposition. Woodrow Wilson rejected the emerging orthodoxy that elevated judicial action and celebrated legal expertise as necessary for post-war justice. American policymakers contested the idea that legal expertise was necessary for legitimate action in the field, directly challenging the Napoleonic-era decision to allow legal practitioners a voice and deliberately departing from past precedent. Far from co-signing the turn towards judicial action in ICL, the American political establishment hoped to wind back the clock to the pre-Napoleonic *status quo ante* and re-adjudicate nineteenth-century developments.

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79 "Prime Minister On German Crimes" 1918.

80 "Prime Minister On German Crimes" 1918.

81 "Meeting of the Imperial War Cabinet," 20 November 1918, 6: CAB/23/37/37, TNA; Lloyd George 1939, 57, emphasis added.

82 "Meeting of the Imperial War Cabinet," 20 November 1918, 6: CAB/23/37/37, TNA; Lloyd George 1939, 57, emphasis added.

83 "Prime Minister On German Crimes" 1918.

84 Bassiouni 2002, 250.

Wilson opposed the legalization and judicialization of international criminal justice. Wilson "distrusted" lawyers, rejected their proposals for post-war order, and thought "legalism had no place in… [his] new diplomacy."[85] He did not "intend to have lawyers drafting the treaty of peace" or weighing in on post-war planning.[86] As one prominent American legalist, John Bassett Moore, explained, "word has gone around that they do not want 'international lawyers,' as they are likely to be prejudiced in favour of the past, with all its evil associations and practices."[87]

Moreover, Wilson worried prosecuting the Kaiser could result in "bolshevism" or further instability in Europe.[88] In late 1918, the German Government requested American support for a "neutral" reconciliatory (not retributive) commission to examine the causes of the war and promote "universal peace… guarantees against future wars" and public confidence.[89] Wilson did not immediately respond but took the Germans' implicit warning seriously. In contrast, Wilson responded to a joint request from Britain, France, and Italy that he agree to issue a (pre-Conference) ultimatum demanding that Holland surrender the Kaiser for immediate trial with a flat refusal. This refusal made the European Allies "nervous as to his intentions regarding the Kaiser, responsibility, and war crimes."[90]

Although the American press, public, and some members of the policy establishment shared the Europeans' desire to put the Kaiser on trial, Wilson and his sympathizers favoured a Napoleon-style exile: a political response to the problem of the Kaiser, rather than a judicial one founded on uncertain legal precedent.[91] Coates argues "Wilsonianism devalued legal expertise" in general throughout the war and during the Paris Peace Conference.[92] At Wilson's urging, the League of Nations covenant "relegated law to a minor position" and envisioned a very limited role for judicial institutions in post-war peace.[93] Wilson did not support the trial plan and did not rely on legal expertise as a source of legitimacy. Accordingly, he sought to undo the tentative legalization of international criminal justice and prevent its judicialization.

While the Europeans had spent the nineteenth and early twentieth century getting accustomed to including legal experts in conference delegations, the Americans had not. As one American delegate in Paris recalled, America "had had no part in a general peace conference" prior to 1919, so the issues involved "were new" to them.[94] Wilson acknowledged this lack in 1917 when he instructed Colonel House "to gather a body of experts to collect and collate data that might be needed… at a Peace Conference."[95] Wilson believed the US "was especially in need of such

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[85] Coates 2016, 153.

[86] Coates 2016, 153.

[87] Quoted in Craft 1997, 233. Moore was invited to serve as China's "technical delegate" to the Conference but Wilson opposed the arrangement as inappropriate.

[88] Coates 2016, 153; Willis 1982, 45.

[89] Foltz 1978, 55.

[90] Foltz 1978, 63.

[91] Willis 1982, 47.

[92] Coates 2016, 163.

[93] Coates 2016, 163.

[94] House and Seymour 1921, 2.

[95] House and Seymour 1921, 2.

specialists… because of its traditional policy of isolation and the consequent lack, in its governmental departments, of a personnel thoroughly conversant… with the inter-relations and internal composition of the European and Asiatic powers."[96] This group became known as "The Inquiry" and was primarily made up of "regional specialists," economic experts, and cartographers, not lawyers. Only two IL experts were "affiliated with although distinct from" the Inquiry, and they played a minor role.[97] The Inquiry "refused to have anything to do with the war crime question" and eschewed international legal issues.[98]

The Inquiry (which eventually became the "Council on Foreign Relations") produced a report "on the main outlines of an equitable settlement," which later became the basis of the Fourteen Points.[99] This contained no mention of war crimes trials and scarcely any of international law. By mid-1918, the Americans had concluded that data "bearing on the drawing of boundary-lines would be needed [in Paris], and that no [other] information… excepting general economic information…would be of any value."[100] For Wilson, post-war peace was not a legal or judicial question. It was a political, cartographic, and economic one. While France and Britain solicited and publicly cited legal expert advice to legitimate post-war policies, Wilson opposed "bringing law into" post-war decisions and was committed to being a "disinterested" party in Paris.[101] Wilson warned his delegation to "be prepared to fight… 'disagreeably if necessary,' for a new world to be moderated" by the League of Nations, not law.[102] He developed no policy statement on post-war justice; consequently, the Americans arrived at Paris to find that they had "underestimated" the importance the Europeans "placed on the responsibility and atrocity issues" and were unprepared to contest the Europeans' judicial vision.[103]

Many American lawyers agreed with Wilson's rejection of the trial plan, although their reasoning was very different. Rather than rejecting law, many American lawyers viewed the trial plan as a threat to the legitimacy and future of IL, as wartime debates in the ASIL had demonstrated. These strange bedfellows of Wilson were reluctant to create an *ex post facto* international tribunal with no basis in positive law, preferring to hope that the post-war era might see further codification and institutionalization, despite Wilson's hostility. In any event, American policymakers and lawyers opposed the trial plan; British lawyers cautiously co-signed some aspects of a trial plan; and French lawyers and European policymakers were enthusiastic proponents of an expansive judicial vision.

The Paris Peace Conference and the Commission on Responsibility

All these perspectives were represented at the Paris Peace Conference. Most stakeholders, except Wilson's American delegation, agreed post-war justice demanded legal expertise. French

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[96] House and Seymour 1921, 2.
[97] House and Seymour 1921, 7.
[98] Foltz 1978, 56.
[99] House and Seymour 1921, 2.
[100] House and Seymour 1921, 5.
[101] Foltz 1978, 56.
[102] Foltz 1978, 56.
[103] Foltz 1978, 81.

lawyers and Entente politicians agreed war crimes and aggression necessitated an *ex post facto* judicial response, while Anglo-American lawyers favoured post-war institution-building but not retroactive judicial action. Wilson and his colleagues sought a purely political diplomatic response. From these starting points, and after significant contestation, Conference delegates arrived at the nebulous vision of ICL narrated in the Treaty of Versailles. The Treaty envisioned a quasi-political, quasi-judicial victor's tribunal entrusted with enforcing universal moral principles, fulfilling the Allies' highest political motives, devising *ex post facto* punishments, and upholding existing law. The Treaty left many constitutive ICL questions unsettled. Yet, the Conference sparked important debates and eventually endorsed a legalized and judicialized vision of ICL.

In opposition to Wilson, most Allied governments were eager to involve legal experts in post-war planning. This triggered tension from the outset. At the first preliminary meeting of the Conference, the French called for judicial vengeance and circulated Larnaude and de Lapradelle's report to all delegates.[104] Clemenceau, elected President of the Preliminary Conference, urged delegates to draw inspiration from the report and "prepare memoranda on the responsibility of the authors of the war and the penalty for the crimes committed during the war."[105] Clemenceau and Lloyd George sent a clear message that this report was an ideal—supportive and expansive—expert product, and that they hoped to receive more memoranda in a similar vein. Wilson pushed back. He proposed "the question of national and individual crimes against decency be settled in the comparative privacy of the Supreme Council"—the Conference's highest *political* organ.[106] The other Allies resisted this attempt to refer these discussions to that purely political forum and convinced Wilson to turn the matter over to non-binding expert consideration. Wilson would have preferred to settle the matter "quickly through an agreement between the leaders of the major allies," but the Europeans were adamant.[107] Foltz argues Wilson was also impressed by Larnaude and de Lapradelle's efforts to tie the trial plan to the future of the League of Nations, and therefore to Wilson's priorities.[108]

Accordingly, on January 25, 1919, the delegates established a new expert advisory commission. The "Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties" (the "Commission") would consider:

> The responsibility of the authors of the war…The facts as to breaches of the laws and customs of war committed by [Germany and its allies]… The degree of responsibility for these offenses attaching to particular members of the enemy forces, including members of the General staffs and other individuals, however highly placed… The constitution and procedure of a tribunal appropriate for the trial of these offences… [and related] matters.[109]

Each of the five Great Powers (The US, Britain, France, Italy, and Japan) appointed two members to the Commission, with alternates, and five additional members were elected by "Powers with

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[104] Foltz 1978, 68-70.
[105] Schabas 2018, 13.
[106] Maogoto 2014, 176.
[107] Foltz 1978, 79-80.
[108] Foltz 1978, 79-80.
[109] Carnegie Endowment for International Peace 1919, 1.

special interests."[110] Crucially, the Allies made no commitment to act on the Commission's recommendations. The Commission's non-binding advisory role helped soothe Wilson's anxieties about allowing legal experts to weigh in.

The Commission divided itself into three sub-commissions to consider: I) evidence of criminal acts, II) responsibility for the war, and III) responsibility for violating the laws and customs of war. Sub-commissions II and III (focusing on aggression and war crimes, respectively) were the sites of the most significant controversies. The two sub-commissions considered whether "prosecutions could be instituted [for aggression and war crimes], and [if so which]… individual or individuals… were, in its opinion, guilty, and the Court before which prosecutions should proceed."[111] Despite the preferences of Clemenceau, Lloyd George, Larnaude, and de Lapradelle, sub-commission II concluded that war guilt was *not* a legal or judicial matter—rejecting attempts to seek legal punishments for moral crimes such as aggression.[112] Sub-commission III produced more varied recommendations regarding how international criminal law could be put into judicial practice *vis-a-vis* war crimes. The deliberations of sub-commissions II and III constituted an early attempt by IL experts to defy the explicit wishes of states, revealing the Janus-faced implications of relying on and elevating expert advice as a source of legitimacy, and the potential for such reliance to lead states to "entrap" themselves.

In establishing the Commission, the Allies created the first multinational technical expert body concerned with international criminal justice. The Commission served in an advisory capacity only but proved a crucial forum for contestation between legal experts. The Commission spent two months in closed meetings before producing a lengthy report, which was later reflected, in a modified form, in the Treaty of Versailles. "Irreconcilable" differences between Commission members resulted in a non-unanimous report, with the American and Japanese delegations each producing a dissenting report, all of which were influential in later eras.[113] As Holthoefer summarizes, the Commission included "prominent diplomats and lawyers representing the Allied nations and their varied legal traditions" and "was strongly divided on its task."[114]

The Commission was wracked by struggles over both substantive questions of international justice and more immediate questions about how they ought to conduct themselves and relate to each other as ICL practitioners. The key substantive questions dividing the commission concerned whether the Kaiser could be put on trial and, if so, before what kind of court (crucial aspects of "how" ICL is practiced). The key practical question concerned the correct conduct of Commission delegates, and the correct relationship between those expert delegates and their political masters.

Inside the Commission on Responsibility: Struggle over Professional Norms

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[110] Belgium, Greece, Romania, Poland, and Serbia.

[111] "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities" 1920; Carnegie Endowment for International Peace 1919, 3.

[112] Carnegie Endowment for International Peace 1919; "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" 1920.

[113] Carnegie Endowment for International Peace 1919.

[114] Holthoefer 2017, 723.

Working within the Commission prompted delegates to articulate different understandings of how to balance their twin roles as state representatives and international lawyers. Questions about the ethos of ICL, norms of professional behaviour, and relationships between IL experts and states—the "how," "who," and "what" of the field—immediately came to the fore. Indeed, accusations of professionally inappropriate conduct or of failing to strike the appropriate balance between state interests and professional integrity were rife. Such accusations were the dominant tool deployed by Commission delegates seeking to discredit the positions and substantive arguments of their peers. Whereas in the national political realm, assertions of legal expertise were an increasingly valuable source of legitimacy (as Lloyd George understood), within the quasi-academic expert forum of the Commission, practitioners struggled over the specific *kind* of expertise and conduct that were valuable in the nascent ICL field.

Commission delegates played dual roles as legal experts and government representatives, continuing the nineteenth-century tradition of states including legal advisors in conference diplomacy.[115] Lewis summarizes the Commission as a "technical body" of "legal advisors which formulated two competing plans for post-war punishment."[116] The Commission was not, however, defined by the ethos of conscious "apolitical" expertise that often characterizes technical bodies in the post-Cold War period.[117] The Commission's plans were shaped by the advisors' backgrounds, ideologies, and legal expertise, in combination with the instructions that each group received from Allied governments. Indeed, some Commission members *embodied* their national governments; one member, Bill Massey, was the sitting Prime Minister of New Zealand and the only New Zealand representative at the Conference.[118]

Several Commission delegates occupied government positions. The American Secretary of State, the British Solicitor-General and Attorney-General, a prominent French Deputy (and future Prime Minister), and the Greek Foreign Minister were all members, in addition to the Prime Minister of New Zealand.[119] The Commission also included former delegates or members of the secretariat at the Hague Conferences on war crimes.[120] Yet they did not conduct themselves as solely representative diplomatic agents. Likewise, many delegates were prominent members of the burgeoning IL profession. Several were on the editorial boards of the most important IL journals of the time; the Americans Lansing and Scott were editor and editor-in-chief, respectively of the *American Journal of International Law*. The Belgian Rolin-Jaequemyns was the founder and editor of the *Revue de Droit International et de Législation Comparée*, and de Lapradelle, the Commission's General Secretary and co-author of the French pre-conference report, was editor of the *Revue de Droit International Privé.*[121] Rolin-Jaequemyns, de Lapradelle, and Scott were also members of the Institut de Droit International, the most prominent professional IL association of the time, and Rolin-Jaequemyns and Japan's Mineichiro Adachi would later become judges of the Permanent Court of

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115 Sacriste and Vauchez 2007, 86.

116 Lewis 2014, 27.

117 Louis and Maertens 2021.

118 Watson 2010.

119 Lansing 1919, 642.

120 Willis 1982, 69.

121 De Lapradelle later founded other influential IL journals.

International Justice.[122] Many delegates were also current or former professors of international law.[123] Yet they did not conduct themselves simply as academics or professionals engaged in theoretical debate.

Delegates struggled to reconcile diverse preferences and political commitments and to strike a balance between what the allied governments expected of them and what they expected of themselves as legal professionals. This tension underpinned the Commission's substantive debates. When advancing or refuting claims about legitimate sources, concepts, precedents, or practices of ICL, Commission members frequently deployed arguments about professionally appropriate (or inappropriate) behaviour. In other words, delegates struggled over norms of professionally appropriate behaviour and over the value of different ideological and professional credentials. They often represented their own position as the professionally appropriate and legally correct one and their opponents' positions as disingenuous or dangerous. In this (quasi-political) professional setting, delegates deployed the language of professional appropriateness and legal correctness, eschewing other logics of argument such as those based on geopolitical expedience, domestic political desirability, or moral correctness. Struggles within the Commission often took the form of arguments over professional conduct and integrity, even when the substance of such struggles was focused on questions of legality and practice.

Scott, an American, recalled "feelings ran about as high as feelings can run," especially among the British and French delegates, who were committed to trials and frequently clashed with the Americans.[124] Both Larnaude and de Lapradelle played active roles in the Commission, and advocated for expansive position taken in their official report.[125] The British were less eager but did not reject the plan wholesale. Lansing, the American Secretary of State and the second American delegate, believed "the British… were not very sincere in their desire to try the Kaiser… but merely felt that they had to urge this measure because of [Lloyd George's] political pledge."[126] Willis' summary of Lansing's view illustrates the atmosphere of frustration and discord within the Commission:

> Lansing… opposed international punishment of war crimes… stressed the lack of precedent, opposed all innovations, and… rejected virtually every important proposal offered by the Europeans. Lansing… had little respect for the British and French [delegates]… and sometimes did not conceal his distaste for men whose 'intellect,' he said privately, was 'prostituted to political ends.'… He used every tactic he could think of to frustrate their efforts… [Lansing said] Wilson 'approved entirely of my attitude… only he is even more radically opposed than I am to that folly.'[127]

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[122] Willis 1982, 69.

[123] Willis 1982, 69.

[124] House and Seymour 1921, 480.

[125] Larnaude was a French delegate. De Lapradelle was the Commission's General Secretary.

[126] Document 27, "Minutes of the Meetings of the Commissioners Plenipotentiary, Wednesday, March 5, 1919:" Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XI, FRUS.

[127] Willis 1982, 69-70.

The contradictions in this point of view are difficult to untangle. Lansing, himself a member of the US Cabinet who was in regular contact with Wilson, was not an apolitical technocrat. Yet he viewed his fellow delegates as "prostituting" themselves to their states' political goals and sought to de-legitimate their contributions on that basis. Lansing described his colleagues' behaviour as disingenuous and inappropriate for legal professionals. However, he failed to articulate a clear vision of how Commission delegates ought to conduct themselves *vis-à-vis* states. Instead, he chose to act as a "spoiler," a choice which many of his colleagues viewed as professionally inappropriate in turn.

Lansing's attitude was awkward, since he was Chairman of the Commission. Given his institutional position, many of his fellow delegates viewed his lack of commitment as inappropriate, arguing the Chairman was honour-bound to support and advocate for the work of the group.[128] Lansing was also accused of disingenuous political motivation, with Pollock (of Britain) telling Lloyd George that the Americans were "reluctant to create the possibility of their President ever being incriminated" by the possibility of sovereign liability.[129] These tensions illustrate the lack of shared understandings about how Commission delegates should behave, resolve disputes, and balance their national loyalty, policy goals, and professional ethics. They also reveal the vast disagreements on substantive questions which plagued the Commission and proved intractable.

Inside the Commission on Responsibility: Sub-Commission II and Struggles over War Guilt

Lansing's accusations would have been highly offensive to his colleagues, who were also attempting to balance conflicting loyalties (to their sending states' positions and to their own professional opinions) while struggling over substantive questions of war guilt and aggression. The French delegates had an easy time on the first score, as their position aligned closely with that of the French government. Yet they had trouble convincing their fellow delegates on substantive matters. Larnaude and de Lapradelle stuck to their natural law-based argument for prosecuting Wilhelm for aggression but found few supporters among the positivist rule-followers in the Commission. According to Willis, "Larnaude had barely begun to explain…when Scott interrupted with a curt lecture on the contemporary state of international law that clearly recognized any sovereign state's unrestricted right to make war, an act for which an individual leader might be called to moral, not legal, account… Pollock [of Britain] quickly agreed."[130] Larnaude and de Lapradelle's position, which had inspired Lloyd George, Clemenceau, and their sympathizers to create the Commission in the first place, was dead on arrival in that expert forum.

The British felt that being appointed to the multinational Commission gave them greater autonomy to freely express their legal philosophies and professional judgements than they had had when advising Lloyd George's cabinet. While Smith's "Special Sub-committee on Law" had reluctantly endorsed the plan to try the Kaiser for aggressive war, the British Commission delegates at Paris—several of whom had been members of that special sub-committee—made it clear that

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[128] Willis 1982, 73-74.

[129] Pollock to Lloyd George, 29 March 1919: LG/F/27/1/2, UK Parliamentary Archives.

[130] Willis 1982, 72-73.

they no longer supported such a charge. Pollock—who was a member of the Bryce Committee, the special sub-committee, and the Paris Commission—had seen the task of Smith's special sub-committee as being to "expand 'Hang the Kaiser' in rational terms."[131] At Paris, in contrast, Pollock's advice was once again un-tethered from the preferences of the cabinet; there, Pollock argued *against* indicting the Kaiser for "political crimes" which arose from "state polic[y]" rather than "individual will."[132] While sub-committee II condemned aggression and attributed moral responsibility for the war to Germany and its allies, they made it clear that aggression , including "violation of… the neutrality of Luxemburg and Belgium" did not incur criminal liability or punishment under existing law.[133] Clearly, Pollock felt more freedom within the Commission to give an impartial professional opinion, even one that undermined Lloyd George's favoured policy and the special sub-committee's earlier report. Indeed, Willis reports "Lloyd George and his private secretary, Philip Kerr, tried unsuccessfully to convince Pollock to secure a recommendation for prosecuting the kaiser for starting the war. [Kerr said] Pollock's failure to do so was a 'great pity.'"[134] In this way, Pollock and others took advantage of the Commission's multinational expert character to exercise more autonomy, in direct defiance of the stated aims of Lloyd George and other Entente statesmen. The Entente's notion that the instigation of a war was inherently criminal did not satisfy this group of international lawyers.

Despite the European Allies' desire for expert approval of an extensive trial plan, delegates diligently struggled over substantive ICL questions and returned disappointingly narrow answers. The relative autonomy and willingness of the British delegates to defy Lloyd George was important for sub-commission II's recommendation that "no criminal charge" could be made against the Kaiser or other individuals for "acts which brought about the war" or "breaches of neutrality."[135] Sub-commission II, which was chaired by the British delegates, drew a clear distinction between crimes established in positive law and moral crimes such as the invasion of Belgium. Upholding the principle of *nulla poena sine lege* and adhering to a narrow interpretation of legal sources, the sub-committee concluded that only positive crimes should be subject to judicial proceedings. "To placate Lloyd George and others," the sub-commission suggested the Entente might "adopt special [non-judicial] measures" to punish war guilt in a political forum, and that efforts should be made to create law enabling the legal punishment of such acts.[136] But they did not give Lloyd George's preferred plan the stamp of expert approval.

Sub-commission II concluded: "the premeditation of a war of aggression… is conduct which the public conscience reproves and which history will condemn… [but which] may not be considered as an act directly contrary to positive law, or one which can be…brought before a tribunal."[137] The Commission report makes it clear that such acts should be considered by

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131 Pollock to Holmes, 30 January 1919, reproduced in Howe 1941, 4.

132 "Proceedings of a meeting of sub-committee 2," 17 February 1919, 13-14: FO 608/246/1, TNA.

133 Holthoefer 2017, 724.

134 Willis 1982, 73.

135 "Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," 23. Reproduced in Carnegie Endowment for International Peace 1919.

136 Willis 1982, 73.

137 "Report Presented," 21. Reproduced in Carnegie Endowment for International Peace 1919.

"historians and statesmen" and be "formally condemned" by the Peace Conference, but should not be considered by a "tribunal appropriate to the trial of offenders against the laws and customs of war."[138] Thus, the sub-committee's argument focused on legal appropriateness and judicial norms; the report makes it clear that a tribunal designed to deal with such political and moral issues would not be a legally "good court." Commission delegates generally agreed that the norms of professional and legal appropriateness that applied in domestic legal systems should be translated into the international sphere, embracing rules-based formalism. Larnaude and de Lapradelle's attempt to argue that ICL was substantively different from domestic law and should be subject to different fundamental principles was popular with Allied governments but unsuccessful within sub-commission II.

Despite concerted efforts from European political elites over several years to obtain expert endorsement for the plan to put the Kaiser on trial for aggression, and despite the European Allies' unmistakable promotion of Larnaude and de Lapradelle's vision, sub-commission II did not give them what they hoped for. This episode demonstrates a key dynamic of the expert legitimation trap: motivated by a desire to legitimate their favoured policy through legal expert endorsement, the European Allies worked to grant IL professionals a voice and place in post-war planning efforts, presumably out of the belief that a favourable decision would legitimize the expansive trial plan. Yet, by elevating and deputizing IL professionals, the Allies opened space for those professionals to contest and make recommendations—and speak authoritatively about those recommendations—which did not align with the Allies' expectations. This was the paradox of unintended consequences, and the expert legitimation trap in action.

Inside the Commission on Responsibility: Struggles over Tribunal Design

In addition to questions about behavioural norms, the translation of domestic legal principles, and aggression, sub-committee III became "deadlocked in a bitter struggle" over whether a tribunal to punish *war crimes* was legally feasible, and, if so, what kind of tribunal was preferable and what law it would apply.[139] While delegates from Britain, the Dominions, and Continental Europe supported prosecuting the Kaiser and other alleged war criminals, the Japanese and American delegates "opposed… the whole miserable business."[140] Yet the enthusiasm and number of supporters for the judicial plan initially drowned out dissenting voices.

At first, the Americans attempted to spoil the discussion on war crimes trials in a bid to force a result like that of sub-committee II, drawing accusations of inappropriate and unprofessional conduct. Lansing used his position as chairman to announce "all…questions [before sub-committee III] must be deferred pending preparation of a comparative compilation of the military codes of the laws of war of all belligerent nations, a project everyone knew could take weeks" in order to "stem" all discussion of an international tribunal.[141] Aggravated, Pollock "demanded an immediate vote" on whether sub-committee III supported a trial plan for war crimes; "Lansing

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[138] "Report Presented," 21 and 23. Reproduced in Carnegie Endowment for International Peace 1919.

[139] Willis 1982, 73.

[140] House and Seymour 1921, 241.

[141] Willis 1982, 73, note 55.

had to comply" and lost, but warned that his opposition to judicial action was unalterable.[142] Lansing tried a number of tactics aimed at achieving either an acceptable compromise or a nil result, including threatening that the US would "withdraw its judges from any trial" at any time.[143] Lansing also argued that prosecuting heads of state would be both illegal and politically risky. He cited historical examples of political elites who were executed only to become causes célèbres—including Mary Queen of Scots and Charles I—and made the tortured argument that, by prosecuting the Kaiser, the Allies would risk putting his obvious moral guilt into question. This argument left his colleagues incredulous.[144]

Nevertheless, on the strength of Pollock's vote, the Commission's majority report—supported by the European members—recommended "violations of the laws and customs of War and the Laws of Humanity" should be tried before a "High Tribunal" of:

> three persons appointed by each of… the United States of America, the British Empire, France, Italy and Japan, and one person appointed by each of… Belgium, Greece, Poland, Portugal, Roumania, Serbia, and Czecho-Slovakia. The members shall be selected… from among the members of their national courts or tribunals, civil or military.[145]

The Commission recommended including representatives of the five major Entente powers in the prosecution section. The Report specified "the law to be applied… shall be 'the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.'"[146] Therefore, the Commission cautiously endorsed the idea that "conscience" and "the laws of humanity" were relevant sources of ICL, departing from the Americans' strict legalism, even as it rejected the French's expansive vision. In this way, the Commission arrived at a plan for ICL which was a genuine compromise between multiple positions and could not have been predicted at the outset, thus further demonstrating the innovative and creative potential of empowering expert practitioners. This compromise also reveals some of the risks (for powerful states) of elevating and empowering expert groups: even the most influential state cannot fully control the output of such a group.

This would be a victor's tribunal staffed by judicial professionals—not academics or diplomats—empowered to set procedure and "appoint experts to assist in the trial."[147] This victors' tribunal was a bridge too far for the Japanese delegates, who agreed it was "important to discover practical means for the punishment" for war crimes but questioned:

> whether it can be admitted as a principle of the law of nations that a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the

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142 Willis 1982, 73, note 57.

143 Willis 1982, 73, note 62.

144 Especially de Lapradelle, Pollock, and Rolin-Jacquemus.

145 "Report Presented," 24, reproduced in Carnegie Endowment for International Peace 1919.

146 "Report Presented," 24, reproduced in Carnegie Endowment for International Peace 1919.

147 "Report Presented," 24, reproduced in Carnegie Endowment for International Peace 1919.

> opposite side… It may further be asked whether international law recognizes a penal law as applicable to those who are guilty.[148]

The Japanese delegates raised concerns about the principle of *nullum crimen sine lege* and cautioned about the possible "consequences" of setting such a precedent, anticipating the discussions of "victor's justice" which would follow the Nuremberg and Tokyo Tribunals of the 1940s. However, in 1919 there was little support for this point of view; although the British delegates had initially preferred a "neutral" tribunal, they did not push this proposal at Paris. This disagreement prompted the Japanese delegates to break with the sub-commission III majority and issue a dissenting report—another outcome unforeseen by Clemenceau or Lloyd George, who hoped for expert agreement.

Unable to scuttle the plan, and at Wilson's direction, the Americans also issued a dissenting report, which inspired future ICL debates.[149] They "radically" disagreed with the majority report and proposed referring any war crimes with a clear basis in extant positive law to national courts-martial or, at most, to a new "tribunal of an international character…formed by the union of existing national military tribunals or commissions" of the victors.[150] They were reluctant to create any international judicial body, preferring "a national military commission or court in each country," arguing that there was "ample precedent" for such a plan.[151] In an attempt to soften the Commission report, they proposed creating this "union" of military tribunals, but this potential compromise was rejected.[152] The American objections to the majority's plan included "the uncertainty of the law to be administered, in that liability is made to depend not only upon violations of the laws and customs of war but also upon violations of the laws of humanity," the illegality of prosecuting Heads of State, and the retroactive nature of the tribunal.[153] The Americans were committed to non-retroactivity, and deeply sceptical of the majority's desire for the proposed "High Tribunal" to apply "the principles of the law of nations as they result from the usages established among civilized peoples… the laws of humanity and… public conscience.""[154]

They framed their rejection of the judicialization of international criminal justice as informed by strict legalism, writing:

> A judicial tribunal only deals with existing law… leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity… [furthermore,] the laws and principles of humanity are not certain, varying with time, place, and

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[148] "Reservations by the Japanese Delegation," reproduced in Carnegie Endowment for International Peace 1919, 80.

[149] "Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, April 4, 1919," reproduced in Carnegie Endowment for International Peace 1919, 58-79.

[150] "Memorandum of Reservations," reproduced in Carnegie Endowment for International Peace 1919, 69 and 59.

[151] "Memorandum of Reservations," reproduced in Carnegie Endowment for International Peace 1919, 71.

[152] "Memorandum of Reservations," reproduced in Carnegie Endowment for International Peace 1919, 71.

[153] "Memorandum of Reservations," Reproduced in Carnegie Endowment for International Peace 1919, 73.

[154] "Report Presented," 24, reproduced in Carnegie Endowment for International Peace 1919.

> circumstance, and according… to the conscience of an individual judge. There is no fixed and universal principle of humanity.[155]

The Americans opposed the majority's plans on the grounds that they were inappropriate under accepted legal standards. While the French had argued that principles such as non-retroactivity and constancy did not apply to ICL, the Americans were adamant that they should. They lost the battle, but practitioners in later eras revived the Commission's debates and found inspiration in the American dissent.

Such was the division of the Commission. The Continental Europeans, led by the French, favoured the creation of an *ad hoc* victors' "High Tribunal." This proposal was buttressed by arguments about natural law and the need to be inventive to secure the future of the League of Nations. The Americans favoured political punishment or using existing national military courts. The British occupied the middle ground and embraced the creation of an *ad hoc* "High tribunal"—agreeing with the French that strict legalism was unnecessary, while also sceptical of some of the more unusual charges (such as aggressive war). These positions were informed by different legal philosophies, political pressures, and understandings of the relationship between the legal and the political. All were framed in terms of professional appropriateness. The Commission achieved a patchy compromise on these issues and did not deliver either the resounding expert endorsement that Lloyd George and Clemenceau sought or the clear refusal to judicialize international justice that Wilson demanded. In seeking to gain the legitimacy conveyed by a multi-national expert endorsement, the European Allies created a space for expert discussion and autonomy with reduced state direction. In acquiescing to the creation of the Commission, Wilson also enabled an outcome he had sought to avoid: a formal statement from Entente representatives supporting a trial plan. The Allies had somewhat entrapped themselves. In the end, they rejected expert advice and incurred a cost as a result, demonstrating the Janus-faced potential of elevating expertise as a source of legitimacy.

"A Legal and Diplomatic Nightmare:" Political Decision-Making

The Commission's report and the accompanying dissenting reports were referred to the Paris Peace Conference's "Council of Four," comprised of the political leaders of France, the US, Britain, and Italy, where they were essentially rejected. The Commission's tentative compromise was subordinated to the political negotiations of the Conference. Sellars reports that the pro-trial Europeans and the anti-legalist Wilson decided to compromise on a new "formula that would allow both sides to claim that they had achieved what they had set out to do."[156] Yet their compromise hollowed out both positions and ultimately undermined the Entente's aims, while also robbing them of the ability to claim the legitimacy of legal expertise, as they might have been able to do by adopting the Commission report.

After debate, the Council of Four agreed to a trial plan that differed from the Commission's vision in many ways, including by suggesting that the Kaiser would be prosecuted for acts of

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[155] "Memorandum of Reservations," reproduced in Carnegie Endowment for International Peace 1919, 73.
[156] Sellars 2013, 7.

aggression as well as war crimes, and that the tribunal would be a primarily political, not judicial, organ. While the Commission had agreed that the Kaiser and German elites could *not* be prosecuted for provoking the war or "the premeditation of a war of aggression," the Council of Four reversed this.[157] Indeed, Article 227 of the Treaty of Versailles arraigns the Kaiser for "supreme offence against international morality and the sanctity of treaties," both of which are at odds with the Commission report, which focuses on violations of the laws of war and notes "no criminal charge can be made" for "breaches of neutrality."[158] Article 227 also envisions a smaller high Tribunal than the one proposed by the Commission, reducing the number of judges from twenty-two to five and underscoring the non-representative membership of the victors' court.

Wilson instigated this departure; he had never wanted legal experts to be involved in the trial plan, had instructed Lansing and Scott to stifle attempts to create an international judicial organ, and was unwilling to agree to the Commission's advisory report. Wilson feared setting a "dangerous precedent," saying, "we must not allow History to reproach us with having judged before establishing the juridical [sic] basis for the sentence."[159] He warned about the dangers of "passion" clouding reason, saying, "You think me unfeeling. But I constantly struggle against emotion."[160] Frustrated, Clemenceau reminded him "nothing is accomplished without emotion. Was Jesus Christ not carried away by passion the day he chased the money changers from the Temple?"[161] Lloyd George explicitly tied the trial plan to Wilson's beloved League of Nations, arguing the League "must have the power from this moment to punish crimes against international law. The violation of treaties is precisely the sort of crime to be of direct concern to the League of Nations."[162] Wilson would not relent in his opposition to the legalization and judicialization of post-war order-building and convinced Italy's Orlando to agree. Yet Lloyd George made it known that Britain "could not sign a peace treaty" with no provision for prosecuting the Kaiser; Clemenceau also refused jettison the plan.[163]

The Council of Four eventually reached an odd compromise. Clemenceau and Lloyd George demanded a trial, and Wilson and Orlando refused to create an international judicial institution to prosecute alleged violations of international law. Facing this impasse, they re-focused on the idea that the Kaiser was guilty of *moral* crimes and jettisoned much of the work done by de Lapradelle, Larnaude, Smith, the Commission, and other IL experts regarding *legal* crimes committed during the war and the legality of judicial action. By watering down their claims that the Kaiser had violated international law—claims which had been so important before the Peace Conference—Lloyd George and Clemenceau secured Wilson's acquiescence to an explicitly *political* trial plan that minimized references to law Willis also speculates that Lloyd George nudged Wilson by linking

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157 "Report Presented," 23. Reproduced in Carnegie Endowment for International Peace 1919.

158 *Treaty of Versailles*, Article 227, reproduced in Marrus 1997, 10-11; "Report Presented," 23. Reproduced in Carnegie Endowment for International Peace 1919.

159 Council of Four, 2 April 1919, recorded in Mantoux 1964, 92.

160 Council of Four, 2 April 1919, recorded in Mantoux 1964, 93.

161 Council of Four, 2 April 1919, recorded in Mantoux 1964, 93.

162 Council of Four, 2 April 1919, recorded in Mantoux 1964, 91-92.

163 Willis 1982, 79.

the trial plan to British support for two US political projects at the Conference (a plan for the Saar region and an amendment to the Treaty of Versailles recognizing the Monroe Doctrine).[164]

Wilson wished to minimize references to international law in the Treaty, including in Articles 227-230. Scott explained Wilson was so "averse to any proceeding against the Kaiser" that he personally prepared the original draft of Article 227.[165] Wilson's draft explicitly stated the charge against the Kaiser would "*not be defined as an offence against criminal law*, but as a supreme offence against international morality and the sanctity of treaties."[166] Thus, Wilson's draft "contained an *express denial* that the [alleged] offense was *criminal*," but, after intervention from Lloyd George, this denial was omitted from the final Treaty.[167] Wilson deleted the denial, but refused to allow Article 227 to reference international law directly.[168] Thanks to Wilson, Article 227 states that "the tribunal will be guided by the highest motives of international *policy*, with a view to vindicating the solemn obligations of international undertakings and the validity of international *morality*."[169] Scott felt this wording was "in effect an admission that law, in the legal sense of the word, did not exist for either offence, or that its violation was not a crime in the sense of criminal law."[170] Willis argues this compromise "did not serve the purposes of either Lloyd George or Wilson."[171] Lloyd George had sought to establish a legal precedent and the principle that sovereigns were criminally liable for crimes including aggression, but "accepted a formulation that did not use the word aggression and specifically denied that the Kaiser was charged with a crime." [172] Wilson believed the Kaiser was not liable and should not be personally punished, yet agreed to "the kind of proceedings least likely to be conducted fairly." [173] The final plan was also likely to attract accusations of inappropriate *ex post facto* retribution.

Despite their initial eagerness to create a Commission of legal experts, the Entente made it clear, at the last minute and in black and white, that international *policy,* not international *law,* was the guiding principle of ICL in 1919. Despite their earlier celebration of legal input as a source of legitimacy, the Entente eventually abandoned legal language, exposing themselves to criticism and to the workings of the expert legitimation trap. The Council of Four's inability to agree on a legal formula and outright rejection of the Commission's recommendation "turned into a legal and diplomatic nightmare" and a source of embarrassment for the Allies once they attempted to enact their politicized trial plan.[174] The compromise language of Articles 227-230 made it difficult for the Allies to invoke legality and legal expertise to bolster the trial plan, and therefore opened opportunities for opponents to contest and reject it.

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164 Willis 1982, 79.
165 House and Seymour 1921, 237.
166 Link 1979, 89, emphasis added.
167 House and Seymour 1921, 237, emphasis added.
168 House and Seymour 1921, 237.
169 *Treaty of Versailles*, Article 227, reproduced in Marrus 1997, 10-11.
170 House and Seymour 1921, 237.
171 Willis 1982, 80.
172 Willis 1982, 80.
173 Willis 1982, 80.
174 Holthoefer 2017, 722.

The Failure of the Trial Plan

Ultimately, the trial plan foundered on the rocks of geopolitics. Most Allies lost motivation; indeed, the US famously failed to ratify the Treaty of Versailles. By the time the Treaty entered into effect on January 10, 1920, the Americans had withdrawn from post-war planning; the Japanese were "indifferent;" the Italians were "ambivalent;" and the British had undergone a "change in mood" and become "indecisive."[175]

A more significant logistical issue was the refusal of the Netherlands to extradite the former Kaiser, who had sought refuge there in November 1918. On January 15, 1920, the Allies sent an "Official request to the Government of the Netherlands for the surrender to the Allies" of the former Kaiser so "that he may be put on trial." The request demanded Holland "hand over" Wilhelm so "he may be sent for trial… in accordance with… the Peace Treaty… [because] the premeditated violations of international treaties, as well as the systematic ignoring of the most sacred laws of international justice, [must] be followed… by the… penalties provided for by the Peace Treaty."[176] This first part of the request invoked legal language and appealed to broad international morality and justice. This reflected the preference of some legally-minded allied elites, such as Lord Birkenhead, the British Lord Chancellor, who helped draft the request and preferred "judicial language… clear and precise," upholding the judicial framing of ICL before the Paris Peace Conference.[177] The Allies also framed their demands around the Treaty of Versailles, even though Holland had not signed the Treaty.

The latter half of the request departed from "judicial language" and mirrored the political language of the Treaty. The request listed the "many wrongs" of the war, including "the cynical violation of the neutrality of Belgium and Luxemburg" and stated: "for all these acts the responsibility, at least the *moral* responsibility, lies with the Supreme Head who ordered them or… infringed the most sacred rules of the *human conscience*… Holland would not fulfil her international duty if she… hindered the chastisement of the[se] crimes."[178] Here we see the flexible relationship between "moral responsibility" and "crimes" and the Allies' continued insistence that aggression must be punished, despite expert advice to the contrary.

Finally, the most illuminating part read:

> the Powers… call attention to [this demand's] special character… there is question *not of a public Commission of a juridical character, but of a high international political act, rendered necessary by*

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[175] Schabas 2018, 266.

[176] Document 47, "Annex B to ICP-20: Note to the Queen of Holland Demanding the Delivery of the Kaiser for Trial:" Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume IX, FRUS.

[177] Quoted in Schabas 2018, 267.

[178] Document 47, "Annex B to ICP-20: Note to the Queen of Holland Demanding the Delivery of the Kaiser for Trial:" Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume IX, FRUS, emphasis added.

> *the conscience of the world*, in which the forms of law have been laid down solely to assure to the accused… guarantees of a kind *so far unknown in international law*.
>
> The Powers are convinced that Holland, who has always shown her respect for right and her love of justice… will not wish to [enable]… the violation of the essential principles of the *solidarity* of nations… The [Dutch public] is deeply interested in… facilitating the trial demanded by the voice of thousands of victims.[179]

The Allied powers made it clear to the world—since this request was published and widely circulated—that the trial of the Kaiser was unequivocally a "high international political act," not a "judicial" one.

This admission was appalling to IL professionals, including Scott, who lamented that the Allies were "without shame… believing… force would prevail where right was lacking."[180] By admitting that the trial was a matter of "high politics," not law, and that Wilhelm's crimes were "political" not "legal," the Allies admitted that they had no "right" to "claim the Kaiser" or force his extradition.[181] Holland's response took advantage of this, refusing to surrender Wilhelm on the grounds that Holland was not a party to the Treaty of Versailles and "was a neutral, and in no way bound 'to associate itself with this act of high international *policy* of the powers.'"[182] Holland commented: "if in the future there should be instituted by the society of nations an international jurisdiction, competent to judge in case of war deeds qualified as crimes and submitted to its jurisdiction by stature antedating the acts committed, it would be fit for Holland to associate itself with the new regime."[183] Until such a time, "neither [Dutch]… laws… which are based upon the principles of law universally recognized, nor the age-long tradition [of Dutch neutrality] permit… Holland to defer to the desire of the powers by withdrawing from the former Emperor the benefit of its laws and… tradition."[184] Holland refused to surrender the Kaiser to a patently political tribunal to be punished for an admittedly political offense and reasserted its commitment to principles of legality in international justice, taking up the legal and judicial framing which the Entente had rejected in order to legitimate its own refusal to cooperate. Lloyd George and his colleagues had surrendered the rhetorical tool of citing legal principles and advice.

By following Wilson's lead and maintaining that the trial was a political, not legal, project, the Allies weakened their ability to claim the legitimacy and power of the law. By explicitly distancing themselves from arguments about legality or legal expertise, they relinquished a powerful tool of legitimation and created rhetorical space for the Dutch to refuse their demands without appearing to shirk their obligations under international law. Thus, the European Allies left ICL common sense in disarray; after publicly elevating legal expertise as a source of legitimacy and appearing to

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[179] Document 47, "Annex B to ICP-20: Note to the Queen of Holland Demanding the Delivery of the Kaiser for Trial:" Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume IX, FRUS, emphasis added.

[180] House and Seymour 1921, 240.

[181] House and Seymour 1921, 240-241.

[182] House and Seymour 1921, 243.

[183] House and Seymour 1921, 244.

[184] House and Seymour 1921, 244.

ratify the legalization and judicialization of the field, they yielded to last-minute pressure from Wilson to de-emphasize the importance of legality and reject legal expertise. But in this rejection, they swam against the tide of public opinion and political rhetoric, as Holland's invocation of international law indicates. After celebrating legal expertise so loudly, the Entente's attempt to backtrack was seen as disingenuous and inappropriate. They had entrapped themselves and paid a reputational non-compliance cost; the legalization of ICL could not be undone so easily.

Conclusion

ICL "took its first hesitant steps at the Paris Peace Conference."[185] Although the Kaiser was never put on trial, legal professionals and political decision-makers debated and compromised on questions about the organization and purpose of an international criminal tribunal; they also debated definitions of international crimes and the appropriateness of importing domestic legal norms into the emerging ICL field. Many of these disputes reemerged in later ICL institutions, although the choices made at Paris had downstream effects, defining and narrowing the terms of subsequent debates.

In contrast to the Napoleonic case, in 1919, the judicial and legal framing of ICL was much more palatable. ICL remained a matter of "high politics," but its legalities were no longer an afterthought. As Holthoefer argues, and in contrast to the Napoleonic case, politics was the catalyst for legal innovation and debate: "Allied *political demand* for an international tribunal to prosecute… Kaiser Wilhelm II… and German soldiers prompted international lawyers to investigate the possibility of international jurisdiction over violations of international law."[186] These international lawyers remained "trapped" within states and were not delegated decision-making power, but they provided advice to policymakers. Some of this advice was even followed. Furthermore, the legal experts consulted in 1919 contributed to a general understanding that international justice for war crimes, aggression, and wartime atrocities was a *judicial* matter that ought to be addressed within judicial institutions by legal professionals. This was an important step towards the expert capture of the field; framing ICL as a legal and judicial issue de-legitimized policy options that sought to exclude legal voices from the field. Legal experts did not have decision-making power but, after 1919, they had a "seat at the table."

Although many IL professionals—like Scott—lamented the politicization and failure of the Wilhelmine tribunal plan, the debate over the plan had long-lasting consequences for the development of ICL as a field of legal and judicial practice. While further development of the Napoleonic precedent had been hindered by the lack of an IL profession in the early 1800s, the abortive attempt to prosecute the Kaiser sparked intense debate amongst IL scholars throughout the interwar period. As in 1815, the great powers were not interested in further developing ICL in the 1920s. However, this lack of great power interest did not prevent further discussion and contestation. International lawyers took up this discussion within the League of Nations and within professional associations, where they continued to debate questions that had been raised in 1918-

[185] Schabas 2018, 101.

[186] Holthoefer 2017, 719, original emphasis.

1919.[187] By the time a new opportunity to enact ICL arose in 1945, many of ICL's key questions had been considered by IL professionals and scholars for decades. It became more difficult for statesmen to ignore legal expert advice and deny that ICL should be a judicial issue, as Wilson had done in 1919.

[187] Holthoefer 2017; Sacriste and Vauchez 2007.

Chapter Four: Interlude: Interwar Growth

After the failure of the Wilhelmine trial plan, the Allies refrained from enacting international criminal justice for over twenty-five years. Political elites interpreted the Wilhelmine episode as "proof of the folly of entrusting a *political problem* to *legal methods*," questioned legalization and judicialization, and considered reframing ICL as pure high politics.[1] Unsurprisingly, scholars have noted an "absence of legal milestones" towards the criminalization of aggression or institutionalization of ICL during the interwar period.[2] However, IL professionals did not surrender their interest in the field. Instead, they participated in projects furthering the legalization and development of ICL, even when ignored by powerful states. To paraphrase, international lawyers interpreted the Wilhelmine episode as proof of the folly of entrusting a *legal problem* to *political negotiation*. When the Allies revisited ICL after the Second World War, they found a new landscape of common sense in which IL practitioners were more organized, authoritative, and willing to act autonomously. These changes shaped the post-Second World War critical juncture of institution-building at Nuremberg and Tokyo. The most notable interwar ICL developments include the reception and narration of the Wilhelmine episode, law-making efforts, the birth of new IL concepts and philosophies, and the elevation of experts in other areas of international politics. These changes laid further foundations for the expert legitimation trap and expert capture in the field, all while the erstwhile Allies' attention was elsewhere.

The Reception of 1919

Interwar IL professionals avidly discussed the abortive Wilhelmine trial plan. Whereas in 1816, there had been no professional community to receive, interpret, and challenge the Napoleonic precedent, the Wilhelmine episode sparked immediate contests over its meaning. A cottage industry quickly emerged, where lawyer-delegates from the Paris Peace Conference wrote memoirs and articles, and delivered speeches, all aimed at IL professional audiences, recounting "what really happened at Paris."[3] Other international lawyers joined in dissecting the legacy and failings of the Wilhelmine plan (and the Napoleonic exile).[4] The dominant position in such writings was a formalist, rules-based one, similar to that of the ASIL and Grotius Society during the war. As Lord Cave told the Grotius Society, the Allies' failure to base the Wilhelmine trial plan on "a charge of definitive crimes known to the law" was a colossal error that underscored the need to codify "the Criminal Law of War" and prescribe punishments "at the earliest possible moment."[5] Interwar international lawyers generally agreed that the Allies had over-stretched and damaged the progressive IL project. There was also significant discussion of the differences between "the jurist and the politician['s]" relative ability to secure international justice, with the jurist hailed as the clear favourite.[6] The legal and judicial framing of ICL was thus ratified and further entrenched as a foundational assumption of the field.

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[1] Bass 2000, 105, emphasis added.

[2] Sellars 2012, 7.

[3] For a collection: House and Seymour 1921; Lansing 1919.

[4] Garner 1920; Hill 1919; Gregory 1920.

[5] Cave et al. 1922, xviii-xxx.

[6] Hill 1919, 549.

Codification and Institution-building Proposals

IL professionals also launched forward-looking institution-building and codification projects. This included both schemes to outlaw war and efforts to further codify and devise enforcement mechanisms for *jus in bello* and *jus ad bellum*. The former project received active support from powerful states, most notably through the 1928 Kellogg-Briand Pact, while the latter was marginalized by states but embraced by IL professionals.[7] This divergence of focus would prove significant, as political elites in the 1940s were hyper-aware of the Kellogg-Briand Pact and sought to make it a foundational element of post-Second World War ICL projects, but were out of touch with other developments.

The Kellogg-Briand Pact (the "General Treaty for the Renunciation of War as an Instrument of National Policy" or the "Pact") was embraced by major powers and international publics, but met with expert scepticism.[8] IL scholars were dismayed by the lack of a clear definition of "war as an instrument of national policy" and by the fact that the Pact depended upon goodwill compliance rather than an international police force or compulsory jurisdiction for an impartial court.[9] In this respect, the Pact was congruent with other explicitly political interwar efforts to address the problem of war, including the League of Nations' efforts to, in the words of the League Covenant, "promote international co-operation and to achieve international peace and security by the *acceptance of obligations* not to resort to war."[10] Many IL scholars viewed the Pact as a political act "camouflaged" as law—"belligerent purposes" disguised by a "profession of non-belligerency."[11] Academics used the signing of the Pact as an occasion to discuss their preferred ICL project: the codification of the laws of war and legal enforcement mechanisms. As one member of the Grotius Society noted "it would be more satisfactory if the [Kellog-Briand] Treaty had been supplemented by the establishment of the criminal jurisdiction of the Permanent Court of International Justice, with power to try war crimes and to impose penalties." [12] He agreed with many colleagues that, without such measures, the Pact was merely a "pious resolution."[13]

Thus, while the Great Powers renounced war and celebrated the Pact as the last word in preventing the recurrence of wartime abuses, legal experts called for further codification of the laws of war and international crimes, and "for an independent [judicial] authority to represent the interests of international society and adjudicate violations of communal rights."[14] Expert efforts in this vein began in 1920, when the League of Nations' Advisory Committee of Jurists began drafting the statute for the League's Permanent Court of International Justice. Advisory Committee

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[7] Hathaway and Shapiro 2017.

[8] Colombos 1928; Hill 1929; Borchard 1929; Philip Marshall Brown 1929.

[9] Colombos 1928, 90 and 97; Hill 1929, 618-619.

[10] *Covenant of the League of Nations* 1919, preamble, emphasis added.

[11] Hill 1929, 617.

[12] Conversation in Colombos 1928, 100.

[13] Conversation in Colombos 1928, 100.

[14] Holthoefer 2017, 719.

members proposed enabling the court to function as a "High Court of International Justice" with jurisdiction over "crimes against international public order and… the universal law of nations."[15]

Debate ensued, with most members (including American and Japanese veterans of the Paris Conference) welcoming the non-retroactive nature of the proposal, but some concerned about creating a court before defining the crimes and forms of liability it would punish.[16] Nevertheless, the Advisory Committee took a proposal to the League of Nations' General Assembly, where the matter was rejected as "fully premature."[17] This pattern would persist throughout the period, with many expert-led efforts defeated by state disinterest, delay, or hostility.[18] By the 1920s, influential IL professional associations like the International Association of Penal Law (AIDP) and the International Law Association (ILA) began holding regular conferences to discuss codification and institution-building.[19] Such conferences addressed many key ICL issues, including the question of whether the principle of *nulla poena sine lege* ought to translate into international law (professionals generally agreed that it should), and whether an international criminal code must precede a court.

These debates were meaningful to legal professionals but neglected by the League. A 1929 editorial comment in the American Journal of International Law bluntly accused the League of hypocrisy and of attempting to "deceive by the profession of just intentions."[20] The Great Powers and other states rhetorically claimed "that international law is obligatory" while rejecting legal advice, refusing to further define or develop international law, and putting national interests above legal concerns. Overall, according to the editorial, the interwar state of affairs must lead "thoughtful men" to conclude that "we have not yet passed from the reign of superior power to the reign of law," as envisioned by the progressive IL project.[21] But IL professionals felt the need to develop the field where possible, even if the League embraced few such efforts.

Legal Concepts and Legal Philosophies

In addition to efforts aimed at further codifying ICL, interwar IL professionals contributed to the development of concepts and legal philosophies that re-shaped the field. These efforts were inspired by the Allies' unsatisfying attempt to prosecute the Kaiser without clear precedents or norms. As Holthoefer argues, the Allies' attempt "to invoke legal rights claims to solve political problems… prompted legal experts to subsequently clarify the nature of international crime and international obligations, as well as to explore avenues for future legal development."[22] The failure of the Wilhelmine plan catalysed new debates and a "significant shift in how lawyers conceived of and approached violations of international law." [23] The Wilhelmine plan had highlighted the

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15 Advisory Committee of Jurists 1920, 498 and 501.
16 Advisory Committee of Jurists 1920, 502-518.
17 Caloyanni 1928, 70.
18 Bassiouni 2002, 289-290; 1997.
19 Holthoefer 2017, 730; Bassiouni 1997.
20 Hill 1929, 617.
21 Hill 1929, 619.
22 Holthoefer 2017, 728.
23 Holthoefer 2017, 728.

inadequacy of existing ICL, and opened the door for IL academics and professionals to step into the void, even without formal state support.

Conceptual discussions born in the Commission on Responsibility and other expert commissions blossomed into a "vigorous interwar debate among legal experts over the existence of international crimes, the authority to punish," and other constitutive questions of ICL.[24] The period saw the introduction of the concept of international crime into legal and political vocabularies. The pre-war idea that illegal acts committed by states were mere "delinquencies" was replaced by a robust consensus that "international crimes" did indeed exist, could be committed by states, and could be punished.[25]

The conceptual label of "international crime" was invoked by states and practitioners in reference to a narrow range of prominent political problems during the period, including the problem of aggressive war and the problem of political assassinations. The League voted on, but never ratified, two legal instruments, the *Protocol for the Pacific Settlement of International Disputes* and the *Convention for the Prevention and Punishment of Terrorism,* which sought to define wars of aggression and political assassinations as "international crimes" and to define appropriate punishments. Both legal instruments were drafted by members of the IL profession, who tended to agree on the existence of the category of "international crime" but disagreed about how such acts could be punished. Both instruments also defined international legal crimes as acts that threatened international (in the case of aggressive war) or domestic (in the case of assassination/ terrorism) political and social order.[26] In this way, the novel "international crime" concept was clearly framed as supportive of the League's pro-*status quo* aims. As Holthoefer summarizes, "by the time the Allies sought legal justification for the prosecution of Nazis for war crimes after World War II, their legal teams… had a legal vocabulary of international crime and international criminal responsibility on which to draw."[27] This legal concept would become a beacon of relative certainty in a sea of continuing ambiguity regarding how international crimes could be further defined, punished, and prevented after the Second World War. The development of international crime as a "distinct legal category" also made proposals for an international criminal court and other forms of enforcement, which were seen as impossibly optimistic during the war, more plausible and imaginable.[28]

In parallel to these projects, the interwar period also saw the rise of idealistic legal pragmatism (as a response to rules-focused "classical orthodoxy" and "formalism") within the US legal and policy community.[29] The rules-based legalism and formalism that dominated the ASIL in 1919 was rejected as an "impediment to social and economic justice" during the New Deal era.[30] In its place, American scholars embraced legal pragmatism, which combines elements of "legal realism" and

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[24] Holthoefer 2017, 718.

[25] Peaslee 1916, 333; Oppenheim 1906, 1920.

[26] *Draft Convention for the Prevention and Punishment of Terrorism* 1937; *Protocol for the Pacific Settlement of International Disputes* 1924.

[27] Holthoefer 2017, 713.

[28] Holthoefer 2017, 714.

[29] Wang 2005.

[30] Wang 2005, 259; Green and Adams 2019.

"sociological jurisprudence," rejected "textbook models of legal practice" and embraced the potential for "the imaginative use of law… to address the new social and economic problems of the industrial age."[31] This activist legal philosophy rejects the view of law as an objective science and instead views law as "a dynamic process rather than a static set of rules."[32] One prominent legal pragmatist viewed law as an "instrument, or a social institution… for the advancement of the health of society as a whole."[33]

This approach to law would prove consequential for practical ICL from the 1940s onwards. In 1815 and especially 1919, states and non-lawyers had been the main proponents of the "proto-pragmatist," inventive approach to international criminal justice. With a few notable exceptions, such as Larnaude and de Lapradelle, legal professionals involved in the Napoleonic and Wilhelmine episodes prioritized fidelity to existing international law when providing advice and legal justifications. Following the interwar period, expert ICL practitioners had access to a larger range of conceptual and philosophical tools with which to articulate and evaluate international legal arguments and practice. As Borgwardt summarizes, the Nuremberg and Tokyo tribunals were products of a "pragmatic, New Deal-style middle way that could support a conception of the progressive development of international law, while avoiding the pitfalls of the past."[34]

Lawyers in Global Governance

The Interwar period also saw a further rise in the prominence of IL professionals and "third party" experts in general. Sacriste and Vauchez document the interwar "transformation of international politics," in which "an entire market of interstate mediation… conciliation" and consultancy emerged and states increasingly sought out "independent 'third parties'" and "brokers, whose reputation for impartiality would be beyond question" to resolve interstate issues.[35] This new market, in combination with the many new institutional positions and networks available to international lawyers following the founding of the League of Nations, International Labor Organization, and other international organizations, bolstered international lawyers' reputation for "impartiality and independence from power politics."[36] Furthermore, the "*Esprit de Genève"* within such institutions valued transnational cooperation and a technocratic, internationalist, cosmopolitan "view from nowhere," rather than strict loyalty to national politics.[37] Together, these shifts enhanced international lawyers' prominence, authority, and commitment to progressive internationalist projects.

Conclusion

Despite their disappointment in the League's refusal to support codification or institution-building efforts, the IL profession had a busy and fruitful interwar period. By the next critical

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[31] Wang 2005, 260 and 264.
[32] Wang 2005, 264.
[33] Landis to Simpson, 27 May 1936, quoted in Wang 2005, 264.
[34] Borgwardt 2005, 217 and 213.
[35] Sacriste and Vauchez 2007, 98-99.
[36] Sacriste and Vauchez 2007, 85.
[37] De Traz 1929; Murray 2002; Eijking 2022b, 31.

juncture of state-led institution-building in the 1940s, the legalization and judicialization of the field were more deeply entrenched. Left largely to their own devices, IL professionals had generated a new corpus of legal knowledge on which practitioners could draw, including the construction of "international crime" as a legal category and the advent of modern legal pragmatism as a guiding philosophy. Professionals and experts in general had also experienced a rise in fortunes during this period, becoming more central to international politics and ordering efforts, in defiance of Wilsonian anti-legalism. Together with the experiences and precedents of 1919, these developments set the stage for the Allies' return to ICL institution-building in the aftermath of the Second World War.

Chapter Five: Nuremberg and Tokyo: Delegation, Insulation, and Discipline

It is difficult to overstate the importance of the International Military Tribunal ("IMT" or "Nuremberg Tribunal") and the International Military Tribunal for the Far East ("IMTFE" or "Tokyo Tribunal"). The post-Second World War tribunals, especially the IMT, are often seen as the "big bang" of ICL (and of Transitional Justice).[1] Although the "myth" of Nuremberg as the "origin point" of ICL and Transitional Justice has been critiqued, the institution cannot be ignored.[2] Likewise, the IMTFE has been hailed as "the first truly international court," a "groundbreaking example of international cooperation and engagement" and a "harbinger" of later courts.[3] ICL was enacted in practice for the first time in the 1940s. The post-war tribunals were also crucibles for contestation. During this period, Allied states debated and eventually ratified the vision of ICL as a field of quasi-political legal and judicial practice, as narrated in 1919.

The Allies adopted a delegation model of legal expertise in the 1940s. They expected tribunal officials to serve as diplomats-cum-lawyers, obey instructions, and further their home states' favoured policies, even as they fulfilled judicial functions. However, once the tribunals began operating, this expectation was challenged by officials, who sought to insulate their work from external political interference even as they struggled with tribunal colleagues over other questions. In addition to the ratification of ICL's *legalization* and *judicialization*, the 1940s saw numerous developments in international law. I highlight two changes in particular: concerted efforts at *insulating* and *disciplining* the ICL field. Both projects were led by professional legal practitioners, rather than Allied political elites.

As discussed in the Introduction, insulation and disciplining were key mechanisms for entrapment which furthered ICL's expert capture. "Insulation" refers to attempts to narrate and enforce a boundary between ICL institutions and their political principals and between ICL and other fields, including the field of international diplomacy. The post-war insulation project was led by practitioners (especially judges) at the tribunals. These practitioners contested the quasi-political delegation model favoured by the Allies and discouraged the Allies from directly interfering in proceedings. Instead, practitioners worked to construct a semi-permeable membrane between the tribunals and states, in which information might flow from court officials to their home governments, but the tribunals were protected from interference in the other direction. It is for this reason that I label this phenomenon "insulation," rather than "depoliticization," since the latter term implies a formal and rhetorical severance from "politics" and fails to capture the arms-length but still intertwined relationship post-war tribunal officials carved out with states. This insulation project directly challenged the delegation model of ICL expertise the Allies expected when designing the tribunals. The turn towards insulation was justified with arguments about principles of legality and judicial appropriateness, further illustrating the potential consequences of the Allies' embrace of legal expertise and legitimacy.

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[1] Teitel 2000, 2003; Zunino 2019, 11.

[2] Zunino 2019, 131-136.

[3] Sedgwick 2012, 41 and 278.

At the same time, the post-war tribunals saw efforts by practitioners to "discipline" and shape the inchoate community of ICL practice. Even as they altered the expected relationship between themselves and the Allies, tribunal officials struggled with each other over both substantive legal questions and questions about appropriate credentials, procedures, ethos, and philosophy. They began to *discipline the ICL discipline*. Since the Wilhelmine Tribunal never progressed beyond the planning stage, IL professionals in 1919 were never forced to decide between different visions of appropriate credentials, inter-professional relationships, decision-making procedures, judicial ethos, and other day-to-day practical questions. Likewise, they were not forced to devise mechanisms for managing dissent or disagreement in a multi-national, multi-cultural judicial organization. Practitioners at Nuremberg and Tokyo grappled with all these questions and began to struggle over and forge common-sense answers to some of them; in the process, certain positions, credentials, and approaches came to dominate while others were "disciplined" to the margins of practical ICL. Likewise, tribunal officials began to forge a sense of community and collegiality, which proved consequential. This contestation re-shaped the "rules of the game" within ICL institutions by setting new standards for how practitioners would relate to their work and colleagues, and for legitimate argument and decision-making. Although the IMTFE and IMT left many questions unanswered, they left a legacy that prized collegiality, legal pragmatism, impartiality, and an ideological commitment to the state-led ICL project as key traits for practitioners. The tribunals also saw efforts to normalize (narrow) dissent, rather than wholehearted unanimity, within ICL institutions. While today many of these characteristics seem obvious, in the 1940s they were not; their contemporary "obviousness" is a legacy of the IMT and IMFTE.

Thus, while much more could be—and has been—written about the post-war tribunals' contributions, this chapter highlights a few in particular: the further embrace of the legalization and judicialization of the field, and the growing power and autonomy of expert practitioners.[4] The latter is most visible in the ways practitioners began, first, to discipline and shape the internal norms and procedures of the field ("discipline") and, second, to bar states from certain areas of ICL practice ("insulation").

This chapter chronicles these developments by considering initial expectations about the tribunals and how they operated in practice. It proceeds as follows: first, I give an overview of the tribunals. Then, I consider their creation, including wartime rhetoric and post-war planning. This focus sheds light on the Allies' expectations and the state of ICL in the mid-1940s. This examination reveals the extent to which the nineteenth and early twentieth-century legalization and judicialization of ICL had come to dominate common-sense expectations of legitimate ICL. It also reveals new expectations, including the expectation that court officials would enact a delegation model of expertise. The third section of this chapter considers developments once "the rubber hit the road" and legal professionals began enacting ICL for the first time in institutions outside of direct state control. It examines struggles within the tribunals, as well as between tribunal officials and Allied states, focusing on disputes that fuelled the insulation and disciplining of ICL.

[4] Bassiouni 2008; Von Lingen 2018; Boister and Cryer 2008b; Luban 1987; Mettraux 2008; Tanaka, McCormack, and Simpson 2011.

Overall, such disputes reveal the importance of the expert legitimation trap in ICL and showcase ways the elevation of expertise as a source of legitimacy in the field opened the door for expert autonomy and defiance of (some of) the Allies' wishes. The post-war tribunals represent the first time the expert legitimation trap was truly "sprung" on powerful states. Finally, this chapter offers concluding thoughts.

This analysis draws on official government reports; tribunal and conference documents and transcripts; practitioners' memoirs, diaries, and correspondence; and, most notably, on archival sources held at the National Archives at Kew, including Foreign Office, Commonwealth Relations Office, Dominions Office, Colonial Office, and Lord Chancellor's Office files. It also draws on US State Department archives, archives held at the Bodleian Libraries, and other primary and secondary sources.

The Tribunals' Structure and Jurisdiction

While geopolitics and the Entente's last-minute denial of any legal legitimacy derailed efforts to prosecute the Kaiser in 1919, the victorious Allies managed to prosecute Axis leaders in the 1940s. This chapter focuses on the most famous and unambiguously international post-war ICL efforts: IMT at Nuremberg in 1945-1946 and the IMTFE at Tokyo in 1946-1948.[5] The period between the end of the Second World War and the solidifying of Cold War tensions saw a brief flurry of other prosecutions in Europe and Asia (some of which took place at Nuremberg but were not international proceedings).[6] Those subsequent proceedings are not the focus of this chapter.

The IMT and IMTFE were designed along similar lines to the Wilhelmine Tribunal. They were tribunals of victors claiming to represent international society, to which the Allies appointed officials. The tribunals were new institutions, rather than "unions" of existing domestic and military courts. They had jurisdiction over several crimes, including offenses clearly defined in positive law, such as war crimes, and others that were questionable at the time. Furthering the theme of post-war victors designing tribunals which could be accused of enacting retroactive law, the tribunals had jurisdiction over not only unprecedented crimes (as in 1919), but also controversial modes of liability, including conspiracy and organizational membership.

The Nuremberg Tribunal sat between November 1945 and October 1946; two judges (a primary and an alternate) from each of the US, Britain, France, and the Soviet Union sat in judgment on twenty-two high-ranking German figures and six organizations.[7] The prosecution was also representative of the "Big Four," with each selecting a chief prosecutor and staff. Formally

[5] Boister and Cryer 2008b, 3.

[6] Bloxham 2013.

[7] Bloxham 2013, 567; Marrus 1997b, v. All eight judges participated in deliberations. Only the primary judges voted on key matters addressed in the judgement. The primary judges were: Iona Nikitchenko (Soviet Union); Geoffrey Lawrence (Britain); Francis Biddle (America); and Hendi Donnedieu de Vabres (France). The alternates were: Alexander Volchkov (Soviet Union); Norman Birkett (Britain); John Parker (America); and Robert Falco (France).

equal, the four prosecutors "acted individually although in collaboration;" each national prosecution team focused on one of the four counts of the Nuremberg Indictment.[8]

The IMT was created via an international treaty (the London Agreement of August 1945, which contained the Nuremberg Charter) "for the just and prompt trial and punishment of the major war criminals of the European Axis," who committed "as individuals or as members of organisations" crimes over which the Tribunal had jurisdiction.[9] It had jurisdiction over:

> *Crimes against peace*… planning, preparation, initiation or waging of a war of aggression, or a war in violation of international… agreements… or participation in a common plan or conspiracy [to commit such crimes]… *War crimes*: namely, violations of the laws or customs of war… [and] *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds… in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[10]

It also had jurisdiction over "a *common plan or conspiracy* to commit" crimes against peace, war crimes, and crimes against humanity; "leaders, organizers, instigators, and accomplices" in the "formulation or execution" of any such conspiracy were liable.[11] This conspiracy charge became "count one" of the Nuremberg Indictment, with crimes against peace, war crimes, and crimes against humanity becoming counts two, three, and four, respectively.[12] The British prosecution staff investigated and presented evidence regarding aggressive war and treaty violations. The French focused on war crimes and crimes against humanity in Western Europe, and the Soviets focused on the same in Eastern Europe. The Americans focused on the conspiracy charge. The IMT was also empowered to "declare" any "group or organisation" a "criminal organization;" this would allow "competent national authorit[ies]" to "bring individuals to trial for membership" in any such group (such as the Gestapo, SS, or SA) in the future.[13] This organizational jurisdiction was a critical part of the Allies'—especially the Americans'—vision of post-war justice and lustration.

The IMTFE was a "sister," not a "twin," of the IMT; the Tokyo Charter was heavily based the Nuremberg Charter and established in a January 1945 decree issued by General MacArthur in his capacity as Supreme Commander for the Allied Powers ("SCAP").[14] The tribunal sat from May 1946 until November 1948. Judges[15] from eleven polities (the US, the USSR, Britain, France,

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[8] Horwitz 1950, 486.

[9] Charter of the International Military Tribunal, Article 2, reproduced in Marrus 1997b, 52.

[10] Charter of the IMT, Article 6, reproduced in Marrus 1997b, 52.

[11] Charter of the IMT, Article 6, reproduced in Marrus 1997b, 52.

[12] International Military Tribunal Indictment, 6 October 1945, reproduced in Marrus 1997b, 57-70.

[13] Charter of the IMT, Articles 9-10, reproduced in Marrus 1997b, 53.

[14] Von Lingen 2018, 3.

[15] The judges were: William Webb (Australia); Mei Ju-ao (China); Radhabinod Pal (India); Erima Harvey Northcroft (New Zealand); William Patrik (Britain); Bernard Victor Röling (Netherlands); Henri Bernard (France);

China, Canada, Australia, New Zealand, the Netherlands, India, and the Philippines) heard evidence against twenty-eight Japanese elites.[16] Each Ally also appointed a prosecutor. In contrast to Nuremberg, the prosecution was led by a single Chief of Counsel, chosen by MacArthur. MacArthur selected the American Joseph Keenan, who had "responsibility for investigation and prosecution" but was assisted by the "Associate Counsel" designated by other Allies.[17]

The IMTFE was empowered to "try and punish Far Eastern war criminals."[18] The tribunal had jurisdiction over the same core crimes as the IMT (crimes against peace, conventional war crimes, and crimes against humanity), with tweaks to the definitions of such offenses, including the specification that "crimes against peace" encompassed both "a *declared or undeclared* war of aggression."[19] The Tokyo Charter also differed from the Nuremberg Charter in that it made no provision for "conspiracy" as a separate charge. The IMTFE was granted a broader temporal jurisdiction (including the period preceding the war) but was not authorized to designate "criminal" groups.

The tribunals were products of their time; their charters reflected the ICL visions of the Allies and their operations reflected salient debates in the field. Eventually, the tribunals became sites of contestation over ICL common sense, where tribunal officials challenged the Allies' expectations. Such officials struggled to define and defend the external boundaries and internal norms, rules, and expectations of the emerging ICL field—to insulate and discipline ICL. These struggles were too numerous to examine in their entirety. However, the most contentious issues included questions about the relationship between ICL institutions and states, the ethos of ICL, the acceptability of dissent, and the credentials relevant to expertise in the field. These struggles over the *who, what,* and *how* of ICL are explored later in this chapter.

I now consider the Allies' expectations and struggles over the design and goals of the tribunals. These struggles resulted in the Nuremberg and Tokyo Charters, in the Allies' formal ratification of ICL's legalization and judicialization, and in those states' embrace of the delegation model of ICL expertise. In other words, these struggles set foundations for later expert-led contestation and innovation.

The Creation of the Tribunals: Conventional Wisdom, Design, and Expectations

As the war ended, the Allies considered how to respond to the apparent war crimes, aggression, and atrocities committed by the Axis powers. What kind of justice was possible and appropriate? As noted in Chapter Four, after the failure of the Wilhelmine trial plan, debate on international

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John Higgins (America)(resigned in 1946); Myron Gramer (America)(replaced Higgins in 1946); Ivan Zarynov (Soviet Union); Delfin Jaranilla (Philippines); and E. Stuart McDougall (Canada).

[16] India and the Philippines gained independence during the period in which the IMTFE sat. India and the Philippines were included following last-minute decisions taken by Britain and the US out of the belief that the court would be seen as more legitimate if more Asian countries participated. Banerjee 2018, 267-268.

[17] Horwitz 1950, 486.

[18] Charter of the International Military Tribunal for the Far East, Article 5, reproduced in Boister and Cryer 2008a, 8.

[19] Charter of the IMTFE, Article 5, reproduced in Boister and Cryer 2008a, 8.

criminal justice expanded in two directions. First, the great powers abandoned thoughts of international prosecutions and worked to outlaw war itself, notably through the Kellogg-Briand Pact. They were assisted by some international lawyers, but not all IL professionals believed pledging to prohibit war was sensible. Many professionals took the second path, spending the interwar period advocating for the further codification of the laws of war, the creation of a permanent international criminal court, and the adoption of an international penal code.[20] Within these parallel discourses, practitioners struggled over ICL's concepts and goals. While academic debates about ICL underwent significant changes during the period, many diplomats' and policymakers' understandings did not develop in the same direction. The statesmen who spearheaded the creation of the tribunals were therefore working from hazy understandings of previous episodes of international criminal justice and of extant law. They were interested in the Wilhelmine trial plan and the Kellogg-Briand Pact, but less aware of other interwar developments.

This section explores ICL debates during the mid-1940s and the design of the tribunals. It considers how the Allies contested and eventually ratified a quasi-political, legalized, and judicialized vision of ICL. It then highlights tensions inherent in the Allies' embrace of that view, examining how the "Big Four" and others articulated different visions at the London Conference and other post-war planning events. Finally, it describes how policymakers swept such tensions "under the rug" by embracing a delegation model of expertise and staffing the courts with professionals who they hoped would represent their favoured policies and execute instructions. As the next section of this chapter explores, things did not go as planned. By further elevating legal expertise as central to legitimate action in ICL and granting legal practitioners institutional space, the Allies entrapped themselves, imperilled their control over outcomes, and granted expert practitioners more autonomy to resist state interference.

Rediscovering Quasi-political Judicial ICL

It took some time for the Allies to return to a judicial vision of ICL, but not long for them to agree that post-war punishment of enemy leaders remained a political issue. Decision-making about the fate of German and Japanese elites reveals a widespread understanding that post-war punishment need not be separated from diplomacy and geopolitics. However, each Ally had a unique vision of post-war justice. After agreeing on a judicial approach, states continued to voice expectations that the tribunals would further their post-war political goals and did not worry that such proclamations might undermine the tribunals. The eventual design of the tribunals reflected expectations that ICL would be practiced by legal experts-cum-diplomats acting on behalf of the victors; this was a delegation model of expertise and a quasi-political, quasi-judicial vision of ICL.

Nazi Germany

First, consider the debate over a judicial response to Nazi atrocities. Today the Allies' choice to prosecute "remnants of the Nazi elite" seems "natural and obvious."[21] However, the primary British judge at Nuremberg remembered "three possible courses: to let the atrocities which had

[20] Holthoefer 2017; Sacriste and Vauchez 2007; Caloyanni 1928; Hill 1929, 1919; Sellars 2012.
[21] Smith 1981, 3.

been committed go unpunished; to put the perpetrators to death or punish them by executive action; or to try them."[22] The widely reported (by 1945) evils of Nazism, including aggression, totalitarian repression, and, especially, the Holocaust made impunity unthinkable.[23] Thus, the question at the heart of the Napoleonic and Wilhelmine episodes resurfaced: did war crimes and aggression demand a political or legal response and, if it was to be a legal response, what was the appropriate forum for justice?

Bosco notes, "in the war's final months, a firing squad" was "as likely" as a trial.[24] Churchill, Stalin, and Roosevelt initially favoured executing German leaders.[25] Eventually, the quasi-judicial paradigm tentatively established in 1919 triumphed through a combination of internal debate and international pressure. Notably, many arguments in favour of trials were justified with references to legal correctness, appropriateness, and "civilization," with the implication that non-judicial action was regressive and "barbaric." Thus, in addition to re-embracing a judicial approach, the Allies reinforced the importance of legal expertise for legitimate action in ICL.

After internal debate, the Americans championed the trial plan as a means of inaugurating a new world order and establishing the historical record of German abuses without repeating the mistakes of the post-First World War settlement. [26] Morgenthau, the Secretary of the Treasury, initially proposed a draconian plan to cripple Germany and demanded the summary execution of German leaders.[27] Stimson, the Secretary of War, proposed trials as an alternative.[28] Stimson was inspired by the work of Colonel Murray Bernays (a judge advocate officer), who argued that "a trial in which the major Nazi leaders were accused of a conspiracy to wage aggressive war would reveal the full scope of Nazi criminality."[29] This proposal appealed to Stimson who had "as a United States Attorney… prosecuted anti-trust and fraud cases by showing a conspiracy of big businesses," found "a similarity in the organization of the Nazi hierarchy," and believed trials "would disclose 'the full evil of the Nazi system.'"[30]

American policymakers "assumed that the United States through the power of its ideals would be able to shape the new international order" and that judicial action backed by legal expertise would be the most progressive means of doing so.[31] Washington embraced the opportunity to establish legal precedents, including "the criminalization of aggressive war, inaugurating an age of world order."[32] In a 1944 memorandum to Roosevelt, Stimson argued punishing war criminals "in a dignified manner consistent with the advance of civilization" would have a "great" effect on

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[22] Lawrence, "The Nuremberg Trial," reproduced in Mettraux 2008, 292.
[23] Neave 1978, 8; Taylor 1993, 21; Desbois 2008.
[24] Bosco 2014, 24.
[25] Bosco 2014, 24; Herring 2011, 583.
[26] Smith 1981, 24.
[27] Bosco 2014, 24.
[28] Smith 1981, 30-31; Dallek 1982.
[29] Ferencz 1980, 67.
[30] Ferencz 1980, 67.
[31] Herring 2011, 589.
[32] Bosco 2014, 27.

posterity.[33] The Americans feared summary executions would visibly violate "the most fundamental principles of justice," and turn Nazis into "martyrs."[34] Remembering 1919 and the explicitly anti-legal political position of the Treaty of Versailles, they were determined that "[t]he Germans [would] not again be able to claim… that an admission of war guilt was exacted… under duress."[35] The ability to shape the historical record was also valued; trials would be "the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence."[36] In particular, Bernays and Stimson's view of Nazism as a "criminal conspiracy" dominated American visions of the war.[37] The American policy establishment agreed that legal and judicial action was the best and most justifiable response to the political problem of post-war justice. Influential military men also supported the plan, including the Chief of Staff, who "stressed that that summary execution should not be employed because some kind of judicial proceeding was essential" and Judge Advocate General Myron Cramer (who later became a judge at Nuremberg), who argued executions would violate fundamental principles of military and civilian law.[38] America's position was self-consciously framed using the language of legal expertise and directly referenced Washington's understanding of such legal legitimacy as integral to post-war order and to the comprehensive political and moral rejection of Nazism.

Meanwhile, the Soviets embraced trials as a means of seeking reparations for damages. Hirsch explains that during the war, Stalin and Molotov (the Foreign Minister) "called for a 'special international tribunal' to try Nazi leaders, partly as a means of establishing a *legal claim* for [the] reparations… necessary for rebuilding… cities and industries. The Soviets took it as a given that the Nazi leaders were guilty and deserved to be hanged."[39] Stalin saw no trade-off between summarily executing Nazi leaders and putting them on trial; in his view, it was necessary to have both.[40] Trials offered the potential benefit of bolstering and legitimating the USSR's claim to reparations by inviting an international legal body to ratify Soviet claims. The Soviets also valued the public spectacle associated with Stalinist Show Trials.

France and Britain hoped to salvage influence and reputation. Like the Soviets, the French were eager for reparations. France was also "more a victim than a victor," and a trial would provide an opportunity for catharsis and for setting the historical narrative about the war. [41] As Beigbeder summarizes, France was grappling with:

> mixed feelings of relief over the Liberation, and… revenge over… German occupiers and… French collaborators… The Nuremberg trial was to give a *civilized*, judicial response

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[33] Stimson, "Memorandum Opposing the Morgenthau Plan," reproduced in Marrus 1997b, 27.
[34] Stimson, Stettinius, and Biddle, "Memorandum for the President," reproduced in Marrus 1997b, 30.
[35] Hull, Stimson, and Forrestal, " Draft Memorandum for the President," reproduced in Marrus 1997b, 29.
[36] Stimson, "Memorandum Opposing the Morgenthau Plan," reproduced in Marrus 1997b, 27.
[37] Ferencz 1980, 67.
[38] Smith 1981, 33.
[39] Hirsch 2020, 4, emphasis added.
[40] Hirsch 2020, 6.
[41] Beigbeder 2006, 238; Hirsch 2020, 4.

> to … outbursts of hate… against the perpetrators… The detention and trial of the major Nazi leaders… were an object of satisfaction and hope for retribution.[42]

This understanding points to the popular triumph of the 1919-era push toward judicialization. French political and popular discourse drew a clear connection between an international judicial response to wartime atrocities and "civilization," indicating that judicial action was understood as the most legitimate response.

In January 1942, de Gaulle and other representatives of governments in exile issued the St James' Palace Declaration, calling for "punishment, through… organized justice, of those guilty of or responsible for these crimes."[43] The Declaration resolved that perpetrators of aggression and atrocities be "sought out, handed over to justice and judged," but did not specify the exact form of such "organized justice."[44] De Gaulle linked the Declaration to the legacy of 1919, announcing a "firm intention… that those guilty… cannot evade, as did those of the other war, the deserved punishment."[45] Like the Americans, the French embraced trials as a "civilized" and progressive response to Nazi atrocities.

The British disagreed, sharing concerns with the French and Americans, while occupying a less precarious place than the former and a less triumphant one than the latter. Britain "had stood alone against Germany… [was] bankrupted… and worried about losing influence and empire."[46] Churchill wanted to mete out "justice" and "punishment" to Nazi elites but regarded such a project as patently political and was sceptical of attempts to re-frame it in legal terms. In July 1944, Churchill asserted:

> There is no doubt that this [Holocaust] is probably the greatest and most horrible crime ever committed in the whole history of the world… all concerned who may fall into our hands, including the people who only obeyed orders… should be put to death after their association with the murders has been proved.[47]

As Luban notes, the phrase "'after their association with the murders has been proved' is ambiguous: does it mean a trial before law? In fact, [London's]… idea was to round up the top Nazis and shoot them."[48] In cabinet meetings, Churchill maintained Nazi elites were "outlaws" (harkening back to Napoleonic language), joked that Britain might get an "electric chair, for gangsters" from America "on lease lend" and maintained trials would be a transparent farce: "It is really a political act: better to declare that. We shall put them to death."[49]

As late as April 1945, London maintained:

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[42] Beigbeder 2006, 238.
[43] Inter-Allied Information Committee 1942.
[44] Inter-Allied Information Committee 1942.
[45] Quoted in Beigbeder 2006, 239.
[46] Hirsch 2020, 4.
[47] Quoted in Conot 1983, 11.
[48] Mettraux 2008, 653.
[49] Quoted in Doward 2006, para. 4.

> Hitler and… [associated] arch criminals… must… suffer… death for their conduct leading up to the war and for their wickedness [during]… the war. It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of *tribunal claiming to exercise judicial functions*, or whether the decision taken by the Allies should be reached and enforced *without the machinery of a trial*.[50]

The British believed "execution without a trial" was "preferable."[51] A transparently political "machinery" claiming "to exercise judicial functions" but lacking independence might undermine the project. Thus, Churchill and his colleagues were sceptical of an explicitly political judicial institution and intuited that naked political aims might violate fundamental principles of legality. Few other Allies took this possibility into account, although the practitioners appointed to the tribunals would share Churchill's concerns. Churchill did not reject trials in principle but rejected the (in his reading) explicitly political trials which would result from any attempt to prosecute Nazi elites. Such trials might undermine Allied war aims and post-war policies.

What did the British see as the risks of trials? First, they viewed the attempt to prosecute the Kaiser in 1919 as a mistake that should not be repeated. Eden, the Foreign Secretary, argued "we should avoid commitments to 'try the war criminals' and to 'hang the Kaiser (alias Hitler).'"[52] The Wilhelmine tribunal had been a misstep and "the fate of… enemy leaders should be decided as a *political* question by the United Nations as in the case of Napoleon."[53] Echoing the arguments of policy-makers in 1815 and Wilson in 1919, Eden argued aggression and atrocities should be treated as political and moral, rather than legal, crimes. Churchill also favoured following—and exceeding—the Napoleonic precedent by declaring Axis leaders and collaborators "world outlaws" and having them "shot to death within six hours [of capture] without further reference to higher authority;" this would avoid "all the tangles of legal procedure."[54]

Second, the British doubted the possibility of creating a working *international* tribunal. In response to a report on a Soviet show trial in 1943, one Foreign Office official emphasized the:

> hopelessness of… [creating] an international tribunal to try war criminals. The gulf which separates our idea of justice from the Russian is too wide to be bridged… how could we even agree to a common procedure; or if we did, how could carry it out where the underlying spirit is so different?… If you are going to have trials of war criminals, [Soviet show trials] may well be the best way of doing it, but it is not the British way.[55]

Later events would demonstrate the prescience of these concerns. Other British objections to the judicial approach included that trials would take too long, that they would become a pulpit for Nazi propaganda, that they would be "embarrassing," that they might expose the Allies to accusations of war crimes, and that they would entail *ex post facto* legislation, which was "abhorrent

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[50] Quoted in Conot 1983, 13-14, emphasis added

[51] Quoted in Conot 1983, 14.

[52] Eden, "Action of the German authorities in occupied territory," 5 October 1941: CAB 66/19 Part 6, TNA.

[53] Eden, "Treatment of war criminals," 22 June 1942, 3, emphasis added: CAB 66/25 Part 44, TNA.

[54] Churchill, "The punishment of war criminals," November 1943: FO 371/34378, TNA.

[55] Allen, Foreign Office Minute, 13 March 1944: FO 371/43374, TNA.

to the 'Anglo-Saxon mind.'"[56] Crucially, the Americans also appealed to western notions of justice to argue for the opposite position, asserting that the Napoleonic precedent was "retrogressive" and summary execution without trial was "contrary to the fundamental conception of justice."[57] The debate over the judicial model was still very much alive, with all sides framing their positions in terms of adherence to fundamental principles of legality and legal expertise, and accusing opponents of deviating from such principles. Thus, the legalization of the field was further ratified, although its judicialization remained contested.

The British were eventually forced to concede, under pressure from France and the Dominions, and in light of the Americans' threat to hold a trial without British participation.[58] The revelation that the highest-ranking Nazis—Hitler, Goebbels, Himmler—were dead also softened London's resistance.[59] The creation of the Nuremberg Tribunal signalled tentative Allied ratification of the framing of international criminal justice as a judicial matter. This framing was not yet hegemonic; American power tipped the scales towards a judicial solution.

Allied "war crimes policy" was articulated finally at the San Francisco Conference in April 1945; there, the British and the Soviets followed Washington's lead and embraced trials.[60] France soon acquiesced.[61] Further groundwork for the IMT was laid from June 26 to August 2, 1945 at the International Conference on Military Trials in London (the "London Conference").[62] After significant disagreement, conference delegates generated the London Charter (or the "Nuremberg Charter"), which formed the basis of the tribunal.[63] This was soon followed by the Tokyo Charter, which was closely modelled on the Nuremberg Charter, despite taking the form of a decree issued by General MacArthur, rather than a multilateral treaty. The London Conference revealed the extent of inter-Allied disagreement and the prescience of Britain's fears. Although they coalesced around a quasi-political judicial model, the Allies disagreed on what such a model would look like in practice, the goals it would achieve, and the correct relationship between the tribunals and the Allies. They arrived at a tentative compromise in which each state would appoint tribunal officials with the expectation that they would advocate for their home states' policy goals; this expectation proved optimistic.

Imperial Japan

Discussions regarding justice in Asia followed similar patterns and were cut short by the creation of the IMT As in Europe, the judicial framing of international criminal justice was disputed but ultimately ratified in Asia. Likewise, the Allies expected the IMTFE to be quasi-

[56] Sellars 2013, 79.
[57] Quoted in Sellars 2013, 78.
[58] Sellars 2013, 80.
[59] Conot 1983, 11-12.
[60] Kochavi 1998, 219-220.
[61] Kochavi 1998, 220.
[62] Kochavi 1998, 222.
[63] Jackson 1949, v-vii.

judicial, quasi-political institution, and expected tribunal officials to model a delegation model of expertise.

The fate of Imperial Japanese leaders received little attention during the war. Solis Horwitz, the American Deputy Chief Counsel of the IMTFE's prosecution section, recalled the "paucity of… public declarations with regard to Japanese war criminals."[64] Horwitz identified only one wartime instance of a US official declaring an intention to "punish" Japanese war criminals, but even that instance did not reference judicial action.[65] In December 1942, Vice President Wallace asserted: "immediately upon… victory," the Allies would decide "what to do with the defeated nation. Revenge for the sake of revenge would be a sign of barbarism—but this time we must make… sure that the guilty leaders are punished, that the defeated nation realizes its defeat and [cannot]… rearm."[66] Wallace signalled a desire to avoid the mistakes of 1919 and asserted the importance of "civilized" measures but did not specify the form of revenge. Judicialized justice was not the obvious "common-sense" path.

China's expectations were also nebulous. China was an enthusiastic observer of the St James' Palace Declaration, calling for "the punishment, through… organized justice" of European Axis leaders.[67] The Chinese "intend[ed] when the time [came] to apply the same principles to the Japanese-occupying [sic] authorities."[68] They maintained "the elementary principles of justice and morality cannot be vindicated unless the wrongs… done to the Chinese people [and others]… are equally dealt with according to law," accepting a legal, but not necessarily judicial framing, of legitimate action.[69] Beyond this, they made no proposal.

Other Allies had still less to say. In the Cairo Declaration of December 1943, the Asian "Big Three" (Britain, China, and the US) declared they were "fighting… to restrain and punish the aggression of Japan."[70] This was followed by the Potsdam Declaration of July 1945, which was also issued by the "Big Three," and later adhered to by the USSR. The Potsdam Declaration states: "we do not intend that the Japanese shall be enslaved… or destroyed… but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." It asserts the need to eliminate "for all time the authority and influence of those who… deceived and misled the people of Japan into embarking on world conquest… we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world."[71] The form of post-war justice remained unspecified.

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[64] Horwitz 1950, 477.

[65] Horwitz 1950, 477.

[66] Quoted in Horwitz 1950, 477-478.

[67] Inter-Allied Information Committee 1942.

[68] Document 41, "The Ambassador of the Polish Government in Exile (Biddle) to the Secretary of State:" Diplomatic Papers, 1942, Volume I, General; The British Commonwealth; The Far East, FRUS.

[69] Wunz King, 9 January 1942, quoted in Holborn 1943, 387.

[70] Document 343, "Final text of the Communiqué:" Diplomatic Papers, The Conferences at Cairo and Tehran, 1943, FRUS.

[71] Document 1382, "Proclamation by the Heads of Governments, United States, China and the United Kingdom:" Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945, Volume II, FRUS.

As the end of the war neared, planning for post-war Japan took a backseat to European planning. There was no prolonged debate about the Tokyo trial plan. This was likely due to American dominance in Asia and the recent precedent of Nuremberg. Having consented to a trial in Germany, the Big Four raised no significant objections to a similar course in Japan. Crucially, many Allies embraced the potential for the IMTFE to reinforce the judgement and precedent of the IMT—an expectation which became a source of tension at the IMTFE.

France and Britain approached the IMTFE as an opportunity to shape the historical record of the war and salvage imperial influence. Britain's primary concerns were captured in the Foreign Secretary's response to the 1947 proposal that the Tokyo Tribunal be "cancelled" shortly after it had begun. He believed abandoning the trial would prove "disastrous," would "deal a shattering blow to European prestige" and would "proclaim to the world that Japanese militarism had been justified since we had tried to convict it but failed."[72] Despite France's imperial presence in Asia, the IMTFE "aroused little interest" in France.[73] Beigbeder argues France's participation "could only be justified" by France's desire to reinforce the Nuremberg tribunal; beyond "the forced collaboration of French Indochina with Japan… and the massacre of French war prisoners by Japanese forces in 1945… France had no [other]… role in the war [in Asia]."[74]

Likewise, the Netherlands was concerned about how the IMTFE might impact its interests in the Netherlands East Indies (Indonesia) and overall status.[75] One jurist with the Dutch Ministry of Foreign Affairs summed up the Dutch position, writing:

> according to Western standards unthinkable things have… occurred [in Europe] that require action. In the Far East, however, very different views on what is and is not allowed dominate. What happened there, one cannot judge by Western standards, nor treat according to Western methods.[76]

This gestured towards creating a bifurcated system of ICL, in which abuses by the "civilized" West require judicial response, while those elsewhere may not. Perhaps the legitimacy conferred via legal and judicial action in Europe, as was becoming the common-sense expectation, might not translate to Asia? However, like most of the seven lesser Allies in Asia, the Dutch could not veto the tribunal plan, and the opportunity to participate in international war crimes trials was too good to refuse.[77]

Thus, the turn to trials in Asia was inspired by the IMT and framed as the most "civilized" and legally correct response to atrocities. As with Nuremberg, the Allies embraced the IMTFE as a means of pursuing specific and sometimes contradictory post-war policy aims. The Allies addressed such tensions by putting their faith in tribunal officials, who they hoped would follow

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[72] Henniker to Addis (U666/1/73), 22 May 1947: 371/66553, TNA.
[73] Beigbeder 2006, 257.
[74] Beigbeder 2006, 257.
[75] Schouten 2018, 244.
[76] Busmann, quoted in Schouten 2018, 244.
[77] Schouten 2018, 245.

state direction and serve as faithful diplomats-cum-lawyers. It is to these tensions and to the ascendance of this delegation model of expertise that I now turn.

A Tense Planning Process

In April 1945, R.W. Flournoy, a US State Department legal advisor, wrote that the Nuremberg Tribunal "will not be strictly judicial, but merely 'quasi-judicial.'"[78] Flournoy continued, "international law is very imperfect at present and punishment for its violation must necessarily be left to a great extent to political, rather than strictly judicial, action."[79] The view that international criminal justice was necessarily quasi-judicial and quasi-political informed the Allies' expectations about both tribunals. In the minds of policymakers, ICL was not decoupled from diplomacy and power politics. Consequently, despite the centrality of judicial independence, impartiality, and depoliticization to western notions of domestic legal legitimacy, those principles were not seen as necessary for post-war justice, as policymakers' willingness to proclaim quasi-political intentions demonstrates. Having agreed to create a quasi-political tribunal in Europe, the Allies sent representatives to the London Conference to negotiate specifics. This proved difficult. The Conference met from June 26 to August 2, 1945, and quickly devolved into struggles over goals, concepts, legal philosophies, and the appropriate relationship between states and tribunals.

While they agreed there could be *some* relationship and interchange between the IMT and governments, delegates disagreed about the limits of that relationship. In particular, the London Conference vindicated Britain's fears that "the gulf" separating the Western "underlying spirit" and "idea of justice from the Russian" might prove "too wide to be bridged."[80] Robert Jackson, the US Supreme Court Justice who was the American delegate at the Conference (and later the American Prosecutor at Nuremberg), reported:

> The four nations whose delegates sat down at London to reconcile their conflicting views represented the maximum divergence in legal concepts and traditions likely to be found… Britain and the United States… are… common law countries… France and the Soviet Union both use… the Continental system. But between French and Soviet practice there are significant variations… It was to be expected that differences in origin, tradition, and philosophy among these legal systems would beget different approaches to the novel task of dealing with war criminals through the judicial process.[81]

As noted in Chapter One, different legal cultures shape actors' understandings of appropriate procedures and roles while shaping visions of the purpose of criminal law and the judiciary. In designing a post-war court, even an explicitly political one, the Allies instinctively drew on domestic legal cultures to narrate and legitimate their ideal tribunal (and stigmatize alternatives).[82]

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[78] Flournoy to Hackworth, 14 April 1945, quoted in Sellars 2013, 82.
[79] Flournoy to Hackworth, 14 April 1945, quoted in Sellars 2013, 82.
[80] Allen, Foreign Office Minute, 13 March 1944: FO 371/43374, TNA.
[81] Jackson 1949, v-vi.
[82] Taylor 1993, 63-64.

In London, proponents of the "adversarial" (common law) and "inquisitorial" (civil law) models of criminal justice clashed with those of the "socialist law" system which held sway in Stalin's Soviet Union.[83] Adversarial procedures structure criminal trials as disputes, with the prosecution and defence on opposing sides and the judge as a decision maker (in non-jury trials); evidence is presented in the course of the trial (and, in the 1940s, the defence did not always have advanced access to such evidence). The inquisitorial system conceptualizes "criminal procedure as an official investigation… by… impartial officials of the state [including judges]… to determine the truth," and evidence is usually submitted as part of the initial indictment.[84] The two systems assign different roles to legal professionals and are premised on different definitions of key concepts.[85] Nevertheless, both prize the independence of the judiciary. The "Soviet" or "socialist" system of criminal justice was similar to the inquisitorial system but weighted towards "the state and the party."[86] In the Soviet system, "the investigator in cases of serious crimes was not a judicial official… but instead was an official of the procuracy, which also… [managed] prosecution. The investigator could hold a suspect without contact with legal counsel for months."[87] Party officials initiated "campaigns against particular types of crimes, telling prosecutors whom to prosecute and forcing the courts to convict defendants."[88]

Reconciling these procedural differences was the first "great" problem at London.[89] Debates over judicial roles, rules of evidence, and other procedural questions were protracted and frustrating, with all delegates attempting to convey to their colleagues the limits of acceptable and legitimate behaviour according to their national system. One of Jackson's statements on evidentiary procedures is typical in this respect: "the American people will not recognize as a trial a trial at which no evidence is produced in open court. There is no use of our going ahead with a trial that our people will not recognize as a fair trial. I can't do that."[90] As the custodians of the majority of the evidence and defendants, the Americans and British pushed for a rough "workable" compromise, resulting in a blending of procedures that was weighted towards the adversarial model.[91] Telford Taylor, one of the American prosecutors at Nuremberg notes, "the French and Russians went a long way to meet their allies' psychological needs for the adversarial process, even though they understood it imperfectly; at the very last meeting [Russia's] Nikitchenko had to ask: 'what is meant…by 'cross examine'?'"[92] But a compromise procedure was found.

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[83] The inquisitorial/ accusatorial divide does not fully map onto the civil law/ common law divide, but there is significant overlap (and was greater overlap during the 1940s). Also see: Chapter One and La Porta et al. 1999.

[84] Langer 2004, 4.

[85] Langer 2004, 10-11.

[86] Maggs 2017.

[87] Maggs 2017.

[88] Maggs 2017.

[89] Document XLII, "Minutes of Conference Session of July 20, 1945," reproduced in Jackson 1949, 319.

[90] Document XLII, "Minutes of Conference Session of July 20, 1945," reproduced in Jackson 1949, 325

[91] Document XLII, "Minutes of Conference Session of July 20, 1945," reproduced in Jackson 1949, 319.

[92] Taylor 1993, 64.

This procedural compromise failed to resolve deeper disagreements over the correct relationship between political actors and judicial practitioners. According to Jackson, whose "distrust"[93] of the Soviets was well-known, the Soviets saw a:

> court as 'one of the organs of government power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests.' It is not strange that those trained in that view should find it difficult to accept or to understand the Anglo-American idea of a court as an independent agency responsible only before the law…. The [London] Conference [revealed] the influence of these antagonistic concepts. While the Soviet authorities accept the reality and binding force of international law in general, they do not submit themselves to… customary law deduced from the practice of western states… it is less surprising that clashes developed at the Conference than that they could be reconciled.[94]

It would be more accurate to say that these differences were "papered over;" even Jackson admitted that they quickly reappeared as the trials began.

Jackson's reference to the "Anglo-American idea of a court as an independent agency responsible only before the law," while clearly intended to stigmatize the Soviets, also reveals contradictions in the western Allies' embrace of quasi-political justice, as Churchill had feared.[95] Given that Western domestic notions of legality and legitimacy rested on judicial impartiality and independence, there was a degree of cognitive dissonance in calling for trials while expecting tribunal officials to take instructions and further strategic aims. This dissonance arose from the Allies' assertion that the field of ICL was *not* entirely one of "legality" into which domestic legal principles could be translated wholesale. Rather, they narrated ICL as a hybrid realm of both judicial and political action. References to Anglo-American legal principles were often made in a bid to de-legitimize the positions of other states—notably the USSR—and were not seen as fundamentally undermining western designs. Instead, the same principles of legality were cited to frame trials as a "civilized" policy choice (as discussed above). The Soviets expected a high degree of political control over the trials; the other Allies rejected such all-encompassing state dominance but lacked a clear sense of where to draw the line between political imperatives and judicial processes, given their decision to blend the norms of both spheres. This ambiguity shaped the tribunals.

Although stigmatizing, Jackson's characterization of the Soviet position was reasonably accurate. Hirsch finds the Soviets expected both tribunals to mirror the "Moscow Trials of 1936 to 1938… a grand political spectacle whose outcome was certain. Nuremberg would expose the depths of Nazi depravity and hand out death sentences."[96] Indeed Major General Nikitchenko, the head of the Soviet delegation at the London Conference (and, later, the Soviet judge at Nuremberg), saw the Nazi's guilt as already established by the Big Three's wartime declarations, in a view which harkened back to popular understandings of Napoleon's "outlawry." According

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[93] Taylor 1993, 70.
[94] Jackson 1949, vi.
[95] Jackson 1949, vi.
[96] Hirsch 2020, 4.

to Conot, Nikitchenko believed: "'We are dealing… with the chief war criminals who have already been convicted by both the Moscow and Crimea [Yalta] declarations.' The job of the court was… to decide the degree of guilt [and]… mete out punishment. The essence of the case would be determined before the start of the trial."[97] The Soviets hoped for high-profile death sentences, along with the establishment of a legal basis for restitution and international expert verification of Nazi crimes (including blaming some Soviet crimes on Nazis).[98]

Other Allies were repulsed. In an April 1945 address to the ASIL, Jackson summarized the American view and justified it in terms of professional appropriateness, legality, and legitimacy, saying:

> The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man… there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict… our profession should see that it is understood that any trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result.[99]

For the Soviets, the trial plan's value lay in its high-profile educational value and predictable outcome; for the other Allies (and western IL professionals), show trials with pre-determined outcomes would threaten "the most fundamental principles of justice."[100] Having agreed on a judicial approach, the Allies grappled with the fact that a judicial approach *means* different things in different legal and political cultures, and the appropriate balance between judicial independence and political control is not self-evident. Jackson's words also signalled a departure from the attitudes of elites in 1815 and 1919, who were not overly concerned with due process. This indicates that the judicial framing floated but ultimately hollowed out in 1919 was more deeply internalized in the 1940s; state representatives increasingly drew analogies and imported normative standards from domestic judicial systems. In other words, the ICL began to be more strongly defined—and rhetorically "captured"—by legal standards and decoupled from political and diplomatic ones. This shift was consequential for the work of the tribunals, since it enabled officials to articulate and impose their own visions of ICL.

The Allies were further divided on the nature of international criminality and the goals of international justice. The US framed the tribunals as vehicles of transition from "imperial" international order to a new order under the UN system.[101] Washington also articulated the ethos and legal philosophy that they expected to guide the tribunals' work: they hoped the tribunals would not "give undue weight to technical contentions and legalistic arguments."[102] Jackson characterized the US position as "based on the common sense of justice… [and] relatively simple

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[97] Conot 1983, 18.

[98] Thanks to Soviet pressure, the Nuremberg Indictment included the charge of murdering 11,000 Polish Prisoners of War in the Katyn Forest. Taylor 1993, 117; Schabas 2014.

[99] Jackson 1945, 16.

[100] Stimson, Stettinius, and Biddle, "Memorandum for the President," reproduced in Marrus 1997b, 30.

[101] Jackson 1949, 8 and 51.

[102] Jackson 1949, 8.

and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable."[103] This reveals two tensions which shaped post-war ICL. First, there was inter-Allied tension between champions of "sterile legalisms" and "common sense" justice. This signalled both the Americans' willingness to bend the letter of the law in pursuit of political aims and the rise of the "idealist" legal philosophy of "legal pragmatism" in New Deal America.[104] Second, the Americans framed judicial ICL as a progressive and anti-imperial project aimed at creating a more moral international order. The question of whether the tribunals would preserve existing orders or create new ones (and the degree of such creativity) was contested. Both questions were subject to struggle, with all sides invoking legal expertise to legitimate their claims, and the Allies eventually resorting to a delegation model of expertise in a bid to secure desired approaches from within the tribunals.

Tensions over the legitimate legal philosophy of ICL came to a head within the tribunals themselves and are discussed in more detail the next part of this chapter. In contrast, questions about the appropriate goals and concepts of ICL were a source of strife during both post-war planning and in the tribunals. As Mégret notes, "the power of international criminal justice… is the power to designate the criminal."[105] As discussed in Chapter One, this includes the power to define "what" ICL protects and the *status quo* it proports to restore. Sellars argues the Big Four saw Nuremberg's primary goal as being "to remove old threats and underwrite the new *status quo*."[106] But what would that *status quo* look like?

Washington framed the turn towards judicialized ICL as legitimate, civilized, and progressive, in contrast to old, corrupt methods of maintaining order.[107] This framing relies on the idea that judicial procedures impart legitimacy, while echoing early twentieth-century arguments about the hollowness of "old diplomacy" and the need for new international practices.[108] In contrast, the Dutch, British, and French all hoped the tribunals would slow the decline of and re-legitimize their imperial power. In this respect, the American vision was radical; yet Washington also aimed to restore elements of pre-war order. Jackson's opening statement at Nuremberg emphasized the novelty of the IMT while outlining the international *status quo* that ICL should protect. Jackson explained:

> whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions. It may be that… [interwar] Germany… faced desperate problems… [warranting] the boldest measures short of war. All other methods… were open… but aggressive warfare was outlawed.[109]

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[103] Jackson 1949, 51.
[104] Borgwardt 2005, 217 and 213; Wang 2005, 259.
[105] Mégret 2014, 23.
[106] Sellars 2013, 113.
[107] Jackson 1949, 8 and 51.
[108] Marrus 1997b, 83-84.
[109] "Proceedings: Second Day, Afternoon," 21 November 1945, in International Military Tribunal 1947b, 149.

The view that "aggressive war" was a supreme international crime because of the threat it posed to international society and *status quo* was embraced by the European Allies. The French—and some groups within the USSR—had long maintained that aggressive war was a crime akin to "treason" in domestic societies, because it was a threat to the order of international society as a whole.[110] This harkens back to the language used by the Congress of Vienna to declare Napoleon an "outlaw," to the Paris Peace Conference's insistence that the Kaiser be prosecuted for aggression, and to the great powers' focus on measures to outlaw aggression during the interwar period. This also comported with interwar Soviet legal thought and the legal culture of the soviet criminal law, in which "criminal responsibility" was "based upon the so-called 'social danger' of the act and the wrongdoer."[111]

This conservative view was challenged by actors in the emerging Third World, who had different hopes. In December 1941, Chang Kai Shek explained China's goal was:

> a just and durable peace. The term peace, unfortunately is often identified with the maintenance of status quo… the new peace must be dynamic and revolutionary… *we want a peace that is not merely the maintenance of status quo or the absence of violence, but a peace that is dynamic because it can progressively remove symptoms and causes of international friction.*[112]

Rather than protecting the pre-war order, the Chinese hoped to forge a new order that would be more radical than the one envisioned by the US. This mismatch was not meaningfully addressed in post-war discussions, but contributed to difficulties at Nuremberg and especially Tokyo, where the Third World perspective was "disciplined out" of ICL.

The Allies were more aligned regarding international crimes. While the tribunals' best-known legacies include punishing war crimes and crimes against humanity, contributing to the definition of genocide, and other human rights-related milestones, the Allies saw things differently.[113] As had been the case in 1919, the planning and waging of aggressive war was viewed as *the* supreme offence; the 1940s tribunals marked the "clear triumph of the aggression paradigm" in ICL.[114] In further parallel to 1919, the assertion that aggression was the supreme international crime triggered surprisingly little discussion in Allied policy-making circles about sources or precedent in positive international law.

The "crime against peace" charge was the centrepiece of the Nuremberg Charter and (eventually) of the prosecution's case—the "nexus" at which all other charges intersected; the IMTFE had a similar focus.[115] Aggression was, for the Allies, the core of the Axis' evil. For example, Douglas argues that Soviet and American narratives of Nazi crimes:

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110 Sellars 2016b, 26 and 45.
111 Starosolsky 1950, 365.
112 Quoted in Holborn 1943, 387.
113 Sikkink and Kim 2013, 271-273; Zunino 2019, 132-133.
114 Douglas 2019, 62.
115 Douglas 2019, 63.

> both portrayed extermination as the result of aggression. For the Soviets, extermination was a feature of fascist aggression hell-bent on the destruction of the communist state; for the Americans, extermination was integral to the subjugation of peoples conquered by territorial conquest. In both narratives, mass atrocity was a consequence or technique of Nazi aggressive militarism. [116]

The centrality of the "aggression paradigm" in the Allies' thinking about wartime criminality sheds further light on some of what the Allies hoped the tribunals would achieve. The idea that the tribunals should "set the historical record" of the war and provide irrefutable proof of the Axis' crimes for posterity was a powerful and popular one. This expectation led the Allies to expect certain verdicts and results. For the Soviets, as discussed, nothing but death penalties would do. For many of the Allies, the finding that the Germans and the Japanese were guilty of aggression and crimes against peace was to be one of the most important outputs of the tribunals.

Such a finding would ratify the Allies' understanding of the war. Axis leaders were characterized in the press and in private as "gangsters," "thugs," and "outlaws," who had plotted and then perpetrated aggression, war crimes, and other atrocities. The Axis' other war crimes and atrocities were often framed as the first phase of their aggression, or as subsidiary crimes. The idea that such crimes had been systematically plotted was central to the Big Four's narrative. The conspiracy charge in the Nuremberg Indictment was therefore crucial; they believed that by finding enemy elites and organizations guilty of conspiracy, the tribunals would lend expert legitimacy to the "planned aggression" narrative.[117] From the invasion of Poland to the Holocaust to the attack on Pearl Harbor, the Allies' vision held that Axis elites must be punished for both planning and committing international crimes. Relatedly, the Allies agreed that it would be important for the tribunals to speak with unanimously for the "international community" in morally and legally condemning the crimes of Nazi Germany and Imperial Japan. The principle of unanimity was taken as an integral—and assumed—component of judicial ICL.

In the end, the Allies could neither reconcile their divergent legal traditions nor resolve their conflicting political objectives. Their decision to pursue "quasi-political," "quasi-judicial" trials deepened these tensions, as disagreements extended beyond legal procedure to encompass the tribunals' goals and the expected role of states. Rather than abandon the judicial approach, they forged ahead with tribunals premised on a hybrid logic—part legal, part political—anchored in a delegation model, hoping to steer outcomes by appointing legal professionals who would represent their home states. Each state approached this task on its own terms, selecting judges and prosecutors who they hoped would both confer legal legitimacy and advance national aims. But in doing so, the Allies empowered actors who would later contest their control. By rhetorically embracing legal expertise as the foundation of legitimate action in ICL, they ceded interpretive space to legal professionals, enabling expert autonomy and contestation. The expert legitimation trap was thus "set," and primed to "spring."

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[116] Douglas 2019, 63.

[117] Smith 1982, 36; Sellars 2016b, 25; Conot 1983, 10-13; Luban 1987, 818.

Embracing Delegation and Selecting Practitioners

The Allies did not resolve these tensions before launching the tribunals. Instead, they assumed they could shape procedures and outcomes through carefully chosen appointees. Even those Allies who opposed Stalin's show trial vision believed overt political influence could continue inside the courtroom; therefore, they appointed officials whom they believed would advocate for their preferred goals. Yet this selection process exposed a contradiction in the Allies' simultaneous invocation of legal legitimacy and sidelining of principles like judicial impartiality and independence. Legal professionals, publics, and journalists recognized this tension and questioned the Allies' quasi-political judicial vision. As a result, the tribunals were undermined from the outset, as the Allies found themselves entrapped by—and incurring legitimacy costs for—their earlier embrace of judicialization and legalization.

The backgrounds of tribunal officials offer insight into the expectations of those who appointed them and reveal the limited autonomy of ICL at the time. While legal education and experience were considered necessary, the IL profession had little influence on nominations, and no transnational consultation took place. Public and media engagement was minimal. The selection process was informal and inconsistent. In some instances, factors that today would be seen as immediately disqualifying a judge, such as being a victim of the alleged crimes, were framed as qualifications. Likewise, credentials which might now be seen as indispensable, such as familiarity with international law or a commitment to international criminal justice, were de-prioritized.

Unlike at the modern ICC, judges and prosecutors did not stand for election; the Allies were free to unilaterally appoint judges and prosecutorial staff (although IMTFE nominations were rubber-stamped by General MacArthur.)[118] Beyond specifying the number and nationality of judges and prosecutors, the Nuremberg and Tokyo Charters establish no necessary credentials. Many Allies took advantage of this freedom to emphasize qualifications that they believed would enable them to shape and direct the tribunals from within. The Tokyo Charter gave MacArthur "the power of appointment" to select one judge to be the President of the Tribunal and appoint the lone Chief of Counsel (chief prosecutor).[119] MacArthur chose the Australian William Webb as President and Joseph Keenan, an American who had drafted the Tokyo Charter and became known for his abrasive, "erratic" personality and "confirmed" alcoholism, as chief prosecutor.[120] Both appointments proved unpopular with the other Allies and tribunal staff, but appointments were impossible to challenge under the Charters.[121]

The Soviets' desire that the post-war Tribunals function as international show trials and follow state instructions was reflected in their appointees. Stalin chose "Andrei Vyshinsky, who had prosecuted the spectacularly staged Moscow Trials, to head a secret Moscow-based commission that would direct the Soviet work [at Nuremberg]. When selecting Soviet judges and prosecutors…

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[118] MacArthur was committed to having the Tokyo Tribunal running quickly and did not veto any nominations.

[119] David Cohen and Totani 2018, 45 note 46.

[120] Harries and Harries 1987, xxx; Röling and Cassese 1993, 2.

[121] Charter of the IMT, Article 3.

Stalin similarly looked to people with show trial experience."[122] The same was true of Tokyo. Iona Nikitchenko and Roman Rudenko were appointed as the Soviet judge and prosecutor, respectively, for Nuremberg, and Ivan Zaryanov and Sergei Golunsky (later replaced by Aleksandr Vasilyev) served as judge and prosecutors at Tokyo, respectively. Nikitchenko was the Soviet representative at the London Conference, and was initially pegged to be Soviet Prosecutor but was appointed to the bench at the last minute.[123] He was chosen because of his experience as a judge in the Moscow Show Trials.[124] Likewise, Rudenko had worked as the prosecutor for Ukrainian and Russian show trials in the 1930s and 1940s; his assistant prosecutors also had show trial experience.[125] The Soviets at Tokyo were similarly qualified. Zaryanov was a member of the Military Collegium of the Supreme Court of the USSR and had previously been the head of the Military Law Academy of the Red Army. He spoke no English and had "handed down death sentences on a mass scale" during the "purge trials" of the 1930s.[126] The Soviet prosecutors at Tokyo were more worldly, but still representatives of Stalinist criminal justice.[127] Golunsky had significant legal and, importantly, diplomatic experience, including at the Yalta and Potsdam Conferences.[128] Polunina argues Golunsky's appointment reflects "the peculiarity of Soviet legal practice of the time which gave state prosecutors a leading role;" the Soviets also appointed Golunsky to lead their delegation at Tokyo, hoping his political experience would help him further the USSR's interests and demonstrating their belief that diplomatic experience was an essential qualification for competence in ICL. [129]

The Americans also sought to further their desired vision of post-war justice. In a distorted echo of 1919, the Americans favoured military experience for judges. While, in 1919, Americans like Scott favoured military tribunals as being more formalist and likely to adhere to the letter of the law, this time the Americans favoured military experience because they expected that military personnel would take a more pragmatic view and be "less likely to give undue weight to technical contentions and legalistic arguments."[130] Washington believed military men would be more likely to embrace the legal pragmatism and "non-technical" inventiveness which was in vogue in US legal and political circles at the time, and less likely to grant attention to the "sterile legalisms" and formalist arguments which they expected the accused to present in their defence.[131] German and Japanese elites must not be allowed to exploit legal technicalities. The appointment of Major

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[122] Hirsch 2020, 9. Vyshinsky also directed the Soviet delegation at Tokyo.

[123] Conot 1983, 18 and 65

[124] Hirsch 2020, 8

[125] Hirsch 2020, 8

[126] Polunina 2018, 130; Röling and Cassese 1993, 64. On Stalin's instructions, Zaryanov vigorously opposed the death penalty. Zaryanov was so closely associated with Stalinist justice that, during the Khruschev 'thaw,' he was stripped of his rank of Major General of Justice and expelled from the Communist Party for "gross violations of socialist legality" during the show trials.

[127] Vasilyev, who succeeded Golunsky, had been Moscow City Prosecutor.

[128] Polunina 2018, 128.

[129] Polunina 2018, 131.

[130] Jackson 1949, 8.

[131] Jackson 1949, 51.

General Myron Cramer, former US Judge Advocate General, to the bench at Tokyo, and numerous military officers to other roles in both tribunals, reflected this.

Crucially, Washington valued familiarity with conspiracy, racketeering, and organized crime, since they hoped to prosecute the Germans and Japanese on charges of criminal conspiracy and membership in criminal organizations. These forms of liability were central to Washington's conception of wartime crimes. Keenan, the Chief Prosecutor at Tokyo, made his name in the 1930s as the "scourge of America's mobsters" and racketeers.[132] Harries and Harries view Keenan's appointment as a public relations stunt, since Keenan's "gang-busting persona fitted the hoodlum image of the Japanese militarists projected by American propagandists."[133] However, this propagandistic image was a perfect reflection of how American policymakers viewed German and Japanese crimes and "conspiracies." [134] Keenan's professional background fits snugly into the larger pattern of American appointments and was ideally suited to the Americans' expectations for post-war justice and view of the Nazis and the Japanese as "gangs" of "thugs."[135] As Simpson summarizes, the Nuremberg Indictment (and other aspects of the trial) was "permeated" by "the need" to think of the war as arising from a "'dark conspiracy'… designed and executed by a small cabal of leading Nazis around… Hitler."[136]

Appointments like Keenan's spoke directly to the attitude the Americans hoped to foster in the tribunals, and the kind of legal findings they hoped the tribunals would make. Sedgwick argues "from an Anglo-American legal perspective, the logical response to Japanese thuggery became the use of conspiracy laws designed to prosecute 'gangs' and to bring in legal specialists experienced in prosecuting organised crimes."[137] Like Keenan, many members of the US prosecution team at Tokyo "embodied the twin… pillars of experience 'putting away' criminal groups and an uncritical belief in the criminality of Japan's conspiratorial regime."[138] The prosecutor G. Osmond Hyde, for example, had participated in the US government's attempt "to seek out and seize World War I 'enemy' property and assets… hidden behind legal and banking structures."[139] Referring to Axis leaders as "gangsters" was not merely an attempt at propaganda, it was a claim about the legal status of the US' enemies and the crimes for which they could be tried. The focus on conspiracy and criminal organizations also reflected the American plans for the de-Nazification of Germany and the re-ordering of Japanese society. These aims shaped the kinds of experience that US decision-makers saw as relevant for putting ICL into practice and informed the outcomes which they hoped the tribunals would achieve.

Other Allies also made nominations based on their preferred vision of international justice. The lack of an organized community of ICL practitioners and of a specific linkage between ICL

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[132] Harries and Harries 1987, xxx.
[133] Harries and Harries 1987, 105-106.
[134] Smith 1982, 36.
[135] Harries and Harries 1987, 105.
[136] Simpson 2014, 167-168.
[137] Sedgwick 2012, 175.
[138] Sedgwick 2012, 175; Annual Report of the Alien Property Custodian 1926.
[139] Sedgwick 2012, 175.

and domestic principles of legality facilitated these choices. Röling, the Dutch judge at Tokyo, was surprised by his nomination, believing it occurred "by chance" and speculating:

> The reason was that I was a judge in Utrecht and… professor of Indonesian criminal law. It was suggested that, because I had something to do with Asia, it would be good for me to have this job in the Far East. I was not an international lawyer. At that time I didn't know anything about international law.[140]

Röling's path to the Tribunal grants insight into the Dutch government's approach, while also illustrating the limited expert pool on which the Dutch were able to draw. Röling's knowledge of Dutch and (colonial) Indonesian criminal law, and his having had "something to do with Asia" fit with the Dutch government's conception of the tribunal and of Dutch imperial status in Asia. Röling's lack of IL experience also highlights the lack of any community of ICL practice at the time—and the Allies' inability to or disinterest in selecting based on professional criteria seen as indispensable in the field today. None of the prosecutors or judges at Tokyo had any expertise in international law, Japan, or the Japanese language; likewise, Nuremberg officials had limited international law expertise.[141] But many officials had wartime military experience, a qualification unrepresented in the modern ICC.[142]

Many members of the tribunals had personal backgrounds that would today constitute serious conflicts of interest. Most notably, Delfin Jaranilla, the Filipino judge at Tokyo, served in the military during the war—as a colonel and Judge Advocate General—and had been a Prisoner of War and victim of the notorious Bataan Death March in 1942, which had a death toll of over 10,000.[143] Jaranilla was beaten and nearly died on the Death March, and had endured the "Rape of Manila," during which his grandchild died.[144] Together with decades of education in the United States (the imperial metropole of the Philippines at that time), and significant "experience as a pro-American legal professional," these experiences were viewed as qualifications by the Filipino government, which took a very hardline stance on Japanese guilt and the tribunal's political aims.[145] As an American colony, the Philippines may have felt obliged to "select an individual who had not obviously cooperated with Japan, and who would cooperate with the US. The candidate also needed sufficient legal knowledge to serve at a military tribunal and the experience of military service."[146] Nagai argues the Filipino government's "criteria for the nomination included a good relationship with the US… no evidence of collaboration with the Japanese during the war, legal qualifications and finally a distinguished public career."[147] As a fluent English speaker, military veteran, Filipino Supreme Court judge, and pro-American war victim, Jaranilla was amply qualified.

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[140] Röling and Cassese 1993, 19-20.

[141] Boister and Cryer 2008b, 78 and 81-82. Sen and Raman debunk the argument that Pal was an international law expert at the time of his appointment. Sen and Raman 2020, 236.

[142] Dittrich et al. 2020, 81.

[143] Nagai 2018, 205; Dittrich et al. 2020, 81.

[144] Nagai 2018, 205-207.

[145] Nagai 2018, 211.

[146] Nagai 2018, 211.

[147] Nagai 2018, 211.

Understandably and predictably, his wartime experience was uppermost in his mind during his time at the tribunal. One colleague noted that he regularly referenced "Bataan. Always Bataan."[148]

Similarly, the Soviet judge at Nuremberg, Nikitchenko, had been a delegate at the London Conference and was initially poised to become the Soviet prosecutor. Nikitchenko had made his belief in the guilt of the defendants clear at the Conference, and had participated in discussions of evidence, charges, and crimes; he could not possibly claim impartiality.[149] Even the other Allies were shocked by his sudden judicial appointment. But Soviet leaders "refused to consider the idea that a judge should be a disinterested party without prior knowledge of the case."[150] Nikitchenko's show trial experience and understanding of "Stalin's expectations for the international tribunal (quick decision, quick punishment)," made him an ideal candidate.[151]

Potential conflicts of interest abounded. Myron Cramer, the American judge at Tokyo, had already prepared a report on the legal responsibility for the attack on Pearl Harbour, while the Soviet judge (Zaryanov) had sentenced three alleged Japanese spies to death as "counterrevolutionaries."[152] The Australian judge (and President of the IMTFE), William Webb was Australia's war crimes commissioner, had spent two years investigating Japanese war crimes, and had given his opinion about the liability of Japanese elites.[153] Webb was chosen explicitly because of his experience in criminal jurisdiction and his knowledge of Japanese war crimes; he resisted the appointment because of his knowledge of the case, but eventually accepted.[154]

The fact that Webb was squeamish about his appointment (while the Australian government and other Allied governments were not) is indicative of how out of step the Allies were with the implications of framing ICL as a judicial issue. As a seasoned professional and Chief Justice of the Supreme Court of Queensland, Webb evaluated his nomination to the IMTFE using the judicial standards he had learnt and internalized over the course of his domestic legal career. The idea that the IMTFE would be merely "quasi-judicial" and would not be subject to the same standards of impartiality may have been acceptable to Allied elites, but it did not readily filter down to tribunal appointees. For Webb and for others, any court, international or not, should logically be subject to certain professional and ethical standards. In response to the Allies' decision to establish tribunals, legal professionals understandably assumed that domestic norms of legality and judicial appropriateness would apply to the ICL sphere.

The press and the public shared this assumption. Accordingly, they questioned the appointments of Webb, Jaranilla, and others.[155] Morris summarizes the public controversy surrounding Webb: "it was suggested… that he should have refused the appointment or disqualified himself… on the basis that his investigation of Japanese war crimes… meant that he

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148 Röling and Cassese 1993, 29.
149 Conot 1983, 65.
150 Hirsch 2020, 78.
151 Hirsch 2020, 78.
152 Minear 1971, 83; Brackman 1987, 65.
153 Boister and Cryer 2008, 83; Smith 2000, 101; Hewton 1976, 44-45.
154 Narrelle Morris 2018, 47.
155 Brackman 1987, 116-117.

had been too closely involved… and could not be impartial."[156] Indeed, Justice Frank Brennan, Webb's colleague at the Supreme Court of Queensland, publicly denounced the appointment to the *Sydney Morning Herald*, citing concerns about the perceived legitimacy of ICL and the Australian judiciary:

> Sir William has already acted as an investigator of Japanese atrocities and has delivered several reports to the Australian and British Governments… Sir William intends to… adjudicate on cases listed against major Japanese war criminals. What will foreign nations think of such a state of affairs? Could British justice allow a detective who had investigated crimes, and made findings against a class, preside as judicial officer to try other offenders of the same class?… The issue will surely be raised, and Sir William Webb may be placed in a false and invidious position, and Australia made to look stupid. I am perfectly satisfied that [Webb]… would be just and impartial, but if he presides at the trials foreign nations will be in a position to point the finger of scorn at our conception of British justice. We have, in Australia, other excellent and brilliant jurists, any one of whom could fill the judicial role with dignity and distinction. I therefore feel it my duty to give a timely warning to save our country from contemptuous ridicule.[157]

Such challenges were felt keenly by professional and international audiences but ignored by the Allies. Brennan's statement to the *Herald* provoked a question in the Australian House of Representatives, but the Attorney General denied any impropriety, misleadingly asserting that "Webb had nothing to do with" any relevant investigations.[158]

The Tokyo Defence Counsel objected to the appointments of Webb, Jaranilla, and others, but their objections were dismissed.[159] Indeed, both the London and Tokyo Charters disallowed any criticism.[160] Yet accusations of bias and politicization undermined the legitimacy that the Allies sought. Overall, there were "strong grounds to presume bias from individual judges, in violation of the common law rule, [which was] at least arguably a general principle of international law" that judges against whom there was a credible accusation of bias "should withdraw."[161] Allegations of inappropriate appointments and judicial bias were aimed at both tribunals (from both inside and outside) from the outset. Such accusations shaped the tribunals' legacies, revealing significant miscalculation on the part of the Allies, who apparently assumed that a quasi-political judicial institution would be seen to be as legitimate as an avowedly apolitical one.

While they disagreed on many aspects of ICL, the Allies had arrived at certain shared expectations about post-war ICL: it would be legalized and judicialized, but not depoliticized. Notwithstanding their different domestic legal traditions, there was a general understanding that the Allies' influence and control would extend into the courtroom. The tribunals were expected to speak with one clear, legitimate voice on behalf of international society and mankind, and the Allies

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156 Narrelle Morris 2018, 45.

157 "Judge's Doubts on Webb Appointment" 1946.

158 House of Representatives Debate. 22 March 1946. Commonwealth of Australia Hansard, 533.

159 Brackman 1987, 116-117.

160 Charter of the IMT, Article 3.

161 Boister and Cryer 2008b, 83.

expected to continue shaping that voice. Under the weight of these expectations and doubts, a heterogenous range of legal professionals arrived at Nuremberg and Tokyo. They faced the challenge of enacting international criminal justice in practice for the first time. This mandate required them to carve out a new area of practice, establish common ground for their work, and manage their relationships with the states that had appointed them. These challenges opened opportunities for contestation and creativity, as practitioners struggled with colleagues and with principals over the future and nature of international criminal justice. In so doing, they pushed the boundaries of states' expectations. They demanded and exercised greater judicial independence than the Allies anticipated and established new standards for pragmatic ICL. The "expert legitimation trap" facilitated this process, making it more difficult for the Allies to oppose or control the actions of tribunal officials.

Inside the Tribunals: Insulating and Disciplining ICL

The Americans "insisted with tedious perseverance [that disagreements] be reconciled as far as possible in the closed conferences and not be glossed over only to flare up again in the public trials," fearing that public expert disagreement would delay and weaken the perceived legitimacy of the verdicts.[162] Nevertheless, struggles "flared up" repeatedly. Some were foreseen by the Allies; thanks to their varied backgrounds, tribunal officials clashed over constitutive and substantive issues. Questions that had divided elites were reactivated as practitioners struggled to forge common understandings. However, the Allies did not foresee the extent to which cracks would appear between themselves and their chosen expert delegates-cum-experts. Practitioners clashed over the implications of ICL's judicialization and the appropriateness of a delegation model of expertise. In other words, many tribunal officials disagreed with the Allies' understanding of the appropriate relationship between the tribunals and their political principals, and the extent to which states could credibly intervene in judicial activities. Parallel to ongoing internal debates aimed at *disciplining* the field, tribunal officials invoked the language of legal appropriateness and legitimacy (which had been so useful to the Allies) to repel political intervention and *insulate* the tribunals. This section considers noteworthy efforts at *disciplining* and *insulating* ICL. Both dynamics illustrated the expert legitimation trap at work and saw ICL practitioners use their increased authority and the language of legal legitimacy to reshape ICL in ways sometimes unforeseen or unwanted by their political principals.

The dynamics of insulating and disciplining ICL were intertwined. Tribunal officials struggled with colleagues over ICL common sense; they frequently reported such struggles to Allied governments while also working to address them internally. When certain governments tried to resolve such conflicts according to their preferred vision of ICL, tribunal officials (especially judges) rejected such intervention as inappropriate. The Allies were told to "keep out" of internal struggles and judicial decision-making and found themselves trapped, unable to override tribunal officials without undermining the legitimacy they had worked to build. This pattern was evident in disputes over professional conduct and ideology, as well as over judicial procedures and legal

[162] Jackson 1949, vi.

concepts. I consider noteworthy internal conflicts and efforts to discipline ICL first, before examining how tribunal officials worked to insulate ICL institutions.

Disciplining ICL

A heterogeneous range of legal professionals arrived at Nuremberg and Tokyo. They were tasked with enacting ICL for the first time. This required them to define a new area of practice, establish common ground, and manage relationships with colleagues and states. These challenges sparked creativity, as judges and prosecutors struggled to define not only substantive legal questions but also the "rules of the game" for ICL—the standards by which (in)appropriate and (il)legitimate conduct, credentials, arguments, and decision-making could be judged. Key areas of debate included the appropriate state-tribunal relationship; judicial conduct and procedures; ethos and legal philosophy; and substantive legal questions. These disputes "moved the needle" on key issues and narrowed the scope of acceptable conduct in ICL, as tribunal officials stigmatized certain behaviours, philosophies, and backgrounds as suspect. Many of these debates remained unresolved at the end of the 1940s. To the extent that tribunal practitioners were able to generate new common-sense understandings, such success hinged upon their ability to foster a sense of collegiality and common cause within the tribunals. Therefore, this period saw initial strides towards creating a genuine community of ICL practice (especially at Nuremberg) and set the stage for further expert capture.

The common sense tentatively established at Nuremberg and Tokyo left a legacy that prized collegiality and collaboration, legal pragmatism and flexibility, judicial impartiality and independence, and an ideological commitment to the state-led international criminal justice project. Judges and prosecutors who deviated from these ideals were stigmatized by colleagues and accused of unprofessional and un-lawyerly behaviour.

Impartiality and Relationships with States

The Allies agreed on a delegation model of ICL practice. Their chosen prosecutors and especially judges disagreed on the appropriate relationship between tribunals and states. Furthermore, the Allies expected officials to act as delegates conscious of state interests, rather than merely as independent judicial officers or "trustees." This vision received mixed support in the tribunals. Practitioners, most of whom were steeped in domestic legal traditions that valued judicial independence and impartiality, debated whether they could claim judicial legitimacy without severing ties with states. They also struggled to define when national fellowship tipped into inappropriate bias. These disputes were framed using the language of professional appropriateness and principles of legality, indicating that practitioners consciously debated the "rules of the game" of ICL through the lens of their professional knowledge, and struggled to reconcile contradictions in the Allies' quasi-political judicial vision. Ultimately, most practitioners decided that impartiality and independence were essential to the tribunals. However, they failed to agree on how to signal such virtues in practice or balance between national loyalty and impartiality.

Nuremberg Charter was formally "silent on whether the members were to be independent of, or were to act as spokesmen for, their respective countries;" the same was true of the Tokyo

Charter.[163] The Charters included no rules against sharing (or directions to share) information with governments or interested parties. They included no claims about judicial impartiality or confidentiality, despite the fact that both are central to commonly accepted principles of legality in many domestic legal systems. At Nuremberg, the French, American, British, and Soviet judges and prosecutors had different interpretations of acceptable conduct. Some Western judges maintained social ties with government and prosecutorial colleagues, but eschewed trial-related conversations.[164] Others maintained a personal distance but occasionally received briefings regarding their home states' preferred outcomes; many also received legal advice from government colleagues.[165] The Soviets received instructions from and reported to Moscow, prompting Western colleagues to view them as "automatons" seeking "merely to follow Stalin's orders."[166] IMT officials questioned their colleagues' approaches, but never attempted to articulate formal rules or confront colleagues, allowing tensions over impartiality and national ties to simmer without reaching a boiling point. This tacit acceptance proved fruitful at Nuremberg, especially compared to what happened at Tokyo.

In contrast, some IMTFE's judges made an early attempt to impose rules about impartiality, confidentiality, and other behavioural norms; they failed. One of the IMTFE chambers' first acts was to sign and deliver a "joint affirmation to administer justice according to law, without fear, favour or affection" and bring "open minds both on the facts and on the law."[167] In parallel, they drafted a "pre-trial agreement to keep secret all deliberations in chambers" and to deliver a unanimous judgement, on the understanding that a lack of unanimity would undermine the credibility and legitimacy of the Nuremberg precedent and the Tokyo tribunal.[168] Both efforts were spearheaded by Western judges, who sought to publicly align the IMTFE with the principles of judicial independence and impartiality they had been taught to value and expect domestically. Unfortunately, these decisions were taken before either the Indian or Filipino judge had arrived in Tokyo. When he arrived, Justice Radhabinod Pal (India) refused to sign either agreement, dismantling his colleagues' efforts. The fact that such a written agreement was seen as necessary highlights the uncertainty surrounding behavioural norms for tribunal officials, and the tribunal majority's desire to publicly signal adherence to Western legality.[169] The fact that such an agreement was not achieved illustrates the heterogeneity and internal dysfunction of the IMTFE bench and the extent to which ICL was unmoored from legal professional norms that seem obvious today. Pal's "irregular" refusal irked his judicial colleagues and sparked the first of many accusations of unprofessional conduct in the IMTFE.[170] Other judges, especially those from the courts' common-law majority (Judges Cramer (US), Webb (Australia), Jaranilla (Philippines), McDougall (Canada), Northcroft (New Zealand), and Patrick (Britain)) accused Pal of seeking to "torpedo" the tribunal by any means necessary, of being insufficiently collegial, and of abandoning the duty which (they

163 Smith 1977, 5.
164 Smith 1977, 5-8.
165 Smith 1977, 5-8.
166 Smith 1977, 7.
167 "IMTFE Transcript of Proceedings," 3 May 1946, 21-22.
168 Takatori 2018, 155.
169 Sedgwick 2018, 30.
170 Takatori 2018, 155; Röling and Cassese 1993, 28.

argued) he owed to the court and his colleagues.[171] Notably, similar accusations were *not* levelled against the Soviet judge, who (collegially but disingenuously) signed onto both agreements while regularly communicating with Moscow.

Through their objections, Pal's colleagues sketched a vision of "how" ICL ought to be practiced, which was more insulated, independent, and collaborative than that of Allied elites. This vision was shaped by Western norms of judicial conduct and did not subscribe to the Allies' assumption that the ICL field could selectively import standards and concepts from domestic legal systems. Yet, the IMTFE majority's vision also placed a heavy emphasis on collegiality and unanimity within the judges' chambers (which is not required domestically). This emphasis on collegiality represents an early attempt to define and discipline the internal decision-making norms and norms of professional behaviour within the IMTFE. In fact, Pal refused to sign the agreements because he rejected the entire tribunal project as inherently improper and partial (which I return to below), rather than because of a wholesale rejection of judicial impartiality. Pal also contested the idea that he owed it to his colleagues to be flexible or collegial. Thus, both sides in the dispute framed their actions as necessary for upholding and protecting judicial independence and integrity: values which Allied political elites had downplayed when creating the tribunals but practitioners aimed to uphold. They also staked out competing positions on the ethos which should govern ICL practice, with Pal asserting his conscience and personal understanding of legality over his colleagues' desire for collegiality and public unity. Pal was an ostracized outlier, and the IMTFE judges had already proved themselves willing to go beyond and re-interpret the ICL common sense espoused by their political principals.

The ability to assert judicial impartiality was important to most tribunal officials, although they disagreed on how to demonstrate it. Accusations—and instances—of judicial partiality were rife. Such accusations became a common means of discrediting and denigrating difficult colleagues (and disciplining and defining ICL). Röling, the Dutch IMTFE judge recalled several of his colleagues arrived at Tokyo with "preconceived idea[s] of its outcome," which he regarded as inappropriate and frustrating but unsurprising.[172] In particular, Röling noted his Russian, Chinese, and Filipino colleagues were always "eager for severe punishments," while Pal "knew from the very start that he would not find anyone guilty of anything."[173] Mei Ju-ai of China's personal feelings are made clear in his diary, where he notes "we are now living in an era of the rule of law, where all arch-criminals must be tried before execution; otherwise, I wish I could kill a few to appease my hatred of the evil war criminals!"[174] Similarly, Jaranilla often spoke about his desire for vengeance for the Bataan Death March and other crimes, drawing criticism from colleagues for his Americanized views, while the Soviet judges at both tribunals made it clear that they would seek death penalties for all accused.[175] Likewise, the accusation that Pal arrived in Tokyo determined to "torpedo" the tribunal reveals his colleagues' frustration with naked partiality (especially when directed against the entire IMTFE project). Such prejudgments made it difficult for more open-minded judges to

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171 Scott to Dening (PA 39/18/48), 25 November 1948: DO 35/2938, TNA.

172 Röling and Cassese 1993, 29.

173 Röling and Cassese 1993, 29.

174 Mei Ju-ao 2019, 13.

175 Nagai 2018, 203; Röling and Cassese 1993, 28.

seek compromise and agreement, and caused friction within the judges' chambers, especially at Tokyo. With respect to the IMTFE, Bassiouni argues "with the exception of Röling (Netherlands), Pal (India), and Bernard (France), many of the judges appeared politically motivated;" Cryer and Boister argue that Pal, who arrived at Tokyo with set intentions to reject the tribunal in its entirety, was also operating based on political biases.[176] Thus, a general sense of judicial bias was difficult to dispel and was a perennial complaint tribunal judges levelled against one another.

These biases were seen to undermine public perceptions from the outset, demonstrating another unintended consequence of the Allies' expert-selection process. IMTFE defence counsel petitioned to have several judges removed, including Webb, Jaranilla, Cramer, and Zaryanov of Australia, the Philippines, the US, and the USSR, respectively.[177] These challenges were dismissed, although the IMTFE never justified this dismissal in writing. They simply noted "no objection to… any member of the Tribunal can be sustained," since the Charter provided no mechanism for "dismissing or withdrawing" judges, and reasserted their professional integrity.[178]

With the exception of the Soviet judges, judges accused of improper bias defended themselves on the grounds that their personal integrity and professionalism would enable them to manage and negate pre-existing bias. They did not argue that they had no prejudices, and they did not argue that judicial impartiality was unimportant; instead, they accepted impartiality as a precondition for the legitimacy of the tribunals but argued such impartiality could be secured through wise decision-making, rather than through the recusal of biased judges. Webb asserted in court: "before I accepted an appointment… I seriously considered what effect my [wartime activities] would have on my position as a Member of this Tribunal. I… [concluded] I was eligible, my views being supported by the best legal opinion…in Australia."[179] This was disingenuous; as noted, Webb's appointment was publicly challenged via a detailed "warning" in the Australian press.[180] Webb ignored all questions and simply "asked that each judge review his personal qualifications and opinions and decide for himself if he was fit to sit," a measure which did not address the "strong grounds to presume bias" from several judges.[181] The kind of personal management Webb had in mind was demonstrated later, when Jaranilla excused himself from sitting during the Philippines phase of the IMTFE prosecution.[182] But, while Webb, Jaranilla, and others were satisfied that personal integrity could negate even the most obvious bias, many of their colleagues were unconvinced, which undermined the judges' ability to work together. Furthermore, the optics were not good. The defence counsel's objections gained traction in the press and academic circles, undermining the credibility and legitimacy of both tribunals, particularly the IMTFE, from the outset. With the benefit of hindsight, one cannot help viewing this as something of an "own goal:" an unnecessary cost incurred by the Allies' failure to consider that demonstrable judicial impartiality might be an important resource for their quasi-political tribunals.

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176 Bassiouni 1997, 33 note 96; Boister and Cryer 2008b, 95.

177 Boister and Cryer 2008b, 83-84.

178 "IMTFE Transcript of Proceedings," 6 May 1946, 98; Mei Ju-ao 2019, 90.

179 "IMTFE Transcript of Proceedings," 6 May 1946, 98

180 "Judge's Doubts on Webb Appointment" 1946.

181 Boister and Cryer 2008b, 83-84.

182 Brackman 1987, 242.

Beyond biases, the question of appropriate judicial roles remained. Some practitioners embraced the Allies' invitation to act as state representatives first and legal professionals second. Mei, the Chinese IMTFE judge, viewed himself "primarily as a representative of China," considered "his fellow judges first and foremost to be representatives of their respective countries" and "perceived the level of respect shown to himself in Tokyo as a direct reflection of the national prestige of… China."[183] Likewise, the Soviet judges and prosecutors demonstrated their loyalties in many ways, including their insistence on wearing Soviet military uniforms and their tireless advocacy for Stalin's favoured outcomes.[184] At one of the IMT's first sessions, Justice Nikitchenko sided with the Soviet prosecutor's attempts to postpone the start of the trial until the Indictment was re-translated into Russian, lest the current draft "harm the interests of *our country*."[185] Judges and prosecutors frequently referred to themselves as "representatives" and spoke of their "nations" more often than they spoke of "international society" or "humanity."[186] This reflected the material reality, as each judge or prosecutor was "responsible only" to, paid by, and replaceable by his home state.[187]

But there were also disputes over the appropriateness and implications of such behaviour. Jackson believed the Soviets' blatant lack of independence shifted what Telford Taylor (another US prosecutor at Nuremberg) called the "standard of permissibility" within the tribunal.[188] Jackson told Biddle (the American judge) that the Nuremberg prosecutors should have more leeway than in ordinary trials, arguing "this is not an ordinary trial. Some of the proprieties went by the way when General Nikitchenko" was appointed to the bench.[189] Biddle and Taylor were sceptical of Jackson's implicit claim that standards of legality ought to be lower at Nuremberg; Taylor felt "such a situation would destroy the appearance, if not also the actuality, of a fair trial… the preservation of fairness was vital," even if some members of the tribunal undermined such fairness.[190]

Many officials regularly reported to national governments. In the most extreme example, the Soviets were officially under the command of Vyshinsky, who reported to the Politburo and relayed instructions from Stalin. Soviet judges worked hard to follow such instructions, as tribunal records make clear (for example, Soviet judges frequently vacillated on their colleagues' suggestions until they could receive direction or draft texts (including of the IMT judgement) from Moscow).[191] Other officials maintained looser lines of communication. The US State Department and the British Foreign Office had official representatives at Nuremberg and Tokyo, and judges and prosecutors from both tribunals regularly reported to their home governments, in addition to being in regular contact with academics, family members, and colleagues. For example, the British Foreign Office regularly received detailed accounts about the frustrations, dynamics, and daily

183 Bihler 2018, 95 and 89; Mei Ju-ao 2019, 73.
184 Hirsch 2020, 99 and 381.
185 Taylor 1993, 125.
186 Boister 2018, 191; Mei Ju-ao 2019, 12-13.
187 Taylor 1993, 125.
188 Taylor 1993, 134.
189 Taylor 1993, 134.
190 Taylor 1993, 134.
191 Hirsch 2020, 384 and 399.

proceedings at the Tokyo tribunal from the British judge and other British officials.[192] They circulated these reports to other British and Dominion government offices and received copies of reports from Dominion judges in return. IMTFE Justices Webb (Australia), Northcroft (New Zealand), and Patrick (UK) regularly communicated with their home governments, as did Mei (China) and Zaryanov (USSR). When McDougall, the Canadian judge, suggested to Webb, the President of the Tribunal, that he should take measures to prevent and investigate "leaks" to the press, Webb dismissed the concern, disclosing that he personally "frequently told persons outside the Tribunal, that is to say, my own Government…and others interested, when the Judgment might be expected."[193] Likewise, Mei was understood to have told the press and the Chinese government about IMTFE sentencing decisions before the official judgement was released.[194]

Judges who regularly reported to their home governments were not always stigmatized as behaving unprofessionally. In fact, McDougall was initially seen as a radical because of his *refusal* to share information with Ottawa. Takatori argues that this silence was "indicative of personal and professional rectitude" and "an ethical choice; [McDougall] might well have thought it improper for a judge to exchange information with his government, which technically represented one of the prosecuting nations."[195] Such sentiments made McDougall an outlier among his colleagues on both tribunals, and would have made him much more suitable for the modern ICC.

McDougall sought to maintain distance from Ottawa, importing his existing understanding of judicial norms to the tribunal. In contrast, other officials criticized colleagues for being too rigid in their attempts to apply domestic judicial norms to international work. Justice Birkett (US) argued other IMT officials failed

> to appreciate that the trial is *only in form* a judicial process and its main importance is *political*. For that, of course, what was required was not only a knowledge of law but a knowledge of history, particularly German history, a knowledge of men and world affairs, and an instinct to apply these things at every stage of this most remarkable case.[196]

Birkett clearly shared the Allies' understanding of the Nuremberg Tribunal as a quasi-political and quasi-judicial undertaking and was comfortable serving as a political decision-maker and legal expert. He also took a clear stand on the necessary credentials for ICL officials, signalling a belief that legal training and experience were not the only prerequisites for practicing ICL.

Similarly, officials struggled to specify appropriate judicial and prosecutorial conduct, including relationships with colleagues. Some officials felt a greater sense of kinship and common purpose with co-nationals than with fellow members of the prosecution section or the bench, provoking criticism from colleagues and hampering attempts to forge commonalities across national lines. Bernard, the French judge at Tokyo, "kept in such close contact with the French associate

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192 Takatori 2008, 159. See generally: LCO 2/2992, TNA.

193 Quoted in Takatori 2008, 159.

194 Takatori 2008, 160.

195 Takatori 2008, 158.

196 Reproduced in Hyde 1964, 515.

prosecutor that his conduct would be considered unbecoming in 'ordinary trials.'"[197] Likewise, the British judges and prosecutors at Nuremberg drew criticism from American colleagues for holding "private discussions" among themselves; Telford Taylor viewed the British relaxation of "restraints which would be observed in domestic Anglo-American legal practice" as "reprehensible."[198] Justice Mei of the IMTFE privately "thought of the Chinese representatives [judge and prosecutors] as a team jointly representing their country," but insisted on the Chinese prosecutor moving to a different hotel, due to his desire to signal competence to his Anglo-American colleagues and his fear that "it would be deemed inappropriate for a judge and an associate prosecutor to live in such close physical proximity."[199] Likewise, the British strove to maintain "social and personal distance" between judges and prosecutors at Nuremberg, in order to maintain the appearance of impartiality.[200] Such contradictory antics demonstrate the lack of clarity around appropriate behaviour within the tribunals.

Such national affinities had consequences for the procedures and outcomes of the trials. For example, Birkett, the British alternate judge at Nuremberg, was disappointed in the American Chief Prosecutor's cross-examination of Hermann Goering. Birkett believed Jackson was overwhelmed and had allowed Goering to use the witness box as a "platform… to explain and expound" his poisonous beliefs.[201] Birkett was distressed by Jackson's ineptitude and by "the failure of the Tribunal to intervene… and retain control of the proceedings."[202] The next day, Birkett "drafted a notice" to be read out from the bench, giving "clear and firm notice that no irrelevancy in the answering of questions will be tolerated."[203] According to Birkett, this attempt to regain control was rejected by the American *judges* "for reasons personal to Jackson… and therefore [the draft statement] was not used, a fatal mistake, I think, which will have profound effects on the trial."[204] It is not clear whether the American judges were concerned about embarrassing Jackson—for Birkett did see Jackson's "failure" as an embarrassment—or were concerned about interfering with Jackson's plans. In either case, their allegiance to their fellow American was strong enough to prevent them from intervening to regain control of the tribunal's procedures, a move which would have been entirely appropriate for the bench in almost any legal system. According to Birkett, the American judges' decision was not justified in terms of legal roles or professional appropriateness, but in terms of national loyalty or teamwork. Birkett viewed the Americans' parochialism as unprofessional and inappropriate.

These disputes illustrate a key dynamic in the expert legitimation trap. By invoking legal expertise, citing judicial standards, and appointing legal professionals, the Allies opened the door for those professionals to reinterpret and re-adjudicate ICL amongst themselves. The quasi-political approach favoured by Allied elites, which hinged on the idea that the post-war tribunals

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197 Takatori 2008, 160.
198 Taylor 1993, 121.
199 Bihler 2018, 90; Mei Ju-ao 2019, 55.
200 Smith 1977, 7.
201 Reproduced in Hyde 1964, 510-511.
202 Reproduced in Hyde 1964, 511.
203 Reproduced in Hyde 1964, 512.
204 Reproduced in Hyde 1964, 512.

could claim legal legitimacy while also downplaying common judicial standards, was tested by tribunal officials and found wanting.

All these questions left a mess, sparking interpersonal friction and accusations of unprofessional conduct without generating clear decisions on the limits of co-national collaboration, external communication, and bias. Yet, underpinning these disputes, tribunal officials were addressing questions raised by the Allies' decision to create the tribunals. Having been told that the IMT and IMTFE were legitimate judicial institutions, these professionals considered how to adapt their knowledge and internalized expectations to their new work. Primary sources, including tribunal transcripts, journals, letters, and interviews reveal a general sense of uncertainty and concern regarding how the principles of judicial independence, impartiality, and fairness could translate into an international criminal tribunal established by victorious powers. For the most part, IMT and IMTFE judges, prosecutors, and defence counsel agreed such principles were essential for the legitimacy and effectiveness of the tribunals. They could not agree on how such principles translated, but nevertheless articulated various positions which proved important decades later, when the impartiality and independence of ICL would become even more central to legitimate practice in the field.

Ethos, Ideology, Philosophy, Procedure, and Substance

These controversies over judicial legitimacy, impartiality, and independence simmered in the shadow of the largest dispute to wrack the tribunals: the debate over the legality, goals, and legitimacy of the courts themselves. The Allies' decision to create victors' tribunals via international treaties and declarations was unexpectedly controversial within the tribunals, as was the judicial ICL project itself. Such controversies highlighted different understandings of ICL's guiding philosophy, behavioural and procedural norms, and ethos.

The most prominent (internal and external) critique of the tribunals was based on the argument that any "victors' tribunal" is inherently biased. This challenge cut to the heart of the Allies' contradictory position on ICL, opening opportunities for tribunal officials and academics to articulate alternative visions. As one IMTFE defence counsel put it: "Both Mr. Keenan and Mr. Comyns Carr [the American judge and prosecutor] have said that this trial [is necessary]… to protect civilization… by 'civilization,' do you not include… 'respect for treaties' and 'impartiality of trials'?… it would be to the good of civilization if this Indictment is rejected."[205] Defence counsels challenged both tribunals' jurisdiction and validity, beginning a trend which has continued at all subsequent ICL institutions.[206] Another IMTFE defence counsel argued that, since the judges were

> representatives of the nations which defeated Japan and which are the accusers… a legal, fair and impartial trial is denied to these accused… The Charter says that the Tribunal is established for a just and prompt trial… and the President of the Tribunal… said that the Tribunal would conduct their proceedings 'with the utmost expedition consistent with

[205] "IMTFE Transcript of Proceedings," 13 May 1946, 189.
[206] Luban 1987, 828.

> justice to the accused.' But… under the circumstances of its appointment, the trial can neither be fair, legal, nor impartial… [therefore] this Tribunal does not have jurisdiction. In making this argument… we mean no [personal] disrespect. The vice is inherent in the situation. The parties plaintiff in this criminal action are the nations with which Japan was and still is at war, which have defeated Japan, and which have accepted her surrender… all the [judges]… [to quote President] Webb… constitute a 'tribunal comprised of the representatives of the Allied Powers that defeated Japan.'[207]

The idea that both tribunals were examples of "victors' justice" arose frequently inside and outside the courtrooms, although such criticisms did not meet widespread sympathy until later.[208] Likewise, both tribunals were criticized on the grounds that their existence and jurisdiction violated the principle of *nullum crimen sine lege.*[209] Where did international law specify that a group of victors had the legal right to constitute a tribunal to try enemy officials? And where were "crimes against peace," "aggression," or "conspiracy" criminalized in international law? Commentators and practitioners disagreed about the implications and validity of both these critiques, and tribunal judges disagreed about the appropriate way to voice and address them. Although the Allies expected that such critiques would be levelled by defence counsel, they hoped their chosen judges would give them little attention.[210] They apparently did not foresee that IMT and IMTFE judges might themselves be proponents of such ideas, or that such ideas might undermine the legitimacy and functioning of the tribunals. Yet they were, and they did.

On the question of "victor's justice," the IMTFE's Pal (of India) agreed that the tribunal was inherently illegal.[211] Pal found that the "ALLIED POWERS AS VICTORS HAVE NOT, UNDER THE INTERNATIONAL LAW, THE LEGAL RIGHT to treat such persons as war criminals."[212] Contra Pal, most judges were content that the tribunals' Charters provided sufficient legal basis for the tribunals and argued that it was not their role to assess the legality of the Charters, even as they also "harboured doubts about the legality" of certain charges, including conspiracy.[213] Some judges, including de Vabres, argued that *nullum crimen sine lege* applied only to *codified* law (such as domestic law) and that, if the principle was to be applied to ICL, the great powers would need to codify it first.[214] Others suspected that the tribunals might in fact violate *nullum crimen sine lege,* but believed that the tribunals' goals were so important that even imperfect justice was preferable to impunity for war criminals.[215] Nikitchenko argued the IMT was "not intended to protect old law… [or] shield old principles from violation."[216] In this instance, rigid formalism must bend to historic circumstances. This more pragmatic view of law as open to "dynamic" interpretation, rather than strict application, proved popular within the tribunals as judges sought to reconcile the

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[207] "IMTFE Transcript of Proceedings," 14 May 1946, 196-198.
[208] Marrus 1997b, 243.
[209] Helfman 2012, 360 and 365.
[210] Jackson 1949, 51.
[211] Pal's judgement is reproduced in: Pal 1999.
[212] Pal 1999, 23, emphasis/ capitalization in original.
[213] Hirsch 2020, 368.
[214] Helfman 2012, 365, incuding note 60.
[215] Helfman 2012, 360 and 365.
[216] Quoted in Helfman 2012, 365 note 60.

tribunals' lack of precedent with their historic importance.[217] This turn towards pragmatism re-shaped ICL, even as it contributed to outcomes which fell short of the Allies' hopes. The popularity of a pragmatic and flexible approach to the legality of the tribunals also reflected a conscious effort on the part of some judges to foster a sense of collegiality, compromise, and common commitment to the ICL project within the tribunals.[218] This effort was largely successful at Nuremberg but failed spectacularly at Tokyo.

The extent of judicial disagreement on substantive questions of ICL is too broad to be summarized here, yet two vectors of disagreement are notable: debates over the conspiracy charge at Nuremberg, and debates over retroactivity and the ICL project at Tokyo. IMT judges arrived at Nuremberg determined to collaborate and forge workable procedures and behavioural norms. They quickly adopted a collegial and cooperative attitude. IMT judges interacted as equals; Lawrence, the President, and the primary and alternate judges worked together to debate and craft the IMT judgement. Technically, the judges selected Lawrence to write the draft judgement. Nevertheless, he delegated most of this task to Biddle (the American lead) and Birkett (the British alternate) and regularly sought and incorporated input from all judges.[219] Smith reports that this inclusiveness was deliberate: "inclined toward compromise from the start, Biddle took the initiative in finding a formula that would be acceptable to all… [and] meet the pressing wishes of each judge."[220] The judges held countless long meetings to discuss procedural and substantive questions, in addition to questions about the specific language of the judgement.[221] They circulated "drafts and redrafts" of the judgement and worked "in secret" but in an "open atmosphere" to find compromise, always with an eye to preserving "judicial integrity."[222] This committee approach was highly successful; with the exception of a few more contentious legal questions, "understandings were achieved without recourse to a formal vote; if the majority of members were dissatisfied with a portion of the draft, the discussion continued until a [satisfactory] formula was found."[223]

This collegial and flexible approach proved useful when the judges were debating the conspiracy charge. Although this charge was the cornerstone of the Allies'—especially the US and USSR's—expectations for the IMT, it did not sit well with the bench. Smith summarizes:

> nearly every Westerner associated with the bench failed to share the American Government's vision that a grand Nazi conspiracy had existed… it also appears that the Soviet judges attached little or no importance to it… a minority of judges and their aides wanted to reject the whole conspiracy idea, but even most of those who wished to retain it were determined that it should be limited in time and restricted in form. Washington's hope to develop conspiracy to a degree that would condemn the whole Nazi system was

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[217] Wang 2005, 264.

[218] Western judges, especially from the United States, Britain, Canada, and Australia, viewed collegiality and common commitment as essential components of professional behaviour within the tribunals.

[219] Taylor 1993, 549; Hirsch 2020, 369-370.

[220] Smith 1977, 134

[221] Taylor 1993, 549.

[222] Smith 1977, 143.

[223] Smith 1977, 144.

> never held to be a serious possibility during the Tribunal's deliberations. The crucial question was whether conspiracy was to be completely rejected or only sharply limited. [224]

The judges were able to move from a seemingly impossible impasse, in which Donnedieu de Vabres, the primary French judge, rejected the Charter's conspiracy charge as completely illegal and *ex post facto* while other judges cautiously supported the charge, to a compromise decision to "limit conspiracy to crimes against peace."[225] It was decided that conspiracy as a form of liability would be "limited to Crimes against Peace, while the prosecution's charges of conspiracy to commit War Crimes and Crimes Against Humanity would be eliminated."[226] In other words, while Herman might be found guilty of participating in the conspiracy to invade Poland and of committing crimes against humanity, he could not be found guilty of a *conspiracy* to exterminate the Jewish people. This was a blow to the Allies' hopes for the IMT. Indeed, demonstrating the extent of the Nazi "criminal conspiracy" had been one of the central goals of the Americans' and Soviets' embrace of the trial plan. It proved to be "a bust" and they were disappointed that only eight of the twenty-two defendants were found guilty on this count (all of whom had also been found guilty of crimes against peace).[227] Smith argues that the IMT's judgements on conspiracy:

> protected the defendants much more than they put them in jeopardy… [and] marked the demise of the [US'] grand design for war crimes prosecution; not only was the general Nazi conspiracy discarded, but Bernays' basic idea of linking prewar persecutions to wartime atrocities by means of a conspiracy charge was also completely rejected by the Tribunal."[228]

Yet, while this verdict illustrated the inherent unpredictability of empowering legal professionals to act as delegates-cum-judges, it was also the result of the judges' ability to generate common behavioural norms and adopt shared values.

This conspiracy compromise was achieved through extensive internal memoranda, discussion, and bitter argument but, crucially, did not paralyze the tribunal. Thanks to Biddle and Falco (the French alternate) suggesting the compromise language and asking colleagues to "abandon our respective national ideas of criminal law and place ourselves to the facts," the compromise was accepted.[229] The Soviet judge remained opposed to the compromise but was willing to relent, respecting the voting and discussion procedure of his colleagues, and even consenting to modify the instructions he received from Moscow in the name of a compromise outcome. As Smith notes,

> Tribunal members… achieved a certain measure of confidence in each other's capacity and integrity. Although conflicts and bewildering moments of non-communication abounded, there was a kernel of truth in Biddle's later comment that 'over the long months of the trial' the eight judges had become friends.'… All the judges were clearly determined to make the system work, and, even though fatigue and frayed nerves made the going

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[224] Smith 1977, 133.
[225] Taylor 1993, 550.
[226] Smith 1977, 133.
[227] Hirsch 2020, 387.
[228] Smith 1977, 137.
[229] Taylor 1993, 550.

> difficult… the Tribunal members shared an unusual spirit of camaraderie right through to the end."[230]

In adopting and consciously maintaining this spirit of camaraderie, committee decision-making, and consensus-building in the name of the mission of the IMT, the Nuremberg judges articulated and ratified a vision of ICL which valued collegiality, pragmatism, and a commitment to the ICL project. They agreed on "rules of the game" for "how" to practice ICL, establishing mechanisms to constructively manage and resolve disagreements. Thus, they imposed internal discipline on their work, even while friction and contestation remained. Thanks to these shared values and decision-making norms, the IMT avoided deadlock. The IMT's judgement was almost unanimous, with the Soviet judge deciding at the last minute to write a relatively short dissenting opinion which was entirely focused on opposing acquittals and sentences for specific defendants and enemy organizations.[231] This dissent did not threaten the integrity or visible unity of the IMT.

In stark contrast, the IMTFE was unable to establish workable shared norms, collegiality, or commitment to the ICL project. There is little to no evidence that IMTFE officials learned from, drew on, or sought to mirror the norms and procedures developed at the IMT; it is unclear if they were even aware of the IMT chambers' approach to deliberations (indeed, the IMT was still ongoing when the IMTFE began its work). In any event, IMT procedures and norms were not translated into the Tokyo Tribunal; the IMTFE was left to develop its own culture and norms. Tribunal officials struggled to specify and discipline appropriate judicial and prosecutorial conduct and, by extension, tribunal procedures and outputs. Most infamously, both the President and Chief Prosecutor of the IMTFE were vehemently criticized by colleagues for unprofessional, uncollegial, and inappropriate behaviour; both were frequently accused of being "indiscreet" and "injudicious" in and out of the courtroom.[232] Keenan, the chief prosecutor, was known to be a bully, grandstander, and alcoholic who lacked professional skills. He offended colleagues, insulted witnesses, and was prone to "angry" and "rage-fuelled" outbursts against both witnesses and the bench.[233] The British Prosecutor, Comyns-Carr, summarized the "tale of woe" in a letter to the British Lord Chancellor's Office: Keenan "although, or perhaps because he's apparently still on [the] wagon, has been playing merry hell with the case and the British Commonwealth contingent, and seems finally to have disgusted most Americans."[234] Comyns-Carr was more brutal in a report to the US Attorney-General, complaining of Keenan's professional incompetence and personal rudeness. Comyns-Carr spent a great deal of time "trying to teach Keenan how to XX [cross-examine]" key witnesses and had to "educate" Keenan's "entirely incompetent staff," including some who Keenan had "reduced to a state of incoherent jitters" with his bullying.[235] Keenan was reported to be "at all times hopelessly incompetent, and at most times also completely intoxicated."[236] Northcroft, the New Zealand judge, reported to Wellington that Keenan was

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230 Smith 1977, 144.

231 Nikitchenko, "Dissent," 1946: General Eugene Phillips Nuremberg Trials Collection, UGA.

232 Comyns-Carr to Rieu, 10 June 1947: LCO 2/2992, TNA.

233 Mei Ju-ao 2019, 100.

234 Comyns-Carr to Rieu, 10 June 1947: LCO 2/2992, TNA.

235 Comyns-Carr to the Attorney General, 21 October 1947: LCO 2/2992, TNA.

236 Viscount Jowitt to the Lord Chancellor, 23 January 1948: LCO 2/2992, TNA.

"incompetent," "unseemly," and "stupid."[237] That Keenan had been appointed at all struck most IMTFE officials as a significant error in judgement on the part of the US Government and SCAP, leading to questions about states' ability to judge credentials for such important work. Many IMTFE officials viewed Keenan's appointment as a political act aimed at the American public, and some considered resigning rather than continue to "endure" working "under [Keenan's] heel."[238] Likewise, Keenan's unsuitability led IMTFE prosecutors and observers to denounce the Tokyo model of the prosecution section (in which one Chief Prosecutor is appointed to lead his colleagues) as impractical. The "Nuremberg system" (in which multiple prosecutors worked collaboratively as equal colleagues) was now preferred.[239]

Keenan frequently argued (including in court) with Justice William Webb, the Australian IMTFE President. [240] Just as Keenan frustrated and destabilized the prosecution section, Webb threw the judges' chambers into disarray and "set" most of his colleagues by their "ears."[241] Webb was found to be rude, "offensive," "vulgar," autocratic, and unprofessional, a "quick-tempered turbulent bully resentful of the expression of any view differing from his own" and even lacking "any legal capacity."[242] In the courtroom, he monopolized proceedings, hogged the bench's only microphone, and insulted witnesses (including by calling the Japanese Prime Minister "stupid").[243] He regularly threatened to find defence counsel in contempt for questioning the court's jurisdiction and legality, appearing to criticize the wartime conduct of the Allies, or taking issue with Webb's ham-fisted approach; on at least one occasion, he followed through on the threat.[244] Webb's colleagues openly expressed their dissatisfaction (to each other, to their colleagues, and to their home governments) with his "inappropriate" conduct.[245]

In addition to drawing accusations of unprofessionalism, Webb's conduct catalysed debates over decision-making norms and procedures, exposing a gap in ICL common sense and a crucial difference between the IMT and the IMTFE. A certain degree of disagreement is inevitable in any institution (especially an international one), but deadlock from such disputes need not be. If practitioners have a shared sense of how disagreements can be legitimately resolved, adjudicated, or mitigated, and a shared sense of how a "winning argument" or authoritative decision-maker can be identified, disputes need not be catastrophic.[246] In such contexts, actors "tacitly agree on the value of the capitals that are relevant to the field" and compete within set boundaries and according

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[237] Takatori 2018, 160.

[238] Comyns-Carr to the Attorney General, 21 October 1947: LCO 2/2992, TNA.

[239] Comyns-Carr to the Attorney General, 21 October 1947: LCO 2/2992, TNA.

[240] Mei Ju-ao 2019, 100.

[241] Patrick to the Lord President of the Court of Session, 29 March 1947: LCO 2/2992, TNA.

[242] Patrick to the Lord President of the Court of Session, 29 March 1947: LCO 2/2992, TNA; Letter fragment, 18 April 1947: LCO 2/2992, TNA.

[243] Minear 1971, 84.

[244] "Incident at Tokyo: US Counsel Suspended" 1947; Draft telegram (U592/1/73), 12 April 1947: FO 371/66552, TNA.

[245] Mei Ju-ao 2019, 102.

[246] Wenger 1999, 82-83.

to shared norms.[247] Beyond "vulgar personal squabbles," the controversy over Webb's presidency provided the occasion for detailed disputes "over the rules" of ICL.[248]

While the judges at Nuremberg had quickly settled into a collegial and compromising mindset, intra-Chambers relations at Tokyo only worsened over time. They could not agree on the appropriate relationship between the IMTFE President and his fellow judges. Webb was inclined to behave as a "tyrant," rather than as "primus inter pares" ("the first among equals"), a fact which rankled almost every other judge on the bench, and led at least three to contemplate resigning.[249] He also had a very different approach to drafting the tribunal's judgement, refusing to accept input from colleagues and eventually presenting them with a "turgid" draft weaving together quotations from Thomas Aquinas and Marcus Aurelius instead of the Nuremberg Charter or International Law scholarship.[250] One British official relayed that it included "twenty pages of quotations from… Aristotle… St. Paul, Ambrose of Milan, St. Augustine… Thomas Aquinas... [it appears] it was prepared by a young Australian in [Webb's] office and by a catholic lecturer. It is really a laughable document if it were not so serious."[251] Webb berated colleagues who suggested changes.[252]

Webb's conduct exacerbated another intra-Chambers issue: the debate over the ICL project. As noted, the original nine IMTFE judges planned to produce a unanimous judgement; Justice Pal's outright refusal to comply disrupted this plan. Pal arrived in Tokyo determined to reject the tribunal as inherently illegal.[253] As one of the last judges to be appointed following the last-minute decision to include India and the Philippines in the IMTFE, Pal arrived in Tokyo on May 17, 1946 (two weeks after the beginning of proceedings). As early as July 5, 1946, Pal delivered a memorandum to his judicial colleagues announcing his intention to dissent from the majority judgement and from the ICL project itself, writing: "I cannot induce myself to the view that the acts ascribes to the accused while functioning in the capacity of persons charged with the working of the state constitution could constitute any crime within the cognizance of International law… I am preparing a detailed judgement of my own."[254] This infuriated most of his colleagues, who maintained that, in the words of Patrick (of Britain), "to repudiate the Charter… amounts to a violation of all moral decency let alone the legal aspects of the case."[255] Pal was accused of profound unprofessionalism and seeking to "torpedo" the tribunal, with colleagues asserting that he should have refused his appointment if he was unprepared to uphold the IMTFE Charter.[256] It must be noted that dissenting opinions are acceptable in many legal systems around the world, including in the common law systems from which most of Pal's critics hailed. The IMTFE judges' objections were not founded

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[247] Martin-Mazé 2017, 213-214.

[248] Bourdieu and Wacquant 1992, 102.

[249] Patrick to the Lord President of the Court of Session, 29 March 1947: LCO 2/2992, TNA; Tokyo to Foreign Office-Telegram 549, 26 April 1947: LCO 2/2992, TNA; Jowitt to the Lord Chancellor (U/610/1/73), 17 April 1947 FO 371/66552, TNA.

[250] Von Lingen 2018, 119.

[251] Untitled Fragment, 18 April 1947: LCO 2/2992. The document is filed as if it is from Northcroft to Myers, but that appears to be an error.

[252] Sedgwick 2018, 32.

[253] David Cohen and Totani 2018, 433-435.

[254] Quoted in Sedgwick 2012, 83.

[255] Gascoigne to Washington, 20 May 1947: LCO 2/2992, TNA.

[256] Scott to Dening (PA 39/18/48), 25 November 1948: DO 35/2938, TNA.

in their domestic legal experiences, but reflected efforts to discipline the tribunal and ICL common sense by encouraging support for the ICL project and collegiality and stigmatizing dissent.

Pal's rigid refusal to conform actually inspired one of his other colleagues to pen another dissenting opinion. Röling (Netherlands) also had his doubts about the legality of the Charter and the charges; while his colleagues all agreed to unanimity, Röling had decided to keep silent in the name of collegiality, but Pal's defection led him to do likewise. The majority's rigid position on the unimpeachability of the IMTFE Charter did not sit well with Röling, who wrote in his dissent:

> according to the majority judgement, the Tribunal, although called upon to mete out justice, is not… called upon to judge whether the victorious powers have stayed within the limits of international law. Members of an International Tribunal, therefore could only refuse office or resign in case they regard the Charter as trespassing those limits, and leave their places to judges prepared to share those views as set out in the Charter. This standpoint… [is] dangerous for the future… [and] incorrect at this moment, It would be the worst possible service this Tribunal could render to the cause of international law if it should establish as a rule that an international tribunal… would have to apply the rules [laid down by victorious powers]… without having either the power or the duty to inquire whether it was applying rules of justice at all.[257]

Röling thus used the same idiom of legality and professional appropriateness as his colleagues. Pal congratulated him on this choice, also using the same idiom, writing: "I am sincerely glad… you have made up your mind to write a short dissenting opinion…I have always felt that justice demands this. We are not there to minister to the moral prejudices of the world public and even at the risk of wounding such public opinion. We are not to sacrifice our own convictions."[258]

The IMTFE judges failed to establish norms of collaboration and constructive criticism. IMTFE judges also failed to agree on how to operationalize fundamental principles of legality which, they all agreed (contra the Allies), should be translated into ICL. This failure rendered the IMTFE profoundly handicapped. Indeed, the inability to develop workable and fair procedures spawned another dissent, this time from Henri Bernard, the French judge. Bernard's dissent focused on the IMTFE's inadequate procedures and decision-making processes. Bernard maintained that "a verdict reached by a Tribunal after a defective procedure cannot be a valid one," that the deliberations in Chambers were uncollegial and unfair, and that "essential principles, violation of which would result in the nullity of the entire procedure… were not respected."[259] The failure of the IMTFE to collaboratively manage and discipline ICL contributed to the outcome the Allies and the Chambers' majority feared most: a non-unanimous verdict.

Thus, the IMT and IMTFE left two immediate legacies regarding the behavioural norms of ICL: Nuremberg's collegiality and Tokyo's dysfunction. Undoubtedly, the differences between the tribunals were shaped by the quirks of individual personalities (such as Lawrence's and Webb's) in addition to broader contextual factors, including the greater heterogeneity of the IMTFE and the

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[257] "Opinion of Mr. Justice Röling, Member for the Netherlands" ("Röling Opinion"), 12 November 1948.

[258] Quoted Sedgwick 2012, 83 note 161.

[259] "Dissenting Judgement of the Member from France" ("Bernard Opinion"). 12 November 1948, 20 and 18.

fact that not all IMTFE judges arrived in Tokyo prepared to embrace the ICL project.[260] It was not immediately clear which model of ICL would triumph in the long term, or how the legacies of Nuremberg and Tokyo would combine and intersect to inform future ICL practice. The question of how these legacies intersected is considered in Chapters Six and Seven.

Insulating ICL

While these internal struggles persisted, the IMTFE and IMT also responded to outside interference in ways that were apparently unforeseen by the Allies. Tribunal officials, especially judges, began to *insulate* the tribunals from overt political meddling, leveraging the language of legal legitimacy and principles of legality to draw and maintain boundaries with political principals. Likewise, the tribunals' substantive findings sent a clear message that the Allies' chosen narrative of the war would not be fully ratified. States' freedom of action in the field was curtailed; ICL was not yet depoliticized, but a much more independent and autonomous field of expert practice began to take shape.

Procedural Independence

As noted, many tribunal officials communicated with national governments and did not completely reject the Allies' delegation model of expertise; there was a degree of entanglement. But Bassiouni argues that each IMTFE "member acted as a representative of his country's government, and not in an individual capacity;" this is misleading.[261] Although IMTFE and IMT officials were expected to act as state delegates, they resisted such expectations and carved out a new, more distant relationship with states. This resistance was a direct outgrowth of tribunal officials' interpretation of what it means for ICL to be a field of judicial practice, and their determination to import principles of legality (including judicial independence) into their work. This determination led them to clash with their political principals, who were all too eager to intervene in the tribunals. The clearest example of this dynamic can be seen in the interactions between Allied states and IMTFE judges regarding procedural and inter-personal issues, and the potential for dissenting judgements.

The "threat" that some IMFTE judges (initially Pal and Röling, and later Bernard) might dissent from the Tokyo judgement was unforeseen and highly controversial within the Tribunal. Dissent was also regarded as a threat by the Allied governments, who feared that anything other than a unanimous judgment would "undo" the Nuremberg Precedent and humiliate the Allies.[262] Likewise, the uncollegial behaviour of individuals like Webb and Keenan caused great concern, especially once other officials began to consider resigning from the tribunal. The Allies, in particular Britain, the US, Canada, and New Zealand, received regular updates and reports on difficult characters and potential dissenters, and they (especially Britain) went to great lengths bring

[260] I examined the importance of such personal affinities, heterogeneity, and background knowledge for productive innovation and community-building in ICL in greater detail in: Stafford 2020.

[261] Bassiouni 1997, 33.

[262] Jowitt Fragment, 8 May 1947; LCO 2/2992, TNA. Also, generally: FO 371/6553, TNA; LCO 2/2992, TNA.

"rogue" judges in line.[263] British officials frequently expressed frustration that India and the Netherlands had appointed judges who were difficult to control and likely to dissent (in defiance of the Dutch and Indian governments' positions). The Foreign Office quickly began brainstorming about how they could support Patrick's (the British judge) "campaign" to "convert" his colleagues to a unanimous judgment.[264]

Whitehall's first thought was that better leadership by Webb, the Australian president of the Tribunal, and intervention by General MacArthur, who was "responsible for the conduct of the trial and appointed the judges and president" might prove effective at preventing dissent.[265] On May 14, 1947, the Lord Chancellor met with the Attorney-General and several other government officials, including representatives of the Foreign Office, the Dominion Office, and the Law Officers' Department. The vast majority of those present were trained lawyers. They agreed that

> Orme Sargent [of the Foreign Office] should write to… MacArthur, mentioning the Charter, and the attitude of the Indian and Dutch Judges to it, and the danger that the trial may break down owing to differences among the Judges, and suggesting that Lord Wright [the Chairman of the UN War Crimes Commission] should go [to Tokyo]… to take the line that the Judges ought not to impugn the Charter.[266]

They wanted Wright to leverage "his position as representative of Australia on the War Crimes Commission… to persuade" Webb "to handle the Tribunal differently."[267] The Lord Chancellor "offered to write an unofficial and friendly letter to Dr. Evatt," the Australian Attorney-General and Minister of External Affairs, "if the plan with McArthur and Wright fell through."[268] Hopefully Evatt would either pressure Webb to change his leadership style, or replace him. On May 16, they directed Gascoigne, the British Liaison Officer in Tokyo to "see General MacArthur and tell him that we are concerned about the difficulties which have arisen among the members of the Tribunal and which, if they are not checked, may detract seriously from the success of the trial."[269] He was advised to suggest that MacArthur intervene and to "consult Lord Patrick" on how to discuss the matter with MacArthur.[270]

Thus, the British government aimed to prevent a dissenting judgement or the breakdown of the IMTFE by any means necessary, even if this required them to direct the actions of the Tribunal's judges, have judges removed from their posts, or inform MacArthur, the executive authority of the court, about the Tribunal's inner workings. Each of these actions would likely be

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[263] The extent of the British's (and other Allies') involvement is noted in existing histories of the Tokyo Trial, but the anachronism (by today's standards) of this historical fact—and what it indicates about contemporary understandings of international (criminal) law, diplomacy, and politics, is seldom remarked upon by scholars. Takatori 2018 is an exception.

[264] Sargent to Jowitt, 30 May 1947: FO 371/66553 TNA.

[265] Telegram (U610/1/73), 16 May 1947: LCO 2/2992, TNA.

[266] Meeting Minutes regarding War Crimes Tribunal for the Far East, 14 May 1947: LCO 2/2992, TNA.

[267] Meeting Minutes regarding War Crimes Tribunal for the Far East, 14 May 1947: LCO 2/2992, TNA.

[268] Meeting Minutes regarding War Crimes Tribunal for the Far East, 14 May 1947: LCO 2/2992, TNA.

[269] Telegram (U610/1/73), 16 May 1947: LCO 2/2992, TNA.

[270] Telegram (U610/1/73), 16 May 1947: LCO 2/2992, TNA.

met with intense criticism today. The US and the Dominions were kept informed about these plans and raised no objections. Britain's plans might be inappropriate if directed at domestic courts, but not (the Allies believed) for these quasi-political international tribunals.

Pushback to Britain's schemes came from Patrick himself, who responded so strongly that he forced the government to "abandon" their plans.[271] Although Patrick had sounded the alarm about internal friction within the tribunal and the dissenting judgements, and viewed some of his colleagues as difficult to the point of being grossly unprofessional, he refused to countenance his government's wish to meddle. Patrick telegrammed to London that he "had grave doubts" about Whitehall's attempts to direct the tribunal.[272] Patrick warned Gascoigne:

> all the… judges, including he himself, would greatly resent the advent of Lord Wright" and "'Webb would blow off the handle'… They would look upon it as an attempt by a man [Wright] who has been largely responsible for the drawing up of the Charter to interfere with final judgment which *should not* be influenced by any *outside sources*.[273]

Interference would be inappropriate and contrary to the judges' expectation of judicial independence.

To further emphasize the point, Patrick stated that he thought asking MacArthur to intervene "might be dangerous…. if MacArthur were to approach Webb the latter would react unfavourably… Furthermore… Macarthur [sic] having convened the court has no longer any jurisdiction over it and cannot interfere with it in any way."[274] It would be "most improper" for him to interfere or influence

> the proceedings of the Tribunal whose sentence [he] was ultimately to review… From a legal point of view it would be improper for the reviewing authority to be informed of any differences existing between judges, save only those which might ultimately be expressed in the latter's final judgement and appeared ex facie on official record.[275]

Patrick's arguments came squarely from the perspective of professional and legal appropriateness; he advocated for the application of the professional norms and standards which define domestic criminal law proceedings, in opposition to the more fast and loose interpretation of the Lord Chancellor, the Attorney- General, and the other lawyers in the British civil service. Patrick emphasized that he felt "more strongly" about the importance of preventing dissent than his home government did, but he nevertheless felt the need to advocate for judicial impartiality and independence at Tokyo.[276] In so doing, Patrick advocated for a more robust separation between the Tribunal and its principals; he articulated and defended a view of ICL as insulated and

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[271] Letter to the Lord Chancellor (U 677/1/7), 30 May 1947: LCO 2/2992, TNA.

[272] Tokyo to Foreign Office- Telegram 702, 19 May 1947: LCO 2/2992, TNA.

[273] Tokyo to Foreign Office- Telegram 702, 19 May 1947: LCO 2/2992, TNA. Emphasis added

[274] Tokyo to Foreign Office- Telegram 702, 19 May 1947: LCO 2/2992, TNA.

[275] Foreign Office to Downing Street (U 666/1/73), 24 June 1947: FO 371/66553, TNA; Tokyo to Foreign Office- Telegram 703, 19 May 1947: LCO 2/2992, TNA.

[276] Tokyo to Foreign Office- Telegram 702, 19 May 1947: LCO 2/2992, TNA.

independent from state interference. Patrick's assessment of Webb's likely response to heavy-handed external meddling was also prescient. By this time, Webb had been waging his own battle against external interference, especially by "actively resist[ing]" MacArthur's and SCAP's efforts to "direct the tribunal" as inappropriate.[277] In particular, Webb resented and resisted SCAP's attempts to shape the prosecution strategy and indictments.

Patrick's response was met with shock and disappointment in London. But it was not overridden. The British government could have chosen to ignore Patrick and intervene with MacArthur and Evatt, or even to withdraw Patrick (whose salary was paid by Whitehall). Instead, they begrudgingly followed his instructions, noting his qualifications and authority on the matter. The British government's position was that Axis war criminals should be punished via judicial proceedings and following expert legal practice. Having established the authority of legal expertise in the ICL field, it would have been difficult or impossible for them to override the strong recommendation made by their chosen legal expert without undermining their ability to credibly claim to support the tribunal, or undermining the tribunal itself. Here we see the expert legitimation trap at work. Expert practitioners deployed the same rhetoric of legal standards and legitimacy which the Allies had used to justify creating the tribunals in order to constrain Britain's freedom to interfere in the IMTFE.

Robbed of the ability to make the direct approach, the British tried subtler methods. In late May 1947, Foreign Office Assistant Undersecretary Esler Dening met with the Dutch government to discuss their mutual desire to stop Pal and Röling from writing dissenting judgements. He reported to London:

> I told Jonkheer van Vredenburch [of the Foreign Ministry] that, according to our information, the Dutch judge on the War Crimes Tribunal was likely to enter a dissenting judgment which would challenge the charter under which the judges were appointed to the Tokyo War Crimes Tribunal and that, if that were so, he might find himself taking similar action to the Indian judge…. Before I left M. van Vredenburch told me that he had enquired into the matter. Apparently there is a commission of four jurists at The Hague *responsible for controlling the activities of the Dutch judge* in Tokyo… van Vredenburch assured me that, though they themselves were somewhat dubious about the validity of the charter, they were *unlikely to allow* the Dutch judge to challenge it in his judgment… It is to be hoped therefore that the Dutch judge will *conform* when the time comes.[278]

This news was greeted with excitement in London. One Foreign Office official was "sure Lord Patrick will be very relieved to hear this" and eager to "[pass] this confidentially on to Tokyo and [inform] the relevant [British government] departments."[279] The Lord Chancellor also celebrated

[277] Boister and Cryer 2008b, 83.
[278] Sargent Japan Department Minute (U689), 21 May 1947: FO 371/66553, TNA.
[279] Garner Marginalia, Foreign Office Minute (U689), 22 May 1947: FO 371/ 66553, TNA.

the "comforting news," hoping that "if the Indian [Pal] is unsupported [in writing a dissent] he may in the end toe the line."[280]

It took the intervention of Birkett, the erstwhile British judge at Nuremberg, to bring them to earth. He informed the government that "it would be inadvisable to pass this on. Netherlands judges are known to be very independent, and the Netherlands authorities might not in fact be able to control him."[281] Once again, the British had expected the Tribunal's judges to respond to demands made by their home governments and were reminded that the legal professionals sent to Tokyo had their own ideas about professional behaviour. As they had with Patrick's recommendation, they grudgingly heeded Birkett's warnings and abandoned the idea, bowing to his presumed authority. It is not clear that such a "commission" to "control" Röling ever existed but, regardless, Röling made it clear that he was committed to judicial independence. Birkett had the correct read on the situation, and Whitehall did not. The IMTFE was more determinedly insulated from the Allies than those states had expected.

In June 1947, they turned back to Patrick for ideas on how to ensure a unanimous judgement. The only appropriate and "fruitful action" which Patrick could propose was to redouble his personal "campaign to convert his colleagues to the vital necessity" of unanimity and support for the Nuremberg judgement. He had "by no means given up hope" but warned that "any action which might be taken *from outside would* destroy all chance which he might still have of making his colleagues see the light."[282] Thus, Patrick clearly articulated a vision of ICL in which institutions were insulated from British meddling; internal contestation was acceptable, but direct external interference was inappropriate. The Lord Chancellor, Attorney General, Dominions Office, and Foreign Office accepted that Patrick's plan was the only available option. They agreed to "leave Lord Patrick to do his best and to hope that" his personal "campaign" to "convert his colleagues" would ensure unanimity.[283] Britain communicated this to other Allies, who agreed.[284] In the end, Patrick was unable to prevent his colleagues from dissenting. But he succeeded in contesting the Allies' expectation of quasi-political justice and state control. Patrick prevented the British Government from directly interfering with MacArthur, the Australians, or the Dutch to change the outcome of the trial, and vocally articulated and defended the importance of judicial independence and impartiality for ICL institutions. That the British government followed Patrick's instructions indicates that he was a respected authority on legitimate action in ICL, and that states (at least the Western Allies) no longer felt able to credibly assert total control.

This defence of judicial independence paved the way for the further insulation and autonomy of ICL institutions, including the rise of the trustee model of legal expertise in the post-Cold War era. But these new norms did not immediately take hold among Allied governments. It is striking that, even after the tribunals closed, officials in Britain, the United States, and the Dominions

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[280] Jowitt Marginalia, Foreign Office Minute (U689), 22 May 1947: FO 371/ 66553, TNA; Jowitt Marginalia, Foreign Office Minute (U677), 23 June 1947: FO 371/ 66553, TNA

[281] Foreign Office Minute (U689), 22 May 1947: FO 371/ 66553.

[282] Outgoing to Addis (U666/1/43), 24 June 1947: FO 371/ 66553, TNA. Emphasis added. The draft strikes out "might" in favour of "would."

[283] Letter to the Lord Chancellor (U 677/1/7), 30 May 1947: LCO 2/2992, TNA.

[284] Especially the US, Canada, and New Zealand.

seemed to be unable to imagine that judges at Nuremberg or Tokyo might have acted independently of the desires of their home governments. This speaks to just how deeply engrained the quasi-political delegation model of ICL had been. One notable exchange occurred in late 1948, after the IMTFE's final judgement (and dissenting judgements, including those of Pal and Röling) had been published. Scott, a British Foreign Office official, commented to a colleague: "It is interesting to speculate what caused Pal to come to Japan with his mind already made up [to dissent]. I believe that he may have been prompted by his Government to take his attitude for political reasons, for it would be in line with their Asiatic policy."[285] Scott's colleague filed the letter and recorded, "I have pointed out to Mr. Scott… that The Dominion of India did not exist when Mr. Justice Pal went to Tokyo in 1946."[286] Perhaps Pal was not acting under orders after all.

The IMT and IMTFE's embrace of judicial independence and the workings of the expert legitimation trap are also evident in the verdicts and findings of the two tribunals. The Allies did not get all (or even *most*) of what they wanted from the tribunals. As discussed, the Allies' (especially the Americans') hope that the tribunals would vindicate and support the narrative of Nazism (and, to a lesser extent, Japanese Imperialism) as fundamentally a criminal conspiracy, was disappointed. Likewise, the Soviets' desire that all defendants should be sentenced to death or at least life in prison was stymied, as was the Allies' desire that the IMTFE should issue a unanimous judgement in support of Nuremberg. The tribunals certainly advanced international criminal law in many ways. Many scholars have examined the crucial jurisprudential and conceptual contributions of the tribunals.[287] In addition to such contributions, the tribunals defined appropriate professional values and behavioural norms, narrowed the scope of legal concepts, and defended the field from overt state interference, furthering the development and expert capture of ICL.

Conclusion

The saga of the post-war tribunals demonstrates the expert legitimation trap in action. Allied states' initial expectations for the IMT and IMTFE were contradictory, but coalesced around a vision of ICL as a field in which legal experts would serve as state delegates within "quasi-judicial" victors' tribunals. Such institutions were meant to enact and legitimate specific political goals without paying undue attention to "sterile legalism" or domestic principles of legality and judicial independence. Once the tribunals began to operate, the Allies' vision was challenged and contested from almost every conceivable angle, as tribunal officials worked to import principles of legality, define and discipline internal norms and attitudes, and repel overt state interference. Not all challenges were successful, but the different ideas and visions of ICL which gained traction within the IMT and IMTFE owed much more to the internal deliberations of tribunal officials than to the imposition and direction of the Allies. The post-war critical juncture saw ICL partitioners leverage their state-granted positions and legitimacy to assert, defend, and consolidate authority in the field, including authority to define its hegemonic common sense, despite the protestations of

[285] Scott to Dening (PA39/18/48), 25 November 1948: DO 35/2938, TNA.

[286] Dening Marginalia (PA39/18/48), 20 December 1948: DO 35/2938, TNA.

[287] Mettraux 2008; Bassiouni, Falk, and Onuma 1986; Douglas 2012; Bloxham 2013; Marrus 1997a; Boister and Cryer 2008b.

the Allies. The Allies were entrapped. This loss of control, combined with other geopolitical considerations, led the Allies to abandon ICL institution-building shortly after the closing of the IMTFE. This abandonment opened further space for expert capture, contestation, and autonomy. The legacies of the tribunals and developments in the field after the Allies abandoned ICL in the late 1940s are discussed in the next chapter.

Chapter Six: Interlude: Cold War Growth

After the conclusion of the Tokyo Tribunal, the erstwhile Allies made it clear that they had no interest in establishing further tribunals. However, ICL continued to evolve—in an academic sense, if not a practical one. By apparently abandoning ICL during the Cold War, powerful states left the field open for other actors—particularly academics and professionals—to "play" and struggle without state input. After working hard to trumpet the legitimacy and importance of the IMT and IMTFE, the erstwhile Allies halted further institution-building but did not prevent the continued development of an autonomous field with unique norms, concepts, and conventional wisdom. This opened space for IL professionals and academics to further capture the field and develop tools and proposals that future practitioners could invoke to exercise further autonomy.

Immediate Legacies of the Tribunals

In the wake of the IMTFE, the Allies concluded, in the words of the British Foreign Office, that "further international trials" were "not only undesirable but also unnecessary."[1] States had felt their control over ICL slipping by the middle of the Tokyo trials; any hint towards future trials was met with reluctance from statesmen and practitioners.[2] By September 1947, the British Foreign Office declared that further "elaborate" international trials would be "a complete waste of time."[3] By July 1948, the inter-Allied Far Eastern Commission (FEC) concluded "as a matter of policy… no further trials… should be initiated" in Japan.[4] Likewise, as Cold War tensions calcified, the prospect of further international trials in Europe evaporated.[5]

As Bassiouni argues:

> post-WWII international criminal justice developments evidenced how the international community, mostly the major powers… were willing to establish some system of international criminal justice – provided they could control it… When the Cold War broke out… realpolitik within international criminal justice quickly curbed its development.[6]

Experiences with obstinate IMT and IMTFE judges, including their efforts to insulate the tribunals and navigate the tensions inherent in the Allies' expectations, had demonstrated that the Allies could *not* fully control ICL. Boister argues the IMTFE "slowly disintegrated under the weight of its own assumptions," as Allied elites' expectations "placed irresistible pressure on the judges to manipulate procedural and evidential rules to ensure the trial did not completely disintegrate… the very fact that the trial permitted this debate indicates that its authors did not have it under sufficient control."[7] The awkward intersection of the Allies' expectations and the judicial standards and

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[1] Foreign Office to Tokyo (F12511/12434/23), 20 September 1947: FO 371/63820, TNA.

[2] Comyns-Carr to Rieu, 10 June 1947: LCO 2/2992, TNA.

[3] Letter from Japan and Pacific Department to British Embassy (F12511/12434/23), 23 September 1947: FO 371/63820, TNA.

[4] "Enclosure 'B:' Trial of Japanese War Criminals" (FEC-314), 29 July 1948: LCO 2/2992, TNA.

[5] Hirsch 2020, 394.

[6] Bassiouni 2017, 94

[7] Boister 2014, 28.

instincts of their chosen practitioners had fuelled efforts to discipline and insulate the tribunals, entrapped the Allies, and demonstrated that ICL was more difficult to credibly shape from afar than expected. This, combined with rising Cold War tensions, made the continued practice of ICL unpredictable and unappealing.

The practice of ICL depended on states' political will; during the Cold War, they were uninterested. The application of ICL was limited to domestic proceedings, such as those held in connection with Canada's Deschênes Commission, where individuals were tried according to domestic laws and international participation was unnecessary.[8] As a result, by the 1990s, few, if any, legal experts had more than a theoretical understanding of ICL; there was no ongoing practice at the international level and ICL was "underground" again, as it had been during the interwar period. Yet, powerful states' disinterest did not deter other actors from continuing to develop the field.

Non-state actors kept ICL alive and laid further groundwork for expert capture, once again operating in an arena from which powerful states had withdrawn. As Bassiouni recalled,

> by 1989… few [people] directly recalled the atrocities discovered in the wake of World War Two and… the post-WWII justice experiences… the sense of continuity in international criminal justice had all but stopped, except for the work of academics and human rights activists, without whom not much would be left today.[9]

This work took many forms. The Cold War period saw a "wave of codification" through the creation of instruments like the Genocide Convention, although there was no accompanying "wave of application."[10] There were also periodic efforts by international lawyers inside and outside the UN system to lobby for a permanent International Criminal Court, and continuous academic and professional discussion of the legacies of Tokyo and especially Nuremberg.[11] Thus, ICL's common sense was different when the ICTY and ICTR were established in the 1990s than it had been at the closing of the IMTFE in the 1940s. Once the 1990s tribunals began operating, the conventional wisdom on these questions was challenged again, as tribunal officials—who wielded more decision-making power and legitimacy than they had before—put ICL back into practice.

UN-Affiliated Efforts

The Cold War saw a surge of codification and professional and academic interest in ICL and related fields, including human rights and international humanitarian law. Some developments occurred in UN-related fora, although non-state actors were key protagonists. Whereas officials at Nuremberg and Tokyo were unsure of which law they were meant to "apply"—the London Charter, "natural law," national laws, the Kellogg-Briand pact, or something else—their 1990s counterparts could draw on a much more robust corpus of written ICL. Instruments such as the 1948 Genocide Convention, the 1949 Geneva Conventions, and their 1977 Additional Protocols

[8] For example: Montague 1987.

[9] Bassiouni 2017, 94-95, note 35.

[10] Sliedregt 2014, 1139-1140.

[11] Kelsen 1947; Leonhardt 1949; Mueller 1987. For a selection, see: Mettraux 2008.

helped solidify earlier efforts.[12] These changes also reduced the potential for accusations that the ICTY, ICTR, and subsequent ICL institutions were violating the principle of *nullum crimen sine lege*. Despite resistance from some states,[13] by the 1990s, it was "universally widely acknowledged" that certain Cold War-era legal provisions such as the prohibition of genocide and the prohibition of murder, torture, and other abuses against non-combatants[14] were part of customary international law and *jus cogens.*[15] *Jus cogens* ("compelling law") refers to the category of international norms which are universally accepted as mandatory or peremptory. The finding that such concepts were part of *jus cogens* was made by an "impartial Commission of Experts" tasked with investigating the Rwandan genocide, and then accepted by the UNSC and Secretariat.[16] Thus, in addition to demonstrating the huge growth of customary and codified ICL during this period, the finding also demonstrates mainstream acceptance of IL expertise in ICL by the mid-1990s.

The history of ICL instruments—especially the Genocide Convention—has been written about extensively, with accounts often foregrounding the crucial role played by legal professionals, academics, and activists in framing and promoting these efforts.[17] In particular, recent works celebrate the advocacy of Polish lawyer Raphael Lemkin, who coined the term "genocide" and lobbied for the adoption of the Genocide Convention.[18] Such professional-led developments narrowed the scope of contestation at post-Cold War ICL institutions, dissolving questions that had plagued practitioners at Versailles, Nuremberg, and Tokyo, such as whether individuals could ever be held personally criminally responsible for something called "crimes against humanity," and whether mass slaughter was an international crime even outside the context of an aggressive war. By the 1990s, the accepted answer was "yes," although the question of how this could be operationalized remained. For example, the Genocide Convention provided for the jurisdiction of a hypothetical "international penal tribunal," but did not create one.[19] Even Lemkin focused primarily on ensuring genocide's inclusion in individual nations' criminal codes so that *domestic* courts could prosecute it.[20]

IL professionals and academics also participated in projects that garnered less attention from states but nevertheless advanced the field. The work of the International Law Commission (ILC) was particularly influential. The UN General Assembly (UNGA) established the ILC in 1947[21] to act on Article 13 of the UN Charter, which stipulated that they should "initiate studies and make

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[12] *Convention on the Prevention and Punishment of the Crime of Genocide* ("Genocide Convention"), 9 December 1948; *Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field*, 8 December 1949; *Geneva Convention (II) on Wounded, Sick, and Shipwrecked of Armed Forces at Sea*, 8 December 1949; *Geneva Convention (III) on Prisoners of War*, 8 December 1949; *Geneva Convention (IV) on Civilians,* 8 December 1949; *Additional Protocol (I) to the Geneva Conventions,* 8 June 1977; *Additional Protocol (II) to the Geneva Conventions,* 8 June 1977.

[13] The United States Senate took thirty-seven years to ratify the Genocide Convention.

[14] Geneva Conventions, 1949, Common Article 3.

[15] S/1994/1125, 26 and 32.

[16] S/1994/1125, 1.

[17] Becker 2021; Sands 2017; Power 2013.

[18] Sands 2017; Power 2013.

[19] Genocide Convention, Article 6.

[20] Lemkin 1947.

[21] A/RES/174(II).

recommendations for… the purpose of encouraging the progressive development of international law and its codification."[22] The commission comprised fifteen UNGA-elected expert members with "recognized competence in international law," further demonstrating the ascendence of expertise in the field.[23] The ILC was tasked with "the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine" (the "codification" of IL) and "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" ("progressive development").[24]

The ILC produced forty-four annual reports between 1949 and 1992, becoming an important forum for academic and professional discussion of ICL and other aspects of international law. The ILC's first program of work was based on the suggestions of Hersch Lauterpacht, one of the twentieth century's "most influential international lawyers," who advised the UN Secretariat as part of the preparatory work for the ILC.[25] The ILC's first agenda in 1949 included the "formulation of the principles recognized in the Charter in the Nurnberg [sic] Tribunal and in the Judgment of the Tribunal;… [and] preparation of a draft code of offences against the peace and security of mankind."[26] The ILC also agreed to discuss the "desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."[27] From the beginning, the ILC was committed to both codifying ICL and spearheading the development of new institutions. Notable ILC achievements include the *Formulation of the Nurnberg Principles* [sic] in 1950 and the *Draft Code of Crimes Against the Peace and Security of Mankind* later in the decade.[28]

The ILC was more than a mere UNGA surrogate. When asked to "formulate" the Nuremberg Principles, the Commission debated "at… length the relationship between the Charter of the Nurnberg [sic] Tribunal and international law."[29] Various members wanted to make it crystal clear that "formulating" the Nuremberg principles was not the same as "declar[ing] that everything in the Nurnberg Charter and judgment constituted principles of international law."[30] At one early meeting, the ILC chairman noted:

> practically all the jurists in the world had expressed their opinions on the [relationship between the Nuremberg Principles and international law], and he wondered whether the Commission would be likely to find a fresh solution. He suggested that for the moment abstract notions be abandoned and the study of the principles… be taken up. Possibly the

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22 United Nations Charter ("UN Charter"), 24 October 1945, Article 13.
23 A/RES/174(II), Articles 2-3.
24 A/RES/174(II).
25 Koskenniemi 2002, 2; United Nations 1957b, 279.
26 United Nations 1957b, 279
27 United Nations 1957b, 279
28 Bassiouni 1993.
29 United Nations 1957b, 30.
30 United Nations 1957b, 30; 1957a, 181-195.

> Commission might decide that some of those principles were *not* principles of international law.[31]

Members were uncomfortable with aspects of the Nuremberg judgment which "had not been accepted" by the Commission.[32] For example, "the Tribunal had affirmed that it was not obliged to apply the principle 'nullum crimen sine lege.'… There were principles in the Nurnberg judgment that the Commission did not wish to adopt."[33] The commission was clearly conscious of being in dialogue with "jurists" and other legal experts rather than being the mouthpiece of states, and was comfortable with questioning the recent Nuremberg precedent on technical legal grounds, despite the erstwhile Allies' strong desire that the Nuremberg precedent be endorsed in its entirety. The commission was not antagonistic to the UNGA, but it nevertheless carved out space for expert dialogue and debate, following the steps taken at Nuremberg and Tokyo to insulate the field.

The *Draft Code of Crimes Against the Peace and Security of Mankind* was revised and revisited by the ILC frequently throughout the Cold War and aimed to define "offences against the peace and security of mankind, [which]… are crimes under international law, for which the responsible individuals shall be punished."[34] The UNGA consistently postponed and avoided discussions of the draft code and did not adopt it, but the document nevertheless catalysed further debates in ICL and provided an opportunity for IL professionals to refine the definitions and modes of liability of international crimes. For example, in the 1980s the ILC decided to limit "the scope *ratione personae* of the draft code to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States," leaving the door open for the criminal accountability of *states* in addition to *individuals*, something which would obviously not be palatable to UN member states.[35]

The ILC was willing wade into difficult territory. In 1991, the ILC updated the *Draft Code* to include not only "Nuremberg crimes" like aggression, genocide, and war crimes, but a number of other offenses including threat of aggression, apartheid, illicit traffic in narcotic drugs, and wilful and severe damage to the environment.[36] In doing so, the ILC drew together and interpreted existing IL scholarship and international conventions.[37] Most notably, the ILC worked, in parallel and in collaboration with a Special Committee of the General Assembly, throughout the Cold War to generate a new definition for the crime of aggression, which had been so central to the Napoleonic, Wilhelmine, and post-war ICL efforts.[38] These efforts were ignored by the UNGA plenary and the superpowers: they were insulated from state interference but also cut off from state endorsement or enactment.

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[31] United Nations 1957b, 30, emphasis added.
[32] United Nations 1957b, 31.
[33] United Nations 1957b, 31.
[34] *Draft Code of Offences against the Peace and Security of Mankind 1954*.
[35] International Law Commission 2023.
[36] International Law Commission 2023; A/46/10, 94-107.
[37] Bassiouni 1993, 248.
[38] Holthoefer 2011, 10.

The ILC was also a forum for debates over the creation of a permanent International Criminal Court—a debate which would become even more important in the late 1990s, culminating in the 1998 Rome Conference, which created the modern International Criminal Court. In the 1950s alone, the ILC received reports on International Criminal Jurisdiction and the creation of a permanent International Criminal Court from two different Special Rapporteurs. The first, Ricardo Alfaro, argued for the creation of "both a substantive international criminal code and a statute for an international criminal court."[39] The second, Emil Sandstrum, took the opposite position, arguing "the time for such a court was not yet ripe."[40] This debate continued throughout the period; the possibility of a permanent court being premature did not deter academics and IL experts from discussing and drafting several proposals for such an institution.[41] This debate also unfolded outside the ILC, with professional associations like the International Commission of Jurists (ICJ), and prominent lawyers and practitioners like Benjamin Ferencz (a Nuremberg prosecutor) and Robert Woetzel playing a large role.[42] Bosco argues, "by the early 1950s, the Nuremberg moment had passed and… momentum dissipated… the Cold War precluded the construction of such an ambitious" international criminal court.[43] It is true that the UNSC and UNGA showed little interest in creating a successor institution to the IMT or IMTFE, but, contra Bosco, the court project was not "dormant." It was underground.

Professional Associations' Efforts

Outside the UN system, other professional associations engaged in lively debates. As early as October 1946, both the Grotius Society and the International Law Association had begun to seriously consider the "codification of international law on new lines."[44] These "new" lines would be explicitly "expert" ones. Cecil Hurst told the Grotius Society: "the need of the moment…is for the international lawyers of all countries to… [formulate]… and [agree] among themselves a statement of the rules and principles of international law… until then… we are in a weak position for maintaining… that international law is binding upon all States."[45] Hurst was clear that such work "cannot be done by Governments or by delegates working under Government instructions" nor by "individuals;" since inter-governmental politics would pollute legal "science" and "the authority of one man" would never carry sufficient "weight."[46] Hurst welcomed the UN as a potential vehicle for such expert-led codification, warning if the UN "will only be guided by the lessons of the past and will avoid the errors into which the League of Nations was led by its attempts to achieve codification of international law through governmental action, it may well be able to build up the system of law and justice on which the new world order must rest."[47] The ILA's quarterly journal enthusiastically reprinted Hurst's speech, and noted that the UNGA's

[39] Bassiouni 1993, 250-251.
[40] Bassiouni 1993, 250-251.
[41] Julius Stone and Woetzel 1970.
[42] Ferencz 1975; Röling 1976; Julius Stone 1976; Ferencz 1972; Julius Stone and Woetzel 1970; Woetzel 1960.
[43] Bosco 2014, 3.
[44] Hurst 1946, 135.
[45] Hurst 1946, 135-136.
[46] Hurst 1946, 140.
[47] Hurst 1946, 158.

decision to "establish a Committee of Experts" (the ILC) was promising; the ILA also established its own committee to "develop and formulate" international law.[48] Likewise, conferences proliferated, often touching on ICL-related topics. As early as November 1946, over two hundred lawyers, including many architects and participants of the post-war tribunals, gathered in Paris for the first International Congress of Jurists to discuss the theme of "Law and Peace."[49] This included the "unfinished business" and mistakes of the Nuremberg tribunal (which had only carried out its sentences a month before).[50]

The ASIL remained a crucial forum for scholars and practitioners. The ASIL's membership grew significantly during the Cold War period, as did that of the IL profession.[51] In 1943, the ASIL discussed "the international ordering system that they thought must come at the end of the war," including "an organization of states capable of preventing aggression, a permanent international judicial system with obligatory jurisdiction" and a system for "the punishment of war criminals."[52] After the Nuremberg and Tokyo tribunals closed, the ASIL continued to consider these issues and act as a forum for debates on questions relating to the laws of war and the definition of aggression.[53] As an illustrative example, at the ASIL's 50th Annual meeting in 1956, the Society's Certificate of Merit was awarded to Julius Stone for his book *Legal Controls of International Conflict*, which surveyed proposals for an International Criminal Court.[54] ASIL members including Quincy Wright, Philip Jessup, and Myres McDougal were prominent in this discussion.[55] Stone also made it clear that scholarly campaigns for an international criminal court were at odds with Cold War geo-political competition but still important, writing, "in a world in which the values of both truth and justice seem in process of partition among national domains it is easy to dream of their reintegration in the international domain."[56] In a world where the superpowers and other states were increasingly disinterested in the practice of ICL, academic discussion of the future of ICL was still worthwhile.

Other notable associations included the ICJ; The International Criminal Law Commission (ICLC); the Foundation for the Establishment of an International Criminal Court (FEICC); and the International Association of Penal Law (AIDP). These institutions played pivotal roles in advancing the field during the Cold War. In the 1960s, AIDP members entered a doctrinal debate about the status of individuals under international law. Until Nuremberg, individuals had been defined as objects, rather than subjects. The work of M. Cherif Bassiouni, the "'father' of modern international criminal law" and other AIDP members not only supported plans for an international criminal court, but also helped promote the definition of individuals as subjects, which proved highly consequential for Human Rights law and ICL, setting the stage for the field's turn towards

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48 Hudson 1947, 106.
49 Hirsch 2020, 392.
50 Hirsch 2020, 393.
51 Kirgis 2006, 189-192.
52 Kirgis 2006, 167-168.
53 Julius Stone 1954; Kirgis 2006, 194.
54 Kirgis 2006, 247.
55 Jessup 1953.
56 Julius Stone 1954, 379.

the "atrocity paradigm" in later years.[57] Institutions such as the ICJ, FEICC, and ICLC pushed for an official definition of aggression and participated in draft proposals for an international criminal court.[58] None of these efforts were ratified by states or enacted in practice, but all contributed to the development of professional and academic ICL, and to the crystallization of scholarly "common sense" about key issues.

Continued Reception of the Post-War Tribunals

As the ILC had noted, the Cold War saw a stream of scholarship and debate about the legacies and precedents of Tokyo and especially Nuremberg; by 1950, it seemed like "practically all the jurists in the world had expressed their opinions" on the legality, legacy, and precedent of the post-war tribunals.[59] Nevertheless, professional associations continued to re-interpret ICL and the legacies of Nuremberg and Tokyo throughout the Cold War.[60] Tribunal alumni participated in this flurry, with prosecutors, judges, defence counsel, and others (perhaps most famously the IMT's prison psychologist) writing and speaking about the tribunals' inner workings and legacies.[61]

As the Cold War wore on, the triumphant post-Nuremberg mood dissipated, but the Nuremberg precedent was not entirely rejected and certainly not forgotten. By the 1982 ASIL annual meeting, Nuremberg and especially Tokyo had become "notorious" "victor's tribunals" whose precedents were not above question.[62] In particular, lawyers questioned the tribunals' uneasy relationship with the principle of *nullum crimen sine lege*, their neglect of war crimes committed by the Allies, and their more tenuous verdicts, including *in absentia* ones.[63] Such debates proved important for reinforcing the ICL field's emerging internal discipline and common sense. While the Napoleonic precedent had found no professional community to immediately receive and interpret its meaning, the post-war tribunals were considered from every angle until a strong scholarly consensus emerged about the good and bad of those institutions. That consensus rejected direct state interference and the boldest forms of *ex post facto* lawmaking, while still retaining appreciation for inventiveness within the bounds of accepted legal principles, including judicial independence.

The field also experienced internal growth and became more cohesive and standardized. The Cold War saw an increase in the number of IL and ICL courses offered at major law schools, spurred on by the "publication of new teaching materials, an increase in the number of law professors who were qualified to teach the subject, and a growing student perception of the utility of international training."[64] The period also saw an increase in membership of professional IL associations; for example, the ASIL had approximately 1100 members in 1933 and 4300 members

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[57] Berlin 2020, 898; Bassiouni 2015.

[58] Bassiouni 1995.

[59] United Nations 1957b, 30, emphasis added.

[60] For example, see the Proceedings from the ASIL's 1986 Annual Meeting, including Paust and Taylor 1986; Bassiouni, Falk, and Onuma 1986; "Discussion" 1986.

[61] Taylor 1993; Conot 1983; Neave 1978; Kramer 1961; Bosch 1970; Gilbert 1947; Horwitz 1950.

[62] Rubin 1982, 140.

[63] Lippman 1988; Luban 1987.

[64] Scoville 2015.

by 1993.[65] Although other areas of public international law received more attention than ICL, the growth and consolidation of the general IL discipline contributed to the strengthening of professional networks and academic communities, which would be influential in future ICL practice and the consolidation of the expert capture of the field. In this way, the ICL discipline continued to be "disciplined" and defined. This comports with Kauppi's (and Bourdieu's) account of how fields gain autonomy and develop unique forms of capital and culture, as "profanes" and "amateurs" are replaced by "professionals," "outsiders" are isolated, "internal mechanisms" of determining status and capital become more important, and "struggles are sedimented and institutionalized."[66] Appropriate qualifications for IL and ICL practice were more clearly defined and disciplined in 1990 than they had been in 1945.

Other areas of international law continued to develop in practice; new legal philosophies and common wisdoms developed alongside them. These philosophies were later imported into ICL. As Koskenniemi discusses, this period saw the "birth of pragmatism" in international law. Following the Second World War, many scholars moved away from a rationalist, scientific, or positivist view of international law, and embraced pragmatic constructivism. Koskenniemi cites the developing thought of Hersch Lauterpacht, which was characterized by:

> an increasing emphasis on the importance of enlightened international law practice. He aimed to grasp the problem of world peace – always a problem of legal order to Lauterpacht – from two sides: the postulation of a cosmopolitan ethic and a stress on legal activism. Each… support[ed] the other: the cosmopolitan ethic was concretized in enlightened judicial practice; judicial practice received its legitimacy from progressive cosmopolitanism. The two were brought together in a constructive conception of the legal order as a function of judicial imagination.[67]

In more straightforward language, Lauterpacht and many of his colleagues began to reject the idea that the law could simply be "found" through the strict application of legal rules; instead, they began to celebrate "flexibility," "judicial creativity," "activism," and "imagination by lawyers."[68]

Koskenniemi's discussion of Lauterpacht's pragmatism is worth quoting at length, since it helps explain a dominant legal philosophy in twentieth-century IL and sheds light on why the trustee-model of ICL expert governance became so popular after the Cold War. Pragmatists:

> dismissed the view of judicial practice as the simple application of rules, for "those rules are often obscure or controversial"… yet… this was not to give the Court a license to replace the law… [or] to allow a "rule of thumb" to replace a "flexible, critical and discriminating" application of the law. This duality of freedom and constraint, creation and repetition… links liberty with responsibility and set clear limits… *Everything depends on the enlightened responsibility of judges* that enables them to see how far they can go and at what

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[65] Kirgis 2006, 13.
[66] Kauppi 2003, 779.
[67] Koskenniemi 2002, 399.
[68] Koskenniemi 2002, 402-403.

> point deference to diplomacy and State will becomes necessary… Lauterpacht's utopia is a world ruled by lawyers.[69]

The eventual attitudes of the International Criminal Tribunals for Yugoslavia and Rwanda, and proposals for an International Criminal Court, reflected this vision of law and independent enlightened judicial activism. As the next chapter of this thesis will discuss, this point of view was prevalent amongst participants in the post-Cold War tribunals. It became a source of cohesion and common purpose in the courts—although it was not shared by the states that appointed tribunal officials.

Conclusion

States largely withdrew from the ICL field during the Cold War. From obstructing efforts to adopt the ILC's *Draft Code* to blocking codification efforts, the UNGA and UNSC were not always active partners of IL academics. Bassiouni gives an overview of the "general consensus of the world community" (by which he primarily means UNSC states) during the early Cold War years that an international criminal court might be "desirable in an idealistic sense" but was "doomed."[70] Bassiouni reports:

> debate on the wisdom, legality and advisability of such a tribunal continued, but it only concealed the fact that no state was ready to act… But *since no state wanted to bear the brunt of being blamed for having obstructed the course of such an idea, the debate continued*. Indeed, the powers that had established the Nuremberg and Tokyo Tribunals only a few years earlier *could not make a complete about-face* in such a short period of time *without losing face and credibility*. Moreover, such a position would have given more credence to the claims that Nuremberg and Tokyo were the imposition of a victor's vengeance on its defeated enemies.[71]

Thus, in a clear manifestation of the expert legitimation trap, the creation of and rhetoric about the post-war tribunals left states hoist on their own petard, unable to disavow or stop the ICL project during the Cold War. When states withdrew from the practice of ICL, academics and IL experts stepped in to fill the vacuum. They continued to develop ICL common sense without input from states, which proved crucial for the later cohesion and autonomy of their profession.

States blocked the production of both "an international criminal code [and] a statue for an international criminal court," eager avoid being "placed in the position to make a political decision on a final legal product, which none of these governments really desired."[72] States lacked the political will to create an international criminal court or put ICL back into practice, but their inability or unwillingness to prevent debates over ICL, Nuremberg, Tokyo, and permanent court opened up space for scholars, experts, and other stakeholders to continue developing the field. By the time the UNSC returned to ICL and began taking it seriously again in the 1990s, the sand had shifted under their feet and the ICL field looked very different than it had in the 1940s. The field

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[69] Koskenniemi 2002, 404, emphasis added.

[70] Bassiouni 1993, 251.

[71] Bassiouni 1993, 251, emphasis added.

[72] Bassiouni 1993, 252.

was also populated by more prominent and stronger groups of other players, especially the new, more mature IL expert community, which was poised to consolidate, ratify, and further capture ICL.

Chapter Seven: The ICTY and the ICTR: Consolidation, Trusteeship, and Expansion

ICL's expert capture was consolidated during the post-Cold War period. The period also saw the inauguration, at the International Criminal Tribunals for the former Yugoslavia and Rwanda (the ICTY and the ICTR), of the modern trustee model of ICL expert governance. This model dominates the field today, as practitioners are expected to act as apolitical decision-makers, rather than state representatives or advisors.[1] This model enables trustees to make decisions and develop policy separately from traditional institutions of national politics and multilateral diplomacy. Backed by UNSC-granted autonomy, both tribunals created innovative jurisprudence while expanding their mandates and launching new initiatives. Legal practitioners in 1815 and 1919 had made strides towards gaining a voice in ICL. Practitioners at Nuremberg and Tokyo were beset by internal conflicts and the need to balance political pressures and judicial roles. In contrast, officials at the ICTY and ICTR maintained firmer boundaries between states and tribunals and established enough shared common ground to innovate. Thus, the 1990s tribunals saw further strides towards *insulating* ICL and the *consolidation* and *exploitation* of expert capture to expand the tribunals' mandates. The ICTY and ICTR also continued to *discipline* ICL, as practitioners contested but eventually embraced shared ideological, behavioural, and decision-making norms, including collegiality, commitment to the ICL project, legal pragmatism, and a focus on human rights. By the early 2000s, most aspects of modern ICL common sense had become popular or entrenched.

The ICTY and ICTR proved able to innovate, challenge expectations, and expand mandates in apparently unforeseen ways. Powerful states' rhetorical use of expertise as a source of legitimacy and acceptance of ICL as an apolitical judicial project, as examined in preceding chapters, created conditions ripe for expert capture. The legacies of such rhetorical and ideological choices hampered states' ability to constrain the autonomy of the 1990s tribunals. Through these tribunals, we see the expert legitimation trap at work and the path-dependent consequences of states' embrace of expertise. Such legitimation efforts enabled practitioners to claim authority in the field beyond the authority derived from their association with states.

This chapter explores the post-Cold War critical juncture by examining the creation and operation of the ICTY and ICTR, which were founded in 1993 and 1994, respectively. I explore the tribunals' creation and examine expectations about the tribunals' aims and relationship to states and international law. This analysis reveals that the proposition that ICL institutions should be independent and insulated from state interference, which was unheard of in 1815, marginal in 1919, and fiercely contested in the 1940s, was hegemonic by the 1990s. With few exceptions, UNSC states and legal practitioners asserted a commitment to judicial impartiality, independence, depoliticization, and insulation. However, despite this consensus, other aspects of ICL common sense—including the limits of such independence—remained unsettled. This chapter then examines the tribunals' operations, foregrounding critical moments of contestation and innovation. Such moments were shaped by and deepened ICL's expert capture.

The tribunals were characterized by struggles over ICL's common sense. This contestation occurred within the tribunals, where practitioners negotiated different understandings of their

[1] Alter 2008.

work, and more fiercely between the tribunals and their principals, in a departure from earlier patterns. Practitioners expressed and enacted a broad sense of collegiality and solidarity with their tribunal colleagues and identified more strongly with colleagues than with their home states. Although the tribunals were riven by cleavages, including divisions between practitioners trained in different models of criminal justice and disagreements over professional norms and goals, this foundation of collegiality and common goals fostered compromise. In contrast, the most profound division was between the tribunals and their principals. Continuing the IMT and IMTFE's efforts towards insulation, ICTY and ICTR officials set boundaries between themselves and external actors, repelling intervention and even directly defying state preferences. Earlier critical junctures saw legal professionals gain and defend a voice in ICL efforts, and then gradually distance themselves from states; the ICTR and ICTY asserted and consolidated their autonomy.

When creating the tribunals, the UNSC asserted the ICTY and ICTR would "apply" law, not "invent" it. The realities of IL precedent, recent advances in the IL profession, and the newfound coherence of the tribunals left practitioners with more expansive instincts. The legitimacy and authority associated with legal expertise—the strongest legacy of earlier ICL episodes—created an environment in which those practitioners could act upon inventive instincts, forge a sense of community and collegiality, expand their mandate, and further capture ICL. The ICTY and ICTR's innovations had a lasting impact on later ICL institutions and on national and international legal precedents.[2] As this chapter's examination of some of these innovations demonstrates, the tribunals had the will and rhetorical and institutional space to inconvenience, ignore, and defy states. The tribunals' innovations, including the creation of new legal procedures and expansion into new activities, illustrate the expert legitimation trap and expert capture in ICL.

The Prelude to the Tribunals

The Tokyo Tribunal adjourned in 1948; it took forty-five years for states to create another ICL tribunal—the ICTY—in 1993.[3] The ICTR followed in 1994.[4] In the intervening years, the Cambodian genocide, the Vietnam War, and other conflicts failed to spur the creation of new international tribunals. However, as discussed in Chapter Six, legal professionals spent the Cold War debating the legacies of Nuremberg and Tokyo, seeking to reignite state interest, and advancing ICL. The landscape of ICL common sense was dramatically different by the time the UNSC turned its attention to the conflict in the former Yugoslavia.

This section examines the factors that sparked the creation of the ICTY and ICTR and considers what these circumstances reveal about ICL common sense in the 1990s. While the UNSC retained the power to create institutions, states were no longer the only accepted stakeholders in ICL efforts. The UNSC was unable or unwilling to credibly assert that international justice was merely a matter of "high politics." By the 1990s, ICL experts had a greater claim to

[2] Zunino 2019, 97-111.
[3] S/RES/827.
[4] S/RES/955.

autonomy and ownership over the ICL field, proof of ever-stronger expert capture. Consequently, they zealously embraced new roles and re-shaped expectations.

Early Sparks

The UNSC "broke new ground" and experienced a "high watermark of enthusiasm over a purported new international order" at the end of the Cold War.[5] The rebirth of practical ICL in the form of the ICTY and ICTR was one product of the "End of History" moment.[6] Yet the drive to create the tribunals came from outside the UNSC, as practitioners and civil society groups called for a response to atrocities in the former Yugoslavia and Rwanda.

The conflicts in the former Yugoslavia and Rwanda were the most significant "causes" leading to the creation of the tribunals, but atrocities do not inevitably lead to an international judicial response. Likewise, pointing to the "CNN effect" does not explain why the UNSC resurrected the Nuremberg precedent and created tribunals after more than four decades.[7] Part of the answer lies with legal professionals, academics, journalists, and members of the public, who cited post-war precedents, championed Cold War-era developments, and sought to revive ICL practice. The 1990s "thaw" created a permissive environment in which these efforts could thrive, and media coverage of atrocities in the Balkans and Rwanda fuelled the fire. The first sparks of the ICTY and ICTR came from non-state actors who had internalized the idea that apparent war crimes and atrocities should be met with a legal and judicial response. The institutions envisioned, created, and abandoned in earlier critical junctures persisted in popular imagination and academic discourse, continuing to influence the field, whether states intended them to or not.

Initial calls for an international tribunal in Yugoslavia came from lawyers, Non-Governmental Organizations (NGOs), journalists, and academics.[8] Mirko Klarin, a Yugoslavian lawyer, journalist, and human rights activist published an early—understood to be the first—call for a tribunal in May 1991, before the war started in earnest.[9] In the op-ed entitled "Nuremberg Now!," Klarin argued for a "mini-Nuremberg." Later, Klarin explained:

> important principles from the Nuremberg chapter [sic] had been violated… One is planning war which is a crime against peace, and the second is crimes against humanity, because we had mass production of ethnic and racial hatred, which is the precondition to committing crimes — to kill, torture, rape… So I said, 'Let's organize a small international criminal tribunal,' something like a small Nuremberg, and let's try our leaders, big and small, before the war, even better instead of the war. It will be much better for everybody

[5] Malone 1997, 394.

[6] Levi, Hagan, and Dezalay 2016.

[7] Robinson 2002; Livingston 1997.

[8] Virginia Morris and Scharf 1995b, 29

[9] Klarin, 16 May 1991, "Nuremberg Now!," *Borba*. Reproduced (translated) in International Criminal Tribunal for the former Yugoslavia 2001.

> if it happens sooner rather than after four or five years of war, two hundred thousand dead, millions of refugees, [and] destroyed cities.[10]

Klarin's editorial demonstrates the legacy and durability of Nuremberg and Cold War developments. While the erstwhile Allies had neglected the Nuremberg Principles, those principles were remembered and formed part of the mental architecture, vocabulary, and common sense of lawyers, journalists, and activists. As such, they shaped such actors' understanding of legitimate responses to atrocities.

After writing the editorial, Klarin went to Brussels to report on the international community's response to the crisis. While there, he learned his proposal was not feasible. Klarin recalled:

> my first idea was, 'Let's see, let's talk with some law professors, with some legal advisors from the Ministry of Foreign Affairs about the possibility of creating something like… an International Criminal Tribunal for former Yugoslavia.'… I simply could not stand the idea that such things could happen at the end of the 20th century, and that nobody would be… accountable… I was… disappointed… when I heard the answer. Nobody can try them, only you can try them, nobody else can do that, I was told.[11]

Klarin was told that there was no political will for an international tribunal; he was *not* told that there was no legal avenue or precedent for creating one. His impulse to "talk with some law professors" and "legal advisors" further demonstrates that ICL and war crimes issues were strongly associated with the legal expert community, even though the power to create ICL institutions still lay with (disinterested) powerful states.

The UNSC came under further pressure. Helsinki Watch (now Human Rights Watch), under the leadership of Aryeh Neier—an activist and law professor—was the first organization to call for an international war crimes tribunal for Yugoslavia.[12] Helsinki Watch and other "international observers" generated reports on war crimes, violations of international humanitarian law, and "*prima facie* evidence that genocide [was] taking place."[13] They called on the UNSC to "intervene… to prevent and suppress genocide" and "enforce the prohibition of 'grave breaches' of the Geneva Conventions by establishing an international tribunal at the highest level to investigate, prosecute, adjudicate and punish those on all sides who have been responsible for war crimes."[14] This compounded the "CNN effect," but the UNSC "remained unwilling to institute vigorous actions to halt the bloodshed" or prosecute accused genocidaires and war criminals.[15] Eventually, in July 1992, the UNSC adopted Resolution 764, reaffirming that "persons who commit or order the commission of grave breaches of the [Geneva] Conventions are individually responsible" but did

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[10] Oral History Interview Klarin 2015, 1-2.
[11] Oral History Interview Klarin 2015, 2.
[12] Power 2013, 258; Hagan 2003, 33.
[13] Scharf 1997, 28-29; Helsinki Watch 1992, 1.
[14] Helsinki Watch 1992, 1.
[15] Scharf 1997, 33..

not specify which domestic or international, political or legal institution(s) might enforce the Conventions.[16]

Expert Commissions

In October 1992, pressure on the UNSC to "do something," together with a "peculiar alignment of [post-Cold War] state interests" led it to establish an "impartial" commission of experts to investigate war crimes in the former Yugoslavia.[17] The UNSC Commission to Investigate Human Rights Violations in the former Yugoslavia ("the 780 Commission") was established by UNSC Resolution 780.[18] Thus, the UNSC's first move ratified the role of experts in ICL; gone were the days when Lord Liverpool solicited legal advice as an afterthought, or when Woodrow Wilson actively excluded lawyers from international justice. Likewise, the fact that the UNSC response was triggered by public pressure is notable; the idea that *legitimate* international criminal justice was primarily a matter of "high politics," rather than a matter for legal experts and public concern, had lost its power. The UNSC ratified the central role of legal expertise in responding to the Yugoslavian crisis, although it did not immediately embrace judicial action.

As in previous episodes, invocations of expertise helped UNSC states legitimate preferred choices. In this case, the 780 Commission was apparently established to justify—or mask—political inaction. Hagan argues the UNSC, led by US Ambassador Madeleine Albright, created the 780 Commission as a "political substitute for a meaningful military response… it was purposefully called a commission of experts… to dampen its symbolic and instrumental possibilities, and perhaps… avoid embarrassing comparisons with the [1940s] UN war crimes commission."[19] Scharf reports the UK, Russia, and France would have preferred to call it a "committee," since the term "commission" signalled *too much* "independence and authority."[20] Scharf recalls the UK and France "made no secret of their preference that the commission be limited to a passive group that would analyze and collate information… passed on to it," rather than an investigative body, out of a fear that active expert investigation would "damage prospects for a peace settlement."[21] In particular, they worried that an active commission might endanger the Vance-Owen diplomatic peace plan, drawing a clear distinction between the expert commission and high political diplomacy. They agreed to give the commission investigative powers only after high-level US intervention.

Bassiouni, the most famous chairman of the 780 Commission, noted its "Achilles heel – the very real problem of no allocation of money or staff," which left it vulnerable to "political skullduggery" and impotence.[22] Bassiouni's words illustrate the understanding that legal expertise ought to have been apolitical and insulated from the realm of politics and "political skullduggery," and the fact that creating an expert institution does not necessarily entail meaningful support of

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16 S/RES/764.
17 Bassiouni 2017, 95; Hagan 2003, 33; S/RES/780.
18 S/PV.3119, 11; S/RES/780.
19 Hagan 2003, 33.
20 Scharf 1997, 41.
21 Scharf 1997, 41.
22 Bassiouni 2017, 99.

its work. In a rhetorical move that would have been unusual in early ICL episodes, Bassiouni drew a boundary between the internal efforts of the Commission and external political machinations. The choice to create the Commission showcased a widespread understanding that independent expert analysis and advice were sources of legitimacy in ICL even if, as Bassiouni's frustration demonstrates, appeals to expertise were not deployed in good faith. But even if establishing the 780 Commission was a mere gesture—an attempt to signal that "something was being done"—it gave legal experts an official voice in the Yugoslavian crisis. This had consequences.

The 780 Commission was headed by Bassiouni, a highly regarded academic with significant ICL expertise and UN experience. Bassiouni's description of the Commission underscores its overtly apolitical expert status and the increased prominence of experts in the field. Secretary-General Boutros Boutros-Ghali appointed all commission members based on a shortlist compiled by the UN Office of Legal Affairs. Bassiouni reports that they were appointed "in their *individual* capacity on the basis of their *expertise and integrity*. The Commission… members did *not* represent their governments, ensuring the political independence and impartiality of this fact-finding body."[23] It would be difficult to craft a better summary of the trustee model of independent, apolitical, and insulated international legal expertise. Commission members had significant international experience, subject-matter knowledge, and academic training.[24] Indeed, the US State Department worried there was "too much emphasis on academic qualifications and too little on investigative or managerial skills," unsuccessfully contesting the selection criteria used by the professional and bureaucratic UN Office of Legal Affairs.[25] The 780 Commission was a self-consciously depoliticized, independent, expert body; in other words, it was a visible product of the idea that legitimate action in ICL is carried out by apolitical experts.

The 780 Commission's expert credentials were understood to be a source of legitimacy and status. According to Bassiouni, members' "qualifications… came from their individual international reputations and high standing as well as their collective network of contacts and connections."[26] Separate from any delegated authority (as agents of UN states), the Commission emphasized its expert status, independence, and moral authority. The Commission was not formally beholden to states to validate or maintain its work, although the UN held the purse strings. Therefore, the Commission was more confident, active, and irritating than many UNSC states had expected. Bassiouni reports many ways the Commission overcame the financial and political obstacles imposed on it by the UN, some of which were met with consternation from states, but were not aborted.[27] The Commission's first report recommended the creation of a tribunal and became the explicit basis of UNSC Resolution 827, which established the ICTY.[28]

The ICTR was created following a similar process. The Rwandan genocide began in April 1994 and ended in July 1994; it generated widespread concern, attention, and outrage at the international

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[23] Bassiouni 2017, 127, emphasis added.
[24] Bassiouni 2017, 127.
[25] Scharf 1997, 42.
[26] Bassiouni 2017, 101.
[27] Bassiouni 2017.
[28] S/RES/827.

community's inability or unwillingness to intervene. In June, the UNSC authorized a multi-national operation to ensure and maintain security, humanitarian areas, and relief.[29] Throughout the summer, UN Human Rights Special Rapporteurs monitored and reported on the genocide.[30] Van den Herik summarizes the tension between these initiatives, noting the UNSC "at first appeared reluctant to qualify the killings in Rwanda as genocide, due to the legal and moral obligations that such a qualification would entail under the 1948 Genocide Convention."[31] The UN Human Rights Commission and UN Special Rapporteurs stated their belief "that genocidal acts were being committed… [thereby forcing] the Secretary-General and the Security Council to recognize that genocide was being committed and to act on it."[32] Indeed, one Special Rapporteur made it clear that he interpreted his mandate as being to collect and present evidence of violations of human rights and humanitarian law "in a way such that it will be usable in the event of a trial by a national or, if appropriate, international court."[33] This was before any such court had been proposed to the UNSC. Unable or unwilling to effectively intervene in Rwanda, the UNSC established another Commission of Experts (similar to the 780 Commission) to investigate.[34] The Commission initially recommended expanding the ICTY, before recommending a separate *ad hoc* tribunal for Rwanda.[35] The UNSC established the ICTR in November 1994, through UNSC Resolution 955.[36]

As with Resolution 780, scholars and practitioners argue that the UNSC's adoption of Resolutions 827 and 955, which created the tribunals, arose from a cynical desire to be seen to "do something" without expending significant resources or making politically difficult choices, or to absolve themselves of blame for failing to intervene.[37] By the 1990s, it was widely acknowledged that the most legitimate and acceptable way for powerful states to "do something" to punish massive human rights violations and war crimes was through legal and judicial means; no one suggested summary executions or exile. Nevertheless, the ICTY and ICTR exceeded expectations and took actions that were not foreseen, and sometimes not supported, by the UNSC.

Expectations

A confluence of factors, including the work of human rights activists and IL academics, and recommendations from expert rapporteurs and commissions, encouraged the UNSC to re-activate ICL.[38] Once adopted, Resolution 827 re-awakened states' attempts to control ICL practice. The post-Cold War ICL landscape, including the increased cohesion and prominence of academic and professional IL, made this tricky. This section considers the discourse surrounding, design of, and expectations for the ICTY and ICTR. The framing of ICL as an arena of apolitical independent legal practice and judicial proceedings dominated these efforts. UN officials, policymakers, and

[29] S/RES/929.
[30] E/CN.4/1995/71.
[31] van den Herik 2005, 29
[32] van den Herik 2005, 29
[33] E/CN.4/1995/7, para. 11.
[34] S/RES/935; Moghalu 2005, 26.
[35] S/1994/1125.
[36] UN Doc. S/RES/955.
[37] van den Herik 2005, 32.
[38] Levi, Hagan, and Dezalay 2016, 289.

lawyers alike were vocal about the importance of expert credentials and judicial independence, in a clear departure from the debates and assumptions of the 1940s, 1910s, or 1810s. However, despite general agreement to create insulated, independent judicial institutions, many questions remained unanswered. Others remained unasked—an oversight that opened further space for innovation once the tribunals began operating.

Actors invoked a range of rhetorical commonplaces to justify their preferred vision of ICL practice, then struggled over the "true" (or politically dominant) meaning and operationalization of such ideas. For example, the tribunals' design and operationalization reveal a range of interpretations of what it means for an institution to be apolitical, guided by judicial precedent or legal expertise, and independent. This section focuses first on the shared expectations of the tribunals' principals, which shaped the design and staffing of the tribunals and were the starting point for innovation. I then examine factors that challenged expectations and furthered expert capture within the tribunals.

Independent and Apolitical Expertise

By the early 1990s, it was generally accepted that ICL institutions should be staffed by credentialed legal experts, follow judicial procedures, and exercise judicial independence. However, the definitions of "correct" judicial procedures, expert credentials, and the limits of this independence were not agreed upon, and sometimes not considered. Likewise, while UNSC states generally asserted a "rules-approach" expectation that the tribunals would apply international law rather than create it, tribunal officials adopted a more idealistic, pragmatic, and inventive approach. Similarly, while individual human rights are now a primary focus of ICL, in the early 1990s, the field's focus was ambiguous.

When establishing the tribunals, UNSC states frequently cited legal expertise as a source of legitimacy and authority. They also trumpeted the importance of judicial impartiality and independence. Buoyed by the Cold War-era rejection of "victors justice," the UNSC jettisoned the idea that ICL institutions should be political or even "quasi-political," embracing the explicit *depoliticization* of the field. The UNSC was vocal about illegitimacy of the old delegation model of ICL. A new common-sense vision (of insulation and trusteeship) was ascendant. This rhetorical emphasis was evident even when states contested the details of ICL practice.

Many UNSC members relied on this framing when discussing the tribunals, "applauding" and citing the advice of the expert commissions which had recommended creating the ICTR and ICTY.[39] The involvement of IL experts was not something to be avoided or downplayed, as Wilson had done in 1919. After voting to create the ICTR, the Spanish Ambassador to the UNSC highlighted Spain's cooperation with the ICTR Commission of Experts as evidence of Spain's commitment to justice.[40] Keating of New Zealand was one of many who explicitly referred to expert advice as proof of the legitimacy and legality of the ICTR.[41] Keating asserted the UNSC

[39] S/PV.3453, 17.
[40] S/PV.3453, 12.
[41] S/PV.3453, 12 and 4.

was "acting within the framework of international law when it uses its authority under the Charter to respond… to the recommendation of the Commission… The Council has acted quickly, but… responsibly. It has listened to all concerned."[42] Likewise, after establishing both tribunals, many UNSC states publicly called for increased support of the International Law Commission's work to create a permanent international criminal court, which had been so neglected during the Cold War.[43] The UNSC was back on board with the ICL project that legal professionals had been keeping alive for decades.

These appeals to expertise as a source of legitimacy reinforced the growing consensus that ICL should be governed by legal and judicial norms, ratifying the role of experts in the field. Although states still tried to exert influence on the tribunals, the belief that ICL institutions should be visibly independent was hegemonic. Decision-makers in 1815 or 1919 relied on experts to bolster "high political" decisions. In contrast, in 1993-1994, the UNSC invited professional and academic input into the tribunals' design and delegated decision-making power to the tribunals, asserting that such expert trusteeship was more legitimate than the quasi-political arrangements of past eras.[44] When creating the ICTR, the UNSC asserted "objectives of independence, objectivity and impartiality," not fidelity to states' political preference, should guide the tribunal.[45]

UNSC members touted the "international character" of the tribunals and their allegedly apolitical goals. With respect to the ICTR, New Zealand stressed the importance of resisting "any proposals that would change the international character of the Tribunal or introduce any suggestion that the Tribunal could be subordinated to Rwandan political intervention."[46] Oman hoped the ICTR would be "instrumental in affording the accused… a fair… trial in accordance with the rule of law instead of leaving them completely to the mercy of the justice of the victorious. Under no circumstances can this Tribunal be considered as a legal instrument for revenge."[47] This stands in contrast to the plans for the earlier ICL institutions examined in Chapters Two, Three, and Five, which were overt and largely uncontroversial exercises in victors' justice, and, in the Napoleonic era, vengeance. The Oman delegate also directly referenced the recently established hegemonic understanding of the Nuremberg and Tokyo tribunals; as Chapter Six discusses, by the 1990s the post-Second World War tribunals been re-evaluated and stigmatized as exercises in victors' justice.

Even states that opposed the tribunals framed their opposition around expert legitimacy and independence, drawing on the same idiom as their opponents did, and as tribunal officials (but *not* states) had in the 1940s. After requesting the creation of a tribunal, Rwanda eventually voted against Resolution 955. The Rwandan government justified its opposition on several grounds, including the ICTR's "international character" and openness to nominees from all UN states—characteristics that were zealously protected by other UNSC delegates as safeguards against

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[42] S/PV.3453, 4.
[43] S/PV.3217, 18; S/PV.3453, 2, 4, and 13.
[44] S/PV.3217; S/PV.3453.
[45] S/PV.3453, 6.
[46] S/PV.3453, 5.
[47] S/PV.3453, 16.

political interference.[48] In contrast, Rwanda framed the ICTR's global character as a *threat* to its legitimacy and independence, and a continuation of impunity. The Rwandan representative told the UNSC, "certain countries… took a very active part in the civil war in Rwanda. [Rwanda] hopes that everyone will understand its concern at seeing those countries propose candidates for judges and participate in their election."[49] The "certain countries" in question included Belgium, the former colonial power in Rwanda. The Rwandan government maintained Belgium's colonial rule had "encouraged the bloody confrontations which ultimately led to the genocide" and spurred the profound racialization of the Hutu, Tutsi, and Twa ethnic groups.[50] France and "other countries, including African countries which contributed to the arming and protection of genocide perpetrators" were also viewed with suspicion.[51] Rwanda rhetorically linked its objections to the—by this time hegemonic—common-sense understanding that a legitimate ICL institution ought to uphold norms of judicial independence and impartiality; they queried whether some states were so implicated in the genocide that they should forfeit their ability to appoint officials to the tribunal. Rwanda's objection reflects the argument that a tribunal that is rhetorically independent may not be independent in practice—what if a Belgian judge was swayed by bias, or Belgium sought to influence the court for its own ends?

This argument got nowhere. Indeed, Rwanda's objections were viewed as attempts to politicize the ICTR.[52] Thus, all sides deployed the vocabulary of judicial independence and apolitical expertise. Incidentally, the fact that Rwanda's position was so marginal at the time is indicative of how far the norms of ICL had come since the 1940s, when judges were expected to be faithful delegates of their home states and only the victorious allies could make appointments to the tribunals.

The Spanish ambassador summed up the conventional position when celebrating the ICTR, saying:

> as in the case of the [ICTY], we believe that the independence of the [ICTR] is its most important attribute: independence *vis-à-vis* Governments, independence *vis-à-vis* national tribunals and even independence *vis-à-vis* the United Nations itself. Furthermore, although the new Tribunal will share with the Tribunal for the former Yugoslavia certain aspects of personnel, materials and means of operation, the Tribunal for Rwanda will have legal independence. It is a separate Tribunal with its own Statute, its own sphere of jurisdiction and its own rules of operation.[53]

The importance of legal independence, which Eldon did not consider in 1815, Wilson rejected in 1919, and the IMT and IMTFE judges fought for in the face of states' resistance, was celebrated by states in the 1990s.

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[48] S/PV.3453.
[49] S/PV.3453, 15.
[50] Rwanda 1995, 27.
[51] Rwanda 1995, 12.
[52] Moghalu 2005, 34-38.
[53] S/PV.3453 (8 Nov 1994), 12.

UNSC discussions indicate that the norms of how ICL officials should conduct themselves and relate to other stakeholders had been effectively captured by legal experts and professionals. ICL was decoupled from diplomacy and national policymaking. UNSC members expressed hopes that the tribunals would contribute to political aims but did not suggest that tribunal officials would be political delegates or diplomats. There was a new rhetorical boundary between these spheres. The tribunals were to be an expression of states' commitments to human rights and anti-impunity, but tribunal officials were meant to be impartial, independent trustees.

Goals and Ethos

This critical juncture also saw contestation (primarily between states and practitioners) over the tribunals' goals and ethos. UNSC members consistently maintained that the ICTY and ICTR were created in the name of "humanity" and "the international community," rather than in the name of a narrow group of states.[54] ICL had departed from Jackson's famous opening address at Nuremberg, where he celebrated that "four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law."[55] This development reflected the Cold War-era reception of and scholarship regarding the Nuremberg and Tokyo tribunals. By the 1990s, the claim that the post-war tribunals had been tainted (if not invalidated) by victors' justice was seen as one of the main weaknesses of the Nuremberg and Tokyo precedents.[56] States and experts were therefore anxious to avoid accusations of victors' justice in the 1990s and to distance the ICTY and ICTR from discredited aspects of the Nuremberg and Tokyo legacy, although they still laid claim to other, positive aspects.

In a famous example of this duality, when voting to establish the ICTY, US Ambassador Albright claimed some aspects of the Nuremberg legacy while jettisoning others in the next breath, saying:

> There is an echo in this Chamber today. The Nuremberg Principles have been reaffirmed. We have preserved the long-neglected compact made by the community of civilized nations 48 years ago to… enforce the Nuremberg Principles. The lesson that we are all accountable in international law may have finally taken hold in our collective memory. This will be no victor's tribunal. The only victor that will prevail in this endeavour is the truth. Unlike the world of the 1940s, international humanitarian law today is impressively codified, well understood, agreed upon and enforceable. The debates over the state of international law that so encumbered the Nuremberg Trials will not burden this tribunal.[57]

The developments which Albright touted, from the rejection of victor's justice to the further development of international law and increased agreement over that law, were largely thanks to ICL academics' and experts' Cold War activities. The ICL common sense celebrated by Albright and her UNSC colleagues was the common sense of an increasingly captured field.

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[54] S/25704; S/PV.3217; S/PV.3175.

[55] Jackson, Opening Address for the United States, 21 November 1945, reproduced in Marrus 1997b, 79.

[56] Hazan 2004, 58.

[57] S/PV.3175, 11.

The UNSC agreed on the legal philosophy and sources of law which should guide the tribunals. Court officials were expected to "apply" existing international law to each case, in a similar way to how domestic courts are often presumed to apply, rather than create, law.[58] The UNSC framed ICL as a judicial field in which the norms of domestic legal institutions should rigidly apply and international law should be carried out, not invented. In other words, UNSC states articulated a formalist "rule-approach" view.[59] In resolutions, speeches, and proposals, UN representatives enthusiastically agreed the tribunals should "apply" universally accepted principles of international law.[60] In a typical example, the Venezuelan Ambassador asserted the ICTY, "would not be empowered… to set down norms of international law or to legislate… It simply applies existing humanitarian law."[61] The same was expected of the ICTR.[62] The Argentinian Ambassador maintained the ICTR was "not authorized to establish rules of international law or to legislate… but, rather… to apply existing international law."[63] In reality, the work of the tribunals was far from simple; rather than applying international law, the tribunals often had to, and were eager to, invent it. This would prove a crucial point of contention between tribunal officials and states once the tribunals' work began.

The UNSC's "rules-approach" formalism informed the expected goals and referent groups of the two tribunals. As Moyn argues, the rise of the modern "judicial vision of global justice," in which "judges and courts" dominate "occurred alongside the eclipse of prior schemes of global justice."[64] Visions of a "constructive" justice that promotes "social renovation to achieve liberty and equality" rather than "retributive punishment" are "marginalized" in favour of a narrower vision of "corrective" justice.[65] The UNSC's discussions of the ICTY and ICTR illustrate Moyn's argument, with delegates declaring that the purpose of the tribunals would be to combat impunity, establish the historical record, and deter and punish international crimes.[66] Even in comparison to the state of ICL today, it is notable how rarely principles relating to transitional justice and reconciliation are referenced in the UNSC transcripts. Some attempt was made to introduce other goals to this common-sense understanding, with mixed success. Bosco summarizes: "the post-genocide Rwandan government fully supported prosecuting the perpetrators of the mass killings, but its *vision* of a tribunal was quite different from that of the [rest of the UNSC]."[67] They argued that the tribunal should be located in Rwanda to "promote the harmonization of international and national jurisprudence" and better serve the Rwandans' desired goals: "to teach the Rwandese people a lesson, to fight against… impunity… and to promote national reconciliation."[68] The idea that international criminal justice should promote reconciliation peripheral at the UNSC but was beginning to gain adherents and would be further championed by the ICTY and ICTR. The idea

[58] Twining 1997.
[59] Koskenniemi 2005, 212.
[60] Virginia Morris and Scharf 1995b, 368-370; Danner and Voeten 2010, 38.
[61] S/PV.3217, 7.
[62] S/PV.3453.
[63] S/PV.3453, 8.
[64] Moyn 2014, 69-70.
[65] Moyn 2014, 69-70.
[66] S/PV.3453.
[67] Bosco 2014, 37.
[68] S/PV.3453, 12.

that ICL should "teach" specific audiences "a lesson" was likewise marginal. The Rwandans' argument was insufficient to overcome the logistical, security, and political concerns associated with establishing a tribunal inside Rwanda.[69]

Dissent within the UNSC was rare and largely unsuccessful. Opposing actors attempted to legitimate alternate visions of international justice by framing them in familiar terms. As Skinner notes, "every revolutionary is… obliged to march backward into battle;" the would-be revolutionaries on the UNSC were no exception.[70] The Rwandans argued for a broader approach to international justice which focused on not only individual criminal accountability but also other forms of responsibility and anti-impunity. At an international conference on "Genocide, Impunity, and Accountability" in 1995, Rwanda called for Belgium to "acknowledge its historical responsibility in the genesis of ethnic ideology" and pay reparations to victims.[71] According to Rwanda, Belgium and France had "specific and direct complicity in the genocide;" Rwanda called for France to be "held legally accountable, under international law" and for Belgium to be "held morally and legally accountable, under international law."[72] Rwanda envisioned such accountability as taking the form of a "compensation fund" for victims and possibly criminal liability.[73] Furthermore, Rwanda's official account of the genocide emphasized the international community's collective failure to act during the decades of human rights violations preceding the genocide. Miller argues this account "reads the culture of impunity as not only domestic but international" and "conceptualize[s] responsibility by external or international actors," in a departure from the "retributivist model… [of] individual prosecution" which dominates the ICTR.[74]

This attempt to expand the dominant vision of international criminal justice failed. Miller notes, "none of the transitional justice institutions dedicated to accountability for the genocide has opened the possibility for holding international actors to account for the effects of colonialism or the failures to intervene prior to and during the 1994 genocide."[75] Such an expansive definition of criminal responsibility or legal liability is also absent from ICL institutions and hegemonic common sense. It is notable that this expansive vision of international justice was not represented within the ICTR or ICTY. While Justice Pal had used his position within the Tokyo Tribunal to promote a more radical and critical vision of ICL, there would be no Pal-like characters at the ICTY or ICTR; the 1990s ICL field was too well-disciplined for that.

Applicable Law

Despite such marginal proposals, there was broad agreement between UNSC states and UN officials that the tribunals would adopt a strict formalist attitude towards international law.

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[69] Although the ICTR Statute left open the possibility that tribunal officials might visit Rwanda, the court remained in Arusha, Tanzania until its closure in 2016.

[70] Skinner 2002, 294-295.

[71] Rwanda 1995, 30.

[72] Rwanda 1995, 30.

[73] Rwanda 1995, 30.

[74] Miller 2016, 167-168.

[75] Miller 2016, 168.

Understandings of applicable law varied. In the case of the ICTY, the Secretary-General favoured the application of "rules of international law which are, beyond a doubt customary law," while the US called for the application of "internationally accepted substantive and procedural law;" some states also proposed including elements of national law of the former Yugoslavia.[76] In the case of the ICTR, Rwanda and the United States supported allowing the tribunal to sentence genocidaires to death, as was permitted under Rwandan law but not under the International Covenant on Civil and Political Rights.[77] The UNSC decided against allowing capital punishment but did not otherwise specify applicable law. The UNSC's formalist expectations were not shaken even by such examples of conflict between different legal systems.

Other than Canada, no state tried to delineate specific details of applicable law, indicating that controversy around such questions within the tribunals was not anticipated or not expected to be consequential.[78] States thereby demonstrated their vague desire for a formalist ICTY and ICTR, but did not specify which body of law the tribunals should rigidly apply. Thus, from the outset, there were signs that international law might prove difficult to uniformly interpret and apply in practice, despite the UNSC's expectations. In addition, the UNSC explicitly delegated the task of defining the tribunals' Rules of Procedure and Evidence (RPE) to the tribunals' judges.[79] This choice underscores the perceived legitimacy of legal experts in ICL, along with their role as trustees and decision-makers, rather than mere advisors or representatives.

Credentials

It is unlikely that the UNSC saw the ability to compromise and "invent" as a necessary credential for tribunal officials. From the UNSC's perspective, legal formalism was ICL's expected ethos and philosophy. Provided that they possessed the "correct" expert knowledge and experience, ICTY and ICTR officials were expected to apply that expertise and generate "correct" outputs. But the UNSC's position on "correct" credentials was vague. Their choices were heavily informed by the standards and advice of IL professionals and associations, further demonstrating the growing expert capture of the field. For example, according to Bassiouni, Helsinki Watch's Aryeh Neier suggested the names of the first two ICTY prosecutors (Ramón Escovar-Salom and Richard Goldstone).[80]

Advice from professionals like Neier augmented the tribunals' Statutes, which enumerated the official credentials required for judges and prosecution staff. The Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute") was generated by a professional working group in the UN Office of Legal Affairs.[81] The Secretary-General also generated "a report on all aspects" of the proposed tribunal, "including specific proposals" for the court's design, "taking into account suggestions" from eighteen states and international entities.[82] These proposals

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[76] Virginia Morris and Scharf 1995b, 368-370.

[77] S/PV.3453, 16.

[78] Danner and Voeten 2010, 38-39.

[79] Statute of the ICTY, Article 15, reproduced in ICTY 1995, 15.

[80] Bassiouni 2017, 111-112.

[81] Scharf 1997, 56.

[82] S/RES/808, 2; Scharf 1997, 56; S/25704, Reproduced in ICTY 1995, 155-229.

were generally drafted by or included input from domestic international law associations and professionals. Many proposals were reflected in the language of the ICTY Statute and, later, the Statute of the International Tribunal for Rwanda ("ICTR Statute").

The Articles relating to expert selection are identical in the two Statutes and leave significant scope for interpretation. This suggests that there were no internationally hegemonic criteria for attributing ICL expertise. The Statutes require that judges:

> be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers… due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.[83]

Article 16 of the ICTY Statute (Article 15 in the ICTR Statute) sets out similar expectations for the Prosecutor and officials in the Office of the Prosecutor (OTP). The Prosecutor shall possess "high moral character and… the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases… The [OTP] staff… shall be appointed by the Secretary-General on the recommendation of the Prosecutor."[84] Therefore, the Statutes provide little guidance beyond the requirement that officials be of "high moral character" and display "integrity," "impartiality," and "competence," particularly as judged by professional colleagues. The apparent contradiction between expecting practitioners to display "impartiality" and independence and expecting them to unquestioningly uphold one particular legal philosophy (that of formalism) was apparently lost on the UNSC.

While the Prosecutor was required to have a high level of "competence and *experience*," the appropriate credentials for judges were more nebulous. Judges were required only to "*possess* the *qualifications* required in their respective countries for appointment to the highest judicial offices."[85] Actual judicial experience was not required. Indeed, not all the judges elected to the ICTY and ICTR had experience on the bench or as advocates.[86] However, credentials were more narrowly defined than they had been in past episodes. In contrast to Tokyo and Nuremberg, few ICTY and ICTR officials came from military backgrounds, and none were active members of any national military when appointed. In further contrast to Tokyo, no ICTY or ICTR officials had been victims of the conflicts or atrocities under the courts' jurisdiction. Clearly, by 1993, being a victim of a death march, as Tokyo's Justice Jaranilla had been, would have been seen as a *disqualification*, rather than a *qualification*. This is borne out by the Charters' explicit emphasis on judicial impartiality. Thus, the norms of ICL were more aligned with domestic norms of judicial independence than with the hazy instincts of statesmen, as they had been in earlier eras.

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[83] Statute of the ICTY, Article 13.
[84] Statute of the ICTY, Article 16.
[85] Statute of the ICTY, Article 13 and 16, emphasis added.
[86] A/47/1006.

Despite this narrowing of expert credentials, the pool remained diverse. The Statutes left room for interpretation and provided no coherent criteria which could result in homogeneous tribunals. There was no universal agreement on the definition of "qualifications…for appointment to the highest judicial offices," or "the highest level of competence and experience in the conduct of investigations and prosecutions."[87] The education and experience required for appointment to the US Supreme Court in 1993 were not identical to the credentials of the judges on the Canadian Supreme Court, the Moroccan Supreme Court, or the Chinese Supreme People's Court. As with all expert institutions, such appointments depend on the political attribution of expertise and domestic social norms, in addition to more overt criteria stemming from legal systems and procedures in different countries.[88] Even with national-level criteria, the judiciary of a given state is heterogeneous. Since states did not attempt to standardize the qualifications required for appointment, differences in national-level qualifications for judicial office were "imported into" the ICTY and ICTR. In this way, national-level diversity was "internationalized," rather than erased.

There is also a telling omission in the language of ICTY Article 13, which provides that "due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."[89] No mention is made of experience in "international criminal law." Likewise, when establishing both tribunals, the British Ambassador asserted "judges, prosecutor and staff" must be "persons with considerable practical experience in the field of criminal prosecution" because the tribunals had to "try persons for serious criminal offences, and it is essential that all involved are experts in the field."[90] He made no mention of practical experience in ICL. This omission reflected the fact that such experience was virtually impossible to come by in the decades since the IMTFE closed. Indeed, of the proposals submitted for the ICTY statute, only one cites experience in "international criminal law" as a credential for judges.[91] Thanks to the increased dominance of legal professionals and academics within the field, practical legal experience was seen as an asset, although practical ICL experience was so inaccessible as to be unthought of. Clearly, tribunal officials would have much to learn.

Overall, the proposals and the Statutes indicate that states and other stakeholders were aware that the tribunals would sit in the hinterlands of existing international law. The apparent contradiction between this awareness and states' insistence that the tribunals would only apply pre-existing law is interesting. The language of the Statutes also made diverse tribunals, and therefore intra-tribunal disagreements, inevitable. The UNSC was apparently unwilling to grapple with and establish clear preferences for how the tribunals would deal with unforeseen or unprecedented issues. Instead, the tribunals were implicitly given autonomy to address ambiguities in ICL and disputes with colleagues; in other words, they were trustees.

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[87] Statute of the ICTY, Article 13 and 16.

[88] Schultz and Shaw 2003; OECD 2020.

[89] Statute of the ICTY, Article 13

[90] S/PV.3217, 18. See also: S/PV.3453, 6.

[91] Scharf 1997, 56; S/25704, Reproduced in ICTY 1995, 155-229.

The Tribunals in Action

Despite being dismissed as "public relations device[s]" that would be "dead on arrival," the ICTY and ICTR changed ICL.[92] The contributions made by the tribunals to international law and jurisprudence are too numerous to be captured here. This section focuses on some key innovations that ratified, changed, or challenged the foundational common sense of the ICL field. These innovations included the creation of a new procedure that re-defined ICL institutions' relationship with states and attitude towards domestic legal practices, the formation of policies and jurisprudence that amended the definition of international criminality and furthered the disciplining of the field, and examples of "mission creep" into new spheres of practice, which extended the expected scope and goals of ICL. These examples demonstrate the further insulation, disciplining, and de-politicization of ICL, in addition to the consolidation and exploitation (or "use") of expert authority in the field.

These developments were enabled by the permissive environment created by the expert legitimation trap—in which states, trapped in the discursive tangle they had woven for themselves, stepped back, and academic and professional legal experts, primed after decades of debate, filled the void. But these professionals did not arrive at the tribunals with a cohesive vision of how to operationalize their unprecedented mandates. Both tribunals were riven by contestation between officials regarding the goals, credentials, practices, and norms of behaviour appropriate to their work. However, for the first time in the history of ICL institutions, this contestation was largely contained within the tribunals and proved highly productive. Such disputes were resolved internally by practitioners who expressed a previously unseen sense of collegiality and solidarity even as they disagreed. This is because practitioners arrived at the tribunals with a common commitment to the international criminal justice project and a common belief that their ties with tribunal colleagues were more important than any ties with states – both legacies of previous critical junctures. Practitioners also embraced their role as trustees and did not permit external actors to meddle in disputes. This increased cohesiveness and insulation of the tribunals prevented contestation from paralyzing them and furthered the expert capture of the field. I now sketch the expectations and experiences tribunal officials brought to their work, before examining their contestation and innovation.

Composition

Other than a designation as professionals, there was no standard set of credentials possessed by all tribunal officials. Therefore, officials approached their work with diverse expectations arising from different forms of practical background knowledge.[93] These differences contributed to contestation over the tribunals' work and, eventually to compromise and change.[94] Carolina de Lima, an early ICTY official, recalled, "there were the university people and there were the police people. There were the lawyers and there were the people who were in the military, so you had a

[92] Ingadottir 2003; Zunino 2019, 97-111; Rudolph 2017.
[93] Pouliot 2008, 258; Wenger 1999, 83.
[94] Stafford 2020.

totally different *modus operandi* of working. You learned how to work with each other."[95] This learning process is frequently mentioned and celebrated in interviews and memoirs of tribunal officials, who generally found such differences inspiring, rather than frustrating.[96]

Within the broad groups identified by de Lima, other forms of diversity proved consequential. Consider the (initial) composition of the tribunals' judges' chambers. The first group of ICTY judges sent to the Hague in 1993 included professionals from Egypt, Italy, Canada, Nigeria, France, China, the United States, Costa Rica, Pakistan, Australia, and Malaysia.[97] Six of the eleven came from countries with a common law legal tradition and an accusatorial system of criminal justice.[98] Two were female. Five were serving as national judges prior to their election; two were full-time academics; and four were government officials.[99] All except one (Vohrah of Malaysia) had at least some experience as a professor or lecturer. Eight judges had experience as national judges; two others had limited experience in international courts. One judge, the Italian Cassese, a well-respected academic who was soon elected ICTY President by his colleagues, had no previous experience as a judge at any level.[100]

The six judges sent to Arusha in 1995 hailed from Sweden, Senegal, Bangladesh, Russia, South Africa, and Tanzania.[101] Bangladesh, South Africa, and Tanzania are common law countries with accusatorial traditions of criminal justice. Senegal is a civil law country with an inquisitorial tradition, and in 1995, Russia was still considered a "socialist" law country, which adhered more closely to the inquisitorial model. Sweden is a civil law country that nonetheless practices an accusatorial model of criminal justice and in which "the figure of the 'investigating judge,'" a feature of inquisitorial systems, is "not… well-received."[102] The ICTR bench included one woman.[103] None of the six had significant military experience, but four had professorial experience, and all had experience with international organizations, national delegations, and expert commissions (including as delegates at UN conferences and commissions). All except one (Otrovsky) had some experience on the bench and as an advocate, magistrate, or prosecutor. The tribunals' other organs were similarly heterogeneous. This is significant because these differences in education, background, professional experience, and personal history shaped practitioners'

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[95] Oral History Interview de Lima 2016, 29.

[96] A/47/1006.

[97] United Nations 1994, 441; Kerr 2004, 45-46. The following judges were elected: Georges Abi-Saab (Egypt); Antonio Cassese (Italy); Jules Deschênes (Canada); Adolphus Karibi-Whyte (Nigeria); Germain Le Foyer De Costil (France);[97] Li Haopei (China); Gabrielle Kirk McDonald (United States of America); Elizabeth Odio Benito (Costa Rica); Rustam Sidhwa (Pakistan); Ninian Stephen (Australia); and Lal Chan Vohrah (Malaysia).

[98] Data from La Porta et al. 1999. Canada, Nigeria, the United States, Pakistan, Australia, and Malaysia have accusatorial traditions.

[99] Danner and Voeten 2010, 57, Fig.2.3.a.

[100] A/47/1006.

[101] Lennart Aspegren (Sweden); Laity Kama (Senegal); Tafazzal Hossain Khan (Bangladesh); Yakov Otrovsky (Russia); Navanthem Pillay (South Africa); and William Hussein Sekule (Tanzania)

[102] Wong 2012, 745.

[103] Navanthem Pillay was the first black woman appointed to the South African Supreme Court.

internalized expectations about the nature of criminal law in general and international criminal law in particular.[104]

Differences in legal backgrounds are known to impact outcomes in tribunals and, crucially, can make it difficult for practitioners from diverse legal systems to find common ground.[105] Maximo Langer and other scholars of legal culture make it clear that "the adversarial and the inquisitorial systems can be understood not only as two different ways to distribute powers and responsibilities" between legal actors "but also as two different procedural cultures and thus, two different sets of basic understandings of how criminal cases should be tried and prosecuted."[106] Different systems therefore generate different "logics of practicality" or "background knowledge;" individuals from different legal backgrounds will "think from" different "structures of interpretation and meaning.[107] This diversity was at the root of many of the internal disagreements that challenged the tribunals and ultimately enabled innovation. Such diversity was not new, of course. The same had been true—to a greater extent—of the IMT and IMTFE, where it hampered the tribunals' ability to operate. In contrast to previous experiences, however, many ICTR and ICTY officials attest that this diversity, importantly combined with a commitment to the project of expert ICL, brought richness and dynamism to the 1990s tribunals.[108]

Ethos and Philosophy

ICTY and ICTR officials shared a commitment to the post-Cold War ICL project in general and the tribunals in particular. While such commitment may be taken for granted today, practitioner buy-in was not always a given in earlier eras, as previous chapters have demonstrated. ICTY and ICTR officials generally identified with the tribunals and their work more strongly than with their home states. The membrane separating states and tribunals was much less porous by the 1990s. Tribunal officials also arrived with enthusiasm and a commitment to developing and operationalizing ICL. Tribunal judges had "campaigned" for election and provided evidence of their qualifications to the UNGA; all tribunal officials made personal sacrifices to relocate to the Hague or Arusha, and agreed to relinquish other professional commitments.[109] Gabrielle Kirk McDonald, the American ICTY judge who eventually became President of the tribunal, recalled that, while she was committed to the "intellectual development of international humanitarian law," she felt a "visceral" need to participate in the Tribunal's "mission."[110] Likewise, Dennis Byron, an ICTR judge from St. Kitts and Nevis, recalled that he had "always had philosophical support for the ICL idea."[111] Accounts of the tribunals' first meetings indicate that the judges all already shared this commitment. All expressed a belief in the project of international judicial action to punish war crimes and human rights violations. There was no "fifth column" that sought to destabilize the

[104] Stafford 2020.

[105] Langer 2004, 4; Cavise 2007, 788 and 802-811; Langer 2007; Hendrix 2004.

[106] Langer 2004, 4; 2007.

[107] Pouliot 2008, 257.

[108] For example: Stuart and Simons 2010, 47; Oral History Interview Sellers 2017, 12, 13-14, and 17; Oral History Interview de Lima 2016, 8; Oral History Interview Møse 2008, 8-10.

[109] Hazan 2004, 44.

[110] Oral History Interview McDonald 2016, 1.

[111] Oral history Interview Byron 2008, 11.

tribunals or viewed them as illegitimate—as Justice Pal had done at Tokyo—or internal faction that disputed the legalization and judicialization of international criminal justice. ICTY and ICTR officials believed and wanted to participate in the international criminal justice project, which helped promote innovation and solidarity with colleagues, despite other contestation within the tribunals and indifference or opposition from states.

This inventive spirit and intentionally pragmatic and idealistic legal philosophy was revealed at the ICTY judges' first plenary meeting to draft the tribunal's Rules of Procedure and Evidence (RPE). Despite their different backgrounds, judges approached drafting the RPE with commonalities. They were united by their desire to operationalize the Court's mandate, develop international law, and uphold professional legal standards and principles of legality. These understandings were critical in allowing the ICTY to avoid paralysis despite fierce disagreements arising from different internalized expectations. The ICTR benefited from similar shared ideals.

Most—if not all—ICTY judges approached operationalization with enthusiasm.[112] ICTY President Cassese's account best captures the prevailing mindset in memoirs and interviews; Cassese recalls that he and the French Judge Claude Jorda "often" referred to the Tribunal as "une manifique aventure morale et juridique."[113] When faced with challenges, Cassese told his colleagues, "if we go home now, we will never establish this precedent, and we will never know if we can apply international criminal justice."[114] This departs from the sentiments of many of the ambassadors at the UNSC, who asserted that the tribunals would merely "apply" existing law. Contemporary accounts make it clear that, with the possible initial exception of the French and Pakistani judges, all ICTY judges arrived at the Hague prepared to "invent" new procedures and develop ICL from day one.[115] ICTR officials were likewise eager to innovate to discharge their mandate and deal with the challenges in Arusha. Jean-Pelé Fomété, who worked as a law clerk at the ICTY before moving to the ICTR registry, recalled the "dynamism" and inventive ethos of both tribunals:

> when we came to Arusha there was literally very little, and you ended up being part of something… you had to deliver while being *creative*, not only in terms of substantive law, but also in terms of crafting operational solutions to problems that were *new* to the UN. And… we did it… [At] the ICTR-ICTY… [there are] challenges… and you are on the alert looking for new things.[116]

The UNSC had celebrated the milestone of creating the tribunals but downplayed the unprecedentedness of their mandates, preferring to represent the tribunals vehicles to apply existing law and further (positive) aspects of the Nuremberg precedent. Furthermore, as Chapters Three and Five discussed, the *newness* of ICL practice was not universally embraced by tribunal officials in earlier eras. For example, the Tokyo tribunal's Justice Pal and Justice Röling understood

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[112] Stephen 2004.

[113] Interview in Stuart and Simons 2010, 47. Jorda replaced De Costil in 1994.

[114] Interview in Stuart and Simons 2010, 47.

[115] Interview in Stuart and Simons 2010, 51; Oral History Interview McDonald 2016, 7-8.

[116] Oral History Interview Fomété 2016, 23-24.

their tribunal's lack of precedent and procedures to be hugely discrediting and delegitimating. But, after several decades of professional and academic advocacy and development, the prospect of engaging in the "magnificent adventure" of creating ICL was exciting to many members of the 1990s tribunals.

Officials also generally agreed on the need to distance the tribunals from the questionable aspects and "ghosts" of Nuremberg and Tokyo. Indeed, in his First Annual Report to the UNSC, the ICTY President, Cassese noted: "a conscious effort to avoid some of the often-mentioned flaws of Nuremberg and Tokyo."[117] Such flaws included the tribunals' narrow ("victors"') membership, questionable verdicts (including some *in absentia*), and closeness with states. This awareness of the accepted legacy of the post-war tribunals, and the attendant desire to avoid replicating the past, also united tribunal officials.

Influential Innovations

Armed with these shared commitments, ICTY and ICTR officials sought to enact ICL for the first time in over forty years. In the process, they deepened and ratified the centrality of certain values to ICL common sense, including collegiality and insulation from states. They also engaged in internal disputes which further disciplined of the field, especially in terms of acceptable professional behaviour, professional roles, and decision-making norms. Finally, fuelled by their common commitment to ICL, and taking advantage of their expert autonomy, tribunal officials expanded and re-shaped the ICL, including by introducing new procedures which altered their relationships with states and taking on new roles and appealing to new constituencies.

Collegiality, Pragmatic Inventiveness, and Insulation

At its first plenary meeting, the ICTY innovated beyond the expectations of its principals by inventing a novel procedure to name and shame uncooperative states and pursue justice without the presence of the accused. This rule has no precedent in any domestic legal system, directly defied powerful states, and re-defined the function of ICL. The new procedure also challenged prior expectations held by some ICTY judges, who fought over the matter but eventually reached an innovative compromise thanks to a shared commitment to the tribunal's goals and to "inventing," rather than simply "applying" IL. This procedure was soon imported into the ICTR's judicial toolbox. The compromise demonstrated and furthered collegiality within the ICTY and signalled the tribunal's deliberate insulation and independence from its political principals.

The ICTY and ICTR encountered difficulties ranging from financial and administrative woes to the hostility of states.[118] The ICTY was particularly precarious from the outset. Some statesmen involved in the Balkan peace process feared the ICTY might adversely impact peace-making efforts if it became more than a "public relations device."[119] ICTY officials feared the tribunal might be sacrificed to secure peace. But, the greatest threat to the ICTY was its inability to arrest indicted

[117] A/49/342-S/1994/1007, para.71.

[118] Bosco 2014, 36-37 and 62-63; Kerr 2004, 49-50; Scharf 1997, 84; Goldstone 2000, 86-88; Moghalu 2005, 65; Danner and Voeten 2010, 43; Hagan 2003, 34-35 and 38.

[119] Danner and Voeten 2010, 43; Hagan 2003, 34-35 and 38.

individuals in active war zones.[120] In response to this problem, the ICTY (and later the ICTR) adopted Rule 61 of the RPE (the Rule), which was developed by the ICTY judges under Article 15 of the ICTY Statute.[121] The Rule outlines a novel procedure that can be described as a trial *in absentia* without a verdict. The creation of this procedure was opposed by the Court's principals, was a departure from pre-existing legal practice, and was the result of compromise within the judges' chambers.

The Rule outlines a procedure where the failure to arrest an indicted person may trigger the publication of the evidence and indictment against the accused in a public hearing. Rule 61 *hearings* are not *trials* and do not result in a verdict. Such hearings "air" evidence and facilitate the public "shaming" and stigmatization of the accused and non-compliant states (including by reporting them to the UNSC).[122] The ICTY judges created Rule 61 and the other RPE during the Court's first and second plenary meetings.[123] Rule 61 is not modelled after any existing procedure in any national legal system. Although the procedure resembles a federal grand jury hearing in the United States and a trial by default in various European countries, these procedures produce different results and enact different "philosophies of purpose."[124] Few domestic legal systems initiate procedures to "publicize the [alleged] wrongful acts of a fugitive suspect."[125] It is an innovative procedure underpinned by an innovative understanding of the role of criminal justice in general and international criminal justice in particular—wherein publicity, shaming, and stigma need not always result from or be connected to legal verdicts and punishment.

States had made it clear that they were unambiguously opposed to any *in absentia* proceedings.[126] Yet they had left space for the tribunal to innovate, exercise agency, and defy. The UNSC's decision to give the ICTY Chambers control over the RPE had theoretically opened the door for Rule 61.[127] Few states had expressed an opinion on whether it was appropriate for the ICTY to invent a procedure to "name-and-shame" fugitive indictees and uncooperative states, but states generally agreed that the tribunals should simply "apply" universally accepted principles of international law and certainly not impose *in absentia* justice.[128] Rule 61 was also a departure from pre-existing legal standards.[129] The post-war trial *in absentia* of Martin Bormann at Nuremberg was, by 1993, seen as a grave miscarriage of justice.[130] Thus, the Rule was novel and bold: an innovation that cannot be credited to states, pre-existing legal training, or professional habitus. It was instead

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120 Scharf 1997, 10; Holbrooke 1999, 107; Interview in Stuart and Simons 2010, 47.

121 Danner and Voeten 2010, 39; ICTY 1995, 15.

122 IT/32, Rule 61.

123 Stephen 2004, 385.

124 Hildreth 1998, 516.

125 Hildreth 1998, 516.

126 S/25266; S/25537; S/25300; S/25716, all reproduced in Virginia Morris and Scharf 1995a, 327–374, 439–449, 384, 475–476. Only France and Russia expressed (limited) support for *in absentia* trials. The Netherlands suggested creating a procedure to make fugitives "feel unsafe," but that procedure is identical to a regular investigation and is not novel.

127 ICTY 1995, 15.

128 Virginia Morris and Scharf 1995b, 368-370; Danner and Voeten 2010, 38-39; S/PV.3217, 7.

129 Scharf 1997, 51-63; S/25704, reproduced in Virginia Morris and Scharf 1995a, 22.

130 Virginia Morris and Scharf 1995b, 214-215.

the product of a common ethos and commitment to legal pragmatism and inventiveness, and of intense struggle between judges.

The judges shared a commitment to the ICTY but disagreed about how to operationalize the ICTY's mission and about how to import standards of legality into their work. Initially, this struggle to further discipline and define ICL played out in a contest over *in absentia* proceedings. The parties in the dispute over *in absentia* proceedings were led by Cassese, the Italian President of the Tribunal, and McDonald, an American jurist. It is not a coincidence that Cassese was trained in an inquisitorial system of criminal law, while McDonald was trained in an accusatorial one. From the outset, judges from inquisitorial systems favoured the creation of an *in absentia* mechanism, while judges from accusatorial systems feared such a mechanism would discredit the Court and violate core principles of justice.[131] According to the standards internalized by judges trained in inquisitorial systems, such proceedings could be acceptable under specific circumstances; according to judges from accusatorial systems, *in absentia* proceedings were always illegitimate. Both sides of the dispute framed their positions with references to principles of legality, the importance of judicial integrity, and their commitment to the ICL project.

Cassese's desire to allow *in absentia* trials arose in part from his understanding of the Italian legal system.[132] Similarly, McDonald approached the matter from the perspective of American legal practice.[133] Cassese pushed for the inclusion of *in absentia* trials (not merely *hearings*), believing them to be essential to the Court's success.[134] In this, Cassese contradicted the guidance of the Italian government and other states. McDonald and her accusatorial system colleagues felt *in absentia* trials were inappropriate and cited their professional background in their opposition.[135] McDonald recalled: "from my history as a civil rights lawyer, [I] was concerned with balancing the rights of the accused with the need to do justice for the victims."[136]

Pierre Hazan's account makes it clear that the debate over *in absentia* proceedings was directly rooted in the judges' different legal backgrounds and understanding of legitimate judicial action. The judges' recollections support Hazan's conclusion. Hazan describes the conflict:

> The continental [inquisitorial] judges… see [trials *in absentia*]… as an essential instrument for stigmatizing criminals. They know well that the ICTY will have all the difficulty in the world in issuing indictments, particularly against high political and military officials, but they will have no force capable of arresting the accused. The [civil law] doctrine of contumacy allows them not only to censure the crimes but also to try and convict the criminals in their absence… But [for] the common law judges… trial without a defendant is worthless and can easily turn into a legal 'circus.'[137]

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131 Stuart and Simons 2010, 51-52.
132 Oral History Interview McDonald 2016, 6.
133 McDonald 2016, 6.
134 Stuart and Simons 2010, 48.
135 Oral History Interview McDonald 2016, 1.
136 Oral History Interview McDonald 2016, 6.
137 Hazan 2004, 51-52.

This intra-court dispute was directly concerned with the judges' different ideas about legitimate practice in ICL—about the appropriate common-sense goals, procedures, and philosophies which should define the field.

Parallel to this internal struggle, the insulation of the ICTY chambers was tested. Cassese's account of a January 1994 meeting with Madeleine Albright highlights how the Chambers was not immune to external political pressures (although, notably, these pressures were framed as "advice" rather than "instruction"). Cassese recalls that when he met Albright:

> I asked her what she thought of trials in absentia… I was very much in favour… [Albright] said: 'Mr. Cassese, I'm not a lawyer, I'm a diplomat, but I can tell you that if you go for trials in absentia, you're making a mistake. Trials in absentia will be perceived in the US, in the UK and in all common law countries as something wrong, morally wrong. In the constitution we have the right to be present at trial, which is a deeply rooted right.' I dropped the idea. The next day the trials in absentia were dead.[138]

This episode reveals that power—in this case American power—also played a role in shaping how the judges negotiated their differences and "invented" Rule 61. Cassese's encounter with Albright took actual *in absentia* trials "off the table," but did not bring the inquisitorial judges fully in-line with their accusatorial colleagues or the US. Beyond her words to Cassese, Albright did not interfere again. The inquisitorial judges still wanted a procedure to offset the Court's inability to arrest indictees, reasoning that any damage to the ICTY's legitimacy stemming from such a procedure would be less damaging than allowing the court to remain entirely powerless against state non-compliance and non-enforcement. As President, Cassese theoretically could have pushed through his own proposal for the RPE (as Webb might have done at the IMFTE); he chose not to do this and instead embraced the opportunity to negotiate a compromise (following in the footsteps of his predecessors at Nuremberg, but not Tokyo).

If no immediate compromise exists, one must be invented. McDonald recalls: "we argued about it a long time. And finally Judge Cassese withdrew his proposal… on the condition that we could reach a compromise."[139] Cassese remembers: "I urged my fellow judges to accept some sort of legal provision for the eventuality that one or more senior indictee should remain at large…Ninian Stephen…proposed the substance of…Rule 61."[140] Stephen, the Australian judge, evaluated various proposals and the goals of the Court, and proposed a compromise which was accepted by all eleven judges.[141] As with many aspects of ICL, Rule 61 is not a direct translation of either civil law or common law traditions; it is essentially a hybrid.[142] As one of the first procedural decisions of the post-Cold War era in ICL, the creation of Rule 61 set the stage for the field's current emphasis on such hybrid measures. However, the existence of this hybrid procedure cannot be explained by an account of ICL expertise which ignores divisions and contestation

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[138] Interview in Stuart and Simons 2010, 48.

[139] McDonald 2016, 7.

[140] Stuart and Simons 2010, 48-49.

[141] McDonald 2016, 6-7; Stephen 2004, 385.

[142] Picker 2008.

between different legal traditions, and the role which conflict plays in "putting options on the table." This case also demonstrates how shared commitment, pragmatism, and productive decision-making norms enabled the judges to overcome their differences and create a new legal procedure.

The dispute between the judges was resolved internally and creatively; *in absentia* trials were not included in the RPE, but a procedure for *in absentia* hearings was invented.[143] The judges emerged from the process as a more cohesive group, in the sense that they had established new shared understandings of how to operationalize the Court's mission. According to Cassese, drafting the RPE "served as an important learning process for a new institution… [it was a] moment of collective education, collective training, and a collective exchange of experiences and adjustments."[144] The ICTY Chambers drew on and further developed shared "rules of the game," "resources for negotiating meaning" and overcoming disagreement, consolidating the expert capture and insulation of ICL in the process.[145]

Expansion into Outreach

The ICTY and ICTR also used their trustee status, formal independence, and expert legitimacy to launch ICL practice into other spheres, taking on new responsibilities and initiatives and helping to re-shape common-sense understandings of ICL institutions' core business in the process. These expansions were apparently unforeseen by the tribunals' principals and spoke to tribunal officials' consolidation and use of their autonomy as expert practitioners in a captured field.

First, the ICTY chambers pioneered the ICTY's Outreach Program, which was the first of its kind and is arguably the ICTY innovation with the most substantial legacy. After a modest start in the late 1990s, the Outreach Program came to be a significant element in both how the Court defined its mission and in how the Court and its observers evaluated the ICTY's success.[146] Outreach is now understood to be a core element of ICL's human rights and reconciliation-focused mission. Prior to the late 1990s, outreach was not considered to be a responsibility of international criminal justice institutions; neither the Nuremberg tribunal nor the Tokyo tribunal made significant efforts to shape public perception, transitional efforts, or collective memory in societies affected by the crimes under their jurisdiction. Although some observers hoped the IMT would "rely on witness testimony to draw in the mainstream media and depict atrocities," practitioners at Nuremberg were more interested in securing legitimacy among scholarly audiences and establishing the historical record "for posterity."[147] When establishing the ICTY, UN states made it clear that, while they hoped the ICTY might have an effect on posterity, they did not expect the ICTY to do anything more than coordinate investigations and trials; there was no hint

[143] Wenger 1999, 82.
[144] Stuart and Simons 2010, 51.
[145] Wenger 1999, 82-83.
[146] Steinberg 2011.
[147] Levi, Hagan, and Dezalay 2016, 300.

that the ICTY should become an "educator."[148] As the Ambassador for New Zealand summarized: "the Tribunal is a court. Its task is to apply independently and impartially the rules of… law."[149]

By the end of the ICTY's mandate in 2017, outreach was defined as a key competency of both tribunals.[150] The ICTY Outreach Program's activities included youth programs, "community-building" in the region, "capacity-building" for legal professionals and institutions, "media outreach," and other programs aimed at making the "Tribunal's trials, appeals and judgements easily accessible to all levels of the population" of the former Yugoslavia.[151] In recent decades, post-conflict societies have gone from being peripheral to international criminal justice efforts, to being identified as key stakeholders and "compliance constituencies."[152] As De Vos et al. note, "now there is a broad consensus on the importance of effective outreach in a court's work;" at the ICC, for example, outreach is a "settled part of tribunal practice, with increased funding and institutional attention paid to the local population as an audience of tribunal proceedings."[153]

Matias Hellman, who worked as an Outreach Coordinator for the ICTY and the ICC, is adamant that "the genealogy of outreach practices and challenges" begins with the ICTY.[154] This deliberate expansion of the ICTY's practices and goals arose from ICTY judges' learning and adaptation, and their ability to credibly assert power to define ICL. UNSC states had not foreseen such expansion, but they could not prevent it. The Outreach Program was born out of the judges' realization that the media in the former Yugoslavia could not be relied upon to give an accurate account of the Court's actions and jurisprudence. Initially, ICTY judges and prosecutors expected "the media" to act as a "partner" to the court, since "if people in a country are not told what their criminal courts are doing, then the deterrent aspect of criminal justice is going to fail." [155] This confidence was revealed to be naïve. The first revelation shattering this assumption occurred during the *Tadic* Trial in 1996. Judge McDonald, describes the moment:

> a witness in Tadic… a journalist from Belgrade, I recall… was explaining the events leading up to the conflict, and describing propaganda, and he said, 'It would be just like David Duke had taken over your media, had taken control of your media in the United States. You too would have had this conflict.'[156]

McDonald's recollection of who made this remark is inaccurate, although her recollection of the substance is correct.[157] This testimony made a strong and horrifying impression on McDonald and

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[148] S/PV.3217, 11-12. Virginia Morris and Scharf 1995b, 366-458; S/25704.

[149] S/PV.3217, 23

[150] ICTY 2009, 104; Tolbert 2002.

[151] ICTY Outreach Programme 2016, 1.

[152] Levi, Hagan, and Dezalay 2016, 293; Clark 2009.

[153] De Vos, Kendall, and Stahn 2015, 13

[154] Matias Hellman 2015, 252.

[155] Quoted in Raymond M Brown 1996, 604.

[156] Oral History Interview McDonald 2016, 55.

[157] The remark was made by Judge Hanna Greve, an expert policy witness called by the prosecution, who quoted from Noel Malcolm's *Bosnia: A Short History*. Malcolm spent years in Bosnia and did not find it "seething with ethnic hatreds." Malcolm asserts: "having watched Radio Television Belgrade in the period 1991-2, I can understand why simple Bosnian Serbs came to believe that they were under threat… As the independent Belgrade journalist Milos

the other judges hearing the case (Stephen of Australia and Vorah of Malaysia).[158] The testimony revealed that the assumption "that the [Yugoslav] Fourth Estate [would] play a positive role in struggling to master the treacherous currents of debate swirling about the trial" was naïve, exposing "another kind of media activity" from that which the judges expected.[159]

The judges responded by using the legal tools available to them to combat such propaganda, initially attempting to stay within the bounds of their existing mission when doing so. They were optimistic that comprehensive judgements and clear jurisprudence would force officials and publics in the former Yugoslavia to come to terms with the reality of the conflict. McDonald recalls:

> we intentionally… because of the effect of propaganda, wanted to make [the *Tadic* judgement] a really full judgment about what happened and why had it happened… and it took us a long time… People were saying, 'Oh, they can't decide on the guilt or innocence.' [But] we decided that early on… the verdict. So we wrote this judgment, and… I really believed in it, and what this journalist said… all this propaganda; [we] spent all of this time writing the judgment, [highlighting] individual occurrences [of crimes].[160]

The (long) judgement was thus specifically dedicated to not only addressing the crimes of Dusko Tadic, but also clarifying the history of the conflict and the "atmosphere" in the Prijedor region (where Tadic had committed his crimes) in general.[161]

Unfortunately, the detailed and jurisprudentially important judgement had little effect in the former Yugoslavia; misinformation about the Tribunal and about the history of the conflict continued to be believed. McDonald discovered this after she was elected to succeed Cassese as President in November 1997. She recalls how, in the early days of her tenure as President, she became aware of the fact that the *Tadic* judgement had not dispelled denial:

> I'm interviewed by… reporters who had just come back from Prijedor. They say, 'No, no, there weren't detention camps. They were voluntary collection centers where Muslims were collected for their own protection. Then they could exit the Prijedor region.' I was boiling. [Laughs] I was boiling. Here we spent all this time, all these witnesses, all this long judgment, seven thousand pages of transcripts—. We have a mandate at the ICTY…to help to bring about and maintain international peace and security. Now how are you going to do that if you can't impress upon the people in the region—not the international legal community, but people in the region—what happened? Give them a historical record of what happened? I felt like a failure. You have this pretty judgment, and we made all of

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Vasic put it… it was as if television in the USA had been taken over by the Ku Klux Klan: 'You must imagine a United States with every little TV station everywhere taking exactly the same editorial line—a line dictated by David Duke. You too would have war for five years.'" Raymond M Brown 1996, 606 and 611; "Tadic Transcript", 974-975. Malcolm 1996, 252.

158 "Tadic Transcript," 975-976.

159 Raymond M Brown 1996, 610-611.

160 Oral History Interview McDonald 2016, 56.

161 "Tadic Trial Judgement," para.124 and 153.

> these findings, and it looks pretty; but it's not influencing people. So, I said to myself, 'Gaby, we've got to do something about it.'[162]

The conventional legal tools available to a judge had failed to reach the Court's constituency; distortion had polluted the relationship between the judiciary, the media, and the public which McDonald and her colleagues expected.

In response, the ICTY judges expanded ICL practice and pushed for the Court to orchestrate its own outreach. Following two attempts to have the ICTY judges visit the former Yugoslavia, the ICTY hosted an "Outreach Symposium" in 1998.[163] This marked "the first successful step in [a] campaign for better understanding of the ICTY" in the region, and launched ICL practice in a new direction.[164] As McDonald's invitational letter made clear,

> For the Tribunal's investigative and judicial work to have the desired effect, it must be known and understood by the people of the region…However, that cannot happen and the Tribunal cannot contribute to the goals of peace, justice and reconciliation if its work is not only not known in the region but also actively misunderstood.[165]

The Symposium brought legal and judicial professionals and officials from the former Yugoslavia to the Hague to observe the Court's activities and dialogue with Court officials, emphasizing their professional and legal legitimacy and credibility.[166] McDonald recalls: "They watched the trials, they could speak one-on-one to the judges… the prosecutors, and the Registry, the whole thing. They got an understanding that we're not sitting in The Hague with horns, trying to go after any group of people. We're professionals just like they're professionals."[167]

Following the Symposium's success, ICL outreach expanded (and, with it, accepted ideas about the mandate and mission of ICL institutions), with the creation of a broad Outreach Program in 1999 and a new Outreach Office within the Court's Registry.[168] The ICTY opened liaison offices in Bosnia and Herzegovina, Croatia, Serbia, Kosovo, and Montenegro, and created infrastructure to allow members of the press more access to the Tribunal.[169] They hosted conferences and professional training programs for individuals in law and other fields, sponsored "study trips" to the Hague and internships for young people, produced film documentaries, and eventually made Court documents and transcripts available online and in the local language.[170] The stated goals of the Outreach Program included establishing "an efficient information network" in the former Yugoslavia, and providing a "comprehensive pro-active information campaign stressing the

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[162] Oral History Interview McDonald 2016, 56-57.
[163] Oral History Interview McDonald 2016, 57.
[164] Oral History Interview McDonald 2016, 57.
[165] CC/PIU/355-E.
[166] CC/PIU/355-E.
[167] Oral History Interview McDonald 2016, 57.
[168] ICTY Outreach Programme 2016.
[169] A/58/297–S/2003/829, 58; CT/CS/PR1542e.
[170] ICTY Outreach Programme 2016.

[Tribunal's] impartiality and independence, as well as countering the endemic misconceptions that had prompted widespread disillusionment with the Tribunal."[171]

The ICTR soon followed suit, expanding its mandate into outreach in 1998 for similar reasons.[172] As one ICTR registry official, Jean-Pelé Fomété, recalled, "it became very clear that our key target audience was Rwanda, and that whatever CNN… or the BBC…would say about our work—which was good for the powerful—if we don't reach out to Rwanda, maybe we might have failed."[173] Spurred by the activism of Justice McDonald (who served on the joint ICTY and ICTR Appeals Chamber) and Agwu Okali, the ICTR registrar, the ICTR sent delegations of judges to Rwanda and brought Rwandan journalists, Members of Parliament, civil society groups, lawyers, magistrates, and others to Arusha to "see it themselves."[174] Court officials also travelled to Rwanda to brief local lawyers on ICL, funded internships, drew cartoons explaining its work, sponsored radio broadcasts, and established local information centers. As Fomété remembers, initially the ICTR "thought it was an international institution, independent, and that it had nothing to do with Rwanda—that it would render justice, that's it… But justice needs to be seen to be done."[175] Moghalu summarizes Okali's desire to "correct the obvious disconnect between the tribunal and Rwandan society… If the whole point… was to help Rwanda build a new, more tolerant society in which the ideology of genocide was to be banished forever, what was the point of the international tribunal if… 'few people know about it, let alone care?'"[176] The creation of this program is understood to be a "major accomplishment" of the ICTR, and a vast improvement on the "near-total information vacuum that hitherto existed between the tribunal and Rwanda."[177]

Similarly, the ICTR also pioneered a turn to "bring victims in" to ICL. As registrar, Okali adopted numerous measures to improve victims' standing and treatment in the ICL process. This included creating a new unit for 'gender issues and assistance to the victims of genocide,' which provided "legal and psychological counselling and limited rehabilitation assistance to victims and survivors."[178] Okali successfully proposed a new procedural rule to the ICTR judges, facilitating "the establishment of a form of restorative justice through a victim oriented assistance program," including through obliging the tribunal to offer rehabilitation and counselling services.[179] This turn to restorative justice and victims' services was "unprecedented and set the standard for other far-reaching initiatives, notably in the statute of the ICC."[180] It also marked a minor but notable turn away from the emphasis on retributive justice which had dominated ICL for more than two hundred years. The ICTY soon followed suit with its own victims' services unit.

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171 A/58/297–S/2003/829, 58; McDonald 2004, 570.
172 Moghalu 2005, 74.
173 Oral History Interview Fomété 2016, 20
174 Oral History Interview Fomété 2016, 20-21.
175 Oral History Interview Fomété 2016, 22.
176 Moghalu 2005, 65.
177 Moghalu 2005, 74.
178 Moghalu 2005, 67.
179 Moghalu 2005, 67; ICTR-RPE, Rule 34, ii.
180 Koomen 2013, 271.

Thus, in addition to re-shaping the expected competencies of ICL institutions, the turn towards outreach and victims re-shaped the expected goals and purpose of judicial ICL. Far from restoring ante-bellum international *status quo,* and in addition to simply establishing the history of particular crimes, ICTY and ICTR officials national reconciliation, individual rehabilitation, and transitional justice as crucial goals for ICL. This idea had been met with scepticism when raised by Rwanda in the UNSC in 1994, yet was transformed into "obvious" ICL common sense by the tribunals themselves, under the weight of their authority. The Outreach Programs and Victims Services' units were almost entirely due to decision-making and innovation within the tribunals and to shifts in officials' ideas about how ICL could legitimately and effectively be practiced. They had no precedent in existing IL or domestic judicial systems and were not envisioned by the tribunals' principles. Yet, today, outreach is understood to be a core function of modern ICL. The ICC's Strategic Plan lists "further development" of outreach and reparations for victims as its second "Strategic Goal," and outreach activities as "Key Performance Indicators."[181] The ICC regularly reports to the UNSC regarding "progress on key principles" for each situation referred to it; progress towards "empowering victims, witnesses and affected communities" is a key benchmark included in such reports.[182] Such activities are part of ICL common sense thanks to practitioners' ability to innovate within institutions (despite UNSC assertions that practitioners would merely apply existing law in the courtroom). Having established a shared understanding of internal decision-making and pragmatic, inventive goals, ICTY and ICTR practitioners expanded their activities into other areas of practice. In the process, they expanded common-sense ICL.

Conclusion

The ICTR and ICTY were the sites of major developments in "how" ICL was practiced. First, the ICTY and ICTR pioneered the model of expert ICL governance by trustees. This model persists in contemporary ICL institutions, such as the ICC and the residual mechanism for the ICTY and ICTR.[183] ICL is framed as a legal and judicial issue, in which practitioners have a responsibility to be impartial, independent, and apolitical. Judges and prosecutors are expected to have no relationship with their home states. The ICL field is therefore no longer an extension of the policy-making or the multilateral diplomacy field; it is a separate autonomous sphere with its own rules and norms, many of which are imported or translated from national judicial and legal professional fields. The internal politics of the ICTY and ICTR, including the creation of procedural rules like Rule 61, reveal the struggles which helped to crystallize this model of ICL practice. Even as they struggled amongst themselves over which specific legal norms applied, ICL practitioners continued to insulate their work from external interference and broadly agreed that norms of legal professional appropriateness were relevant for their work. In this way, the 1990s tribunals continued the work of insulating and disciplining their field and institutions, as their predecessors had done in the 1940s.

Second, having distanced themselves from state interference and agreed that legal professional norms, collegiality, pragmatic inventiveness, and a shared commitment to the ICL project would

[181] International Criminal Court 2023, 13-14 and 30.
[182] Office of the Prosecutor 2025a, 10-15; 2025b, 7-8.
[183] Alter 2008.

structure the field, practitioners began reaching into and re-shaping other spheres. Most notably, the ICTR and ICTY's pioneering Outreach and Victims and Witnesses Units expanded the scope and stakeholders of ICL. These initiatives also marked ICL tribunals' coming-of-age as active decision-makers, rather than reactive agents. Outreach and victims and witness protection were not foreseen or necessarily desired by the tribunals' principals and marked a shift in the field's central goals and ethos, as ICL practitioners used their relative autonomy to actively re-shape the field without state input.

Conclusion

The central observation from which this dissertation flows is that the discourse and practice of contemporary International Criminal Law are defined by a specific constellation of "common-sense" expectations and normative vocabulary. The legitimacy of modern ICL institutions and practitioners is understood to depend on those actors' ability to credibly claim and perform a specific kind of apolitical legal expertise, inventiveness, humanitarianism, and judicial independence. The fact that these expectations are widely shared and naturalized in contemporary international politics obscures their historically contingent and constructed nature. This naturalization also conceals the many versions and visions of ICL that (recently) preceded the contemporary one and the dynamics that contributed to the field's expert capture. This dissertation has chronicled the ascendence of the contemporary expertized vision of ICL. It has implications for our understanding of International Criminal Justice and other global governance fields.

The preceding chapters told the story of ICL's expert capture and transformation from a state-run field of taken-for-granted "high politics" to one centered in the courtroom and defined by expected apolitical expert trusteeship in the name of individual human rights. This is a story of contestation, struggle, contingency, and unforeseen consequences. It is also a story of professionalization, legitimation, and rhetorical entrapment.

I have argued, first, that ICL has been subject to a phenomenon I label "expert capture." Expert capture refers to the process through which professional experts gain authority to shape and defend the assumptions and norms of their field. Second, I have argued that ICL's expert capture was enabled by specific patterns of contestation, legitimation, and institution-building in modern ICL, and by practitioners' efforts to insulate their work from external interference and exercise internal discipline. These patterns contributed to a dynamic that I call the "expert legitimation trap," in which powerful states' reliance on expertise to legitimate favoured policies eventually enabled expert capture and eroded those states' total power in ICL. The intersection between the steady development of the IL profession and the much more sporadic institution-building efforts of powerful states created the conditions of possibility for expert capture, as did the struggles and innovations of practitioners in ICL institutions.

After situating my argument in relevant IR, historical institutionalist, and sociological literature, my first move was to examine the components of contemporary ICL "common sense" and sketch the historical struggles over them. In Chapter One, I introduced some of ICL's key questions, the answers to which constitute the field's common sense. These questions relate to "how" ICL should be practiced (in what institutions and according to what norms); "who" should practice it (based on which credentials and hierarchies); and "what" concepts, goals, and reference groups should be the focus of the field. According to this "common sense," an ideal (legitimate) ICL institution is an independent and apolitical court staffed by legal experts committed to the ICL project, collegiality, adaptability, and human rights protection and outreach.

I then examined the development of this "common sense" from approximately 1815 to 1998, foregrounding key critical junctures of institution-building and practice. This choice was inspired by historical institutionalist scholarship, which I leveraged to examine the uneven patterns of change in ICL. In particular, the concept of "punctuated equilibrium" directs attention to patterns

of change in which relative equilibrium is punctuated by "critical junctures" which provide opportunities for major change, rupture, and transformation. The concept of "critical junctures" also foregrounds moments of conjuncture and intersection, in which different processes, groups of actors, and spheres of activity intersect and (re)shape each other. In the case of ICL, the critical junctures of post-atrocity institution-building saw the burgeoning IL profession and discipline intersect with state-led policy and diplomacy, forcing implicated actors to contest and make consequential decisions as they enacted ICL. The choice to foreground such junctures—while also offering an account of the more superficially stable periods between them—enabled me to chronicle the "boom-and-bust" development and expert capture of the field. This choice also enabled me to chronicle the ways in which the legacies of each critical juncture were refined, deepened, and further developed in such a way that they shaped how actors approached subsequent moments of institutional creativity.

Section II of this dissertation focused on four important critical junctures of ICL institution-building and practice, considering their unique histories, legacies, and interconnections. The historical episodes examined in Section II demonstrate how ICL's expert capture flowed from states' reliance on expert justification in moments of institution-building. This reliance, coupled with the "boom and bust" patterns of institution-building and the diverse membership of ICL institutions, created the "expert legitimation trap." These factors established expert practitioners as authoritative actors in ICL and opened the door for them to assert and defend their autonomy from states while also re-shaping institutions from within. The theorization and empirical substantiation of this "trap" is a key theoretical contribution of this dissertation.

In Chapter Two, I examined Britain and the Concert of Europe's mid-1810s exile of Napoleon Bonaparte to St. Helena. This episode is rarely included in scholarly accounts of the history of ICL. Examining the Napoleonic episode helps uncover the "pre-history" of modern ICL, including early efforts to legalize the field. In particular, the Napoleonic episode illuminates how far modern ICL has come since 1816. Napoleon's fate was understood at the time to be an entirely political question, and legal arguments were only generated as an afterthought, thanks to the intervention of one lone practitioner. This sharp contrast to contemporary "captured" ICL is useful for de-naturalizing the assumptions underpinning the modern field. In addition, many of the tensions and questions contested during the Napoleonic episode reappeared in subsequent episodes; some even persist or have reemerged in the field today. Furthermore, the Napoleonic episode saw early strides towards the legalization of the field, laying a partial foundation for eventual expert capture. That this was only modestly successful at the time and had no immediate legacy, but was eventually salvaged after the birth of the modern IL profession, is notable. Chapter Two concluded with an overview of other developments during the long nineteenth century, including the birth of professional IL, efforts to codify the laws of war, and other social and political changes that shaped the legacy of Napoleon's exile and impacted subsequent ICL efforts.

In Chapter Three, I examined the first thoroughly modern effort at ICL institution-building, when the erstwhile Allies attempted to "expand 'Hang the Kaiser' in rational [modern legal] terms."[1] During the 1919 attempt to hold Kaiser Wilhelm II legally accountable for his alleged

[1] Pollock to Holmes, 30 January 1919, reproduced in Howe 1941, 4.

crimes, including aggressive war, legal professionals gained a greater voice in ICL and articulated perspectives that were very different from those of their political counterparts. The Wilhelmine episode saw the first framing of ICL as a field of judicial practice, the reification of the earlier legalization of the field, the foundation of the first multinational expert ICL institution, and the inauguration of the "advice model" of legal expertise. The episode was also defined by continued contestation over key questions, including how the proposed international tribunal would relate to states and the appropriate relationship between international justice, geopolitics, and domestic law. The Allies' decision to invoke and rely on legal expertise to legitimate their favoured policies invited legal practitioners into the field. This triggered a decades-long interwar debate—which I sketched in Chapter Four—over the role of international law in preventing and responding to apparent war crimes. In debating the Wilhelmine plan, professionals and Allied states laid foundations for the expert legitimation trap, which would be sprung by subsequent generations. Chapter Four acted as a pivot point to explore changes in ICL common sense during the apparently "dead" period of 1919-1945. This chapter highlighted the many ways in which IL professionals developed ICL during this era of state neglect, including through the creation of the concept of an international crime and the development of new legal philosophies.

Chapter Five examined the International Military Tribunals at Nuremberg and Tokyo. The battle over how ICL would legitimately be practiced raged on during this period. Both tribunals were initially expected to operate in a quasi-political, quasi-judicial grey zone, and tribunal officials were expected to conduct themselves as state representatives first and judicial experts second, in keeping with a "delegation model" of IL expertise. During this period, states ratified the legalization and judicialization of ICL. They also embraced the delegation model, only to have their core assumptions challenged by their chosen practitioners. These practitioners contested the delegation model and instead enacted their own projects of disciplining the emerging ICL field and insulating it from state interference. The post-war Tribunals saw the "expert legitimation trap" beginning to be sprung on the Allies, who could no longer ignore the concerns and expectations of expert IL practitioners. For the first time, legal professionals invoked expertise as a source of legitimacy on their own behalf and carried the day in disputes with powerful states. As the second "hinge" chapter of this dissertation, Chapter Six offered an overview of the crucial Cold War interlude between the critical junctures of the 1940s and 1990s. The Cold War saw the consolidation and further entrenchment of gains made at the post-war tribunals and the development of new expert consensuses on crucial questions of ICL. This included an expert rejection of some legacies of Nuremberg and Tokyo, and further popularization of the idea that ICL should be independent, apolitical, and insulated from state interference.

Finally, Chapter Seven chronicled the birth of the contemporary trustee model of ICL expert governance in the ICTY and ICTR and the consolidation of ICL's expert capture. The UNSC's expectations for the ICTY and ICTR were premised on a rigid trustee model, in which tribunals officials were expected to "apply" not "interpret" ICL. UNSC deliberations revealed the acceptance of Cold War-era ICL common sense, as articulated and ratified by IL professionals, including the rejection of the 1940s-era delegation model and "victors' justice." The ICTY and ICTR disrupted the UNSC's conservative assumptions, as tribunal practitioners forged a sense of collegiality, inventiveness, and common commitment to the progressive development of ICL. The two 1990s tribunals proved able to resolve internal disputes in a productive and generative way.

While internal heterogeneity led to clashes, these were more productive than in previous eras, in part thanks to tribunals' greater discipline and ideological coherence, and thanks to the sense of collective purpose within post-1990s institutions, which did not exist before. The tribunals also leveraged their autonomy and expert authority, exploiting the expert legitimation trap to expand the boundaries of ICL practice into other spheres without state interference.

Contributions and Avenues for Further Research

Why does this matter, and what can we learn? This dissertation's empirical, theoretical, and conceptual contributions have implications for various literatures in IR and related fields. This project draws on and contributes to scholarship on international law, global governance, the politics of expertise, legitimation, and international practices. In addition to recapping this dissertation's primary contributions, this section highlights some compelling outstanding questions as potential avenues for future research.

First, this project introduced the concepts of "expert capture" and the "expert legitimation trap," which provide insight into processes of historical change in ICL and potentially into similar phenomena in other fields of global governance. *Prima facie,* ICL is far from the only sphere of global governance captured by expertise. The ability to claim and perform apolitical expertise is central to the legitimation and self-identification of many global governance institutions and practitioners, as Louis and Maertens have demonstrated.[2] The question of how expert capture has unfolded and continues to play out in other fields remains, as does the question of how the politics of attributing expertise intersect with the politics of expert capture and legitimation.[3] An investigation of expert capture in other fields is one of the most interesting potential extensions of this project. Most notably, future scholarship might delve into whether and how the process of expert capture might differ in governance fields where institutional development has followed a more linear and continuous trajectory, as opposed to the "boom-and-bust" pattern of sporadic development in ICL. I have developed the concept of expert capture in deliberately general terms, with the intention of it being portable and applicable to other cases as well. Future research could pick up where this thesis has left expert capture to further develop and refine the concept. In the history of ICL, powerful states' periodic abandonment of the ICL project opened space for members of the IL profession to contest and refine ICL common sense without significant state input, direction, or interference; how might expert capture unfold in a context defined by different patterns of state interest and institution-building? How might it unfold in a context where the nature of claims to expert knowledge differ from the morally inflected tones of legal expertise?

By drawing attention to the "expert legitimation trap" in ICL this project also opened avenues for future research and contributed to scholarship on the consequences of rhetorical legitimation in general and of invoking expertise as a source of legitimacy in particular. While scholarship on Principal-Agent and Principal-Trustee dynamics has examined many costs and externalities of contracting governance tasks to expert practitioners and institutions, this project has revealed another, more long-term, potential cost associated with elevating a particular class of (expert)

[2] Louis and Maertens 2021.

[3] Kennedy 2005; Sending 2015; Kennedy 2016; Werner 2014.

actors.[4] By rhetorically invoking expertise to narrate and legitimate their chosen policies, the Allies (and then the UNSC) popularized and reified a vision of ICL which eventually narrowed and constrained their own freedom of action. By weaving together insights from historical institutionalism, the practice turn, and scholarship on global governance and legitimation, I have been able to examine an under-theorized consequence of "winning" discursive battles. The expert legitimation trap is one of the "manifest political consequences of invoking one mode of representation over another."[5] As explored in Chapter Three, Woodrow Wilson feared that the "high political" question of Kaiser Wilhelm II's fate would be given over to lawyers, rather than decided by statesmen; he therefore sought to re-assert "high political" control over post-conflict justice. Despite Wilson's and other actors' efforts, and thanks to expert practitioners' efforts to build, discipline, and insulate professional expert ICL, Wilson's fears were eventually realized.

Additionally, this dissertation has contributed to scholarship on the history of ICL and especially to critical ICL literature. By exposing the contingent and constructed nature of some of modern ICL's key foundational assumptions, I have contributed to an "assumptions critique" and "history of the present" of the field.[6] By identifying, describing, and exploring the history of contemporary ICL's common sense—including expectations about the relationship between international tribunals and states, and the goals and ethos of such institutions—this dissertation highlights the "kinds of unfamiliar, unchallenged, unconsidered modes of thought" on which "the practices that we accept rest."[7] I hope that, by exposing the historical contestation over different visions of international justice, and identifying some of the "roads not taken," this project helps dispel the notion that ICL is either the timeless, pre-determined product of uncontested expert knowledge or separate from politics. Although I have not been able to "pull on" all the "threads" arising from this project, I believe that the excavation and analysis of some of the many visions of ICL that have been proposed and contested over time is worthwhile. Each of these visions—such as Justice Pal's at Tokyo and Larnaude and de Lapradelle's at Versailles—could be a starting point for a different genealogical analysis. Such examinations would reveal neglected dynamics and forgotten episodes in ICL's history and would likely augment our understanding of the field's expert capture.

This project is a partial response to IR's failure to pay attention to both ICL's historical transformation and the other visions of the field which were once living possibilities but have now been marginalized or faded into obscurity. In my view, this failure hinders our understanding of the past and present of international criminal justice. It also hampers our understanding of changing relationships between powerful states, ICL institutions, and the states, individuals, and communities with whom such institutions interact and in whose name they act.

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[4] Rudolph 2001, 658–660; Posner and Yoo 2005; Helfer 2006; Alter 2008; Barnett and Finnemore 2004; Hawkins et al. 2006.

[5] David Campbell 1992, 7.

[6] Baars 2014; Dreyfus and Rabinow 1982, 118-120.

[7] Foucault 1988, 154.

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