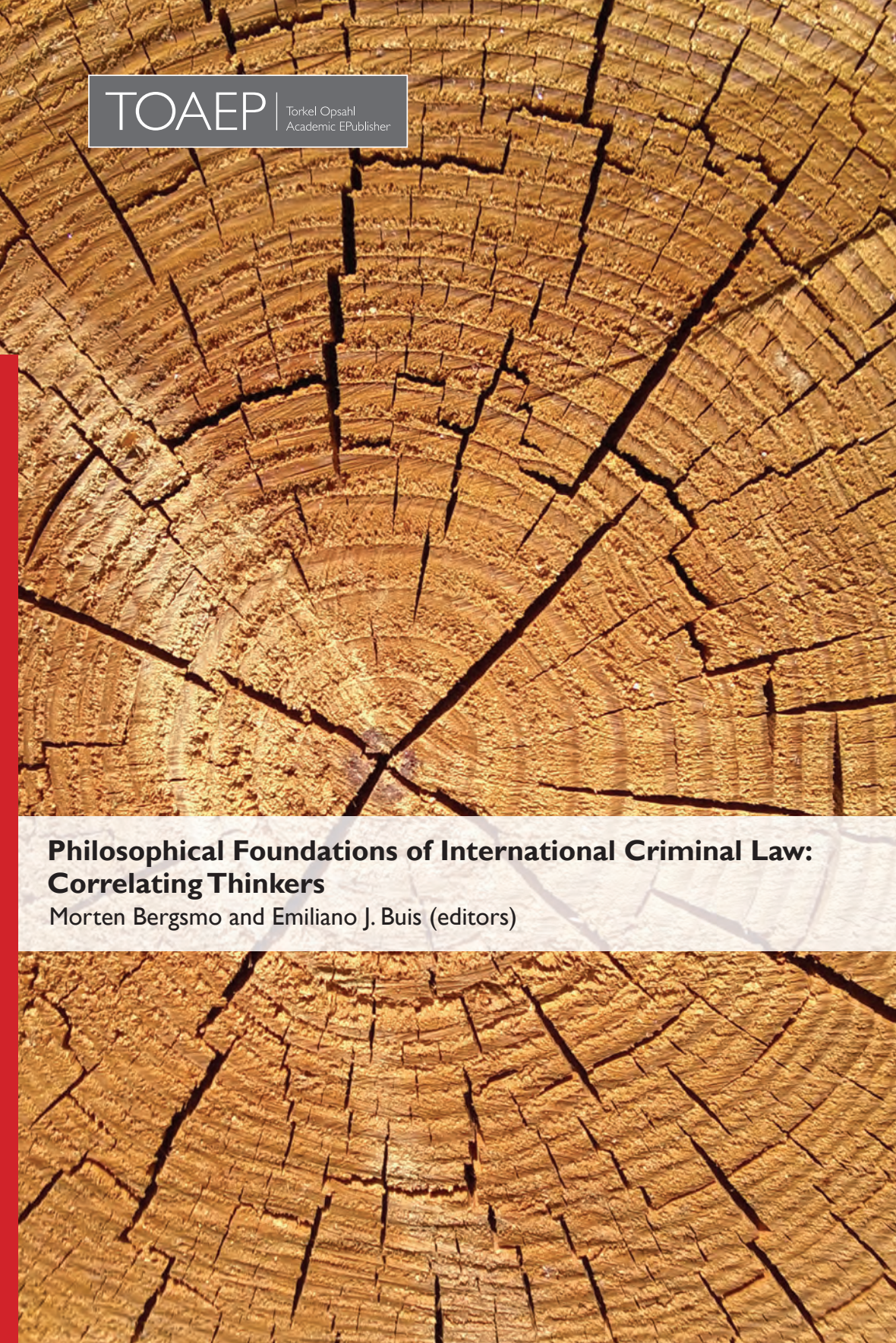

Philosophical Foundations of International Criminal Law: Correlating Thinkers

Morten Bergsmo and Emiliano J. Buis (editors)

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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

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Transnational Governmentality Networking: A Neo-Foucauldian Account of International Criminal Law

Gregory S. Gordon*

20.1. Introduction

Conventional accounts of the genesis of international criminal law emphasise the desire to hold individuals accountable for atrocities and grave breaches rather than let them hide behind the veil of the State. But a vein of important scholarship relying on the work of French philosopher Michel Foucault has called this conclusion into question. Far from viewing international criminal law as a crusade to end impunity for mass atrocity via individual responsibility, this body of scholarship perceives it instead as a product of more sinister and less visible forces – globalisation arising from nation-States and multinational private interests seeking maintenance of institutional order on a supranational scale. This scholarship typically offers philosophical support for its critique of international criminal law by citing Foucault's seminal work *Discipline and Punish: The Birth of the Prison*, for the proposition that international criminal law actors create a "political economy" of punishment, bureaucratising and routinising it, and thereby normatively ingraining it into an emerging globalised social body. This strain of thinking seizes on one of the central

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tenets in Foucault's philosophy, the notion of 'disciplinary power', and reductively translates it into a naked exercise of institutional 'control' over individuals at the supranational level. Seen from this narrow perspective, international criminal law merely represents an extension of statist coercion on a collective scale.

This chapter takes issue with this Foucauldian interpretation of international criminal law. Rather than treating 'power' in the international criminal law context negatively, as a function of coercion, it turns to the later development of Foucault's thought emphasising power as 'governmentality'. Governmentality may be roughly translated as a non-disciplinary form of power arising from an amalgamation of institutions, procedures, analyses, reflections, calculations, and tactics that permit governance over a population. Although it may have certain resonances and interactions with Foucault's earlier notions of sovereignty and discipline, governmentality is more about large-scale demographic techniques that form an overall macrophysics of power concentrated on assuring security for populations.

This chapter will demonstrate that, pursuant to this interpretation of Foucault, modern international criminal law has developed not as an assiduous strategy for maintaining supranational control, but as an organic outgrowth of lower-level transnational networks that have reached critical mass through the process of governmentality. At the outset, those networks consist of low-level, and often informal, investigative, prosecutorial, and judicial trans-border personnel linkages enabled through the intercession of nongovernmental and international organisations. These networks ultimately facilitate the series of procedures, analyses and tactics that have reached critical mass in the formation of international criminal law. They are further geared toward providing security for vulnerable populations, in particular.

When seen from this alternative Foucauldian perspective, international criminal law is no longer a simple binary power-oppression mechanism operating via punishment on a cosmopolitan scale. Instead, it represents a matrix of local-global/global-local horizontal capacity building, multi-layered enforcement techniques, and convergences of rules and strategy. 'Power' in this context can thus be interpreted as a supranational normative and institutional glue that helps situate the post-World War II erosion of atomistic Westphalian sovereignty, identifies population security as its policy lodestar, and puts into perspective the notion of individual

criminal responsibility. It could represent a new and vital way of theorising the foundations of international criminal law – focusing on human security and going beyond the tired recitations of 'the fight against impunity'.

This chapter is divided into five sections. Section 20.2. provides an overview of Michel Foucault and his philosophy, including his foundational concepts of 'power', 'knowledge', 'discourse', 'archaeology', and 'genealogy'. With that background in mind, Section 20.3. outlines the traditional Foucauldian account of international criminal law, explaining how scholars have simply, and somewhat superficially, transposed municipal conceptions of 'disciplinary power' onto a transnational scale writ large. Section 20.4. examines the evolution of Foucault's theories regarding 'power' into the later-stage concept of 'governmentality', which places an emphasis on accretions of personnel and administrative linkages coalescing into governance structures to provide security for populations. Section 20.5. traces the history of international criminal law from a grassroots perspective, showing how lower- and mid-level jurists cum State functionaries created a series of transborder international criminal law networks in the nineteenth and twentieth centuries that eventually transformed into juridical institutions now serviced by contemporary versions of these networks.

Finally, Section 20.6. explains how this growth can be explained as a kind of transnational 'governmentality' that takes its cues from sister initiatives focused on security for vulnerable populations, including the Responsibility to Protect and the Sustainable Development Goals. The section concludes by suggesting a governmentality-focused approach to international criminal law's conceptual underpinnings. This would entail turning away from the stale individual criminal responsibility-focused model of international criminal law and re-conceiving it as a victim-focused institutional/procedural strategy utilised to protect at-risk masses.

20.2. An Overview of Michel Foucault and His Philosophy

20.2.1. Background: Themes of Time, Place and Circumstance

Paul-Michel Foucault's 1926 birth in Poitiers (west-central France, about 200 miles southwest of Paris) to a physician father, who was himself the offspring of a line of provincial physicians (as was his mother), marked

him in many ways not immediately apparent.[1] First, the year of his birth meant that he would come of age during the Nazi occupation of his homeland from 1940 through 1945. The iron-fisted Nazi presence during his teenage years exerted an indirect but important influence on him.

> [He] was old enough to know fear. Allied planes from time to time flew sorties over the town, targeting the railroad station. Located twenty miles inside the frontier of Vichy France, Poitiers itself was throughout the war under the control of German officials, who periodically rounded up Jewish refugees and spirited them off to concentration camps. He thus came of age in a world where the threat of death was ubiquitous yet largely invisible, more a nightmarish rumor than a tangible reality.[2]

Foucault himself would later say:

> I have very early memories of an absolutely threatening world, which could crush us. […] To have lived as an adolescent in a situation that had to end, that had to lead to another world, for better or worse, was to have the impression of spending one's entire childhood in the night, waiting for dawn. That prospect of another world marked the people of my generation, and we have carried with us, perhaps to excess, a dream of Apocalypse.

Nazi influence, even if only in a reactionary fashion, continued to impact that 'other world' after 1945. This was via the growth of communist thought in French academic life, initially through osmosis via the French Resistance, which then carried over to *post-bellum* France.[3] Foucault's early university career was forged in a fire of Marxist theoretical ferment, both checked, and, in certain respects, fuelled by contemporaneous currents of structuralism, existentialism and phenomenology (the latter two being "philosophies of the subject").[4] He would find his own phil-

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1 David Macey, *Michel Foucault*, Reaktion Books, London, 2004, pp. 8–9.

2 James Miller, *The Passion of Michel Foucault*, Harvard University Press, Cambridge (MA), 1993, p. 39

3 See Alan Riding, "France's Troubled Liberation", in *The New York Times*, 24 August 2014, noting that "[t]he French Communist Party had dominated the resistance, including that of the cultural world" and "it seems clear that the left's sway over French intellectual and cultural life throughout the Cold War had its roots in the occupation".

4 Bruno Gonçalves Rosi, "Main Postmodern Theorists and Their Main Concepts", in *Notes on Liberty*, 14 March 2017: "At the beginning of his career he was inserted into the post-

osophical voice by first engaging with these intellectual trends and then breaking away from them.

At the same time, his family history of medical doctors played its part.[5] As already noted, both his parents came from long lines of doctors and, owing to depression (and attempted suicide) over his increasing realisation and embrace of a homosexual identity, Foucault's strict physician father had him institutionalised in a psychiatric facility during his days at the prestigious École Normale Supérieure.[6] Foucault also studied, through on-site visits, the work of psychiatric clinics during his university years. And his later work would be marked by an interest in medical issues, including psychiatry, confinement and societal power over the human body.

Less overtly apparent influences on Foucault's intellectual development also bear notice. One is the German philosopher Friedrich Nietzsche. Foucault claimed to have "turned to Nietzsche to escape not only the horizon of Marxism, but also the Freudianism, structuralism, and phenomenology that were 'each flirting with Marx in turn'".[7] More specifically, the notion of 'genealogy' (a tracing of discourse development analysis) could be said to be Nietzsche's primary impact on Foucault. Through his *Genealogy of Morals*, Nietzsche aimed to re-conceptualise morality by eschewing "the herd's ordering of selves into its institutional arrangements" and animating "resistance against the established order" by "inventing alternative constructions of the self, which attest to personal creativity, ingenuity and artistic sensibility"..[8] In Foucault's own work, as will be discussed below, 'genealogy' became an indispensable method for critically analysing discourse in the fields of science, medicine, psycholo-

WWII French intellectual environment, deeply influenced by existentialists. Eventually Foucault sought to differentiate himself from these thinkers".

5 *Ibid*.: "Initially identified as a medical historian (and more precisely of psychoanalysis), he sought to demonstrate how behaviors identified as pathologies by psychiatrists were simply what deviated from accepted societal standards".

6 Jeff Myers and David A. Noebel, *Understanding the Times: A Survey of Competing Worldviews*, Summit Ministries, Manitou Springs, 2015, pp. 153–4.

7 Justin Richards, "What Is Foucault's Interpretation of Nietzsche's Will to Power?", in *Quora*, 30 April 2016.

8 Marinus Schoeman, "Generosity as a Central Virtue in Nietzsche's Ethics", in *South African Journal of Philosophy*, 2007, vol. 26, no. 1, pp. 18–19. Foucault explicitly provided his interpretation of Nietzsche's view of history in Michel Foucault, "Nietzsche, Genealogy, History", in Paul Rabinow, (ed.), *The Foucault Reader*, Pantheon, New York, 1984, pp. 76–100.

gy/psychiatry, penology and sexuality. Similarly, Nietzsche's 'will to power' was a central tenet of his philosophy.[9] That term captures what Nietzsche perceived as the prime motivator in human striving – the desire "to grow, spread, seize, become predominant".[10] Foucault picked up on this Nietzschean trope in his *History of Sexuality*, by positing the 'will to knowledge', which, in turn, has links to his conception of 'power' (also to be discussed in greater depth below). In fact, in his last interview, he avowed:

> I am simply a Nietzschean, and try as far as possible, on a certain number of issues, to see with the help of Nietzsche's text – but also with anti-Nietzschean theses (which are nevertheless Nietzschean!) – what can be done in this or that domain. I attempt nothing else, but that I try to do well.[11]

So the spirit and ideas of Nietzsche always hover around the core principles in Foucault's oeuvre.

Another overarching factor in Foucault's work is history. In this sense, Foucault is not like most traditional philosophers, for whom philosophy, as traditionally understood, is the central inquiry, with history only factoring in collaterally (or not at all for certain types of philosophy, such as standard metaphysics, which may be shorn of historicity).[12] As we will see, for Foucault, the role of history is central in his philosophical critiques. His conceptual revelations spring from historical inquiry. Whether his task is examining punishment of social pariahs in pre-Revolutionary France, confinement of the insane in Europe during the Enlightenment or establishment of the medical sciences at the beginning

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9 Linda L. Williams, *Nietzsche's Mirror: The World as Will to Power*, Rowman & Littlefield Publishers, Inc., Lanham, 2001, pp. 41–2.

10 Friedrich Nietzsche, *Beyond Good and Evil*, W. Kaufmann trans., Vintage, New York, 1966, p. 259.

11 Hans Sluga, "Foucault's Encounter with Heidegger and Nietzsche", in Gary Gutting (ed.), *The Cambridge Companion to Foucault*, 2nd ed., Cambridge University Press, Cambridge, 2005, p. 210.

12 See Mark Kelly, "Michel Foucault (1926–1984)", in *Internet Encyclopedia of Philosophy*: "Ideas about reason are not merely taken to be abstract concerns, but as having very real social implications, affecting every facet of the lives of thousands upon thousands of people who were considered mad, and indeed, thereby, altering the structure of society". See also William F. Lawhead, *Voyage of Discovery: A Historical Introduction to Philosophy*, 4th ed., Cengage Learning, Boston, 2015, p. 438, noting Kierkegaard's criticism of metaphysical systems as too abstract.

of the nineteenth century, history looms large in all Foucauldian intellectual pathbreaking. As explained by Ladelle McWhorter:

> [Foucault] resisted the label 'philosopher,' despite his training and interests. For a variety of reasons, some philosophical and some political, Foucault rejected philosophies that put the subject at the foundation of analysis and took experience as the object of description. He undertook instead projects of de-subjectivation, projects that create experiences as opposed to merely describing them, projects that pull away from established identities. Foucault's work was not philosophy in the sense that was accepted in his time […] he was not a builder of new theoretical structures. His intellectual enterprise was the critique of disciplines and practices that restrict the freedom to transform ourselves […].[13]

Consistent with this, the Stanford Encyclopedia of Philosophy notes that "it can be difficult to think of Foucault as a philosopher. His academic formation was in psychology and its history as much as in philosophy, his books were mostly histories of medical and social sciences, his passions were literary and political".[14]

20.2.2. Foucault's Childhood and Academic Formation

The second of three siblings, Paul-Michel Foucault had an older sister and younger brother. His father wanted him to follow in the family tradition and become a doctor. But Paul-Michel had other career aspirations – one of the reasons he dropped the hyphenated 'Paul' from his name was to distance himself from his father.[15] Anne Foucault (née Malapert), his mother, was central to his early education. After graduating from Poitier's Saint-Stanislas school (a strict Roman Catholic institution directed by Jesuits and selected by Anne), he matriculated to the prestigious Lycée Henri IV in Paris to prepare for the entrance exams to France's elite higher education institution – the École Normale Supérieure ('ENS'). At Henri

[13] Ladelle McWhorter, "Review of Timothy O'Leary & Christopher Falzon, Foucault and Philosophy", in *Notre Dame Philosophical Reviews*, 2011.

[14] Gary Gutting, "Michel Foucault", in *Stanford Encyclopedia of Philosophy*, 22 May 2013. However, Gutting notes: "Nonetheless, almost all of Foucault's works can be fruitfully read as philosophical in either or both of two ways: as a carrying out of philosophy's traditional critical project in a new (historical) manner; and as a critical engagement with the thought of traditional philosophers".

[15] Macey, 2004, pp. 20–21, see *supra* note 1.

IV, Foucault's philosophy instructor was Jean Hyppolite, whose lectures on Georg W.F. Hegel (generally positing the development of history as a dialectical progress of reason) made a strong impression on the aspiring philosopher. Eventually he took the ENS entrance exams and achieved excellent results – of all incoming ENS students in 1946, Foucault was ranked fourth. And he emerged as a gifted thinker within his *normalien* cohort. His interest in psychiatry and mental illness soon became apparent. In his first year at ENS, he was already enrolled in a course on psychopathology and, as noted above, was visiting mental hospitals. He was also being grounded in philosophy – studying existentialism and phenomenology – under Maurice Merleau-Ponty (who emphasised the philosophy of Martin Heidegger) – and was introduced to cutting-edge Marxist scholarship through Louis Althusser (who read Marx in a structuralist vein). Foucault received his license in philosophy in 1948, in psychology in 1950, and was awarded an advanced degree (or diploma) in psychopathology in 1952.

Despite his academic success, Foucault led a troubled life at ENS. He continued to suffer from bouts of depression and survived various suicide attempts.[16] Under the influence of Professor Althusser, he joined the Communist Party in 1950.[17] But by 1953 he had quit, disillusioned with its Stalinist bent and anti-Semitism and alienated by its conservative attitude toward homosexuality.[18] He started distancing himself from Marxist thought, as well as the then-in-vogue philosophies of structuralism and phenomenology. The theoretical fulcrum for pivoting away from such currents of thought was Nietzsche. As explained by Lawrence Kritzman:

> Reading Nietzsche provided Foucault with a 'point of rupture' in his intellectual formation, enabling him to radically break with those who believed that a phenomenological and transhistorical subject could provide an accurate account of the history of reason […] Like most intellectuals of his generation, Foucault was brought up on the promises of dialectical materialism […] Yet Foucault engaged in a project that

[16] Miller, 1993, pp. 54–55, see *supra* note 2. See also Lawrence D. Kritzman, "Michel Foucault", in Lawrence D. Kritzman and Brian J. Reilly (eds.), *The Columbia History of Twentieth-Century French Thought*, Columbia University Press, New York, 2006, p. 526.

[17] Kritzman, 2006, p. 526, see *ibid*.

[18] *Ibid*.

> was to go beyond the attempt to merge Marxism with phenomenology, structuralism, or Freudianism […] In response to Marxism, Foucault theorizes a new approach to history that challenges the one-dimensional determinism of historical materialism. The exercise of history is more than the repressive and unmediated domination of one class by another; it is rooted neither in the production of surplus value nor in political and ideological struggles. On the contrary, power for Foucault designates localized procedures of local control, an ensemble of actions that induce others and follow one another.[19]

20.2.3. Foucault's Early Career, Doctoral Thesis and Philosophical Foundations

Foucault began his career in 1952, lecturing at the École Normale Supérieure. Starting in 1953, in addition to his ENS duties, he would commute to the north of France three days a week to teach psychology at the Université de Lille. Foucault soon tired of this teaching routine. And in 1954, he was given an out – Georges Dumézil, a French academic with ties in Sweden, learnt of Foucault through a mutual acquaintance. On verifying Foucault's credentials, he secured for him what turned out to be a four-year position as director of the Maison de France cultural centre, attached to the University of Uppsala in Sweden. In 1958, Foucault moved to Warsaw University after being appointed head of a new Centre for French Civilisation in the Polish capital. This turned out to be a short stint – conservative local officials soon discovered his homosexuality and, seeking to catch him in a sting operation, manufactured an affair with a young boy (a so-called 'honey trap'). The Poles notified the French of the indiscretion and Foucault had to find another job. A similar gig was available in Germany and so he served for the following two years as director of the Institut Français in Hamburg (similarly attached to the local institution of higher learning, the University of Hamburg).

But Foucault's years in Sweden, Poland and Germany were filled with more than programming cultural events, engaging in discreet sexual liaisons, and teaching French. At Uppsala, the combination of an excellent medical library and limited social life allowed him to conduct research for what would become his doctoral thesis. Coinciding with an academic ap-

[19] *Ibid*., p. 527.

pointment to the University of Clermont-Ferrand, Foucault submitted his thesis *Folie et Déraison: Histoire de la Folie À l'Âge Classique* (*History of Madness*), supervised by Georges Canguilhem, one of France's most eminent philosophers of science.

Histoire de la Folie deals with the experience and perception of madness in Europe, from the fifteenth through the nineteenth centuries. It posits that the distinction between madness and sanity is strictly an historical construct, fabricated by the Enlightenment to cover for "controlling challenges to a conventional bourgeois morality".[20]

In the process, Foucault discerned three key shifts in the treatment of madness during that period. Breaking with previous conventional wisdom, which had seen madness as a pathology to be removed, Medieval Europe viewed it as sacred and Renaissance Europe accorded it a new respect, as a kind of wisdom.[21] But this view shifted again in the seventeenth century, with the advent of the Enlightenment, which valorised rationality above all else. Those considered 'mad' went from the margins of society to complete exclusion through confinement in asylums.[22] This was followed by the third period, the Enlightenment, beginning at the end of the eighteenth century, when institutions were established solely to confine the mad under the supervision of doctors seeking to cure the 'illness' with medicine.[23] But, as already indicated, Foucault had a jaundiced view of these nominally more progressive institutions. He perceived them as being equally cruel and controlling as the earlier, 'rational' institutions had been.

20.2.4. The Archaeology Books and Foucault's Rise as a Leading French Intellectual

In May 1963, Foucault published his sequel to *Folie et Déraison – Naissance de la Clinique: Une Archéologie du Regard Medical* (*The Birth of the Clinic: An Archaeology of Medical Perception*). Linked both thematically and historically to *Folie et Déraison*, *Naissance de la Clinique* picks up at the same point in the eighteenth century where the earlier book left

[20] Gutting, 2013, see *supra* note 14.

[21] Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, Richard Howard trans., Vintage Books, New York, 1988, pp. 9–10.

[22] *Ibid*., p. 57.

[23] *Ibid*., p. 155.

off. But it deals more broadly with the history of medicine, in contrast to the previous tome's more narrow focus on the origins of psychiatry. It provides an account of the modern medical experience through an "archaeology of medical discourse" – an analysis of discourses themselves, that is, language actually used and divorced from the institutional context.[24] As part of this discursive digging, Foucault introduces the concept of the 'medical gaze', the act of scrutinising a patient inductively, based on observation of the individual body as an object, without adulterating the diagnosis with pre-Enlightenment cultural heuristics or identity politics.[25] And this has implications for State control:

> Foucault concludes that hospitals are superficially places providing medical care, but are intrinsically "a sort of semi-juridical structure, an administrative entity which, along with the already constituted powers, and outside the courts, decides, judges and executes […] Ultimately, the doctor as representative of the larger medical institution seems to embody the power, though it emanates from the institution of medical language itself".[26]

Foucault's developing tendency in *Naissance de la Clinique* toward discursive analysis, that is, historical research stripped of authorial context and moving toward discourse as an anonymous process, was fully realised in his next major philosophical work, *Les Mots et Les Choses: Une Archéologie des Sciences Humaines* (*The Order of Things: An Archaeology of Human Sciences*). Published in 1966, *Les Mots et Les Choses* narratively flows from his previous two philosophical oeuvres in that it tracks shifts in collective knowledge paradigms over time. But this work moves beyond the medical sciences and, in addition to biology, considers discursive evolution in fields of linguistics and economics.[27]

Foucault analysed academic development in these fields through the lens of the '*episteme*'.[28] This then-newly-coined term refers to the orderly

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[24] Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception*, Alan Sheridan trans., Vintage Books, New York, 1994, Preface, pp. x–xi.

[25] *Ibid*., pp. xi–xii.

[26] Daniel C. Newtown *et al.*, "Landscape, Tourism and Meaning: An Introduction", in Daniel C. Newtown *et al.* (eds.), *Landscape, Tourism and Meaning*, Ashgate Publishing Company, Burlington, p. 2.

[27] Michel Foucault, *The Order of Things: An Archaeology of Human Sciences*, Routledge, London, 1989, Preface, p. xxiii.

[28] *Ibid*., p. xxiv.

'unconscious' structures underlying the production of scientific knowledge in a particular time and place.[29] It is the 'epistemological field' that creates the conditions possible for generating knowledge in a given time and place – and it charts several historical shifts of *episteme* in the disciplines covered.[30] This has often been compared to Thomas Kuhn's notion of 'paradigm' and 'paradigm shift'.[31] (Kuhn claimed in his classic 1962 work, *The Structure of Scientific Revolutions*,[32] that there are important alterations in the meanings of key terms – what he refers to as 'paradigm shifts' – as a result of 'scientific revolutions', such as the so-called 'Copernican Revolution' in reference to the scientific community's shift from a Ptolemaic to a heliocentric view of the universe.) [33] Largely because many took it to be a tour de force expression of the new method of structuralism notably championed by anthropologist Claude Lévi-Strauss, *Les Mots et Les Choses* became a surprise bestseller and made Foucault a household name in France.[34] Still, Foucault himself never accepted the 'structuralist' label.

Les Mots et Les Choses also revealed another facet of Foucault's Nietzschean influence. In this regard, it contained one of his most quoted passages – the idea that 'man' was a recent discursive formation nearing its end, and soon to be "erased, like a face drawn in the sand at the edge of the sea".[35] Of course, Nietzsche had announced the death of God; Foucault was now announcing the death of man.

By the time *Les Mots et Les Choses* was published, Foucault had settled comfortably into Parisian academic life – still teaching at Clermont-Ferrand while commuting from the French capital. Also by then, he had been in a three-year relationship with Daniel Defert, his former philosophy student and junior by ten years. During the relationship, Defert had worked for stints in Tunisia and Foucault regularly visited him

29 Clare O'Farrell, "Key Concepts in Foucault's Work", in *Michel-Foucault.Com*.

30 *Ibid*.

31 *Ibid*.

32 Thomas S. Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago, 1962.

33 See Alexander Bird, "Thomas Kuhn", in *Stanford Encyclopedia of Philosophy*, 11 August 2011.

34 The Foucault Society, "Biography of Michel Foucault", *The Foucault Society*, available at the web site of the Society.

35 Foucault, 1989, p. 422, see *supra* note 27.

there.[36] In September 1966, Foucault decided to leave France and take up a post as Professor of Philosophy at the University of Tunis, where he would remain for the next two years.[37] As a result, Foucault was not in Paris during the radical May 1968 student riots and factory strikes based on grievances ranging from American imperialism to capitalism/consumerism, traditional values and order.[38] After the riots were quelled, a series of academic reforms were instituted, including the creation of the Vincennes Experimental University Centre in the Parisian suburbs, a hotbed of radicalism that carried on the spirit of the 1968 riots with sporadic but intense outbursts of protest activity. By year's end, Foucault would become the chair of the new leftist institution's philosophy department.

This was a watershed moment in Foucault's life and academic career. On the academic side of the ledger, he would soon publish *L'Archéologie du Savoir* (*The Archaeology of Knowledge*) (1969), written primarily during his residence in Tunisia. This volume is almost an addendum to *Les Mots et Les Choses*, proposing pure methodological, ahistorical guidelines to conduct the kind of discursive analysis applied in the predecessor book to the specific disciplines of biology, linguistics and economics.[39] Also well-received critically and commercially, *L'Archéologie du Savoir* signalled the imminent manifestation of Foucault's meteoric rise in the academic ranks – his 1969 election to France's most prestigious academic institution, the Collège de France.[40]

20.2.5. Political Engagement and the Power-Knowledge Books

At the same time, somewhat incongruously, while joining one of France's most establishment institutions, Foucault was becoming much more engaged and radical politically. Having missed the May 1968 riots in France (while supporting young radicals in Tunisia), he participated in much of the follow-on protest activity at Vincennes, joining some of the violent

36 Macey, 2004, pp. 76–77, see *supra* note 1.

37 *Ibid*.

38 Peter Steinfels, "Paris, May 1968: The Revolution That Never Was", in *The New York Times*, 11 May 2008.

39 Michel Foucault, *The Archaeology of Knowledge*, Alan Sheridan trans., Pantheon Books, New York, 1972, p. 27: "One is led therefore to the project of a pure description of discursive events as the horizon for the search for the unities that form within it".

40 Lynn Fendler, *Michel Foucault*, Bloomsbury, London, 2010, p. 120.

rioting that periodically resulted in his arrest.[41] Through such activity, he took an interest in the rights of prisoners. And in the early 1970s he co-founded a *Groupe d'Information sur les Prisons* (GIP) to bring to light sub-standard prison conditions and give the incarcerated a voice in French society.[42] Other leftist causes kept him politically engaged through the balance of the 1970s, including protests against the Franco regime in Spain; debates about sex, censorship, and rape in the United States; and support for the Iranian revolution toward the end of the decade.[43]

This turn toward leftist political engagement also reflected an arguably praxis-oriented shift in his major philosophical works. In particular, the historical inquiries were re-oriented from broad examinations of discourse and knowledge toward analyses more focused on institutional control over individuals via the interdependent phenomena of knowledge and power. This entailed dissecting knowledge discourses that crystallised into systems of authority and constraint while tracking the sets of intersecting but fractured identities that such systems engender. This is the theoretical-historical enterprise that gave rise to Foucault's best-known works – the 1970s–80s studies treating penal incarceration and sexuality, to which we will now turn.

20.2.5.1. The Turn Towards Genealogy

In considering this new period of Foucault's work, a foundational underlying methodological issue bears explication. Foucault regarded his 1960s work as premised on an 'archaeology' of knowledge. This connotes an historiography that rested not "on the primacy of the consciousness of individual subjects; [rather] it allowed the historian of thought to operate at an unconscious level that displaced the primacy of the subject found in both phenomenology and in traditional historiography".[44] But this approach was not entirely satisfactory as it was restricted to the comparison of the different discursive formations of different periods.[45] As explained by Gary Gutting:

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41 Jonathan Simons, *Foucault and the Political*, Routledge, London, 1995, p. 10.

42 *Ibid*.

43 *Ibid*. *See also* Chloë Taylor, "Foucault, Feminism, and Sex Crimes", in *Hypatia*, vol. 24, no. 4, 2009, p. 1, discussing Foucault's views on rape in the United States; Clare O'Farrell, *Michel Foucault*, Sage Publications, London, 2005, p. 124.

44 Gutting, 2013, see *supra* note 14.

45 *Ibid*.

> Such comparisons could suggest the contingency of a given way of thinking by showing that previous ages had thought very differently (and, apparently, with as much effectiveness). But mere archaeological analysis could say nothing about the causes of the transition from one way of thinking to another and so had to ignore perhaps the most forceful case for the contingency of entrenched contemporary positions.[46]

20.2.5.2. Surveiller et Punir

20.2.5.2.1. An Overview

Thus, Foucault transitioned from 'archaeology' to 'genealogy'. First deployed in his 1975 book *Surveiller et Punir: Naissance de la Prison* (*Discipline and Punish: The Birth of the Prison*), genealogy, recalling Nietzsche's 'genealogy of morals', filtered the discourse analysis that had preoccupied him through the 1960s "onto a more political terrain, asking questions now about the institutional production of discourse".[47] Or, as explained by Gary Gutting: "The point of a genealogical analysis is to show that a given system of thought (itself uncovered in its essential structures by archaeology, which therefore remains part of Foucault's historiography) was the result of contingent turns of history, not the outcome of rationally inevitable trends".[48]

As applied in *Surveiller et Punir*, this yielded an account of how the modern era eschewed torture and execution, the older modes of castigation, to develop a more 'gentle' way of punishing criminals – that is, imprisoning them.[49] On a larger societal level, this represents a shift from exercise of 'sovereign' (or 'juridical') power (as famously embodied at the beginning of the book with the 1757 public spectacle torture of Damiens, the regicide) to 'disciplinary' power embodied in the veiled treatment of prisoners within the carceral complex that is the modern prison, as em-

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46 *Ibid*.

47 Mark Kelly, "Michel Foucault (1926–1984)", in *Internet Encyclopedia of Philosophy*. Interestingly, the subtitle clearly alludes to *Naissance de la Clinique* (*The Birth of the Clinic*), suggesting continuity in the enterprise. And both subtitles, of course, reference Nietzsche's *Birth of Tragedy*.

48 Gutting, 2013, see *supra* note 14.

49 Melissa A. Orlie, *Living Ethically, Acting Politically*, Cornell University Press, Ithaca, 1997, p. 44.

bodied in Jeremy Bentham's Panopticon or the contemporary penitentiary.[50]

20.2.5.2.2. From Torture to Prisons

Thus, as he did in *Folie et Déraison* with respect to the insane, in *Surveiller et Punir* Foucault analysed institutional shifts in treatment of a nominally marginal sector of society – in this case, criminals (although Foucault sees the notion of what is termed 'criminal' expand greatly into the modern era). The book is divided into four main segments, covering key concepts as follows: (1) Torture; (2) Punishment; (3) Discipline; and (4) Prison.[51]

Through these sections/concepts, Foucault demonstrated the evolution of punishment from public torture and execution (and thus spectacle as a fear-based deterrence mechanism) to imprisonment (a kind of subtle, normalising control mechanism that first appears at the end of the eighteenth century – the so-called 'Classical Age' that is always, as we have seen, the crucial juncture of normative shift in his treatises). And this entails a progression from developing physical mechanisms to effect corporeal/capital punishment to developing social constructs to nominally achieve 'reform' or 'conversion' of persons. In its earlier iteration, as the aforementioned spectacle, punishment sought to communicate the State's invincibility so as to cow the general population and subdue the convict.[52] Thus, as an attendant consequence, the torture-to-imprisonment change marks a shift from conceiving the body as a site of pain to one where the body simply loses its rights and, in effect, punishment operates on the soul.

The evolution of prisons themselves reflected this shift. They were initially conceived of as 'punitive cities' meant to remind the public of the consequences of transgression, as well as protective enclosures, holding the body of the convict for security reasons.[53] But with the modern transformations of punishment, prisons became more hidden from public view, a kind of sub-stratum institution, geared toward altering minds, keeping detailed records of individuals based on observation, and classifying and

50 *Ibid*.

51 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Penguin Books, London, 1975.

52 *Ibid*., p. 49.

53 *Ibid*., pp. 117–23.

estimating the danger represented by the prisoner. In this way, per Foucault, "prison functions […] as an apparatus of knowledge".[54]

20.2.5.2.3. A Micro-Physics of Power

But the prison is not the only locus for manipulating bodies – this notion of control through knowledge – and thus, ultimately, power – extends to other sectors of society. And this is what is meant by 'disciplinary' power. Thus, the military, through minute regulations of dress, demeanour and bearing, conditions individuals to conduct themselves according to State needs.[55] Similar conditioning, based on the requirements of various techno-political tasks, also happens outside of the military context. For instance, it is seen in schools, hospitals and factories, where conditioning consists of such activities as timetabling, curriculum sequencing, and industrial divisions of labour.[56] According to Dave Harris's reading of Foucault, the ensemble of such conditioning techniques is what constitutes the 'micro-physics' of power:

> A unified technique emerged from a convergence and overlap of lots of small movements and tendencies found in schools, hospitals and the military as solutions to various developments, such as an outbreak of disease, or industrial or military innovation. The essential techniques passed from one institution to another, sometimes quickly, sometimes less quickly. Together, they made up a new "micro-physics" of power over individual bodies, which then spread throughout the social body itself, including the punishment system.[57]

For Foucault, this micro-physics of power represents 'disciplinary power' that manifests itself through hierarchical observation, normalising judgment and examination.[58] Much of this is captured in Jeremy Bentham's Panopticon – a central tower surrounded by prisoners in cells, always visually accessible to an omnipresent watchman stationed in the tower.[59] This permits unseen scrutiny of prisoners, who must suppose that they are under perpetual observation, regardless of whether or not they

54 *Ibid*., p. 126.

55 *Ibid*., pp. 139–40.

56 *Ibid*., pp. 149–54.

57 Dave Harris, "Notes on Foucault's Discipline and Punish", in *Dave Harris & Colleagues*.

58 Foucault, 1975, p. 170, see *supra* note 51.

59 *Ibid*., pp. 200–1.

actually are. And, again, per Foucault, this kind of 'panopticism' has extended to other social institutions, such as the workplace, where employees are continually watched by their supervisors.[60] This helps create uniform systems of behaviour, dispersed through society, that can be monitored. As explained by Foucault:

> But the Panopticon must not be understood as a dream building: it is the diagram of a mechanism of power reduced to its ideal form […] It is polyvalent in its applications; it serves to reform prisoners, but also to treat patients, to instruct schoolchildren, to confine the insane, to supervise workers, to put beggars and idlers to work. It is a type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organization, of disposition of centres and channels of power, of definition of the instruments and modes of intervention of power, which can be implemented in hospitals, workshops, schools, prisons. Whenever one is dealing with a multiplicity of individuals on whom a task or a particular form of behaviour must be imposed, the panoptic schema may be used.

Kimberly Hutchings helps put this system of disciplinary power into its full perspective:

> Juridical power belongs to and is exercised by a sovereign body to repress and control its subjects. Disciplinary power, on the other hand, belongs to nobody and is productive rather than repressive in its effects: discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise. According to *Discipline and Punish*, the construction of the sovereign individual, which is both the premise and the accomplishment of the panopticon, is inseparable from the development of the human sciences. The discourses of human behaviour which helped inspire and account for changes in the penal system in the nineteenth century are most frequently presented as effects and channels of disciplinary power. Thus, Foucault's argument appears to be that power produces discourses of knowledge, which in turn produce regimes of

[60] *Ibid*., pp. 203–4.

> truth, criteria through which to discriminate between true and false or normal or deviant.[61]

It should be noted too, however, that this punishment system also finds its origins in concerns of political-economy. John Braithwaite explains:

> [Foucault's] view is that the 'dying a thousand deaths' punishment of the late Middle Ages were not indicative of an attempt to control crime, but rather functioned as a means of publicly demonstrating the awesome power of the monarch. Under feudalism there was no consistently applied justice, most law breaking was tolerated and often even approved. Moreover, there was not the state apparatus to finance a systematic approach to crime control. Of necessity, therefore, punishment had to be arbitrary, cruel and cheap. Mercantilism, with the new phenomena of population mobility which separates servants from traditional masters, pilfering from employers, urban pickpockets, large urban warehouses which were targets for theft, ushered in the need for a rational crime-control policy. No longer could the ruling class turn a blind eye to most crime. Nor could they hope to enforce horrendous 16th century punishments without wiping out half the lower classes. New modalities of punishment had to be found. Rusche & Kirchheimer's theory links up with Foucault in the way it emphasises the new importance of preserving the lives of the lower classes.[62]

Still, regardless of the conscious trajectory of the punishment stratagem, Gary Gutting warns us not to read intentionality into the development of this overall modern system of state control:

> He [Foucault] further argues that the new mode of punishment becomes the model for control of an entire society, with factories, hospitals, and schools modelled on the mod-

[61] Kimberly Hutchings, "Foucault and International Relations Theory", in M. Lloyd and A. Thacker (eds.), *The Impact of Michel Foucault on the Social Sciences and Humanities*, Palgrave MacMillan, Basingstoke, 1997, p. 105.

[62] John Braithwaite, "The Political Economy of Punishment", in E.L. Wheelwright and Ken Buckley (eds.), *Essays in the Political Economy of Australian Capitalism*, ANZ Books, Sydney, 1980, p. 193. Georg Rusche and Otto Kirchheimer's *Punishment and Social Structure* (1939) is a landmark Marxian analysis of punishment as a social institution. See Dario Melossi, "An Introduction: Fifty Years Later *Punishment and Social Structure* in Comparative Analysis", in *Contemporary Crises*, 1989, vol. 13, pp. 311–2.

> ern prison. We should not, however, think that the deployment of this model was due to the explicit decisions of some central controlling agency. In typically genealogical fashion, Foucault's analysis shows how techniques and institutions, developed for different and often quite innocuous purposes, converged to create the modern system of disciplinary power.[63]

20.2.5.3. L'Histoire de la Sexualite

20.2.5.3.1. An Overview

Foucault's last set of books published during his lifetime were the three volumes of *L'Histoire de la Sexualité* (*The History of Sexuality*). Foucault intended to treat sexuality as he had criminality – by showing its treatment as a discursive object through which individuals are ensnared in the knowledge-power interplay. As Gary Gutting notes: "The starting-point is […] still Foucault's conception of modern power […his] initial treatment of sexuality is a fairly straightforward extension of the genealogical method of *Discipline and Punish*".[64]

Beginning with Volume 1, *La Volonté de Savoir* (*The Will to Knowledge*), Foucault had a list of groups he wished to show were specifically affected by this dynamic, including children, women, and 'perverts'.[65] But sexuality ended up being somewhat different from imprisonment.[66] In particular, the genealogy did not merely involve control exercised via others' knowledge of individuals; there was also control via individuals' knowledge of themselves.[67] "Thus, they are controlled not only as *objects* of disciplines but also as self-scrutinizing and self-forming *subjects.*"[68] Central to this analysis would be the practice of confession.

But Foucault's outline of subjects did not unfold as he had originally planned. The intended second book in the sequence, *Les Aveux de la Chair* (*The Confessions of the Flesh*), which analysed the practices of

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63 Gutting, 2013, see *supra* note 14.

64 Gary Gutting, *Foucault: A Very Short Introduction*, Oxford University Press, Oxford, 2005, p. 92.

65 Gary Gutting, *French Philosophy in the 20th Century*, Cambridge University Press, Cambridge, 2001, p. 282.

66 *Ibid*.

67 Gutting, 2005, see *supra* note 64.

68 *Ibid*. Emphasis in the original.

Christian confession, was written but never published (it was later meant to be the fourth book in the series but Foucault died before it could be published).[69] The change in order came about because Foucault came to realise that the Christian confession ritual could not be properly contextualised without tracing the subject's history much further back in time, that is, understanding ancient conceptions of the ethical self.[70] This he undertook in his last two published books, which dealt with Greek and Roman sexuality: 1984's *L'Usage des Plaisirs* (*The Use of Pleasure*) and *Le Souci de Soi* (*The Care of the Self*).

20.2.5.3.2. Volume 1: The Will to Knowledge

20.2.5.3.2.1. Parts 1-3: A Focus on Sexuality

Volume 1, *La Volonté de Savoir* (*The Will to Knowledge*), was divided into five parts: (1) We "Other Victorians"; (2) The Repressive Hypothesis; (3) Scientia Sexualis; (4) The Deployment of Sexuality; and (5) Right of Death and Power over Life. For the purposes of this chapter, the first three parts of the book can be described briefly as they deal in a more focused manner on sexuality itself. Part 1 disabuses the reader of the 'repressive hypothesis', that is, that owing to the capitalistic/bourgeois mores, social communication regarding sex was repressed during the late seventeenth through early twentieth centuries.[71]

This analysis bleeds into Part 2, which demonstrates that, in combating the Protestant Reformation, the Roman Catholic Church implored its adherents to 'confess' to sexual practices stemming from their sinful desires.[72] Thus, from the seventeenth century to the 1970s, there had actually been a "veritable discursive explosion" in the discussion of sex, albeit using an "authorised vocabulary" that legislated the time and place of such communications.[73] Among other things, this impelled discourse spurred an obsession with sexualities that did not fit within the marital relations framework.

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69 Jeremy R. Carrette, *Foucault and Religion*, Routledge, London, 2000, p. 23.

70 *Ibid*.

71 Michel Foucault, *The History of Sexuality Volume 1: The Will to Knowledge*, Robert Hurley trans., Vintage Books, New York, 1978, pp. 3–13.

72 *Ibid*., pp. 17–49.

73 *Ibid*., pp. 17–8.

These marginal sexual practices, referred to as the "world of perversion", included the sexuality of children, the mentally ill, the criminal and the homosexual.[74] In turn, this led to classifications of these perversions via social construct. Thus, where previously a man who had sexual relations with another man would be thought of as having succumbed to the sin of sodomy, pursuant to this new way of thinking, the man would now be classified as a new 'species', that is, a homosexual.[75] Part 3 of the book contrasts the Occidental approach to sex through scientific study, that is, *scientia sexualis*, which had been used to support State racism through such justifications as 'public hygiene', with the less rational Oriental tradition of *ars erotica*.[76]

20.2.5.3.2.2. Disciplinary Power and Bio Power

Parts 4 and 5 of Volume 1 have particular relevance for this chapter. Four, titled "The Deployment of Sexuality", reprises the role of Foucauldian 'power' in relation to sex.[77] In this context, Foucault stresses that he is not referring to power as sovereignty exercised over the individual by the State. Rather, power consists of "the multiplicity of force relations immanent in the sphere in which they operate".[78] Therefore, he contends, "Power is everywhere […] because it comes from everywhere", radiating from all communal interactions and carried out in a bottom-up, as opposed to a top-down, fashion throughout society.[79] This is arguably a carryover of Foucault's micro-physics of power treated in *Surveiller et Punir*.

Part 5 of Volume 1 of *L'Histoire de la Sexualité* is central to the thesis developed in this chapter as it deals with the phenomenon of 'biopower', a conceptual bridge to the notion of 'governmentality', which this chapter will explore in greater depth below. Gary Gutting notes that biopower "is concerned with the 'task of administering life'" and thus "seems to be moving beyond sexuality as such" and "embraces all the

74 *Ibid*., pp. 36–49.
75 *Ibid*., pp. 42–3.
76 *Ibid*., pp. 53–73.
77 *Ibid*., pp. 77–131.
78 *Ibid*., p. 92.
79 *Ibid*., pp. 93–4.

forms of modern power directed toward us as living beings, that is, as subject to standards of not just sexual but biological normality".[80]

Bio-power operates on two levels. As explained by Foucault himself:

> In concrete terms, starting in the seventeenth century, this power over life evolved in two basic forms; these forms were not antithetical, however; they constituted rather two poles of development linked together by a whole intermediary cluster of relations. One of these poles – the first to be formed, it seems – centered on the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls, all of this was ensured by the procedures of power that characterized the disciplines: an anatomo-politics of the human body. The second, formed somewhat later, focused on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary. Their supervision was effected through an entire series of interventions and regulatory controls: a bio-politics of the population. The disciplines of the body and the regulations of the population constituted the two poles around which the organization of power over life was deployed. The setting up, in the course of the classical age, of this great bipolar technology-anatomic and biological individualizing and specifying, directed toward the performances of the body, with attention to the processes of life – characterized a power whose highest function was perhaps no longer to kill, but to invest life through and through.[81]

20.2.5.3.3. Volumes 2 and 3: *The Uses of Pleasure and the Care of the Self*

In Volume 2 of the *L'Histoire de la Sexualité*, *L'Usage du Plaisir* (*The Uses of Pleasure*), Foucault examined sexuality in ancient Greek society

[80] Gutting, 2005, see *supra* note 64.

[81] Foucault, 1978, p. 139, see *supra* note 71.

as personal power politics in social relations.[82] In this context, 'ethical' sexual behaviour is a function of practicing sex within a specific social and class position.[83] This is in contrast to the Christian tradition where sexual pleasure smacked of sin.[84] In Volume 3, *Le Souci de Soi* (*Care of the Self)*, Foucault further investigated the ancient Greco-Roman rules of self-control through important texts, such as Artemidorus's *Oneirocritica*, (*The Interpretation of Dreams*), which permit access to specific forms of pleasure and truth.[85] Again, this stands in contrast to the Christian concept of sin in relation to sexual pleasure.[86]

Notwithstanding the overt focus on sexuality, Foucault's later work was still generally interpreted as continuing his critique of State power. But how does all this relate to international criminal law? To answer that question, it is helpful to consider the extant views of Foucault's philosophy *vis-à-vis* international criminal law. The next section will be devoted to that.

20.3. Foucault in the International Criminal Law Literature to Date: *Discipline and Punish* Super-Sized for the Supranational

20.3.1. A Dearth of Treatment

In the specific realm of international criminal law, the literature devoted to Michel Foucault's thought is not abundant. Sara Kendal has engaged international criminal law historical scholarship through the lens of Foucault's *Archaeology of Knowledge*, offering that Foucault would likely object to any Whiggish account of international criminal law history "by reminding us of the nonlinear, non-teleological movement of history, with its dynamic of fits and starts, accidents and contingencies".[87] In "Do International Criminal Courts Require Democratic Legitimacy?", Marlies

82 Michel Foucault, *The History of Sexuality Volume 2: The Use of Pleasure*, Robert Hurley trans., Vintage Books, New York, 1985, pp. 219–20.

83 *Ibid*., pp. 27–9.

84 *Ibid*., pp. 14–6.

85 Michel Foucault, *The History of Sexuality Volume 3: The Care of the Self*, Robert Hurley trans., Vintage Books, New York, 1986, pp. 3–36.

86 *Ibid*., pp. 39, 64.

87 Sara Kendall, "The Nuremberg Military Tribunals and the Origins of International Criminal Law by Kevin Jon Heller; Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited edited by Yuki Tanaka, Tim McCormack and Gerry Simpson – Book Review", in *Melbourne Journal of International Law*, 2012, vol. 13, no. 1, pp. 349–50.

Glasius cites John Pratt's article "Towards the 'Decivilizing' of Punishment?"[88] to consider a Foucauldian perspective on the "pervasive control mechanisms of the power/knowledge complex" within the international criminal law context.[89] In other words, she features the power-as-coercion strain of Foucault's thought.

20.3.2. The Fixation on Disciplinary Power in the Anglosphere

Glasius' article is of a piece with the dominant international criminal law Foucauldian discourse, sparse though it may be.[90] And it is informed by standard criminological scholarship. That scholarship is ably distilled in Pat O'Malley and Mariana Valverde's excellent 2014 piece "Foucault, Criminal Law, and the Governmentalization of the State".[91] O'Malley and Valverde contend that, in the anglophone world, the principal Foucauldian account of criminal justice has been filtered exclusively through *Discipline and Punish* and preoccupied with disciplinary institutions and practices.[92] This "near obsession with discipline",[93] as they refer to it, has resulted in a reductive and distorted perspective that channels Marxist themes of exploitation and oppression. As they describe it:

> In considerable measure, habits of sociological thinking that were common to Marxists and other sociological criminologists proved difficult to abandon, or acted as a filter through which *Discipline and Punish* was read. In crude terms, for many scholars influenced by this text this new formation of 'power,' particularly the historical diagram of discipline, in effect simply replaced class and other determinants of criminal law and justice in their analytic pantheon. Discipline be-

88 John Pratt, "Towards the 'Decivilizing' of Punishment?", in *Social and Legal Studies*, 1997, vol. 7, pp. 487–515.

89 Marlies Glasius, "Do International Criminal Courts Require Democratic Legitimacy?", in *European Journal of International Law*, vol. 23, no. 1, p. 62.

90 A similar perspective is also seen in the international human rights law literature. See Tony Evans, "International Human Rights Law as Power/Knowledge", in *Human Rights Quarterly*, vol. 27, no. 3, 2005, pp. 1046–68, noting that international human rights law is in tension with Foucauldian 'market discipline'.

91 Pat O'Malley and Mariana Valverde, "Foucault, Criminal Law, and the Governmentalization of the State", in Markus D. Dubber (ed.), *Foundational Texts in Modern Criminal Law*, Oxford University Press, Oxford, 2014, pp. 317–34.

92 *Ibid*., p. 329.

93 *Ibid*., p. 318.

> came a new touchstone of the truth of modernity, in terms of which much law could be explained.[94]

20.3.3. The Impact on International Criminal Law Scholarship

20.3.3.1. Transplanting Domestic Discipline

As suggested in Glasius' article, that perspective has arguably carried over to Foucauldian or Foucauldian-tinged scholarship in the domain of international criminal law. For example, in his seminal piece, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*,[95] Mark Drumbl explicitly acknowledges the equivalences: "In the end, the architecture of the special field of mass violence is little more than an expropriation of domestic methodologies".[96] From that conceptual foundation, Drumbl goes on to quote *Discipline and Punish*, critiquing international criminal law based on its institutional 'drift' into what he describes as a Foucauldian "political economy of punishment".[97] Drumbl adds:

> This political economy bureaucratizes and normalizes punishment, thereby inserting it deeply into the now-globalized social body. Although Foucault's discussion is limited to punishment by the state, I would apply his heuristic to the new and additional layers of bureaucratization contemplated by the emerging punitive arm of the supra-state of international organization.[98]

Following on this, Drumbl concludes his piece by expressing fear that, without sufficient regard for local interests:

> [International] criminal law may simply speak the language of and serve self-referential globalitarian interests. Worse still, it may promote the interests of international elites over those of disenfranchised victims. The punishment inflicted by international institutions would then accomplish precisely

94 *Ibid*., p. 317.

95 Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", in *Northwestern University Law Review*, 2005, vol. 99, no. 2, pp. 539–610.

96 *Ibid*., p. 545.

97 *Ibid*., p. 541.

98 *Ibid*.

> what Foucault most feared, namely generating power for the powerful […].[99]

20.3.3.2. A Supranational Carceral Complex and Notions of Gramscian Cultural Hegemony

This rather monolithic Foucauldian account of international criminal law was further developed more recently in the 2015 Ph.D. dissertation of Gözde Turan at İhsan Doğramacı Bilkent University in Ankara, Turkey. Titled *A Critique of the International Criminal Court: The Making of the 'International Community' through International Criminal Prosecutions*, Turan's study titrates Foucault's philosophy even more assiduously through a power-exercised-as-oppression filter.[100] She begins with the perspective that the International Criminal Court ('ICC') is a more "diffuse and amorphous power" than the "the state" and thus "revitalizes the twin legacies of the state of containment and disciplinary supervision of problematic populations at the global level".[101] This means that "ongoing investigations and cases before the [International Criminal] Court give the impression of a developed, modern, western world judging and punishing the 'other', under-developed, and non-western ones as the latter cannot cope with the conditions of modernism".[102]

She arrives at this conclusion via the kind of binary, reductive Foucauldian analysis that O'Malley and Valverde describe above. That process begins by interpreting Foucault to designate 'law' as a locus of "power economies".[103] But to deploy its power, law needs the bludgeon of an external actor. Traditionally, she opines, this metaphorical stick was wielded by the Westphalian State. But modern realities have expanded the agency options. As Turan notes:

> The Westphalian state is not an irreplaceable form of government for the operation of power in Foucauldian terms […] The crucial thing is that there is and has to be [a] macro-level that 'brings together, arranges, and fixes within that ar-

99 *Ibid*., p. 610.

100 Gözde Turan, *A Critique of the International Criminal Court: The Making of the 'International Community' through International Criminal Prosecutions*, Ph.D. Thesis, İhsan Doğramacı Bilkent University, 2015 (available on the web site of the University).

101 *Ibid*., p. iii.

102 *Ibid*., p. 75.

103 *Ibid*., pp. 101–2.

> rangement the micro-relations of power' (Dean, 1994: 157). And as long as the forms and instruments of power have historicity, the room is open for alternative forms and instruments transcending the nation-state at the international level where the state is just one of the players.[104]

In this way, Turan is able to direct her Foucauldian critique toward the ICC. In particular, there is an apparent allusion to disciplinary power in her observing that "Foucault's understanding of law […] illustrates how micro techniques and strategies gradually permeate into global legal and political institutions".[105] In more specific terms, "just like administrative power becomes an inseparable part of the penitentiary system or medicine, international criminal law progressively encloses administrative tactics".[106] And thus, per Turan, a kind of supranational panopticism develops through the unwitting vehicle of complementarity:

> Though the international criminal law discourse is at its very early stage of operationality, the capillary power of the discourse penetrates throughout a wide range of geography with the support of a myriad of actors and organizations […] States become disciplined subjects that are watching over themselves, accommodating their judicial systems as well as political or economic systems to the globalized standards […] In the global market economy, political rulers are not expected, and in fact they cannot, control each and every event taking place in the market. It is due to partly the feasibility question and partly efficiency concerns that require supportive subjects such as states and non-governmental organizations as cogs of a broader mechanism. The concomitant and closely linked network of local and global organizations, which are not confined to only judiciary mechanisms, provide the transmission of information required for surveillance and evaluation of subjects.[107]

This supranationally transposed Foucauldian domestic model of the ICC as part of a global 'political economy' of punishment, as Drumbl puts it, is reinforced in Turan's dissertation by her inclusion of a Gramscian analysis. Italian Marxist politician and theoretician Antonio Gramsci in-

[104] *Ibid*., pp. 125–6.

[105] *Ibid*., p. 131.

[106] *Ibid*., pp. 262–3.

[107] *Ibid*., p. 266.

troduced the notion of 'cultural hegemony', which posits that the dominant ideology of society reflects the beliefs and interests of the ruling class.[108] Institutions – including those linked to education, media, family, religion, politics, and law, as reified in the body of the State – manage to impose on subordinate citizens the norms, values, and beliefs of the dominant social group.[109]

Through this, "the dominant group is able to construct a 'common sense' view about the way the world is (and how it cannot be changed) through a subtle blend of encouragement and intimidation".[110] And, per Gramsci, a changing of the guard in terms of cultural hegemonic dominance entails a concomitant structural modification through imposition of a new "historical bloc", that is, a new alignment of social and political forces that exercise power over subservient groups. In her dissertation, Turan seeks to "converge Foucault and Gramsci" with a "political economy perspective".[111]

20.4. Foucault's Turn Towards 'Governmentality'

20.4.1. Overview

In the previous section, we considered Pat O'Malley and Mariana Valverde's paper *Foucault, Criminal Law, and the Governmentalization of the State*, which explained that Anglophone scholarship on Foucault was characterised by a "near-obsession with discipline" to the exclusion of his other, later scholarship. Part of that had to do with the availability in English translation of his later works. As explained by O'Malley and Valverde:

> It is a legacy of the kind of sociological misreading of *Discipline and Punish* that colored Foucaultian criminology in the Anglophone world. [Another] problem with the foundational vision of *Discipline and Punish* […] is a result of the extraordinary delays in publishing, and to a lesser extent translating, some of his key, later works — a factor that allowed

[108] Kalyan Sanyal, *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism*, Routledge India, New Delhi, 2007, p. 27.

[109] *Ibid*.

[110] Giancarlo Chiro, "From Multiculturalism to Social Inclusion: The Resilience of Australian National Values since Federation", in Fethi Mansouri and Michele Lobo (eds.), *Migration, Citizenship and Intercultural Relations: Looking Through the Lens of Social Inclusion*, Routledge, London, 2011, p. 16

[111] *Ibid*., p. 132.

> *Discipline and Punish* to develop and retain its mantle as foundational text for so long. The publication of *The Foucault Effect* in 1991 included […] the first influential translation of Foucault's essay on 'Governmentality' from the late 1970s. It outlined in striking terms the rise of non-disciplinary forms of power during the eighteenth century that Foucault regarded as at least as significant as discipline. Just as important, he also provided an explicit rebuttal of attempts to establish 'an age of discipline,' a succession of sovereignty-discipline-government, and the existence of 'pure' types of power. As noted, Foucault saw sovereignty, discipline, and government(ality) as involved in a 'triangular' relationship producing hybridizations, interactions, alliances, and so on. By implication, his remarks were intended to correct in France exactly the kind of reading of *Discipline and Punish* that later arose in English. The delay of nearly a decade and a half in publishing the College de France and other important lectures and translating them into English (*three* decades if we consider the more detailed discussions in *Security, Territory, Population*) meant that much Foucault-influenced criminological scholarship was allowed to retain and develop its foundational misreadings of *Discipline and Punish* into the 1990s.

As the above passage suggests, that later neglected scholarship in the Anglophone world centred on the concept of 'governmentality'. We got a glimpse of it toward the end of Section 20.2. when discussing *The History of Sexuality*. It will be recalled that in the concluding parts of that book's first volume, Foucault introduced the concept of 'bio-power', which operates on two levels. On the micro-level, it consists of a form of individual body optimisation, and, on the macro-level, a series of population governance techniques meant to ensure a healthy and engaged citizenry. And this latter aspect of bio-power implicates one of the central concepts of this paper, namely 'governmentality'.

What are the details of 'governmentality'? In two lectures delivered during the 1977–1978 and 1978–1979 academic years, Foucault provided explanations. The first of the two lectures, *Security, Territory, Population*, given during the first months of 1978, established the foundational ten-

ets.[112] For the purposes of this chapter, an analysis of these lectures will sketch out the theory in sufficient detail (the 1979 lectures, collectively titled *The Birth of Biopolitics*, largely examine neoliberal politics and reprise, or do not concern, the foundational insights of the 1978 lectures – mostly focusing instead on economics).[113] The 1978 lectures are divided into 13 separate sessions that Foucault gave each Wednesday from 11 January through 5 April of that year. Their key points will be extracted below.

20.4.2. A Review of Bio-Power and an Introduction to the Notion of Security

Foucault kicked off the course on 11 January 1978 by briefly reviewing the notion of bio-power (consistent with what we have already examined). Then he launched into a discussion of the first part of the overall course title, that is, security, by instantiating three strata of power. He accomplished this by positing the occurrence of a theft and noting that, at a threshold level, there would be a punishment – a banishment or a beating, say.[114] This would represent 'sovereign' or 'punishment' power as embodied in the 'legal' or 'juridical' mechanism.

At the second level, in addition to the application of the penal law just considered, there would be incarceration, surveillance, and 'penitentiary' techniques: "obligatory work, moralization, correction, and so forth".[115] This would correspond to the kind of 'disciplinary' power considered in *Discipline and Punish* and situated at the individual body level – in other words, entailing a 'microphysics' of power. Finally, at the third level, and once again assuming the simultaneous deployment of the sovereign and disciplinary variants, would be the power of governmentality, which developed post-eighteenth century. Impliedly, this would be a 'macro-physics' of power. And that power would engage authorities in finding solutions to a series of inquiries:

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[112] Michel Foucault, "Security, Territory, Population", in Michel Senellart (ed.), *Lectures at the Collège de France*, Palgrave Macmillan, London, 2009.

[113] See Paul Patton, "Power and Biopower in Foucault", in Vernon W. Cisney and Nicolae Morar, *Biopower: Foucault and Beyond*, University of Chicago Press, Chicago, 2016, p. 103: "Even though the 1978-79 course was entitled *The Birth of Biopolitics*, it was devoted to the analysis of liberal and then neoliberal forms of government, in particular the indirect forms of action on the actions of individuals exercised through market mechanisms".

[114] Foucault, 2009, p. 19, *see* supra note 112.

[115] *Ibid*.

> For example: What is the average rate of criminality for this [demographic]? How can we can predict statistically the number of thefts at a given moment, in a given society, in a given town, in the town or in the country, in a given social stratum, and so on? Second, are there times, regions, and penal systems that will increase or reduce this average rate? Will crises, famines, or wars, severe or mild punishment, modify something in these proportions? There are other questions: Be it theft or a particular type of theft, how much does this criminality cost society, what damage does it cause, or loss of earnings, and so on? Further questions: What is the cost of repressing these thefts? Does severe and strict repression cost more than one that is more permissive? […] The general question basically will be how to keep a type of criminality, theft for instance, within socially and economically acceptable limits and around an average that will be considered as optimal for a given social functioning.[116]

Foucault then commented on the significance of these inquiries: "The third form [of power] is not typical of the legal code or the disciplinary mechanism, but of the apparatus (*dispositif*) of security, that is to say, of the set of those phenomena that I now want to study".[117] Notwithstanding its being different from disciplinary power, governmentality can nonetheless be linked to mechanisms juridical in nature. Per Foucault, "I could also say that if we take the mechanisms of security that some people are currently trying to develop, it is quite clear that this does not constitute any bracketing off or cancellation of juridico-legal structures or disciplinary mechanisms".[118] Instead, while possessing, and operating alongside of, judicial/disciplinary techniques, and, to some extent, modifying them, a dominant mode of power emerges.

And, in the case of governmentality, the dominant power mode in modern times, the focus is security. Foucault explains further: "In reality, you have a series of complex edifices in which, of course, techniques themselves change and are perfected, or anyway become more complicated, but in which what above all changes is the dominant characteristic, or more exactly, the system of correlation between juridico-legal mecha-

[116] *Ibid*., pp. 19–20.

[117] *Ibid*., p. 20.

[118] *Ibid*., p. 22.

nisms, disciplinary mechanisms, and mechanisms of security".[119] And this, in turn, entails "the reactivation and transformation of the juridico-legal techniques and the disciplinary techniques".[120] Foucault then gave examples of security-focused campaigns, which deal with large population segments, but have legal and disciplinary implications – these would be measures to regulate the pandemics of leprosy, the plague and smallpox.[121] For the 18 January 1978 lecture, he also offered the example of famine (which involved systems of price control, storage, export and cultivation).[122]

20.4.3. A Focus on Population, Its Well-Being and the Necessary 'Techniques'

Building on and consistent with this, in the 18 January 1978 lecture, Foucault summarised the values that underpin this notion of governmentality:

> The idea of a government of men that would think first of all and fundamentally of the nature of things and no longer of man's evil nature, the idea of an administration of things that would think before all else of men's freedom, of what they want to do, of what they have an interest in doing, and of what they think about doing, are all correlative elements. A physics of power, or a power thought of as physical action in the element of nature, and a power thought of as regulation that can only be carried out through and by reliance on the freedom of each, is, I think, something absolutely fundamental. It is not an ideology; it is not exactly, fundamentally, or primarily an ideology. First of all and above all it is a technology of power, or at any rate can be read in this sense.[123]

One week later, Foucault delivered what is perhaps is the most influential lecture of the course. Michel Senellart explains why:

> This lecture, which is presented as a logical extension of the previous lectures, in actual fact marks a profound turning point in the general orientation of the lectures. Foucault introduces here, in fact, the concept of 'governmentality,' by which he suddenly shifts the stake of his work in a sort of

[119] *Ibid*.

[120] *Ibid*., p. 24.

[121] *Ibid*.

[122] *Ibid*., pp. 51–54.

[123] *Ibid*., p. 71.

> dramatic theoretical turn. After having separated the problem of government, as it arises in the sixteenth century, from the stratagems of the clever prince described by Machiavelli, and having shown how 'population' allowed the art of government to be unblocked in relation to the double, juridical and domestic model that had prevented it from finding its own dimension, Foucault [deviates from the title of the course – *Security, Territory, Population* – and orients himself toward] the concept of 'governmentality' […].[124]

Senellart notes that, "A new field of research opens up with this concept – no longer the history of technologies of security, which provisionally recedes into the background, but the genealogy of the modern state".[125] And this involves "applying to the state the 'point of view' he had adopted previously in the study of the disciplines, separating out relations of power from any institutionalist or functionalist approach".[126] In effect, as Senellar sums it up: "The problematic of 'governmentality' therefore marks the entry of the question of the state into the field of analysis of micro-powers".[127] Foucault himself emphasised at this point in the course what issues were at stake going forward in the lectures:

> Is it possible to place the modern state in a general technology of power that would have assured its mutations, its development, and its functioning? Can we talk of something like a 'governmentality' that would be to the state what techniques of segregation were to psychiatry, what techniques of discipline were to the penal system, and what biopolitics was to medical institutions?[128]

So influential was this lecture that it was first published in English as a separate essay called "Governmentality" in the book *The Foucault Effect* (1991).[129] In addition to introducing and defining 'governmentality',

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[124] Michel Senellart, "Course Context", in Michel Senellart (ed.), *Lectures at the Collège de France*, Palgrave Macmillan, London, 2009, pp. 492–3.

[125] *Ibid*., p. 493.

[126] *Ibid*.

[127] *Ibid*.

[128] Foucault, 2009, p. 141, *see* supra note 112.

[129] Michel Foucault, "Governmentality", in Graham Burchell, Colin Gordon, and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality*, University of Chicago Press, Chicago, 1991, pp. 87–104.

its importance lies in theorising how the wellbeing of the individual on a macro-level, that is, the level of the population, could be achieved:

> [Population] will appear above all as the final end of government. What can the end of government be? Certainly not just to govern, but to improve the condition of the population, to increase its wealth, its longevity, and its health. And the instruments that government will use to obtain these ends are, in a way, immanent to the field of population; it will be by acting directly on the population itself through campaigns, or, indirectly, by, for example, techniques that, without people being aware of it […].[130]

At the same time, there would still be juridical implications in carrying out this enterprise. Foucault problematised this new breed of government "because it was no longer a question, as in the sixteenth and seventeenth centuries, of how to deduce an art of government from theories of sovereignty [and the idea of the prince maintaining power, as dealt with by Machiavelli], but rather, given the existence and deployment of an art of government, what juridical form, what institutional form, and what legal basis could be given to the sovereignty typical of a state".[131]

And here he came back to the 'techniques' alluded to at the beginning of this famous lecture in the block quote above. And Foucault at last provided a definition of 'governmentality': the "ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target […] and apparatuses of security as its essential technical instrument".[132]

20.4.4. Historicising Governmentality: The Link to 'Pastoral Power'

In this course, Foucault also historicised, if not analogised by metaphor, the ancient origins of this kind of power by alluding to the relationship between a shepherd and his flock. Such power was exercised over "a multiplicity in movement".[133] And it serves as a metaphor for the Hebrew God, who "is never more intense and visible than when his people are on the move, and when, in his people's wanderings, in the movement that

[130] Foucault, 2009, p. 165, *see* supra note 112.

[131] *Ibid*., p. 142.

[132] *Ibid*., p. 144.

[133] *Ibid*., p. 171.

takes them from the town, the prairies, and pastures, he goes ahead and shows his people the direction they must follow".[134]

Foucault referred to this as 'pastoral power', which he characterised as a "fundamentally beneficent power".[135] And he contrasted this with other, less solicitous varieties of power, such as those exercised in ancient Greece and Rome. Such power was, he noted, "characterized as much by its omnipotence, and by the wealth and splendor of the symbols with which it clothes itself, as by its beneficence".[136] He could thus define it by its orientation toward the "ability to triumph over enemies, defeat them, and reduce them to slavery" as well as "the possibility of conquest and by the territories, wealth, and so on it has accumulated".[137] To underscore his point he emphasised that, regarding pastoral power:

> [Its] only raison d'être is doing good, and in order to do good. In fact, the essential objective of pastoral power is the salvation (*salut*) of the flock. In this sense we can say that we are assuredly not very far from the objective traditionally fixed for the sovereign, that is to say the salvation of one's country, which must be the lex suprema of the exercise of power.[138]

Moreover, pastoral power is, as Foucault describes it, "an individualizing power". And he fleshed this out:

> That is to say, it is true that the shepherd directs the whole flock, but he can only really direct it insofar as not a single sheep escapes him. The shepherd counts the sheep; he counts them in the morning when he leads them to pasture, and he counts them in the evening to see that they are all there, and he looks after each of them individually. He does everything for the totality of his flock, but he does everything also for each sheep of the flock.[139]

In his 22 February 1978 lecture, Foucault connected this forward in time to the 'Christian pastorate', which introduced pastoral power into the

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134 *Ibid*.

135 *Ibid*.

136 *Ibid*.

137 *Ibid*. But note that Foucault also indicates that power exercised in ancient Greece and Rome cannot be characterised solely as deleterious. There were, he suggests, beneficent aspects to it.

138 *Ibid*., p. 172.

139 *Ibid*., p. 173.

West and shared similar characteristics of earlier pastoral practice. But it was centred on three core objectives, one of which was the formulation of the law. As Foucault put it, "the pastor guides to salvation, prescribes the law, and teaches the truth".[140] And this period serves as a bridge to the contemporary configuration of governmentality. As explained by Ben Golder and Peter Fitzpatrick in their book *Foucault's Law*:

> As Foucault's historical narrative unfolds in *Security, Territory, Population*, we can trace a shift from the pastoral care of a flock in early Christian models of the pastorate to the governmental management of a population in modern state formations, or from the pastoral promise of spiritual salvation to the pastoral promise of material salvation within the frame of the modern administered state. 'In a way,' Foucault argues elsewhere, 'we can see the state as a modern matrix of individualization, or a new form of pastoral power.'[141]

20.4.5. The Roles of Police and Diplomacy

And, as the pastorate transformed into the rational, secular State in modern times, fulfilment of governmentality's legal function, as well as an essential apparatus for ensuring the general weal of the flock (or in contemporary terminology, the population) was the police. As explained by Foucault in the 15 March 1978 lecture of *Security, Territory, Population*:

> From the beginning of the seventeenth to the middle of the eighteenth century there is a series of transformations thanks to which and through which this notion of population, which will be a kind of central element in all political life, political reflection, and political science from the eighteenth century, is elaborated. It is elaborated through an apparatus (*appareil*) that was installed in order to make *raison d'État* function. This apparatus is police.[142]

Also implied in the infrastructure of governmentality was something Foucault referred to in the 22 March 1978 lecture as "the new military-diplomatic type of techniques".[143] He described it as follows: "If

[140] *Ibid*., p. 224.

[141] Ben Golder and Peter Fitzpatrick, *Foucault's Law*, Routledge, London, 2009, pp. 30–31, citing Michel Foucault, "The Subject and the Power", in *Critical Inquiry*, vol. 8, no. 4, 1982, pp. 783–4.

[142] Foucault, 2009, p. 358, *see* supra note 112.

[143] *Ibid*., p. 384.

states exist alongside each other in a competitive relationship, a system must be found that will limit the mobility, ambition, growth, and reinforcement of all the other states as much as possible, but nonetheless leaving each state enough openings for it to maximize its growth without provoking its adversaries and without, therefore, leading to its own disappearance or enfeeblement".[144]

As part of this, he explained, we can situate the establishment of a permanent network of "diplomatic missions" along with "the organization of practically permanent negotiations".[145] He then added, interestingly for purposes of this chapter, that this "veritable society of nations" was "correlated with" that other essential apparatus, the police.[146] These are agents who are concerned with securing "the development of the state's forces" and "techniques to be employed to increase the state's forces".[147]

But there are no negative, repressive connotations here. In fact, Foucault went on to specify that the police represent the State's means for serving "the happiness of all its citizens".[148] And he provided details. He explained that the police function provides the order and support necessary to ensure the population's proper nutrition, infrastructure (maintenance of roads, rivers, public buildings, and forests), childhood education, public health, aid for the indigent and promotion of commerce and trade.[149] In more general terms, this amounts to assuring continued population growth, provision of foodstuffs, health care, and circulation of goods.[150] Foucault then summarised:

> Generally speaking, what police has to govern, its fundamental object, is all the forms of, let's say, men's coexistence with each other. It is the fact that they live together, reproduce, and that each of them needs a certain amount of food

[144] *Ibid*.

[145] *Ibid*., p. 389.

[146] *Ibid*., pp. 389–90. Foucault also discusses yet another related infrastructural corollary – the military, see *ibid*., pp. 391–2.

[147] *Ibid*., p. 413. Clearly, this goes beyond the traditional definition of police limited strictly to law enforcement and connotes a wider overall administrative function. As Foucault notes himself, 'police' is not limited in the sense of merely being "an instrument in the hands of judicial power" (p. 441). Rather, it is more capacious in that it "consists […] in the sovereign exercise of [power] over individuals who are subjects".

[148] *Ibid*., p. 409.

[149] *Ibid*., pp. 414–9.

[150] *Ibid*., pp. 417–20.

> and air to live, to subsist; it is the fact that they work alongside each other at different or similar professions, and also that they exist in a space of circulation; to use a word that is anachronistic in relation to the speculations of the time, police must take responsibility for all of this kind of sociality (*socialité*).[151]

And police governance, to the extent it is juridical, is primarily regulatory in nature. In the words of Foucault, during his 5 April 1978 concluding lecture: "We are in a world of indefinite regulation, of permanent, continually renewed, and increasingly detailed regulation, but always regulation, always in that kind of form that, if not judicial, is nevertheless juridical: the form of the law, or at least of law as it functions in a mobile, permanent, and detailed way in the regulation".[152] And the point of this regulation is to uphold 'freedom', which Foucault defines as "the right of individuals legitimately opposed to the power, usurpations, and abuses of the sovereign or the government". And thus he concludes:

> Henceforth, a condition of governing well is that freedom, or certain forms of freedom, are really respected. Failing to respect freedom is not only an abuse of rights with regard to the law, it is above all ignorance of how to govern properly. The integration of freedom, and the specific limits to this freedom within the field of governmental practice has now become an imperative.[153]

20.4.6. Putting Governmentality into Perspective

And so, springing from the regulatory implications of bio-power, a new and important theory of 'governmentality' is sketched out in *Security, Territory, Population*. We have seen that its antecedents can be traced to a pastoral tradition that developed from the Hebrew patriarchs to the Christian church founders. And it centred on the care of a multitude of beings, while permitting focus on individuals within the multitude. The goal of this power was security of the multitudes, and often in reference to large-scale problems, such as pandemics, famines and wars.

[151] *Ibid*., p. 420.

[152] *Ibid*., p. 442.

[153] *Ibid*., p. 451.

And, in the form of the modern rational State (governmentality being a portmanteau word of 'government' and 'rationality'),[154] it consists of a series of techniques that include procedures, analyses and reflections, calculations, and tactics meant to protect the well-being of the population while never losing focus on the individual. In support of it, legal procedures, supported by police and transnational diplomatic efforts, play an integral role.

Although it is the most recent iteration of power, governmentality does not exist alone – it operates simultaneously with juridical and disciplinary power. That said, while juridical and disciplinary power might be described as coercive, governmentality is a beneficent force. More than just seeking 'security', it strives for freedom, which Foucault characterises as liberty from the "usurpations […] and abuses of the sovereign".[155] Golder and Fitzpatrick postulate that this includes "the constant improvement of the population, the maximization of its health, well-being, material prosperity, and so forth".[156] And Johanna Oksala further contextualises it within the philosopher's greater oeuvre:

> Foucault had shifted the emphasis in his analysis of disciplinary power from repressive institutions to productive practices. He was now attempting to move from a theory focusing on the institution of the state to an analysis of modern practices of government. He criticized the tendency to demonize the state in political thought, to see it as the simple enemy and the root of all political problems. The state does not only exercise repressive, negative power over the social body, it was one historical modality of 'government' that reflected changes in the rationality of governmental practices.[157]

But how, if at all, might this epistemic breakthrough relate to the formulation and development of international criminal law? To answer that question, we must first consider international criminal law's modern origins and recent developments. In this regard, it is helpful to consider

[154] Mark G.E. Kelly, *The Political Philosophy of Michel Foucault*, Routledge, London, 2009, pp. 60–1.

[155] Foucault, 2009, p. 451, *see* supra note 112.

[156] Golder and Fitzpatrick, 2009, p. 32, *see* supra note 141.

[157] Johanna Oksala, *How to Read Foucault*, W.W. Norton & Company, New York, 2007, pp. 84–5.

the transnational, grassroots nature of modern international criminal law's early days, which has, in many ways, carried over to the present. With that perspective in mind, we can then return to the notion of 'governmentality' and examine whether it can help theorise international criminal law in a manner different from, and beneficial to, existing international criminal law scholarship. That will be the object of the two sections that follow.

20.5. International Criminal Law as an Outgrowth of Transnational Networking

20.5.1. Transgovernmental Networking: An Introduction

In the first part of the new millennium a novel theory in international law scholarship was gaining currency. First introduced in the 1970s by political scientists such as Robert Keohane and Joseph Nye, the theory of 'transgovernmental networking' posited that various actors attached to the governments of a wide range of countries generate and develop policy by interacting with each other outside formal institutional frameworks and without explicit State sanction.[158] In her 2004 book *A New World Order*, Anne-Marie Slaughter provided an excellent introduction to the theory, noting that terrorists, arms dealers, money launderers, drug dealers, traffickers in women and children, and the modern pirates of intellectual property all operate through global networks.[159] So do lower-level government officials, as she explains:

> Networks of government officials – police investigators, financial regulators, even judges and legislators – increasingly exchange information and coordinate activity to combat global crime and address common problems on a global

[158] See Robert O. Keohane and Joseph S. Nye, "Transgovernmental Relations and International Organizations", in *World Politics*, vol. 27, no. 1, 1974, pp. 39, 43.

[159] Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004. See also Youri Devuyst, "Transatlantic Competition Relations", in Mark A. Pollack and Gregory C. Schaffer (eds.), *Transatlantic Governance in the Global Economy*, Rowman & Littlefield Publishers, 2001, p. 127; Anu Piilola, "Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation", in *Stanford Journal of International Law*, 2003, vol. 39, p. 207; Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", in *Virginia Journal of International Law*, 2002, vol. 43, p. 1; Christopher A. Whytock, "A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation", in *Boston University International Law Journal*, 2005, vol. 23, p. 1; David Zaring, "Informal Procedure, Hard and Soft, in International Administration", in *Chicago Journal of International Law*, 2005, vol. 5, p. 547.

> scale. These government networks […] are underappreciated […] [in addressing] the central problems of global governance. [Consider] the networks of financial regulators working to identify and freeze terrorist assets, of law enforcement officials sharing vital information on terrorist suspects, and of intelligence operatives working to preempt the next attack […] Turning to the global economy, networks of finance ministers and central bankers have been critical players in responding to national and regional financial crises […] Beyond national security and the global economy, networks of national officials are working to improve environmental policy across borders. Nor are regulators the only ones networking. National judges are exchanging decisions with one another through conferences, judicial organizations, and the Internet […] Finally, even legislators, the most naturally parochial government officials […] are reaching across borders […] to adopt and publicize common positions on the death penalty, human rights, and environmental issues.[160]

At the same time, such networks remain connected to international organisations and courts, such as the United Nations or the International Criminal Tribunal for the former Yugoslavia, and non-governmental organisations such as the International Committee for the Red Cross.[161] And such organisations become hosts for the new transgovernmental networks.[162] In this regard, and germane to this chapter, G. John Ikenberry comments: "Particularly revealing is Slaughter's remarkable account of the cooperation between national judicial authorities and international and regional courts, which is serving to globalize jurisprudence".[163]

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[160] Slaughter, 2004, pp. 1–5, see *ibid*. It should be pointed out, however, that Slaughter's theory has been the target of much criticism regarding its omission to account for systemic economic and political inequalities of the global system, as well as how it fails to appreciate the continued importance of nations and national populations. See, for example, David Singh Grewal, *Network Power: The Social Dynamics of Globalization*, Yale University Press, New Haven, 2008.

[161] See Jenia Iontcheva Turner, "Transnational Networks and International Criminal Justice", in *Michigan Law Review*, 2007, vol. 105, p. 988, noting that the "cooperation could occur […] through different kinds of international and regional associations" and be "supported by non-governmental organizations".

[162] *Ibid*., p. 6.

[163] G. John Ikenberry, "Review of 'A New World Order' by Anne-Marie Slaughter", in *Foreign Affairs*, 1 May 2004.

In 2007, Jenia Iontcheva Turner extended the transgovernmental network concept to the specific judicial domain of international criminal law. In "Transnational Networks and International Criminal Justice", she demonstrated how investigators, prosecutors, and judges confronted with international crimes were beginning to collaborate, both with their international colleagues and with their peers at international criminal institutions.[164] In her piece, Turner emphasised that these transborder international criminal law networks are a new phenomenon, noting that "until recently, [international criminal law] had not generated the kinds of informal transgovernmental networks that have emerged in other fields".[165] As set out below, the history of the origins and development of international criminal law suggests otherwise.

20.5.2. The Historical Origins of Transgovernmental Networking

As international criminal law's transnational networks came into being in the twentieth century, they could trace their skeletal origins to the rise of international and non-governmental organisations during the nineteenth. The birth of the international organisation could be linked with the convening of the Congress of Vienna during 1814–1815 after the decades of war that followed the French Revolution and the conquests of Napoleon. But in addition to being regarded as "the first international organization in the modern era of nation-states",[166] its creation of the 'Concert of Europe' was arguably as much the product of informal one-on-one confabs in cosy salon nooks as it was of formal negotiations at conference tables in august halls.[167] In this sense, its casual linking of government officials in more intimate settings also presaged the great transnational networks of today.

Those were also previewed in the formal creation of permanent treaty-based international governmental organisations that started sprouting up around mid-century as "the modern international system developed

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164 Turner, 2007, p. 985, see *supra* note 161.

165 *Ibid*., p. 986.

166 Thomas D. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power*, Lynne Rienner Publishers, Boulder, 2006, p. 39.

167 Charles L. Mee, *Playing God: Seven Fateful Moments When Great Men Met to Change the World*, Simon & Schuster, New York, 1993, p. 118: "The congress did not take place in official meetings in formal settings since Talleyrand had dislodged it from such settings, forcing it into 'informal' sessions in Metternich's study, and into the ballrooms and salons and boudoirs of Vienna, whispered conversations in the corners of the rooms at the duchess of Sagan's".

and multilateralism found its voice".[168] Such bodies included the International Telegraph Union (1865) and the Universal Postal Union (1874). But a precursor to both of these was a hybrid association (part intergovernmental and part non-governmental organisation) whose creation was spurred by the worsening depredations of modern warfare. The International Committee of the Red Cross ('ICRC'), founded in 1863, was the brainchild of a traveling 31-year-old Swiss businessman, Henri Dunant. The Genevan had happened upon the appalling aftermath of the 1859 Battle of Solferino, part of the Italian drive for independence from Austria and one of the great bloodbaths of the 1800s. Appalled by the visible suffering of wounded soldiers, prostate and untended on the battlefield, Dunant resolved to establish an international organisation to care for future fallen combatants and protect those who ministered to them.

At his urging, and on the initiative of fellow Genevan Gustave Moynier, a local welfare group, *La Société Genevoise d'Utilité*, set up a five-member committee to realise Dunant's proposals. That committee would eventually become the ICRC. In addition to Dunant and Moynier (a lawyer), it consisted of Dr. Louis Appia, Dr. Théodore Maunoir, and General Guillaume-Henry Dufour, who took a leading role in the project given his stature as the pre-eminent Swiss military figure of the time.[169] In 1863, the Committee organised an international conference that established the first municipal Red Cross societies (in Belgium and Germany), which would provide assistance to the war wounded. The ICRC then worked with the Swiss government to convene an international conference that negotiated and adopted the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This marked the formal birth of international humanitarian law.

[168] Jackson Maogoto, "Early Efforts to Establish an International Criminal Court", in José Doria, Hans-Peter Gasser, and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers, Leiden, 2009, p. 5.

[169] François Bugnion, "International Committee of the Red Cross (ICRC)", in David P. Forsythe (ed.), *Encyclopedia of Human Rights*, vol. 1, Oxford University Press, Oxford, 2009, p. 92.

20.5.3. The Red Cross Movement Gives Rise to International Criminal Law Transgovernmental Networking

But how would the law be enforced? Many in the ICRC, including, at first, Moynier himself, felt that formal, judicial mechanisms were unnecessary as "an appeal to emotion by gritty descriptions of individual suffering would shock the public into humanitarian outrage and by extension pressure warring states to adhere to humanitarian norms and rules".[170] But the Franco-Prussian War of 1870–1871, during which unpunished atrocities in contravention of the Geneva Convention were committed by both sides, disabused Moynier of this notion.[171] In 1872, he presented a proposal to the ICRC calling for the establishment of a treaty-based international tribunal to punish violations of the laws of armed conflict.[172]

According to the late Christopher K. Hall, "Moynier's proposal led to a flurry of letters from some of the leading experts in international law, including Francis Lieber, Achille Morin, [Franz von] Holtzendorff, John Westlake and both Antonio Balbin de Unquera and Gregorio Robledo […] published with a commentary by Gustave Rolin-Jaequemyns a few months later in the *Revue de droit international et de législation comparé*".[173] In his book *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, Mark Lewis supports this account and adds that Jaequemyns independently advocated for creation of a court among this circle.[174] And Lieber and Westlake added to the discussion by raising "critical questions".[175]

Although the proposals of Moynier and Jaequemyns did not come to fruition, they arguably generated a proto-international criminal law transgovernmental network. Even if not perhaps a 'pure' transgovernmental network as described by Slaughter, in that certain individuals taking part in it were not government representatives, many of them were (or were involved in politics at the national level). For instance, Jaequemyns

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170 Maogoto, 2009, p. 5, see *supra* note 168.

171 *Ibid*., pp. 6–7.

172 *Ibid*., p. 5.

173 Christopher Keith Hall, "The First Proposal for a Permanent International Criminal Court", in *International Review of the Red Cross*, vol. 322, 31 March 1998.

174 Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, Oxford University Press, Oxford, 2014, p. 17.

175 *Ibid*.

himself was a member of the Belgian Liberal Party and served in the Belgian parliament (and ultimately became Belgian Minister of the Interior).[176] During this time, Lieber, who had drafted the famous "Lieber Codes" at the request of US President Abraham Lincoln, was serving in the US government "as a diplomatic negotiator between the US and Mexico".[177] John Westlake was active in the UK's Liberal Party and ultimately served in Parliament for the Romford Division of Essex.[178] And Antonio Balbín de Unquera was a Spanish judge in Madrid.[179] They were eventually joined by, among others, Italian Foreign Minister Pasquale Mancini.[180] Thus, they were either part of their municipal governments or intimately acquainted with them.

Many of them formed the core of the Institute of International Law, which "sought to liberalize states by abolishing servitude, establishing the right to free assembly, and reforming harsh penal laws".[181] Overall, "they believed international law should progress according to changing social values […] and saw themselves as the keepers, or the 'conscience' of those values […] the protection of individual rights […]". And this group of individuals coalesced into what we can analogise to an embryonic transnational network because they "believed in gentlemanly conduct in international affairs".[182] From these origins, a network, or networks, sprung up that would grow and develop through the post-World War I years. As contextualised by Lewis: "This was vastly at odds with the actual politics and conduct of the time, but this belief in an elite, civilized manner of conducting the business of governance and diplomacy persisted

[176] Jean J.A. Salmon, "Gustave Rolin-Jaequemyns (1835-1902)", in Joseph Barthélemy, Henry Nézard, and Louis Rolland (eds.), *Les fondateurs du droit international*, Éd. Panthéon-Assas, Paris, 1904, pp. 103–4. Apparently, Jaequemyns was not serving in the Belgian Parliament at the time of Moynier's proposal.

[177] Jean-Marie Henckaerts, "Lieber Code", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 410.

[178] Lassa Oppenheim, "Editor's Note", in Lassa Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law*, Cambridge University Press, Cambridge, 1914, p. xi. Like Jaequemyns, it would seem that Westlake was not serving in the British Parliament at the time of Moynier's proposal.

[179] "Antonio Balbín de Unquera", *Geneanet*, describing him as Magistrado, Presidente del Tribunal de Justicia de Madrid.

[180] Lewis, 2014, p. 21, see *supra* note 174.

[181] *Ibid*., p. 21.

[182] *Ibid*., p. 22.

in later jurists' ideology that systems and laws could regulate the world's problems".[183]

20.5.4. International Criminal Law Transgovernmental Networking Post-World War II

20.5.4.1. From the Paris Peace Conference Through the 1920s

Commitment to that ideology was sorely tested during the carnage of World War I and the lack of a meaningful justice response in its wake. A slew of post-bellum proposals to mount an international criminal tribunal to try war criminals were rejected. Those included the recommendation of an Entente-created Commission on Responsibilities during the Paris Peace Conference (that had to settle instead for low-level trials by the Germans themselves in Leipzig); a proposal by Belgian Baron Edouard Descamps within the League of Nations framework; and a recommendation of the Red Cross (envisioning a neutral commission, rather than a court).[184] But the spirit of the pre-war Moynier/Jaequemyns international criminal law group carried through to the mid-1920s as embodied in a fresh international criminal law network. This one centred around a new generation of jurists connected to two new organisations, the International Law Association ('ILA') and the *Association Internationale de Droit Pénale* ('AIDP').

20.5.4.1.1. The ILA Proposal

The ILA developed a proposal for a permanent international criminal court between 1922 and 1926. The effort was spearheaded by Hugh H.L. Bellot, a British jurist and parliamentarian, who had advised the British regarding war crimes liability during the Paris peace negotiations.[185] The proposal was very detailed. It envisaged a Hague-based international penal tribunal that would fall under the institutional aegis of the Permanent Court of International Justice. And many of its finer points were meant to mollify States regarding the sovereignty prerogative. According to Lewis:

> [The] ILA took several steps designed to reassure states that this would not be a political or biased court. The court would

[183] *Ibid*.

[184] *Ibid*., pp. 27–94.

[185] *Ibid*., p. 96. Bellot worked for the office of the Attorney-General of England and Wales, investigating humanitarian law violations committed during World War I. See "Hugh H.L. Bellot, D.C.L", in *Transactions of the Grotius Society*, vol. 14, 1928, pp. xi–xiv, xiii.

> be optional and states would still be free to use their own tribunals to prosecute individuals accused of violating the laws and customs of war, assuming they held them in custody. Additionally, states were given certain rights that were intended to assuage their fears of unjust prosecution or bias. If a state did not currently have a judge on the bench, it would be allowed to appoint one, whether it was on the defending side or prosecuting side. Finally, one should note that there was no independent prosecutor who had a duty to prosecute all violations of the laws and customs of war, wherever they occurred, nor could a state bring charges on behalf of victims who lived in other states. States would only be able to file charges on their own behalf and for their own subjects and citizens. This too was designed to protect state sovereignty.[186]

Other details, more related to the proposed court's internal workings, were also fleshed out. It called for fifteen judges, who would be seasoned magistrates or attorneys with substantial criminal courtroom experience. And they would be vetted by the League of Nations Council and Assembly, which would have had to vote on them.[187] According to the schema put forth, hearings would have been public, based on both written and oral evidence. And two important due process guarantees were accorded to defendants: *nullum crimen sine lege* (that is, they could not be prosecuted for crimes that were not codified in advance of the charged conduct) and a post-conviction right to request a new trial if new evidence came to light.[188]

Jurisdiction would have lain in respect of both individuals and States for two principal delicts: war crimes and "violations of international obligations of a penal character". The first offence Belllot defined as violations of the laws and customs of war as contained in treaties, conventions, declarations, and customary principles "generally accepted as binding by civilised nations".[189] The second offence, "violations of international obligations of a penal character", would correspond to violations such as "white slave" trafficking, piracy, and potential crimes such as

[186] Lewis, 2014, p. 100, see *supra* note 174.

[187] *Ibid*.

[188] *Ibid*.

[189] *Ibid*.

"cutting undersea communication cables".[190] The tribunal's subject-matter jurisdiction would not have included the crime of aggression or that of minorities-treaty violations resulting in violence.[191] But an alternative proposal, put before the ILA by Welsh solicitor and Liberal Member of Parliament, Frederick Llewellyn-Jones, proposed enforcing the minorities treaties with criminal penalties. The ILA, however, rejected the proposal.

20.5.4.1.2. The AIDP Proposal

The other roughly contemporaneous proposal for an international criminal court came from the AIDP. One of the group's intellectual leaders, Romanian parliamentarian and jurist Vespasian Pella, developed the plan within the framework of a 'transnational' network.[192] That network included the Inter-Parliamentary Union, an organisation of parliamentarians from around the world dedicated to the peaceful resolution of inter-State disputes and the avoidance of war. It also included the ILA as "Pella sent a communique to the ILA" and "decided to invite Bellot to work on [the AIDP's] own draft statute, leading Bellot, Pella, and other AIDP jurists to collaborate in 1927-28".[193] Lewis points out that Bellot "had connections to the British legal establishment and said in 1926 that government officials backed his idea for an international criminal court for war crimes".[194]

What the AIDP produced was, once again, very complex and detailed. Its starting point was a court with jurisdiction over individuals who committed "international military offences", in other words, breaches of the laws and customs of war in the existing treaties.[195] But Pella's plan went beyond the Hague and Geneva Conventions by extending jurisdiction over a wider range of crimes committed in occupied territories. In this way, it provided greater security for the most vulnerable segment of the population – civilians. Moreover, Pella's proposed court would have

190 *Ibid*., p. 97.

191 *Ibid*.

192 *Ibid*., p. 102. Lewis refers to these as 'transnational organisations'. For a detailed analysis of the role of the AIDP, see Mark Lewis: "The History of the International Association of Penal Law, 1924-1950", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.): *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 599-660.

193 Lewis, 2014, p. 102, see *supra* note 174.

194 *Ibid*., p. 112.

195 *Ibid*., p. 107.

been able to prosecute States as well as individuals, including heads of States, for a wide range of conduct that could disrupt international peace: aggression; violations of demilitarised zones and disarmament agreements; support for armed groups that worked against the internal security of another State; financial support for political parties in a foreign State; or even counterfeiting another State's currency.[196]

After Pella presented his plan to the Inter-Parliamentary Union, which enthusiastically embraced it, a transnational network of parliamentarians worked with him to develop it and they convinced him to integrate the court into the League of Nations Council. Lewis describes this as "a prudent move in light of the 1922–1924 League debates about collective security, when states such as Britain did not want to be locked into automatic obligations to participate in blockades and send troops".[197] Now, the proposal was gaining broader support among a wider network of government officials, including Nikolaos Sokrates Politis, who had served as Greece's Minister of Foreign affairs and was its representative at the League of Nations,[198] Henri Donnedieu de Vabres, a French jurist who would serve as France's judge at the International Military Tribunal at Nuremberg, and the Greek judge Megalos A. Calayonni.[199] Also belonging to the network were French parliamentarian Jean-André Roux and Polish Supreme Court judge Emil Stanislaw Rappaport.[200]

Working with this network, Pella converted the proposal into a detailed, written statute containing 70 articles.[201] The statute was submitted to the League of Nations by another member of the growing network, Belgium's former Prime Minister and then member of its Foreign Ministry, Henri Carton de Wiart (who would also serve as president of the League

196 *Ibid*.

197 *Ibid*.

198 "Nikolaos Sokrates Politis: Greek Jurist and Diplomat", in *Encyclopedia Britannica*, chronicling Politis' service as a diplomat.

199 Lewis, 2014, p. 108, see *supra* note 174.

200 Daniel Marc Segesser and Myriam Gessler, "Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919-1948)", in Dominik J. Schaller and Jürgen Zimmerer (eds.), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, Routledge, London, 2009, pp. 11–12; "André Roux: 1870-1942", in *Assemblée Nationale*, indicating Roux's service in the French Parliament; "Emil Stanisław Rappaport", in *World Heritage Encyclopedia*, providing details regarding Rappaport's work as a Polish judge.

201 Lewis, 2014, p. 109, see *supra* note 174.

of Nations).[202] But the League rejected the proposal as it "preferred new legal conventions for specific problems, not grand system changes and new institutions, such as the creation of an international criminal court".[203] Thus, unfortunately, by the end of the 1920s, the network's "only successful project was the 1929 Convention for the Counterfeiting of Currency".[204]

Still, the international criminal justice networks, to that point, had laid an essential groundwork. And, as Lewis stresses, that foundation rested on the desire to achieve human security:

> [These] legal projects have dealt with […] *security* […] the concept that persons involved in international war or affected by one – wounded or sick soldiers, medical personnel, and civilians under occupation – should be secure from further unnecessary violence […] [That] criminal prosecution could be used to secure international peace by preventing war itself.[205]

20.5.4.2. The International Criminal Law Networks and Terrorism in the 1930s

But the work of the transnational international criminal law networks did not terminate at the close of the Jazz Age. Undaunted, the same conglomeration of jurists/government officials, supplemented by the likes of Jules Basdevant, who worked in the French Ministry of Foreign Affairs,[206] and Ernest Delaquis, who served in the office of the Swiss Federal Administration of Justice,[207] worked on yet another proposal – this time to create an international criminal court to prosecute cases of terrorism (inspired by the 1934 assassination of King Alexander I of Yugoslavia in Marseille). Spearheaded by Pella, and working under League auspices, this group proposed a five-judge, permanent international criminal court that would be called on to try accused terrorists if domestic justice efforts stalled.

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202 *Ibid*., p. 112.

203 *Ibid*.

204 *Ibid*., p. 117.

205 *Ibid*., p. 122 (emphasis added). But Lewis points out too that 'security' also enveloped the notion that "the authority of state governments and new international organizations had to be protected".

206 "Jules Basdevant", in *L'Encyclopédie Biographique de l'Homo Erectus*.

207 "Notes", in *Journal of Comparative Legislation and International Law*, vol. 33, no. 3/4, 1951, pp. 97–105.

Once again, the proposal was detailed and enumerated a broad range of criminal conduct, including instigation and incitement to terrorism, which was defined as "criminal acts directed against persons or property and constituting terrorist action with a political object".[208] And, in this case, support and discussion of the proposal extended beyond judges, parliamentarians and diplomats – it included police. According to Lewis, this could be attributed to the fact that:

> [Police] forces became professionalized and wanted to share their techniques of investigation and identification with each other (fingerprinting, record-keeping, and communications), and police that had achieved bureaucratic autonomy were interested in forming their own international organizations to fight crime, without government oversight. Hence there was a difference between state-directed efforts to create police cooperation and those initiated by police forces themselves.[209]

Notwithstanding widespread buy-in from the burgeoning international criminal law transnational networks, the increasingly volatile atmosphere of the 1930s, marked by growing tension between authoritarian and democratic States, thwarted consensus among the national capitals. Thus, as the 1930s drew to a close, it became apparent that the anti-terrorism convention, with its plank for a permanent, albeit more narrowly-focused, international criminal court, would never see the light of day.

The decade's gathering war clouds finally burst forth on the first of September 1939 with the Nazi *blitzkrieg* against Poland. World War II had begun and the transnational efforts to codify and institutionalise international criminal law had to be put on hold.

20.5.4.3. World War II, Nuremberg, and the Genocide and Geneva Conventions

As the long war stretched on, details related to the Nazi campaign to murder all of Europe's Jews were gradually revealed to the world. In his book *The Birth of the New Justice*, Mark Lewis explains that, during the war,

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[208] *Bases pour la conclusion d'un accord international en vue de la répression de crimes c*ommis *dans un but de terrorisme politique*, 10 December 1934 (Geneva), C.542.M.249.1934.VIII, in Council and Member States Documents, vol. 1380 (1934.C.483.M.210 to C.583.M.274), LNA, Geneva.

[209] Lewis, 2014, p. 141, see *supra* note 174.

jurists with ties to the World Jewish Congress and/or the Institute of Jewish Affairs, including Sheldon Glueck, Jacob Robinson, Hersch Lauterpacht, and Raphael Lemkin, were able to keep the 1920s–1930s transnational international criminal law networks alive.

Post-war, they still relied on those networks. In the first place, they used them to persuade Allied government officials at Nuremberg to incorporate 'victim-centred' features into the International Military Tribunal ('IMT') justice process.[210] And, after the IMT trial, they prevailed upon their transnational network contacts "across Europe to urge their governments to make extradition requests when British occupation authorities announced in fall 1947 that Britain would release all Germans suspected of war crimes if other governments had not claimed them".[211]

Still, the Nuremberg experience left these jurists dissatisfied, especially Lemkin, a Polish-Jewish lawyer, who had escaped Nazi-occupied Europe but lost nearly all of his family in the Holocaust. Chapter 18 above by Mark Drumbl contains an incisive discussion of his contribution. Lemkin was frustrated with the so-called 'war nexus' requirement (showing how crimes against humanity was linked to the other two crimes in the Tribunal's subject-matter jurisdiction – war crimes and crimes against peace). This effectively exculpated all pre-1939 Nazi persecutory measures against the Jews and others. "This is one of the reasons why, after the judgment, Lemkin moved to create a Genocide Convention whose terms would not be hemmed in by a connection to war."[212]

20.5.4.3.1. Lemkin's Interest in Genocide Prevention

To understand what motivated Lemkin to launch his crusade to outlaw and criminalise genocide, a brief review of his background is helpful. Technically, at his birth in 1900, he was a Russian citizen, having been delivered on a farm near the village of Bezwodene (not far from the town

[210] *Ibid*., p. 178.

[211] *Ibid*., p. 179.

[212] *Ibid*., p. 177. It should be pointed out, however, that the Allies' Control Council Law Number 10 provided that so-called zonal courts (that is, courts established in each Ally's zone of occupation in Germany) could prosecute crimes against humanity without the 'war nexus'. See Gregory S. Gordon, "Hate Speech and Persecution: A Contextual Approach", in *Vanderbilt Journal of Transnational Law*, vol. 46, no. 2, 2013, pp. 309–10.

of Wołkowysk) in what was then Imperial Russia.[213] During his childhood and teenage years, he discovered a passion for languages, history and the law.[214] And always living under the spectre of the anti-Jewish pogroms then endemic to that region, he developed sympathy for minority-group rights and a burning sense of indignation regarding government complicity in the mass violence.

That sense was only heightened when, on the eve of studying linguistics at the University of Lvov, Lemkin learnt of the trial of Soghomon Tehlirian, who had assassinated Talaat Pasha, the Armenian Genocide's chief architect. During Tehlirian's trial in Germany, where the assassination took place, Lemkin found himself wondering why the Ottoman leader was not prosecuted for the killing of millions while Tehlirian was prosecuted for killing one.[215] The principle of sovereignty, Lemkin felt, cannot be conceived as the right to kill millions of innocent people; instead, it entails "conducting an independent foreign and internal policy, building schools, construction of roads, in brief, all types of activity directed toward the welfare of people".[216]

Based on Tehlirian's acquittal, as well as other contemporaneous not-guilty verdicts *vis-à-vis* ethnic-massacre-revenge assassinations across Europe, Lemkin came to conclude that "popular sentiment had finally aligned against destroying entire national groups".[217] In 1926, he graduated with a Polish law degree and began thinking of ways to harness that popular sentiment to effect transnational normative change. He became a prolific, and well-respected, criminal law expert. And, in 1927, on the strength of his growing reputation, was appointed secretary of the Court of Appeals in Warsaw. Two years later he was given the position of deputy public prosecutor in the District Court of Warsaw (while also teaching classes as a professor). At the same time, Lemkin secured an adjunct law

[213] John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Palgrave Macmillan, New York, 2008, p. 6.

[214] Tanya Elder, "What Do You See before Your Eyes: Documenting Raphael Lemkin's Life by Exploring His Archival Papers, 1900-1959", in Dominik J. Schaller and gen Zimmerer (eds.), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, Routledge, London, 2009, p. 26.

[215] Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide*, University of Pennsylvania Press, Philadelphia, 2016, p. 36.

[216] *Ibid*., p. 37, quoting from Lemkin's previously unpublished autobiography.

[217] *Ibid*., p. 38.

professor position at Tachkemoni College in Warsaw, and lectured at the Free Polish University.[218]

Having achieved this status, he began integrating into the transnational international criminal law networks previously described in this chapter. As chronicled by John Cooper:

> Lemkin was introduced to the international law circuit, and in particular to the *Association Internationale de Droit Penal* by his mentor and colleague at the Free University of Warsaw Professor Emil Stanislaw Rappaport. At these conferences which were held under the auspices of the League of Nations, Lemkin made many useful contacts, including the Belgian statesman Count Henri Carton de Wiart, the President of the League, and Karl Schlyter, the Swedish Minister of Justice; in addition, he met the leading international lawyers, such as Professor Vespasian Pella [also a Romanian parliamentarian] and Professor Donnedieu de Vabres […].[219]

20.5.4.3.2. 'Barbarism' and 'Vandalism' Proposed to the International Criminal Law Transnational Network

By 1933, Lemkin was ready to take advantage of these connections. Of contextual significance, this was the year that Adolf Hitler took power in Germany (having become Reich Chancellor on 30 January 1933). Already at the beginning of that year, waves of Jewish refugees were pouring out of the Third Reich.[220] Then, in August, 3,000 Assyrian Christians in the Iraqi village of Simel were slaughtered as part of an ethnic cleansing episode.[221]

Convinced that existing international instruments were not equal to the task of protecting national minorities, Lemkin sought to advocate for bold humanitarian law reforms at the League of Nations. In that year of Hitler's ascension to power, he introduced a proposal that called for criminalising what he termed 'barbarism', that is, "acts of extermination directed against the ethnic, or social collectivities whatever the motive (po-

218 *Ibid*., p. 39.

219 Cooper, 2008, pp. 17–18, see *supra* note 213.

220 *Ibid*., p. 18.

221 *Ibid*.

litical, religious, etc.)".[222] He also proposed criminalising destruction of the group's cultural life, which he referred to as "vandalism". This he defined as "a systematic and organized destruction of the art and social heritage in which the unique genius and achievement of a collectivity are revealed in the fields of science, arts and literature".[223] Lemkin sought to present his proposals at an international law conference in Madrid. But his work had drawn the ire of the anti-Semitic press in Warsaw and resistance from the Polish government, which was trying to placate Nazi Germany and the Soviet Union. According to Douglas Irvin-Erickson:

> At the time, Poland was seeking non-aggression pacts with Stalin and Hitler. Wishing not to antagonize the two powers by sending a Jewish delegate to deliver such a proposal, the Polish government blocked Lemkin from leaving the country. In what appears to be a blatant case of antisemitism, Lemkin was denied travel documents and prevented from presenting his ideas. Without his presence [in Madrid], his proposal to outlaw barbarity and vandalism was tabled without debate. Within weeks, Lemkin was forced to resign from his public posts.[224]

Still, Samantha Power notes that Lemkin's proposal stimulated a discussion about 'collective security'.[225] She adds: "Lemkin had issued a moral challenge, and the lawyers at the conference did not reject his proposal outright […] They [were not] prepared to admit that they would stand by and allow innocent people to die".[226]

But with his proposal shelved and his job eliminated, Lemkin began a private law practice, while continuing to write academic papers (but now focused on international exchange and payment systems). And he remained active in the 1930s transnational international criminal law networks. Lewis writes that "Lemkin continued to participate in the criminal law movement, writing approvingly in 1935 about the League of Nations' preparations for the anti-terrorism convention. In 1937, he shared Pella's

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222 L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Martinus Nijhoff Publishers, Leiden, 2005, p. 89.

223 *Ibid*., p. 39.

224 Irvin-Erickson, 2014, pp. 49–50, see *supra* note 215.

225 Samantha Power, *A Problem from Hell: America and the Age of Genocide*, Harper Perennial, New York, 2002, p. 22.

226 *Ibid*.

long-standing point of view that international criminal law could be used to protect international peace".[227]

20.5.4.3.3. The Birth of 'Genocide' as a Criminal Law Concept

Fascist State aggression soon disrupted the work of the transnational international criminal law networks, however. As the *Wehrmacht* was rolling over the Polish military, Lemkin fled, first to Lithuania and then to Sweden, where he lectured on international monetary exchange at the University of Stockholm. In 1941, he left for the United States, where he had secured a law professorship at Duke University. Having conducted extensive research on Nazi occupation policies during his time in Sweden, in 1944 Lemkin published *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. In Chapter 9 of the book, harking back to his proposals on 'barbarity' and 'vandalism' and fusing them, he coined the term 'genocide'. It derived from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).[228] And he defined it as:

> [A] coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[229]

In the meantime, Lemkin had begun working for the United States government as an adviser, first to the Board of Economic Warfare and Foreign Economic Administration and then to the US chief prosecutor at

[227] Lewis, 2014, p. 190, see *supra* note 174.

[228] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, D.C., 1944, p. 79.

[229] *Ibid*.

Nuremberg, Justice Robert Jackson.[230] Even though "Lemkin's intellectual work was known to and influenced Jackson and his staff",[231] the word 'genocide' did not appear in the Charter of the International Military Tribunal at Nuremberg.[232] And while the term was mentioned several times during the trial, it does not appear in the IMT's final judgment of 1 October 1946.[233] Frustrated by this and the narrow scope of crimes against humanity (limited, as noted above, by the 'war nexus'), Lemkin left Europe for the US and concentrated his efforts on drafting and then securing adoption of a Genocide Convention at the United Nations.[234]

20.5.4.3.4. Drafting the Genocide Convention

And, once there, Lemkin was joined in drafting the Convention by two of the core members of the 1920-30s international criminal law transnational network – Vespasian Pella and Henri Donnedieu de Vabres.[235] The fruit of their labours, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, was "ingenious", as Mark Lewis describes it, for its expansive and detailed treatment of the genocide phenomenon.[236] And he enumerates its virtues.

First, it expanded the interwar idea of minorities protection to racial, religious, ethnic, and national groups generally, but concentrated on collective violence (which the minorities treaties did not) and included a mechanism for prosecution (which the League's Minorities Committee did not).[237] Pursuant to Article I, it defined genocide not only as extermination via murder, but as a series of other acts, including infliction of bodily and mental harm against a group, the imposition of conditions of life meant to destroy the group, the forced transfer of children from one group

[230] Elder, 2009, p. 27, see *supra* note 214, referring to Lemkin's work with the U.S. Board of Economic Warfare and Foreign Economic Administration; Iavor Rangelov, *Nationalism and the Rule of Law: Lessons from the Balkans and Beyond*, Cambridge University Press, Cambridge, 2013, p. 80, noting Lemkin's service to Justice Jackson.

[231] John Q. Barrett, "Raphael Lemkin and 'Genocide' at Nuremberg, 1945-1946", in C. Safferling and E. Conze (eds.), *The Genocide Convention Sixty Years after its Adoption*, T.M.C. Asser Press, The Hague, 2010, p. 37.

[232] *Ibid*., p. 42.

[233] *Ibid*., p. 52.

[234] *Ibid*.

[235] Lewis, 2014, p. 187, see *supra* note 174.

[236] *Ibid*., p. 182.

[237] *Ibid*.

to another, and measures designed to prevent births, including forced sterilisation.[238] Intent to destroy was paramount and motive was not relevant. "This was important because it eliminated the possibility that a defendant could claim that eliminating the group was necessary to protect state security" – that the group was a 'fifth column', a group of terrorists, or harboured insurgents.[239]

There were other important innovations. The crime did not have to be committed during war. And pursuant to Article III, modes of liability were extended to include conspiracy, incitement, attempt and complicity.[240] Article IV ensured that State officials who perpetrated genocide against their own populations could be held criminally liable. And all parties to the treaty were required to enact domestic legislation to enforce the treaty provisions, under Article V. In another significant development, via Article VII, genocide was not to be considered a political crime for purposes of extradition. Article VIII specified that parties to the Convention could call upon the United Nations ('UN') to enforce it and, as Lewis explains, "could file a lawsuit against [a] state [not upholding the Convention] with the International Court of Justice […]".[241] Finally, most relevant for purposes of this chapter, pursuant to Article VI, the Convention contemplated prosecution of violations under the jurisdiction of "an international penal tribunal".[242]

After intense lobbying and negotiations, as well as proposed modifications that were rejected and tweaks that were made along the way, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948.[243] It entered into force on 12 January 1951.[244] Lemkin then devoted the remain-

238 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951, Article I (www.legal-tools.org/doc/498c38/) ('Genocide Convention').

239 Lewis, 2014, p. 183, see *supra* note 174.

240 Genocide Convention, Article III, see *supra* note 238.

241 Lewis, 2014, p. 183, see *supra* note 174.

242 Genocide Convention, Article VI, see *supra* note 238. Lewis also notes that the Convention had certain limitations, including failure to establish universal jurisdiction and inclusion of details regarding the process of investigation/prosecution and intervention. See Lewis, 2014, p. 183, *supra* note 174.

243 Genocide Convention, see *supra* note 238.

244 Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, Cambridge, 2008, p. 25.

ing days of his life, before succumbing to a heart attack in 1959, to pushing for ratification among undecided nations.[245]

20.5.4.3.5. The International Criminal Law Transnational Network and the Geneva Conventions

In the meantime, work on updating the Geneva Conventions, including proposals for incorporating criminal suppression into them, was also under way. And once again, the transnational international criminal law networks, this time within the framework of the ICRC, played an important role. In effect, they had taken the torch from previous generations of the networks, which had fought so tenaciously for a permanent international criminal jurisdiction. According to Mark Lewis:

> Dutch delegate Mouton, a military judge who had been a member of the UNWCC [United Nations War Crimes Commission], was joined by Belgian Major Paul Wibin, a medical doctor: both supported universal jurisdiction (the concept that all states have an obligation to punish certain crimes under international law) and the use of an international criminal court, which Mouton wanted to establish under the auspices of the Permanent Court of International Justice, *as various jurists such as Descamps and Bellot had before him*.[246]

And the unifying thread of the earlier network labours soon became apparent when the ICRC convened a working group to draft grave breaches provisions for the new Geneva Conventions. That group consisted of Mouton, Henry Phillimore, a British barrister and former IMT-Nuremberg prosecutor, Hersch Lauterpacht, who had been an adviser to the British for the Nuremberg trial and would serve as the UK's judge on the International Court of Justice, and Jean Graven, a Swiss judge and law professor, who had served as the Swiss government's representative at the Nuremberg trial.[247] Through Graven, Lewis explicitly notes the link be-

[245] Power, 2002, p. 56, see *supra* note 225, noting that Lemkin succumbed to a heart attack in 1959.

[246] Lewis, 2014, p. 244, see *supra* note 174 (emphasis added).

[247] *Ibid*., pp. 236, 257–8. See also Jonas Grimheden, "The International Court of Justice – Monitoring Human Rights", in Gudmundur Alfredsson *et al.* (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff Publishers, Leiden, 2005, p. 260, discussing Judge Lauterpacht's work on the International Court of Justice; "Jean Graven", in *Mediatheque Wikivalais*, available at www.wikivalais.ch/index.php/Jean_Graven, last accessed on 1 August 2018, describing Graven's Nuremberg service.

tween this group and the previous work of the transnational international criminal law networks:

> [Graven] was the Secretary of the *Association Internationale de Droit Pénal* and frequently corresponded with Pella, the Romanian catalyst for an international criminal court since the 1920s. Graven's involvement created [an] intersection between the Red Cross project and the line pursued by the criminological jurists and their pursuit of a permanent international criminal court. For Graven, the International Military Tribunal at Nuremberg represented an absolute revolution in international criminal law that proved that establishing a court was viable, as well as transformed the international legal order by proving that "might was not right" and political leaders could be held responsible for wars of aggression. Additionally, by late 1948, he had watched the development of the Genocide Convention and believed that politics, as the arch nemesis of law, had worked against making an international criminal court the primary jurisdiction in that convention.[248]

Consistent with this, the group's final work product was compatible with previous iterations of the transnational network drafts floated since the time of the Moynier-Jaequemyns project. As summarised by Lewis:

> [The proposed] system supported universal jurisdiction. Many jurists had pursued this for a variety of crimes since the 1920s -- Descamps for "crimes against the international order," Pella for "violations of international peace and security," and Lemkin for "crimes of barbarity and vandalism". The new provisions told states they had a new duty: either prosecute the suspects or extradite them, the same concept that Pella had sought in the anti-terrorism convention and Lemkin had sought in the Genocide Convention. The Working Group's clauses stated that individuals would be held criminally liable for violations of the conventions. Jurists going back to Moynier in the nineteenth century had tried to accomplish this for the Geneva Conventions, but they had always run into obstacles. Finally, it ruled out superior orders as a defense that could exonerate a defendant. This would have taken a key idea from the Nuremberg Charter and placed it in a codified body of international law for the first

[248] Lewis, 2014, p. 259, see *supra* note 174.

> time: the ideas of "*raison d'état*" and "military obedience" would have been sharply curtailed.[249]

Although not all of these provisions survived the final draft (including, for example, international jurisdiction), most of them did and are now embodied in the grave breaches portions of the current Geneva Conventions.[250] But the momentum of the post-World War I through post-World War II international criminal justice project that the transnational international criminal law networks had so persistently pushed forward, was stalling. Cold War politics would soon stifle any further progress on the development of international criminal law. But by the beginning of the 1990s, after the dismantling of the Berlin Wall, a thaw in trans-global relations meant a revival of the project. And with inter-ethnic violence erupting in the former Yugoslavia and Rwanda, government officials in new transnational international criminal law networks began following in the footsteps of Moynier, Lieber, Jaequemyns, Bellot, Politis, de Wiart, Llewellyn-Jones, Pella, de Vabres, Lemkin, Lauterpacht and Graven.

20.5.5. International Criminal Law Transgovernmental Networking Post-Cold War

In the explosion of international criminal law activity after the fall of the Soviet Union, international criminal law has become institutionalised and ingrained in the world order in a way that members of the pre-Cold War networks could have only dreamt about. But those pioneer networks laid the foundation that made it all possible.

The International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR'), the Special Court for Sierra Leone ('SCSL'), the Extraordinary Chambers in the Courts of Cambodia and the ICC, among others, have spotlighted international criminal law's enduring global footprint. The documents establishing these institutions, and setting out their jurisdictional prerogatives, have codified international criminal law. And the judgments issued from their courts have interpreted the key provisions and created a new and

[249] *Ibid*., p. 262.

[250] *Ibid*., pp. 262–3. Lewis notes that: "One factor that dissuaded the Diplomatic Conference as a whole from making an international criminal court the primary venue for criminal repression was a lack of knowledge about international criminal law […] Cold War cultural-legal politics also contributed to eliminating a direct reference to an international jurisdiction". See *ibid.*, p. 267.

separate vein of jurisprudence in international law. So, given that the vision of the founding network members has been largely realised, is there still a place for transnational international criminal law networks in today's world? As explained above, Jenia Iontcheva Turner believes there is. She has broadly identified two categories: 'co-ordination and support' networks and 'joint-action' networks.

20.5.5.1. Co-ordination and Support Networks

The 'co-ordination and support' networks are further divided into three subcategories: (1) investigative; (2) prosecutorial; and (3) judicial. In general, Turner notes that the co-ordination and support networks assist "states emerging from armed conflict" that often "lack the resources to develop and implement a prosecution strategy for international crimes, which usually involve mass atrocity, governmental complicity, [and] *serious security problems* […]".[251]

20.5.5.1.1. Investigative Networks

With respect to the "investigative" transnational international criminal law networks, Turner provides as examples the 'Argentine Forensic Anthropology Team', which has fostered global exchanges in the investigation of human rights violations through, among other activities, training and advisory assistance and promoting national and international forensic standards.[252] Another organisation, the Institute for International Criminal Investigations ('IICI'), focuses primarily on training and deployment of international-crimes investigators at scenes of war crimes around the world.[253] And Interpol, which began setting up working group meetings to identify the needs of national police force war crimes units, has provided them with increased use of Interpol databases, the preparation of a best practice manual, and identification of points of contact in member countries.[254] In fact, in 2014, Interpol created a dedicated unit to focus on war crimes, genocide and crimes against humanity.[255]

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[251] Turner, 2007, pp. 1006–7, see *supra* note 161.

[252] *Ibid*., p. 1008.

[253] *Ibid*.

[254] *Ibid*., p. 1007.

[255] Interpol, "Project Sheet: War Crimes and Genocide Sub-Directorate", available on the Interpol web site.

20.5.5.1.2. Prosecutorial Networks

As for the prosecutorial networks, Turner refers to the 'Colloquium of Prosecutors of International Tribunals', has which brought together supranational prosecutors from the ICTY, ICTR, ICC, and the SCSL to discuss "evidence management, witness and protection management, gender crimes, operating procedures, tracking and arrests, speeding up trials" and "political strategies towards non-cooperating States".[256] More recently, the International Humanitarian Law Dialogues hosted annually by the Robert H. Jackson Center in Chautauqua, New York, gather current and former international war crimes tribunal prosecutors. At this forum, they can explore current issues centred on a theme, allowing for meaningful discussions concerning contemporary international criminal law.[257]

20.5.5.1.3. Judicial Networks

Finally, regarding judicial networks, Turner notes that most transgovernmental 'networking' among national and supranational judges occurs in less formal ways. "Judges from the ICC, ICTY, and ICTR have become actively involved in meetings and training sessions with their counterparts from Iraq, Indonesia, the former Yugoslavia, Cambodia, and elsewhere."[258] Consistent with this, Anne-Marie Slaughter has observed that we are witnessing a rise of a community of courts in which judges are increasingly referring to each other's opinions not because these opinions are binding authority, but because of their persuasive reasoning.[259]

And there are networks that combine all three cohorts. Turner points to the 'Justice Rapid Response Initiative' that has, since publication of her article, evolved into the non-governmental organisation Justice Rapid Response ('JRR'). JRR manages the swift deployment of criminal justice and related professionals from a stand-by roster.[260] These deployments can be requested by the international community to investigate, analyse and report on situations where serious human rights and international criminal violations have been reported.[261] JRR's training programme has

256 Turner, 2007, pp. 1006–7, see *supra* note 161.

257 The Robert H. Jackson Center, "Jackson Center Opens 11th Annual International Humanitarian Law Dialogues", 24 August 2017, available on the web site of the Center.

258 Turner, 2007, pp. 1006–7, see *supra* note 161.

259 *Ibid*., pp. 115–6; Slaughter, 2004, p. 69, see *supra* note 159.

260 Justice Rapid Response, "About Us", available on the Justice Rapid Response web site.

261 *Ibid*.

been developed and carried out in collaboration with the IICI, suggesting that these networks are co-ordinating and, to a certain extent, converging with one another.[262]

20.5.5.2. Joint-Action Networks

Turner also describes what she calls 'joint-action networks', which also combine all three cohorts (that is, investigators, prosecutors and judges). In these, participants engage each other "daily in face-to-face joint activities – investigation, prosecution, or adjudication – for a sustained period of time".[263] She describes the most prominent "joint action initiatives" as the hybrid courts established to try international crimes in Sierra Leone, Kosovo, East Timor, and more recently, Cambodia and Bosnia and Herzegovina. Hybrid courts, established in the country where the crimes took place but staffed by both local and international investigators, prosecutors, and judges, are, according to Turner, true 'networks':

> Although hybrid courts may seem too institutionalized to fit the definition, they fulfill some of the same functions as transgovernmental networks and lack many of the trappings of permanent supranational institutions. They exist on a temporary basis, and like other networks, they initiate daily dialogue among judges and prosecutors from different countries about the application of international criminal law to domestic cases.[264]

And thus, the contemporary transnational international criminal law networks include jurists like the present author, who have all worked for the UN, for national governments, for international criminal tribunals and in the legal academy but, through all these various endeavours, remain engaged in advancing the international criminal law project.[265] The Case Matrix Network ('CMN') – a department of the Centre for International Law Research and Policy ('CILRAP'), run by Ilia Utmelidze, Emilie Hunter and Olympia Bekou – was the first actor to initiate 'positive complementarity' or international criminal law capacity-development support activities *vis-à-vis* national criminal justice agencies, starting several years

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[262] *Ibid*.

[263] Turner, 2007, p. 1017, see *supra* note 161.

[264] *Ibid*., p. 1019.

[265] Other actors in this vein would include Serge Brammertz, Nina Jørgensen, Juan Mendez, David Tolbert, and Alex Whiting.

before the ICC's States Parties first recognized this area at their 2010 Review Conference in Kampala, Uganda.[266] CILRAP's Director, Morten Bergsmo, coined the term 'positive complementarity' when he led the preparatory team of the ICC Office of the Prosecutor in 2002-03 (later serving as its Senior Legal Adviser). He also developed the original idea of a justice rapid response unit.[267]

20.6. The Transnational International Criminal Law Networks and Governmentality

20.6.1. Governmentality's Conceptual Foundations

Having now considered the concept of governmentality and the phenomenon of transnational international criminal law networks, it remains to analyse their relationship to one another. In examining the development of Foucault's thought, we have seen that modernity's transformation of large-scale societal structuring into a salutary 'macro-physics of power' gives rise to the governmentality phenomenon.

Its roots are found in the historical and metaphorical relationship between the biblical shepherd and his flock. In today's world, the beneficent biblical animal husbandry has evolved into statist population governance focused on human security. It operates to stave off mass crises, such as wars and pandemics, but it aspires never to lose sight of the individual in this process. To achieve its ends of protecting the population by means of instituting a security regime, governmentality effects an accretion of institutions, procedures, analyses and reflections, calculations, and tactics.

Governmentality is deployed alongside 'sovereign' and 'disciplinary' power. And it is perhaps conceptually permissible to suggest these latter two impliedly, and ultimately, operate in service of the security regime. Internal enforcement of that regime relies on police efforts just as

[266] The CMN web site (www.casematrixnetwork.org/) explains its activities. During the five years leading up to the Kampala Conference, the CMN was the main co-operation partner of the ICC Legal Tools Project which at the time engaged more than 20 national jurisdictions in capacity-development, see www.legal-tools.org/; see also Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, Oslo, 2011, pp. 572 (in particular 'Part I: Constructing National Ability to Investigate, Prosecute and Adjudicate Core International Crimes'). CILRAP's web page www.cilrap.org/events/ details several relevant activities held between 2006 and 2011.

[267] See Alexander Muller, "Foreword", in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. v–viii.

external preservation of it depends on diplomacy efforts. The latter give rise to a permanent network of "diplomatic missions" along with "the organization of practically permanent negotiations", as cited above.

We have also seen that Foucault developed this concept of governmentality in the 1970s *vis-à-vis* his usual focus on pre-twentieth century phenomena. As befits a philosophical doctrine of that vintage and nature, it is State-centric. But how would Foucault have developed this theory in light of the collapse of the Soviet Union and its satellite States? How might he have problematised the advent of a permanent international criminal court from a governmentality perspective? The doctrine's foundational theoretic premises, as well as the international criminal law history chronicled in this paper, suggest the manner in which Foucault might have updated and expanded governmentality.

20.6.2. The Internationalisation of Governmentality

20.6.2.1. A Focus on Population as Opposed to Territory

And it is submitted the theory could have plausibly undergone a kind of internationalisation. There are several reasons for this. First, the focus on 'populations' is more broadly anthropocentric, as opposed to territorially-focused. Thus, in pointing out that contemporary versions of governmentality require "security apparatuses that minimize and/or leverage risk", Majia Holmer Nadesan remarks:

> At issue are not those of the nineteenth century seeking to protect a geographically delimited territory. Rather, security is thought of in terms of global circulation of goods, information and people. Consequently, the modern art of government is not limited to the population and territory of individual states but extends to the larger population of people and things encompassed by the entirety of the world *system*.[268]

20.6.2.2. Trans-Border Ambulatory Populations

Moreover, in tracing the origins of governmentality to the pastoral tradition, Foucault emphasises the movement of the flock through variegated geographic spaces. In *Security, Territory, Population*, he explained:

> The shepherd's power is not exercised over a territory but, by definition, over a flock, and more exactly, over the flock

[268] Majia Holmer Nadesan, *Governmentality, Biopower, and Everyday Life*, Routledge, London, 2008, p. 187.

> in its movement from one place to another. The shepherd's power is essentially exercised over a multiplicity in movement […] The Hebrew God [is the one] moving from place to place, the God who wanders. The presence of the Hebrew God is never more intense and visible than when his people are on the move, and when, in his people's wanderings, in the movement that takes them from the town, the prairies, and pastures, he goes ahead and shows his people the direction they must follow […] The Hebrew God appears precisely when one is leaving the town, when one is leaving the city walls behind and taking the path across the prairies.[269]

When this "flock" is analogised to modern human populations, as implicit in Foucault's analysis, its ancient trans-border movements, under the aegis of the deistic shepherd, suggest, in modern terms, international or 'global' governance over peoples.[270] This analogy has resonance for the twenty-first century's continual and routine streaming across borders of large swaths of humanity. According to Alexandria Innes, Oded Lowenheim and Brent Steele:

> Risk management as a technology of governmentality is seen in the context of mobile populations, who are often characterized as high risk. [This is seen in] the use of new security technologies that are seen to minimize risk in aviation security practices. [And it is seen] in the realm of things like border screening and airport security.[271]

This is especially true since the 1970s, when Foucault introduced the notion of governmentality. Per Michael Goodhart:

> Two significant developments have sparked the recent explosion in demands for more accountable international relations. The first is the spectacular increase, since the 1970s, in global governance, along with related changes in the quantity and quality of transnational activity generally. Global governance

[269] Foucault, *Security*, 2009, p. 171, *see* supra note 112.

[270] Global governance has been defined as "efforts to bring more orderly and reliable responses to social and political issues that go beyond capacities of states to address individually". Thomas G. Weiss and Leon Gordenker, "Pluralizing Global Governance: Analytical Approaches and Dimensions", in *Thinking about Global Governance: Why People and Ideas Matter*, Routledge, London, 2011, p. 190.

[271] Alexandria Jayne Innes, Oded Lowenheim, and Brent J. Steele, "Global Governance & Governmentality", in David Levi Faur (ed.), *Oxford Handbook of Governance*, Oxford University Press, Oxford, 2012, p. 720.

> regimes [arise] in domains where trans-border flows of various kinds limit domestic policy and regulatory reach. The growth in global governance, in turn, both reflects and hastens the ongoing expansion and intensification of interdependence, especially economic interdependence.[272]

20.6.2.3. Global Governance, International Relations Theory, and Large-Scale Demographic Crisis Management

Not surprisingly, then, international relations scholarship has begun to link global governance concerns explicitly with governmentality. In their book *Governing the Global Polity: Practice, Mentality, Rationality*, Iver Neumann and Ole Sending offer that "the governmentality approach offers a new perspective on global governance as a set of inter-related practices with a distinct logic or rationality".[273] And thus "the coming of governmentality on the global level" can perhaps be seen "as a coda of its emergence on the national level during the eighteenth century".[274]

As we saw in our review of *Security, Territory, Population*, the types of problems Foucault engaged with in introducing the concept of governmentality – large-scale demographic emergencies and/or pathologies (pandemics, wars, and so on) – further justify grafting governmentality onto the contemporary international plane (and this will certainly be true for international criminal law as it confronts widespread demographic pathologies of genocide and crimes against humanity, among others). So, for instance, refugee crises that prompt humanitarian intervention are arguably by-products of establishing "a global governance regime premised on liberal ideas".[275] And this specifically implicates the techniques of governmentality. In the refugee crisis context, citing Foucault's theory, Paolo Novak notes:

> By constituting refugee displacement as a problem of government, the refugee enables and defines the contours of a

[272] Michael Goodhart, "Accountable International Relations", in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press, Oxford, p. 290.

[273] Iver B. Neumann and Ole Jacob Sending, *Governing the Global Polity: Practice, Mentality, Rationality*, University of Michigan Press, Ann Arbor, 2010, pp. 13–14.

[274] *Ibid*., p. 15.

[275] Paolo Novak, "Refugees and Empire", in Immanuel Ness and Zak Cope (eds.), *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism*, vol. 1, Palgrave Macmillan, Basingstoke, p. 1363.

> wide range of protection and assistance practices, an 'ensemble formed by the institutions, procedures, analyses, and reflections, the calculations and tactics that allow the exercise of a very specific albeit complex form of power' [detailing Foucault's breakdown of governmentality]: a form of power that attempts to shape and direct human conduct towards specific ends.[276]

Of course, as we have seen, governmentality's brief in taking on these massive demographic convulsions is the provision and maintenance of security. And this feature is also indicative of the concept's suitability for transnational adaptation. In his book *A Foucauldian Approach to International Law*, Leonard M. Hammer observes that "human security moves one away from the state as the central character towards […] the international system as it opens up vistas for expanding upon human rights protections".[277] Security may also spur internationalisation in respect of armed conflict. According to Hammer:

> The expanding vista of human security is also quite apparent for other aspects of international law that demand some form of normative relationship between systems, such as incorporating notions of human security into the context of humanitarian norms. Human security can begin to address a variety of normative gaps in the international system found in humanitarian norms where there is a great difficulty in accounting for non-state actors engaged in conflicts, as well as adapting the norms to internal conflicts, essentially the prevalent forum in most present conflict situations.[278]

20.6.2.4. A Diplomatic Network and Permanent Inter-State Negotiations

Governmentality is further compatible with internationalisation given its permanent network of "diplomatic missions" along with "the organization of practically permanent negotiations".[279] Foucault refers to these as 'diplomatic-military' techniques,[280] which envisage a "framework of a balance

[276] *Ibid*.

[277] Leonard M. Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*, Routledge, London, 2007, p. 103.

[278] *Ibid*., p. 104.

[279] Foucault, 2009, p. 389, *see* supra note 112.

[280] *Ibid*., p. 452.

of power between rival states competitively pursuing growth".[281] This central feature of governmentality, then, also provides the structural support for conceptual transplantation within the international realm.

20.6.3. Governmentality and International Criminal Law

20.6.3.1. A Response to Phenomena Such as Genocide and Crimes against Humanity

But is all of this compatible with governmentality in conceptualising the origins-story of international criminal law? Reviewing that narrative from the perspective of the international criminal law transnational networks suggests so. That account maps well onto the theoretical edifice of governmentality as sketched out in this paper. We have already touched on international criminal law as a security response to large-scale social pathologies such as genocide or crimes against humanity. This aligns perfectly with Foucault's credo that eradicating similar phenomena – that is, pandemics, famines – calls for deployment of governmentality.

20.6.3.2. An Outgrowth of a Networked Horizontal Regulatory Scheme

But there are other, less immediately apparent, rationales for extending governmentality to international criminal law. In the first place, significantly, experts conceive of 'global governance' governmentality as a *horizontal*, as opposed to a vertical, regulatory structure. Per Innes, Lowenheim and Steele: "The agents of regulation [in governmentality] are not understood in a top-down hierarchical way, but comply with a *horizontal or networked* understanding of power relations".[282]

And that is the nature of international criminal law's origins as tracked in the development of the transnational networks studied in this chapter. Each stage in that chronicle evidenced groups of jurists, government officials and academics co-ordinating across State boundaries to flesh out and promote this new discipline. Consistent with Anne-Marie Slaughter's conception of transgovernmental networks, with certain notable exceptions, these State representatives were not at the upper end of the

[281] Graham Burchell, "Peculiar Interests: Civil Society and Governing 'The System of Natural Liberty'", in Graham Burchell, Colin Gordon, and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality*, University of Chicago Press, Chicago, 1991, p. 123.

[282] Innes, Lowenheim, and Steele, 2012, p. 718, see *supra* note 271 (emphasis added).

governmental food chain. And they operated within the framework of international and non-governmental organisations.

20.6.3.3. A Diversity of Actors

Moreover, the identity of these actors fits within the theorised nature of governmentality on the global plane too. As explained by Innes, Lowenheim and Steele, at the international level, governmentality's players "can be understood as individuals, States, agencies, international and transnational organizations, private authorities, and so on".[283] Neumann and Sending explain that governmentality results in "the emergence of a more '*network like*' system for governing at the global stage where states share much of their power with non-governmental organisations, corporations, and international organisations".[284]

20.6.3.4. Security for Vulnerable Populations

In addition to the horizonal, "network-like" nature of international criminal law's foundations as examined above, it will be recalled that its objectives centred on security, another core precept of Foucault's governmentality theory. The likes of Moynier, Lieber, Jaequemyns, Bellot, Politis, Llewellyn-Jones, Pella, Lemkin, Graven and Lauterpacht promoted their various international criminal law proposals with a view to protecting civilians in the context of war or citizens targeted for extermination, mass violence, terrorism, torture, slavery, and trafficking. Others enveloped within international criminal law's proposed security net included wounded soldiers, prisoners of war, and aid workers. Lemkin's own trajectory as Holocaust survivor, as well as genocide theoriser and convention drafter, reifies international criminal law's concern for the security of at-risk groups.

One could say then that international criminal law, as conceived by these framers, was focused on a certain type of security – the security of *vulnerable* populations (consistent with Foucault's focus on large-scale societal emergencies and pathologies). And protecting such vulnerable populations from the depredations enumerated above accords them with a kind of freedom. Thus, security implicates freedom, one of governmentality's central concerns, as postulated by Foucault.

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283 *Ibid*., p. 719.

284 Neumann and Sending, 2010, p. 20, see *supra* note 273.

This focus on the security of vulnerable populations is central to the argument of this paper that international criminal law's origins can be properly theorised via governmentality, which is, in turn, properly updated via international criminal law. Current UN priorities underscore this point. For instance, the UN created the Commission on Human Security in January 2001 in response to the UN Secretary-General's call at the 2000 Millennium Summit for a world "free of want" and "free of fear".[285] In 2015, a chief concern at the UN was assisting "vulnerable populations in emergencies".[286] More recently, in August 2017, the UN Secretary-General, António Guterres, repeated this commitment within the context of the emerging norm of 'Responsibility to Protect':

> There is a gap between our stated commitment to the responsibility to protect and the daily reality confronted by populations exposed to the risk of genocide, war crimes, ethnic cleansing and crimes against humanity. To close this gap, we must ensure that the responsibility to protect is implemented in practice. One of the principal ways in which we can do so is by strengthening accountability for the implementation of the responsibility to protect and by ensuring rigorous and open scrutiny of practice, based on agreed principles.[287]

One other UN mission – that embodied in the Millennium Development Goals ('MDGs') – further demonstrates the commitment to assisting vulnerable populations. The MDGs find their origin in the "Millennium Declaration" issued at the September 2000 Millennium Summit.[288]

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[285] The United Nations Trust Fund for Human Security, "Human Security Now", available on the United Nations ('UN') web site.

[286] UN News Centre, "Marking World Day, UN Spotlights Plight of Vulnerable Populations in Emergencies", 10 July 2015, available on the UN web site.

[287] UN Secretary-General, Report, "Follow-up to the Outcome of the Millennium Summit: Implementing the Responsibility to Protect – Accountability for Prevention (Report of the Secretary-General)", UN Doc. A/71/1016, 10 August 2017 (www.legal-tools.org/doc/c666fa/). Officials at the UN 2005 World Summit pledged to protect vulnerable populations from genocide, crimes against humanity, war crimes and ethnic cleansing via the 'Responsibility to Protect' doctrine, which sanctions military deployment pursuant to Security Council resolution to thwart commission of such offenses. See UN General Assembly, Resolution 60/1, 2005 World Summit Outcome, UN Doc. A/Res/60/1, 24 October 2005, paras. 138–40.

[288] Elkana Ngwenya, "An Empirical Analysis of Gendered Differences in MDG Awareness Across Sources of Information", in Harleen Kaur and TAO Xiaohui (eds.), *ICTs and the Millennium Development Goals: A United Nations Perspective*, Springer, New York, 2014, p. 42.

The MDGs obligated states to realise a new "global partnership […] and a series of time-bound targets" to be met by 2015. Among other things, they seek to eradicate extreme poverty, hunger and disease (MDG 1), reduce child mortality (MDG 4), and combat HIV/AIDS, malaria, and other diseases (MDG 6).[289] Thus, they focus on security measures for the most vulnerable populations.[290]

In 2015, the MDGs were updated with the Sustainable Development Goals ('SDGs'), which are meant to protect "fragile and conflict-affected societies" such that the "needs of the most vulnerable populations are brought to the fore".[291] Indeed, SDG 16 incorporates peace and justice "as explicit and related development goals, emphasizing the importance of rule of law, access to justice, and inclusive institutions".[292] Relatedly, The World Bank's 2011 World Development Report entitled "Conflict, Security, and Development" linked, for the first time, transitional justice to security and development.[293]

20.6.3.5. An Ensemble Formed by Institutions, Procedures, and Various Techniques

Moreover, the work product of the transnational international criminal law networks, focused on the security of vulnerable populations, constitutes an "ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics".[294] In particular, as we have seen, the proposals put forth by these networks always crystallised around the formation of an 'institution', that is, an international criminal court. To take the Bellot plan as one example, the proposed institution's procedures were specified

289 *Ibid*.

290 "Getting to Know the Sustainable Development Goals", in *SDG Guide*, p. 3, on the SDG web site, noting that the MDGs "focus on the most vulnerable populations, and address extreme poverty, hunger, disease, gender equality, education and environmental sustainability".

291 Organisation for Economic Co-operation and Development, "The Sustainable Development Goals: An Overview of Relevant OECD Analysis, Tools and Approaches", p. 5.

292 International Nuremberg Principles Academy, "10 Years after the Nuremberg Declaration on Peace and Justice: 'The Fight against Impunity at a Crossroad'", Nuremberg Forum 2017, 8 September 2017.

293 The World Bank, "2011 World Development Report: Conflict, Security, and Development", available on the World Bank web site. See also, International Nuremberg Principles Academy, 2017, *supra* note 292.

294 Foucault, 2009, p. 144, see *supra* note 112.

in great detail, including jurisdiction, the number and qualification of judges, the vetting procedure of judges, the nature of hearings at the court, evidentiary regulations and post-conviction protocols.

Analysis and reflections were embedded into the proposals we examined and calculations and tactics led to doctrinal success in the adoption of instruments such as the Genocide and Geneva Conventions. And those kinds of analyses, reflections, calculations and tactics ultimately gave rise to the international criminal law infrastructure we see today, complete with tribunals of an *ad hoc*, hybrid and permanent nature.

20.6.3.6. The Role of Police in Conjunction with Diplomacy

Finally, the work of these networks is of a piece with Foucault's notions of police and diplomacy in connection with governmentality. Although Foucault stresses that 'police' does not refer to the narrow constabulary or judiciary function in the traditional sense, he hastens to add that the concept does have juridical implications. Upon the panorama of governmentality laid out in its full conceptual scope, the police feature represents an essential regulatory force. And given its explicit tethering to diplomacy in Foucault's work, it marries well with the idea of international law enforcement for atrocity crimes.

That point is underscored by the fact that, per its pastoral roots, governmentality never loses sight of the individual. Its chief metric may be 'population' but that is still calibrated unit by unit, such that individual criminal responsibility conceptually jibes with this paper's transnational scaling of governmentality. Just as the shepherd never loses sight of threats to any one lamb in the flock, he has to account for each lone wolf. The genocidaire in reference to the outgroup victim, as it were, is conceptually analogous.

And, to be fair, Foucauldian international criminal law scholarship has started to take notice. While this chapter has lamented the current literature's misplaced emphasis on a kind of fallacious super-sized disciplinary power, there has been an opening to governmentality within the field. In particular, Sara Kendall has advised viewing international criminal law-context power in "its more diffuse manifestations in what [Foucault] termed governmentality ('the conduct of conduct'), [and] biopower ('directed at the level of the population') […]". She would opt, then, for "a more complex and multifaceted understanding of the workings of pow-

er" and examine where it becomes "capillary, that is, in its more regional and local forms and institutions".[295]

Elsewhere, Kendall emphasises this phenomenon strictly from the perspective of bio-power:

> In international criminal law, [acts of classification and categorisation] when directed at the level of the population, perform additional forms of governance. Borrowing from Michel Foucault, we can conceptualise such governance as a kind of 'biopower', intervening at the collective level (here, among conflict-afflicted populations) to promote life and health. Unlike other theorisations of 'biopower' that would regard it as a repressive form of power […] Foucault regarded biopower as productive power, in the sense that it was oriented toward producing greater vitality in the population towards which it was directed.[296]

Are we seeing a shift in the international criminal law scholarly fault line? Kendall's observations certainly suggest so. It is hoped that this paper will help move the discourse even further toward the direction of accepting governmentality as the key Foucauldian paradigm for theorising the advent, development and operation of international criminal law.

20.7. Conclusion

This chapter has taken a diachronic view of Foucault's philosophy and its vital late-stage tenet, 'governmentality'. Certainly, in his early career, the great French thinker initially devoted himself to understanding Occidental society through its treatment of marginalised groups and the attendant discourse arising from that treatment. And through the plight of these fringe actors, he detected changes in governing paradigms. During the great population swell from the fifteenth through the nineteenth centuries, ruling by fear – the mode of power he described as "sovereign" – became infeasible. Exemplary punishment could no longer serve as the needed organisational template for unwieldy and growing demos in such societies.

[295] Sara Kendall, "Critical Orientations: A Critique of International Criminal Court Practice", in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, London, 2014, p. 62.

[296] Sara Kendall, "Beyond the Restorative Turn: The Limits of Legal Humanitarianism", in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2015, p. 373.

At the same time, Western thought was becoming increasingly secular and rational. In this context, Foucault was able to glean the emergence of an operational principle that reached critical mass at the institutional level. It was characterised by the dissemination and enforcement of multidirectional protocols and procedures carried out under ubiquitous surveillance in institutions such as hospitals, military barracks, schools, factories and government offices. Foucault called it "disciplinary power" and used the modern penitentiary to illustrate its operation in detail through his seminal 1975 treatise *Discipline and Punish; The Birth of the Prison*.

Among Foucault's most widely-translated and read works by the time of his death, *Discipline and Punish* served as a touchstone for English-speaking criminology scholars. But as many of Foucault's subsequent materials long remained unpublished in English, criminological academic work in the Anglosphere calcified. The ratio of *Discipline and Punish* was reductively distilled into an elite-over-dispossessed coercion polemic with Marxist overtones. Having been uncritically framed as such, its reception into international criminal law scholarship was seamless. That literature artificially inflated the municipal dynamic and cartoonishly stretched it to fit over the supranational landscape.

This chapter has called into question this traditional Foucauldian take on international criminal law. In developing the doctrine of 'governmentality', an outgrowth of his 'bio-power' theory, Foucault began to take a bird's-eye view of societal co-ordination above the individual institutional level. From that perspective, he discerned a beneficent organisational power whose seat was the modern State and whose origin was biblical mass-herd husbandry. In anthropocentric terms, its mission was taking care of 'populations' by providing them with 'security', consisting not only of quotidian succour but also protection against large-scale crises, such as pandemics and famines. The State would accomplish this through the use of 'police' – a regulatory mechanism – yoked to a diplomatic cadre within an entrenched network of permanent negotiations amongst nations.

In reference to a theory developed in the 1970s in a far more State-centric world, it is reasonable to wonder whether governmentality would be compatible with power exercised on the international plane. This chapter has offered several reasons for why it would. Apart from its overt reliance on diplomacy and inter-State negotiation, governmentality's concern with human populations impliedly crossing national frontiers and con-

fronting mass demographic pathologies, increasingly topical phenomena in the modern world, suggests the theory arguably had a modern transnational-orientation already embedded in its DNA.

From that conclusion, it does not strain credulity to extend transnational governmentality to one of public international law's main subbranches, international criminal law itself. And this extension is further sanctioned via an historical review of international criminal law's transnational networks. Those formal and informal configurations of jurists and government officials advanced the international criminal law project seeking to insulate at-risk peoples confronting the spectre of mass demographic plagues such as genocide, crimes against humanity, torture, slavery, terrorism, aggression and war crimes. Per Foucault's vision of governmentality's essential ingredients, their work implicated an amalgamation of institutions (international criminal tribunals), procedures (rules of procedure and evidence), analyses (consideration of existing law and how to develop it), reflections (reliance on history and related topics, such as the law of war), calculations (the proper apportionment of judicial personnel and subject-matter jurisdiction), and tactics (international ratification and then judicial co-operation) that, in the ensemble, were geared toward providing security for vulnerable populations.

As Foucault envisaged, they would rely on the 'police' juridical-regulatory function and diplomacy in the form of State co-operation. And, as the pastoral roots of governmentality permit focus on the individual, so would international criminal law, given its stress on individual criminal responsibility. Significantly, and compatible with scholarly views of international governmentality as operating via horizontal network linkages, these (for the most part) lower-level international criminal law network functionaries worked in trans-border clusters formulating and promulgating a body of soft law that hardened after the atrocities of World War II. And new generations of transnational international criminal law networks have developed this doctrine, and helped implement it, in the post-Cold War era.

This is not to suggest that existing Foucauldian international criminal law scholarship should be shunted aside. Let us not forget that Foucault himself emphasised that governmentality operated in tandem with sovereign and disciplinary power. On the international plane, how can this be conceptually retrofitted for synchronous operation with governmentality within the international criminal law sphere? If, for example, discipli-

nary power were theorised at the level of the individual institution itself, such as the International Criminal Court, perhaps a kind of supranational panopticism could be detected. In this regard, Gözde Turan's attempted conjoining of the spirit of Foucault's carceral complex to complementarity's homogenising influence in Africa could have purchase. Does this recast the ICC's extensive activity on that continent as an exercise of disciplinary power that could be equated with neo-imperialism? It is beyond the scope of this chapter to grapple with that inquiry. But it is hoped that, with governmentality explicitly in the mix, future scholarship may take up the challenge.

In the meantime, *vis-à-vis* the larger conceptual phenomenon of international criminal law itself, governmentality occupies its own space beyond the realm of disciplinary power, even if it happens to function alongside it. As international criminal law's utility is being questioned from both resource and transitional justice perspectives, this paper's 'neo-Foucauldian' account of it could move the discourse in new and useful directions. International criminal law, as theorised through the lens of governmentality, with its emphasis on security for vulnerable populations, aligns well with the discursive project implicit in the UN SDGs and the promotion of Responsibility to Protect.

This would represent a narrative shift in international criminal law's traditionally abridged account of itself – tired recitations of the 'individual criminal responsibility' and 'fight against impunity' shibboleths. Maxim Pensky's chapter in *Philosophical Foundations of International Criminal Law: Foundational Concepts*, "Impunity: A Philosophical Analysis", points to the need for international criminal law to expand, if not reconceive, its own foundational assumptions. Sharing this concern, Immi Tallgren speculates whether, in light of vulnerable populations suffering from large-scale demographic crises, we need a new "critical reading" of international criminal law whereby we would "open up other fronts than the 'fight against impunity'".[297]

Assuming we move on from the "fight against impunity" to security for vulnerable populations, apart from this paper's theorised Foucauldian take on international criminal law, does the discipline's existing discourse augur a positive reception for the envisioned narrative shift? Consistent

[297] Immi Tallgren, "The Durkheimian Spell of International Criminal Law?", in *Revue Interdisciplinaire d'Études Juridiques*, 2013, vol. 71, no. 2, p. 160.

with Tallgren's ponderings, there would appear to be support. The ICC's Rome Statute itself, in its Preamble, declaims that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity".[298] It then implies that one of the ICC's mandates is to remove such threats to human security ("such grave crimes threaten the peace, *security* and well-being of the world").[299]

Consistent with this, and much more than the other international criminal tribunals that preceded it, the ICC is quite victim-focused.[300] Unlike the *ad hoc* Tribunals, for example, victims actually have standing in their own right at the ICC.[301] According to the Rome Statute, the ICC must "permit [victims'] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court".[302] Victims have a right to be heard, as well as to speak: the prosecutor and judges must consider victims' interests in making a range of decisions, including whether to initiate an investigation into particular allegations and whether to bring charges.[303] Moreover, the Rome Statute provides for a Trust Fund for Victims as a tool through which the victims of crimes before the Court can be compensated for damages suffered.[304]

There is also preliminary support for this victim-centric, security-focused approach in the international criminal law literature. In her paper "The International Criminal Court as a Human Security Agent", Lauren Marie Balasco proposes that the ICC "was born from the human security community" and is considered a part of the "human security agenda".[305] But she laments that the ICC may be reluctant in embracing "its role as a human security agent" based on its tendency to "dismiss such responsibil-

298 Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Preamble (www.legal-tools.org/doc/7b9af9/) ('Rome Statute').

299 *Ibid*. (emphasis added).

300 See Gregory S. Gordon, "Toward an 'International Criminal Procedure, Due Process Aspirations and Limitations'", in *Columbia Journal of Transnational Law*, 2007, vol. 45, p. 696.

301 *Ibid*.

302 Rome Statute, Article 68(3), see *supra* note 298; Gordon, 2007, p. 696, see *supra* note 300.

303 Rome Statute, Articles 53(1)(c) and (2)(c), see *ibid.*; Gordon, 2007, p. 696, see *ibid.*

304 Rome Statute, Articles 75, 79, see *ibid.* See Peter G. Fischer, "The Victims' Trust Fund of the International Criminal Court: Formation of a Functional Reparations Scheme", in *Emory International Law Review*, 2003, vol. 17, pp. 189–90.

305 Lauren Marie Balasco, "The International Criminal Court as a Human Security Agent", in *Praxis - The Fletcher Journal of Human Security*, 2013, vol. XXVIII, p. 46.

ities as outside its purview".[306] For the Court to "ensure that its mission of achieving justice is done without diminishing the security of the very people it seeks to represent", Balasco urges "scholars and policymakers […] to take into account this [security] origin when assessing the Court's role".[307] It is hoped this chapter will make a valuable contribution in that regard.

Foucault alludes to the Treaty of Westphalia in *Security, Territory, Population*.[308] And he suggests that governmentality, conceptually predicated on beneficent exercise of State authority, is bound up in the notion of sovereignty reified in the epochal 1648 peace agreement.[309] But does the international extension of governmentality as envisaged in this chapter, plausibly germinating from the theory's genetic code, provide perhaps another glimpse of Westphalia's entropy in the modern world? If so, might this have troubled Foucault in any way? Perhaps one need only consider the time-machine hypothetical of 'human security' being proposed to the young homosexual living under the apocalyptic spectre of Nazi occupation and all its attendant criminality. One doubts the young Paul-Michel could have imagined his future philosophy being put to any better use.

306 *Ibid*.

307 *Ibid*., pp. 46-47.

308 Foucault, 2009, p. 377, see *supra* note 112.

309 *Ibid*.

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