THE INTERNATIONAL CRIMINAL COURT:

Mapping the Politics of Myth Construction on the “Road to Rome”

Henry McCoy

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University of Sydney
ABSTRACT

This thesis investigates the reasons why it took seventy-four years for the International Criminal Court to be officially established in Rome in 1998 after the idea for the Court was first mooted in 1924. It is argued that the processes of myth-construction were pivotal in contributing to the Court’s enduring identity crisis throughout this period. Based on evidence pertinent to this inquiry, the thesis challenges the conventional histories that frame the Court’s evolution within a teleological development of international criminal law. The jurists, Dr Hugh H.L. Bellot (1860–1928) and Sir Hersch Lauterpacht (1897–1960) are key sources in supporting the ultimate hypothesis proposed here – that is, the recent perceptions of the Court’s genesis within the late nineteenth century Red Cross movement originated from the 1998 Rome Conference. This strategic myth was orchestrated with the chief purpose of unifying the interests of national delegates and international Civil Society by suppressing any future political doubt of the Court’s humanitarian function.
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Introduction

Revisiting the “Invented Traditions” of the International Criminal Court

Traditions which appear or claim to be old are often quite recent in origin and sometimes invented […] they normally attempt to establish continuity with a suitable historic past. – Eric Hobsbawm.¹

The evolution of the International Criminal Court (ICC) is a conspicuously unchartered field of historical inquiry. The Court as it functions today, was formally proposed during the United Nations (UN) diplomatic conference in Rome in 1998, and subsequently, was officially inaugurated in 2002.² Its genesis, however, can be traced back further to the “minor utopias” of international lawyers, focused on Europe at the dawn of the twentieth century.³ Although in recent decades the history of the ICC has predominantly attracted legal scholars and political scientists, whom revelled in a constitutional history of criminal law, there has been limited investigation on why the Court took nearly a century to become more than a reality on paper.⁴ This thesis offers original insight into the processes through which

⁴ Constitutionalism has been the key focus of the following legal studies, which use history to provide an account of precedent, rather than an account of the past: William A. Schabas, An Introduction to the International Criminal Court (Cambridge: Cambridge University Press, 2008); William A. Schabas, Unimaginable atrocities: justice, politics, and rights at the war crimes tribunals (Oxford: Oxford University Press, 2012); Mahmoud Cherif Bassiouni, eds., ICC ratification and national implementing legislation (Toulouse: Eros, 1999); Lawrence J. LeBlanc, The United States and the Genocide Convention. (Durham [N.C.]: Duke University Press, 1991); Antonio Cassese, Paola Gaeta and John R.W.D. Jones, eds., The Rome statute of the international criminal court: a commentary (Oxford; New York: Oxford University Press, 2002); Nidal Nabil Jurdi, International Criminal Court and National
the politics of myth-making guided the Court’s path; from an abstract utopian ideal, to a central institution at the core of our modern global infrastructure. In doing so, the study shall dispel the traditionally perceived continuity in the Court’s historical trajectory by revisiting its history of opposition.

The Court, in common with a large number of historic institutions, has its own “invented traditions”. These are employed to trim the edges of what may be an inconvenient narrative of the past. Throughout the twentieth century, the international community has endorsed various foundation myths to become a doctrine in which a group’s values have been based. The current study’s interest is not limited to the extent to which myths have been created, but also intriguingly, why people chose to reject or embrace them. Identification of these myths is the first step in explaining the processes that led to their birth, and importantly, understanding the impact upon their receivers, perpetuators and dissidents.

Two schools of thought currently overshadow these gaps in the historical record – one tracing the Court’s lineage within a broader teleology of expanding international criminal law throughout the twentieth century, and the other emphasising its humanitarian origins.

Grand narratives of the ICC’s linear progress were first raised in 1950, when the Special Rapporteur of the International Law Commission, Ricardo J. Alfaro identified the ICC within a larger landscape of building international tribunals. For Alfaro, the creation of the Permanent Court of International Justice at the meeting of the Advisory Committee of Jurists at the Peace Palace of The Hague in 1920 was year zero in the ICC’s history. Michael J. Struett alternatively traces the ICC’s origins to the first meeting of The American Society for

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the Judicial Settlement of International Disputes in Baltimore on 6 February 1910.\(^8\) The United States Secretary of State Philander Chase Know, President William Howard Taft, Andrew Carnegie and Elihu Root were present at this meeting where the invention of an impartial and permanent court of justice was discussed.\(^9\) Leila Nadya Sadat considers the Court’s genesis to be rooted in the 1899 and 1907 International Peace Conferences at The Hague.\(^10\) While Sadat acknowledges that the “ICC has been in the ‘shadowland’ […] for the entire twentieth century” on account of numerous “conceptual, legal and political obstacles”, she offers no further explanation of why national powers never “officially considered” the idea until 1998.\(^11\) To date, the observation that “the Rome Treaty was the natural destination of The Hague Conferences” is one that remains unchallenged.\(^12\)

Legal scholars Nina H.B. Jørgensen and Jean H. Quataert have each extrapolated on this view in recent decades by focusing on the latter half of the twentieth century.\(^13\) They believed the Nuremberg and Tokyo International Military Tribunals of 1945 and 1946, the Genocide Conventions of 1937 and 1946–1948, the \emph{ad hoc} tribunals for the Former Yugoslavia (1993) and Rwanda (1994), and the Special Hybrid Courts for Sierra Leone, Cambodia, East Timor, Kosovo and Bosnia-Herzegovina were following one path leading to Rome in 1998. Louis Henkin, a prominent American scholar of contemporary international

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\(^12\) Sadat, “The Evolution of the ICC”, p. 31.

law, subscribed to this belief when stating, “from Nuremberg one can see a direct line [...] to the ICC launched at Rome in 1998”.14

The second school of thought is the “promotional view”, whereby the ICC is promoted as a “moral achievement in spite of and against politics”.15 At the Rome Conference in 1998, UN Secretary-General, Kofi Annan portrayed the ICC as an “historic milestone” in an ancient struggle to voice the humanitarian spirit of “international Civil Society” – a phrase in modern usage describing a global body of non-government organisations that share a collective interest in the preservation of human dignity.16 “The road leading to the holding of the Conference in the Eternal City”, Annan proclaimed, “had been a long one, passing through some of the darkest moments in human history”.17 The Rome myth was perpetuated by members of the Conference and subsequent scholars to ground the ICC’s origins within the latter nineteenth century work of the International Committee of the Red Cross (ICRC).18

Contrary to this sustained belief, nineteenth century British newspaper archives, as well as the published and miscellaneous writings of figures overlooked, but nevertheless closely involved

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15 Samuel Moyn, “Promotion and its limits, Part 3: Four ways to talk about the ICC: politics, promotion, professionalism and preservation”, Humanity, available at http://www.humanityjournal.org/blog/2013/01/promotion-and-its-limits-icc-pt-3, last accessed 17 May 2013; Moyn provides three additional frameworks for conceptualising the ICC: the “political view” describes ICC as an international project with multiple intersecting agendas; the “professional view” portrays the Court as a vocational experience for contemporary international lawyers; and the “preservation view” considers the aims of contemporary political actors to justify the existence of the Court.


17 UN Doc. A/CONF.183/SR.1, p. 61.

in the idea of an ICC throughout the twentieth century, appear remarkably silent on the Court’s genealogy in the Red Cross movement – a persistent amnesia within historical sources that remains unexplored.

This thesis interprets and dissects the conventional narratives by drawing from an alternate body of scholarship: one that emphasises the primacy of language and context. Herbert M. Butterfield criticises “the Whig historian” who “oversimplifies the historical process” by reading “history from the point of view of his present day”. 19 Indeed, this is the predominant form that much legal history has followed until recently, and one that many legal historians continue to follow. Robert Cryer notes in his comprehensive work on the enforcement of international criminal law since the late 1980s, that “it would be easy to write a simple ‘Whig history’ of international law, but that would be inaccurate”. 20 Emmanuelle Jouannet scrutinises the “various changing purposes” of international law throughout the seventeenth to twenty-first centuries. 21 She breaks her study “down into periods” in order to examine the dualism of international law, that on one hand, protects the interests of nation-states, and on the other, safeguards the “well-being of the world’s people” – a phenomenon she terms the “liberal-welfarist” crisis. 22 From this perspective, Samuel Moyn candidly rejects the “promotional” view that turns a blind eye to the history of conflict in the ICC’s development and the manner in which the Court’s historically intended purpose has not remained static in time. 23

This study traces the experiences and political philosophies of individual lawyers as a lens through which to contest Whig narratives and survey the extent to which politically motivated distortions of history were driving forces in the progression and retrogression of

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the ICC. This approach has its roots in the contextualism of a number of historical methodologies, including the credo of Marc Bloch, who argues the need to distinguish between “beginnings” and “explanations” by providing language with an historical resonance.\textsuperscript{24} Clifford Geertz terms this method the “semitic approach” in his anthropological study \textit{The Interpretation of Cultures} (1973), which seeks to gain “access to the conceptual world in which our subjects live so that we can […] converse with them”\textsuperscript{.25} While Jay Winter warns against the risks of “an uncritical distance towards thinkers and their projects”, Martti Koskenniemi, in his evolutionary tome of international law extending from 1870 to 1960, strikes a balance between grand historical narratives that “flatten the work of individual lawyers” and realist approaches that frown upon “the assumption that individual lives could have a significant effect on the grand course of international politics”.\textsuperscript{26}

Chapter One analyses the motivations of British international lawyer, Dr. Hugh H.L. Bellot (1860 – 1928), who is credited as author and presented the first official statute of the ICC at the Stockholm Conference of the International Law Association (ILA) in 1924. I will argue that the hierarchy of competing myths about international civilisation that emerged in Europe, and especially from within Britain, during the aftermath of the First World War was a significant factor in the rejection of Bellot’s proposal. This rationale challenges the conventional wisdom expressed by contemporary scholarship that the idea of an ICC possessed direct roots in the legacies of the Hague Peace Conferences of 1899 and 1907, and the subsequent creation of the Permanent Court of International Justice in 1920. As a result, Bellot’s liberal vision of Anglo-American civilisation will be used as a yardstick to measure the extent to which perceptions of the Court’s history, purpose and legitimacy transformed or endured throughout the twentieth century. Importantly, it also enables an examination of the

\textsuperscript{24} Marc Bloch, \textit{The historian’s craft}, trans., Peter Putnam (Manchester: Manchester University Press, 1954), p. 32.
relationships between “invented traditions” and the international political cultures from which they have evolved.

Chapter Two examines the Austrian international lawyer, Sir Hersch Lauterpacht’s (1897 – 1960) universal vision of individual human rights as a perspective through which to explore the newly discovered understanding of the ICC in the mid-twentieth century. His motivations for supporting the Nuremberg Tribunal (1945 – 1946) as a foundation myth of the Court, and the manner in which the ICC became an evolving institutional expression of rights shall be focal points of analysis. This analysis serves as a contextual basis for revisiting the contentious relationship between the ICC and the Permanent Court of International Justice, which on 18 April 1946 became a judicial organ of the UN, known as the International Court of Justice. Whilst many of Bellot’s contemporaries recognised the Permanent Court of International Justice as a superior tool for the preservation of international civilisation during the 1920s, the inability of the International Court of Justice to overrule sovereign states was noted by various Eastern and Western Governments of the UN as a warning of the difficulties to be faced by an ICC, when enforcing individual rights and responsibilities as new a standard of international law. The mid-twentieth century marked a significant transformation in the differences between these two Courts. The “strange triumph” of the “human rights revolution”, combined with Lauterpacht’s loss of faith in the effectiveness of international courts will be a benchmark for measuring why the Nuremberg Myth was an unstable foundation upon which to build international support for the creation of an ICC during the 1950s.27

Chapter Three uses the previous two sections as a platform to argue that historical accounts of the ICC’s genesis in the Red Cross Movement of the late nineteenth century were an “invented tradition” of the 1998 Rome Conference. This foundation myth aimed to conceal

competing hegemonies at the Conference and served to dissipate political doubt of the Court’s humanitarian role in a decade when international politics were sharply divided between the rival demands of nation states and international Civil Society. Up to this point in time, the fragmentation of the ICC’s ideological mission had been an overwhelming obstacle to its establishment, to such an extent that neither Bellot nor Lauterpacht were able to translate their own visions of the Court into a reality. In 1998, fresh perceptions of the past drew upon the power of collective experience that played a key role in the politics of consent in Rome.
Chapter One

A Discourse on Civilisation:
Dr Hugh H.L. Bellot and the Alter Ego of the Permanent Court of International Justice

At the Buenos Aires Conference, 1922, it was resolved: ‘That in the opinion of this Conference the creation of an International Criminal Court is essential in the interests of justice and that the Conference is of the opinion that the matter is one of urgency.’ It was also resolved that Dr. Bellot be instructed to draft the Statute for this Court and to submit it to a Committee of the Association […] the Court shall apply […] the general principles of law recognised by civilised nations. – Dr Hugh H.L. Bellot at the Stockholm Conference in 1924.\(^{28}\)

This chapter will examine Dr Hugh H.L. Bellot’s liberal vision of Anglo-American civilisation at the dawn of the twentieth century as a perspective through which to investigate the purpose of the International Criminal Court (ICC). It will argue against universalist interpretations of the ICC’s development, to instead frame the Court’s genesis within a discourse on civilisation. In so doing, it will seek to identify the manner in which the ICC’s ideological mission was fractured by the competing modes of international civilisation that emerged in the aftermath of the First World War – a fracture that ultimately prevented the implementation of Bellot’s proposal at the Stockholm Conference of the International Law Association (ILA) in 1924. For Bellot, the ICC provided opportunities to defend his Victorian upper-middle class perception of civilisation by reinforcing nineteenth century critiques against \textit{ius positum},\(^{29}\) to humanise the laws of war, and to counterbalance American


\(^{29}\) Positive law (\textit{ius positum}) was a European legal tradition of the mid–eighteenth to mid–twentieth centuries that upheld sovereign nation-states as both creators and enforcers of the law. See: Antony Anghie, \textit{Imperialism, Sovereignty and the Making of International Law} (Cambridge, UK; New York:
hegemony following the induction of Wilsonian liberalism at the Paris Peace Conference of 1919. In his eyes, the Permanent Court of International Justice (PCIJ) founded by the Advisory Committee of Jurists at the Peace Palace of The Hague in 1920 had not accomplished these tasks.

The PCIJ, also known as the new “World Court”, was a “scheme for preventing war” by settling disputes between governments.30 This Court was remarkably similar to its predecessor – the Permanent Court of Arbitration, which was established at the 1899 Peace Conference of The Hague and sought to guarantee “perpetual peace” by negotiating settlements between nation-states.31 Although considered as early as 1907 during the Second Conference of The Hague, the PCIJ was not implemented at this time. This was due to an inability to elect judges – “to reduce forty-four to fifteen without excluding judges from some of the other states”.32 The Court was formally proposed in 1920 in accordance with Article fourteen of the Covenant of the League of Nations.33 At the Court’s official inauguration on 16 June 1920, Leon Bourgeoisie announced on behalf of the League that the new Court was to be one of justice and not arbitration.34 Many contemporaries saw the PCIJ as a symbolic renewal of global order after the unsuccessful International Arbitration Court and International Prize Court of 1907, neither of which gained sufficient momentum and had patently failed to prevent the atrocities of the First World War.35 The rehabilitative spirit of

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31 “International Arbitration”, Dundee Courier, 7 January, 1907, p. 4.
the new Court led the *New York Times* to believe that the PCIJ would not survive without “the physical as well as the moral backing of the League of Nations”.

It was not until four years before his death, Bellot ultimately stood before the ILA at The Riddarhuset in Stockholm and presented the first statute for the ICC. “There is a considerable body of opinion behind it”, he claimed, “I have largely modelled my Statute upon that of the Permanent Court of Justice”.

Hollis R Bailey observed, “he has made a new court of it.” Bellot assured his audience that the ICC served a “totally different purpose […] the administration of criminal law”. Criminal jurisdiction, however, did not adequately explain the ICC’s purpose because of two ambiguities that cannot be readily ignored. Firstly, even if Hannah Arendt argues that “the purpose of a trial is to render justice”, it is important to note that the PCIJ and the ICC were both in the interests of justice, and sought to prevent future conflicts. Secondly, Bellot conceded, “it is impossible to predict exactly what methods will be employed in future war, and therefore you cannot define them”. In response, the Honourable Charles H. Butler observed, “the laws of humanity and the dictates of public conscience are expressions too vague and indefinite to be the guide of any Court, no matter how constituted.”

For Bellot, the laws of humanity were not grounded in a contemporary human rights discourse, but instead symbolised “the general principles of law recognised by civilised nations”, for which nearly a decade earlier, Andrew Pearce Higgins, a British lawyer and fellow colleague of The Grotius Society, had alleged were the “basis of all laws”. This chapter looks beyond the legal language of Bellot’s statute to instead ground his desires for the Court within context.

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Historical scholarship has not investigated why Bellot supported the creation of a Court as opposed to a Commission or a Committee. Neither has scholarship addressed or considered why the creation of an ICC was a matter of “urgency” despite the existence of the PCIJ. In a similar vein to Alfaro’s 1950 United Nations (UN) Report, historians Daniel Segesser and Myriam Gessler have read Bellot’s statute to be symptomatic of a broader teleological narrative of expanding international criminal law throughout the twentieth century. While acknowledging Bellot’s early contribution, they are nevertheless critical of his efforts, asserting that “Bellot […] had dominated the debate on the punishment of war crimes […] the lead passed on more and more to jurists with a legal background dominated by Roman law.” While seeking to dispel the traditional continuity in the ICC’s history through the lens of individual experience, one cannot overstate Bellot’s historical agency. In spite of the coincidental lapse in the ILA’s efforts to establish the Court following Bellot’s death, work was continued by the Interparliamentary Union, the International Congress of Penal Law, the Association International de Droit Penal and the Pan-American Union. Segesser and Gessler avoided making definitive claims on Bellot’s impact upon the historic evolution of the Court. Their study does not explore the circumstances which led to the creation and rejection of Bellot’s original proposal at Stockholm.

On the evening of 12 August 1928 Bellot passed away at the Hotel Europa in Warsaw while finalising his work on the thirty-fourth conference of the ILA. To Bellot’s contemporaries, his allegiance to humanity transcended customary loyalties to the British Empire. Frank Savery, the British Consul-General in Poland, who on hearing the news put pen to paper, writing that Bellot had died “on the field of battle, fighting” for the “ideal of

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Internationalism through Law”. Savery’s tributary words evoked the merits of heroism, sacrifice, and piety, and subtly alluded to the tragic loss of Bellot’s son during the First World War. A poetic image of a father reunited with the ghost of his son upon the battlefield was a myth that saw Bellot’s devotion to international law pitted against the universal experience of human loss. An obituary writer for the ILA reflected that the British Foreign Office disallowed Bellot’s commendation of honours from a “Northern Monarch” for his “undoubtedly sound” advice to the Polish Government in regard to their disputes with Germany, and the Hungarian Government in their conflict with Romania, because such efforts did not acknowledge “services to the British Empire” but rather “services to humanity”. It is not probable that Bellot sought to establish an ICC for mere vocational reasons. During the War he was already a well-established Professor of Constitutional Law at the prestigious University College in London. Whether Bellot equated his own trauma to a universal experience, perhaps typified by his enthusiasm for an ICC, remains unexplored by contemporary scholars.

Although international lawyers frequently employed anti-national rhetoric in the name of humanity and civilisation during the late nineteenth and early twentieth centuries, one cannot fail to recognise the sudden shift in Bellot’s focus after the death of his son. Following resignation from his professorship at University College in London, Bellot began publishing articles on the prevention and punishment of war crimes and was soon appointed to the War Crimes Committee by the British Attorney-General, Sir Frederick E. Smith. It

was at this point in time, that Bellot began specialising on the treatment of prisoners of war.\textsuperscript{54}

These efforts continued into 1915 when he became Honorary Secretary of The Grotius Society – an organisation that was inspired by the memory of Hugo Grotius, a seventeenth century natural law theorist who was widely credited with founding the law of nations.\textsuperscript{55} “The aim of the Society”, Bellot wrote, “is to promote impartial discussion on the Laws of War and Peace”.\textsuperscript{56} The following year, he accompanied the British lawyer, Lord Robert Phillimore as Co-Secretary of the ILA – an association which “emanated from America” and was founded in Brussels in 1873.\textsuperscript{57} Bellot soon became a focal member of an intellectual elite class of lawyers, whose “heroic work” transcended the vices of aggressive nationalism and acted as “the legal conscience of the civilised world”.\textsuperscript{58} Just as Bellot’s personal narrative was tied to a universal humanity and was used as a vehicle to justify the moral authority of international lawyers, so too had he harnessed the myths and memories of Hugo Grotius (1583 – 1645), John Locke (1632 – 1704), John Stuart Mill (1806 – 1973) and Francis Lieber (1798 – 1872) to define the role of international courts in an Anglo-American civilisation.

The aftermath of the First World War provided fertile terrain for international lawyers to contemplate the invention of an ICC. In a neatly paradoxical sense, the initiation and forestalment of the ICC’s creation in the 1920s was symptomatic of an identity crisis within the international legal community. The role of international law in the scientific governance of the global community was re-evaluated when nineteenth century liberal distinctions between civilised European and uncivilised non-European communities were

pummelled by “the unlicensed barbarism of war”. 59 While Hannah Arendt draws a relationship between the coincidental emergence of European liberalism and imperial expansionism, she also highlights the internal disintegration of the “European nation-state system” following the emergence of minority rights, refugee movements and various revolutions after the War. 60 Furthermore, while Antony Anghie and Emanuelle Jouannet both interpret the Eurocentric nature of international law as the embodiment of imperial rule, Koskenemmi observes that international lawyers balanced “their moderate nationalism with their liberal internationalism.” 61 He argues, “no stable standard of civilisation emerged to govern entry into the community of international law” in the late nineteenth and early twentieth centuries. 62 Just as the Allies had expelled Germany from the family of “civilised states” at Versailles in 1918, so too had Bellot denounced national courts as the legal basis of Anglo-American civilisation in Stockholm in 1924. For the British lawyer, Higgins, the “Westaphalian myth” of state sovereignty was no longer a sacrosanct principle, “the very foundations of the law of nations has been shaken by this civil war”, furthermore “there is much need for a Court in which the states of the world could place complete confidence”. 63 Bellot defended Higgins’ words while delivering a guest lecture at the University College London in 1921. He announced “without such a Court civilisation is in dire peril”. 64 These opinions echoed across the Atlantic when two years later the American Senator, Thomas Marshall was cited in the Nottingham Evening Post, proposing that the “laws of every civilised people shall be so altered so as to provide that no war shall be fought until a


found “the sentence too hard”. 71 The British *Western Daily Press* believed these sentiments revealed the alien and uncivilised “mentality of the German military system”. 72

One must note an important distinction between Bellot’s universal critique against absolute state sovereignty and the conviction of British mass politics to stigmatise the German nation. While Bellot wrote that “the Prussian theory of war”, which advocated a principle of “military necessity […] cannot be tolerated by the civilised world”, he argued that “selfish nationalism” caused “international chaos” and obstructed the impartial delivery of justice in times of peace. 73 From these sources alone, it cannot be conclusively determined whether Bellot aimed to mask a personal vendetta against Germany behind an anti-national guise of intellectual reason, or whether Leipzig merely provided ammunition for his preconceived criticism against state-centred positive law. His broader academic critique against statehood did nonetheless distinguish his own voice from the emotionally charged and unruly appearance of mob justice. In doing so, it anticipated the doubts raised by James Leslie Brierly, a Professor of International Law and Diplomacy at Oxford, who claimed that an ICC would attract “martyrdom to the compelling sense of patriotic duty”. 74 From this point, one may deduce Bellot’s intention was to avoid delivering “victors’ justice” which had been the expectation of an ICC following the British public’s response of casting themselves as martyrs to the judgements of the Leipzig Trials. The impartial and immutable word of the law was both integral to his liberal vision of Anglo-American civilisation and an invaluable symbolic foundation upon which to generate widespread support for the creation of an ICC. The depersonalised legal phraseology of Bellot’s statute may be read as a continued and beckoned call for international law to transcend the fog of national politics. Therefore, whilst an international tribunal was not considered a novel concept by 1924, Bellot recognised the

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71 *The German Gazette*, 29 May, 1921 in “Wounding to German Susceptibilities: Sentences for doing his duty”, *The Times*, 1 June, 1921, p. 9.
74 James Leslie Brierly, “Do We Need an International Criminal Court?”, *British Yearbook of International Law*, vol. 8, no. 81, (1927), p. 84.
challenge when three years earlier he had quoted the nineteenth century American Chief Justice, Marshall, who declared that “no political dreamer was ever wild enough to think of breaking down the lines, which separate the States” with the rule of an International Criminal Court.\textsuperscript{75} Bellot thus included in his statute the key phrase, “the Court shall be open to the subjects or citizens of every State”.\textsuperscript{76}

Bellot’s intentions to depoliticise the Court were resonant with the form of his statute. His decisions to emphasise the laws of humanity, to declare English and French as the official languages of the Court, and to frame Articles eighteen, nineteen and twenty-five within a humanitarian branch of law marked a significant departure from the PCIJ and signified a degree of latitude in his role as the sole drafter.\textsuperscript{77} In addition, these factors demonstrated Bellot’s goal to humanise the laws of war, as several years earlier he avowed, “war should be conducted between combatants with humanity”.\textsuperscript{78} He referred to the rules of war established by the ancient Greeks and Romans in order to provide his humanitarian ideals with a firm historical resonance.\textsuperscript{79} Bellot revealed a leaning towards an historical method of thought during his early legal career when he published the well-renowned history on The Inner and Middle Temple: Legal, Literary and Historic Associations (1902).\textsuperscript{80} In later years, he expressed a debt to the German born, liberal American nationalist François Lieber, who had written the American war book Instructions (1881) in conjunction with American wartime officers.\textsuperscript{81} Bellot wrote, “Lieber’s Instructions also formed the basis for those laws of war on land contained in Conventions II and IV of the Hague Peace Conferences 1899 and

\begin{itemize}
  \item \textsuperscript{75} Bellot, \textit{Texts Illustration the Constitution of the Supreme Court of the United States and the Permanent Court of International Justice}, p. 3.
  \item \textsuperscript{76} The International Law Association, “Report of the Thirty-third Conference”, p. 81.
  \item \textsuperscript{77} The Statute of the PCIJ did not include “the laws of humanity”, and neither was English an official language of the Court. See, Advisory Committee of Jurists, “Draft–Scheme for the Institution of the Permanent Court of International Justice”, pp. 303–307; The International Law Association, “Report of the Thirty-third Conference”, pp. 79, 81– 82.
  \item \textsuperscript{78} Bellot, “War Crimes and War Criminals”, p. 13.
  \item \textsuperscript{79} Bellot, “War Crimes and War Criminals”, pp. 754–755.
  \item \textsuperscript{80} Hugh H. L. Bellot, \textit{The Inner and Middle Temple: Legal, Literary and Historic Associations} (London: Methuen and Company, 1902).
\end{itemize}
1907”, and furthermore, “they guided the principles of justice, honour and humanity” – an impartial justice which transcended nationalism. 82 Bellot’s reverence for Lieber’s humanitarian wisdom did not signify, nor can be mistaken for a praise of American political culture. Bernard E. Brown reminds us that Lieber’s humanitarian character marked the limits of his nationalism, which showed signs of a greater loyalty to liberal internationalism. 83 In 1847, Lieber had cautioned against aggressive expansionism in America by recounting memories of the Thirty Years War, and Prussia’s “wavering inconsistency between the requirements of civilisation and a police government, keeping the noble land for centuries from her destiny”. 84 He was strongly opposed to the expansion of American slaveholders in the South and lost his son in the civil war – a loss Bellot would have empathised with. “As civilisation has advanced”, Lieber wrote in his Instructions, “private citizens are no longer murdered, enslaved, or carried off to distant parts”. 85

Bellot expressed this ideology in Stockholm by drawing a clear distinction between “a belligerent and a neutral”. 86 He had previously criticised the Prussian theory of war that upheld the principle of absolute state sovereignty, while simultaneously blurring the distinction between combatant and non-combatant. This was evident in the ambiguous legal phraseology of the German war book Kriegsbrauch im Landkriege (1902):

According to the notions of the laws of war today the following persons are to be treated as prisoners of war […] all civilians staying with the army […] all persons actively concerned with the war […] prisoners of war are subject to the laws of the State which has captured them. 87

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Bellot was vitriolic in his assault upon these German laws when he stood before The Grotius Society on 21 March 1921, making particular reference to the “Fryatt case”. Nearly six years earlier, Charles Fryatt, Captain of an unarmed British merchant vessel attempted to resist capture from an enemy by ramming a German submarine. Journalists for the Evening Telegraph recalled the “Anglo-American view” in which “a merchant ship […] is allowed to resist capture from an enemy of war”. Contrary to this view, Fryatt was tried at the German municipal Court in Bruges and executed on the basis that his actions were unlawful. For Bellot, the Fryatt and Leipzig cases revealed the incompetence of national courts and the archaic personality of German law. They symbolised the barbarism “we had thought had been left behind with the Thirty Years War of the 17th century”, and as such, they had no place in the Anglo-American civilisation that Bellot sought to defend in his statute of the ICC. Bellot was opposed to the opinion of Reverend T.J. Lawrence, a member of The Grotius Society, who had posited that modern developments such as national conscription have “put in jeopardy the time honoured distinction” between belligerents and neutrals. Instead, Bellot rested his case on the authority of the eminent American international lawyer, James Brown Scott, who believed that “the execution of Captain Fryatt appears to have been without warrant in international law”.

America’s place within Bellot’s idea of civilisation requires further clarification. He did not share the opinion of his one surviving son Hugh Hale Bellot (1890 – 1969), who was a Commonwealth Fund Professor of American History at the University of London. In 1955, Hugh Bellot praised the former American President Woodrow Wilson as “a politician

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89 “Murder of Captain Fryatt”, Evening Telegraph, 4 March, 1920.
among scholars”, who “remains to this day an extremely stimulating person”.  

Bellot, the elder, did not subscribe to the dogma of the late nineteenth century that “through America, England is being exposed to the world”. As Mark Mazower has stated, the United States joined the Allies in 1917 and in consequence became commonly recognised as a European power, “if not its first rank”. Various international peace organisations drew upon “invented traditions” by harnessing the minds of select individuals to identify their American origins. The ILA for instance, claimed inspiration from the American “learned blacksmith” and diplomat, Elihu Burrett. Even if Bellot was a key figure of the ILA and revered the work of American philanthropist and international peace-worker, Andrew Carnegie (1835 – 1919), he did not idolise America nor did he entirely endorse Carnegie’s attitude that the cooperation between nation-states and “the establishment of a Permanent Court of Arbitration […] is the most important step forward of a worldwide humanitarian character”.

When examining the role of the United States in leading Anglo-American civilisation towards perpetual peace, Bellot turned to the origins of the Supreme Court, which he claimed was the inspiration for the PCIJ. He contradicted the American historian, Henry Maine, who believed the Supreme Court was “a virtually unique creation” of the United States Constitution. Bellot argued that John Locke’s (1632 – 1704) separation of the authority of the judiciary, executive and legislative in his Second Treatise of Government (1690) had provided a blueprint for each of these Courts, and thereby recognised their English

He told his students in London “this doctrine crossed the Atlantic to persuade the framers of the [US] Constitution that only the complete separation of powers can prevent the approach of tyranny”. Bellot’s emphasis on Locke’s contribution to international law may be read as both a criticism of American supremacy within the global context and an assault upon positivism. While Bellot was not himself a theorist of natural law, he did support Locke’s understanding of man’s liberty from “absolute arbitrary power”. These were the ideas that had motivated Bellot to cite the English academic Professor Pollard, who stated there must be “antagonism between the interests […] of the Government and the governed. No one could really be trusted with the exercise of sovereign power”.

Bellot was set apart from Carnegie by his attachment to the Victorian ideals of social progress. These principles were fostered by his father, William Henry Bellot, who had sent him to study at Leamington College in Oxford and Trinity College in Cambridge. It was in this intellectual and upper-middle class milieu where Bellot was exposed to the political philosophies of the English philosopher John Stuart Mill (1806 – 1873). Bellot’s writings showed a conscious recognition of Mill when citing his 1861 words, that “the Supreme Court […] is one of the most prominent wants of civilised society”. His influence was noted more subtly when Bellot wrote, “a violation of international law is not yet regarded as a crime to be prevented and punished unless it is of those members of the family of nations who are directly affected”. These words resonated with Mill’s observation that “one of the effects of civilisation is, that the spectacle […] of pain, is kept more and more out of sight of

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102 Bellot, Texts Illustration the Constitution of the Supreme Court of the United States and the Permanent Court of International Justice, p. 6.
104 Bellot, Texts Illustration the Constitution of the Supreme Court of the United States and the Permanent Court of International Justice, p. 6.
106 Bellot, Texts Illustration the Constitution of the Supreme Court of the United States and the Permanent Court of International Justice, p. 8.
those classes who enjoy in their fullness the benefits of civilisation”. Mill believed it was the duty of those classes who were “in advance of society” to maintain and evaluate the laws of a community – a reflection of Bellot’s choice to distinguish himself from the unruly crowd of mass politics at the time of the Leipzig Trials. Furthermore, Mill wrote in his essay Civilisation (1836) that “perfect co-operation, is an attribute of civilisation”. As a result of his father’s political teachings, Mill emphasised a utilitarian view of cooperation. In civilised society, he believed, “power passes more and more from individuals […] to masses”. Individual liberty was favoured until it threatened the welfare of society.

According to Mazower and Jouannet, Mill drew vivid distinctions between European and non-European societies, “with the former civilising the latter”. Bellot’s ideologies cannot be detached entirely from his late nineteenth century roots, nor can one overstate his admiration for Mill as a clear indicator of his own imperialist mindset. The historical record notes only two direct moments of Bellot’s imperial tendencies. In 1927, he wrote a letter to The Times stating “the abandonment by the Crown of its territorial jurisdiction […] may seriously jeopardise imperial interests.” In earlier years he voiced the opinion before The Grotius Society that “some States had little idea of law and order”, and furthermore, “it would be advantageous if the Constitutions of some other countries could be framed more on Anglo-American lines.” Even if Mill had written his essay on civilisation in a decade when “history and progress” were “unremitting preoccupations of nineteenth century British Liberalism”, the preservation of Empire was not Bellot’s primary intention at Stockholm, for his Anglo-American values were chiefly directed towards “civilised states”,

111 Mill, “Civilisation”, p. 3.
114 Keen, “The Duties of Nations”, p. 68.
with the ultimate goal of taming their competing demands for sovereignty above the rule of international law.

Mill’s utilitarianism structured Bellot’s understanding of the rights and duties of civilised nations. For him, the relationship between the individual and the masses paralleled that of the state and the global community. His interpretation of Hugo Grotius’s “family of nations” was essentially utilitarian. It was for this reason, he wrote:

The Americans, just as they have established equality before the law for individuals within the State, so they have established equality before the law for the States of the Union.\textsuperscript{116}

Bellot did not maintain Carnegie’s enthusiasm for national self-interest when conceptualising the law of nations. In 1917, Bellot suggested that The Grotius Society, the American Institute of International Law, the American Society of International Law and the Institut de Droit International should convene and propose a list of war crimes that would be codified into international law by the Allied and neutral powers – a proposal he conjectured, in which “state interests will take second place”.\textsuperscript{117} This was the spirit of impartiality in which Bellot conceived his statute for the ICC.

Bellot’s utilitarian conception of the Grotian tradition did not support the ideals of Wilsonian liberalism. At the Paris Peace Conference of 1919, President Woodrow Wilson proposed a fourteen-point plan in which national self-determination would ensure the collective security of Anglo-American civilisation.\textsuperscript{118} Self-determinism was a grounding concept for minority rights.\textsuperscript{119} They were not an individual, but rather a group concept. Erez Manuela has argued that Wilson did not use self-determinism to ensure the racial equality and sovereignty of China within the global community. Jay Winter and Mark Mazower have each

\textsuperscript{116} Bellot, \textit{Texts Illustration the Constitution of the Supreme Court of the United States and the Permanent Court of International Justice}, p. 7.
extrapolated on this idea by positing that the League of Nations perpetuated an imperial goal to establish legal hegemony across Europe and maintain the sovereignty of nation-states.\textsuperscript{120} Mazower has made particular reference to Wilson’s adoption of the nationalist ideals presented by the Italian political activist Giuseppe Mazzini (1805 – 1872), whose vision of an international society of sovereign nation-states had underpinned the values set forth at the Concert of Europe in 1815, following the defeat of Napoleon – “Woodrow Wilson appreciated” that “Mazzini was among the first […] to think seriously about international cooperation in terms of politics and nationalism”.\textsuperscript{121} In 1920, Lord Shaw, a member of The Grotius Society, recalled the speech delivered by Wilson in Congress on 22 January 1917, “there must be, not a balance of power, but a community of power, not organised rivalries, but an organised common peace”.\textsuperscript{122} In a somewhat sceptical tone Lord Shaw concluded by questioning, “what, then, was the ambit of this community of power, this common peace?”\textsuperscript{123}

Bellot directly criticised self-determinism as an aspect of American self-interest when he proclaimed that a country embedded in “the political theory of exclusive self-interest or selfish nationalism, can never become a member of the family of nations”.\textsuperscript{124} For this reason, he blamed Wilson for the loss of the British ocean liner \textit{Lusitania}, which was sunk by a German submarine in 1915.\textsuperscript{125} He believed such a catastrophe might have been averted had Wilson “denounced German submarine warfare, not because it infringed American rights of property and privileges of commerce, but because it violated the rights of all neutrals”.\textsuperscript{126}

It was from this political and intellectual context that Bellot came to detest the PCIJ, which safeguarded the interests of the Great Powers. For Bellot, it symbolised anti-progress. “This Court”, Bellot wrote, “has occupied rather the position of a standing Commission of

\begin{itemize}
  \item Shaw, “Civilisation and Law: America?”, p. xxiii.
  \item Shaw, “Civilisation and Law: America?”, p. xxiii.
  \item Bellot, “War Crimes and War Criminals”, p. 15.
  \item Bellot, “War Crimes and War Criminals”, p. 15.
\end{itemize}
distinguished diplomats”. The Court, therefore, did not uphold “the main forms of
civilisation” because it was not consistent with his depoliticised Anglo-American vision of
“liberty regulated by law”. 

Bellot, a pragmatist understood his statute would be shelved if he did not honour the
PCIJ. The United States would not allow a Court “of which she has played a great part” and
“which constitutes a living expression of her own ideals” to perish. Lord Phillimore, the
British delegate on the Advisory Committee of Jurists, confessed that he and the American
representative, Elihu Root both “felt that any elimination of any of the larger nations would
weaken the Court”. Phillimore and Root each held a significant authorial power over the
final draft of the statute. In spite of the symbolic value of the “Root-Phillimore plan” as a
joint Anglo-American agreement, the writers of The Advocate for Peace Through Justice
promoted the PCIJ as an “American project” that represented “the most notable and
significant document before the world today”, and one that would allow “passionless
decisions” to be made “irrespective of political policy”. Bellot’s anti-national rhetoric was
taken beyond his original intentions and was employed to secure global consent for the
creation of the PCIJ, which did not threaten the sovereignty of the Wilson administration.

The overarching grandeur of the PCIJ, coupled with the widespread approval it had
received from the international community was made visible at the Vienna Conference of the
ILA in 1926. Bellot’s original plan for an ICC was buried beneath a plethora of ideas and
suggested amendments that were proposed by various members of the conference. On the
morning of 9 August, Judge Caloyanni, the Chairmen of the Conference, made the ruinous
observation that “no less than three-quarters” of the revised statute “correspond with, and

127 Bellot, Texts Illustration the Constitution of the Supreme Court of the United States and the
Permanent Court of International Justice, p. 20.
128 Bellot, Texts Illustration the Constitution of the Supreme Court of the United States and the
Permanent Court of International Justice, p. 37.
129 Bellot, Texts Illustration the Constitution of the Supreme Court of the United States and the
Permanent Court of International Justice, p. 35.
130 Lord Phillimore, “Scheme for the Permanent Court of International Justice”, Transactions of the
131 “The world’s most significant document”, p. 292–293.
very often are word for word taken from, the statute of the now existing Permanent Court”. ¹³² One year hence, Brierly concluded in his paper for the British Journal of International Law, “we need no new court for this purpose”.¹³³ The underlying interest in the preservation of civilisation had distorted the lines of legal jurisdiction between these two courts. In this regard, Bellot was ambitious in being the first to articulate his own dream in writing, but his implementation was not strategic. His statute inevitably yielded to the politics of consent and was deemed second in authority to the broader opinions of the ILA.

In this chapter, Bellot’s liberal vision of Anglo-American civilisation was used as an lens to survey new historical interpretations of the ICC’s purpose in the first decades of the twentieth century. To identify the historical intentions that motivated the initial stages of the Court’s development, one must look beyond the limits of jurisdiction and the constitutional history of criminal law. Its official “criminal” status was only a formal signature used to differentiate the Court from various international tribunals of the period. The Court’s distinctive purpose was indeed subtler, and was strategically hidden beneath the legal phraseology of Bellot’s statute. While Bellot was often a lone voice that did not represent the universal opinion of his age, these circumstances were in fact instrumental in our understanding of why the ICC did not significantly progress beyond the preliminary stages of the Stockholm Conference. Its ideological mission did not possess one single origin. The Court was not only a response to the perceived atrocities of German barbarism, but it was also a reaction to the ineptitude of national courts and the Wilson administration’s post-war strategy to secure an American hegemony within the global community. An understanding of Bellot’s perspective dissuades against holistic assumptions that the ICC was both a paragon of imperial rule and the natural progeny of the PCIJ. For Bellot, the ICC was not so much an “organ” of the PCIJ, as it was its alter ego.

¹³³ Brierly, “Do We Need an International Criminal Court?”, p. 88.
Chapter Two

A Discourse on Human Rights:
Sir Hersch Lauterpacht and the Nuremberg Myth

An International Criminal Court [...] has not yet received the serious consideration which it merits [...] the idea of an international criminal court is much wider than the punishment of war crimes. It vitally affects the problem of individual responsibility for criminal violations of international law. There cannot be much hope for international law or morality if the individual acting as the organ of the State can [...] screen himself effectively behind the impersonal, metaphysical State. – Sir Hersch Lauterpacht at The Hague Academy of International Law, 1937.134

The objectives of this chapter are twofold. The first is to examine Sir Hersch Lauterpacht’s (1897 – 1960) universal vision of individual human rights as a perspective to explore the newly discovered purpose of the ICC in the mid-twentieth century. In this period the Court became an evolving institutional expression of rights, and the language of civilisation no longer fuelled the moral engine of international law.135 The second aim of the chapter is to contrast the political cultures of international law between the 1920s and the 1950s by revisiting the contentious relationship between the ICC and the PCIJ, which on 18 April 1946 had become a judicial organ of the United Nations (UN) and evolved into the International Court of Justice (ICJ). I will revisit the relationship between the ICC’s “invented traditions” and the growth of international politics by drawing particular reference to the Nuremberg Trial as a foundation myth of the Court. The hollow rhetoric of the “human rights revolution”, coupled with Lauterpacht’s loss of faith in the effectiveness of international

135 According to Mazower, the UN abandoned the vocabulary of civilisation in order to avoid being labelled a neo-imperialist project during the era of decolonisation: Mazower, “An international civilisation?”, p. 565.
courts during his latter years will be a yardstick for measuring why the Nuremberg myth was an unstable basis upon which to build international support for the creation of an ICC at the time.

The Austrian born international lawyer, Lauterpacht was a humanist, a scholar and a judge. Three years after tragically losing his family to the Nazis, Lauterpacht was called on to play a significant role at the International Military Tribunal in Nuremberg (1945 – 1946), advising and drafting speeches for the American and British chief prosecutors, Sir Robert Jackson and Sir Hartley Shawcross. Lauterpacht shared Bellot’s objection to the “positive doctrine” of absolute state sovereignty though he distanced himself from the civilisation discourse to instead promote individual human rights as the linchpin of international law – a principle that anchored the notions of “individual criminal responsibility” and “crimes against humanity” in the Nuremberg Charter and Judgements. One year prior to the Nuremberg Trial, Lauterpacht’s former mentor at Cambridge, Hans Kelsen (1881 – 1973), had claimed that the purpose of penalising individuals “should be to stigmatise guilty persons morally and politically” in order to avoid the persecution of an entire nation, thereby offering Germany the chance to reintegrate into the European community. The extent to which Lauterpacht’s involvement in Nuremberg had influenced his perceptions of the ICC’s historical foundation, purpose and legitimacy have received little attention by contemporary historians. For Lauterpacht and Bellot, the purposes of an ICC and international law were entwined. As this chapter will demonstrate, Lauterpacht sought to promote Nuremberg as the backbone of international law for it had gathered the spiritual power of collective experience following the trauma of the Second World War, and furthermore, the trial aided his own self-identification,

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138 Hans Kelsen, Peace through Law (Chapel Hill: The University of North Carolina Press, 1944), p. 120.
when the concept of the individual as the basis of international law was a fashionable belief among his British colleagues during the interwar period. Koskenniemi notes that Lauterpacht’s “early self-positioning in Britain” was an “assimilative strategy”. \(^\text{139}\)

Historians have not considered why the Nuremberg myth did not generate sufficient momentum for the creation of an ICC during the 1950s, when a number of delegates from the Rome Conference in 1998 and legal scholars subsequently regarded the prosecution of war criminals at the International Military Tribunal of Nuremberg to be either foundational or the key turning point in the ICC’s history. \(^\text{140}\) Lawrence J. LeBlanc frames the ICC’s origins within the work of the Genocide Convention held in Geneva in 1948, which aimed to strengthen the groundwork established in Nuremberg two years earlier. \(^\text{141}\) On 9 December 1948 at the Geneva Convention, the General Assembly of the United Nations (UN) invited the International Law Commission (ILC) “to study the possibility of establishing a criminal chamber of the International Court of Justice”. \(^\text{142}\) The following day a journalist for The Times observed, “this new measure clearly has connexion with the Nuremberg judgement”. \(^\text{143}\) Lauterpacht did not so much establish the Nuremberg myth as he did perpetuate it. “The stature of the Nuremberg Charter and Judgement will grow with the passage of years”, Lauterpacht announced, “as a vital event in the maintenance of the authority of the very preservation of international law”. \(^\text{144}\) Before a lecture hall of students at the Hebrew University of Jerusalem on 7 May 1950, he extolled the virtues of the Nuremberg Charter for


\(^{141}\) LeBlanc, The United States and the Genocide Convention, pp. 151–174.

\(^{142}\) LeBlanc, The United States and the Genocide Convention, p. 159.

\(^{143}\) “Genocide Declared A Crime”, The Times, 10 December, 1948, p. 3.

pronouncing the inalienable and superior human rights of individuals and responsibilities above the law of sovereign nation-states. “The Judgement which is based on them, will continue to be a source of controversy”, he advised, “unless the principal Powers who framed them […] accept them as law.”  

Two months after Lauterpacht’s address in Jerusalem, the ILC presented two reports on the possibility and desirability of creating an ICC. In the judgement of Ricardo Alfaro, both the International Military Tribunals at Nuremberg and Tokyo “did actually function and fulfil their mission”, and as a result, “their texts show that the constitution of an international court is possible and feasible”. In contrast, the report by Emil Sandström did not strongly endorse either Nuremberg or Tokyo as founding precedents upon which to form an ICC. While Sandström recommended the Court should be a principle organ of the UN, paralleling the International Court of Justice, he concluded that state sovereignty would be too great an obstacle to overcome, due to the necessity to amend the UN Charter. Czechoslovakia, Byelorussian SSR, Poland, and the Soviet Union protested against the ICC on grounds of state sovereignty, while Australia, Brazil, Sweden, the Union of South Africa, and the United Kingdom each upheld and shared the view that the Court was an impractical endeavour. They concluded that individuals were not the perpetrators of international crimes. An air of cynicism pervaded the United States Senate Congress. Many delegates interpreted Alfaro and Sandström’s reports as possessing only “symbolic value”, as opposed to offering a genuine contribution towards the establishment of an ICC. Writers for The Grotius Society were similarly sceptical of Alfaro’s “exaggerated” claim that “the public opinion of the world has been clamouring for the establishment […] of an international jurisdiction competent to deal

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with international crimes”.\textsuperscript{151} The British Attorney-General and a chief prosecutor in Nuremberg, Sir Hartley Shawcross cautioned against any effort that would “undermine the principles of individual criminal responsibility for crimes against humanity and for war crimes which we had succeeded in laying down”.\textsuperscript{152} It was not to be until seven years later that the General Assembly finally “decided to postpone the consideration” of an ICC until the draft code of “Offences against Peace and Security of Mankind” was completed.\textsuperscript{153} This resulted in the Netherlands representative at the UN condemning the decision as “an act of treason against the principles established” in Nuremberg and Tokyo.\textsuperscript{154} Historical scholarship has not investigated why the UN’s efforts to establish an ICC were dropped in 1957, and more specifically, why nations were inclined to dismiss the ICC as an unrealistic project, nor why the proposal of an ICC was resurrected in the mid-twentieth century when “the International Court of Justice was at the time regarded as the most important international tribunal in the world” and “had no competitor”.\textsuperscript{155} Wolfgang Freidman, author for the Virginia Law Review wrote:

\begin{quote}
The creation of the Permanent Court of International Justice […] and its continuation under the United Nations Charter under the International Court of Justice […] led many advocates to place great hopes in this new juridical international institution.\textsuperscript{156}
\end{quote}

Just as Bellot’s liberal vision of Anglo-America was challenged at the Stockholm Conference, so too was Lauterpacht’s faith in Nuremberg as a foundation myth for the ICC. On 3 August 1951 The Times wrote, “the Nuremberg tribunal could not be regarded as a precedent” for “if the court were set up and could not function effectively it would merely

become an object of contempt.” The British Attorney-General in 1951, Sir Frank Soskice noted that “the practical difficulties of setting up an international criminal court would be overwhelming” because “the accused might be persons with big followings in their own countries”. Nearly a decade earlier, Dr. Ernst Cohn stood before The Grotius Society and proclaimed “the task set before this Court is too great” and “by trying an impossible task the law exposes itself to ridicule”. He spoke in regard to the recent conference held in London at the Palace of St James, which planned a declaration for the ICC. The Grotius Society recognised the St James Conference as yet another number to add to the talks of past failures to establish an ICC for “this declaration of intention was not signed by the greatest Powers”. The declaration of the 1937 St James Conference held only nine signatures from representatives, whose countries were occupied by German forces. It amounted to merely a slip of paper in the wind of realpolitik.

The initiation and forestalment of the ICC’s creation in the mid-twentieth century was once more symptomatic of an identity crisis within the international legal community. In contrast to Bellot’s era, the ICC’s legitimacy and vitality during the 1950s were hinged upon debates on the subjects of international law – debates that emerged simultaneously with the birth of the global human rights movement after the Second World War. New horizons in the international legal profession unveiled new limitations, triggering discussions on the overall effectiveness of international courts to reignite. While the International Court of Justice concerned international public law between states, and not international private law between individuals, its early performance was nevertheless an alternate political battleground for deciding the relevance of the Nuremberg and Tokyo Tribunals as founding precedents upon which to model an ICC. In 1959, Friedman noted, “the International Court of Justice […] is a

157 “World Criminal Court”, The Times, 3 August, 1951, p. 3.
158 “World Criminal Court”, p. 3.
far weaker institution […] the shadow of national sovereignty constantly looms over the Court”. 162 As will be discussed later, numerous cases in the ICJ archives have revealed the widespread dissatisfaction and doubt of nation-states with the absolute impartiality of the Court. As a result, the British Government withdrew its support for the ICJ in 1957 - coincidently the same year in which resentful British delegates at the UN had pronounced, “no useful purpose will be served by setting up such an International Penal Tribunal unless it can function effectively”. 163 While many had recognised the PCIJ as a superior entity to the ICC during the early 1920s, the ICJ’s inability to overrule sovereign states was soon recognised as a dark sign that foreshadowed the ICC’s unrealistic ambition to enforce individual rights and responsibilities. The differences between these two courts had markedly changed. The ICJ had become a negative mirror image of the ICC. Lauterpacht himself had written in 1945 that the ICJ was successful “not so much on account of its actual achievements as an agency for settling controversies endangering the peace of the world, as in the revelation of its potentialities”. 164 On account of the ICJ’s exclusive symbolic value, Friedman concluded in 1962 “a draft Convention establishing an International Criminal Court has no prospect of adoption”. 165

Realpolitik intensified in the mid-twentieth century, in part due to the League of Nations’ failure to prevent the Second World War. As Jouannet has argued:

The inter-state classical liberal conception was the one that continued to be the rule in actual practice, while the concept of international human rights remained purely doctrinal with no effective consequence before 1945. 166

For Lauterpacht, the “growing conviction in the reality of power in international relations and diminishing faith in the reality of law” was indicative of the lawlessness exhibited during the

162 Friedman, “Sir Hersch Lauterpacht and the International Court”, pp. 408, 413.
166 Jouannet, The Liberal-Welfarist Law of Nations, p. 188.
World Wars, the inevitable paradox of “victors justice”, and the unrealistic ideal of impartial law as an organisational tool for all of “mankind”. Mazower notes the manner in which the Nazis and Fascists abused the minority rights regime and undermined the League of Nations during the interwar period by harnessing these terms to advance their own causes. He describes the “human rights revolution” during the mid-twentieth century as a “strange triumph” in which “a weaker international organisation was probably the price necessary for United States and Soviet participation” in the United Nations. Jouannet points to the twin phraseologies of the United Nations Charter that opens by stating, “we the peoples of the United Nations”, while the United States Constitution declares, “we the peoples of the United States”. Moyn, in citing Lauterpacht’s contemporary Professor H.A. Smith, notes that Grotius was not widely considered to be the founding father of international law in the mid-twentieth century, and furthermore, “individual rights […] were being marginalised by the United Nations Charter, not advanced by it”. In 1950, Lauterpacht wrote, “international law does not at present recognise […] the rights of the individual” as “they are not fully enforceable”. It was the “crucial question of implementation” he had raised two years earlier at the Brussels Conference of the ILA, the same year in which The Times had voiced the British Government’s understanding that violations of international law are “essentially a crime committed by the States” and not by individuals. While human rights were a new machination of anti-political post-war rhetoric wherein “individuals on the fringes of political

life had significant agency”, they did not succeed in becoming an enforceable legal concept during Lauterpacht’s era.174

Lauterpacht’s tendency was to distance himself from the idiom of civilisation. As Mazower has stated, “the UN quickly banished what was left of the old imperial vocabulary of international civilisation”.175 In 1939 Georg Schwarzenberger, a fellow contemporary of Lauterpacht and writer for The Grotius Society, remarked on the comments of H.A. Smith, who had stated in a London radio broadcast the previous year:

Conduct which in the nineteenth century would have placed a government outside the pale of civilized society is now deemed to be no obstacle to diplomatic friendship. This means, in effect, that we have abandoned the old distinction between civilized and uncivilized States.176

In 1960, Clarence W. Jenks published an extensive tribute to Lauterpacht’s life and legal career. He affirmed that Lauterpacht’s supreme legacy to international law was a “firm bridge between British and Continental thinking”.177 While realist historiography may guard against definitive statements of Lauterpacht’s direct influence upon the evolution of international legal thought, he nonetheless symbolised a dramatic shift from the international political culture of Bellot’s generation. During Lauterpacht’s time at the London School of Economics (1923 – 1937), he wrote “The So-called Anglo-American and Continental Schools of Thought in International Law” (1931) under the supervision of Dr. Arnold McNair. He criticised “the alleged contrast between Anglo-American and Continental schools of thought in international law”.178 For him, such a distinction found “no support either in the existing rules of

international law, or in the practice of international tribunals.” He continued by arguing that the “abandonment of this deeply rooted belief is desirable” for reasons of both “scientific accuracy” and the preservation of a “humanitarian point of view” in the international legal profession. Contrary to the accepted wisdom of his day, Lauterpacht pointed to the humanitarian doctrine of Hugo Grotius as a “universal moral code” which “whether in its traditional or modern garb” had anchored international law. In this respect, Lauterpacht believed “the general principles of law recognised by civilised nations” were a “safety valve” rather than a legitimate “source” of international law. According to Koskenniemi, Lauterpacht, who was originally educated in Vienna and sought to immerse himself within the intellectual elite of British society, rejected the civilisation “gap”. For Lauterpacht, the ICC was not vested in the interests of Anglo-American civilisation. Human rights were to be the new maxim of a Grotian morality in international law.

Lauterpacht’s “individualism” was a significant departure from Bellot’s utilitarian view of the Grotian tradition. Unlike Bellot, Lauterpacht used Grotius’s *Mare Liberum* (1609) to argue, “the individual is the ultimate unit of all law”. He did not articulate Grotius’ legacy to be the humanisation of war with “respect for the better instincts of civilised nations”. While Bellot had claimed in 1916 that “atrocity crimes have been the cause of individual aggressors”, he maintained that such cases were “rare in history”. Just as members of The Grotius Society had argued in 1920 that the League of Nations originated

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179 Lauterpacht, “The So-called Anglo-American and Continental Schools of Thought in International Law”, p. 453.
180 Lauterpacht, “The So-called Anglo-American and Continental Schools of Thought in International Law”, p. 482.
from Grotius’ legal philosophy, so too had Lauterpacht remoulded the past by promoting *Mare Liberum* as the ideological foundation of both the United Nations and the concept of the individual as the basis of international law, which underpinned the Nuremberg Charter and Judgements.\(^{187}\) Whilst he employed Grotius’ words to provide individual human rights with an ancient resonance as testament to their universal authority, he also claimed that such an ideology would have been deemed “revolutionary” in the 1920s.\(^{188}\) In this respect, Lauterpacht was conscious of his manipulation of history. He was aware that the individual, as a fundamental component of international law, was by no means a universal truth. Lauterpacht harnessed Grotius’ works to illustrate that individual human rights were not an invented tradition, to instead recognise their universality and show that they endured the test of time. “The doctrine of humanitarian intervention has never become a fully acknowledged part of positive international law”, he proclaimed, “it was one of the factors which paved the way for the provisions of the Charter of the United Nations relating to fundamental human rights.”\(^{189}\) As such, Lauterpacht advocated the universal protection of individual human rights when delivering his 1950 lecture at the Hebrew University of Jerusalem by harnessing the power of collective experience, “the murder of six million Jewish inhabitants of the occupied territories was in its essence, in its inception, and in the cruelty and magnitude of its execution, a crime against humanity”.\(^{190}\) He later acknowledged that “no international tribunal” was equipped to defend such rights.\(^{191}\) Coincidently, T.B. Murray of The Grotius Society proposed in the same year that an ICC would be “the most effective protection of those rights”.\(^{192}\)

It is evident that Lauterpacht’s distortions of the past were as fluid as his interpretations of language. For him, the individual human being as the base unit of

\(^{187}\) Lauterpacht, “The Grotian Tradition in International Law”, p. 27; See also, Lauterpacht, See also, “The Subjects of International Law”, p. 33.


\(^{189}\) Lauterpacht, “The Grotian Tradition in International Law”, p. 46.


\(^{191}\) Lauterpacht, “The Subjects of International Law”, p. 35.

international law was neatly captured in the line “populi respectu generis humani privatorum locum obstinent” of *Mare Liberum*. His analysis was centred upon the word *privatorum*, derived from the Latin stem *privatus*, which has no direct translation into English. Charles T. Lewis draws several meanings from this term, taken from readings of the classical scholars Cornelius Tacitus, Julius Caesar, Marvus Livius and Horatius Flaccus. His translations take the form of various expressions including: “a private citizen, withdrawn from state affairs, not in official life, private property, out of office, retired, private use” or “apart from the public”. Furthermore, it is logical that Lauterpacht used Ralph V.D. MaGoffin’s translation of *privatorum* published in 1916 at the Division of Law of the Carnegie Peace Endowment to mean “individual” because following the Carnegie Endowment for Peace’s invitation to Lauterpacht to lecture at several law schools in the United States in July 1940. While Lauterpacht used language strategically, which may be construed as an act of myth construction, his passion for international private law was also indicative of the individualism expressed in the mid-twentieth century human rights movement.

When analysing Lauterpacht’s rationale it is important to recognise that his individualism predated the 1940s. Nuremberg offered Lauterpacht the opportunity to disseminate his pre-existing ideology throughout the global community. In *The Life of Sir Hersch Lauterpacht* (2010), his son Elihu makes particular note that:

> The position of the individual in international law was long a matter of major concern for Hersch. From his earliest days of his research in Vienna, he rejected the view that States alone are the subjects of international law.

Just as Bellot may have equated his own trauma to a universal humanity, so too has Vrdoljak subscribed to the romantic narrative that recognises Lauterpacht’s European experiences of

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anti-Semitism and Zionism in Galicia as deciding factors in his commitment toward international law. From this point of view, one may believe Lauterpacht’s motivation to become a lawyer was exposed, when he claimed that the punishment of war crimes involves the “inherently reprehensible desire for retribution […] containing hitherto ruthlessly suppressed craving for revenge within the channels of a regularised legal procedure”. Koskeniemi, however, was less emphatic on this point. He conceded that Lauterpacht’s professional literature revealed minimal evidence of his Zionist tendencies, believing that his Jewish heritage resurfaced “only incidentally” throughout his predominant legal career.

Lauterpacht’s most palpable reference to his Jewish heritage was made in Jerusalem in 1950, when he proclaimed, “Jews, individually and collectively, have played a leading role in making the natural rights of man part of the positive Law of Nations.” Following this declaration he made specific reference to Professor Feinberg and René Cassin, whom he believed symbolised the proud contributions of the Jewish community toward the promotion of international human rights. In this instance, Lauterpacht’s immediate aim to placate his Jewish audience must be appreciated. His rhetorical skills were similarly confirmed in 1949, in his draft speech for the Brazilian chancellor, Lord Jowitt. His opening address announced, “it is fitting that I should begin this address […] by paying tribute to the memory of Ruy Barbosa, the great statesman and jurist of your country”.

Lauterpacht’s dismissal of absolute state sovereignty and his philosophy of individual human rights were grounded more visibly in British academic culture, originating from his experiences at the London School of Economics (1923 – 1937) and Cambridge University (1937 – 1939). In these intellectual contexts Lauterpacht’s fertile mind was exposed to the ideologies of Hans Kelsen (1881 – 1973), Edward Hallet Carr (1892 – 1982), Arnold Duncan McNair (1885 – 1975), James Leslie Brierly (1881 – 1955) and the work of John Westlake (1828 – 1913). His membership of this elite class of British intellectuals was forged upon his election to the prestigious Whewell Chair at Cambridge in 1937 – a professorship that was formerly held by Westlake, Carr and his supervisor, McNair. On 3 December, Lauterpacht received a letter from Kelsen, “I fondly remember at this particular point in time with inner satisfaction, that you have been my student and that your writings echo my own intellect”. In a similar vein, Lauterpacht’s individualism strongly resonated with Brierly’s legal teachings. In 1958, he laid particular emphasis on “the principal aspects of Brierly’s contribution” to international law, which was “the recognition of the individual”. Nearly three decades earlier, he drew similar sentiments from the Austrian born Jewish international lawyer, Baruch Spinoza (1632 – 1677) – “the function of law, Spinoza says, is to protect the individual”. Nuremberg can by no means be seen as the catalyst for Lauterpacht’s conception of individual criminal responsibility, which he had unquestionably acquired throughout his British education. It does however illuminate the extent to which his faith in the Nuremberg Trial, as a suitable foundation myth for ICC, was an “invented tradition”.

In his analysis of *Mare Liberum*, Lauterpacht drew evidence from the Enlightenment and Victorian figures, Emerich de Vattel (1714 – 1767) and John Westlake in order to support

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his Grotian vision of human rights and the notion of “individual responsibility for criminal violations of international law”. While Lauterpacht often cited Vattel as an historical and institutional authority, Westlake was a more of an influence on his thinking. In his paper “Westlake and Present Day International Law” (1925), he underlined Westlake’s condemnation of “the claim that men, acting in groups not subject to regulation by a superior, can repudiate their personal responsibility”. This ideology persisted in Lauterpacht’s 1950 edition of *International Law and Human Rights*, wherein he pronounced, “crimes against humanity are crimes regardless of whether they were committed in accordance with and in obedience to the national law of the accused”. Coincidently, these values resonated with the statements made by Sir Hartley Shawcross in 1951, for whom Lauterpacht had written draft speeches and advised at Nuremberg, “the criticism that soldiers were being punished simply for obeying their orders was wholly wrong”. He continued by asserting that “a soldier was bound only to obey a lawful order. There was no such thing as a duty of absolute obedience.” Both Westlake’s and Lauterpacht’s voices resonated within this passage. Even if Lauterpacht reinforced Bellot’s Victorian criticism against the Westphalian principle of absolute state sovereignty, his methods took a new path. Lauterpacht blurred the distinction between a “belligerent and a neutral” as a means of illustrating the universality of human rights – a direct contradiction to the humanitarian voice, which Bellot had derived from the teachings of Lieber’s *Instructions*.

In contrast to Bellot, Lauterpacht did not employ humanitarianism to portray the ICC as above the realm of international politics. He was rather more forthright in his understanding of the ICC as a facilitator of international relations. “The punishment of war

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207 Lauterpacht, “The Grotian Tradition in International Law”, p. 27.
210 Lauterpacht, “The Subjects of International Law”, p. 36.
211 “Clemency For War Criminals”, p. 2.
212 “Clemency For War Criminals”, p. 2.
crimes committed by the enemy”, he wrote, “is a problem of politics rather than of law”. 213

Until his final years, international courts played an important role in his Kantian vision of international organisation after the Second World War. He adopted the phrase by Immanuel Kant (1724 – 1804) that “the public right ought to be founded upon a federation of states”. 214

Koskeniemi explains that Lauterpacht’s view of the relationship between the individual and the state was anchored by this “Federalist Utopia”. 215 In 1951, a journalist for The Times wrote, “there was a need for a supranational organisation to which all nations, great and small, strong as well as weak, would be subject”. 216 One year earlier, Lauterpacht had written:

It is the abiding lesson of history […] that a world-embracing federation […] of which regional federations may be a necessary stage […] is, in the words of Immanuel Kant, the only means of attaining perfect internal government, which is, in turn, the essential condition of the realisation of the moral and intellectual capacities of mankind […] the relation between the individual human being and the federation would be more direct. 217

“Regional federations” were a “necessary stage” toward his Kantian dream of “perpetual peace”, as direct contact between the individual and international law was a long-term ambition that could not happen overnight. “This analogy between individuals and states”, he wrote, “has proved a beneficent weapon in the armoury of international progress”. 218 Political integration and cooperation between states would be essential until the Great Powers had accepted the Nuremberg principles as law. This was a reflection of Westlake’s formative influence upon Lauterpacht’s legal thought. In his analysis of Westlake in 1925, Lauterpacht had noted:

Neither individuals nor corporations other than States can […] come into direct contact within international law. Their rights, if any, grounded in international law, are not rights of international law, and their duties, if any, originating from international law, are not duties imposed by international law; these rights and duties

215 Koskeniemi, “Hersch Lauterpacht (1897–1960)”, p. 656; During his studies at the London School of Economics, Lauterpacht had observed that “the federation of the world” was a key principle of Westlake’s legal philosophy. See: Lauterpacht, “Westlake and Present Day International Law”, p. 402.
218 Lauterpacht, “The Grotian Tradition in International Law”, p. 27.
must be transformed into rights and duties of municipal law in order to be enjoyed by or to be binding upon individuals.\textsuperscript{219}

He most strongly supported the integration of national and international courts in order to make the ICJ more feasible and appealing to national powers. In 1958, he used Brierly as a figurehead to support this plan for international organisation – “the practice of international law should touch the individual not directly, but only through the State to which he belongs”\textsuperscript{220}. Henceforth, even if Lauterpacht persistently upheld the individual as the base unit of international law, he was simultaneously aware that the immediate abandonment of the state was an unrealistic expectation. This was also the desire for many of Bellot’s contemporaries.

The inability of the ICJ to generate international cooperation between states demonstrated the limits of both Lauterpacht’s Kantian vision of global order, and universal acceptance of the Nuremberg myth as a precedent upon which to model an ICC. Faith in the power of an ICC to bypass nation-states and enforce individual rights and responsibilities was significantly weakened when the ICJ failed in its basic task to hold states accountable under international law. The ICJ was based upon a rule of consent, and as such, was not successful in guaranteeing cooperation from sovereign states. This may explain why in 1958 Lauterpacht had also decided to emphasise Brierly’s “scepticism concerning the current proposals to establish an International Criminal Court”\textsuperscript{221}. While Lauterpacht had defended the principle of consent as a vital element of international law in 1934, his opinion shifted dramatically in 1945. “There cannot be international security or any true evolution of the law”, he wrote, “if the future international organisation is to perpetuate […] the rights of sovereign States to remain judges in their own cause”.\textsuperscript{222} To that date “the Permanent Court of Justice has no

\textsuperscript{221} Lauterpacht, “Brierly’s Contribution to International Law”, p. 440.
such power” to refuse the will of national powers.²²³ His former mentor, Kelsen believed that “a World State is not in the scope of political reality”.²²⁴ As a result of the amplified realism in international politics following the Second World War, Kelsen argued, “if peace is conceived as a state of absence of force, the law then provides only for relative, not for absolute, peace”.²²⁵ Lauterpacht understood this reality during his career as a judge on the ICJ (1955 – 1960). There were numerous episodes wherein the ineffectiveness and inability of the ICJ to settle political disputes were demonstrated across the globe. On 26 May 1951, the United Kingdom presented a case to the ICJ, in which “Persia is accused of a denial of justice, and a breach of treaty obligations”.²²⁶ The final judgement declared that the Court “lacks jurisdiction” for it did not possess the willing consent of the Persian Government.²²⁷ However the Corfu Channel Case was an edifying success for the British Government:

In a Judgment given on April 9th, 1949, the Court held Albania responsible, under international law, for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life that resulted to the United Kingdom […] the Court therefore gives judgment in favour of the claim of the United Kingdom and condemns Albania to pay to that country a total compensation of £843,947.²²⁸

In 1955, C. D’Oliver Farran wrote, “no one has ever been able to accuse this Court or any of its members of anything but the most scrupulous impartiality”.²²⁹ In the same year, The Times reminded its readers, “the Court has no coercive force to support its judgement”.²³⁰ In the Norwegian Loans Case between France and Norway, on 6 July 1957 it was decided once more that “the Court found by twelve votes to three that it was without jurisdiction to

²²⁶ “British Case On Oil Put To World Court”, The Times, 28 May, 1951, p. 4.
adjudicate upon the dispute.”231 In the same year, the British Government announced that it “no longer accepts the Court’s jurisdiction” concerning matters that “affects the national security of the United Kingdom”.232 As a result, in The Development of International Law by the International Court (1958), Lauterpacht confessed that the ICJ “is of a voluntary character” and “the opportunities for exercising the jurisdiction of the Court are limited”.233 It was in his final years when Lauterpacht conceded, “it would be an exaggeration to assert that the Court [ICJ] has proved to be a significant instrument for maintaining international peace.”234 Proposals for the ICC faced strong opposition within this political context. There was strong doubt that the individual, as the lowest common denominator of international law, would become a foreseeable reality during the 1950s if the ICJ failed to deliver justice in such cases. The Nuremberg myth ultimately proved to be a fractured foundation upon which to build the ICC.

In this chapter, Lauterpacht’s vision of individual human rights was employed to delineate a transformation in the ICC’s purpose since the 1920s. The Court’s function was not limited to humanising the laws of war, nor was it perceived to safeguard the sovereignty of Anglo-American civilisation. By the 1950s, such rhetoric was deemed archaic. In Lauterpacht’s era, the ICC was firmly grounded in a human rights discourse – the protection of individual rights and responsibilities. Lauterpacht recognised that such notions would have been considered “revolutionary” in Bellot’s era. It was Nuremberg that provided the ideal opportunity to plant human rights within an historical reality, one which maintained the power of collective experience. The entanglement of the ICC within the international human rights revolution prevented it from gaining strong support from national powers. Their entwined fates may help to explain the unexplored phenomenon of why these two projects

had disappeared from the international vocabulary until the end of the Cold War.

Furthermore, the wave of realpolitik that permeated the international political culture after the Second World War resulted in greater scrutiny upon the performance of the ICJ. Although possessing a different jurisdiction, the ICJ eventually came to be seen as a prototype of the ICC’s potential weaknesses by many of its critics. Lauterpacht, a perpetuator of the Nuremberg myth, on the other hand soon began to dispel the weaknesses and realities of a potential ICC through his criticisms of the ICJ. This alter ego Court became a ghost that prevailed and continued to haunt the ICC’s chance of ever becoming more than a reality on paper.
Chapter Three

The Legacy of the 1998 Rome Conference
and the Invention of a Red Cross Tradition

Humanitarianism likes to see itself in terms of pure virtue, a kind of anti-political gesture of compassionate brotherhood. – Mark Mazower.235

The historical account of the ICC’s genesis in the Red Cross Movement of the late nineteenth century was an “invented tradition” of the 1998 Rome Conference. Furthermore, this foundation myth served to dissipate political doubt of the Court’s humanitarian role in a decade when international politics were sharply divided between the competing demands of nation-states and non-government humanitarian organisations. In the 1990s, the universal humanitarian character of the Court was no longer anchored in Victorian upper-middle class ideology, nor the historic ideals of Hugo Grotius or Francis Lieber, from whom Bellot and Lauterpacht had drawn inspiration. Neither was the Court vested in Bellot’s Utilitarian conception of the Grotian Law of Nations, or in Lauterpacht’s Kantian Federalism. Up to that point in time, the fragmentation of the ICC’s ideological mission had been overwhelming, to the extent, that neither Bellot nor Lauterpacht were able to translate their own utopian visions of the Court into a reality. New conceptions of the past drew upon the power of collective experience and played a key role in the politics of consent at Rome. To borrow from Moyn’s words on contemporary human rights, the ICC was a “last utopia” in global politics.236 Many delegates at Rome saw the Court as a substitute for the United Nations, which had failed to

236 Moyn argues that human rights were reborn in the post-Cold War era as a “last utopia”, aiming to replace the nation state with international law. Paradoxically, human rights “were forced to assume the very maximalism they triumphed by avoiding”. See, Moyn, The Last Utopia, p. 8.
prevent the atrocities of the former Yugoslavia and Rwanda. From an alternate view, the Court was a “strange triumph”. The suppression of political agency, on the behalf of “Civil Society”, was an essential compromise for the participation of national powers at the Rome Conference. In the collective mind of the Conference, the Red Cross tradition was a vital shield against negative perceptions of the Court as either a neo-imperialist project or a safeguard for absolute state sovereignty.

Seventy-four years after Bellot’s original proposal at Stockholm, the United Nations convened a diplomatic conference to formally discuss the establishment of an ICC. From 15 June to 17 July 1998, delegates from 148 western and non-western nations, 236 non-government and 33 intergovernmental organisations united in Rome for this purpose. As Jouannet stated, “where in the nineteenth century one could still cite a few major commentators, it seems impossible” in the late twentieth century, “so plethoric has international law writing become.” Matos Fernandes, the national representative of Portugal observed in Rome, “the world entered a new century in an era of globalisation”. This was the era in which “global citizenship” became a leading term. In contrast to Stockholm, the aim in Rome was not simply to create a blueprint for the Court, but to gain approval from an interdependent global community. As such, Kofi Annan called for universal ownership of the new world Court by highlighting the symbolic importance of “the Eternal City” – Rome. The world had assembled at the doorstep of the “universal empire” in a solemn effort to create a new institution. The intoxicating symbolism and grandeur of the event had motivated delegates such as Obed Asamoah, the representative of Ghana, and Valdis Birkavs, the representative of Latvia to remind others that “the Statute must not be

pushed through just for the sake of creating a symbolic entity” and furthermore “the establishment of an international criminal court should not be regarded as an end in itself”.\textsuperscript{241} A mere three years earlier, Cherif Bassiounni, a War Crimes Specialist for the United Nations had voiced the imperative that an ICC should embody the “moral values commonly shared by the international polity”.\textsuperscript{242} These words echoed throughout the conference halls in Rome through the words of Yves Sandoz, representative for the International Committee of the Red Cross (ICRC) when he claimed, “the key to its success lay in proving its competence and thus gaining the confidence of all”.\textsuperscript{243} Two days earlier, Michel Kafando, the national delegate of Burkina Faso, declared, “non-government organisations, particularly humanitarian bodies, had played a catalytic role in […] safeguarding peace and security and the protection of human rights”.\textsuperscript{244} From this evidentiary basis, LeBlanc noted that the latter half of the twentieth century emphasised the Court’s “humanitarian rather than its penal nature”.\textsuperscript{245}

Scholarship has extensively documented the identity crisis of international law in the post-Cold War era. At the time of the Rome Conference, international law was divided between the concerns of national powers and the humanitarian demands of international Civil Society. “Contemporary international law”, Jouannet observes, “is neither strictly welfarist law nor strictly liberal law, but indeed a liberal-welfarist law”.\textsuperscript{246} Michael Barnett, in his detailed account of international humanitarianism, perceived the manner in which “the world-changing events of the 1990s”, most notably the \textit{ad hoc} tribunals set up by the United Nations for the prosecution of genocide crimes in the Former Yugoslavia and Rwanda, had “caused all humanitarian agencies to rethink their relationship to politics and in the process, their

\begin{footnotesize}
\textsuperscript{242} Bassiouni, eds., \textit{ICC ratification and national implementing legislation}, p. 1.
\textsuperscript{244} UN Doc. A/CONF.183/SR.4, p. 84.
\textsuperscript{245} LeBlanc, \textit{The United States and the Genocide Convention}, p. 164.
\end{footnotesize}
humanitarian identity”.

Elizabeth Bogwardt, in her renowned work on the American genesis of contemporary human rights law, writes how “the Kantian vision of collective security may have to yield to the pluralistic vision offered by […] Civil Society”. In the late twentieth century, notions of collective security were not vested in Bellot’s Utilitarian conception of the Grotian tradition, or Lauterpacht’s Kantian Federalism. While these international lawyers had witnessed two very distinctive crises in the international legal fields of their own day, Stephen Neil Macfarlane and Yuen Foong Khong argue in their book *Human Security and the UN: A Critical History* (2006) that the paralysis of contemporary international law was due to the rise of “democratic pluralism” at the end of the twentieth century: a condition wherein the sovereignty of both states and individual human beings was paradoxically elevated.

Four years prior to the Rome Conference, United Nations Specialists investigated this paradox in the “Human Development Report”. For many scholars, this report was a favourable point of reference to demarcate a shift in the international political vocabulary from the language of national to human security.

Furthermore, it marked the closing gap between international humanitarian and human rights law - “Human security is not a concern with weapons – it is a concern with human life and dignity”.

Bob Reinalda notes that “human security” was an anti-national term universally employed for “strengthening efforts to tackle issues such as war crimes and genocide and finally for preparing the ground for humanitarian intervention.” In 1993 Kenneth Roth, the Executive director of Human Rights Watch, maintained that the language of human rights had not changed, however, it had acquired a new humanitarian significance due to the global

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NGO movement.\textsuperscript{254} For this reason, Emma Rothschild argued in 1995 that formerly marginalised non-government groups developed greater agency in the new era of global politics, and contested that the “NGO wave can be seen as a result of many governments’ will to withdraw from global action” in humanitarian emergencies.\textsuperscript{255} In this respect, a primary concern for the delegates in Rome was to overcome the “liberal-welfarist” crisis of international law through a politics of consent. Hence, a member of the Non-Government Organisation Coalition for an International Criminal Court had pledged on the afternoon of 15 June that “global civil society […] would work tirelessly with Governments and international organisations to achieve such a great, historic result”.\textsuperscript{256}

The Rome Conference was the first moment when contemporary associations between the ICRC and the ICC were drawn. The Court’s humanitarian identity sought to unify national interests with those of Civil Society - a rhetorical counterweight to the “liberal-welfarist” conception of international law. On the afternoon of 16 June, Cornelia Sommaruga, a representative of the ICRC, announced that the Conference was “reiterating the firm support of the International Committee of the Red Cross” and that “by virtue of its mandate to work for the faithful application of international humanitarian law, his organisation supported moves to set up” an ICC.\textsuperscript{257} Two days after Sommaruga’s declaration, Mariapia Garavaglia, member of the same delegation made particular reference to the events of November 1997, wherein:

The 175 national societies of the Red Cross and the Red Crescent, the International Federation and the International Committee of the Red Cross had adopted a resolution calling on national societies to promote the establishment of an effective and impartial international criminal court. The 120 million volunteers of the Red Cross and Red Crescent were waiting for

\textsuperscript{255} Rothschild, “What is Security?”, 81.
\textsuperscript{257} UN Doc. A/CONF.183/SR.2, p. 88.
a strong political message on the prevention and punishment of violations of international humanitarian law.258

The vitality of the Red Cross in the creation of an ICC was not limited to the voices from the ICRC. Various national representatives at Rome also hinged their enthusiasm for an ICC upon the aspirations of the Red Cross. René Novella, the representative for Monaco, announced that his country wished to participate in the historic construction of an ICC, “in keeping with his country’s longstanding involvement in […] the international Red Cross conventions.”259 When proposing a few amendments for the draft Statute of the ICC, Garcia Labajo, the Spanish national representative, hoped that they “would meet with support, as their general purpose was to reflect the […] activities of the International Committee of the Red Cross”.260 Yunus Bazel, Afghanistan’s national representative, was so supportive of the inclusion of the Red Cross in the ICC’s humanitarian function that he proposed “a provision for referral by the International Committee of the Red Cross”.261 In this respect, the ICC would be truly seen as an extension of the ICRC’s political reach. From these instances, one may deduce that the promotions of the Red Cross as a founding humanitarian symbol of the Court was not entirely to serve the self-seeking ambition of delegates on behalf of the ICRC.

The manner in which various groups used the Red Cross as a foundation myth to dispel political doubt of the Court’s role in voicing the humanitarian concerns of Civil Society during the late twentieth century is an area unchartered by historians. Many delegates understood that the Court’s legitimacy was vested in the force of its history. This offered an indelible stamp to the memory of generations. On the opening morning of the Conference in

1998, Annan began the proceedings by declaring that “the road leading to the holding of the Conference” had passed through “some of the darkest moments in human history” and was “stimulated by the hard work of the Red Cross”. Historical accounts that describe a genealogy between the ICC and the ICRC are a recent trend of the post-Rome era. Bellot used John Locke’s *Second Treatise of Government* (1690) to illustrate the English origins of the United States Supreme Court, and Lauterpacht traced the beginnings of a Western liberal human rights discourse to Grotius’s *Mare Liberum* (1609) in order to provide the Nuremberg myth with an historical resonance. Likewise contemporary legal scholars have employed the work of Gustave Moynier (1826 – 1910), Swiss international lawyer, member of the Institut de Droit International and President of the ICRC, in order to argue the ICC’s historical roots in the Red Cross Movement of the late nineteenth century. The Rome myth is a “Whig” interpretation of the ICC’s history, one that views the Rome conference as an inevitable outcome of Moynier’s 1872 proposal to build an international tribunal for the purpose of enforcing the humanitarian principles of the 1864 Geneva Conventions. Legal historians Sir Arthur Watts and William Schabas both endorse this narrative. Watts attempts no explanation of why the ICC “has been slow to gather sufficient momentum”, and alternatively Schabas argues that “Monnier’s innovative proposal was much too radical for its time”. These writers consider the ICC’s ancestry from the Red Cross to be self-evident.

Christopher Keith Hall posited the most extensive scholarly defence of the Rome myth in his paper *The First Proposal for an International Criminal Court* (1998), published in the International Review of the Red Cross. “A century and a quarter after Gustave

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262 UN Doc. A/CONF.183/SR.1, p. 61.
263 Alternatively, known in his day as the Geneva Committee, the National Aid Society or the Society of Public Utility. See: “How the National Society for Aid to the Sick and Wounded in War was Founded”, *London Standard*, 28 September, 1871, p. 6; “The National Society (Red Cross) Aid Society”, *London Standard*, 14 January, 1886, p. 2; “The Red Cross”, *The Times*, 9 May, 1928, p. 15.
Moynier’s daring proposal,” he wrote, “more than three hundred non-governmental organisations throughout the world have joined forces in an NGO Coalition for an International Criminal Court.”

In his eyes, it was the duty of the Rome delegates to “draft a statute worthy of Moynier’s vision.”

The evidentiary backbone of Hall’s argument rests on an English translation from the original French text of Moynier’s 1872 proposal, which at no point makes explicit reference to the Court’s “criminal” or “penal” nature.

Moynier’s generation commonly referred to his proposal as the “Geneva tribunal.” Not once was it officially labelled as an ICC. Even if the original French text outlines the proposal as a “tribunal”, writers for the Pall Mall Gazette described the idea as a “committee”, rather than an actual court of law.

The only two consistencies between Moynier’s vision and the Rome Statute were the “international” and “permanent” aspects of each proposal. Mark Kertsen thus argues that Moynier’s vision was a “forerunner to the Permanent Court of International Justice.”

This collective belief, however, relies upon two assumptions. Firstly, that the Advisory Committee of Jurists in 1920 had based their propositions for a PCIJ upon their perceptions of Moynier’s proposal or the legacies of the Red Cross. As shown from the verbatim reports of the Advisory Committee of Jurists, published by the Van Langenhaysen Brothers at The Hague in 1920, this was not the case, as these reports pay no credence to either Moynier or the Red Cross.

Secondly, it presumes that the PCIJ and the ICC can be conflated into one historical continuity. As previously discussed, not only were acknowledgements of the Red Cross entirely absent from Bellot’s written works, but his own proposal for an ICC, far from praising the PCIJ, was a reaction against it. In his eyes, the PCIJ

266 Hall, ‘The first proposal for a permanent international criminal court’, p. 8.
268 Hall, ‘The first proposal for a permanent international criminal court’, pp. 8–10.
270 “Article 1” in Gustave Moynier, Note sur la création d’une Institution Judiciare International (Genève: Imprimerie Soullier et Wirth, Cite, 19, 1872), p. 10.
had failed to uphold his liberal vision of Anglo-America. Essentially Bellot’s notion of an ICC was not so much to create an “organ” of the PCIJ, as it was to produce its alter ego. These observations cast doubt over the conventional wisdom of modern scholarship to alternatively suggest that the ICC’s birth cannot be directly interpreted from the origins of the Red Cross. The Rome myth should not be considered an uncovered universal truth, but an artefact of international Civil Society in the late 1990s.

The Court’s lineage from the Red Cross is conspicuously absent from historical records. Evidence indicates that neither Bellot or Lauterpacht considered the humanitarian legacy of the Red Cross when comprehending their own visions for an ICC. Bellot’s liberal vision of Anglo-American civilisation and Lauterpacht’s faith in the Nuremberg myth were ideologically fractured foundations upon which to build international support for the creation of an ICC. However these fractured foundations are in fact instrumental in answering the question of why the Court remained dormant for such an extended period of time. The Rome myth silenced these histories of conflict. While Lieber’s Instructions was the linchpin of Bellot’s humanitarian knowledge on “the laws of humanity” and was furthermore a critical point of reference in his vindication against statehood, the Prussian theory of war and his defence for the sanctity of Anglo-American civilisation, it is important to note that for many contemporaries of the late nineteenth century, Lieber and Moynier were regarded as similar minds, both in spirit and intellect. In 1880, The Oxford Journal wrote:

The Institut de Droit International […] the codification of international law and the spread of its principles are among the objects proposed by the society. The idea of such a society seems to first have occurred to Dr. Lieber and M. [Gustave] Moynier, the founder of the Red Cross Societies.

In addition, Moynier co-authored ‘Appeal to the Belligerents’ for Institut de Droit International – a document bearing a resemblance in its line of thought to Lieber’s

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Instructions.\(^{276}\) While this text did not receive the same grandiose international recognition as Lieber’s work, journalists for the Leeds Mercury observed in 1877:

‘Appeal to the Belligerents’ […] this document, it may be remembered, aimed at defining and summarising the laws of warfare as based […] among civilised peoples […] M.M. [Gustave] Moynier and Rolin Jaequemyns were instructed to draw up a further declaration on the subject.\(^{277}\)

This document was by no means held up in comparison to Lieber’s Instructions at the time. While Moynier and Lieber shared similar passions for humanitarianism and international law, their historical relationship should not be overstated. It cannot be questioned that Bellot borrowed heavily from Lieber, was aware of the influence of the 1864 Geneva Conventions upon the work of the 1899 and 1907 Peace Conferences at The Hague, and was himself a member of Institut de Droit International.\(^{278}\) Nevertheless he did not once throughout his entire career refer to either Moynier or the Red Cross as vital sources of inspiration, nor did his contemporaries at the Stockholm Conference lend support to their relevance when discussing the constitutional architecture of an ICC. The forgotten histories of individuals such as Bellot suggests that the Court’s genesis cannot be directly traced to the late nineteenth century Red Cross, as traditionally believed.

Lauterpacht wrote in International Law and Human Rights (1950) that the “precarious doctrine” of “humanitarian intervention” sought its primary influence from the work of Grotius, which was grounded in the “defense of human rights”.\(^{279}\) Even if these words echoed the thoughts of Jean S. Pictet (1914 – 2002), international Swiss lawyer and Vice-President of the ICRC, who in the same year had written in the Red Cross Principles (1950) that, “humanitarian law includes […] the law of war, consisting mainly of the Hague and Geneva Conventions, and […] the rules for the safeguard of human rights”, it is evident that neither Lauterpacht or Pictet drew a conscious link between the ICRC and an ICC, as

\(^{276}\) “International Law”, Leeds Mercury, 13 October, 1877, p. 17.
\(^{277}\) “International Law”, p. 17.
\(^{279}\) Lauterpacht, “The Subjects of International Law”, p. 32.
made at the 1998 Rome Conference and by subsequent legal scholars.\footnote{Jean Pictet, \textit{Red Cross Principles} (Geneva: International Committee of the Red Cross, 1956), p. 29.} Henceforth, while Barnett talks with specific reference to Henry P. Davison’s (1867 – 1922) leadership of an “American-led Red Cross” after the First World War, it was also apparent that the Red Cross “was quite willing to follow its identity into new areas” in the late 1990s.\footnote{Barnett, \textit{Empire of Humanity}, p. 92.}

It cannot be claimed that the foundation myth of the Red Cross was the entirely spontaneous invention of the Rome delegates. Many of the ideas of the Rome myth had already blossomed from the crosspollination of humanitarian traditions and pre-existing human rights ideology. Notions connected with the ICC shifted into a new humanitarian setting as a result of the interaction with the international Civil Society in the 1990s. Just as Mazower argued that the League of Nations served as an incubator for the creation of the United Nations in 1945, so too had the Nuremberg Myth facilitated the emergence of the Red Cross tradition in 1998. As a result of the ICC’s entanglement within a Western liberal human rights discourse during the mid-twentieth century, the Court’s historical association with the ICRC rose in parallel with a refashioning of human rights ideology from a predominantly moral notion to an enforceable humanitarian concept at the close of the twentieth century. An example of this is the way Annan cited the Nuremberg tribunals and the Red Cross as twin pillars for understanding the Court’s historical identity.\footnote{UN Doc. A/CONF.183/SR.1, p. 61.} In this case, the Red Cross was not used so much a substitute for the Nuremberg myth, as it was an additional reinforcement of the ICC’s humanitarian character. Many delegates in Rome continued to support the relevance of the Nuremberg trials in articulating the Court’s purpose. French representative, Béatrice Le Fraper Du Hellen was not a lone voice when she stated on the morning of 16 June, “France felt that the Statute should go at least as far as the Nuremberg Charter”.\footnote{UN Doc. A/CONF.183/C.1/SR.1, “United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Rome, 15 June – 17 July 1998, Official Records”, vol. 2. \textit{Summary records of the plenary meetings and of the meetings of the Committee of the Whole} (New York: United Nations, 2002), p. 133.}

Concurring with these sentiments Swiss representative, Jakob Kellenberger, shared the
common view that “individual criminal responsibility, foreshadowed by Nuremberg” was a significant foundation upon which to base the Rome Statute. 284 Representatives from China, Cuba, Singapore and Greece however were “unconvinced by the argument concerning the precedent set by the Nuremberg Trials”, as they had transpired from a “specific historical background”. 285

The ICC’s humanitarian Red Cross identity related to the Nuremberg myth was interpreted in a new historical light in Rome. The spirit of the myth evolved with context. For many of the Rome delegates, Nuremberg represented the convergence of international human rights and international humanitarian law – an attitude that was historically resonant with the international political culture of Civil Society and the new monolithic concept “human security”. For instance, Mohammad Aziz Shukri, speaking on behalf of the Syrian Arab Republic, argued that the Nuremberg Trials were a critical foundation of the Court, which conveyed an “overlap between crimes coming under the heading of genocide, crimes against humanity and violations of human rights”. 286 While many in Rome believed that Nuremberg was foundational in the ICC’s history, its impact upon the collective memory of the ICC’s identity was more subtle than traditional views have claimed. The Nuremberg myth exhibited a relatively minimal short-term influence upon international public opinion in the 1950s. This was because it failed to produce confidence in the creation of an ICC, due to the widespread frustration exhibited by national powers, who criticised the inability of the ICJ to pass effective and ruling judgements upon the global community.

To date, no historian has explored whose interests the Rome myth served; the multiple roles it may have performed at the Conference; and how it had helped the delegates to identify the Courts political function. New historical interpretations arise when the Rome myth is understood as a strategic interpretation of the ICC’s past, as opposed to being entirely

the natural progeny of an evolving international political culture. The current chapter has thus far investigated the extent to which the Rome myth was an “invented tradition” of the late twentieth century. Furthermore, it was revealed how on a preliminary level the Red Cross was an anti-national platform commonly employed for articulating the Court’s humanitarian purpose, which sought to overcome the “liberal-welfarist” crisis in international law by unifying the collective interests of both national powers and the members of Civil Society in Rome.

The following section will investigate the extent to which the Rome myth was a cover to cushion the blows of competing political hierarchies and claims of sovereignty between the United Nations and Civil Society. From one perspective, the ICC was considered to be a “last utopia”. Just as Moyn has argued that “human rights were born as an alternative to grand political missions” and the “fall of prior utopias”, so too was the ICC envisioned by many delegates in Rome to be a substitute for the United Nations.287 In this respect, the ICC was not a “utopia” that had triumphed in its own merits, rather it was viewed as a “last resort”.288 For many contemporaries of Bellot’s and Lauterpacht’s, the PCIJ and the ICJ had led public opinion to believe that the creation of an ICC was both an impractical and undesirable endeavour during the 1920s and 1950s. By the 1990s, international public opinion had turned and the ICJ was no longer a ghost that haunted the prospects of an ICC from ever becoming more than a reality on paper. Only in a few instances at the Rome Conference had the ICJ been cited warning against the creation of an ICC. On 17 June, Kamel Hassan Al-Maghur, the representative for the Libyan Arab Jamahiriya stated that “his country had submitted five issues to the International Court of Justice” wherein “States had used their influence in the

[Security] Council to impede the work of the ICJ even before the cases had started”. 289 For this reason, he “warned against the adoption of anything in the Statute” of an ICC that “might encourage such conduct”. 290 However the ineffectiveness of the ICJ was not the primary cause for concern in Rome that it once had been in Lauterpacht’s final decade. The main issue in question became the Court’s direct relationship with the UN. Majority opinion in Rome supported Reinalda’s view that, “the United Nations itself as an organisation is far from equipped for such [humanitarian] interventions.” 291 Mary Robinson, the United Nations High Commissioner for Human Rights confessed that “the United Nations had had a poor record in preventing violations of human rights” – words that reflected the genocides committed in the former Yugoslavia and Rwanda. 292 A. Abdullah, the representative for Afghanistan, believed that these “tragic events” had occurred because “United Nations resolutions had gone unheeded”. 293 As such, Robinson believed that the creation of an ICC would symbolise a “break in the past” wherein “political will and an effective weapon against the culture of impunity had all been lacking”. 294 Paskal Milo, the national representative of Albania prefaced his remarks by stating that civil society “was increasingly concerned about the failure of the international community to prevent the continuing serious violations of international humanitarian law”. 295 Marcel Dubouloz, calling attention to his own experiences as a member of the International Humanitarian Fact-Finding Commission stated that “the establishment of an international criminal court was certainly the missing element”. 296 However, just as Bellot had realistically recognised that his statute for an ICC needed to pay

293 UN Doc. A/CONF.183/C.1/SR.11, p. 87.
homage to the PCIJ, or otherwise be immediately swept under the carpet, so too had Lloyd Axworthy, the representative for Canada pointed to the uncompromising reality that “the Court would need to have a constructive relationship with the United Nations”. Mohammah Zamir, the representative for Bangladesh concurred in his belief that “global participation” would be necessary in the new Court.

“Global participation” was to be delivered at high political price. Taking an alternative perspective, the implementation of the ICC could be viewed a “strange triumph” in 1998. Just as Mazower has argued that a “weaker” United Nations was a necessary cost for the involvement of the United States and Soviet Russia in 1945, so too was the diminished political agency of Civil Society an essential compromise for the participation of national powers at the Rome Conference. The role of governments in manipulating the Rome myth has been unduly ignored by historians. While the Red Cross was invoked as an anti-political symbol of Civil Society’s integral role in the proceedings of the Conference and the cultural fabric of the Court itself, the rule implemented in Rome was that all non-government organisations would only possess the capacity to “participate as observers, without the right to vote” and then “through a limited number of their representatives, oral statements” could be made only “as appropriate”. Civil Society was to have no direct influence or the power to make executive decisions in dictating the words of the Rome Statute. In light of these limitations, the Rome myth may be interpreted as a tool that was used for masking the reality that national sovereignty was in no true sense threatened by the presence of non-government organisations at the Conference and Antoine Cassese’s bold claim that the ICC “is a revolutionary institution that intrudes into state sovereignty” is ostensibly overstated. The contrivance of history and proclamations of the Courts ancestry from the Red Cross were

antidotes to this political reality. As such, Peraza Chapeau, the representative of Cuba, had duly noted that the “International Criminal Court could not be separate from the States that created it”. The Rome myth was not so much a solution to the “liberal-welfarist” crisis in international law, as it was an insurance policy designed to safeguard national sovereignty by placating Civil Society’s desire for global recognition. In parallel to the PCIJ of Bellot era, the ICC had become the maxim of self-seeking nationalism that Civil Society had sought to replace.

In this chapter, the foundation myth of the Red Cross was used to investigate the politics of consent in Rome and proves critical to understanding the newfound purpose of the Court at the close of the twentieth century. The universal humanitarian character of this Court was not anchored in the historic ideals of Hugo Grotius or Francis Lieber, from whom Lauterpacht and Bellot had drawn inspiration. Neither was the Court vested in Bellot’s Utilitarian conception of the Grotian Law of Nations, or in Lauterpacht’s Kantian Federalism. These utopias did not have currency in Rome. The emphasis on the Court’s humanitarian identity was an antidote to the “liberal-welfarist” crisis in international law. By 1998, the ICC had become a Court of compromise with various intersecting agendas. For some, the Conference was a genuine advance against state sovereignty, while for others it was an overtly symbolic event that tamed Civil Society’s frustrated call for political recognition in a globalised world. Its newly discovered position in the realm of diplomacy was arguably one reason why the Court was no longer emphatically compared with the ICJ, but rather the United Nations, an administrative global political body. Just as Bellot’s proposal for an ICC was a substitute for the PCIJ, so too were many NGOs in Rome challenging the sovereignty of the United Nations. In a neat paradox, the new Court adopted the maxim of political compromise that activist members of Civil Society had sought to eradicate. In this sense, the ICC of 1998 was not so much a “revolutionary” institution but a “strange triumph”.

\[302\] UN Doc. A/CONF.183/SR.5, p. 93.
Conclusion

From “Minor Utopias” to “the Last Utopia”
A Ladder of Foundation Myths

The histories of Bellot and Lauterpacht have each revealed fragmentation in the Court’s historical trajectory – demonstrating firstly, that the processes of myth-construction are a critical lens for interpreting and dissecting the conventional Whig narratives of the Court’s development; and secondly, these processes fundamentally contributed to the ICC’s enduring identity crisis throughout the previous century. Ultimately, the politics of international consent proved to be far more influential than any individual myth-maker. This factor was crucial to the establishment of the ICC. In this climate, the collective membership and grandeur of the 1998 Rome Conference was orchestrated to revive the historical and political credibility of the ICC in the post-Cold War era.

A thorough analysis of the official Rome Treaty archives, British newspapers of the nineteenth and twentieth centuries, as well as the published and miscellaneous writings of figures who were closely involved in the ICC’s progress and development bring us to an appreciation of the legacy of the Rome Conference in a new light. Kofi Annan was indeed justified in believing that he had witnessed an “historic milestone” on the morning of 15 June 1998, as it was the first moment in which the idea of an ICC had found traction with the international community. Contrary, however, to the orthodox wisdom of contemporary legal scholarship, the Conference cannot be seen to be the direct result of The Hague Peace Conferences of 1899 and 1907, the birth of the PCIJ in 1920, or the long-term realisation of the innovative “Geneva Tribunal” proposed by Moynier during his career as a leading figure of the late nineteenth century Red Cross movement. These provide convenient precedents, as

303 UN Doc. A/CONF.183/SR.1, p. 61.
opposed to accounts of the past. Based on this hypothesis, this thesis has approached recent literature on the Court’s genesis within the Red Cross movement as primary sources of the decade in which they were written.

The ICC was a concept that attracted and embodied a vast array of competing values across separate generations. This resulted in different perceptions of the Court’s history, purpose and legitimacy, and furthermore was instrumental in the Court’s delayed evolution from Stockholm to Rome. As established in Chapter One, Bellot’s vision for an ICC was buried beneath a set of competing myths and the traditions of international civilisation that emerged in Europe after the First World War. His faith in the overarching liberal internationalism of Lieber’s humanitarianism and his utilitarian conception of the Grotian law of nations, challenged the “Westphalian myth” of absolute state sovereignty, and the ideals of Wilsonian liberalism expounded at the Paris Peace Conference of 1919. It was within this political and intellectual framework that Bellot saw the PCIJ as a threat to his own Victorian upper-middle class perception of Anglo-American civilisation. By contrast, Lauterpacht hinged the Court’s history within a human rights discourse during the mid-twentieth century, when the idiom of civilisation had run its course in global politics. As such, he believed the ICC’s primary function was to protect individual rights and responsibilities under the umbrella of international law. Nuremberg provided the ideal opportunity for Lauterpacht to plant human rights within an historical reality, one which maintained the power of collective experience. Regrettably, the Nuremberg myth offered yet another fractured foundation upon which to generate international enthusiasm for the creation of an ICC. Human rights were themselves a “strange triumph”, and the UN recognised the weakness of the ICJ as indicative of an ICC’s potential failure.\(^{304}\)

Despite mixed outcomes both the PCIJ and the ICJ were Courts that addressed nation states, and respectively, were institutions that triumphed in decades when group rights and the “interstate classical liberal conception” of international law were the touchstones of global

From the mid-twentieth century onwards, in response to a different epoch, the notion of an ICC evolved to encompass the evolution of individual rights. Conflating the ICC’s historical development within a broad teleology of building international tribunals overlooks this observation and the ICC’s contentious relationships with the PCIJ and the ICJ. Bellot’s contemporaries blurred the edges between the PCIJ and the ICC, and in doing so, significantly obstructed the creation of an ICC in the early decades of the twentieth century. To formally differentiate his own statute from the pre-existing PCIJ, Bellot stressed the ICC’s “criminal” jurisdiction. Even in the 1950s when the ICC transformed into an institutional expression of rights, Lauterpacht’s contemporaries persisted in drawing analogies between the ICC and the ICJ, despite their separate legal jurisdictions. Eventually this resulted in widespread doubt among UN delegates over the prospect of an effective ICC.

This thesis has examined historical tensions between the Court’s evolutionary and revolutionary character. The idea of an ICC shifted between evolving institutional expressions of international morality and new machinations of anti-national rhetoric throughout the twentieth century – from Bellot’s ideals of “humanity” and civilisation; to Lauterpacht’s idiom of “human rights”; and finally, to the monolithic notion of “human security”, which reflected the intellectual environs of an increasingly globalised community in the late 1990s. Bellot’s vision of Anglo-American civilisation did not adapt to new political contexts in the same manner achieved by the Nuremberg myth. The meaning of the Nuremberg myth was modified between periods and adopted a new historical significance at the 1998 Rome Conference, when human rights had transformed into an enforceable humanitarian concept. In this regard, the ICC’s entanglement within a human rights discourse in the mid-twentieth century possessed a lasting legacy, one that significantly impacted upon the Court’s historical trajectory and fuelled fresh interpretations of the Court’s genesis within the Red Cross movement of the late nineteenth century. Whilst possessing a weak evidentiary basis, this foundation myth was interwoven into the collective values of the Rome Conference, and as

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305 Jouannet, The Liberal-Welfarist Law of Nations, p. 188.
such, was authorised by the Rome delegates and legal scholars. This “invented tradition” was a signature of contemporary international Civil Society, as it had been co-authored by the consenting national powers at Rome. In 1998, the visions of Bellot and Lauterpacht suffered final defeat to “the last utopia”.\textsuperscript{306} The Court was entwined with contemporary human rights law, evolving into the safeguard of national sovereignty it had vowed to oppose.

\textsuperscript{306} Moyn, \textit{The Last Utopia}, p. 8.
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