The Ad Hoc Tribunals: A Critical Appraisal of their legacy in the 21st Century

by

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Abstract

This thesis seeks to critically appraise the use of ad hoc tribunals as the mechanism to administer justice on the international stage in the 20th century. To do so the first part of the thesis will seek to examine the existing literature relating to the concept of legitimacy and how laws earn their legitimacy, both at national and international level. It will then look at the history of the war crimes doctrine and how that would go on to form the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda respectively, before looking at the two tribunals themselves and how they developed the doctrine during their lifespan. After establishing the key offences of the ad hoc tribunal, it will then look at how these were developed into the offences that became part of the Rome Statute that created the International Criminal Court as the first permanent international criminal court. The second part of the thesis will develop a model for the future administration of justice and test the measures of legitimacy identified in the first chapter against the model to explore how in the future the maximum number of people can be protected by international criminal law.

‘The moral arc of the universe is long, and it bends towards justice’

Dr. Martin Luther King Jr[1]

Contents

[1] M Luther King jr, 'Speech given at the National Cathedral March 1968' (*Dr Martin Luther King Jr* , 31 March 1968) <https://www.si.edu/spotlight/mlk> accessed 21 January 2022.

Glossary of Terms, Abbreviations and Symbols

CED	Collins English Dictionary
ECHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
Nazi	Nationalsozialistische Deutsche Arbeiterpartei, NSDAP, or National Socialist German Workers' Party in English
NATO	North Atlantic Treaty Organisation
OED	Oxford English Dictionary
Rome Statute	Statute of the ICC
SA	Sturmabteilung known as Brownshirts
SS	Schutzstaffel
UN	United Nations
UNSC	United Nations Security Council
UNWCC	United Nations War Crimes Commission
USSR	Union of Soviet Socialist Republics
VRS	Army of Republika Srpska
YPA	Yugoslav People's Army – Jugosovenska Narodna Armija
Yugoslav Army	Vojska Jugosavije

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And finally, to my children, I hope this inspires you to reach a little further than you think is possible.

Introduction

International criminal law can be many things. It can govern anything from the hijacking of aircraft and the smuggling of drugs to the conduct of nations during times of conflict. In more recent history, it has included individual criminal responsibility covering not only leaders and elected officials but also soldiers and even ordinary citizens. These laws, at their heart, manage the relationships between states. They define how states protect their most vulnerable citizens and the relationship of citizens with their governments and with other citizens. However, law and justice are two very different distinct concepts. Justice speaks more of the concept of fairness, which is usually directed towards the victim of a crime or families left behind. This includes fairness of process and the law under which offenders are prosecuted. The balance between legality and justice is never felt more acutely than in international criminal law, where the conduct of some of the accused encompasses the worst behaviour imaginable. In the twentieth century, the barbaric nature of man was held up to the spotlight, from the fields of Passchendaele and the Somme to the death chambers of Sobibor and Auschwitz-Birkenau, through the killing fields of Cambodia and townships of Rwanda to the enclaves of Srebrenica; when given the opportunity to demonstrate their darkest side man has too often met the challenge with depravity. Yet even in the darkest of times there is light, where each instance of cruelty has been met by others seeking to condemn such behaviour and bring justice to the victims. This pursuit of justice in the twentieth century saw unprecedented developments in the sphere of international criminal law. It was unprecedented because the world had never seen conflict on such a global scale, conflict that meant innocent civilians became involved in a way that they had not before. World War One was the first war of its kind, i.e. a global conflict that threatened the peace and security of so many millions of people. It was the mishandling of the administration of justice at the end of World War One that create the conditions that led to the outbreak of World War Two and this time it was the destruction of humanity as we knew it, that was at threat. It was not just the sheer scale of the conflict that was so shocking, but the lengths that governments would go to in order to destroy those they saw as their enemies, and it was during these darkest days that humanity looked at itself and said, ‘Never Again’.

This thesis will examine the key characteristics of law since the beginning of written records, through the prominent theories of the last two millennium. It will look at the features a law must contain in order to bestow upon it legitimacy from the prospective of each of the theories, before outlining a model for the writer's theory of legitimacy. The thesis will then trace the history of international criminal law from its first trials in the Holy Roman Empire to the creation of a permanent International Criminal Court, assessing the developments and highlighting the difficulties that have been encountered with each new tribunal or court; focusing on the core offences that were prosecuted at Nuremberg through to those finally codified in the Rome Statute of the International Criminal Court 2002.[2] These core crimes are defined as comprising the offences where individual responsibility for the crime arises directly from international law, thereby removing the necessity for legislation to exist at a national level. These crimes that are considered to be so heinous in nature that the responsibility lies with the global community to ensure they are punished. It will look at whether the institutions now in place support the development of international criminal law and promote peace, security and, above all, justice, or whether there is in fact a need for the re-organisation of the administration of international criminal law with the aim of ensuring humanity is never again dragged into global conflict. It will also examine the development of the key offences under the doctrine of *crimes of war* and how these have embraced or rejected the key features of legitimacy. It will trace the developments through the creation of ad hoc tribunals and why there was a need for the creation of a permanent international criminal court. In addition, it will look at the nature of the relationship of the permanent court and states and other international bodies, and whether these relationships help or hinder the pursuit of justice. Finally, it will seek to develop and evaluate a model for the continued development of the doctrine. The model outlined will be examined through the lens of existing legal theory and the writer's own theory of legitimacy. It must be recognised that the model, as with the doctrine itself, has not been developed in a vacuum and is subject to influences that are not solely of a legal nature. Rose-tinted spectacles cannot be used to

[2] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

gloss over the important and often crippling difficulties that the doctrine faces. The model will seek to address these difficulties and look at ideas for managing or overcoming them.

Chapter One - Identification of values to identify legitimate practices within international criminal justice

What makes a law legitimate? Why do the majority of people choose to follow laws even when they may go against their core beliefs or their own interests? When looking at society as a complex melting pot of ideas, beliefs, and norms why have so many communities come to the same conclusions as to what is and is not acceptable behaviour for its citizens or subjects? At a national level it may be clear what a punishment will be for an infraction of a law, but international law has not always had a clearly codified set of rules so what, if anything, stopped the countries from invading at whim? While war has been a constant, the integrity of borders is often respected. There must have been a reason. Thomas M Franck (1931-2009) in his article 'Legitimacy in the International System' published in the American Journal of International Law posed a question. It is this question that the first chapter of the thesis in part seeks to answer, '*Why should rules unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?*'[3] In order to answer the question posed it is imperative that this chapter begins by explaining international law as a concept.

International law can encompass both the interaction of states, and interactions of individuals, whether or not these interaction cross state borders.[4] International criminal law prohibits atrocities and makes perpetrators criminally accountable for such conduct, and although it usually governs their conduct during war time, it is not limited to times of recognised conflict. It is there for times when national law is unwilling or unable to administer criminal justice. However, despite several attempts by the global community to enforce such accountability through the creation of ad hoc tribunals and even the setting up of a permanent international criminal court, the international community has floundered, and atrocities have continued to occur, with their perpetrators remaining unpunished. These failures are in

[3] TM Franck, 'Legitimacy in the International System ' [1988] 82(4) The American Journal of International Law 707.

[4] The notion of interactions between individuals that do not cross state borders being under the jurisdiction of international law will be address later in this thesis, in the chapter regarding the International Criminal Tribunal for Rwanda.

part due to the voluntary nature of international criminal law, where veto and political bias leads to non-intervention and even denial of atrocities. To be a truly functioning legitimate international criminal legal system it must incorporate the entire world and all the state players, whether formally recognised or not. It must be free from, or at the very least, protected against political bias as far as possible.

Since time immemorial the legal community together with philosophers of the legal and political persuasion have debated the true nature of a legal system, from the definition of an individual law to how laws interact with the state and the individual citizens. This chapter will look at the philosophical debate that has occurred looking firstly at what constitutes a law, together with what their purpose is, how these come together to form a legal system and finally how laws achieve legitimacy.

J.L. Brierly (1881 – 1955) speculated in his 1944 work 'The Outlook for International Law'[5] that jurisprudence in the mid-nineteen forties regarded international law as '*no more than an attorney's mantle artfully displayed on the shoulders of arbitrary power and a decorous name for the convenience of the chancelleries'*.[6] Franck takes issue with this description of the jurisprudential value, or lack of it speculated by Brierly. He argues that positivist legal theorists can and will argue that international law is not law as it cannot meet the standards set for a law that the positivists have created, but their arguments Franck believes, while irrefutable, are completely irrelevant. He goes further to say that he believes '*that international law is the best place to study some of the fundamental teleological issues that arise not only in the international, but also the national systems'*.[7]

There are two ways in which laws can be studied, they can be examined by looking purely at the form that a law takes, looking at the way a law is created and the body that creates it, or it can be examined from a teleological[8] position, whereby the substance and purpose of a law are looked at, rather than how the law is created, i.e., we look at the why.

[5] JL Brierly, The Outlook for International Law (OUP 1944) 13.

[6] Ibid.

[7] TM Franck, 'Legitimacy in the International System ' [1988] 82(4) The American Journal of International Law 706.

[8] Relating to or involving the explanation of phenomena in terms of the purpose they serve rather than of the cause by which they arise.

What are laws and what are they used for?

Despite being a word in common usage, the word *law* is not clearly defined and understood; in that there is no singular definition upon which all lawyers agree. A widely accepted definition appears in the Oxford English Dictionary,[9] here it defines law as '*the body or rules whether proceeding from formal enactment or from custom which a particular state or community recognised as binding on its members or subjects'*[10]. Drawing from this definition, a singular law is a recognised rule; however, this definition does not require a need for formal enactment and states that laws can be developed purely from customary behaviour. Using this definition, a law would not need to satisfy key features of jurisprudence that positivists claim to be imperative. It could be argued that the OED definition, therefore, is looking at law from a teleological position, however it does not mention the substance of the law, the law could be profoundly unjust or purely nonsense and still be recognised as a law. It also recognises that while a law can be derived from both a state and/or a community, it is crucial that the law is recognised as binding on its members, although it does not state by whom it must be recognised, for example, can a claim of non-recognition negate the need to follow a law? The key feature of the law from the point of the OED therefore is that the law is recognised, not whether it has been enacted in a specific way or holds specific values.

The definition given in the Oxford Dictionary of Law is slightly different. There law is defined as *'[t]he enforceable body of rules that govern any society'*.[11] This definition highlights the enforceability of the set of rules, and it removes the need for recognition by the society. It does not mention by what means the law should be enforced and by whom.

The Collins English Dictionary[12] has yet another different definition of law, stating that law is '*a rule or set of rules, enforceable by the courts, regulating the government of a state, the relationship between the organs of government and the subjects of the state, and the relationship or conduct of subjects*

[9] Hereafter referred to as the OED.
[10] Oxford University Press, 'Law' (*Dictionary* , 1 September 2021) <https://www.oed.com/view/Entry/106405> accessed 31 January 2022.
[11] Oxford University Press, Oxford Dictionary of Law (6TH edn, OUP 2006).
[12] Collins English Dictionary hereafter CED.

towards each other'.[13] This definition differs from those given in both of the Oxford dictionaries in that the Collins definition requires the law to be enforceable by a court and also limits the law as being within a state,[14] either regulating the behaviour of the government between the organs of the state and its subjects or between the subjects themselves. The Oxford Dictionary of Law definition requires enforceability but fails to note who the law should be enforced by; this could lead to laws being recognised that have been put forward by dictators or corrupt governments with no recourse to courts or justice in any way. Meanwhile the CED recognises it is the courts that regulate laws but fails to mention how laws would work in countries where there is no separation of government and court system, leaving the system open to abuse by an unrestrained leader. Most importantly, however, the CED definition appears to totally disregard international law, failing as it does to mention the conduct between states or the conduct of individuals who are not subjects of the state. It is imperative for this thesis that the definition of law that is relied upon encompasses an aspect of international law. It must therefore recognise the relationship between states and also individuals as global citizens rather than just citizens of individual countries. Later in this chapter, a definition of law will be put forward that encompasses both national and international law, but first, it is important to look at what the legal community defines as international law at present and more importantly for this thesis the definition of international criminal law that I am going to rely upon in later chapters.

What is international law?

The term international law was first used by Jeremy Bentham in 1789[15], and is the body of law concerned with the rules and principles that govern the activities and interactions between states and other bodies that govern. It is important to recognise the development of non-state parties, for example, international organisations including the United Nations that have been delegated power by governments and also to look at the role of non-governmental organisations (NGOs).

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[13] Collins, 'Law' (*English Dictionary*) <https://www.collinsdictionary.com/dictionary/english/law?showCookiePolicy=true> accessed 31 January 2022.

[14] The OED gives the definition of a state as '*A community of people living in a defined territory and organised under its own government; a commonwealth, a nation.'*.

[15] John Grant, International Law Essentials (1st edn, Edinburgh University Press 2010) 1.

The Oxford Dictionary of Law defines international law as

> '[t]he system of law regulating the interrelationship of sovereign states and their rights and duties with regard to one another. In addition, certain international organisations (such as the United Nations), companies, and sometimes individuals (e.g. in the sphere of human rights) may have rights or duties under international law. International law deals with such matters as the formation and recognition of states, acquisition of territory, war, the law of the sea and of space, treaties, treatment of aliens, human rights, international crimes, and international judicial settlement of disputes. The usual sources of international law are (1) conventions and treaties (2) international custom, in so far as this is evidence of a general practice of behaviour accepted as legally binding; (3) the general principles of law recognised by civilized nations. International law is also known as public international law to distinguish it from private international law, which does not deal with relationships between states'.[16]

It is important to note from this definition that international law may not have been specifically codified in the same way as a law at national level, which makes it especially difficult for international law to comply with any strict definition of law. The OED definition expands the definition by covering both a state and a community; this could, therefore, include a wider community, including a global community. The use of the words *members* or *subjects* allows for the definition to cover both subjects of a recognised country and also members of a group, for example, *member states* who have ratified conventions and treaties, it could also include people who are essentially stateless. The OED definition also recognises not only enacted laws but also customs. This is especially important when looking at international law when there has often been argument as to when and/or whether a custom has become law. The only limit that the OED definition puts on the legality of the law is that the law must be recognised as binding by the members and/or subjects.

Unlike national law, international law has not always been codified, this is especially true of international criminal law and especially during the first of the modern attempts to prosecute perpetrators of offences under the umbrella of *crimes of war*. The law must, therefore, be able to be grounded in a tradition or philosophy to demonstrate that it has become part of the legal landscape. This is especially important given the fact that the states of the world do not all share a common legal system, and, in some cases, states have systems that conflict with the norms that are prevalent in other states.

[16] Oxford University Press, Oxford Dictionary of Law (6th edn, OUP 2006).

This is particularly true of laws based in highly religious areas of the world. International law must therefore resonate with differing cultures and beliefs. International law is made up of '*conventions, treaties, [customs] and standards'*,[17] many of which states have signed up to or codified to differing degrees, there must therefore be some grounding in commonly held norms. While international law itself concentrates on promoting development both socially and economically,[18] international criminal law aims to promote peace and security, this means that in some cases it must supersede national law to prevent conflict or bring about peace, it is at these times that international criminal law can find itself needing to defend its legitimacy.

The definition of law that this thesis will use tries to encompass both the changing nature of international law and also the complex nature of international relations is as follows: -

> A law is a rule or custom whether formally enacted or not, recognised by a majority of individuals within a state or between states themselves, or between organs of the government, that has the ability to be tried before a recognised fair court, tribunal, or other judicial organ. It is not imperative that the individual themselves recognises the law but that a reasonable person in the same situation would recognise that the conduct would likely infringe upon a right of another individual or inhibit the function of a state or government.

This definition recognises that while laws are not always formally enacted they must be recognised by a majority. This also means that laws can develop as societal norms change. The nature of international criminal law as it stands means that it is almost exclusively used as punishment after the fact, rather than prevention and the definition put forward focuses on the ability of some form of court to recognise the conduct as infringing upon a right or function. The punishments handed down by the courts after a guilty verdict during the first war crimes trials was often the harshest punishment available, that of death; in the modern era, post-cold war and the development of human rights, these punishments are now more symbolic in nature. This can be seen by looking at the length of sentence applied by the International Criminal Tribunal for the Former Yugoslavia[19] and the International Criminal Tribunal

[17] United Nations, 'International Law and Justice' (*United Nations Global Issues*, 1 January 1999) <https://www.un.org/en/global-issues/international-law-and-justice> accessed 31 January 2022.
[18] Ibid.
[19] Hereafter known as the ICTY.

for Rwanda,[20] Crimes against Humanity for example, an offence that can include murder and torture carried an average sentence at the ICTY of thirteen years and at the ICTR of only nine years.[21] Even for the crime of Genocide the median sentence at the ICTR was only twenty years.[22] The countries that made up the Former Yugoslavia, and Rwanda have all abolished the death penalty,[23] and this is true of one hundred and six countries of the one hundred and ninety-three recognised UN member states, seven countries allow the death penalty in extreme circumstances, including crimes committed in war time. Twenty-nine countries have the death penalty but have not executed anyone for at least ten years or have an official commitment not to execute and fifty-six countries have the death penalty and have carried out executions or have no official declaration not to execute.[24] The international criminal court[25] has ruled out the availability of the death sentence, even for the worse of crimes (but the development of ICC will be addressed in a later chapter).

Now that is it is clear which definition of law the thesis is using it can be brought back to Franck's original question, if it is not the threat of arms or sentences that deter would-be perpetrators, what is it that makes a subject or member state recognise a law and act within its boundaries?

Academic lawyers and legal anthropologists have attempted to build a definitive answer to the questions of what a law is and how it should be defined, by instead of determining its etymological definition, looking at its teleological purpose. This means they looked at the purpose of the law either at an individual or at a societal level and then defined that term as 'legal'. E.Adamson Hoebel (1906-1993) gave his attempt at definition in his seminal work, 'The Law of Primitive Man' in 1954, stating that *'[A] social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the*

[20] Hereafter known as the ICTR.

[21] B Hola and others, 'International Sentencing Facts and Figures ' [2011] 0(9) Journal of International Criminal Justice <https://www.legal-tools.org/doc/4ba8ff/pdf/> accessed 3 February 2022.

[22] Ibid.

[23] Justiceinfo.net , 'Rwanda/Justice - The Death Penalty abolished in Rwanda' (*JusticeInfoNet*, 20 July 2007) <https://www.justiceinfo.net/en/18942-en-en-300707-rwandajustice-the-death-penalty-abolished-in-rwanda97099709.html> accessed 3 February 2022.

[24] BBC news - reality check team, 'Death Penalty: How many countries still have it?' (*BBC News* , 11 December 2020) <https://www.bbc.co.uk/news/world-45835584> accessed 3 February 2022.

[25] Hereafter known as the ICC.

application of physical force by an individual or group possessing the socially recognised privilege of so acting'.[26]

This definition implies that a rule is only legal if there is the threat of physical force behind it. It draws directly from 'The Prince'[27] by Machiavelli (1469-1527) where Machiavelli stated that '*The chief foundations of all states, new as well as old or composite are good laws and good arms; and there cannot be good laws where the state is not well armed, it follows that where they are well armed they have good laws*'.[28]

Adamson Hoebel's definition also only justifies the power of application of physical force by an individual or group or threat thereof, as lawful if the individual or group has the recognised *privilege* of applying such force. In most countries the application of the law by the police is done through a system that does not recognise the separation of the government or government agency and the police officers. However, in the United Kingdom the police operate under a system whereby they garner authority for their actions by exercising their powers under imposed limits and also by being accountable for their actions. Adamson Hoebel's definition bears a clear resemblance to the British tradition that the police force only has the power to police the country with the consent of the British population. This tradition known as the *Peelian Principle*,[29] from the founder of the British Police Force Robert Peel, is not recognised in many other countries. However, the then Home Secretary, Theresa May, in 2012, released a response to a freedom of information request asking for the Government to explain the meaning of policing by consent. In the release Ms May draws from the 1956 work of Charles Reith, New Study of Police History.[30] In this work Reith states that policing by consent is the philosophy of policing that is *'[u]nique in history and throughout the world because it derived not from fear but almost exclusively*

[26] E Adamson-Hoebel, The Law of Primitive Man - A Study in Comparative Legal Dynamics (Harvard University Press 2009) 28.
[27] N Machiavelli, The Prince (Penguin Books 1981).
[28] Ibid.
[29] College of Policing , 'The Code of Ethics - Reading List ' (*College of Policing* , July 2014) <https://assets.college.police.uk/s3fs-public/2021-02/code_of_ethics_readinglist.pdf> accessed 3 February 2022.
[30] C Reith, New Study of Police History (1st edn, Oliver & Boyd 1956).

from public co-operation with the police, induced by them designed by behaviour that secures and maintains for them the approval, respect and affection from the public'. [31]However, it must be noted that even this definition of policing by consent highlights that an individual cannot withdraw individual consent either from the police or from the law itself. It could, therefore, be argued that the notion of policing by consent is spurious. In fact, most countries do not have a concept of policing by consent. Even within the UK the concept is not equally applied to all citizens and many ethnic groups within the UK would not subscribe to this notion. For example, in response to the publication of the Macpherson Report, an independent inquiry into the killing of Stephen Lawrence in a racial motivated murder in 1993, and during the launch of a new drive to encourage forces to be more representative of the communities they represent, Chief Constable of the Suffolk Constabulary, Gareth Wilson admitted that British Policing has been, and is still institutionally racist.[32] It is unlikely that these minority groups would feel represented by the police force, or that their consent was sought, let alone agreed. The truth is that if consent actually existed there would be the ability to opt-out however, this is not the case. The OED definition of law should therefore more likely be caveated with that law is as recognised by the majority as binding rather than recognised as binding by the individual member or subject, as the definition used by this thesis clearly does.

There are flaws in all of the definitions, whether attempting to define law as a concrete thing or as teleological concept of the body '*legal*', neither is able to fulfil the exact definition required by international criminal law. This is due in part to the intense political nature of international law; especially international criminal law and it is clear that even the definition given in this work may not satisfy all legal philosophers. But by trying to be all things to all members, international criminal law runs the risk of being unenforceable in times of need or worse, so politically biased that the waters are muddied forever. The developments of international criminal law through the ages will be appraised in

[31] UK Government , 'Definition of Policing by Consent ' (*FOI Release* , 10 December 2012) <https://www.gov.uk/government/publications/policing-by-consent> accessed 3 February 2022.

[32] L Dearden, 'British Police 'still institutionally racist', senior officer admits as new recruitment strategy launched' (*Independent* , 12 October 2018) <https://www.independent.co.uk/news/uk/crime/police-racist-uk-recruitment-bame-institutionally-npcc-strategy-women-disability-a8581646.html> accessed 3 February 2022.

chapter two of this thesis, in the meantime, this chapter is going to concentrate now on philosophical developments of jurisprudence, from the point of view of the international criminal law perspective.

Adamson Hoebel's work on what is legal suggested that arms were imperative to the application of a legal social norm, as mentioned this notion is taken from Machiavelli. Niccolo Machiavelli, who is often described as the father of political science, has been demonised by scholars for his work, especially in 'The Prince',[33]where he sought to justify the killing of innocents and other behaviour that would commonly be seen as immoral. This has meant that he has been somewhat marginalised by modern scholars. His work, however, greatly influenced not only historical development in law and politics but also science. Noted admirers of Machiavelli include figures as diverse as Francis Bacon (1561-1626) and John Adams (1735-1826).

Both Adamson Hoebel's and Machiavelli's assertions, however, are troubling to the case of legitimising international criminal law. Since the rise of the human rights movement,[34] beginning with the abolition of slavery to more modern movements including the *Black Lives Matter* movement, international criminal law has lost its strongest '*arm*'. The threat of physical harm is no longer an avenue open to the court, so it can also no longer rely on hard labour or capital punishment as a way by which to punish those found guilty of an offence. It was clear at the Nuremberg trials after World War Two that those found guilty of the worst of crimes could face the hangman's noose. In fact, of the twenty-four[35]

[33] N Machiavelli, The Prince (Penguin Books 1981).

[34] The movement to ensure that every human being is entitled to a number of rights and freedoms. The first Universal Declaration of Human Rights was made in 1948 and spells out the main rights that must be protected However it is not binding in international law.

[35] The 24 defendants indicted at Nuremberg were; Martin Bormann (tried in absentia) – Guilty of war crimes and crimes against humanity – sentenced to death, Karl Donitz – Guilty of Planning, Initiating and waging wars of aggression and other crimes against peace – sentenced 10 years, Hans Frank – Guilty of war crimes and crimes against humanity – sentenced to death, Wilhelm Frick – Guilty of Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity – sentenced to death, Hans Fritzche – Acquitted, Walther Funk - Guilty of Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity – sentence to life imprisonment, Hermann Goring - Guilty of Participation in a common plan or conspiracy for the accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity – sentenced to death, Rudolf Hess - Guilty of Participation in a common plan or conspiracy for the accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace – Life imprisonment, Alfred Jodl- Guilty of Participation in a common plan or conspiracy for the accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity – sentenced to death, Ernst Kaltenbrunner - war crimes and crime against humanity – sentenced to death, Wilhelm Keitel - Guilty of Participation in a common plan or conspiracy for the

originally indicted, nineteen were found guilty, twelve of those nineteen were sentenced to death. Ten were hanged, one was tried in absentia (and it was later discovered that he had died soon after the end of the war) and one committed suicide after the verdict was laid down. (Of the other five indictedes, three were found not guilty, one lacked mental and physical capacity to stand trial and one committed suicide before the trial).[36] The question that must be asked now is does the administration of international criminal law have any arms by which to enforce its decisions? At present, there is no global police force or army, and the international courts rely on their members to enforce any sanctions applied by the courts or tribunals; the courts have very little power to chastise the members should they not. It is, of course, important to note that the theories put forward by Machiavelli are political science theories for a very different era and even Hoebel's approach was written in 1950, more than seventy years ago, when the human rights movement was in its embryonic stages. Despite the Universal Declaration of Human Rights having been signed in 1948, the movement has since developed to include international covenants that are binding upon those who have ratified them. These include the 1966 International Covenant on Civil and Political Rights[37] and the International Covenant on Economic, Social and Cultural Rights.[38] In 1977, the Human Rights Commission was set up to hear complaints

accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity – sentenced to death, Gustav Krupp von Bohlen und Halbach – no decision (indicted by mistake, Allies meant to indict his son Alfried), Robert Lay – no decision (Committed Suicide before trial), Baron Konstanin von Neurath - Guilty of Participation in a common plan or conspiracy for the accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity- sentenced to 15 years, Franz von Papen – Acquitted, Erich Raeder Guilty of Participation in a common plan or conspiracy for the accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes – sentenced to life imprisonment, Joachim von Ribbentrop - Guilty of Participation in a common plan or conspiracy for the accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity – sentenced to death, Alfred Rosenberg - Guilty of Participation in a common plan or conspiracy for the accomplishment of crimes against peace, Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity- sentenced to death, Fritz Sauckel – Guilty of war crimes and crimes against humanity- sentenced to death, Dr Hjalmar Schacht – acquitted, Baldur von Schirach – Guilty of crimes against humanity – sentenced to 20 years imprisonment, Arthur Syess-Inquart- Guilty of Planning, Initiating and waging wars of aggression and other crimes against peace, war crimes and crime against humanity – sentenced to death, Albert Speer – Guilty of war crimes and crimes against humanity – sentenced to 20 year imprisonment and finally, Julius Streicher – Guilty of crimes against humanity – sentenced to death.

[36] The Editors of Encyclopaedia Britannica, 'Nuremberg trials' (*Encyclopaedia Britannica*, 20 July 1998) <https://www.britannica.com/event/Nurnberg-trials> accessed 3 February 2022.

[37] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[38] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

from individuals regarding breaches of those covenants, this has subsequently developed into the UN Human Rights Council.[39] From the foundations of these developments there is a clear movement towards ingraining universal rights that reflect basic human rights principles. These principles and how they relate to core legal theory will be examined further later in chapter.

None of the definitions of law so far have mentioned morality. Law does, however, often seems to mirror what is morally accepted or expected in a society. The OED defines moral as *'[o]f relating to human character or behaviour considered as good or bad; of or relating to the distinction between right and wrong, or good and evil, in relation to actions, desires or character of responsible human beings'*.[40] Law is a way of codifying the moral compass of society, however these morals develop and change over time. The human rights movement highlights these changes in moral concepts, in recent years the changes in moral boundaries have been further highlighted by high profile human and civil rights movements including '*Me Too'* and '*Black Lives Matter'*. If moral beliefs can shift over time, as they so obviously can, are there core beliefs that do not change, upon which a core set of laws could be built? The rights that are spelt out in the United Nations Universal Declaration of Human Rights[41] signed in 1948 range from absolute rights that cannot be infringed upon under any circumstances to qualified rights that can be balanced against a number of factors to determine when and how they can be infringed. These latter rights are not specifically protected by the declaration but rather by subsequent developments of international humanitarian law. However, the point to highlight is that by acknowledging absolute rights and fundamental human rights the law itself is accepting at least some basis in morality. If a law is a rule that is accepted as binding upon the majority and is based at least in part on commonly held beliefs in certain aspects of life or morality coming from differing cultures and traditions, upon what do these laws base their legitimacy? In order to answer this question, it is essential to be clear about the definition of the term '*legitimacy*' and how legitimacy is defined in international criminal law.

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[39] United Nations, 'Welcome to the Human Rights Council ' (*United Nations Human Rights Council* , 15 March 2006) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> accessed 3 February 2022.

[40] Oxford University Press, 'Moral ' (*Oxford English Dictionary* , 1 December 2002) <https://www.oed.com/view/Entry/122086> accessed 3 February 2022.

[41] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

Etymology of the word Legitimate

The etymology of the word legitimate stems from the mediaeval Latin word *legitimatus.* Legitimatus is the past participle of the verb '*legitimare*' meaning '*make lawful, declare to be lawful'*.[42] The term, however, has developed to embrace a number of meanings[43] and it is, therefore, important to distinguish between the word *legitimacy* and the concept or concepts that it encompasses. This thesis is concerned solely with the concept of legal legitimacy defined as '*conforming to the law or to rules'*[44] rather than the more common usage of the word defined as '*able to be defined with logic or justification, valid'*.[45] The concept of legal legitimacy can be subdivided into two distinct elements: procedural and substantive legitimacy.

This concept harks back again to Franck. The procedural legitimacy relates to the codification of the law itself. It looks at the body that creates the law and the administration of the law. It does not look at the law from a teleological position and draws its legitimacy purely from the process and not the substance of the law itself. Therefore, if the correct process is followed an '*unjust*' or 'i*mmoral*' law could be found to be wholly legitimate from a procedural point of view. Procedural legitimacy at international criminal law level is often the most highly criticised area of legitimacy, especially when a court is relying on customary law, rather than statute-based law, as it fails even the most basic of tests. This is because international law does not have a single spearhead, or ruler to lay down rules through which laws are to be made. At both Nuremberg and the ad hoc tribunals some of the offences laid out in the charters had not previously been codified. It is also true to say, that even when the offence has been previously codified defendants often question the legitimacy of the court itself to apply the statutes, this is due to the fact the procedural law also looks at the body that is applying the law and whether the

[42] Online Etymology Dictionary , 'Legitimate' (*Online Etymology Dictionary* , 25 October 2017) <https://www.etymonline.com/word/legitimate> accessed 3 February 2022.
[43] Oxford University Press, 'Legitimate' (*Oxford English Dictionary* , 1 March 2016) <https://www.oed.com/view/Entry/107112?rskey=f3mdzv&result=1&isAdvanced=false#eid> accessed 3 February 2022.

[44] Ibid 41.
[45] Ibid 41.

body is acting beyond the scope of its powers (*ultra vires*), or even if it possesses the power to apply the law in the first place.

Substantive legitimacy draws from the purpose of the law and legitimacy refers to certain substantive norms (notions of what is right and wrong, fair and unfair, just and unjust) that should be treated as binding within legal proceedings. It will look at the reason or situation that the law was created to address or prevent. To do this is imperative that the purpose of the law is clear.

Purpose of Law

Laws have a number of purposes; they not only shape the behaviour of the citizens ruled by them, laws also regulate relationships between citizens. Furthermore, they regulate the relationship of the citizens to the state. This can be seen in both civil and criminal law. It can also be contended that law creates and regulates preferred practices designed to influence behaviours, often through the use of coercive force. Finally, it can be said that laws protect specific members of society, especially those who are unable to protect themselves, for example, children or those who are vulnerable because of physical or mental illnesses. All countries regardless of their political or religious persuasion have a plethora of laws, many of which they share. Some laws must therefore stem from common thought or behaviour. It may be that there are key common values that are shared by all societies. When examining the legitimacy of the law, it is important to look at the original purpose the creators of the law were trying to achieve. At international criminal law level laws are often created reactively, after an event where the previous canon of laws has been superseded by events or developments in warfare. The purpose, therefore, would be to prevent such events recurring. The question of purpose is therefore two-fold, what was the original purpose of the law and is it still relevant to current conditions?

Well drafted laws will allow for development and also for interpretation by the courts, while not being so open ended that their purpose can be easily manipulated. The law may establish a new standard of behaviour or introduce a protection of a liberty or right. It is especially important to ensure that the purpose of the law is clear at international law level as it may have to incorporate a number of differing traditions that may not have the same established standards. Mary O'Connell wrote in her book 'The Power and Purpose of International Law' that *'[l]aw exists wherever human beings strive to live*

together in peace, and this is true of the international community as of any national or local community'.[46] This is especially true since the development of fast travel routes by planes and cars. Communities that were previously cut off from interactions with other communities or cultures are now exposed to them. Differences between groups will be highlighted and may lead to confrontations.

While international criminal law seeks to promote peace, it comes to the forefront in times of conflict. Dutch scholar Hugo Grotius (1538 – 1645) wrote extensively on the law of war. Grotius was a politician who led a colourful life. Born in Delft, Netherlands, Grotius was exceptional even from childhood, it was during the 1620s that he wrote his seminal work 'On the Law of War and Peace'.[47] He wrote extensively on the definition of war and whether any war is just. Taking his cue from Cicero who had said '*it is unnatural to take from another to enrich oneself'*.[48] Grotius believed war, therefore, was not a selfish act of empowerment of a nation against others but for the protection and promotion of society and its citizens. To analyse what standards should be established as key, legal scholars throughout history have discussed human nature and how it can be defined. Through establishing key aspects of human nature, it is possible to analyse standards that society would recognise as imperative to peaceful succession of power and avoidance of conflict. It is the entity that wields power that must be recognised. Therefore, power must have been obtained in the right manner, either through a democracy or through the just seizure of power. It was, he wrote, quoting Cicero again '*a villainous act for one man to lay an ambush for another, because nature has founded a king of relation between us'*.[49] Other legal scholars were contemporaneously writing about the true nature of humanity. Believing that by recognising the true basis of human nature, and applying legal theory to it, a legal system could be legitimised, and those key features of legitimacy could be identified. The English philosopher, Thomas Hobbes (1588-1679), spoke of an inherently selfish human nature[50] and argued for the complete removal of religion from politics and thus from the creation of law. He argued that citizens should give their complete obedience to an unaccountable sovereign. Otherwise, what awaits is a state of nature that closely

[46] ME O'Connell, The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement (1 edn, OUP 2008) 20.
[47] Neff SC (ed), *Hugo Grotius on the Law of War and Peace: Student Edition* (Cambridge University Press 2012).
[48] Ibid.
[49] Ibid.
[50] T Hobbes, Leviathan (OUP 1996).

resembles civil war. Born in the year of the Spanish Armarda, Hobbes lived until the age of 91, he studied at Oxford but only through the use of scholarships and a wealthy uncle. He was able to enter into wealthy society through tutoring well off families, initially the Cavendishes but he would later tutor King Charles II. During the English Civil Wars that would eventually lead to the restoration of the monarchy, Hobbes was forced to flee to France, where he met prominent European thinkers including Decartes, Mersenne and Gassendi. Even after his return to England his security was an issue, his critical approach to law and politics removing religion angered powerful religious figures and fearing for his safety he is reported to have burnt many of his papers. Despite this some of his papers have survived and it is through his extensive writings he contributed some of the basic concepts that the foundations of the realist traditions are built upon. The first being that humans are by nature egoistic, and that politics is rooted in the struggle for power. Hobbes believed in the anarchic state of nature, and he described life as '*nasty, brutish and short'*. This is, he believed, because humans who are not governed are motivated by competition for goods and food and they compete and invade each other for gain.

John Locke (1632-1704), whilst agreeing that it was human nature to be selfish, believed that human nature was equally characterised by tolerance and reason.[51] Accordingly, to Locke, law had a role to play in regulating behaviour to counteract this selfishness and build upon reason and tolerance. A key feature of regulating the behaviour in many countries is the formation of the government and this is often a long-established tradition that differs from nation to nation. Younger nations, however, such as the United States of America, have had to put together a clear process as to how their own government will be formed. In order to lend legitimacy to the government when it is eventually formed the founding members, or in America's case the founding fathers, must submit to a process that is contemporaneously believed to be legitimate.

When the states that originally formed the United States of America agreed to join together, they signed the Declaration of Independence. Traditionally celebrated by Americans on the 4th of July, the declaration was actually signed on 2nd August 1776. The declaration was signed by 56 of the

[51] The Gutenberg Project, 'Two Treatises of Government by John Locke ' (*The Gutenberg Project*, 22 April 2003) <https://www.gutenberg.org/files/7370/old/trgov10h.htm> accessed 3 February 2022.

representatives of the General Congress of the United States of America, including Benjamin Franklin and Thomas Jefferson, and it set up the country known now as the United States of America [the USA]. It states that *'[w]e hold] these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights Governments are instituted among Men, deriving their just powers from the consent to be governed'*.[52]

Liberty in the legal sense is that a citizen has the right to be self-governing and democracy allows for the self-governing citizens to make group decisions, by taking the opinion of the majority[53] at regular elections. In a democracy, liberty is the fundamental right of all citizens to ensure that citizens must at some point agree to laws that may not be in their own best interest i.e. to protect their own rights and securities, they must respect those of others. '*Deriving their just powers from the consent to be governed*' is a clear message to the defeated monarch, King George III of the United Kingdom, whose rule was overthrown during the American War of Independence, following a period known as the American Enlightenment. As with many countries previously ruled by a foreign power it was the application of taxes without the colonies' power to object that caused the schism.

Earlier it was argued that for a law to be enforceable there must be some degree of coercive force in order to police those who do not obey the laws,[54] legitimacy at national level is often cited to exist because a citizen feels an obligation to observe the law, if that is not because of the threat of coercive force what else could compel a citizen to abide by a law that may even be at their own detriment. An element of consent to the application of the law, through voting for example, can be seen as giving consent to the government applying laws, even if they go against the individual interests of the citizen. Academic lawyer, Alan Hyde stated in his article, 'A critique of Weber's Economy and Society: An

[52] The National Archives , 'Declaration of Independence : A Transcription ' (*America's Founding Documents* , 1 January 2008) <https://www.archives.gov/founding-docs/declaration-transcript> accessed 3 February 2022.
[53] In a simple sense, dependent on the voting regulations of the country or state.
[54] Hoebel and Machevelli.

Outline of interpretive Sociology',[55] *'[it has never] been demonstrated empirically that a subject obeys the sovereign's command, solely or even in part, because of a belief in the legitimacy of the process'*.[56] It is, however, empirically demonstrated that laws are obeyed by the majority of citizens. They, therefore, must be obeyed due to some factor or a combination of factors which may include elements not related to a sense of their legitimacy – such as fear of the consequences of being punished, for example loss of liberty or freedoms. This could be shown by citizens in a country obeying laws that have been put in place by a dictator for example, who may not have abided by common features of legitimacy to enact the law. Or it could be because for most people the thought of committing an illegal act goes against their character – an inherent goodness for example.

The behaviour of citizens is linked closely to the government. To examine whether a citizen recognises a law it is first important to analyse what a citizen is and how their behaviour is affected by the form of governance under which they are governed. In the twentieth and twenty first centuries the only form of government that is generally recognised as fair and effective is that of democracy. Democracy comes from the ancient Greek *demkratia*, from *demos* meaning 'the people' and *kratos* 'rule'; in short it means rule by the people.[57] However, in ancient Rome Plato talks about the dangers of democracy and also its limitations, believing that democracy is too susceptible to demagoguery, instead favouring an aristocracy.[58] The dangers of demagoguery have been thrown into sharp focus recently by the 2020 American Election. 45th President Donald J Trump sought to invalidate the results of the election that he had lost. A demagogue seeks to obtain or cement power by promoting politics of division, they are often nationalist and isolationist. The politics of the demagogue gain popularity by creating a situation where certain sections of society, often the ruling parties are seen as the elites, they attack the media and are known to promote conspiracy theories against their opposition. During the 6th of January 2021 insurrection attempt at the US Capitol, the marauding mobs shouted, '*Fuck the mainstream media'* and

[55] A Hyde, A Critique of Weber's Economy and Society: A Outline of interpretive Sociology (Bedminster Press 1968).
[56]TM Franck, 'Why a Quest for Legitimacy' [1987-1988] 21(1) U C Davies Law Review 542.
[57] AC Grayling , Democracy and Its Crisis (Oneworld Books 2017) 2.
[58] Aristocracy – meaning a form of government in which the power is held by the nobility.

Murder the Media was scrawled across a door.[59] Despite the insurrection attempt power was successfully passed to Joseph Biden on 20th January 2021, so it could be argued that democracy survived the attack despite 74,222,959 people having voted for the losing candidate in the election.[60] Much of the rhetoric that surrounded the Trump media campaign related to disenfranchisement of voters. And this rhetoric continued against the International Criminal Court when Trump laid sanctions against the Prosecutor. It is important to note here that countries that see themselves as great democracies are still susceptible to demagoguery and tyrants, highlighting even more strongly that there is a need for an independent body in international criminal law that cannot be controlled by a single government or person.

Before the creation of nations and states laws existed, before even the advent of taxation, which seems to be the first laws that were codified, there was a notion of punishment for indiscretions. The Code of Hammurabi is thought to be one of the earliest and complete written codes. Proclaimed by King Hammurabi who reigned ancient Babylon from 1792 to 1750 BC,[61] the code was made up of 282 rules, and it laid out punishments and fines for infringements of the rules. This code although written nearly 4000 years ago contains recognisable laws, including laws against theft, laws regarding marriage and there are even laws regarding the behaviour of judges.[62] It is clear then that certain laws are imperative to the prosperity of any community.

Natural Law

Chronologically speaking, the development of legal philosophy began with natural law. Both ancient Greek and Roman scholars discussed at length the links between human nature and the creation of laws to bring about binding rules on the behaviour of citizens and states alike. The natural law tradition is

[59] JC Wong, "We're the news now': Pro-Trump mob targeted journalists at US Capital ' (*The Guardian Newspaper*, 8 January 2021) <https://www.theguardian.com/us-news/2021/jan/07/capitol-attack-trump-targeted-journalists> accessed 3 February 2022.

[60] CNN , 'Presidential Results ' (*CNN Politics*, 3 November 2020) <https://edition.cnn.com/election/2020/results/president> accessed 3 February 2022.

[61] Historycom Editors, 'Code of Hammurabi' (*History*, 9 November 2009) <https://www.history.com/topics/ancient-history/hammurabi#:~:text=The%20Code%20of%20Hammurabi%20was,unite%20all%20of%20southern%20Mesopotamia> accessed 3 February 2022.

[62] Yale Law School , 'The Code of Hammurabi' (*The Avalon Project*, 2008) <https://avalon.law.yale.edu/ancient/hamframe.asp> accessed 3 February 2022.

the oldest of the legal philosophies. There are two distinct branches of natural law; natural law that relies upon a deity of some kind, and law that comes from human nature. This battle between religion and morality is widely addressed by legal scholars throughout the ages.

Thomas Aquinas (1225-1274) was a Dominican Priest and a Scriptural theologian who wrote extensively on philosophy and religion. Aquinas coined the maxim '*Gratia non tollit naturam, sed perficit'*,[63] this maxim roughly translates to '*Grace does not destroy nature but perfects it'*. Aquinas was clear that natural law had its basis in religion. He advocated that God made humans and that because they were made by God, they would desire the things that were best for them, these things were known as the '*Seven Basic Goods'*. These seven basic goods were life, reproduction, education, seeking God, living in society, avoiding offence, and finally shunning ignorance. From these basic goods, Aquinas argued humans can derive the natural laws. For example, by recognising the value of your own life, you are inherently recognising the value of all life. Therefore, it follows that it is a violation of this basic good to kill another human, so the crime of murder is in contravention of natural law. Other laws can be derived from the basic goods either when read alone or in conjunction with one another. It is a basic good to want to live in society and to avoid offence, therefore, it is natural law not to steal from your neighbour, so it follows that theft would be a violation of natural law. Aquinas believed that a law is defined by four clear causes; it had to be a) a rational command, b) promulgated, c) by the one or ones who have a care of a perfect community and d) for the sake of the common good of that community.[64] He stated these causes to be the formal cause, material cause, efficient cause, and the final cause.

To fulfil the notion of rational command the command must be coherent – this means that the command is logical and consistent. The law must not contradict any pre-existing rule that has the force of law. The law must be issued by a person that holds true political authority in the community, however the use of the word *political* does not necessarily mean belonging to a formal government; indeed, it is argued that political authority could relate to parents making rules for their children. It is also true that

[63] IEP, 'Thomas Aquinas' (*Encyclopaedia of Philosophy*, Unknown) <https://iep.utm.edu/aquinas/> accessed 3 February 2022.
[64] Ibid.

just because the law is issued by the correct political authority that in itself does not give force to the law. A command must have the purpose of preservation and promotion of a common good for a community or society.[65]

Aquinas then outlined four different types of law: eternal law, natural law, divine law, and human law. Eternal law relates to the idea that there is an entity that rules over the entire universe, to Aquinas it is God who created rules that are for the good of the whole universe of creatures. To Aquinas natural law is the application of eternal law to rational creatures – humans. Eternal law laid down a number of moral laws that constitute the foundation of society and these laws transcend the differences of all human cultures. Natural law works, Aquinas believed, because it is human nature as rational creatures for human beings to seek to perfect themselves. In acting rationally humans seek to protect those things they hold as most important – the protection of life, education of children, increased liberty and working towards the common good; seeking to pursue these common goods is consistent with the flourishing of human society.

While natural law seeks to promote a flourishing society, divine law is the relationship between the individual and God. It sees the individual perform actions that are proportionate with them living an eternal life with God. It is important to note here Aquinas believed that living against natural law does not lead to a human achieving an eternal life with God, so to Aquinas the purpose of living a good life was to go to heaven and live eternally with God.

The relationship between natural law and human law is that human law begins with indemonstrable precepts; goods should be rewarded, evil should be punished, and the punishment should fit the crime. Human law cannot be deduced empirically from natural law precepts – from the law of non-contradiction alone. Natural law acts as a control on what is legitimate, no binding law contradicts the precepts of natural law. Aquinas's philosophy was quoted nearly seven hundred years later by Dr Martin Luther King Jr. in his 'Letter from Birmingham Jail' when he said '*An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just.*

[65] Ibid.

Any law that degrades human personality is unjust'.[66] King asked the question '*How does one determine whether a law is just or unjust?*',[67] answering this by saying *'[A] just law is man-made code that squares with the moral law or the law of God*'.[68] To both Aquinas and Luther King Jr then, a moral judgment must be attached to the law in order to legitimise its content.

In contrast to Thomas Aquinas, Immanuel Kant (1724-1804) wished to separate natural law from God. His upbringing was strictly Pietist,[69] against which he rebelled. Kant was strongly influenced by the German philosophers of the late seventeenth and early eighteenth centuries, including Alexander Baumgarten (1715-1762) and Christian Wolff (1679-1754). These philosophers discussed the moral duties that humans had to God, to others and to themselves. Influenced by this tradition, Kant believed it was the task of morality to inform mankind of its various duties. He looked specifically at the duties humans held to themselves and to others. Like Wolff before him, he believed that morality was the quest to make themselves and others more perfect. The concept of perfection weighed heavily on this tradition of natural law. In May 1715, Wolff wrote in a letter to Gottfried Wilhelm Leibniz (1646-1715)

> 'I need the notion of perfection for dealing with morals. For, when I see that some actions tend toward our perfection and that of others, while others tend toward our imperfection and that of others, the sensation of perfection excites a certain pleasure [*voluptas*] and the sensation of imperfection a certain displeasure [*nausea*]. And the emotions [*affectus*], by virtue of which the mind is, in the end, inclined or disinclined, are modifications of this pleasure and displeasure; I explain the origin of natural obligation in this way… From this also comes the general rule or law of nature that our actions ought to be directed toward the highest perfection of ourselves and others'.[70]

Kant placed his emphasis on the autonomy of the individual. He put forward the notion that there was a single fundamental principle of morality. He called this principle, a categorical imperative. This categorical imperative was a moral obligation that came from a position of pure reason.[71] Categorical

[66] M Luther King jr, Letters from Birmingham Jail (Penguin Classics 2018) 10.

[67] Ibid.
[68] Ibid.
[69] Pietist – Evangelical Lutheran.
[70] Stanford encyclopaedia of philosophy, 'Christian Wolff' (*Stanford Encyclopaedia of Philosophy*, 3 July 2003) <https://plato.stanford.edu/entries/wolff-christian/> accessed 3 February 2022.
[71] GW Leibniz and others, Philosophical Essays (Hackett Publishing Company 1989) 232.

imperatives were divided into four formulations so that humans could derive what was the moral position using these formulations. The formulations were - The Universalisability Principle, the Formula of Humanity, the Formula of Autonomy and finally a formulation he called the Kingdom of Ends.[72]

Kant's Principle of Universalisability means that when a person acts in accordance with a maxim a universal law is created, rather than a series of contradictory laws. When the maxim is applied therefore, it applies equally and is clear to all those who come across it. Applying this principle to, for example, human rights law, Kant would argue that human rights should apply equally to all humans. This principle would support the concept of absolute rights. Furthermore, Kant's second formula even brings in early human rights thinking by conveying upon the system the concept of humanity. This formula recognised the humanity of a person and explained how this should be kept in mind with all interactions. All humans have an intrinsic moral worth. The third formulation was that of autonomy. Kant's version of autonomy is defined by the OED as '*the freedom of will that enables a person to adopt the rational principles of moral law (rather than personal desire or feeling) as the pre-requisite for his or her actions; the capacity of reason for moral self-determination*'.[73] Finally, there is the formulation of Kingdom of Ends, the meaning of which is less obvious from its title. However, it relates to the concept that this formulation requires that all people have a clear obligation to act upon the principle that a community of rational people would accept the maxim or law. Therefore, they would only accept maxims that are capable of being applied equally upon all citizens. These abstract theoretical principles can be applied to more modern situations, including the civil rights movements of the nineteen sixties. Martin Luther King Jr. implicitly applied Kant's 4 formulations when he wrote *'[a]n unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding upon itself. This difference is made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal'*.[74]

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[72] Ibid.

[73] Oxford University Press, 'Autonomy ' (*Oxford English Dictionary* , 1 June 2011) <https://www.oed.com/view/Entry/13500?redirectedFrom=autonomy+#eid> accessed 3 February 2022.

[74] M Luther King jr, Letters from Birmingham Jail (Penguin Classics 2018) 10.

Practical application of Kant's theoretical principles remains important, especially in the context of this work. It is commonly accepted that under Kant's theory that an action can be morally acceptable if it can be universalised. The opposite is therefore true, if an action cannot become morally acceptable it is against moral law.

The second part of Kant's theory came from human desires or hypothetical imperatives. These hypothetical imperatives differed from person to person and so could not be used to dictate societal behaviour but merely personal behaviour. These hypothetical imperatives offer little to no insight into the moral realm, but rather apply to the character forming of the individual.

In more recent history, prominent American legal scholar, Lon Fuller (1902-1978), put forward a model the foundations of which were heavily based in a procedure-based system to address gaps he perceived in the legitimacy of natural law. Fuller argued that there is an ideal system of law that is dictated by God, by the nature of man or by nature itself.[75] This ideal system is the same for all societies and all periods of time. He argues that all enacted laws that are contrary to this system are void and can make no moral claim to be obeyed.[76] Key to Fuller's argument is that there is a morality that is the binding source of law.

Fuller looks at the two main sources of law, from where it draws not only its content but its force. He divides law into *made law* and *implicit law*. *Made law* is the law of the statute; this law is enacted by a legislator or a legislative body and comes into force at a determined time.[77] The second source is *implicit laws*, which are customary laws, in contrast to made law whereby implicit law comes from a social custom and is not formally enacted. It usually develops over time, and it is often difficult to pinpoint when it has become enforceable and so enforceability is usually assigned within broad limits. There is no formal and authoritative verbal declaration for the terms within the law. It also does not have the narrative of the enacted statute law. In many cases international criminal law stems from customary law, often not codified until later, after the criminal event c.f Nuremberg and the

[75]L Fuller, Anatomy of Law (Praeger 1968).
[76] Ibid.
[77] In English and Welsh Law this is stated on the Act when it is passed.

International Criminal Tribunals for Yugoslavia and Rwanda. Fuller goes further to complete his definition by looking at the purpose of the law itself. Could this philosophy lend itself to supporting the legitimacy of international criminal law before codification occurs or indeed mean that codification is not needed at all. If this is the case, these philosophies could be used to help legitimise law that was used at Nuremberg and subsequent tribunals.

A challenge to Fuller however, comes from the question of laws that seem to have no moral basis, laws that are completely procedural in nature. To Fuller, for a definition of law to be complete, it must also give some insight as to its purpose. He argues that the purpose of a law is to achieve social order; this is done by subjecting a man's conduct to some general rules and guidance so that they may adjust their behaviour accordingly. Fuller put forward eight key principles, which he believed set clear guidelines for the qualities needed to validate a law, in procedural terms. Fuller stated that '*a total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all'.*[78]

In his book, 'The Morality of Law' Fuller defined his theory using the allegory of a king, who is trying to pass a new legal code over his kingdom; in doing so he comes across a number of problems. As each of these problems are highlighted one or more of the eight principles of Fuller's theory becomes clear. These clear pillars of Fuller's theory are important as they can be directly compared to differing legal philosophies later in the chapter.

Consistency

In the beginning the king, who Fuller calls King Rex, decided that he would write a new code of rules for his kingdom. However, it soon becomes clear to him that he is unable to create a code of conduct due to the sheer number of laws he needs to think of and instead he decides to rule on each individual case himself. Rex made many rulings but there appeared to be no discernible pattern to the King's

[78] L Fuller, The Morality of Law (Revised edn, Yale University Press 1969) 39.

rulings and his subjects were unable to determine a code of conduct for their behaviour.[79] It is the failure of this second venture that leads Fuller to his first principle, consistency.

The principle is that there needs to be rules and these rules must be complete to stop them being applied on an ad-hoc basis, a criticism that is often levelled against international criminal law. The principle of consistency is especially difficult, for example, in the context of the legitimacy of the ICTY. Its legitimacy has been questioned by numerous defendants as the Statute of the ICTY had not been formally codified before 1990, and on occasion when crimes were committed, they went mostly unpunished. So, a clear outcome of any case could not be determined.

An example of when the principle of consistency was challenged at the ICTY was during the appeal of Aleksovski.[80] Aleksovski contended that '*only international humanitarian law which is beyond any doubt part of customary law can be applied by the International Tribunal, and [he] points to the Report of the Secretary General which makes no mention of precedent as a source of law'*.[81]

This principle of consistency is known as the doctrine of *stare decisis* or binding precedent meaning that a court is bound by its previous decisions; it is also bound by the courts above it. In 1966, the House of Lords[82] (of the United Kingdom) reaffirmed the doctrine while also stating that while the court would continue to treat decisions as *normally binding*, it would '*depart from a previous decision when it appears right to do so'*.[83] While the doctrine emerged principally from common law jurisdiction, it is also of limited value to civil law jurisdiction. While there is only limited recognition, judges in cases under such jurisdictions usually conform to previous decisions unless the law has been proved to be unworkable. While *stare decisis* does not in itself mean that the law is a valid law, by following the principle of binding precedent even with limitations, laws cannot be applied on an ad-hoc basis. This would, therefore, promote consistency of the laws being applied. However, as is clear from the

[79] Ibid
[80] *Prosecutor v Aleksovski (Judgement in Appeal)* ICTY-95-14/1-A (24 March 2000)
[81] Ibid.
[82] At the time of the issuing of the statement the House of Lords was the highest court in the country.
[83] UK Government , 'Statements to the House - Judicial Precedent ' (*Parliamentary Business* , 2006) <https://publications.parliament.uk/pa/ld199697/ldinfo/ld08judg/redbook/redbk45.htm> accessed 3 February 2022.

Aleksovski,[84] *stare decisis* is not in itself a source of law but purely a clarification of the application of existing law by similar or higher courts.

Promulgation

After realising that laws must be consistent, Rex decided that he would set up a court at the beginning of each year to try all the crimes committed according to his rules, rules that he alone knew. His subjects argued that it was unfair to be ruled by a set of laws of which they had no knowledge. They argued that the laws should be published so that they could measure their behaviour accordingly.

Promulgation is the official publication or public proclamation of a new law, decree, ordinance, etc., thereby putting it into effect.[85] This promulgation is the requirement that laws are presented to the public is a form that makes them accessible to citizens.[86]

This is where international criminal law, especially the statutes of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, may struggle to meet Fuller's strict principles. Customary law may meet Fuller's principles if the specific law can be traced through a recognised pattern of behaviour or observance of the law as this could fulfil the promulgation requirement. However, a difficulty is whether it is clear to the public that this rule would apply to them. Fuller argues only that the law should be published, not that it must be disseminated widely. The publication of the London Charter could in theory satisfy the promulgation aspect of Fuller's theory, however despite being widely published and available to the public, the code was subsequently ignored at an international level for almost fifty years. It was also not universally applied at the time as it was obviously applicable to the public as a whole. Subsequent codification has used some but not all of the London Charter, and it is not clear when these aspects left the legal sphere, nor whether the remaining

[84] *Prosecutor v Aleksovski (Judgement in Appeal)* ICTY-95-14/1-A (24 March 2000).

[85] Oxford University Press, 'Promulgation' (*Oxford English Dictionary* , June 2007) <https://www.oed.com/view/Entry/152502?redirectedFrom=promulgation+#eid> accessed 3 February 2022.

[86] J Ellis and A Fitzgerald, 'The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality' [2004] 49(1) McGill Law Journal 779.

aspects have been enforceable the whole time or by whom any infractions of such laws would be policed by.

International law therefore struggled to meet the promulgation aspect of the theory and it could be argued it continued to do so until the ratification of the Rome Statute for the International Criminal Court. The statutes for both the ICTY and ICTR had very little scope for their sphere of reach, they applied only to the territories mentioned in the statute itself. This brings into play several issues that are highlighted during jurisprudential arguments regarding retrospectivity, including both territorial and temporal retrospectivity. However, these will be more closely looked at shortly.

Clarity

Following King Rex's publication of his laws his subjects were dismayed to observe that the code that King Rex had published was unintelligible. King Rex quickly withdrew his code and upon consultation with legal experts, he instructed them to re-write the code in a coherent form so that his subjects could understand it. It could still be argued that while specific acts like murder are clearly defined and easily understood by most, if not all, citizens, other crimes, for example, torture require more complete definitions as to what constitutes the offence.

In 1978, Ireland took the United Kingdom to the European Court of Human Rights[87] making a case that the government of the United Kingdom was guilty of torture. It was alleged that the treatment of detainees in the early 1970s which included wall standing, hooding, subjecting detainees to noise, and depriving them of both food and sleep amounted to torture and inhumane or degrading treatment.

In the 1978 the Court judged that the treatment was applied for hours at a time and caused intense physical and mental suffering including acute psychiatric disturbances, but it did not amount to torture[88]. This judgment was reaffirmed in March 2018.[89]

[87] Hereafter the ECHR.
[88] Ireland v The United Kingdom (1978) 5310/71 1 1.
[89] Amnesty International UK, 'UK/Ireland: Hooded men torture ruling is 'very disappointing', says Amnesty' (*Amnesty International UK Press Releases*, 20 March 2018) <https://www.amnesty.org.uk/press-releases/ukireland-hooded-men-torture-ruling-very-disappointing-says-amnesty> accessed 3 February 2022.

Perhaps the most infamous alleged case of torture in recent years is that of Guantanamo Bay Detainees. A number of reports have outlined the alleged '*enhanced interrogation'* techniques that were used by the United States in order to extract information from the detainees. These included rectal feeding and rehydration without medical evidence of a need to do so, confinement in a box, stress positions, sleep deprivation, forced nudity, restricted diets and of course, waterboarding. In his article in The New York Times 'The Red Cross Torture Report: What it Means', Mark Danner states

> 'One fact, seemingly incontrovertible, after the descriptions contained and the judgments made in the ICRC Report, is that officials of the United States, in interrogating prisoners in the 'War on Terror' have tortured and have done so systematically…we know that the decision to do so was taken at the highest level of the American government and carried out with the full knowledge and support of its most senior officials'.[90]

What is abundantly clear from these two examples is that despite freedom from torture being an absolute right what actually constitutes torture is not clearly defined, in this case the law against torture lacks the clarity Fuller requires.

Non-contradiction

Following King Rex's publication of his new clear rules, it was evident that rules that he had written contradicted each other. Each law it seemed contradicted another and soon there was a picket set up carrying signs that said '*the king has made himself clear- in both directions'*.[91]

Possibility of Compliance

King Rex was angry with his subjects, so after clearing up the ambiguity in his code, he instructed his legal advisers to tighten every aspect of the code, making the rules almost impossible for his subjects to adhere to. One subject discovered this and issued a passage that stated *'[t]o command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos'*.[92]

[90] M Danner, 'The Red Cross Torture Report: What It Means' (*The New York Review*, 30 April 2009) <The Red Cross Torture Report: What It Means> accessed 3 February 2022.
[91] Ibid
[92] L Fuller, The Morality of Law (Revised edn, Yale University Press 1969).

The subjects again petitioned the king, and the code was withdrawn.

Retrospectivity and Constancy

The King set his draftsmen to work on a new code and they soon corrected the inconsistencies of the earlier codes. The code was then reprinted for the King's subjects. However, the code had taken time to re-produce since the King's original draft and the legislation had moved on considerably since that time. This meant that the code that was published contained offences that citizens could be indicted for before the code was published. This part of Fuller's principles highlights law that is applied retrospectively. The fact that the code needed to be changed so frequently highlights another of Fuller's principles, constancy.

Retrospectivity known under the doctrine of *nullum crimen, null poena sine lege*[93] meaning *no punishment without pre-existing law* is well established in almost all legal systems. In 'Anatomy of the Law', Fuller quotes the draftsman of the Constitution of New Hampshire (USA) who noted the *moral indignation*[94] of the draftsmen who inserted in their law-making charter in 1784[95] the following short passage '*Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences'*.[96]

This was followed in 1861 in the United Kingdom in the case of Midland Railway Co v Pye. In the Common Law Reports, when CJ Erle spoke of retrospectivity he said

> 'Those whose duty it is to administer the law very properly guard against giving to an act of parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain, and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment'.[97]

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[93] S Twist , 'Retrospectivity at Nuremberg: The Nature and Limits of a Schmittian Analysis' Vol 1 of 3 ' (*University of Central Lancashire Clok*, 2012) <http://clok.uclan.ac.uk/6779/1/Twist%20Susan%20Final%20e-Thesis%20Vol%201%20%28Master%20Copy%29.pdf > accessed 3 February 2022.
[94] L Fuller, Anatomy of Law (Praeger 1968).

[95] Ibid.
[96] Ibid.
[97] The Midland Railway Company v Pye [1861] 142 ER 419 (Court of Common Pleas) (CJ Erle).

Retrospectivity can apply in many different ways, be it that the law itself did not exist when the act was committed, or the laws jurisdiction was not yet applied to the land area the offence was committed in. It is important to note here that retrospectivity in international criminal law has always been a bone of contention as codification is often after the fact, be it that the law has been officially codified but the court through which will be tried does not yet have established jurisdiction or the law has not been codified at the time of the act but is codified after the fact. Despite being a clear feature of legitimacy in Fuller's mind, international criminal law throughout its development has failed to clear this step. Even now when a permanent criminal court exists there are a number of hurdles of retrospectivity that international criminal law fails to clear.

Congruence between declared rule and official action

Once King Rex had finalised the initial code, the rate of changes slowed considerably, and the King decided that he must not only oversee all cases but also distinguish between his decisions with reasoned judgments. This highlighted Fuller's final principle that there must be a strong congruence between the rules in the code itself and the laws that are administered.

The code that King Rex had put forward at the outset could be seen as mirroring the situation that existed before the statute of the ICTY had been written. The statute of the ICTY has also developed considerably since it came into force. Although it should be apparent that some actions would not be permitted by the new code, for example, in international criminal law when there are crimes that mirror national statutes or it may be argued it is clear because of past experience of the law in an earlier form or from common norms of society, not all of the crimes had been official codified into one cannon of law before the formation of the ICTY. In any event the ICTY did not exist when the initial criminal offences were committed so there was no reason to believe that if a crime were committed it would be tried. Furthermore, many events had gone unpunished since Nuremberg and therefore, while a defendant may have been expected to recognise that their behaviour was in contravention of international criminal law, the defendant had no reason to believe that they would be held to account as there was no enforcement mechanism in place. In the case of the ICTY the statute is made up of many offences that were outlined both at Nuremberg and in the subsequent trials in the Far East [International

Military Tribunal for the Far East 1946]. However, there are some offences that had not previously been subjected to the rigors of a trial, for example, genocide was not a part of either the statutes of Nuremberg or the trials in the Far East and only really existed as an academic concept rather than a strictly legal rule.

Substantive Natural Law

If international law and the statutes of the ICTY and ICTR struggle to meet the procedural principles of natural law set out by Fuller, it is important to examine if they can meet the principles of natural law that are set out in more substantive natural law theories.

Lon Fuller is not the only natural law scholar who held strong views on how the standards of morality were derived from nature and the nature of human beings. However, despite all the clear processes that natural law theory has, it also has some major stumbling blocks. Under the Universal Declaration of Human Rights,[98] certain rights are declared to be absolute, meaning they cannot be limited or restricted in any way. These could be seen as returning to the basic good of Aquinas. These rules were declared by the United Nations General Assembly in Paris on 10 December 1948[99] and all member states must pledge to abide by them. There are very few absolute rights, they are: -

- The Right to life, liberty and security of person
- No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms
- No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment
- *Nulla poena sine lege*

These rights are described as absolute and it is agreed by the majority that they should not be infringed upon, a precept now widely accepted by academics and jurists worldwide. It cements the position of *no punishment without law* as being fundamental to the rights of an individual. It carries no caveat, nor

[98] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

[99] Ibid.

any mitigation of the rule. It is absolute and clear. While *nulla poena sine lege* is part of procedural law, the remaining absolute rights are substantive in nature.

These absolute rights that protect all humans imply that at a very basic level the UN at its core derives at least some of its policies from a natural law root. John Finnis, (born 1940) a natural law theorist wrote in his book 'Natural Law and Natural Rights' that natural law is a '*set of principles of practical reasonableness in ordering human life and human community…*'.[100] He also said '*certain propositions in normative ethics and political theory are self-evidently true*'.[101] These absolute rights would fall into these normative ethics. In his book, Finnis offers a summary of his theory:

> 'There is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realised, and which are in one way or another used by everyone who considers what to do, however unsound his conclusion; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking, and which, when all brought to bear, provide the criteria for distinguishing…between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of general moral standards'.[102]

This theory of practical reasonableness, which yields to the more commonly known natural law principles together with a theory that encompasses both the basic forms of human good with a practical reasonableness that is workable, equal to rebutting many of the common criticism that are aimed at natural law theory in general, means that Finnis is placing natural law firmly at the forefront of the law-making procedure. What then are the basic principles by which natural law seeks to establish itself.

Basic Norms

Basic norms or basic principles are the foundation of the natural law tradition. These basic norms of human good in traditional natural law theory are mostly drawn from western philosophy beginning with the Ancient Greeks, such as Aristotle, later taking its lead through Thomas Aquinas and a Judeo-Christianity philosophy and encompassing Kant who choose not to recognise religion at all.

[100] A Wallin , 'John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of basic goods' [2012] 35(1) Campbell Law Review.
[101] Ibid.
[102] J Finnis, Natural Law and Natural Rights (2nd edn, OUP 2011) 23.

Whilst disputed as a natural law philosopher, Thomas Hobbes (1588 -1679), created nineteen laws that he believed made up and supported natural law in the seventeenth century. His theory was an amalgamation of natural law theory and command-theory traditions.[103] The first law is '*that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war…*'.[104][105] Aristotle had put forward an image of the perfect human life. Perfectionism guides humans to promote and protect objectively good human lives, whether this is through perfecting oneself as much as possible or at least to some recognised level or by promoting the good of others and thereby promote one's own good. It would follow then that each human had a duty to do this.

Hobbes disregarded Aristotle's image of the perfect human, instead preferring to put forward the view that humans have a natural tendency to hurt each other and work towards their own endeavours and that society needs to be protected from this by laws. Hobbes further inverts the fundamental legal maxim, the *Golden Rule*, which becomes instead do not that to another, which thou wouldst not have done to thy self.[106]

Natural Law theorists were fundamentally seeking to break down human nature to its bare bones. Looking at the rationality of the command, it is the origins of this rational command that theorists discuss and debate most fully. Be it Thomas Aquinas basing his rationality in religion, and how it is through law that God seeks to perfect his creation or Immanuel Kant, who sought to remove religion from the debate all together and instead applied his four formulations that he believed gave law the legitimacy it sought, each theorist seeks to give the reader a clear foundation on which to balance the weight of existing law. Each theory starts with human interaction and how law can be used to enhance or protect those relationships. Whether that theory is based on viewing humans as inherently good or

[103] The Editors of the Encyclopaedia Britannica, 'Thomas Hobbes' (*Encyclopaedia Britannica*, 04 May 1999) <https://www.britannica.com/biography/Thomas-Hobbes> accessed 3 February 2022.

[104] T Hobbes, Leviathan (OUP 1996).

[105] The charter of the UN Security Council clearly echoes this, the preamble to the charter states in its aims the shared endeavour to maintain peace and in some circumstances the Security Council is willing to issue resolutions to its member states to allow them to declare war upon offending states in order to return regions to peace.

[106] T Hobbes, Leviathan (OUP 1996).

inherently bad makes little difference their interactions must still follow basic rules. This thesis takes the basic rules or norms as key to natural law theory.

1. Each actor must be governed by the same laws and held to the same standards as another.
2. The rule or law must be clear and have the ability to be followed and
3. The destruction and degradation of human life is never permitted. All humans should be protected from these occurrences.

These are three key features of natural law that will be taken forward to the model.

Comparing Natural Law with other philosophies

So far, this chapter has concentrated on natural law. However, the aim of this chapter is to identify the key features of legitimacy and there are other legal philosophies through which these key features can be identified.

Positivism

This chapter has already examined in detail the natural law theory of Lon Fuller, but attention is now turned to positivist philosophers including Hans Kelsen, John Austin, Jeremy Bentham and HLA Hart. Herbert Hart (1907-1992) in his seminal book 'The Concept of Law'[107] explained positivism to mean '*the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality*'.[108] Positivist theory would argue that any law takes its legitimacy from its source rather than its merits. Positivism pushes aside morality and instead places its emphasis on how laws are created. Positivists therefore look solely at the form of the law rather than its substance, unlike natural law where it can be interpreted both from a procedural and substantive perspective.

John Austin (1790 – 1859), who along with Jeremy Bentham, is seen as a founding father of the legal positivism movement posits that law is the command of an unlimited sovereign. This means that the sovereign has unlimited power to impose duties and obligations on individuals. This echoes the divine right of kings, similar to that put forward by James I of England (1603 – 1625), although the sovereign

[107]HLA Hart , 'The Concept of Law' (Clarendon Press 1976) 181.
[108] Ibid.

need not be a monarch. He argues that it is the threat of sanctions that distinguishes law from non-law; this is in line with Machiavelli's need for good arms.

Positivist legal theory was the prevailing modern legal theory until the latter part of the 20th century. In order to maintain its hold upon the legal landscape, it had to adapt in order to address many criticisms that were levelled against it. In an attempt to address these criticisms, namely that laws have different purposes and that not all have coercive force as Austin had theorised, HLA Hart developed his modern positivist theory which is now seen as the comprehensive positivist philosophy.

Hart argued that law should be descriptive not prescriptive, arguing against Austin by declaring that there is no clear division between lawmakers and laws. This was because lawmakers still had to obey the laws that they made and also not all laws were coercive. Hart argued that laws have a number of purposes. There are commands; these are the laws people think of most often and are often supported by some coercive force on the individual to ensure that the law is observed, this is also true of laws that make some sort of moral judgment. There are also laws that govern administrative issues; others are opportunistic,[109] for clarification or suggestion. Hart discussed what he saw as the rules of obligation, dividing laws into two sets, primary and secondary rules.[110]

The *primary rules of obligation* are laws that are passed. Citizens are bound by law, not just because of a coercive force but for society's benefit; hence citizens accept a duty to follow these primary rules.[111] The *secondary rules of obligation* are the processes followed, that is, they are rules for the procedure used to enact law where the public officials are bound by law to follow a specific procedure in order to enact law.[112] He argued that it is these secondary rules that make the law socially accepted. He further theorised that society could object to the courts' validity. If society rejects the procedure that put the law in place, this in itself invalidates the law.[113] Using Hart's philosophy, the power to create laws can be delegated away from the sovereign if that delegation is accepted by the society that is ruled by it.

[109] Opportunistic law is often described as law making to correct a loop hole in the system.
[110] HLA Hart , 'The Concept of Law' (Clarendon Press 1976) 76 -97.
[111] Ibid.
[112] Ibid.
[113] Ibid.

For example, laws enacted by local councils or even supranational agencies such as the European Union or the United Nations. Professor Hart asserted that these laws had just as much legitimacy as those created by the sovereign as long as the public recognised the delegation as legitimate.

As Fuller did earlier, Hart used the allegory of Rex and Rex II and how the rule-making power passed from father to son upon succession. Firstly, Hart gives the example of King Rex, as king of an unnamed state it was King Rex who creates and administers laws. His subjects in the most part observe these. It could be argued that the subjects develop a habit of obedience. However, Hart argues that while men may acquire habits such as '*driving on the left-hand side of the road'*[114] where '*the law runs counter to strong inclinations…our eventual compliance with them, even though regular, has not the unreflective, effortless, engrained character of a habit*'.[115] If the subjects of the nation obeyed Rex purely through habit what then would happen upon Rex's death and the succession of Rex II? '*The mere fact that there was a general habit of obedience to Rex I in his lifetime does not by itself even render probable that Rex II will be habitually obeyed*'.[116] There is nothing then to say that Rex II's rules will be obeyed, and it will of course take time for any habits to be formed which may be detrimental to Rex II's rule. It is, therefore, important for the stability of any state to establish continuity for any form of rule. Hart explains this system through his Rex analogy,

> '[I]f the rule provides for the succession of the eldest son, then Rex II has a title to succeed his father. He will have the right to make law on his father's death, and when his first orders are issued we may have a good reason for saying that they are already law, before any relationship of habitual obedience between him personally and his subjects has had time to establish itself.'.[117]

Perhaps to his own detriment, Lon Fuller would engage Hart in a fierce debate that eventually derailed his own career sufficiently that his theory lacks subsequent development. Hart began the debate in his article printed in the Harvard Law Review in February 1958. The article entitled 'Positivism and the Separation of Law and Morals'[118] was a passionate defence of his school of thought. In it he dissects

[114] HLA Hart , 'The Concept of Law' (Clarendon Press 1976) 51.
[115] Ibid.
[116] Ibid.
[117] Ibid 53.
[118] HLA Hart, 'Positivism and the Separation of Law and Morals' [1958] 71(4) Harvard Law Review 593-629

Bentham and Austin's theories, pointing out clear and well-reasoned criticism of their theories that his develops and are able to solve. Hart argued that morality and the law were separate, and a morality judgment should not be made when deriving law's binding power, Fuller on the other hand argued that it was in fact morality that was the source of binding power. The debate surrounded a case

> 'In 1944, defendant, desiring to get rid of her husband, reported to the authorities derogatory remarks he has made about Hitler while home on leave from the German army. Defendant wife having testified against him, the husband was sentenced to death by a military tribunal apparently pursuant to statutes making it illegal to assert or repeat any statements inimical to the welfare of the Third Reich. . . . However, after serving some time in prison, the husband was sent to the front. Following the defeat of the Nazi regime, the wife, as well as the judge who had sentenced her husband, was indicted under 4 289 of the German Criminal Code of 1871, for the unlawful deprivation of another's liberty (rechtswidrige Freiheitsberaubung '). On appeal to a German Court of last resort in criminal cases, held, that the sentencing judge should be acquitted, but that the wife is guilty since she utilised out of free choice a Nazi ' law to the sound conscience and sense of justice of all decent human beings to bring about the death or imprisonment of her husband'.[119]

Hart argued that where laws had been created, the courts and judges had no option but to apply the law as it stood, however evil the law itself was. Fuller argued that by removing the moral judgement of the law you effectively removing the very foundations upon which laws sit. Judging the legitimacy of a law in a vacuum of purely whether it meets the procedural criteria set out for it is a massive hurdle for international criminal law, that relies so much upon basic norms. In accordance with Hart's defence of the German Court would come an equal defence of grossly harmful laws including laws that dehumanise sections of society or despotic laws of an unhinged dictator. Without a moral compass to guide law there is little to protect it from itself.

Law as it ought to be

A common argument against positivism since its inception has been that the distinction between law and morality was a superficial separation, that in Hart's own words '*blinds men to the true nature of the law and its roots in social life'.*[120] Hart's own belief was that law was more complex than the original positivists had put forward. He rubbished the concept of command theory that Bentham and Austin had eulogised. The notion that laws were obeyed out of habit was simply untrue, as was the idea that

[119] HO Pappe, 'On the Validity of Judicial Decisions in the Nazi Era' [1960] 23(3) The Modern Law Review 260-274.

[120] HLA Hart , 'The Concept of Law' (Clarendon Press 1976).

lawmakers, in this case the sovereign, were outside of the scope of the law. Hart was acutely aware of the deficiencies in command theory, namely that not all laws are commands. Laws are not simply in place to command; they also puts forward rules should you wish to carry out certain behaviours or acts. Hart even mentions Hans Kelsen's idea of basic norms to show that many have battled with trying to fit command theory into a working positivist philosophy, which in Hart's opinion was impossible.

Despite his criticisms of both Bentham and Austin it is clear that Hart admired both scholars, seeing them as being '*not dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws'*.[121]

Positivism, Succession and the UN

In international law the ability to make laws has in part been handed to the United Nations and in turn in the sphere of international criminal law it was further delegated to UN Security Council who felt that they had sufficient standing to create the ad hoc tribunals through delegated legislation from the UN General Assembly. From a positivist standpoint, a clear rule must exist through all stages of law formulation for a legitimate rule to be created. Under substantive natural law, the UN Charter can be seen to draw from the same basic principles that have always existed, although it fails to meet all of the procedural natural law principles set out by Fuller. In Hart's version of positivism, it is the pre-existence of a clear chain of continuity that gives legitimacy to an organisation to make any rule. In international law the General Assembly is the primary organisation of the United Nations; it is '*the main deliberative, policymaking and representative organ of the UN'*[122] and under Rule 134[123] of the Rules of Procedure any state wishing to join the UN must submit an application, which must include an express declaration (made in a formal instrument) that the state accepts all the obligations contained in

[121] HLA Hart , 'The Concept of Law' (Clarendon Press 1976).
[122] United Nations, 'About the General Assembly' (*General Assembly of the United Nations*, Unknown) <https://www.un.org/en/ga/about/index.shtml> accessed 3 February 2022.
[123] United Nations, 'Rules of Procedure' (*General Assembly of the United Nations*, Unknown) <https://www.un.org/en/ga/about/ropga/adms.shtml> accessed 3 February 2022.

the Charter,[124] so this is a clear process by which the UN could argue that they are a legitimate law making body.

Hart addresses the concept of international law head on, devoting a whole chapter to discussing whether international law can satisfy his theory. Hart talks of the '*multiple relationships between law, coercion and morality*'[125] and to what degree, if any, these relationships must be apparent to satisfy positivism. Hart argues that the positivist theory actually describes a legal system rather than defining the word law. This, he declares, is the reason his book is called 'The Concept of Law' rather than the Definition of Law. Hart argues that while international law has used the expression '*law*' in its title for at least 150 years, (nearer 200 now since a number of years has passed since the publication of Hart's book) '*the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings…*'.[126] Hart broke law down to a union of primary and secondary rules. Primary rules govern human conduct in that it makes citizens conduct *non-optional or obligatory.*[127] Secondary rules, however, allow for the alteration of those primary laws, be it changing the rule or repealing it all together. As legitimate law is a union of both, it is therefore imperative that there is some form of organisation to administrate these changes. At the time 'The Concept of Law' was written there was no unifying statute that oversaw international law, nor was there an organisation to oversee the application of these laws. Hart states that it is arguable '*that international law not only lacks the secondary rules of change and adjudication which provide legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules*'.[128] It is clear that international law differs from municipal law, however, and since Hart wrote on the topic the landscape of international law has changed, almost beyond recognition.

[124] Ibid
[125] HLA Hart, 'The Concept of Law' (Clarendon Press 1976) 208
[126] Ibid 209.
[127] Ibid 80.
[128] Ibid 209.

While the UN and the General Assembly existed when Hart wrote, no international court existed to administer the law. The law had also not yet been codified. It has now been codified in the statutes governing the ad hoc tribunals and later formalised by the Rome Statute that created the ICC.[129] As it had not been codified at the time of the creation of the ad hoc tribunals of the ICTY and ICTR, the question is whether the General Assembly and Security Council had or indeed now have, the necessary delegated power to codify the rules that already existed through treaties and conventions and customs. Someone must hold the power, if it initially resides with the sovereign state, they delegate limited power to the UN General Assembly who in turn delegate it further to the Security Council. There is a clear chain of command to meet Hart's criteria and further the body of law is now codified and agreed by such delegated authority to assume legitimacy at the very least to the Rome Statute.

Another legal theorist whose work influenced Hart and his writing was Hans Kelsen (1881 – 1973). Kelsen believed that '*law is valid only as positive law, that is, statute constituted law'*.[130] Kelsen's theory was built upon the concept of basic norms. This rests upon a hypothesis that presupposes that these basic norms are valid laws.[131] Like Hart, Kelsen's theory addresses international law and the common assumptions that have plagued international law's quest for legitimacy. Writing in the early 1930s, Kelsen addressed international law before the outbreak of World War Two and the subsequent trials that followed, which means that Kelsen's writing is not initially coloured by the events in Nuremberg. However, his position changed after the events of World War Two and Kelsen's theory developed substantially.

Pre-War Kelsen and his Theory of International Law

Kelsen's first published attempt to theorise international law was published in 1920, following the First World War[132] 'Das Problem der Souveranitat und die Theorie des Volkerrechts'.[133] In this publication Kelsen went against the popular theory of international law, which was that '*international law was*

[129] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

[130] H Kelsen, 'The Pure Theory of Law' [1935] 51(3) Law Quarterly Review 517-535.
[131] Ibid.
[132] F Rigaux, 'Hans Kelsen on International Law' [1998] 9(1) European Journal of International Law 325-343.
[133] Ibid.

merely a branch of state law…and the compulsory character of international law was derived from the convergent will of all states. Indeed, some scholars of that period conceived international law as 'common law' of nations'.[134] Kelsen's approach to the question of legitimacy of international law was threefold. Firstly, he looked at the nature of a federal state; secondly, he looked at the duty of any state to afford its citizens certain fundamental rights and freedoms; finally, he looked at the means by which the constitutional scheme is respected and ensured. Bringing these together Kelsen rejected the legitimacy of international law as it failed to meet even the most basic of positivist conditions.

Nature of Federal State

Perhaps the most commonly discussed issue regarding international law is that of sovereignty of states. In a federal state situation, the discussion revolves around whether the members of the federation hold individual sovereignty, or whether only the federation as an organisation has sovereignty.[135] Expanding this idea to an international arena it is whether the individual states have sovereignty or whether a master organisation, for example the United Nations, could hold superior sovereignty.

Kelsen's hypothesis on international law is conceived from the concept of federate and confederate states. He argued that it '*cannot be concluded that states that were sovereign before entering into a federal pact retain some parcel of their originary*[136] *sovereignty'.*[137] He argued that the '*basic norm'* of the system must be found in the unifying organisation that set it up. This is clearly an idea that can be extended to legitimise international law by legitimising the United Nations as a confederate organisation. The law made by the confederate organisation, in this instance the UN, is therefore legitimate. The basic norm is therefore found within the organisation. Kelsen argues that the historical set up that led to the creation of the organisation should not be questioned.[138]

The basic norm of international law, argues Kelsen, is *'…a norm which countenances custom as a norm-creating fact, and must be formulated as follows: The states ought to behave as they have customarily*

[134] Ibid.
[135] Ibid.
[136] That is the origin or source of something; that gives rise to, or causes the existence of, something.
[137] F Rigaux, 'Hans Kelsen on International Law' [1998] 9(1) European Journal of International Law 325-343.
[138] Ibid.

behaved'.[139] Therefore, a basic norm is not positive law, but a concept that Kelsen himself often seems to ignore by giving positive law examples in support of his theory.

Duties of a State to its citizens

The second constitutional issue Kelsen addressed was that of a citizen's fundamental rights and freedoms. Here as in the UN Charter there are fundamental rights that each citizen enjoys. This can be seen through a number of constitutions, for example the American and French constitutions. It is even evident for countries that do not have written constitutions, for example the UK and Australia.

Who rules the Constitution?

It was Kelsen's view of the constitution that brought him into direct conflict with Carl Schmitt (1888-1985), a contemporary German lawyer and philosopher. Kelsen argued that the guardians of the constitution should be found in the judiciary, which would protect a nation from a tyrant. Schmitt, in contrast, argued that only the President should have the power to safeguard the constitution. Most constitutions have in built protections in them that means that no one person has absolute power. However, emergency measures can often lead to unforeseen occurrences. The use of emergency powers in times of conflict or threat of war is common and it requires a robust constitution to withstand an aggressive move by a would-be dictator, who seeks to take control.

Positivism does not help legitimise law as its main proponents disagree on even the most basic fundamental ideals. However, it may be useful to carry forward a notion of positivism and that is that there must be a clear path from the lawmaker to the law.

As positivism was the predominant theory of the first half of the twentieth century, this chapter will now look at a challenging theory. This battle was not only played out in academic debate like that of Fuller and Hart, but also in the court room where Kelsen was to clash with his most important legal rival, Carl Schmitt.

[139] Ibid.

Comparing Positivism and the Philosophy of Carl Schmitt's Existentialist Theory

Carl Schmitt was a lawyer and legal theorist[140] who wrote extensively from 1912 until the 1970s. He is best known for his work during the period of the Third Reich in Germany. He wrote widely on his view of constitutional law and politics which were described as existentialist and nationalist. He acted as counsel for the Reich government in their case against Prussia.

Following World War Two Schmitt refused to submit to denazification or admit any guilt concerning the regime's action[141] and because of this he was barred from taking up any further academic positions. He continued his study of international law and had frequent visits from former colleagues and other academics, continuing to write and even give lectures. He died in 1985.

His career and writings are marred with controversy due to his association and perceived allegiance to the Nazi movement but, despite this his writings remain influential. Schmitt's theory looked less at explaining the legitimacy of laws and more at explaining the situation as it now existed. He also acknowledged the influence of the political on legislation.

Schmitt on Nomos

To Carl Schmitt, international law could be traced back to one singular issue, that of land-appropriation. In his opinion it preceded all subsequent law. He quotes Isidore of Seville's medieval definition of international law later quoted in Decretum Gratiani in 1150 (translated literally into English from the original Latin) *'[i]nternational law is land- appropriation, building cities and fortifications, wars, captivity, bondage, return from captivity, alliances and peace treaties, armistice, inviolability of envoys, and prohibition of marriage with foreigners'*.[142]

Schmitt argues that in a pre-global world, when civilisations were divided and kept separate by empires that their division meant no common aspiration, the world shared no political goal. While ancient civilisations were not entirely disconnected, their interactions lacked true global character. It is the

[140] Born in 1888 in Plettenberg – Died 1985 in Plettenberg.
[141] C Schmitt, Constitutional Theory (Duke University Press 2008).
[142] C Schmitt, The Nomos of the Earth in the International Law of Jus Publicum Europaeum (2nd edn, Telos Press 2006).

changing spatial consciousness of civilisations that has brought about international law. Supporting his point in the book The Nomos of the Earth[143] he names eminent scholars, including John Locke and Immanuel Kant and he hammers home this point when he says '*Land appropriation is found at the beginning of the history of every settled people, every commonwealth, every empire'*.[144]

Land-appropriation exists in two distinct ways. The first is that a parcel of land without a previous owner is appropriated by a group or empire. The second is that a parcel of land is taken from another to be added to an existing empire or group. This second source of land-appropriation obviously comes with its own difficulties, and it is this form that international criminal law is mostly interested in. The interactions between groups seeking to expand their empires while also living in harmony with other empires is the basis of international law. The first known treaty relating to such interactions was made between Egyptian King Ramses II and Hattushilish III, King of the Hittites. The treaty contained provisions that covered mutual aid against domestic and foreign enemies as well as provisions dealing with the extradition of refugees, and emigrants' amnesties. This treaty marked a shift towards recognition of mutual or common global goals. It was the rise of the religious empire, however, that was to make a more marked difference.

Described by Schmitt as the rise of *respublica christiana* [Christian Republic], the Holy Roman Empire began its land appropriation in the Middle Ages, although the term Holy Roman Empire was not specifically used until the thirteenth century.[145] The Holy Roman Empire made a clear distinction between the two types of war it recognised. The first was conflict between Christian princes over their land barriers. The aim of these wars was to secure borders and barriers that already existed. The second type of war, holy war, was a war between the Empire and non-Christian princes and people. The Empire developed the concept of *just cause* [justa causa], when the papacy would declare war upon non-Christian territories considered by it to be heathens. The aim of the war was the annihilation of the non-Christians. In short, the Holy Roman Empire embraced genocide and, in fact, made it the aim of their

[143] C Schmitt, The Nomos of the Earth in the International Law of Jus Publicum Europaeum (2nd edn, Telos Press 2006).
[144] Ibid.
[145] Ibid.

conflicts. It is clear from Schmitt that these subsequent developments come from the original land-appropriations.

Further in The Nomos of the Earth[146] he seeks to reclaim the original meaning of the word *nomos* from the bastardised meaning that has developed. The original meaning taken from the Greek is '*the first measure of all subsequent measures, for the first land-appropriation understood as the first partition and classification of space, for the primeval division and distribution'*.[147] The term has subsequently been used to signify a *schedon* or mere rule [Plato] or a mere individual *nomoi* or law [Aristotle]. To Schmitt *nomos* is more than all of these, as it is the foundation stone of all relationships between people. He passionately states the opposing of *nomos* and *physis* [nature], whereby *nomos* became an imposed *ought* entirely dissociated from and opposed to the *is* as incorrect, '*as a mere norm or act nomos no longer could be distinguished from thesmo [law or legislation] psephisma [plebiscite] or rhema [command] and from other categories whole content was not the inner measure of a concrete order and orientation but only statures and acts'*.[148]

This chapter has looked at the arguments from natural lawyers and positivists as to what law is or what law ought to be and here Schmitt is saying that is not the argument at all. *Nomos* is more than just a mere rule or law as put forward by Plato or Aristotle, but it is the foundation stone upon which civilisation itself is built. It is the changing global understanding of how *nomos* itself can be utilised that changes world order. It is through *nomos* that states exert power. Schmitt recognised that it had been the Eurocentric spatial recognition of vast free spaces that had allowed for a new international law to be possible. This interstate structure, he argued, had not been down to Roman legal concepts nor traditional formulas of just wars but solely down to *the emergence of a new spatial order.* He argued that this new spatial order had led to the rationalisation of the new territories into *states*. The cementing of the states had overcome the problems of the Civil War that had blighted the sixteenth and seventeenth

[146] Ibid.

[147] Ibid.
[148] Ibid.

centuries. The conflicts he said had been resolved by a public-legal decision for the territorial domain of the state – a decision no longer ecclesiastical, but political, even state-political.[149] This is the crux of Schmitt and his legal theory; in that it is politics rather than *law* that dictates relationships between people and states. Schmitt's theory, unlike the others, does not seek to apply the concepts of legitimacy to the laws as they exist but rather like the realism that was to follow in the latter part of the twentieth century, it tries to explain the conflicts that exist by looking at the system of government that makes the law and the system that interprets the law.

Unlike Fuller and HLA Hart's later discussions through essays Schmitt was able to demonstrate his argument practically through a federal court.

Positivism v Existentialism – The Case of the Third Reich v Prussia

In 1932 federal elections were held in Germany. Much like the recent situation in Greece which suffered severe austerity[150], Germany had been suffering due to measures put in place in order to finance the large war reparations Germany had been ordered to pay following World War One.[151] This, alongside a worldwide depression following the Wall Street Crash of 1929 left Germany on the brink of economic collapse. Heinrich Bruning, the then Chancellor of the Weimar Republic was dismissed[152] and Franz von Papen was appointed.[153] Von Papen was anti-republican and anti-democracy, and he, alongside President von Hindenburg formed a plan to rid Germany of what was seen as the threat from communism[154] which they blamed for all of Germany's economic ills. Von Papen was a neo-conservative, his aim was to establish an absolute monarchy in the Weimar states.[155] To do this, Von Papen wanted to create a new parliamentary system that consisted of two houses, the upper of these two

[149] Ibid.
[150] L Armistead, 'Greek Crisis is 'like the Weimar Republic'' (*The Telegraph*, 05 October 2012) <https://www.telegraph.co.uk/finance/financialcrisis/9591004/Greek-crisis-is-like-the-Weimar-Republic.html> accessed 3 February 2022.
[151] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), (adopted 28 June 1919, entered into force 10 January 1920) 1919 225 CTS 188.
[152] WL Patch jr, Heinrich Bruning and the Dissolution of the Weimar Republic (CUP 1998).
[153] WE Braatz, 'Two Neo Conservative Myths in Germany 1919-32: The 'Third Reich' and the 'New State'' [1971] 32(4) Journal of History of Ideas 569-584.
[154] Ibid.
[155] Ibid.

houses would be appointed by the state leader.[156] To bring about this change, Von Papen hoped to create a coalition of parties; however, he quickly discovered that support was limited and only the Nationalists were really open to his ideas. In return for their support of Von Papen's plan, the *Nationalsozialistische Deutsche Arbeiterpartei (*Nazi Party) requested the suspension of the decree that had banned the *sturmabteilung*[157] and also insisted that Von Papen gave assurances that a fresh election would be called. Von Papen, to legitimise his government, was forced to call an election, which allowed the Nazi party under Adolf Hitler to gain yet more seats. Hitler now laid claim to the position of Chancellor. Von Papen still somewhat naively believed that he could control Hitler and the Nazi party. In July 1932, the Reichstag voted to give the President emergency powers, in turn an emergency decree was issued giving the President almost unlimited power, including the ability to dissolve the Reichstag and issue new laws without the support of the government. It also gave Von Papen the power to lift the ban on the SA and SS, which in turn removed the Nazi's final rationale for supporting von Papen. While there was a safety mechanism built into the constitution that gave the government the power to force the Reichstag to nullify the issuing of an emergency decree, the government did not nullify the decree.

In what would become a major step towards the end of the Weimar Republic, Hindenburg issued an emergency decree to remove the government of Prussia, following unrest in the area using article 48 of the Weimar Constitution. Von Papen used the emergency decree to put himself in control of Prussia.

The Preußenschlag or Prussian Coup as it became known was the pretext under which von Papen sought to remove the Braun cabinet and take direct control of Prussia. The Prussian government complained to the constitutional court that Von Papen's conduct was contrary to constitutional law.

Schmitt's case

Schmitt represented the Von Papen's government. His case was built on four pillars:

[156] Ibid.
[157] Hereafter known as the SA.

Support of von Papen

Schmitt argued that von Papen had the necessary power to use the emergency decree issued by Hindenburg. He also argued that the Social Democratic Party that were in power in Prussia under Otto Braun were not independent. It was therefore necessary to remove the political nature of the government for the good of Germany. He argued that the freedom from party politics that von Papen had given his government afforded to it full legitimacy.

Rejection of democracy

Schmitt had rubbished democracy as a principle of equal chance, when the opponent wants to destroy your foundation stone, this is fundamentally suicidal to your theology. He endorsed autocracy, giving power to a single '*sovereign*' who was free to make any decision he wished without the restraints of any external legal mechanisms. However, it was not a rejection of the concept of democracy but, in fact, a rejection of liberal democracy. Georg Dahm writing in 1935 stated that '*Schmitt's works [are], from the start, directed at one specific aim: the unmasking and destruction of the liberal Rechtstadt and the superseding of the legislative state'*.[158]

Schmitt further argued for the separation of democracy and the liberal constitution. He argued that in order to have an intelligible and stable foundation for a constitutional democratic state in the twentieth century and beyond there must be two things: basic individual rights and separation of powers. He went further to argue that '*if the Weimar state was to provide a lasting and stable public order – democracy, constitutional change and the will of the people could only operate within a framework of inviolable constitutional commitments'*.[159]

Schmitt's rejection of democracy should not be tarnished by his support of the Nazi party, because, in fact, his theory has been endorsed by later governments, as it is not only a rejection of democracy but an endorsement that some liberal constitutional commitments should be placed beyond the reach of the

[158] R Cristi, 'Carl Schmitt on Liberalism, Democracy and Catholicism' [1993] 14(2) History of Political Thought 281-300.

[159] BA Schupmann, 'Responding to the rise of extremist populism ' (OUP Blog , 5 February 2018) <https://blog.oup.com/2018/02/rise-extremist-populism/> accessed 3 February 2022.

democratic amendment procedure.[160] In other words, despite Schmitt's rejection of Kelsen's norm theory, he does admit that certain ideals should be protected so that they cannot be destroyed by extremist populism. It is argued that Schmitt's theory inspired Germany's Eternity Clause [Article 79 of the post-war German Constitution[161]] that lays out the protection of fundamental principles [Basic Law] that all German Governments must abide by. The clause acknowledges Articles one to twenty of the Constitution that lays out protections including human rights, separation of power, and the rule of law. Article 79. 3 states '*Amendments to this Basic Law affecting the division of the Federation into Lander, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible'*[162].

In short, the constitution cannot be amended to divide the German Federation, nor can amendments be made that affect the participation of the legislative process, and the Basic Law (that lays out human rights) cannot be amended in any way. The German Constitution is in fact one of the strictest constitutions as it clearly acknowledges the dangers of populism and also the manipulation of a weak constitution. It specifically prevents circumstances for a similar rise to power to that of Adolf Hitler's.

Endorsement of Nationalism

Schmitt endorsed nationalism. He argued that the Nazi party had gained millions of supporters in the 1932 election which gave them the legitimacy of recognition and the Prussian government therefore had no basis for the ban on the military part of the party. However, the figures show that officially the Nazi party had around 900,000 members in 1932.[163]

Undermining of the Constitutional Court

Finally, Schmitt argued that the Constitutional court did not have the power to rule in this case as judicial review was invalid. There were three key reasons why; firstly, the Prussian government had no legal standing as it had been replaced and therefore had no right to bring the case in the first place. Secondly,

[160] Ibid.
[161] Federal Ministry of Justice of Germany , 'Basic Law for the Federal Republic of Germany' (*Federal Ministry of Justice* , 29 September 2020) <https://www.gesetze-im-internet.de/englisch_gg/> accessed 3 February 2022.
[162] Ibid.
[163] LD Stokes , 'The Social Composition of the Nazi Prty in Eutin 1925-1932' [1978] 23(1) International Review of Social History 1-32.

the court only has the remit to rule in legal matters and this case was political. He argued that under the then German constitution the President is the guardian of the constitution in political matters. Under the powers expressed in Article 48,[164] it was he alone who could rule what was the correct course of action in this case. Finally, and perversely of Schmitt as he had argued that all law was political, he argued there was a primacy of the political view over the legal view, and this of course gave power to the President and not the court.

Kelsen's view of Prussian Case

As discussed earlier in this chapter, Kelsen's version of positivism recognised certain basic norms. In this case, the norm would be that the constitution should be obeyed. Kelsen supported the judicial review, believing that it was the logical way to ensure the government stays within the law. He argued against Schmitt's view that the Court did not have jurisdiction, maintaining that the Constitution gave the court entire jurisdiction derived from article 19.[165]

Kelsen contended the court was contradictory about Prussia's claims. He maintained that the emergency powers could compel the government to fulfil their duties. However, the government had been expelled. Kelsen's strict positivism meant that while he may not have agreed with the decision of the court this did not remove its legitimacy. He was clear that whatever the court decided, the decision was valid as the court had legitimacy because it had been created under the legitimate process of the

[164] Article 48 states that '1. *If a Land does not fulfil its duties according to the Reich Constitution or Reich statutes, the President can compel it to do so with the aid of armed force*
2. If in the German Reich the public security and order are being significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed force. For this purpose, he may provisionally suspend in whole or in part, the basic rights established in Articles 114, 115, 117, 118, 123,124, 153.
3. The President must inform the Reichstag without delay of all the measures instituted according to Section 1 or Section 2 of this Article. The measures must be set aside at the request of the Reichstag.
4. In the case of immediate danger, the Land government can institute for its territory the type of measure designated in the second section on an interim basis. The measures can be set aside at the demand of the President or the Reichstag.
5. A Reich statute determines the details' Schmitt, C *'Legality and Legitimacy'* (Duke, 2004) pg 103

[165] Article 19 of the Constitution of the Weimar Republic states '*Regarding constitution disputes within a state, where no court is responsible to deal with, as well as in disputes of non-private matter between various states or between a state and the Reich, the Reich state court, at the request of one party, decides in the name of the Reich, unless another Reich court is responsible. The Reich president executes decisions of the Reich state court*'.

Constitution. He put forward that while the decision was nullable, it was still valid, as the court did not nullify any of the parts of the Constitution and so the President's unrestricted powers were valid.

The Schmittian principle therefore brings to the forefront the need for a law to recognise the political nature of the process. It also places ultimate power in the sovereign.

A New Interpretation

The three philosophies that have been addressed so far in this chapter have balanced the substantive to the procedural to the political. The final philosophies this chapter will look at is the interpretive theory developed by Ronald Dworkin (1931-2013), and the emergence of Legal Realism.

Interpretative Law Theory

Throughout the twentieth century there was a clear preference for positivism in legal philosophy. However, in 1977 Ronald Dworkin published his critical response to Hart's positivism theory.[166] He argued that the nature of legal arguments lay in the best moral interpretation of existing legal practices. The key to Dworkin's theory is that morality and law cannot be separated and, as in natural law theory, morality precedes the law. He states '*jurisprudential issues are at their core issues of morality'*.[167] He further contends in support of law that the state has a positive obligation through the use of law to protect a person's autonomy. In his work 'Law's Empire'[168] Dworkin distinguished law from justice by saying *'[l]aw is also different from justice. Justice is a matter of the correct or best theory of moral or political rights… Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past'*.[169]

It was Dworkin's opinion that law that has the best relationship to the rights that must be protected convey the best form of justice.

[166] R Dworkin , 'Law as Interpretation' [1982] 9(1) Critical Inquiry 179-200.
[167] R Dworkin , Taking Rights Seriously (Harvard University Press 1977).
[168]R Dworkin , Law's Empire (Harvard University Press 1986) 97).
[169] Ibid.

Dworkin stated that law could be divided into three areas: firstly, descriptive law, this is the observation of the law as it is now. No moral judgment is made of the law, it is purely an observation of it.[170] In the case of the statute that was created for the ad hoc tribunals, this stage could be seen as echoing what happened. The lawmakers first looked at Treaties and Convention that were already in place and also the statute used during the Nuremberg trials and drafted the statute accordingly. Secondly, there is normativity. Normativity is a value judgment, where the behaviour is judged to be what is right or wrong. With normativity, there is the question of what should have been done.[171] Here, the Statutes, Treaties and Conventions are judged, to determine whether the laws applied created a just outcome. Finally, there is the interpretive part of the law. This requires aspects of both descriptive and normativity, where the meaning of the law must be investigated and the degree of acceptance of the law is sought to make a value judgment of the legislation. It is this pursuit of a '*normal*' or '*sensible*' interpretation of the law that ascribes a morality to the law itself.[172] Dworkin therefore looks at the substantive form of the law in order to make a '*value judgment*' on the law.

Stages of Interpretation

The interpretative stage can be further divided into three stages. Firstly, the pre-interpretative stage, where the social norm is established.[173] For example, it is a social norm in the UK to drive on the left-hand lane of the road. These norms were developed for a reason; in the case of driving on the left-hand side of the road, it was for safety reasons that everyone must drive on the same side within a state.

Secondly, there is the interpretative stage, and a meaning is ascribed to the behaviour. This second stage extends to different types of interpretation – artistic interpretation, where the behaviour is given a purpose, goal or principle and scientific interpretation where no judgment is made on the principle. It is purely whether the rule of behaviour is observed, and to what extent.

[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.

The third stage is the post- interpretative stage. At this stage the other interpreter must look at what the practice actually requires to better justify any interpretations made in the second stage, or what establish would be the just outcome of the law.

Dworkin's constructive interpretative approach to legal practice is the assumption that it is the duty of judges to identify legal rights and assume that the laws were created by a community and express the community's conception of fairness and justice. Therefore, the key features of Dworkin's theory are the notion of justice and fairness. A constructivist approach to international criminal law would seek to look at the aspects of criminality that the law strives to address; it would then look to interpret the law looking at the widely recognised behaviour, in this case, whether the majority of states or their citizens alter their behaviour to comply with the law in question. Finally, from the initial aim of the law, and an interpretation of the law as it stands, what the most fair and just outcome of the law would be.

Realism

The final theory this thesis will address is that of realism. Realism supports the view that the '*global elite*' impose their will on the majority of the population. It follows the money and the power to show how laws are created and interpreted to reflect how law works within society. Realism states that the world starts from a position of anarchy and this anarchy dictates the behaviour of states and their citizens. Highlighting the subjective exercise that occurs in the interpretation of all legislation, based on the majority decisions made by judges or politicians, the key focus is that it is human nature to act on self-interest and that this self-interest will always trump morality. Using historical examples to illustrate this to be case, Thucydides (5th Century BCE) wrote long before realism was posited as a theory that '*that considerations of right and wrong have never turned people aside from the opportunities of aggrandisement offered by superior strength*'.[174] This view is also implied in statements made by the Athenian envoys in the Melian Dialogue. The Athenians offered the Melians a

[174] The history of Thucydides has been extensively written about and I will not attempt to refer to the many books and articles that cover the topic, however should the reader wish to consult a reliable translation can be found under the following reference – Thucydides, The History of the Peloponnesian War (Penguin Books 2000).

choice, they could either surrender or face destruction. The Athenians told them not to appeal for justice but instead to think of their own survival. They stated that discussions can only happen when both parties have equality of arms, when they are under equal compulsion. If they are not under the same forces of law and subjected to a common authority, the stronger party has the right to dominate the weaker party. Asking the other party to disregard any talk of mortality and instead rely upon rationality, intelligence and foresight and act upon their own concerns for personal security, Thucydides argues that unrestrained power without a sense of justice leads to uncontrolled desire for more power. The Athenians disregarded the Melian argument that in the long run considerations for justice are useful to all parties. This path was ultimately unsuccessful for the Athenians who, '*drunk on the prospect of power and glory'* engaged in war against Sicily and ultimately overestimated their own strength and lost the war. It can be concluded that while it is short sighted to ignore reality it is equally blind to rely upon power alone. More modern Realist including Hans Morganthau (1904-1980) and Raymond Aron (1905-1983) can be compared to Thucydides – while is it sensible to make demands that are in the national interest, one should not deny that political actors are subject to moral judgments.

Niccolo Machiavelli challenged the established political tradition; his was a radical form of realism that applied to both domestic and international affairs. He claimed that all means, whether moral or immoral, are justified to achieve political ends. By asserting that states' highest duty was maintaining themselves, Machiavelli never refused to admit that immoral tactics and actions used in politics were evil, despite that he saw them as justified. In relation to international politics, Nazi Germany's Heinrich von Treitschke would later use Machiavellian logic to justify why international agreements were only binding insofar as it was beneficial to the state itself. This concept of *realpolitik* was thus introduced and would be used to justify total war.

Realism in the twentieth century was a response to the idealistic perspective of those such as Woodrow Wilson which thrived after WWI. Two competing forms of realism put forward by Morgenthau and Aron respectively would dominate the academic discussion for years to come. Morgenthau is perhaps the best known of the two realists, famed for his persuasive language and his six principles that were included in his best-known work 'Politics among Nations'. Morgenthau put forward the belief that

politics was governed by objective laws, and the roots of these laws lay in human nature. Basing his theory firmly in this camp meant however that he recognised that there was unlikely to be a new idea in political theory and any such new theory should be subjected to the dual test of both reason and experience.[175] Setting the political realism concept in terms of power apart from other aspects of governance such as religion, ethics or economics[176] is imperative to Morganthau's theory of political realism, as without this definition between the areas of governance there is no way by which politics can be understood in Morganthau's view. This is evident in history, while it would be preferential to many that statesmen would apply ethical or other value concepts upon their decisions, it is clear that the rationale behind their actions is in fact defined by power. Applying this theory to previous historical events a clear example of this is the entry of the United States of America into World War Two, their entry was only confirmed when their power was threatened by the attack on Pearl Habour on 7th December 1941. Before this the US believed their best policy was to build up its own defences and avoid conflict with either side. A more modern reading of the situation, often attempting to apply a more ethical view on the matters, places the US as leaders of the '*free world'* and regards their entry into the conflict as more altruistic in motivation, but actually it is clear that the US entered World War Two to protect their own power.

The reason for basing the assessment of the political landscape to be defined in terms of power is that searching for the political motivation of a state actor leads to value judgments where emotions and interests of both the actor and the observer are imposed upon the action, distorting the original motivation, and rendering the examination useless and in many cases deceptive. It also places a moral judgement upon those decisions that are framed by often unforeseen consequences of the original action or decision. In hindsight, Neville Chamberlain's policy of appeasement based purely in the guise of protecting British power could be seen as a good, as there was little point involving the UK in a conflict that did not affect their own balance of power. In fact, this is the same policy that the US continued until 1941 as mentioned earlier, so it is clearly a policy that was and is common in national foreign

[175] HJ Morganthau, Politics Among Nations: The Struggle for Power and Peace (5th edn, Alfred A Knopf 1978) 4-15.
[176] Ibid.

policy. Chamberlain's policy was to avoid conflict for the UK by sacrificing countries and land that the UK held no interest in. His motivations are often looked upon favourably by historians who describe him as a man who sought to preserve peace, but it is clear from history that these policies inevitably led to World War Two. Winston Churchill, regarded by many as one of the greatest ever Britons, had policies that were clearly motivated by his own thirst for personal and national power. These motivations could be judged as morally inferior to those of Chamberlain, but of course, in terms of policies these motivations led to superior political decisions than Chamberlain's and ultimately, helped the United Kingdom to retain its power once the conflict had been won in the form of the UN Security Council permanent seat.[177] It is clear then that good motives do not guarantee good policies, nor is it a guarantee against bad policy. It is the job of the statesman to comprehend as far a possible the ramifications of any political decision or policy. Realism must judge the statesman ability to make such a judgment based on their intellect, will and action[178] rather than the moral qualities of his motives. In the case of Chamberlain again, it is clear that he failed to intellectualise his decision by looking at the consequences of his policy. It is not a far-removed step from his original decision to see that Hitler, hell-bent on revenge due to German defeat in World War One, would attempt to push forward to show the full might of his German Empire.

When describing political theory Morganthau uses the analogy of a photograph and a painted portrait. He states

> '[T]he difference between international politics as it actually is and a rational theory derived from it is like the difference between a photograph and a painted portrait. The photograph shows everything that can be seen by the naked eye; the painted portrait does not show everything that can be seen by the naked eye, but it shows, or at least seeks to show, one thing that the naked eye cannot see: the human essence of the person portrayed'.[179]

Not only does a photograph shows everything that can be seen, and painted picture will show only what the artist wishes to include, this means key details can be distorted or removed completely. A statesman

[177] This matter will be discussed at length later in the thesis so I do not intend to explain it further here.
[178] HJ Morganthau, Politics Among Nations: The Struggle for Power and Peace (5th edn, Alfred A Knopf 1978) 4- 15.

[179] HJ Morganthau, Politics Among Nations: The Struggle for Power and Peace (5th edn, Alfred A Knopf 1978) 4-15.

should make his political decisions based on the photograph with all the known details, the evaluation of the decision, however, will often by made by those looking at the portrait, with the addition of the '*human essence'*. While it is clear that political theory will have to address these elements at its forefront it is a theory upon which to make a judgement call about what makes a rational foreign policy rather than making a judgment call upon what makes a good or bad foreign policy because these judgments are based not solely in political theory. It is this key concept of objectivity that makes realism a universally valid theory. It can mean that opposing foreign policies are both equally valid as rational foreign policies.

Applying this to evaluations of the model in later chapters it is important to apply the guise of modern foreign policy on the it. The objectives of the states upon which the model will apply will differ greatly, but most states share common threads of political objectives, e.g. asserting national sovereignty and maintaining or gaining power to assert their national or political ideals upon the largest possible number of people.

Conclusion

The theories put forward have a number of key features that proponents argue must be present in order to legitimise international criminal law and later this thesis' model itself. It is clear that crucial to legitimacy as it exists now is that it is widely recognised and observed. If a law can be seen to be observed by the majority of states or by all states, the majority of the time, then they must be legitimising it in some way.

It is also the case that there are two distinct types of law; the first is the law that concerns humans, their interaction with each other or between them and the government. These laws can be seen as laws through which there is some kind of '*victim*' or where the conduct of one human may cause some form of harm to the other party, be it physical, emotional, or financial. The second type of law is purely administrative this law usually puts forward rules that govern best practice or allow for the smooth running of a state. This thesis is concerned solely with the first type of law.

This thesis seeks to argue that there is a basic set of norms upon which law can garner legitimacy. Those norms begin with the unalienable right taken from the Universal Declaration of Human Rights, article one stating *'[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason conscience and should act towards one another in a spirt of brotherhood'*.[180]

If all humans are judged to be free and equal then it can be argued that their right to be protected from acts of criminality at war is also equal, as is their right to justice should they become victims of this criminality. Therefore, international criminal law has a core norm, i.e., that of protection of citizens under its jurisdiction. Its jurisdiction should also extend to every single citizen as the declaration states that all humans are afforded such protection.

Once this central norm has been established, it is for the model to establish how this protection can be administered in order to protect everyone. This is where a secondary set of norms that is taken from the opposing theories can be looked at.

Firstly, from natural law the model will take that the law must be clear and capable of being followed. This does not necessarily mean by way of codification; it may be that conduct has been agreed by parties or in the case of ICL it may be that it is clear that the conduct would infringe upon the central norm that we have established. All the laws should be read from the perspective of this norm. If the conduct in question infringes upon the dignity or rights of others, then it is an offence under criminal law. This is the case whether looking at law from a national or international perspective. Hence why most of the laws that are found at international criminal law level have a mirroring statute at national level, it is usually the scale of the offence that differs. This is why the model will seek to argue that the majority of cases will never reach the international sphere and will instead be tried at a national level.

Secondly, as everyone has equal rights to be protected from harm this also means that they have equality before the law. This means the law must be fair and consistent. This set of norms usually encompasses the rights of the defendant. In order to be legitimate, the court must ensure that the law is applied

[180] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

consistently. International criminal law is often reactionary, and this brings forward arguments of retrospectivity relating to its application be that temporal or spatial but using the central norm as its guiding factor means that offences can be developed should that situation create a need to do so without infringing upon the defendants right of consistency. For example, a new weapon is developed such as the weapons used in Star Trek that kill through the use of phasers, that use energy sources to kill or injury their opponents or a widescale energy source such as a laser that can wipe out large areas of people. While this specific type of weapon has not been outlawed, it is clear that such a weapon would infringe upon the central norm of the system and thus it would be outlawed, not because it has been agreed on but because it is clear from the norm that this type of weapon would have the potential to kill many. Through history there have been examples of the development of warfare that have infringed upon this norm, and they have later been codified against. It would therefore not infringe upon the consistency layer of legitimacy to criminalise an activity that would so obviously be codified against if the development or weapon be used on a widescale basis. That you poison a person on purpose with a unknown chemical that you have created, that is not yet illegal, and they die, makes you no less guilty if your intent was to kill them. The same is true of a weapon that is developed if that weapon is used in a widespread manner, one that may endanger innocent parties, its use is still in contravention of the central norm.

Finally, the law must have some possibility of compliance. Again, this brings up the notion of fairness. While conduct that clearly infringes upon the central norm may be deemed to be unlawful, if the offence in questions has not been agreed upon as unlawful or is in fact farcical in nature then it does not constitute a legitimate law. Possibility of compliance also means that in some cases infringing upon an individual's right to be free and have their dignities protected may be required in order to fulfil the second part of the central norm, that of acting with a reasoned conscience. For example, it may be considered a crime to shot down an aeroplane killing its occupants but if you are shooting down an aeroplane that is heading towards a crowded area intent on dropping bombs on the civilian population, this act is unlikely to constitute a crime of war.

The outer circles of norms are therefore a balancing act that have the central norms as the deciding factor of whether the act constitutes an offence and whether the law surrounding the act is legitimate. While on the face of it, it would be obvious to imply that killing another human constitutes an offence

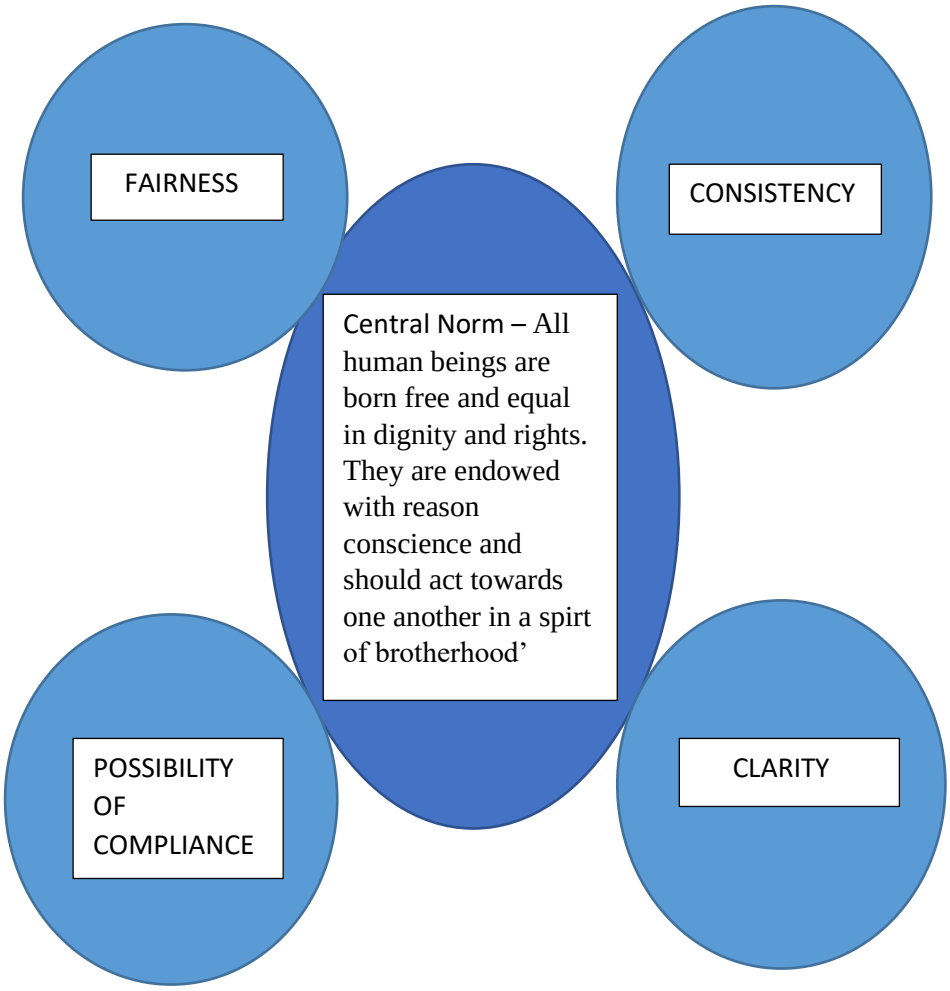

Fig.1.

it is only when read in conjunction with the outer norms that a clear picture of the offence can be developed.

Chapter Two - History of War Crimes Legislation

In chapter one this thesis examined the concept of legitimacy and created a model for the key features of it. The next three chapters will look at the developments of international criminal law and the growth of the *crimes of war* doctrine. In chapter two this thesis will look at the history of war crimes trials and the legislation that each tribunal used against a backdrop of an ever-changing global geo-political landscape. Chapter three will focus specifically on the most recent ad hoc tribunals for Rwanda and the former Yugoslavia and will trace through their creation and the developments that were made in doctrine. Chapter four will then analyse the creation of the permanent international criminal court. It will look at the mechanisms that created each of the tribunals and courts, and at the key offences that are tried as part of the '*crimes of war'* doctrine, charting their development and documenting the challenges each attempt to administer international criminal justice has encountered.

The Beginning

Throughout history there have been many opportunities to punish behaviour in conflict which was seen as wrong. In 1474 Sir Peter von Hagenbach stood trial for alleged crimes committed between 1469 and 1474 while serving the Duke of Burgundy. These atrocities were committed against civilians. His trial for murder and rape before 28 judges from various city states of the Holy Roman Empire is cited as the first International War Crimes Trial.[181] For centuries since then there has been a battle between states to punish those seen as committing crimes in times of war and those seeking to prevent further conflict.

Over the past six hundred- and fifty-years states have, through treaties and bi-lateral agreements, tried to define the conduct of states during times of conflict. These agreements were usually signed to define peace terms after the fact, to reconfirm boundaries or succession following conflict. In 1856 the Treaty of Paris[182] was signed, bringing the Crimean War to an end. While it severely restricted the Russian Empire by restricting its influence in the Black Sea area, it opened up the sea that had previously been impassable by trade ships by significantly recognising the neutral flags of the trading vessels,

[181] G Gordon and others, Hidden Histories of War Crime Trials (OUP 2013) 13 -49.
[182] Peace Treaty between Great Britain, France, the Ottoman Empire, Sardinia and Russia (Treaty of Paris) (signed 30 March 1856) (1856) 114 CTS 409.

guaranteeing their safe passage.[183] It is clear then, some treaties are used by victors to bring about more advantageous conditions for themselves or economic, trade or friendly states. This adds evidence to the argument that often war crime trials and the administration of international criminal law in general is nothing more than '*victors*' justice'.

Modern day international criminal law is often said to have begun in the United States of America. In April 1863, the 16th President of the United States, Abraham Lincoln, promulgated as General Orders 100 what was to become known as the Lieber Code.[184] The code laid out the conduct that was expected of American soldiers in war time. During the American Civil War, Francis (Franz) Lieber, a German American jurist, had been asked to incorporate all the existing customary rules regarding conflict into this one document. Arguably, Lincoln used the Code to stave off any further trouble in and from the southern states following the Emancipation Proclamation of 1st January of the same year[185] as it gave further legal basis for the proclamation. However, Southern states still argued that they would treat black Union soldiers as criminals and not soldiers as the Lieber Code proclaimed them to be. The American Civil War also answered two fundamental questions that would have a bearing on legal and political leaning for the rest of the world. Through the victory of the northern states, it confirmed that the United States was an indivisible nation with a sovereign national government this nation, the United States of America (USA) would go on to play a major role in international law to this day. The second development was that it was perhaps the final nail in the coffin of the slave trade. Now the USA was in line with the United Kingdom (Great Britain) which had abolished the slave trade in 1807.[186] The abolition of slavery in Great Britain and other states led to The Mixed Commission for the Transatlantic

[183]United Nations, '1948 History of the United Nations War Crimes Commission and Developments of the Laws of War ' (*United Nations War Crimes Commission* , Unknown) <http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf> accessed 3 February 2022.

[184] Yale law school , 'General Orders No 100 : The Lieber Code' (*The Avalon Project*, 2008) <https://avalon.law.yale.edu/19th_century/lieber.asp> accessed 3 February 2022.

[185] J Mcpherson , 'A Brief Overview of the American Civil War: A Defining Time in Our Nation's History ' (*Civil War* , 20 November 2008) <https://www.battlefields.org/learn/articles/brief-overview-american-civil-war> accessed 3 February 2022.

[186] Although this was limited to territories under the control of the British government, it was not until 1843 that territories under the possession of the East India Company abolished slavery.

Slave Trade.[187] Great Britain had signed treaties with Portugal (28th July 1817), Spain (23 September 1817) and the Netherlands (4 May 1818) under which the use of the necessary special warrants would be allowed to board merchant ships. These treaties would eventually lead to the liberation of approximately 80,000 slaves.[188] These treaties also stated that any captured ship would be taken to one of the two sets of mixed commissions. One sat in British territory in West Africa and across the Atlantic there was a commission in territories controlled by the Portuguese, Spanish, and the Dutch.[189] The mixed commission had no jurisdiction over the owners of the boats, master, or crew of vessel. Instead, it had two very clear options; it would either find that the ship had been rightfully detained and liberate its slaves or it would release the boat and any slaves on the boat back to its owners.[190] A point to note at this junction is that a number of the nations that would later have significant difficulties and conflicts that would merit intervention by either the League of Nations or its later manifestation, the United Nations, were involved in conflict with or were subject to colonial rule. For example, the British Slavery Commission was based in Sierra Leone, a country that would only achieve full independence from its British rulers in 1961. Known in the 19th century as '*white man's grave'*, colonial rule in West Africa was somewhat bloody for all involved, and, in fact four British Commission judges were murdered while in office.[191] It is clear that these earlier conflicts and interventions continued to affect the nations for many years. This was also true of the Lieber code and the emancipation proclamation that it supported.

The Emancipation Proclamation would later be ratified into the constitution of the United States of America as the Thirtieth Amendment[192] and it declared '*[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within*

[187] L Bethell, 'The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century' [1966] 7(1) The Journal of African History 79-93.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] L Bethell, 'The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century' [1966] 7(1) The Journal of African History 79-93.
[192] University of Minnesota, 'All Amendments to the United States Constitution ' (*Human Rights Library*, Unknown) <http://hrlibrary.umn.edu/education/all_amendments_usconst.htm> accessed 3 February 2022.

the United States, or any place subject to their jurisdiction.'.[193] It would take a further hundred and one years until the ratification of the Civil Rights Act of 1964,[194] that discrimination based on race, colour, religion, sex or national origin was outlawed. First mooted in his Report to the American People on Civil Rights on 11th June 1963 by the 35th President of the United States John F Kennedy and finally passed by the 36th President Lyndon B Johnson following Kennedy's untimely death the Civil Rights Act of 1964 enshrined into law the right of all Americans to vote and confirmed the end of segregation, despite this it would be naïve to state that this ended racism or discrimination. Even to this day the International Criminal Court has had to defend claims against it that it is institutionally racist, the Civil Rights movement and the destruction of colonial rule would go on to affect the formation of the International Criminal Court, these issues will be addressed in a later chapter.

The Geneva and Hague Conventions

Contemporaneously with the Mixed Commission Courts came The Geneva Conventions and their Additional Protocols. On 24th June 1859, after fifteen hours of fighting in the town of Solferino, between an alliance of France and Sardinia under Napoleon III and the Austrian army, 40,000 lay people dead or injured from battle. The wounded made their way to nearby towns and villages, a large number of the injured making their way to the town of Castiglione. Travelling through Castiglione at the same time was Henry Dunant, a Swiss businessman, who was shocked and appalled by the suffering he witnessed. In 1862 Dunant felt driven to write and publish 'A Memory of Solferino',[195] that documented the suffering he had witnessed. Within months of its publication a temporary Committee of Five had been formed in Geneva and they began to organise relief. This committee was to become the International Committee of the Red Cross. The first conference of the Red Cross was held in Geneva in 1863 and it succeeded in drafting resolutions and recommendations for how those wounded in times of conflict should be treated. However, it was not until the second conference held a year later in 1864 that the full convention was successfully drafted. Ratified and agreed by the attending governments it

[193] J Mcpherson , 'A Brief Overview of the American Civil War: A Defining Time in Our Nation's History ' (*Civil War* , 20 November 2008) <https://www.battlefields.org/learn/articles/brief-overview-american-civil-war> accessed 3 February 2022.

[194] Civil Rights Act 1964 (USA).

[195] H Dunant, A Memory of Solferino (2nd edn, American Red Cross 1939).

bound those governments to '*give humane treatment to sick and wounded in war and protect those who cared for them'*.[196]

Thirty-five years after the First Geneva Convention on 29th July 1899 the Hague Conventions were signed. The Conventions contained Regulations relating to the conduct of soldiers towards belligerents, prisoners and the sick. It also contained provisions relating to the hostilities themselves prohibiting the use of poison or poisonous arms and also the use of projectiles likely to cause superfluous injury.[197] Perhaps the most important development in The Hague Conventions was the Martens Clause in the Preamble to the Convention. The clause took its name from the Russian delegate, Professor von Martens who made the declaration when the Peace Conference failed to agree on the status of civilians that took up arms against an occupying force. The clause stated

> 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience'.[198]

It is often quoted without the final sentence, this being of the utmost importance '*[t]hey declare that it is in this sense especially that Articles 1 and 2 of the Regulations must be read'*.[199] Those two articles state the following

> 'Article 1
>
> The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the 'Regulations respecting the laws and customs of war on land' annexed to the present Convention
>
> Article 2

[196] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI).

[197] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (1899 Hague Convention II).

[198] R Ticehurst, 'The Martens Clause and the Laws of Armed Conflict ' (*International Committee of the Red Cross* , 30 April 1997) <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm> accessed 3 February 2022.

[199] M Salter , 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' [2012] 17(3) Journal of Conflict & Security Law 403-437

> The provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them. These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-contracting Power joins one of the belligerents'.[200]

It is hotly disputed as to whether the Martens clause should be interpreted narrowly or more widely. Its narrow interpretation is that the clause acts purely as a reminder that even after the adoption of a treaty, customary international criminal law still applies. A wider interpretation is that because very few international law treaties are complete, the clause highlights that just because an action or offence is not specifically prohibited that does not mean that it is explicitly permitted. Finally, the widest interpretation is that the clause should be read to mean that all conduct in armed conflict is judged not only by codified law but also by the general principles of international criminal law referred to but not articulated in the clause.[201]

The Martens Clause is a very important development in international criminal and humanitarian law. It has subsequently been re-affirmed albeit with slightly different wording by a number of treaties and conventions of the twentieth century including the later Geneva Conventions and their Additional Protocols. It was also used as a tool of judicial interpretation, this being especially evident during the Nuremberg Trials of the major war criminals and subsequent proceedings in 1945. These will be examined shortly.

The Hague Convention 1899 was followed by the Hague Convention 1907 which contained additional provisions.[202] It incorporated the First Geneva Convention on the Sick and Wounded that the 1899 Convention had previously only applied to those interned in neutral territory.[203]

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[200] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (1899 Hague Convention II).

[201] R Ticehurst, 'The Martens Clause and the Laws of Armed Conflict ' (*International Committee of the Red Cross* , 30 April 1997) <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm> accessed 3 February 2022.

[202] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (1907 Hague Convention IV).

[203] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (CGI).

The use of Conventions went hand in hand with a more arbitrary approach to international relations. The USA and Great Britain were keen to move towards the use of arbitration to resolve disputes, one example being the approach adopted to resolve the claims that arose from the damage inflicted during the American Civil War to the confederate warship, the Alabama.[204] In 1871, Great Britain admitted responsibility for the sinking of the Alabama by British built Confederate raiders. A Panel of Arbitration the following year ordered the British to pay compensation of $15.5 million of which around $6 million was attributed to the Alabama incident.[205]

At the end of the nineteenth and the begining of the twentieth century international criminal law and the arbitration of disputes seems to be moving forward and the Geneva and Hague Conventions were a clear step towards more humane treatment of both soldiers and citizens in time of conflict, but events were about to frustrate this embryonic development of international criminal law.

Interrupted by War

In 1914 nearly 53,000,000 people lived under the rule of Emperor Franz Joseph I in the Austria-Hungarian Empire. The empire covered vast areas and encompassed a number of groups and nationalities. A young Yugoslav Nationalist, Gavrilo Princip sought to free his nation from the rule of the Empire, was a member of *Mlada Bosna* (Young Bosnia) which fought for a united Yugoslavia. On 28th June 1914, it was Serbia's National Day and was also the wedding anniversary of Emperor's son, Archduke Franz Ferdinand, and his wife Sophie, who had planned an event to inspect the empire's army as a direct display of power towards the Serbs. This visit had incited a determined group of six young Serb men to attempt to assassinate the Archduke as he drove along the main street in Sarajevo, the Apple Quay. The Archduke had that day already survived an attempt on his life when a car bomb was thrown at him, injuring members of the public and the police guarding him. Because of this it had been decided to cut his visit short, but Ferdinand had insisted on visiting those injured in the earlier attack who were now in hospital. It had further been decided that the royal couple would use an alternative

[204] United Nations, 'Alabama claims of the United States of America against Great Britain ' (*Reports of International Arbitral Awards* , 2012) <https://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf> accessed 3 February 2022.
[205] Ibid.

route to the one that had been publicized in case of further trouble from the nationalists. As the couple made their way out of Sarajevo their driver, unaware of the change of route, turned the car on to Franz Josef Street. The driver quickly realized his error and in what was to prove a catastrophic move stopped the car in front of Schiller's Grocery Store and began to turn the car in the road. Princip was on his way home, dejectedly believing the group had failed in its mission to assassinate the duke. He happened to be walking past where the driver had chosen to turn. Raising his gun, Princip fired his gun twice, the first shot hitting the duke and striking his jugular vein. He bled to death quickly and the second shot hit his wife Sophie, who also died almost immediately.[206] Princip and his co-conspirators' plan had not been to instigate a World War, but purely to push forward the nationalist cause. However, the leaders of the Austria-Hungary Empire were angry and seized upon the opportunity that presented itself following the assassination. While the official reaction of the Empire was outrage, the Archduke had not been universally popular in the Empire and key figures in the Empire were keen to push for war with Serbia. Austrian Chief of the General Staff, Franz Conrad con Hötzendorf, welcomed war as he felt Serbian agitation threatened to undermine the Empire.[207] This notion was echoed some 70 years later.

On 5th July, just a week after the assassination, Count Alexander von Hoyos brought a letter from the Emperor Franz Joseph asking for German support. Von Hoyos was guaranteed full and unconditional support from Germany. This became known as the '*Berlin blank cheque*'.[208] Germany's Kaiser Wilhelm II was scared of the strength of the Entente powers[209] especially the industrialisation and militarisation of Russia, who it was feared would in time be able to overpower the Triple Alliance.[210] Germany felt it must strike now. It theorised that by issuing an ultimatum to Serbia it would force

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[206] Cambridge University Library, 'Sarajevo 1914' (*Spotlight Archive* , Unknown) <https://www.lib.cam.ac.uk/collections/departments/germanic-collections/about-collections/spotlight-archive/sarajevo-1914> accessed 3 February 2022.

[207] A Mombauer, 'The July Crisis: Immediate Reactions' (*Open Learn* , 14 January 2014) <https://www.open.edu/openlearn/history-the-arts/history/world-history/the-july-crisis-immediate-reactions> accessed 3 February 2022.

[208] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (1899 Hague Convention II).

[209] The Entrente Powers were made up of Russia, France and Great Britain.

[210] Triple Alliance Powers made up of Germany, Austria- Hungary and Italy.

Russia either into a war that it believed Russia would lose, or into a humiliating political defeat if it chose not to fight. Russia was a close ally with the Slavs and Germany knew that it would feel obliged to step in on their behalf.

At 6.00pm on 23rd July a 48-hour ultimatum was issued to the Serbian Foreign Office by the Austria-Hungarian Minister in Belgrade. The ultimatum had a number of demands but, perhaps, the most explosive of the demands was that Serbia must accept the annexation of Bosnia, admit its government's guilt in tolerating a subversive movement in Serbia and issue an official apology in the Serbian press to that affect. Contemporaneous reports quote the Austria-Hungarian Minister, Baron Wladimir Giesl as saying '*However the Serbs react to the ultimatum, you must break off relations and it must come to war'*.[211]

Belgrade responded by agreeing to most of the demands, which wrong footed the Austria-Hungary government. The Entente Powers continued to lobby for peace. Britain especially was torn between allowing Russia to fight without their support, thereby risking a Russian victory and Russia gaining control of Europe, or a German victory giving it greater control over Europe. On 25th July, Austria began to mobilise troops, but it soon became clear that Serbia could not agree to all the terms of the ultimatum (as any investigation would have certainly led to the discovery that Serbian government did indeed have prior knowledge of the plot to assassinate Archduke Franz Ferdinand). At the last minute, when it became clear that Britain would be forced to join the war, Germany tried unsuccessfully to restrain Austria, but it was too late. On 28th July Austria-Hungary declared war on Serbia, and by 1st August Germany found itself at war with Russia. Upon Germany invading Belgium and France as part of its war plan (the Schlieffen Plan), Britain was dragged into the conflict and thus began the bloodiest war in history.[212] It was to become known as the Great War, but sadly is now known as the First World

[211] A Mombauer, 'The July Crisis: Ultimatum and Outbreak of War' (*Open Learn* , 14 January 2014) <https://www.open.edu/openlearn/history-the-arts/history/world-history/the-july-crisis-ultimatum-and-outbreak-war> accessed 3 February 2022.
[212] A Mombauer, 'The July Crisis: Immediate Reactions' (*Open Learn* , 14 January 2014) <https://www.open.edu/openlearn/history-the-arts/history/world-history/the-july-crisis-immediate-reactions> accessed 3 February 2022.

War. The events in Sarajevo had longer lasting effects as well. It would not only trigger the First World War but would contribute to the formation and later destruction of Yugoslavia. Both conflicts would become turning points in the administration and application of international criminal law. It is important to understand the history of these conflicts as the shockwaves have reverberated throughout twentieth and twenty-first century history, as with the earlier Slavery Commissions. Failure of law to address all issues allowed regions to dissolve into conflict later. It is also key to note here, that war was not inevitable but instigating by a pro-war foreign policy of the Austro-Hungarian Empire. There were many opportunities for all parties to avoid war.

World Conflict after The Hague Conventions

The First World War was the first major conflict since the codification of war crimes provisions in The Hague Conventions. The second annex of which proposed the formation of an international tribunal and stated at Article 3 of the proposed plan that: -

> 'The contracting nations will mutually agree to submit to the International Tribunal all questions of disagreement between them, excepting such as may relate to or involve their political independence or territorial integrity. Questions of disagreement, with the aforesaid exceptions, arising between an adherent State and a non-adhering State, or between two sovereign States not adherent to the treaty, may with the consent of both parties in dispute, be submitted to the International Tribunal for adjudication, upon condition expressed in Article'.[213]

During the war, instances occurred that would be recognized as war crimes committed by both sides that would challenge the international communities' commitment to such a tribunal. For example, as the German army advanced through Belgium and eventually occupied the country, it left behind it death and destruction. In particular, in the city of Leuven that German troops began a campaign of absolute destruction and violence. The city, known as the 'Oxford of Belgium', and home to a world-renowned university, was completely burnt to the ground. Over three days, 2000 homes were burned, and 248 civilians were killed.[214] The reign of terror that continued across Belgium earned the Germans the

[213] Yale Law School , 'Peace Conference at the Hague 1899 : Instructions to the International (Peace) Conference at the Hague' (*The Avalon Project*, 2008) <https://avalon.law.yale.edu/19th_century/hag99-03.asp> accessed 3 February 2022.

[214] B Waterfield, 'The City that turned Germans into 'Huns' marks 100 years since it was set ablaze' (*The Telegraph*, 25 August 2014) <https://www.telegraph.co.uk/news/worldnews/europe/belgium/11053962/The-city-that-turned-Germans-into-Huns-marks-100-years-since-it-was-set-ablaze.html> accessed 3 February 2022.

nickname of the Hun, after Attila the Hun, the fifth century ruler infamous for his barbaric behaviour in battle.[215] Thus, began the '*Rape of Belgium'*. In a clear breach of the 1907 Hague Convention, Germany engaged in atrocities aimed at the civilian population of Belgium, furthered by its initial invasion of neutral Belgium. Germany was also in contravention of the 1839 Treaty of London, which had assured the neutral status of Belgium, and of which Germany was an original signatory.[216]

The British too had a case to answer. On the 19th August, following the earlier sinking of HMS Lusitania with the loss of 1198 civilian lives on 7th May 1915,[217] British warship HMS Baralong came across a German U-Boat, U-27, as it prepared to sink a nearby merchant ship. Shots were fired and the U-boat was sunk. A number of crewmen of the U-boat were able to escape the sinking submarine and began to swim towards the merchant ship. The British Commanding Officer of HMS Baralong, Godfrey Herbert, ordered all U-boat survivors to be shot and the German sailors that had reached the boat were rounded up and killed. There is some dispute whether they were killed by the soldiers on board or by engineers who worked with for the White Star line in the engine room.[218][219] Whatever the truth, it was a serious breach of The Hague Conventions, and it was clear that the Germans saw it as a War Crime.

In 1915, as the fighting in World War One reached southern Europe, the Ottoman Empire embarked upon its own battle. The war had given young Turks the opportunity to settle in Armenian settlements. They began implementing a plan, that had been put together in 1911 by senior ministers in the Ottoman Empire,[220] to eradicate native Armenians from the Ottoman Empire. The facts of the violence towards the Armenians are still hotly disputed and the modern country of the Republic of Turkey (which the Ottoman Empire became) still refuses to acknowledge any criminality. In 2005, Doğu Perinçek chairman of the Turkish Workers' Party described the violence known now as the '*Armenian Genocide'*

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[215] Ibid.

[216] Digithèque de matériaux juridiques et politiques, 'Traités de Londres, 1839' (*Digithèque de matériaux juridiques et politiques*, 2008) <https://mjp.univ-perp.fr/constit/be1839.htm> accessed 3 February 2022.

[217] J Protasio, Day the world was shocked : The Lusitania Disaster and its influence on the course of World War One (Casemate Publishers & Book Distributors 2011) 116.

[218] M Hadley, Not the Dead : The Popular Image of the German Submarine (McGill - Queens University Press 1995) 29.

[219] G O'Neill, 'Scandal of the Baralong incident was hidden in a veil of secrecy' [2006] 1(4) Journal of the Sea - The Maritime Institute of Ireland 8.

[220] 'The Armenian Genocide Museum-Institute' Foundation, 'What is the Armenian Genocide ' (*Armenian Genocide* , 2007) <http://www.genocide-museum.am/eng/armenian_genocide.php> accessed 3 February 2022.

as an '*International Lie'*.[221] However, it is believed that around 1.5 million Armenians were killed during the violence that raged from 1915 to 1923, and another 500,000 are thought to have fled or been forcibly removed.[222] Turkey put the figures closer to between 300,000 and 600,000.[223] The treatment of the Armenians was later to help develop the new international crime of genocide.

These examples clearly illustrate that during conflict crimes may be committed by all sides and at in the beginning of the twentieth century there was a desire to form some kind of international tribunal. The desire for justice, however, is often ignored by peace treaties and the treaty that ended the First World War is no different.

The Treaty of Versailles

By 1918, large parts of Europe had been destroyed, Belgium and France having been especially hard hit by the fighting on the Western front. Other countries had fared a little better, having not been invaded, but were still devastated by the loss of life that had occurred. Empires had collapsed, and revolutions had begun. In these final weeks and months, Germany believed it could still win the war, and in fact were within forty kilometres of the French capital, Paris, on the day the Armistice was signed[224] but a revolt, beginning with German sailors in Kiel, spread throughout Germany. With the German public starving, Germany prepared to surrender. Writing later in his book Mein Kampf, a young Adolf Hitler was to declare

> 'My first thought that this outbreak of high treason was only a local affair… [w]ith the next few days came the most astounding information of my life. The rumours grew more and more persistent. I was told that what I had considered to be a local affair was in reality a general revolution. In addition to this, came the shameful news that they wished to capitulate! What! Was such a thing possible?'[225]

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[221] R Akkoc, 'ECHR: Why Turkey won't talk about the Armenian genocide' (*The Telegraph*, 15 October 2015) <https://www.telegraph.co.uk/news/worldnews/europe/turkey/11373115/Amal-Clooneys-latest-case-Why-Turkey-wont-talk-about-the-Armenian-genocide.html> accessed 3 February 2022.

[222] 'The Armenian Genocide Museum-Institute' Foundation, 'What is the Armenian Genocide ' (*Armenian Genocide* , 2007) <http://www.genocide-museum.am/eng/armenian_genocide.php> accessed 3 February 2022.

[223] Ibid.

[224] N Shepley, Britain, France and Germany and the Treaty of Versailles: The failure of long term peace (Andrews 2011) 7.

[225] Great War, 'Mein Kampf - Translated into English by James Murphy' (*The Heritage of the Great War*, Unknown) <https://greatwar.nl/books/meinkampf/meinkampf.pdf> accessed 3 February 2022.

The Armistice was signed at 5am on the eleventh day of November 1918. It was agreed that the hostilities would come to a halt at 11am that same day (Further prolongations were made extending the halt to hostilities until peace was finally ratified at 4.15pm on the 10th January 1920[226]). The end of the hostilities brought with it more issues. However, it was clear that various terms of The Hague Convention had been broken and the Entente Powers were determined to enforce these terms as strictly as they could. The Entente powers were made up of France, Great Britain, Russia and later the United States of America, and it was the late comers who were to push for the peace programme thought up by their President, Woodrow Wilson.

Woodrow Wilson had been elected as the 28th President of the United States in 1913. A democrat, he held a PhD in political science. As America entered the war in 1917, Wilson had put together a secret study that was to culminate in a speech delivered to Congress on 8th January 1918. Here he laid out his 14 points that would form America's long-term plan for the war. These points were later incorporated into the Peace Treaty that would eventually bring fighting to an end. They included re-working of borders, the removal of barriers to trade and reduced armaments.[227] At the beginning of 1919, as the peace negotiations began, America found itself in a position of immense power. The Entente powers owed America a combined debt of nearly eight billion dollars and Britain, who had bankrolled the other Entente Powers during the war, were now left owing America four billion dollars.[228] Germany had agreed to peace on the basis of Wilson's peace programme. The financial position of the warring nations, combined with the growing political power of America who had used the war to strengthen their own naval power, left Germany in a very weak negotiating position.

Britain also realised that it had little choice but to adopt a position of cooperation with America, this course of action being supported by the Imperial War Cabinet. The Cabinet was made up of seven

[226] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles),(adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188.

[227] Exodus Books, 'Fourteen Points - Delivered in Joint Session by President Woodrow Wilson 8 January 1918 ' (*Fourteen Points* , Unknown) <http://www.exodusbooks.com/Samples/VP/O3FourteenPoints.pdf> accessed 3 February 2022.

[228] R Henig, The League of Nations (Haus Publishing 2010) 25.

leaders of the largest nations that belonged to the British Empire at the time of the First World War. Jan Smuts, the Prime Minister of the South Africa at the time, had initially put forward the idea of cooperation and also suggested that they could '*best signalise that cooperation by supporting President Wilson's policy of a League of Nations by going further and giving form and substance to his rather nebulous ideas'*.[229]

On 18th January 1919, a conference began in Paris, attended by dignitaries from thirty-two nations. The conference was controlled by five nations: Great Britain, USA, France, Italy and Japan, although it was the Big Four (the five minus Japan) that were to meet informally to thrash out the main points of the Agreement that was then ratified by the other nations.

The treaty was divided into fifteen parts. These parts covered everything from the Covenant to set up a new League of Nations, to Articles that laid out territorial gains and losses and future military provision for Germany.[230] In terms of the provision of international criminal law and its development, three parts of the Treaty of Versailles are especially important.

Part One – The League of Nations

Part One of the treaty was entitled The Covenant of the League of Nations. The prelude to the Articles laid out the aims of the League of Nations, to '*promote international co-operation and to achieve international peace and security'*.[231] The first part was made up of 26 Articles and an annex that included the original signatories and also the states that had been invited to accede to the covenant. It also included the first Secretary General of the League named as the Honourable Sir James Eric Drummond.[232]

[229] Ibid.
[230] The outline of Article 1 and Article 232 can found in the appendices, under appendix 1 – Treaty of Versailles.
[231] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles),(adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188.

[232] Eric Drummond – British politician and diplomat who was not the original choice for the position but accepted the role and held the position from 1920 until 1933 - brief biography available at Library of Congress, 'Sir Eric Drummond' (*Library of Congress*, Unknown) <https://www.loc.gov/item/2021670568> accessed 3 February 2022.

The League of Nations was an important milestone in international relations. From the very beginning of discussions, the big four wanted to maintain a position of power over the other nations involved. Despite America's involvement in the drafting of the Covenant of the League and Woodrow Wilson's championing the idea, the US Senate rejected the Versailles Treaty and the League of Nations. Therefore, the founding Council was made up of Great Britain, France, Italy and Japan, together with four smaller nations. The rejection of the Treaty of Versailles marked the first time the Senate had rejected a peace treaty and seriously weakened the treaty on the international stage.

Part Two – Boundaries of Germany

The second section of the treaty dealt with the boundaries of Germany. The treaty took great swathes of land from Germany, these were punitive territorial sanctions and returned land that Germany had controlled long before the outbreak of war in 1914. Alsace-Lorraine was returned to France and Belgium was handed the areas of Eupen and Malmedy, Denmark received Northern Schlewig and further areas were ceded to Poland and Czechoslovakia[233]. The industrial area of Saar, was placed under the administration of the newly formed League of Nations and the Rhineland, was demilitarized.[234]

Part Seven – Penalties

Articles 227 to 230 were intended to identify and try those whom the Allied governments had defined as War Criminals. Article 227 of the treaty laid out the provisions for a special tribunal, to be presided over by five judges, one from each of the Allied countries.

The article further concluded that the decision of the tribunal was to be '*guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix punishment which it considers should be imposed'*.[235]

[233] A map illustrating the losses in appendices – appendix 2.
[234] United States Holocaust Memorial Museum, 'German Territorial Losses, Treaty of Versailles 1919' (*Holocaust Encyclopaedia* , Unknown) <https://encyclopedia.ushmm.org/content/en/map/german-territorial-losses-treaty-of-versailles-1919> accessed 3 February 2022.
[235] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles),(adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188.

The treaty also identified the Kaiser as a war criminal and enabled the institution of proceedings to extradite the Kaiser from the Netherlands, where the Kaiser had fled following the German surrender in 1918.

Under Article 228 Germany agreed to the '*right of Allied and Associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war*'.[236]

This is an important development in the provision of international criminal law as it was the first time in modern history that a tribunal of an international nature had been proposed to adjudicate a specific conflict. The Netherlands now held a pivotal position; if it chose to hand over the Kaiser, the Tribunal would be established, and it would create a precedent for future conflicts. Unfortunately for the development of international criminal law, the Netherlands maintained that handing the Kaiser over to Allied forces would be a violation of their neutral status and so eventually the Entente countries were unable to try the Kaiser. Wilhelm II escaped punishment and would live out his rest of his life in exile, dying in 1941 in Huis Doorn at the age of 82.[237] The world would have to wait for a further opportunity to put into practice the laws and customs of war the governments of the Great Powers had spent so long codifying.

Part Eight – Reparations

The provisions in the treaty for reparations remain the most controversial of the treaty articles. The articles assigned all the responsibility for losses firmly at the feet of Germany. It provided provision for the Reparations Commission and even gave the Commission the power to modify the payment of the reparations in view of changing resources, but not the power to reduce or cancel the reparations.

War Guilt

The most humiliating clause of the treaty was Article 231, known as the '*War Guilt'* clause. This formed part of the Reparations section of the treaty, stating *'[t]he Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage*

[236] Ibid.
[237] Historycom Editors, 'Kaiser Wilhelm II' (*History*, 14 April 2010) <https://www.history.com/topics/world-war-i/kaiser-wilhelm-ii> accessed 3 February 2022.

to which the Allied and Associated governments and their nationals have been subjected as a consequence of war imposed upon them by the aggression of Germany and her allies'.[238] Hitler would address the issue of war guilt directly in *Mein Kampf*. It was the undermining of Article 231 that Hitler saw as key to the success and strength of his growing movement. He stated

> 'A preliminary condition for the future success of our movement was that it should bring knowledge of the meaning of the peace treaties to the minds of the popular masses. In the opinion of the masses, the peace treaties then signified a democratic success. Therefore, it was necessary to take the opposite side and dig ourselves into the minds of the people as the enemies of peace treaties; so that later on, when the naked truth of this despicable swindle would be disclosed in all its hideousness, the people would recall the position which we then took and would give us their confidence'.[239]

It is clear from the language used throughout the book that Hitler held immense anger towards the Treaty of Versailles. He called the delegates at the Peace Conference '*international profiteers'* who he claimed sought to '*further [to] exploit and plunder'* Germany. However, within the writings of a clearly angry and somewhat irrational man are cogent arguments against the war guilt clause. The insistence of the French on punishing Germany so harshly and the agreement to return lands won from the French in previous conflicts was a not a recipe for lasting peace.

Leipzig Trials

After the failure to bring the Kaiser to justice in 1920 a list was submitted by the Entente countries to the German government, which contained the names of hundreds of alleged war criminals that they wished to be deported so that they could be tried. The news of the list was greeted in Germany with street protests and the German government refused to hand over those indicted. Not a single person named was ever handed over and, in the end, the German government reduced the list to just forty-five men, many of whom could not be traced. Eventually twelve were put on trial in Leipzig before the German Supreme Court.[240] Of those tried, four were found not guilty and of remainder found guilty

[238] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles),(adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188.

[239] Great War, 'Mein Kampf - Translated into English by James Murphy' (*The Heritage of the Great War*, Unknown) <https://greatwar.nl/books/meinkampf/meinkampf.pdf> accessed 3 February 2022.

[240] A Krammer, 'The first wave of International War Crime Trials : Istanbul and Leipzig' [2006] 14(4) European Review 441-455.

their punishments ranged from six months to four years. These trials were hardly the deterrent to future infringements of international criminal law that the Entente countries had hoped, and for the Germans they were purely show trials that did little more than strengthen anti-Entente feelings in Germany.

The Inter- War Years

Inter-war international legal theory was dominated by the Paris Peace Conference of 1919 and the subsequent effects of the signing of the Versailles Treaty. It focused on promoting positivist legal theory and concentrated mostly on the maxim *pacta sunt servanda* which means that agreements should be honoured. This meant that despite the obvious failures of the Treaty of Versailles, highlighted by the failure of the Entente countries to convince the Netherlands to handover the Kaiser, the terms of the treaty must be honoured. In hindsight the strict punitive measures imposed upon post-war Germany did little to prevent further conflict and could be argued actually exacerbated the problems that led to Hitler's coming to power in 1933.

The inter-war years, however, were not as peaceful as the League of Nations had hoped. In 1928 in an attempt to form a multilateral agreement against such aggressive war as Germany had waged in 1914 the Kellogg-Briand pact was signed. Its aim was for '*all signatories to agree to renounce war as an instrument of national policy and to settle all international disputes by peaceful means'*.[241] As this pact was signed outside the confines of the League of Nations and despite the League's perceived failure, it remains in force. It was later to play a pivotal role at the Nuremberg Trials.

Despite the League of Nations and the Pact major conflicts raged over several continents including in Europe itself. The League of Nations had taken on the responsibility under the covenant to maintain the peace and had failed. Conflict raged in Spain,[242] even countries which had experienced great losses during the First World War, including members of the '*big four'*[243] were quick to return to combat. Italy, for example, was involved in the Second Italo-Ethiopian war of 1935 – 1936. The conflict was

[241] Editors of the Encyclopaedia Britannica, 'Kellogg-Briand Pact' (*Encyclopaedia Britannica*, 20 July 1998) <https://www.britannica.com/event/Kellogg-Briand-Pact> accessed 3 February 2022.
[242] Spanish Civil War.
[243] The big Four after World War One were made up of the leaders of United States of America, United Kingdom, France and Italy.

Benito Mussolini's second attempt to conquer Abyssinia (now known as Ethiopia) following an unsuccessful attempt by Italy in the 1890s. Italian troops pushed the untrained Ethiopian soldiers back, eventually taking the capital city of Addis Ababa on 5 May 1936, forcing Emperor Haile Selassie into exile. Mussolini declared victory, declaring the Italian king, Emmanuel the third, as Emperor of Ethiopia. Even Britain were involved in fighting, including fighting against Italy in Ethiopia, domestically during the Irish War of Independence and further afield in the Third Anglo-Afghan war. The League of Nations condemned Italy and voted to impose economic sanctions upon them. However, as with its subsequent reincarnations, the League of Nations lacked any real power behind their sanctions and the vote did little but highlighted the ineffective nature of the group. Even the Kellogg-Briand Pact lacked the teeth needed to be effective. In 1931, an explosion near a Japanese owned rail track near the Chinese city of Mukden would lead to Japanese invasion of Manchuria. Although Japan was a signatory of the pact for varying reasons including a world depression there was little desire by either the League of Nations or the United States to take any action against Japan. In what would in hindsight be seen as a fatal error no action was taken, it very quickly became clear that the Pact was not enforceable and there would be no sanction for any infringement. These instances had been huge opportunities to clearly issue a show of strength by the international community, through the cooperation of nations, and they failed completely. The first attempts at global justice following world conflict were a complete disaster.

Throughout the interwar years the big four of the Entente nations engaged in smaller conflicts, cementing colonial lands, quelling uprisings or disputing borders. Meanwhile, in the nineteen thirties in Germany, an angry Adolf Hitler was beginning to carry out the plans he had laid down in Mein Kampf.

World War Two

Germany suffered great financial hardship following its defeat in World War One, because the reparations the Entente forces had agreed crippled any chance they had of recovery. The loss of the Saar area under the Versailles Treaty reduced Germany's industrial output significantly. To the west, the loss of fertile farming land in Prussia reduced Germany's capacity to grow food. These effects

coupled with the repayment of reparations that would eventually total $269 billion, a sum that would not completely be repaid until 3rd October 2010,[244] brought Germany to its knees and triggered hyperinflation in 1923.

In 1921 Adolf Hitler has been appointed the leader of *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP) which became known as the Nazi Party. In 1923, he was jailed for the failed Beer Hall Putsch which was an attempt to seize power in Munich. He was charged with treason and sentenced to five years[245] in jail. He spent his time in prison writing Mein Kampf and after being released nine months into his sentence, he found he was more popular than ever. During a series of rallies in the city of Nuremberg, Hitler was to lay the foundations of what would become his key policies – the rebuilding and strengthening of the German nation and attributing blame for all Germany's ills firmly at the feet of the Jewish people.

In 1932 federal elections were held in Germany. Germany had been suffering due to measures put in place in order to finance the large war reparations.[246] Already hit by hyperinflation and then devastated by the worldwide financial depression following the Wall Street Crash of 1929, Germany was left on the brink of total economic collapse. In July 1932 Chancellor Heinrich Bruing asked President Paul von Hindenburg to invoke Article 48 of the Weimar Constitution that gave the President emergency powers. Under these powers the President could issue an emergency decree without recourse to the Reichstag.

Bruning used the power to dissolve the Reichstag and this allowed him to pass economic legislation without the support of government. While there was a safety mechanism built into the constitution that gave the government the power to force the Reichstag to nullify the issuing of an emergency decree this did not happen. This would lead to a constitutional crisis in Germany and eventually to Hindenburg

[244] E Blakemore, 'Germany's World War One debt was so crushing it took 92 years to pay off' (*Historycom*, 27 June 2017) <https://www.history.com/news/germany-world-war-i-debt-treaty-versailles> accessed 3 February 2022.
[245]Historycom Editors, 'Beer Hall Putsch' (*History*, 9 November 2009) <https://www.history.com/topics/germany/beer-hall-putsch> accessed 3 February 2022.
[246] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles),(adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188

appointing Hitler to the position of Chancellor. Heinrich Bruning, the then Chancellor of the Weimar Republic was dismissed[247] and Franz von Papen was appointed.[248] He was anti-republican and anti-democracy. He alongside Paul von Hindenburg formed a plan to rid Germany of communism[249] which they blamed for the current situation. Von Papen was a neo-conservative, whose aim was to establish an absolute monarchy in the Weimar states.[250] To do this Von Papen wanted to create a new parliamentary system that consisted of two houses, the upper of these two houses would be appointed by the state leader.[251] To bring about this change Von Papen hoped to create a coalition of parties, he quickly discovered however that only the Nationalists were open to his ideas. In return for toleration of Von Papen's plan the Nazi Party requested the suspension of the decree that had banned the *sturmabteilung*[252] (the paramilitary wing of the NSDAP) and requested that Von Papen call another election to re-affirm his position. Von Papen was confident of his own popularity and believed he had sufficient support to win another election. However, the election allowed the Nazi party under Adolf Hitler to gain yet more seats.

In February 1933 there was an arson attack on the Reichstag. The fire was blamed on the Communists following the alleged discovery of a Dutch Communist at the scene. Following this the Reichstag Fire Decree was issued, the decree was used to suspend vital articles of the German Constitution. The first article of the decree read: -

> 'On the basis of Article 48, Section 2, of the German Constitution, the following is decreed as a defensive measure against Communist acts of violence that endanger the state:
>
> §1
> Articles 114, 115, 117, 118, 123, 124, and 153 of the Constitution of the German Reich are suspended until further notice. Thus, restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association, and violations of the privacy of postal, telegraphic, and telephonic

[247] WL Patch jr, Heinrich Bruning and the Dissolution of the Weimar Republic (CUP 1998).

[248] WE Braatz, 'Two Neo Conservative Myths in Germany 1919-32: The 'Third Reich' and the 'New State'' [1971] 32(4) Journal of History of Ideas 569-584.

[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Hereafter known as the SA.

> communications, and warrants for house searches, orders for confiscations as well as restrictions on property are permissible beyond the legal limits otherwise prescribed'.[253]

The decree was followed quickly by the Enabling Act, which in effect gave Hitler the power to make laws without the consent of or need to recourse to the Reichstag. The Decree and the Act together had within weeks quickly transformed the Weimar Republic, a somewhat flawed democracy, into the Nazi Dictatorship. Hitler used his unlimited power to re-arm Germany and sign strategic Treaties with nations he felt could advance his ambitions of world domination. This included the Molotov-Ribbentrop Pact of neutrality with the Soviet Union, signed in August 1939.

Less than a week after the signing of the Pact, Germany invaded Poland. Two days later on 3rd September 1939, in accordance with their existing agreements to protect in the event Poland be invaded, France and Great Britain entered the war, although at first their support of Poland is extremely limited. By 6th September 1939, Poland had been defeated and annexed by Germany and the Soviet Union. Hitler did try to deflect Great Britain and France from entering the war by proclaiming peace. However, this meant that the fate of Poland would remain solely in the hands of Germany and the Soviet Union. To Hitler's surprise this was rejected by British Prime Minister, Neville Chamberlain, who in 1938 had famously agreed to the Hitler's annexation of the Sudetenland. Hitler believed that Chamberlain would not have the stomach to lead his country back into war so soon after World War One. However, Chamberlain was furious that Hitler had disregarded his promises of 1938, when he had agreed not to seek further territorial gains. The gamble for Hitler this time did not pay off. Hitler immediately ordered the invasion of France. However, bad weather meant that the invasion was delayed until the spring of 1940. During the intervening time a strange calm lingered over the continent of Europe, they were officially at war, but it was not until German tanks rumbled into France on tenth May 1940 that the allies began to accept that to stop Hitler would take another large-scale conflict on the scale of World War One. By this time Great Britain and France were now worried how far Hitler would push his

[253] Editors of German History in Documents and Images, ' Decree of the Reich President for the Protection of the People and State ("Reichstag Fire Decree") (February 28, 1933)' (*Nazi Germany 1933-1945*, Unknown) <https://ghdi.ghi-dc.org/sub_document.cfm?document_id=2325> accessed 3 February 2022.

territorial ambitions and knew that all-out war could not be avoided. Aggression and annexation by both Germany and the Soviet Union would eventually drag most of Europe into war. Thus just 22 years after the war to end all wars ended another global conflict began.

Much has been written on the war, from the destruction of cities by air power to the discovery of exactly what Hitler's *Final Solution* to the *Jewish problem* entailed. It became obvious early on that should they be victorious the Allied nations were determined to bring those responsible in Germany to trial especially due to their failure to do so after World War One. In fact, it was imperative for international law that this was done, if it were to have any standing ever again. As early as 1940 the allied countries discussed what could be done. The Allied countries issued proclamations and statements regarding their intent to seek justice early. This would eventually lead to the setting up of the United Nations War Crimes Commission.

United Nations War Crimes Commission (UNWCC)

Although not as well-known as subsequent bodies the United Nations[254] War Crimes Commission was set up in 1943. It built upon statements made by countries being torn apart by war as early as 1940. In November 1940 the exiled governments of Poland and Czechoslovakia issued a statement in which they declared the '*violence and cruelty to which their two countries had been subjected was unparalleled in human history'.*[255] They listed the brutalities their peoples had suffered including mass executions, deportations to concentration camps and extermination of the intellectual classes. Just a month later Poland issued another statement that declared Germany's policy of denationalisation in Poland as being contrary to international law. The meaning of denationalisation has evolved since the 1940s. To many scholars it would form part of the genocide doctrine, however this did not yet exist. Instead, Poland was seeking redress through international law in regard to the laws of occupation. It was through the analysis of these laws that a young scholar Raphael Lemkin began to formulate what was to become the doctrine of genocide.

[254] The United Nations here is not the subsequent organization founded on 24 October 1945 but the name given to the Allied forces from 1943.
[255] AJ Kochavi, Prelude to Nuremberg - Allied War Crimes Policy and the Question of Punishment (University of North Carolina Press 2000) 10.

Despite the seriousness of the situation in Poland and the invasion of France it took another year for the Great Powers to issue a statement denouncing Germany for committing atrocities in occupied territory. The statement issued simultaneously by Roosevelt and Churchill on 5th October 1941 mentioned for the first-time officially retributions for the crimes being a key aim of the Allied forces of the war. By this time the relationship between the Soviet Union and Germany had soured and in June 1941 the German army had launched the largest offensive ever by invading the Soviet Union. The statements by the USA and UK were closely followed by an official note made public on 7th January 1942 written by Molotov outlining the atrocities being committed by the Germans in now occupied Soviet Russia. It declared the Hitler government to be criminal and detailed aspects of international law it had infringed. These included he said

> 'German officers and soldiers engag[ing] in orgies of plunder in all captured soviet districts. The German authorities have legalised looting by their army and encourage pillage and violence. The German Government regards this as a realisation of the bandit 'principle' it once enunciated, according to which every German warrior must have a 'personal, material interest in the war'.[256]

He further stated

> 'Residents of a number of districts liberated by the Red Army and situated far apart, state unanimously that the Germans used the civilian population for the particularly dangerous work of extracting mines from areas and objectives in front of the advancing German troops. Several documents of the German Command, taken by Red Army troops during the offensive at Rostov, prove that exploitation of the local population for particularly dangerous military work is provided for by special instructions of the German Command.
>
> Thus, in an order-of-the-day of October 11, issued by the 76th German Infantry Division, Article 6, on Extraction of Mines, says: "Prisoners of war and individuals from the local population should be used for work entailing danger to life." This is but one of many base violations of all international regulations and all human morality with which the German Command has stained itself'.[257]

These statements however clear in their intent did little to build a workable mechanism under which international law could operate successfully. The first practical step towards creating such a mechanism

[256] V. Molotov, *Molotov's Note on German Atrocities in Occupied Soviet Territory,* People's Commissar of Foreign Affairs of the U.S.S.R, to all ambassadors and ministers of countries with which the Soviet Union maintains diplomatic relations, 6 January 1942 (Embassy of the Union of Soviet Socialist Republics – Information Bulletin, 7 January 1942).
[257] Ibid.

came on 13th January 1942, when the *Declaration of St. James*[258] was made and the *Inter Allied Commission* was created. The Declaration signed by Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, The Netherlands, Poland and Yugoslavia stated that the conduct of the German forces went beyond those expected in times of war and importantly declared

> '…(3) [the signatories] place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them
>
> (4) resolve to see it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out and handed over to justice and judged, (b) that the sentences pronounced are carried out'.[259]

It was clear that the allied countries were looking to the end of the war and punishing the Axis countries for crimes that were being committed. The governments of the Allied countries continued to make statements deploring Germany's actions and reiterating the need for punishment at the end of the conflict. It was at this time that a number of unofficial bodies were set up in order to look at how international law could be used to bring about justice. Two such bodies were *The Cambridge Commission on Penal Reconstruction and Development* and the *London International Assembly*. The Cambridge Commission was a symposium of legal academics and jurists from both Oxford and Cambridge and jurists from the occupied countries in Europe. In May and June of 1942, they delivered their opinion on the type of war crimes that should be punished. The commission made a clear distinction between crimes that could be administered by municipal law and stated that the Commission should concentrate on war crimes which it defined as

> '…such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference of property unrelated to reasonably conceived requirements of military necessity'.[260]

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[258] United Nations, '1948 History of the United Nations War Crimes Commission and Developments of the Laws of War ' (*United Nations War Crimes Commission* , Unknown) <http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf> accessed 3 February 2022.

[259] Ibid.

[260] Ibid.

This definition was used as the basis for future discussions, and it distinctly showed that international law was to be used only where national law was unwilling or unable to administer justice. The opinion however took one further step, it was clear that there would be a number of cases that could not be tried under municipal law and there would be a need for the creation of international criminal tribunal. It didn't, however, believe that the current situation was right for the creation of such a mechanism. Whether this was a mistake remains to be seen, but at least some of the issues of retrospectivity that would later dog the Nuremberg trials would have been overcome had the tribunal been created earlier.

The London Assembly[261] also had a part to play in the development of the war crimes doctrine. It had set up a commission in March 1942 that was closely monitored by the leaders of the Allied governments who later sought to follow the recommendations arising from their interim reports, including defining the acts that should be punishable as war crimes, the setting up of the mechanism under which these war crimes could be tried, and recommending that governments immediately, without delay consider their extradition laws and obligations under treaties to begin to codify the fundamental principles of international law that already existed. It is plain from the advice given by the commission of the London Assembly that it had considered a number of the criticisms that would be levelled against any tribunal created after the war and it had given special consideration to codification of principles that already existed. Positivists would argue here, of course, that without codification these fundamental principles were not in fact laws.

Early in the commission discussions it had been noted that the concept of international criminal law was not a stable one, and the developments of warfare meant that war crimes they said should be governed by '*moral law, the conscience of mankind and custom'*.[262] It also discussed the crime of aggression, the concept of superior orders, responsibilities of the leaders and even went so far as to suggest an International Criminal Court. A number of the issues discussed then are still major concerns of international criminal law today, namely, the protection of stateless people over which no national

[261] Ibid.
[262] Ibid.

court has jurisdiction, crimes committed that cross state borders, and where states refuse for political or other reasons to try those who may be guilty of offences.[263]

The Assembly also considered the clear codification of international criminal law agreed by the UNWCC and how this codified law would then be applied by the tribunal. Failing agreement on such a codification being achieved, the commission stated that the decisions of the court should be governed by existing general principles of international criminal law, custom, treaties and judicial precedent and doctrine[264]. This mishmash of legal principles and customs encapsulated both Civil and Common Law systems, and it could also be argued it encompassed Religious and Pluralistic systems. The Assembly it seems were arguing for a new hybrid system of law to be used to administer international criminal law. It was through the work of these commissions and the political will of the Allied countries at the end of the conflict that the International Military Tribunal of Nuremberg was created.

Nuremberg and its aftermath

In January 1945, Allied forces had begun to liberate concentration camps throughout Germany and Poland.[265] Despite German forces nearing the French capital Germany were on the brink of defeat. On 30th April 1945 Adolf Hitler committed suicide in a bunker in Berlin, seven days later Germany surrendered to the Western Allied forces and two days after that on 8th May (9th May in Russia) it finally surrendered to the Soviets. Hitler and Germany had been defeated.

The Allied governments had recognised years earlier that the failure to prosecute those responsible for the World War One had in part led to the rise of Nazi Germany. They wanted to ensure this was not repeated after this conflict. They did however acknowledge that gaps may exist in their jurisdiction. On 1st November 1943 the Allied governments of the USA, UK and Russia published the Moscow Declaration [The Declaration of German Atrocities in occupied Europe], the declaration warned

> 'At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent

[263] Ibid.
[264] Ibid.
[265] United States Holocaust Memorial Museum, '1942-1945' (*Timeline of Events* , Unknown) <https://www.ushmm.org/learn/timeline-of-events/1942-1945> accessed 3 February 2022.

> back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy'.[266]

It further warned, *'[l]et those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors[sic] in order that justice may be done'*.[267] The governments acknowledged that the criminality of the German forces was not limited to occupied states and made sure to note that the declaration was '*without prejudice to the case of German criminals whose offenses have no particular geographical localisation and who will be punished by joint decision of the government of the Allies'*.[268] Kevin Heller noted in his book 'The Nuremberg Military Tribunals and the Origins of International Criminal Law'[269] that it was this reservation that led the Allied governments to create the IMT and to authorise the American government to carried out the NMT trials.[270]

It was in late 1944 and 1945 during the discussions on how justice was to be administered that the USA introduced two different tracks for the administration of justice. These tracks were not completely separate, however, and often intersected. The War Department led the first of the tracks and this culminated in the planning and administration of the IMT. The second track led to JCS 1023/10 and Control Council Law No. 10, and was led by the Joint Chief of Staff.[271] It was during this time that the development of JCS 1023 occurred, a directive that was ultimately not acted upon until later. These conversations and debates regarding the development of the directives led to the Yalta Agreement. The Yalta Conference held between 4th and 11th February 1945, attended by Roosevelt, Stalin and Churchill

[266] Yale Law School , 'The Moscow Conference; October 1943' (*The Avalon Project*, 2008) <https://avalon.law.yale.edu/wwii/moscow.asp> accessed 3 February 2022.
[267] Ibid.
[268] Ibid.
[269] KJ Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (OUP 2011) 9.
[270] Ibid.
[271] Ibid.

laid out several decisions that were to have lasting consequences for international law for more than fifty years.

The Yalta conference reported to the State Department on 24th March 1945 as well as setting out the protocols for German disarmament, the zone of occupation in Germany, reparations and even the provisions for the trying of war crimes, the conference also solidified the development of the United Nations (UN) at the end of conflict.

Later that year in June, a conference was held in London. This conference was to discuss and eventually draft what would become known as the London Charter 1945[272] and built upon the work carried out by the UNWCC. The Agreement made annexed with the Charter itself stated in Article one

> 'In pursuance of the Agreement signed on 8 August 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis'.[273]

The Charter went on to lay out article by article how the Tribunal would be set up and judges installed. Article 6 laid out the three offences that would be tried namely, *Crimes against Peace, War Crimes* and *Crimes against Humanity*. It also set out that those the court found to be acting through others in accordance with a *common plan* would be guilty of the offence itself.

At the trial itself, after the defendants entered their *not guilty* pleas, Justice Robert H Jackson made his opening statement to the court. He stated

> '…The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive

[272] Yale Law School , 'Nuremberg Trial Proceedings Vol 1 Charter of the International Military Tribunal' (*The Avalon Project*, Unknown) <https://avalon.law.yale.edu/imt/imtconst.asp> accessed 3 February 2022.
[273] Ibid.

> enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason…'.[274]

Justice Jackson was clear in his opening statement that the need for justice to prevail was paramount, he continued *'[t]his Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times-aggressive war'*.[275]

It is clear from this statement that Justice Jackson believed that international law had a duty to try to prevent aggressive war. It is also clear that Justice Jackson believed that they were applying existing law at Nuremberg rather than applying new crimes that would violate the doctrine of *nullem crimen sine lege*. In her article 'Rethinking Retrospective Criminality'[276] Dr Susan Twist elucidates the full meaning of the doctrine, tracing its conception in Roman jurisprudence through the Weimar Republic. Non-retrospectivity of law has become a cornerstone to the notion of fair trials. This is further highlighted by Twist when she explains the subverting of the doctrine by the National Socialists in pre-war Germany. A point used by the Allies to support their own abuses of the doctrine and also to explain why the defendants could not challenge them. It seems from his opening to the court and from Twist's article that Justice Jackson believed that article 6 of the London Charter could be used to counter any arguments pertaining to retrospectivity in relation to the crimes set before the court.

As the first trial of its type, Nuremberg was responsible for creating and codifying legal norms and customs. While some were ground-breaking others would not stand the intense scrutiny of time.

[274] Robert H Jackson Center, 'Opening Statement before the International Military Tribunal' (*Robert H Jackson Center*, Unknown) <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/> accessed 3 February 2022.
[275] Ibid.
[276] S Twist, 'Rethinking Retrospective Criminality in the Context of War Crime Trials ' [2005] 27(1) Liverpool Law Review 27-31.

Substantive and Procedural Developments at Nuremberg

The International Military Tribunal at Nuremberg was ground-breaking. As Justice Jackson had stated the victorious nations alongside the other signatories to the London Charter had felt a responsibility to bring those responsible for the war to justice. To do this, the tribunal must at least appear fair. The concept of due process was of course not a new one. Due process is the balance of need for the court to deliver justice and the rights of the accused to a fair and independent trial. While the legal systems of the nations involved do have some differences, due to the nature of their court systems as either inquisitorial or adversarial, there are a number of key features that all courts must adhere to. The tribunal at Nuremberg was a mixed system tribunal in that it used elements of both traditions.

The British and American legal systems were, and still are, adversarial and emphasised the importance of equality of arms between both parties and include the right to counsel and the right to cross examine. In contrast the French and Soviet legal systems were inquisitorial in nature and placed the emphasis very much on the judges as fact seekers, there was also an emphasis on the pre-trial phase. In the end despite being a mix of all systems, Nuremberg was more closely based on the American system, and it allowed the defendants the opportunity to be represented by counsel.

A defence counsel of note was Dr Otto Kranzbühler[277](1907- 2004) who represented Karl Doenitz (1891-1980). It was through his intelligent defence of Doenitz, that Kranzbühler was able to convince judges at Nuremberg that Doenitz was not guilty of Count 1, and despite being found guilty of counts 2 and 3, the court would not lay down a sentence for his count 3 violations. In all, Doenitz, Hitler's choice to succeed him as Fuhrer, was sentenced to just ten years in prison. Kransbühler subsequently represented Friedrich Flick (1883-1972) and Alfried Krupp (1907-1967) at the Industrialist Trial and Saar Industrialist, Hermann Rochling (1872-1955) at a similarly constituted French Court in Rastatt.

1n 1965, Kranzbühler wrote an article in the De Paul Law Review entitled 'Nuremberg Eighteen Years Afterward' in which he offered his critique of the Nuremberg Tribunal. Firstly, he pointed out the clear defects he believed which were obvious from the very onset. One of the main criticism was that there

[277] O Kranzbuhler, 'Nuremberg Eighteen Years Afterwards' [1965] 14(2) DePaul Law Review 333-347.

were representatives and delegates of Stalin sitting on the prosecution bench. From this he draws the conclusion that the trials were obviously political. He stated that

> 'As may be seen from the way the groups of the accused are combined, the idea was not to try criminals for crimes allegedly committed by them, but to prove by means of judicial proceedings that members of all the higher strata, regardless of whether they had directly participated or not, were responsible for everything which Hitler and his aiders and abettors had thought up and carried out'.[278]

This goes against Justice Jackson's who saw the trials as utilising existing international criminal law.

Despite his criticisms of the Nuremberg Trials Kranzbühler did recognise that there needed to be some sort of analysis and discussion following World War II and he even believed that should the conditions be favourable for trial then it could be '*justified and optimum results ought to be achieved'*.[279] It is unclear from his article what Kranzbühler recognised as '*optimum results'*, but Kranzbühler's article suggests that he is very much the realist, and instead of looking at the legitimacy of the laws applied he looked at whether it likely that the law would be applied subsequently and whether it would be applied in the same way. In other words, he looks at whether Nuremburg would set a precedent for international criminal law in the future. He also looked at whether existing recognised international criminal law was being knowingly misapplied or disregarded by judges to create such a precedent. He used the example of the Weizsacker case,[280] where Ernst von Weizsacker (1882-1951) was tried for crimes against humanity. In this case, the judges, he states, admitted to not applying existing law or legal policy but instead stated '*it was the task of the court to find standards of conduct for citizens, officials and civil servants of a state which they would have to be complied with in the future'*.[281] Just one judge,

[278] Ibid.
[279] Ibid.
[280] Ernst von Weizsacker – German Ambassador to the Holy See 1943- 1945. Returned to Germany in 1946, was arrested in 1947 and put on trial in The Ministries Trial and charged with active cooperation with deportation of French Jews to Auschwitz as a crime against humanity. Found guilty and sentenced to 7 years. He eventually served 3 years and 3 months before being released in 1950. He died a year later in August 1951 of a stroke. His son who assisted his defence was Richard von Weizsacker who would become President of the unified Germany from 1984-1994.
[281] O Kranzbuhler, 'Nuremberg Eighteen Years Afterwards' [1965] 14(2) DePaul Law Review 333-347.

Judge Powers issued a dissenting opinion protesting this view and saw it as an '*usurpation of functions'*.[282]

In Kranzbühler's opinion, *ex post facto* laws were knowingly applied at Nuremberg in all the offences. Despite earlier claims of legitimacy by Justice Jackson he justifies this alleged violation of function by saying that Nuremberg was a revolutionary court and therefore only criteria that would be applied in time of revolution should be applied to Nuremberg. It should also be judged not so much on its legitimacy but by its results on humanity.

This thesis, however, is concerned with legitimacy in international criminal law and the standards or factors that must be met to give a law legitimacy. If the precedent set by Nuremberg, if indeed any were, are ignored, where would that leave subsequent courts and tribunal? Chapter one of this thesis looked at the differing views of legal scholars of how law obtains legitimacy. A key feature to many of these philosophies is that a rule must exist at the time the offence is committed, so that the defendant has the ability to follow it, in other words retrospectively applying a law to fit a situation is not supported because it goes against the very definition of law; behaviour cannot be adapted to follow a law if that rule does not exist, therefore it has no possibility of compliance. However, Kranzbühler's argument is that sometimes for the good of humanity these rules must be put aside to obtain justice. If this is the case, then other paradigms must exist at international criminal law level that differ from those of national courts. How then, did the Allies attempt to bring legitimacy to Nuremberg?

Procedural Processes at Nuremberg

There were a number of procedures followed at Nuremberg that could be seen as attempting to legitimise the court. The court itself was a hybrid court that borrowed from the English[283] and American systems. One aspect was considered by Kranzbühler as the most important: equality of arms between the two parties. As discussed earlier in this chapter, the defendants at Nuremberg had been given the opportunity of appointing defence counsel and some of Germany's brightest and best lawyers had taken

[282] Ibid.
[283] It borrows from the English and Welsh systems as Scotland operates a slightly different system although based on common law.

up the roles. Kranzbühler when writing his article was in a unique position to articulate the difficulties, they had experienced. There is, of course, the difficulty of a certain amount of bias but most of his complaints have been substantiated either by subsequent release of information or they were openly admitted at the time.

Kranzbühler argued that while the defendants were allowed counsel there was no equality of arms at Nuremberg. The prosecution had multiple investigators and access to primary source material. In contrast the defence had to rely on the evidence passed to them by the prosecution. Access to the archives was barred to defence counsels for political reasons. The evidence provided to them was not even in its original form; it had been translated from the original German into English. Despite this Kranzbühler was praised for his effective cross-examination. Kranzbühler would continue to argue that trials against war criminals were '*of a political rather than a legal character'*.[284]

A major difficulty for the defence was that no attempt was made at any point in the writing of the charter nor the construction of the court to come to an understanding as to what was defensible under existing international criminal law. The charter itself had been written in such a way to enable the Allies to bring certain defendants to prosecution and conviction was almost assured from the outset. For example, prior to Nuremberg *Superior Orders* had been a defence used by soldiers when accused of offences. Under the German Military Penal Code unless the soldier realised his act was regarded as an offence, he could cite superior orders as his defence. The same had been true of both the American and British Military Penal Codes until 1944, when it was changed to constitute a ground for extenuation only. The only option open to the defence would be duress, although in many cases this was not the case. With little chance of any other outcome than a guilty verdict how can legitimacy be afforded to the Nuremberg trial procedures?

Another requirement for fair trial that was grossly neglected at Nuremberg was the recognised need for the separation of powers. The construction of the London Charter failed to observe such separation. The three branches of government (or law-making bodies) are usually recognised at the legislative,

[284] M Bohlander and others, Defense in International Criminal Proceedings (Brill 2006) 31-66.

executive, and judicial. In the case of Nuremberg there are aspects of overlap for all three branches. For example, American chief prosecutor Justice Jackson and his British counter-part David Maxwell-Fyffe both contributed heavily to the construction of the London Charter and were then responsible for trying the case. Others also crossed the branches.

Substantive Developments

When discussing Nuremberg, it would be simple to say that it was first example of a tribunal of its type and the first real attempt at global justice following the codification of a number of offences. Any real developments, however, must be looked at more closely. As will be shown later in this thesis despite sharing the names, the offences tried at the International Criminal Tribunals for the Former Yugoslavia and Rwanda differ greatly from those tried at Nuremberg. Three offences were defined in the charter under article 6 Crimes against Peace, War Crimes and Crimes against Humanity. Further to these three offences, the charter also stated that those found to be participating in the formulation of a *common plan* was responsible for '*all acts performed by any person in execution of such a plan'*.[285]

Robert Lay (1890-1945) was a German politician who oversaw the German Labour Front under Adolf Hitler from 1933 to 1945, who committed suicide before he could be brought to trial. After being captured by American paratroopers in 1945 he was indicted to appear at Nuremberg. While he awaited trial, he wrote an impassioned refutation of the right of the Allied countries to try the German leaders with war crimes. Of the offence relating to conspiracy, he wrote *'[w]here is this common plan? Show it to me. Where is the protocol or the fact that only those accused met and said a single word about what the indictment refers to so monstrously? Not a thing of it is true*'.[286]

The common plan that Lay questioned was outlined at Nuremberg as

> 'cover[ing] twenty-five years, from the formation of the Nazi party in 1919 to the end of the war in 1945. The party is spoken of as " the instrument of cohesion among the defendants " for carrying out the purposes of the conspiracy the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and " lebensraum " in Europe, by the use, if necessary, of armed force, of aggressive war. The seizure of power by the Nazis, the use of

[285] Yale Law School , 'Nuremberg Trial Proceedings Vol 1 Charter of the International Military Tribunal' (*The Avalon Project*, Unknown) <https://avalon.law.yale.edu/imt/imtconst.asp> accessed 3 February 2022.

[286] P Sands and others, From Nuremberg to The Hague: The Future of International Criminal Justice (UCL 2003) 1.

> terror, the destruction of trade unions, the attack on Christian teaching and on churches, the persecution of the Jews, the regimentation of youth- all these are said to be steps deliberately taken to carry out the common plan.'.[287]

The panel of Judges laid out that *'[i]t [was] immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt'*.[288]

And further

> 'The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime'.[289]

This justification of common plan does not seem to have been taken from existing statute definitions either in Germany or the Allied countries. In his defence of Wilhelm Frick, Dr Otto Pannenbecker referred to the German Penal code and the offence of conspiracy as it had existed in Germany prior to 1945. Under the code a defendant could be held responsible for acts committed by others if he had participated in a common plan which was then carried out by others. However, the weight of what a defendant could be held responsible for was heavily limited by exactly what the defendant had deliberately agreed to. '*A defendant who participated in certain plans cannot be held responsible for subsequent plans of a wider scope, or for acts of commission which far exceeded the original plans without his co-operation'*.[290] While the defendants may have shared ideals it would have been incredibly difficult for the prosecution to attribute guilt to the defendants if it were to rely on this

[287] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 56.
[288] Ibid.
[289] Ibid.
[290] Yale Law School , 'Nuremberg Trial Proceedings Volume 18 - One Hundred and Seventy-Sixth Day Thursday, 11 July 1946' (*The Avalon Project*, 2008) <https://avalon.law.yale.edu/imt/07-11-46.asp> accessed 3 February 2022.

definition of the offence. Hence the court's decision to make the definition so wide that it would be virtually impossible to launch a defence against it. The only defence open was that because the interpretation used was not be taken from the German Penal Code that this was in fact retrospective law being applied. This defence put forward by Pannenbecker was wholly rejected by the court.

Crimes Against Peace

The most contentious of the offences tried at Nuremberg was Count 1 Crimes Against Peace. It was defined as '*namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing… War crimes… Crimes against humanity…*'.[291] This offence did not exist in any of the Allied or Axis countries at the time of the war being waged. The definition limits the scope of the crime to only international conflict. It does not acknowledge the aggression that undoubtedly took place following the rise to power in 1933 of the Nazis. Pannenbecker argued that the repression that many Germans were subjected to in the years between 1933 and 1945 could easily be considered preparation for aggressive war as the Nazis managed power '*by use of force, sly acting and terror'*.[292]

The prosecution used the Kellogg-Briand Pact as the legal basis for the offence. The pact as was discussed briefly earlier in this chapter had never before been enforced. The pact made between governments was at no point intended to bind the behaviour of individuals but rather the nations that agreed to be bound by it. The defence argued repeatedly against Count 1 and its grounding in the pact was extremely weak. The argument that Justice Jackson used was that '*there must always be a beginning'*,[293] but even this is feeble as despite the fact that the Pact remains in force Nuremberg failed to create a precedent for the offence. It was not until 2010 that the International Criminal Court again adopted an offence of Aggression although it differs vastly from that put forward at Nuremberg.

[291] Yale Law School , 'Nuremberg Trial Proceedings Vol 1 Charter of the International Military Tribunal' (*The Avalon Project*, Unknown) <https://avalon.law.yale.edu/imt/imtconst.asp> accessed 3 February 2022.

[292] O Pannenbecker, 'The Nuremberg War Crimes Trials ' [1965] 14(2) DePaul University Law Review 348 – 358.
[293] Yale Law School , 'Nuremberg Trial Proceedings Vol 1 Charter of the International Military Tribunal' (*The Avalon Project*, Unknown) <https://avalon.law.yale.edu/imt/imtconst.asp> accessed 3 February 2022.

Despite this some scholars argue that crimes against peace was a recognised offence prior to World War Two. In his book 'International Human Rights Law', Javaid Rehman (Born 1967) does not even question the inclusion of both Crimes against Peace and War Crimes stating that they are '*recognised as international criminal offences prior to the commencement of the Second World War'*.[294] In fact, he directs the controversy at the inclusion of Crimes against Humanity. This will be addressed in a moment.

War Crimes

Kranzbühler used the definition given by Lassa Oppenheim (1858-1919) and Hersch Lauterpacht (1897 -1960) in 'International Law'[295] published in 1944. They make the following distinction of crimes that are subject to criminal prosecution '*(1) violations of the rules of war by members of the armed forces or (2) armed hostilities by non- members of the armed forces'*.[296]

What is immediately clear from this definition is that it does not, as Kranzbühler points out, have sufficient breadth to enable the prosecution of statesmen, public officials, members of the legal profession or industrialists.

Crimes Against Humanity

Inside the court for the first time the charge of *crimes against humanity* was put forward. The offence was codified for the purpose of the trial. In order to codify the offence, Justice Robert Jackson consulted Hersch Lauterpacht, who was a prominent legal scholar[297] however, to avoid later controversy they choose to leave their deliberations unrecorded.[298] The term *crimes against humanity* had been used before in relation to Turkey's campaign of genocide against the Armenians, when the French, British and Russian governments condemned their conduct as '*crimes against civilisation and humanity'*.[299]

[294] J Rehman, International Human Rights Law (2nd edn, Pearson Education Limited 2010) 719.

[295] O Pannenbecker, 'The Nuremberg War Crimes Trials ' [1965] 14(2) DePaul University Law Review 348 – 358.
[296] Ibid.
[297] C Baksi, 'Landmarks in law: Nuremberg and the first trial for crimes against humanity' (*The Guardian Newspaper*, 18 December 2020) <https://www.theguardian.com/law/2020/dec/18/landmarks-in-law-the-first-trial-where-the-word-genocide-was-spoken> accessed 3 February 2022.
[298] D Luban, 'A Theory of Crimes Against Humanity ' [2004] 29(1) Yale Journal of International Law 85-167.
[299] Ibid.

The offence embraced the crimes of murder, torture, and persecution of minority groups inside Germany before and during the war.[300]

Despite being associated with the shocking criminality of the Nazi era, the crime had, in fact, been talked about during World War One. The Allied forces declared that they would hold those responsible for the Armenian genocide in the Ottoman government to account for the massacre. After World War One, the talk turned to holding the Germans responsible for violations of international law. During the Paris Peace Conference held on 25th January 1919, a commission had been formed. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which became known as the Commission of Fifteen, was appointed and they reported on the violations of international law.[301] It would be the recognition of the offence that would become one of Nuremberg's lasting principles. As it established the responsibility of those in positions of power to be held responsible for campaigns of violence even against their own civilians.

Subsequent Trials

After the initial Nuremberg Trial, there were twelve subsequent trials held. These included the Doctors' trial, the Judges' trial, and the Ministries trial. These trials, known as the Nuremberg Military Tribunals [NMT] lasted from 9th December 1946 until 13th April 1949. Justice Jackson encouraged the Joint Chief of Staff to continue their work on putting together directives that would lead to further German criminals being brought to justice. On 15th July 1945 the 'Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offences and Trial of Certain Offenders'[302] [Directive JCS 1023/10] was finally approved. The directive mirrored Justice Jackson's report that sought to set up further tribunals to detain all those suspected of committing crimes that made up the London Charter as this had been due to expire in August 1946. The USA decided against setting up another tribunal like that held at Nuremberg and instead opted for zonal courts. Justice Jackson would

[300] C Wyzanski, 'Nuremberg: A Fair Trial? A Dangerous Precedent' (*The Atlantic*, April 1946) <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/> accessed 3 February 2022.

[301] D Matas, 'Prosecuting Crimes Against Humanity : The Lessons of World War One' [1989] 13(1) Fordham International Law Journal 87.

[302] KJ Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (OUP 2011) 9.

go on to say '*The Nuremberg trials established that all of humanity would be guarded by an international legal shield and that even a Head of State would be held criminally responsible and punished for aggression and Crimes Against Humanity'*.[303]

Benjamin B. Ferencz was one of the war crimes investigators and subsequently the Chief Prosecutor at the Einsatzgruppen Trial, he spent his career alongside others developing the framework of international law. He witnessed the atrocities perpetrated by the Nazis and devoted himself to the ensuring that those responsible for such atrocities were held accountable. The trials of the Nazis and the documentation of their atrocities shone a spotlight on the reach of the statute of crimes against humanity. Ferencz witnessed the liberation of, or days after the liberation of the concentration camps at Buchanwald, Mauthausen, Flossenburg and Ebensee[304] and he saw the death registries that the Nazis had kept documenting the thousands of deaths that occurred. Writing in 2017, to mark the 70th anniversary of his case as lead prosecutor against 22 members of the Einsatzgruppen, Ferencz recalls the scenes that continue to haunt him to this day, it was he said *'... as if I had peered into hell'*.[305] Trials continued after World War Two, including the Far East War Crime trials and the Chinese trials. However, the USSR became frustrated with the trials, they had been restrained at Nuremberg and marginalised by the British and American judges. Often the dissenting voice in the judgments the USSR were committed to what it saw as injustices. It is common for western historians to minimalise the role of the USSR in the Nuremberg trials, but it would seem in some instances they were in fact ahead of their time. Judge Iona Nikitchenko wrote in his dissenting judgment in relation to the acquittal of Hans Fritzche,

> The dissemination of provocative lies and the systematic deception of public opinion were as necessary to the Hitlerites for the realisation of their plan as were the production of armaments and the drafting of military plans. Without propaganda, founded on the total eclipse of the freedom of press and of speech, it would not have been possible for German Fascism to realise its aggressive intentions, to lay the groundwork and then to put to practice the war crimes and crimes against humanity'.[306]

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[303] Robert H Jackson Center, 'The Influence of the Nuremberg Trial on International Criminal Law' (*Robert H Jackson Center*, Unknown) <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> accessed 3 February 2022.

[304] N Khomami, ''It was as if I had peered into hell': the man who brought the Nazi death squads to justice' (*The Guardian Newspaper*, 7 February 2017) <https://www.theguardian.com/law/2017/feb/07/nazi-death-squads-nuremberg-trials-benjamin-ferencz> accessed 3 February 2022.

[305] Ibid.

[306] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 156.

While the judges at Nuremberg had recognised the importance of the role of propaganda in the judgment of Julius Streicher, who published 'Der Sturmer' which was an anti-Jewish weekly newspaper. For his role of editor from 1923 -1933,[307] he was found guilty of crimes against humanity. They wrote '*Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter and constitutes a crime against humanity*'.[308]

The judges it seems did not follow their own precedent. Frustrated with what it saw as incomplete justice being applied the USSR launched its own trial.

The Khabarovsk Trials

The Khabarovsk Trials were another set of trials that took place after World War Two. Khabarovsk was a large industrial city near the USSR's border with Japan. At the trial twelve members of the Japanese Kwantung Army were tried as war criminals. At the trial evidence was presented that outlined the Japanese experimentation that had occurred during their occupation of Manchuria. There is much controversy surrounding the trials, mostly because they were carried out by the USSR and although only in its infancy the cooling relations between Russia and the USA and the beginning of the Cold War had made sure that any move by either side was viewed with suspicion and cynicism by the other. As such the reporting and subsequent writings on the trials is lacking substance.

The indictments handed down to the twelve were divided into four areas '*the organisation of dedicated units for the preparation and implementation of bacteriological warfare; the commission of criminal experimentation on living human subjects; the use of bacteriological weapons in the war against China; and activities undertaking in preparation of bacteriological warfare against the USSR'*.[309]

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[307] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 56.

[308] Ibid.

[309] JB Nie and others, Japan's Wartime Medical Atrocities: Comparative Inquiries in Science, History and Ethics (Routledge 2011).

Reading of the evidence presented includes many admissions from the Japanese defendants of the cruel and inhumane treatment of the test subjects by those working in the infamous testing facilities known as Unit 731 and Unit 100. It is believed that Allied governments were unaware of the nature of these units until the publication of the evidence at the trials or it would certainly have been used in the IMTFE, as it seems inconceivable given the nature of the evidence presented that they would have allowed such crimes to go unpunished. Indeed, one of the judges that presided over the IMTFE, Judge Rolling [Bert. V.A Rolling] noted that he first learnt of the atrocities committed by the Japanese through the Khabrovsk Trials.[310] The USSR had in fact attempted to raise the issues of the bacteriological warfare carried out by the Japanese at the trial but had been stopped by the Americans, who had the leading weapons developers now at their disposal and they were soon offered immunity from prosecution in exchange for their valuable research.

Whether it was through resentment towards the Americans or the intense need for justice the USSR was determined to bring those it could to trial for their actions. The trial was prepared quickly. Although subject to a number of delays, the trials eventually started on Christmas Day 1949 and lasted for just six days. One of the reasons for the haste was due to the reintroduction of the death penalty in the USSR, this was due to happen on 1st January 1950 and the decision had been made by the Soviet government to protect the defendants from the threat of capital punishment. This decision was almost totally politically minded, rather than the Soviets having any moral objection to its use in this circumstance. In fact, the other allied countries that had held trials of Japanese war criminals had sentenced a number of those found guilty to death, in fact the USA had sentenced almost a quarter of those found guilty to death.[311] In the end the sentences of the twelve varied from 2 to 25 years imprisonment, although in 1956 those still held were released and repatriated to Japan.

Despite its undoubtedly political nature, the Khabarovsk Trials were key for the unveiling of the nature of the bacteriological experiments that the Japanese had carried out and highlighted how vulnerable to

[310] VV Romanova and YA Shulatov, 'After the Khabarovsk Trials of 1949: the USSR, US and the Attempt to Organize a New Tribunal at the Far East during the Cold War ' [2017] 4(3) History of Medicine 261-273.
[311] Ibid.

political bias the access to justice that those wronged in conflict are subjected to. Subsequent trials would do little to move away from the political bias that dogged Nuremberg and the Khabarovsk trials.

The Eichmann Trial

For a long time, the Jewish people had sought to establish their own state. The Balfour Declaration of 1917 supported by the United States was created to do just this. The aim of the declaration was to recognise the fact that the Jews preferred to set up their homeland in Palestine. The British, however, were not such avid supporters. The British held a colonial mandate for Palestine until May 1945, and they wished to uphold their good relations with the Arabs in the area. They opposed the creation of the Jewish state and the unlimited migration of Jewish people to the area as they believed that good relations with the Arabs were vital.[312] When President Truman took office in April 1945, he immediately appointed a number of experts to study the Palestinian issues. A number of panels and special committees led to the adoption by the United Nations of Resolution 181, also known as the Partition Resolution. The resolution divided Palestine in two and left Jerusalem under international control administered by the United Nations. Thus, Israel was created.

Adolf Eichmann was the Nazi Officer, who was in charge of the deportation of European Jews to concentration camps. After the German defeat he fled from his home to Austria where he stayed under an assumed identity. He eventually fled to Argentina. In the meantime, the Israeli government had passed legislation the sole aim of which was to seek justice for the Jews killed by the Nazi regime. In 1960 in part helped by intelligence gathered by Simon Wiesenthal (1908-2005), the Israeli Security Service captured a 'Ricardo Klement' in Buenos Aires. Klement was, in fact, Eichmann. He was quickly taken to Jerusalem to appear before an Israeli Court. His indictment included 15 charges, including Crimes against the Jewish People, Membership of a hostile organisation, Crimes against Humanity and War Crimes. He was found guilty of crimes against humanity, war crimes and

[312] Department of State United States of America, 'Creation of Israel 1948' (*Office of the Historian* , Unknown) <https://history.state.gov/milestones/1945-1952/creation-israel> accessed 3 February 2022.

membership of a hostile organisation. He was sentenced to death by hanging and the sentence was carried out on 1st June 1962.

An interesting aspect of the Eichmann trial is that Israel had not existed at the time the crimes were committed. In fact, Eichmann's defence team had launched their appeals on the basis that Israel did not have jurisdiction over the accused to try the offences. The Israeli people it was argued, many of whom had suffered at the hands of the Nazi regime either directly or indirectly, had no legal basis to punish those who had committed such awful acts against them. The Israeli government when establishing legislation recognised that jurisdiction would be questionable and acknowledged that the legislation would be applying law retrospectively and extraterritorially. At the time of the Eichmann trial Israel was yet to publish their constitution and the will of the Kneesseth, the President's office, was seen as supreme. Without a Bill of Rights many of the doctrines that other nations rely on had yet to be established.

Eichmann's defence attorney was Robert Servatius (1894-1983) who also represented Fritz Sauckel, Karl Brandt and Paul Pleiger at Nuremberg. Following a precedent set by the post war trials Eichmann's defence was paid for by the Israeli government. The government also conducted extensive investigation into Servatius' past and found nothing that warranted concern. The law also had to be changed as foreign attorneys had no rights of audience under Israeli law. Following Eichmann's conviction, appeal, and final execution Servatius returned to Germany, but he refused to speak to the media regarding the legality or legitimacy of the case. The legacy of the Eichmann trial does little to forward the legitimacy of international criminal law, as although it contained aspects of international jurisdiction it was tried under Israeli national law.

The Cold War and its effects on Post War Justice

After the Second World War and the trials that followed, there was a distinct cooling of relations between the Allied countries. It had become clear at the Yalta Conference that allied relations were becoming more difficult. Despite working together at the Nuremberg Trials, the USA and Russia (as the USSR) endured a strained relationship and following the end of the World War Two this relationship cooled even further. Historians struggle to agree on an exact date when the conflict began but many

cite the American's issuing the Truman Doctrine as a starting point. The doctrine opposed further expansion of the USSR and directly led to the formation of the North Atlantic Treaty Organisation (NATO) in 1949. The conflict became known as The Cold War.

The Cold War was a different type of conflict. Instead of directly engaging each other in hostilities the two nations instead entered into a series of proxy wars that supported strategic regional conflicts, which aimed to destabilise and devalue the other's core ideals. The victorious Allied nations were concerned with national security, countries that had once been allied were now sworn enemies. Despite the security concerns the big three, the USA, the USSR and Great Britain did not desire to be dragged into further conflict and the USA especially pushed to establish international institutions dedicated to promoting security. The newly formed United Nations together with its Security Council would seek to dictate the administration of international criminal law over the next forty years. The Allied countries of the USA, USSR, Great Britain and France, along with China enjoyed the power of an all reaching veto that would ensure that their interests were always protected. This would have devastating consequences on the doctrine, essentially paralysing it completely. It was not until the collapse of the USSR and the thawing of relations between the USA and the newly formed Russian Federation that international criminal law would move forward.

Chapter Three - Creation of the Ad hoc Tribunals

The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been described as the greatest advancement of international humanitarian law[313] since Nuremberg. The triumphs and tribulations that these ad hoc tribunals have journeyed through have ultimately led to the creation of the International Criminal Court. This chapter will trace through the creation of both of the ad hoc tribunals. Continuing from chapter two's history it will address the importance of the of the two tribunals' mandates and whether and to what extent, they were met. It will also look at the introduction and developments of statute and doctrine for the first time since the tribunals that followed World War Two and the development of international law to address internal conflict. What follows is a brief history of both Yugoslavia and Rwanda and what led them to conflict in the first place and why the world felt compelled to act where they had failed to do so on previous and subsequent occasions.

Yugoslavia – A History

Yugoslavia was a synthetic state, created out of the ashes of the Balkan states on 1st December 1918, although it was not formally recognized until 13th July 1922 at the Conference of Ambassadors in Paris. The events of 1914 in Sarajevo were significant, Princip and his murderous gang were committed to the destruction of the Austro-Hungarian Empire and the creation of a united Slavic state. Yugoslavia was just that, the land of the South Slavs.[314] It is important to understand the detail of the complicated history of the nation in order to understand how the Balkans conflict that led to the creation of the ICTY came about.

The idea of freedom from the Austro-Hungarian Empire had been prevalent in the Balkan states for many decades; Croatia a union of the southern Slavs had been touted as early as the 1840s but for the Serbs it was the thought of the recreation of a Serbian state and perhaps a Serbian Empire that was the dominant idea. The states that would later gain independence had already had their boundaries

[313]L Barria and S Roper, 'How effective are International Criminal Tribunals? An analysis of the ICTY and ICTR' [2005] 9(3) The International Journal of Human Rights 349-368.
[314]T Judah, 'Yugoslavia 1918-2003' (*BBC*, 17 February 2017) <https://www.bbc.co.uk/history/worldwars/wwone/yugoslavia_01.shtml> accessed 3 February 2022.

haphazardly re-drawn and their people forcibly moved on a number of occasions; that a union of these states was suggested was hardly surprising as the populations had been so thoroughly mixed by both the Austro-Hungarian and the Ottoman Empires which had both claimed parts of what is now Serbia and Montenegro. In 1912 the Ottoman Empire was pushed back by two small Serbian and Montenegrin areas, which subsequently gained their freedom, but the rest was held firmly by the Franz Joseph I, Emperor- King of the Austro-Hungarian Empire.

This led to war[315] in 1912, and with the help of Russia, the Balkan League was formed. Together the countries that made up the League – Serbia, Bulgaria, Greece and Montenegro, formed a League that could pull together 750,000 men.[316] In October 1912 Montenegro declared war on Turkey and the other members of the league swiftly followed suit. Victory was swift and decisive. By 3rd December 1912 an armistice had been agreed, and a peace conference was begun. However, a coup d'état attempt, by a group known as the Young Turks, meant that the conflict soon resumed. The result was the same however, and the Treaty of London that followed in May 1913 resulted in the Ottoman Empire losing almost all their European territory. At the insistence of the European Powers, Albania was given independence and Macedonia was divided between the Balkan states in the League.

The division of Macedonia led to the Second Balkan War, another short war ensued leaving Serbia and its alliance partner Greece as victors and Bulgaria as the loser. Macedonia was subsequently divided under the orders of the Treaty of Bucharest signed on 10th August 1913, with Serbia and Greece taking the majority and leaving Bulgaria with only a very small part of the region.

The result of the Balkan Wars was significant for the later formation of Yugoslavia and also therefore its destruction in the early 1990s. Serbia had gained the Kosovo region and part of Macedonia. Albania was now an independent state led by German Prince, Wilhelm of Wied. This left the area in a state that can only be described as frustration. Bulgaria wounded by their loss in the second Balkan war would turn to Austria for support, and Serbia were angry they had been forced to give up their Albanian gains

[315] The Editors of Encyclopaedia Britannica, 'Balkan Wars' (*Encyclopaedia Britannica*, 20 July 1998) <https://www.britannica.com/topic/Balkan-Wars> accessed 3 February 2022.
[316] Ibid.

by Austria. This frustration would of course boil over and as has been shown in chapter two would lead to World War One.

Defeat of Austria and Germany led to the collapse of the Austro-Hungarian Empire and in 1918 the State of Slovenes, Croats and Serbs was merged with the independent Kingdom of Serbia to become the Kingdom of Serbs, Croats and Slovenes. King Peter of the House of Karđorđević (Peter I) the Serbian royal family was installed as monarch, holding the position until his death in 1921. He was succeeded by his son Alexander I. In 1922 the country was officially recognised by the international community at the Conference of Ambassadors (This was the successor to the Supreme War Council and was incorporated into the League of Nations as one of its governing bodies). In 1929, it was renamed to the Kingdom of Yugoslavia.

In 1934, King Alexander was assassinated by Bulgarian Vlado Chernozemski, who had initially trained a group of three Ustaše fighters, but eventually carried out the assassination himself before being beaten to death by the French police and crowd who witnessed the killing. He was considered a hero by Croatians and his native Bulgarians, but history has been less forgiving of his actions. The Ustaše were a Croatian revolutionary fascist group who were founded by Ante Pavelic in 1929. They promoted the need for a racially pure Croatia and encouraged genocide against those they considered racially impure, especially the Serbs.

When war broke out in 1939, the Balkans remained on the edge of the fighting until they were invaded by the Axis forces on 6th April 1941, a forerunner to the planned invasion of the Soviet Union under Operation Barbarossa. The Kingdom of Yugoslavia fell quickly and was then partitioned by the Axis forces, between Germany, Italy, Hungary and Bulgaria. The complicated nature of the state had never been so apparent. While some of the Yugoslavs fought alongside the Axis forces, others launched guerrilla liberation forces to try to free Yugoslavia. At the same time as fighting with or against the Axis forces the country also fell into a multisided civil war. These groups also at times collaborated with both Axis and Allied forces, at times swapping sides and allegiances as they fought for their own greater aims. The five groups represented the different national and ethnic groups. The Yugoslav Partisans fought on the side of the Allied forces for the entire duration of the occupation of Yugoslavia,

their objective was to create a federal multi-ethnic communist state. The Chetniks were Serbian royalists whose aim was to retain the Serbian Royal family and the establishment of a greater Serbian state. The Chetniks initially sided with the Allied forces but then began to collude with the Axis forces, in particular the Italians and later Nazi Germany itself. The Ustaše remained the fascist group that had begun in 1929 and assassinated Alexander I in 1934, with their aim being to wipe out the ethnic Serbs. Due to their support of Nazi Germany and their fascist ideals they were placed into government by the invading forces as leaders of the Independent State of Croatia or the NDH. Under their orders the Jasenovac Concentration Camp was built and became one of the largest concentration camps in Europe.[317] It is estimated that 700,000 Yugoslavs were killed at Jasenovac, most of them Serbs. Finally, the Slovene Home Guard, they were anti-partisan and sided with the Axis forces throughout the conflict.

Despite efforts to defeat them, with the Axis powers coming particularly close in the 1943 spring and summer offences, the Partisans stood firm with the Allied forces, and on 8th March a coalition Yugoslav government was formed with General Tito as Premier. Shortly after this, they launched a general offensive supported by the British, and it became clear to the NDH that they were in an unwinnable position due to lack of ammunition, so an order was given to surrender.

The liberation of Yugoslavia following the conflict was extremely bloody. Tito, his government, and the Partisans, showed no mercy as they '*liberated*' the country. It is now widely agreed that the Geneva Convention was ignored, and prisoners of war were subjected to brutal treatment. An election was held but the ruling communist government, who had control of the state media, police, and judiciary, were not contested and swept to power, abolishing the royal family once and for all. Executions of the leaders of the Chetniks were carried out following their convictions for war crimes and the civil war was also officially ended. Tito held office as Premier of the Socialist Federal Republic of Yugoslavia, widely respected by leaders around the world, until his death in 1980.

[317] Jasenovac Concentration Camp Memorial Site, 'Jasenovac Concentration Camp' (*Jasenovac Concentration Camp Memorial Site*, Unknown) <http://www.jusp-jasenovac.hr/Default.aspx?sid=6793> accessed 3 February 2022.

Following his death, ethnic unrest began, which further fuelled by the collapse of the Eastern Bloc countries and the demise of the Soviet Union. The federations that made up the state met to try and redefine themselves following the collapse but even after forty years the tensions that had raged in the area since its creation in 1918 meant that no agreement could be reached. War was now inevitable.

The Balkans descend into War

In a rally in Belgrade, Serbia on 19th November 1988 Slobodan Milošević, the soon-to-be Serbian President, said to a cheering crowd '*Serbia's enemies are massing against us. We say to them 'We are not afraid', we will not flinch from battle'*.[318] This call to the Serbian people to be ready for war went out across Serbia and reverberated across the Balkans. At that time the Socialist Federal Republic of Yugoslavia was made up of six federal states; Croatia, Slovenia, Macedonia, Serbia, Montenegro and Bosnia and Herzegovina.[319] There were also two separate regions, Kosovo and Vojvodina, which were protected areas within Serbia[320]. The areas were diversely made up of predominantly Orthodox Christians and Muslims but there were many other ethnic groups that called the area home. With war inevitable it fell to the United Nations to protect the citizens of the separate states from the conflict.

The conflict, like the country, was divided into smaller wars and battles. The first of which began on 31st March 1991 with the outbreak of the Croatian War of Independence. This was closely followed on 26th June 1991 when the short-lived conflict known as the Ten-Day War broke out, and this was triggered when Slovenia succeeded from the union on 25th June 1991. There were limited casualties and after ten days the conflict officially ended on 7th July. The more bloody and largest of the battles were yet to come; the Croatian War of Independence would rage for over four years until 12th November 1995 and the Bosnian War started on 6th April 1992 and raged until 14th December 1995. These conflicts were some of the bloodiest and most barbaric conflicts since World War Two. In total war would ravage the area for ten years.

[318] Little, A, and L Silber. *The Death of Yugoslavia*. BBC: Brian Lapping Associates, 1995. film.

[319] United Nations, 'The Conflicts' (*United Nations International Criminal Tribunal for the former Yugoslavia*, Unknown) <https://www.icty.org/sid/322> accessed 3 February 2022.

[320] Ibid.

Creation of the ICTY

On 22nd February 1993 Resolution 808 (1993) was adopted by the Security Council at their 3175th meeting. This stated that an international tribunal should be established for the prosecution of '*persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'*.[321] The resolution built upon previous reports and resolutions that laid out the grave concerns of the Security Council regarding the on-going violence in the Balkan area and reports by a commission of jurists submitted by France (S/25266), Italy (S/25300) and a report by the Permanent Representative of Sweden on behalf of the Chair-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307).[322] During the discussions prior to, and after the vote to pass the resolution a number of representatives addressed the meeting. Speaking prior to the vote, Ronaldo Sardenberg, the representative for Brazil made it clear that while the reports of the Special Rapporteur of the Commission of Human Rights had provided significant evidence of grave breaches committed on a huge scale and of a systematic nature that could not escape punishment, it was also of major importance that the tribunal have a solid legal foundation. He noted the Security Council acted through powers delegated from the Member States of the United Nations[323] and in accordance with Chapter V, Article 24(1) that states *'[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'*.[324] He stated it was particularly important as the Council was acting through this delegated responsibility especially when invoking Chapter VII of the Charter '*Action with respect to threats to the peace, breaches of the peace, and acts of aggression'*.[325]

Following the vote on the draft resolution Jean-Bernard Merimee the representative for France stated that the report drawn up by jurists had concluded that the creation of an international tribunal could be decided upon by the Security Council as it was covered by Chapter VII of the UN Charter. He further

[321] UNSC Res 808 (22 February 1993) UN Doc S/RES/808.
[322] Ibid.
[323] Hereafter known as the UN.
[324] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS V.
[325] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS VII.

stated that it was important that the tribunal should be created as soon as possible through the passing of a further resolution by the Security Council. Madeleine Albright, the representative for the United States of America went on to say

> 'The lesson that we are all accountable to international law may have finally taken hold in our collective memory. This will be no victors' tribunal, the only victor that will prevail in this endeavour is the truth and unlike the world of the 1940s international humanitarian law is impressively codified, well understood, agreed upon and enforceable. The debates over the state of international law that so encumbered the Nuremberg trials will not burden this tribunal'.[326]

This, however, was a little presumptive on the part of Ms Albright. The tribunal has struggled with questions of legitimacy since its creation.

History of Rwanda

As with Yugoslavia, Rwanda has an interesting history. As both countries descended into civil war it is important to understand how both nations found themselves at war with their fellow countrymen. Rwanda has been inhabited since the last major ice age. It was during the Neolithic era and up to the Middle Ages that three different tribes the Hutu and Tutsi and the Twa Pygmy migrated to the area. The Hutus outnumbered the Tutsi almost eight to one.[327] It was not until the ninetieth century that country was recognised as one nation under the leadership of King Rwabugiri who had consolidated a campaign of military conquest that concluded with formation of the nation. The two tribes were described by class or clan rather than be their ethnic differences.[328] The Tutsis formed the upper classes; however, the military was made up of both Hutu and Tutsi and over time they were able to form a cohesive system that allowed the country to prosper. The lines between the classes were indistinct and the two tribes often intermarried. It was not until colonisation that the idea of Tutsi superiority was hypothesised.

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[326] *Conflict In Former Yugoslavia*. UN Security Council: C-Span, 1993. video.

[327] Freedman, P et al. *Rwanda: Do Scars Ever Fade*. History Channel, A&E Television: Bill Brummel Productions, 2004. DVD.

[328] Ibid.

In 1884 a conference was held in Berlin, it determined leadership for much of the Great Lake region of Africa. However, Rwanda was not covered by this conference and instead their future was settled by a separate conference in Brussels in 1890. At the conference Rwanda and neighbouring Burundi were handed over to the German Empire in return for renouncing all claims to Uganda. However, poor cartography meant that Belgium could still lay claim to parts of Western Rwanda, and it was not for a further decade that the final borders to the colony were established.

Despite a number of Germans leading expeditions to the area and an influx of missionaries to convert the native tribes the Germans did little to change the Rwandan way of life. However, the colonists did begin to highlight differences between the established tribes. The Tutsis curried favour with the Germans, as they were willing to convert to Roman Catholicism. They were handed positions in local governance, and this eventually turned into ruling the whole of Rwanda. The introduction of a head-tax by the Germans for all Rwandans created further divide between the two tribes as Hutus realised that instead of improving their social standing through the ownership of cattle as they had in the past they could do so by the acquisition of money.

In 1919 under a mandate of the League of Nations Rwanda became a Belgian protectorate. They fully established Roman Catholicism and also introduced the French language. It was the Belgian colonists who established the ethnic divide between the Hutu and Tutsis, setting up a racial index to determine who was a true Tutsi. Hutus were denied higher education and positions in government.[329] By the 1930s the racial divide had been fully institutionalised; each citizen held an identity card that marked the tribe they belonged to.

By the 1950s the Tutsis were arguing for an independent Rwanda, however there was growing unrest from the Hutus against the Tutsi elite and the Belgians who had supported them. In 1959 revolution was sparked when a Belgian organised election resulted in landslide victories by the majority Hutus and sparked a backlash against the Tutsis. Tutsis began to flee the country and in 1962 the Hutu-led government was granted independence from Belgium. The oppressed became the oppressor. Genocide

[329] Ibid.

began. In December 1963 some 20,000 Tutsis were killed by Hutus in a massacre,[330] which pushed Tutsis further to flee the country and a large number of them settled in nearby Uganda. Others went to neighbouring Burundi and other nearby countries.

A cycle of conflict began in Rwanda. Tutsis refugees launched attack on Hutu settlements and outposts, retaliatory attacks resulted in a large number of Tutsis being killed. By the 1980s nearly half a million Tutsis refugees called for recognition and return to their homeland but the then president, Juvenal Habyarimana, believed that they could not economically support the refugees. Their calls were rejected. In the early 1990s the Rwandan Patriotic Front (RPF) invaded northern Rwandan and initiated the Rwandan Civil War. The group of rebels that made up the RPF was mostly made up of Tutsi refugees who had fled to Uganda in the preceding years. Talks between the RPF and Juvenal Habyarimana's government began on 12th July 1992 and the Arusha Accords or 'the Peace Agreement between the Government of the Republic of Rwanda and the Rwandan Patriotic Front' were finally signed on 4th August 1993.[331] On 6th April 1994 Juvenal Habyarimana's plane was shot down by a surface-to-air missile and he was killed. The assassination created a power vacuum that ended the Accords and sparked the Rwandan genocide.

Creation of the ICTR

Despite the need for urgency expressed by the UN Security Council to address the situation in the Balkans, the violence in Rwanda was widely ignored by the international community. Madeleine Albright would later say in an interview with Frontline *'[i]t [Rwanda] sits as the greatest regret that I have from the time I was UN Ambassador and maybe even Secretary of State, because it is a huge tragedy, and something that sits very heavy on our souls*'.[332] Albright also stated that she did not feel that the situation was one that the international community could have dealt with any differently.

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[330] Rwanda Profile – Timeline – BBC Website available at https://www.bbc.co.uk/news/world-africa-14093322 last accessed 18/09/2021.

[331] J Stettenheim, 'The Arusha Accords and the Failure of International Intervention in Rwanda ' (*Genocide Archive Rwanda* , Unknown) <https://genocidearchiverwanda.org.rw/index.php/The_Arusha_Accords_and_the_Failure_of_International_Intervention_in_Rwanda> accessed 3 February 2022.

[332] *Conflict In Former Yugoslavia*. UN Security Council: C-Span, 1993. video.

As with the ICTY the Security Council asked that Secretary General of the UN, at the time the Egyptian Boutros Boutros-Ghali, to put together a Commission of Experts[333] to look into the violations of international humanitarian law by the Hutu minority in Rwanda.[334] On 4th October 1994 the Secretary General reported to the Security Council, he cited three main observations:

a) Individuals from both sides to the armed conflict have perpetrated serious breaches of international humanitarian law, in particular of obligations set forth in articles 3 common to the four Geneva Conventions of 12 August 1949 and in protocol II additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.
b) Individuals of both sides to the armed conflict have perpetrated Crimes against Humanity in Rwanda;
c) Acts of Genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way. These acts of mass extermination against Tutsi group as such a constitute genocide within the meaning of article II of the Convention on the Protection and Punishment of the Crime of Genocide. The commission has not uncovered any evidence to indicate the Tutsi elements perpetrated acts committed with the intent to destroy the Hutu ethnic group as such.[335]

Unlike in the Former Yugoslavia the government of Rwanda initially supported the establishment of the ICTR and offered their full cooperation.[336] Following the report, Resolution 955[337] was adopted, which included the full statute of the tribunal. This resolution was issued by the Security Council acting under Chapter VII of the Charter of the United Nations that deals with how the UN can act in regard to threats to peace, breaches of peace and acts of aggression.[338]

Differences between the creation of the ICTY and ICTR

While the ICTY and ICTR are very similar constructs there are a number of marked differences. Despite the conflict in Rwanda having rumbled on for a number of years, the ICTR was granted limited temporal jurisdiction over the conflict from 1st January to 31st December 1994 only. Therefore, anything that happened before or after these dates was beyond the jurisdiction of the tribunal. The ICTY, in

[333] UNSC Res 935 (1 July 1994) UN Doc S/RES/935.
[334] L Barria and S Roper, 'How effective are International Criminal Tribunals? An analysis of the ICTY and ICTR' [2005] 9(3) The International Journal of Human Rights 349-368.

[335] UNGA 'Letter from the Secretary- General' (4 October 1994) UN Doc S/1994/1125.
[336] UNGA 'Letter from the Permanent Representative of Rwanda' (29 September 1994) UN Doc S/1994/1115.
[337] UNSC Res 955 (8 November 1994) UN Doc S/RES/955

[338] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS VII.

contrast, only marked the start of the conflict giving no final date for the end of the jurisdiction and in fact the jurisdiction of the tribunal was actually extended to include Kosovo.

The second of the differences is that the location of the tribunal was not specified in the resolution for the ICTR. The resolution that set up the ICTY specified that a suitable seat be found in the Netherlands, in contrast resolution 955 stated:

> '[The Council]… Decides that the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements'.[339]

Another major difference is the timing of the tribunals' creation. In the case of the ICTY the conflict in the Former Yugoslavia was still raging, this is because the ICTY has jurisdiction over a number of separate conflicts that ravaged in the Balkans. Conversely, the ICTR did not seek to address the entire conflict but purely the short period when the Commission of Experts had identified genocidal activities. Similarly, when read in conjunction with Experts' report, the UN had already apportioned blame to one group of people, the Hutus, while almost exonerating the Tutsi people as clearly the report states as its third observation that they had seen *'[a]cts of Genocide against the Tutsi group [were] perpetrated by the Hutu elements… The Commission have not uncovered any evidence to indicate that Tutsi elements perpetrated acts with the intent to destroy the Hutu ethnic group'*.[340]

This can be seen as reminiscent to the Nuremberg Trials in that the Statute is limited to overseeing guilt of one section of society. Not a single Tutsi was indicted at the ICTR.

[339] UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

[340] UNGA 'Letter from the Secretary- General' (4 October 1994) UN Doc S/1994/1125.

Differences in the statutes of the ICTY and ICTR

Despite the codification and application of offences at Nuremberg, the ICTY and ICTR were the first time that certain offences were tried and also that all offences were tried in a tribunal that was not conducted by the victorious nation after a conflict. This is an important distinction to make as up until this time all attempts at international justice have been forced upon defeated nations. The ICTR was also the first attempt at international justice in relation to an internal armed conflict. Until this time international criminal law had applied purely to international conflicts. While two of the offences bear the same name as those charged at Nuremberg there had been significant developments in their definition and application. Developments were also made over the course of the life of the two tribunals.

Not only did the tribunals outline and apply the offences differently from at Nuremberg, but they also applied them differently to each other. The developments made at these tribunals would have a direct effect on how the offences were outlined and applied at the ICC later on. Some crimes have been redefined and some have been extended since Nuremberg.

War Crimes

The War Crimes doctrine is one offence that has been redefined since Nuremberg. The codification of the Geneva Convention 1949 has been added to the War Crimes doctrine and this of course did not exist when Nuremberg occurred. A key difference between the statute of the ICTY and the ICTR is the articles that make up the war crime offences. The ICTY includes two articles, Article 2 Grave Breaches of the Geneva Convention of 1949[341] and Article 3 Violations of the Law or Customs of War. The

[341] Grave Breaches of the Geneva Convention of 1949
The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) Wilful killing;
(b) Torture or inhuman treatment, including biological experiments;
(c) Wilfully causing great suffering or serious injury to body or health;
(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out lawfully and wantonly;
(e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) Unlawful deportation or transfer or unlawful confinement of a civilian;
(g) Taking civilians as hostages.

Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended) UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877.

ICTR, however, only has a single article, Article 4 Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.

There are common elements in all three of these articles, these shall be addressed first. The key elements for a war crime are:

1. For the prosecution to prove a war crime they must first prove the existence of an armed conflict and then define whether the conflict is internal or international in nature.

2. A sufficient connection to the armed conflict must be proven. This is known as the nexus requirement.

3. The crime must constitute an infringement of a rule of international humanitarian law.

4. The rule must be customary in nature, or if it belongs to treaty law, certain conditions must be met.

5. The violation must be sufficiently serious.

6. The violation or the rule must entail individual criminal responsibility of the person breaking the rule.

Existence of an armed conflict

For the Geneva Convention or War Crime Article to apply it must be proven that an armed conflict exists. The International Red Cross commentary to the Geneva Convention I (Art 2(1)) suggests that '*any differences between two states and leading to the intervention of members of the armed forces is an armed conflict'*.[342]

This definition suggests that armed conflict can only exist when it is international in its nature. If this definition were to be used it would mean that Article 4 of the ICTR would not be enforceable as it would be virtually impossible to meet this crucial condition.

[342] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I).

During the discussions of the Security Council to determine the statute of the ICTY the delegate from the USA, Madeleine Albright, suggested that a determination of the definition as to what constitutes an armed conflict should be made and it should be entered into the statute for the avoidance of doubt. This would make a determination as to the territory under consideration by the tribunal and also the nature of the conflict. However, despite the discussions, the Security Council decided not to include a definition in the statute. It was therefore left to the Trial Chamber to define the issue.

The first case to come to trial at the ICTY was that of Dusko Tadić[343] during which the issue of character of the conflict arose. Tadić was charged with offences under Article 2 of the Statute, Grave Breaches of the Geneva Convention. A key requirement of the offence is that the conflict be international in its nature. This requirement was agreed by all parties to the case.[344] It was further agreed that to be defined as international the conflict must be between two or more states. A significant aspect of the judgment looked at the how a seemingly internal conflict could in fact become international in nature if: -

I. Another State intervenes in that conflict through its troops or,
II. Some of the participants in the internal armed conflict act on behalf of that Other State,

The Tribunal in the Tadić case found that it had to make a choice: whether it should pass its ruling as covering the armed conflict as a whole and make a declaration as to its nature, or whether the various areas to which the indictment in the case related should be considered on an individual nature. Despite both the Trial and Appeals Chamber making a clear declaration that until 19th May 1992 the conflict was of an international nature, the Tadić indictment actually only covered alleged crimes committed between 23rd May 1992 and 31st December 1992. The prosecution in the Tadić case argued that at all times relevant to the indictment the conflict was international in nature because it was being fought between two states; that is Bosnia and Herzegovina[345] and the Federal Republic of Yugoslavia.[346] It was put forward that '*until 19 May 1992 the armed conflict existed between BH and JNA[347] and then*

[343] *Prosecutor v Dusko Tadić aka DULE (*Opinion and Judgment) ICTY-94-1 (7 May 1997).
[344] Ibid.
[345] Known hereafter as BH.
[346] Known hereafter as FRY.
[347] Yugoslav People's Army - *Jugoslovenska narodna armija.*

thereafter VJ[348] *was involved in an armed conflict against BH. Consequently, it is submitted that the only conclusion that can be drawn is that an international armed conflict existed between BH and the FRY during 1992'*.[349] The Prosecution pointed out that the Trial Chamber '*made no express finding on the classification of the armed conflict between the Bosnian Serb Army (VRS) and BH after the VRS was established in May 1992*'.[350] The question at appeal was therefore, whether after 19th May 1992 the conflict continued to be of an international nature or whether in fact it became internal. The appeal was asked to determine the legal criteria for determining when an armed conflict which appears to be *prima facie* internal can be rendered as international in nature if the combatants can be considered as acting on behalf of a foreign power. The Appeals Chamber sought to identify the conditions under which forces may be assimilated to organs of a State other than that on whose territory they live or operate.[351] The Appeals Chamber also had to discuss the criteria for lawful combatants that is laid down in the Third Geneva Conventions of 1949 that relates to the '*The Treatment of Prisoners of War'*. The Hague Regulations on Land Welfare Articles 1 and 2, and Article 4 of the Geneva Convention III 1949 establish the different standards for lawful and unlawful combatants. It was stated in the Convention that combatants can only be considered lawful if they form part of an organised force, but what if the members of other militia forces, or members of volunteer forces including an organised resistance movement[352] are involved? The Appeal Chamber stated that it was a logical conclusion from Article 4 that if during an armed conflict paramilitary units are formed that '*belong*' to a State other than the one against which they are fighting, the conflict must be of an international nature and therefore any serious violation of the Geneva Convention may and can be considered to be '*grave breaches'*. The Appeals Chamber also stated that the ICRC Commentary was too vague as to shed any further light on the exact content of the requirements needed to fulfil the aspect of '*belonging to a Party to the conflict'*. The rationale of the Convention was, of course, formed after the Second World War with the aim of

[348] Yugoslav Army - *Vojska Jugoslavije.*
[349] Taken from the footnotes of the Tadić Judgment – taken from para 2.25 of the Cross- Appellant's Brief.
[350] *Prosecutor v Dusko Tadić aka DULE (*Opinion and Judgment) ICTY-94-1 (7 May 1997).
[351] Ibid.
[352] International Committee of the Red Cross , 'Practice Relating to Rule 4 Definition of Armed Forces' (*IHL Database*, Unknown) <https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_rul_rule4> accessed 3 February 2022.

assigning responsibility for the conduct to any '*irregular forces'* to the State that sponsored that force. It was therefore agreed that for the combatants to be considered lawful the State must have control over the Party and '*a relationship of dependence and allegiance'* must exist. It was concluded that under the provision of Article 4 of the Geneva Convention, the Chamber must use a test of control when determining the requirement for '*belonging to a Party of the Conflict'*. This decision, the Appeals Chamber stated, was '*based on the letter and the spirit of the Geneva Convention'*.[353] It is a rather more contemporary reading of the Convention in line with more modern warfare, not solely considering the organs of state and their formal status but engaging different parties to the conflict, thus encompassing their spirit to prevent or punish the commission of such crimes. This allows for such Conventions to be interpreted on a wide basis thus giving the ad hoc tribunals and later the ICC the authority over as many perpetrators of serious violations of international humanitarian law as possible.[354]

The decision by the Trial Chamber and later the Appeals Chamber not to opt for a general finding as to the nature of the conflict in BH during the relevant period has a number of arguments for and against it.

Positive and Contra-arguments of the Appeal Chamber Decision

Positives

The Appeals chamber's decision to hold that the conflict in the Former Yugoslavia be made up of a number of geographically more limited armed conflicts of mixed character, some both international and internal dependent on the time and place has allowed for developments in the law surrounding internal armed conflicts. This is considered by many to be one of the most fundamental contributions of the ad hoc tribunals and was also fundamental to the drafting of the Rwandan Statute. Furthermore, the narrow focus of the issue that must now be considered in each and every case has meant that the evidence must be considered on a case-by-case basis.

[353] *Prosecutor v Dusko Tadić aka DULE (*Opinion and Judgment) ICTY-94-1 (7 May 1997).
[354] There are obviously limits to the jurisdiction of the ICC has some countries have not ratified the statute, or simply do not belong to the court.

Contra-arguments

There are, however, issues with the Chamber's decision. Firstly, the counter argument to that of each prosecution having to prove its own case on the evidence presented as to the nature of the conflict is the fact that as each prosecution must present a full evidence-supported case this means that arguments can be of a repetitive and time-consuming nature. This is especially important when it is considered by an ad hoc tribunal or a temporary court as they are on a finite timescale. There is also a cost issue involved. Long drawn-out trials cost the tribunals more and this may lead (in future tribunals as no further indictments are being made by the ICTY or ICTR) to tribunals and courts having to make decisions as to which cases to indict. This may obviously lead to certain criminals not being indicted for crimes that are committed. This could have an impact on the legacy of the tribunal in question.

Another issue is that because of this a single ruling it means that the body of law applying to the issue of the nature of the conflict is vast and there is a risk of contradiction between the Chambers depending on the geographical and temporal scope of the case in question. It may also be dependent on the evidence presented at the time of the case and could lead to wide scale appeals. The fact that it was ruled in the ICTY that the conflict in the Former Yugoslavia could be subdivided both geographically and temporally, means that the conflict may not be considered continuous in nature. The application of the case law at future ad hoc tribunals and the ICC is therefore limited.

Finally, it may risk full understanding of nature of the conflict being overlooked or misunderstood both legally and historically, this could have a huge impact on the legacy of the tribunal.

Approach of the ICTR

The approach taken by the ICTR is different from that of the ICTY. The conflict in Rwanda was not of an international nature. The Security Council had to address this issue by adding the Additional Protocol II to the statute. The determination in the statute that the conflict was internal in nature is in direct contrast to their decision when drafting the statute of the ICTY. As the conflict was predetermined to be internal, it meant that only certain categories of the violations of law and customs of war which apply in such context are within the jurisdiction of the court.

The definition given by the Appeals Chamber of an '*armed conflict'* is '*whenever there is a report to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State'*.[355] This definition gives a clear distinction between international and internal conflicts. The first part of the definition is that of international armed conflicts – as a report to armed force between states. The second part of the definition is that of an internal armed conflict – protracted armed violence between governmental authorities and organised groups or between such groups within a state.

As mentioned earlier it is an important distinction because as stated at paragraph 150 of the Čelebići Appeal judgment '*something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rule is broader'*.[356] However, as Guénaël Mettraux points out the reverse if not necessarily true. Mettraux gives the example of Article 52 of Additional Protocol I '*unlawful attacks on civilian object*',[357] this article has no equivalent in the Additional Protocol II that form part of the Statute of the ICTR. It is therefore arguable if a perpetrator committed the acts that form part of this offence in an internal conflict, whether it would be considered a crime at all. Despite this clear distinction in the conventions and it could be argued against the spirit of statute, if this offence was only applied to conflicts that were international in nature. The Chambers of the tribunal have moved towards applying the doctrine of the Geneva Conventions as widely as possible and applying them as equally as possible to armed conflict whether they are considered to be international or internal.

Qualifying as a War Crime

The 'nexus' requirement

Once it has been established that there is in fact an armed conflict and the nature and character of that conflict, it is imperative that the offence is sufficiently linked to the conflict. The Appeal Chamber has on a number of occasions stated that the conduct of the offence must have been '*closely related to the*

[355] *Prosecutor v Dusko Tadić aka DULE (*Opinion and Judgment) ICTY-94-1 (7 May 1997).
[356] *Prosecutor v Zejnill Delalic, Zdravko Mucic (aka PAVO), Hazim Delic and Esad Landzo (aka Zenga) Čelebići Case* (Judgment in Appeal) IT-96-21- A (20 February 2001).
[357] G Mettaux, International Crimes and the Ad Hoc Tribunals (OUP 2011) 11.

hostilities'.[358] The Čelebići judgment spoke of the '*obvious link*'[359] and this was after the trial judgment had referred to a '*clear nexus'*.[360] This nexus distinguishes normal criminal behaviour from that of war crimes. The nexus also seeks to remove from the laws of war, crimes that are purely random or happen in complete isolation to the conflict itself, these are crimes that should by sanctioned at a domestic level. The nexus therefore is especially important as it makes the clear distinction between international criminal law that needs to be sanctioned by either the International Criminal Court or a Tribunal from crimes that must be dealt with by the courts of the nation that holds jurisdiction.

Meaning of a nexus

The tribunals have not been clear on what the actual meaning of a nexus is, but they have laid out a number of things that do not need to be fulfilled for the nexus requirement to be satisfied. Firstly, the conflict does not need to have a causal link to the commission of the crime. The crime therefore does not need to be a direct consequence of the armed conflict; however, it must still play a substantial part in the perpetrator's ability to commit it. The conflict should also be sufficiently linked to their decision to commit the crime, the manner in which the perpetrator commits the crime or the purpose for which the crime is committed.

It was argued in the Kunarac[361] case there was not a sufficient connection to the armed conflict and therefore, Article 3 should not apply. The accused were charged with Crimes under Article 3, '*namely outrages upon personal dignity, rape and torture'*.[362] The appellants in the case argued that the test used should be the '*but for test'* and this should be applied to each and every crime on the indictment. They argued the connection was insufficient as the crimes were not sufficiently linked to the existence of an armed conflict, nor was it linked to their participation in the conflict as a soldier and nor was it sufficiently linked to their alleged victims as civilians. The Appeals Chamber found that criminality of

[358] *Prosecutor v Zejnill Delalic, Zdravko Mucic (aka PAVO), Hazim Delic and Esad Landzo (aka Zenga) Čelebići Case* (Judgment in Appeal) IT-96-21- A (20 February 2001).

[359] Ibid.
[360] Ibid.
[361] *Prosecutor v Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic* (Judgment in Appeal) IT-96-23-T & IT-96-23/1 – T (22 February 2001).
[362] Ibid.

war can and often does, overlap with a great deal of peacetime criminality and many acts that qualify as war crimes and grave breaches would also qualify as domestic crimes. Therefore, the test applied is not a '*but for test'* but purely a sufficient link to the execution of the crime.

The second condition that doesn't need to be satisfied is that the nexus does not imply any strict geographical or temporal coincidence between the act and the armed conflict. This means the acts do not have to have been committed in the battlefields or even when the battle is taking place. It could occur in the build-up to a battle, or even in the aftermath.

Thirdly, War crimes and grave breaches are not limited to crimes of a purely military nature, they can be committed by both combatants and non-combatants. This was demonstrated in the case of Mitar Vasiljević.[363] In this case, Vasiljević a former waiter, was a member of the para-military group the '*White Eagles'*.[364] He was convicted of aiding and abetting persecution and murder. It was found, that although Vasiljević did not see it as part of armed conflict, the acts were committed in furtherance of the conflict, and so this was a violation of the laws and customs of war.[365]

Fourthly, it is not a requirement that the perpetrator be related to or linked to one of the parties of the armed conflict and it is also not a requirement that the action be connected with other crimes, such as Crimes against Humanity.

Fifthly, the nexus requirement for grave breaches of the Geneva Conventions is different from the similarly named requirement in the ICTY statute in relation to Crimes against Humanity, where the act must have been committed '*in the armed conflict'*.[366] The nexus for crimes against humanity is purely that that the Chamber must be satisfied that there was an armed conflict at the time and place relevant to the indictment.

Finally, customary law does not require that war crimes be pursuant to an officially sanctioned practice. This is despite initial suggestions by defence counsels that seemed to suggest that it did have to be

[363] *Prosecutor v Mitar Vasiljevic* (Judgment) IT-98-32 (29 November 2002).
[364] A Bosnian Serb para-military group.
[365] *Prosecutor v Mitar Vasiljevic* (Judgment) IT-98-32 (29 November 2002).
[366] UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877.

proven that there was a policy or plan in existence. However, it is clear from the cases of Tadić, Kunarac and Čelebići (Mucić et al) that the existence of such a plan or policy may help to distinguish a war crime from a purely domestic crime.

Demands of the Nexus

The demands of the nexus are not clear, nor are they mentioned in the statute. It is unclear if: -

I. A perpetrator must be aware of the armed conflict, or if

II. A perpetrator must be aware his actions be part of the conflict.

However, it is clear that the nexus requirement cannot be something '*vague or indefinite'*.[367] It is up to the prosecution to prove the nexus in relation to each and every crime on the indictment. Mettraux gave some examples of crimes that are unlikely to fulfil the nexus requirement: -

I. Retaliation killings between competing paramilitary groups which fight on behalf of the same party to an armed conflict.

II. Parasitical criminality that opportunistically uses the cover of the armed conflict does not, in principle, satisfy the nexus.

III. Crimes that are committed in a purely private capacity.[368]

There are a number of factors to consider in order to determine the nature of the relationship between the perpetrator and the armed conflict for there to be considered a sufficient link. A number of cases have discussed this matter at length. The ICTR Appeals Chamber have clearly stated that with regards to the sufficiency of the nexus a number of factors[369] must be considered rather than a firm set of criteria.[370] A strong indication that a crime may be considered a war crime is that the act may be

[367] *Prosecutor v Clement Kayishema, Obed Ruzindana* (Judgment) ICTR-95-1 (21 May 1999).
[368] G Mettaux, International Crimes and the Ad Hoc Tribunals (OUP 2011) 30.

[369] Factors to be considered when determining the nature of the relationship between perpetrator and the armed conflict are: - a) Status of the perpetrator b) status of the victim or victims c) circumstances in which the crime was committed d) the fat the crime was committed in the context of an ongoing campaign to achieve particular military goals e) the fact the crime coincided with the ultimate purpose of the military campaign f) the fact the crime was committed with the assistance or with the connivance of the warning parties g) the fact that the crime was committed as part of, or in the context of, the perpetrator's official duties h) the fact that the victim was a member of the forces of the opposing party.
[370] G Mettaux, International Crimes and the Ad Hoc Tribunals (OUP 2011) 30.

prohibited in existing Treaty Law. However, the fact that an act is prohibited by a Treaty does not necessarily mean that the act attracts individual criminal responsibility in the case of a breach. The criterion taken on their own are not conclusive and the Trial Chamber must consider all the relevant criterion in order to make a judgment as to whether the nexus requirement has been fulfilled. The ICTY has considered the nexus requirement on a number of occasions, and it has interpreted it on a broad basis. This broad interpretation has resulted in widespread overlap between what acts are considered to amount to war crimes by the statutes of the ad hoc tribunals and those that in the past have been considered by other bodies of law, for example, under domestic law. It must be remembered however, that war crimes are not intended to protect victims against crimes in general, like a domestic criminal law would, but instead they are to protect certain categories of people against the consequences of war. The ICTR has shown less inclination to interpret the nexus in such a broad manner. The first case that fulfilled the criteria was that of George Rutaganda.[371] Mr Rutaganda was found guilty of Genocide, and Murder and Extermination as Crimes against Humanity on 26th May 2003 after an appeal. On appeal, Rutaganda was acquitted of the Crimes against Humanity charges but instead found guilty of war crimes.[372]

The Geneva Convention, Additional Protocols and the Ad Hoc Tribunals

The Geneva Convention III forms part of the war crime doctrine. As with other war crimes there is a need for the prosecution to prove that they were committed during an armed conflict. For the Geneva Convention III to apply the conflict must be international in nature. Therefore, the statute ruling that the conflict in Rwanda was internal meant that part of the Convention could not apply. Specifically, this means that grave breaches cannot be tried by the ICTR. The ICTR statute instead refers to violations of article 3 and also the additional protocols II. The article lays out that the ICTR has the powers '*to prosecute persons committing or ordering to be committed serious violations of Article 3* '[373].

[371] *Prosecutor v Georges Rutaganda* (Judgment) ICTR-96-3 (6 December 1999).
[372] Ibid.
[373] UNSC Res 955 (8 November 1994) UN Doc S/RES/955 as amended.

While the article of the ICTR does not limit the offences to those that are listed as violations of the article, the ICTY does limit the grave breaches to those listed in the provision.

The lists that accompany the articles in both the ICTR and ICTY do share common offences, alongside some marked differences.

Grave Breaches

There are a number of elements that make up grave breaches: -

I. Firstly, as mentioned earlier, the conflict has to be international in character or the conflict must represent a state of occupation.
II. The grave breach must be committed against a protected person or protected property.
III. The offence must be one of those listed in the statute as a 'grave breach'.

International Conflict

The issue of proving the existence of an armed conflict has been discussed earlier in the chapter and the writer does not propose to repeat the discussion further. Although the statute of the ICTY does not explicitly state that the doctrine applies solely to international conflicts its use of the grave breaches provisions seems to suggest that the offences be limited. This means that once the conflict has been proven to exist, proving the nature of the conflict is imperative.

> 'It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State'.[374]

In the Tadić case, the prosecution put forward that to prove the nature of the conflict, a test of overall control must be applied. The judgment put forward that this was supported by not only the provisions of the Geneva Conventions itself but also by the jurisprudence of the Nuremberg Trials, by other

[374] *Prosecutor v Dusko Tadić aka DULE (*Opinion and Judgment) ICTY-94-1 (7 May 1997).

tribunal decisions and by the writings of leading publicists amongst other sources.[375] This test of overall control, later limited to only organised armed groups by the appeal chamber, is a basic test that there was a required degree of control shown by a party to the conflict to prove the conflict was international in nature.

The tribunal used a case from the International Court of Justice[376] to set out the notion of control, the Nicaragua Case. In the Nicaragua case '*a high degree of control has been authoritatively suggested'*.[377] The issue that formed the crux of the argument in the Nicaragua case was whether through its financing, organising, training, equipping, and planning of operations of organised military and paramilitary groups in Nicaragua,[378] the USA exhibited sufficient control over the groups to be held responsible for the breaches that were committed by those groups. It was held that the degree of control needed was a high degree of control.

It was further held that it was further required that not only must the party be in '*effective*' control of the groups but also they must have '*exercised*' such control over '*specific operations'* in which the breaches may have been committed.

State of Occupation

The Hague Regulation of 1907 laid out the definition of what a state of occupation is, at Article 42 it states *'[t]erritory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised*'.[379]

[375] Ibid para88.
[376] ICJ.
[377] *Prosecutor v Dusko Tadić aka DULE (*Opinion and Judgment) ICTY-94-1 (7 May 1997).

[378] Ibid.
[379] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (1907 Hague Convention IV).

Protected Person

The Geneva Convention and its additional protocols protect a number of groups in times of conflict.

Article 4 of the Fourth Geneva Convention states

> 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are'.[380]

Article 4 of Geneva Convention (III) goes further to define those who are protected using the following terms: -

> 'Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognisable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
>
> (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into

[380] Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV).

> regular armed units, provided they carry arms openly and respect the laws and customs of war'.[381]

At the ICTY many of the cases hinged on the identification of the victims, in the Mucić et al[382] case, the defence argued that the victims did not meet the criteria of '*protected persons'*. They put forward that the strict definition of '*prisoner of war'* was not met, arguing that as the nationality of the victims were Bosnian, the same as the defendants who were detaining them, they were therefore outside the remit of Article 4 of the Geneva Convention IV.

The issue of nationality was discussed at length during the trial and during the expert testimony of Professor Economides who testified regarding the concept of '*effective link'*[383] that is required between a state and its nationals. The link was put forward in the Nottebohm case at the ICJ in 1955.[384] The Prosecutor argued that the victims should be considered Bosnian Serbs and as such should not be considered as nationals of Bosnia and Herzegovina. The final argument made by the Prosecution was that the victims should be considered '*protected persons'* until a competent tribunal was able to make a ruling as Article 5 of Geneva Convention III. The judgment in the case discussed the issues of protected persons. As is traditionally the case in such matters, the judgment discussed the fact that states are the only real subjects under International Law. Individuals are therefore only concerned in international law as part of the state to which they are linked by their nationality.[385] As the Nottebohm case made clear, it is for the state in question to determine who it considers as nationals. This principle is taken from the Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws.[386]

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[381] Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III).

[382] *Prosecutor v Zejnill Delalic, Zdravko Mucic (aka PAVO), Hazim Delic and Esad Landzo (aka Zenga) Čelebići Case* (Judgment in Appeal) IT-96-21- A (20 February 2001).

[383] *Prosecutor v Zejnill Delalic, Zdravko Mucic (aka PAVO), Hazim Delic and Esad Landzo (aka Zenga) Čelebići Case* (Transcript of Trial) IT-96-21- A (3 December 1997).

[384] Case facts in Appendix 3.

[385] *Prosecutor v Zejnill Delalic, Zdravko Mucic (aka PAVO), Hazim Delic and Esad Landzo (aka Zenga) Čelebići Case* (Judgment in Appeal) IT-96-21- A (20 February 2001).

[386] Special Protocol concerning Statelessness (adopted 12 April 1930) 179 LNTS 115.

Protected Property

The changing nature of conflict as all-out war moving away from specific battlefields to land that was often occupied by the civilian population has meant that law has developed to protect property. The Hague Convention (IV) respecting the Laws and Customs of War and its annex: Regulations concerning the Laws and Customs of War on Land of 1907[387] state at Article 25 that *'[t]he attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited'*[388]. In some cases, the form of property has been specifically identified by international law as protected, the reason for their protection have been classified either for their humanitarian or cultural value or in order to prevent additional criminality. The nature of the protected property ranges from medical units and transportation to property deemed of significant cultural value. The provisions are applicable to armed conflicts deemed international and internal conflicts and are equally binding save for in very rare exceptions. They are also deemed binding on individuals as well as states. The protections are derived from a number of different legal objects including the Hague conventions 1899 and 1907, the Geneva Conventions and the Additional Protocols (I) and (II).

Underlying Offences

Finally, the offences listed as underlying offences are as follows; wilful killing, torture, inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction, and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In relation to the underlying offences, these apply both to combatants and non-combatants in the context of an international armed conflict.[389] The first reported cases of prosecutions at national level occurred in the 1990s following the conflict in the former Yugoslavia, the individuals were tried in the German, Danish and Swiss courts mainly for grave breaches of the Third

[387] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (1907 Hague Convention IV).

[388] Ibid.

[389] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II).

and Fourth Conventions. Since then, domestic cases have been brought in Bosnia and Herzegovina, Cambodia, Croatia and Iraq.[390] The commentary of Article 51 stated in its introduction that the ICTY had '*breathed life into the grave breaches regime and brought clarity to many different aspects, ranging from the general requirements for its application to the specific underlying crimes*'.[391]

Crimes against Humanity

The offence of Crimes against Humanity was first tried at the end of the Second World War, during the International Military Tribunal[392] at Nuremberg. The charter that established the IMT defined the offence as *'...murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious grounds or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*'.[393]

Despite there being no further war crime trials until the creation of the ICTY, the International Law Commission in 1947 was asked by the UN General Assembly to draft '*a code of offenses against peace and the security of mankind*'.[394] This code was finally finalised in 1996 and added offenses to the original definition including *'...torture…institutionalised discrimination…arbitrary deportation or forcible transfer of population, arbitrary imprisonment, rape, enforced prostitution and other inhuman acts committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group'*.[395] Before the draft code could be finalised however, the UN had created both the ICTY and the ICTR. When drafting the statute for the ICTY the drafters relied strongly on the charter of the IMT. However, as with 1996 code the definition of the offence was expanded to include rape, torture and imprisonment. Article 5 of the ICTY statute included the nexus requirement

[390] Ibid.
[391] Ibid.
[392] Known hereafter as the IMT.
[393] Yale Law School , 'Nuremberg Trial Proceedings Vol 1 Charter of the International Military Tribunal' (*The Avalon Project*, Unknown) <https://avalon.law.yale.edu/imt/imtconst.asp> accessed 3 February 2022.

[394] International Crimes Database, 'Crimes Against Humanity ' (*Crimes*, Unknown) <https://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity> accessed 3 February 2022.
[395] Ibid.

that the IMT had required with an armed conflict but clearly stated that the conflict could be international or internal in character. Article 3 of the ICTR statute in contrast removed the nexus requirement that both the IMT and ICTY had required. Instead of the nexus, the ICTR required that offence must be part of a '*systematic or widespread attack against any civilian population on national, political, ethnic, racial or religious grounds'*.[396]

As with the War Crimes and crimes against the Geneva Convention articles of the statute at the ICTR, the statute has been adapted to fit the internal nature of the conflict. This need for clarification is due in part to the fact the traditionally international criminal law considered disputes between states only. The ICTY is seen as ground-breaking in its development of the doctrine of Crimes against Humanity, for the prosecution of crimes of sexual violence in times of war time. It was in fact the first international criminal tribunal to enter convictions of rape as a form of torture and for sexual enslavement as crime against humanity.[397]

Genocide

It is probably for the convictions relating to genocide that the ad hoc tribunals will be best remembered. Despite the crime of genocide being codified in the 1948 Convention on the Prevention and Punishment of Genocide, it was the ICTY that first indicted defendants for the crime. However, the first conviction for genocide was Jean – Paul Akayesu[398] at the ICTR.

Jean-Paul Akayesu and his conviction for Genocide

Born in 1953 in the Taba Commune, Akayesu was a teacher before he moved into political activities before being elected as bourgmestre (mayor) of Taba.[399] As bourgmestre, Akayesu oversaw not only the economy, local law enforcement and but also the administration of law. As the conflict erupted around his town, Akayesu initially kept the Taba commune free from the conflict by refusing to allow

[396] UNSC Res 955 (8 November 1994) UN Doc S/RES/955 as amended.

[397] United Nations, 'Crimes of Sexual Violence' (*United Nations International Criminal Tribunal for the former Yugoslavia*, Unknown) <https://www.icty.org/sid/10312> accessed 3 February 2022.

[398] *Prosecutor v Jean Paul Akayesu* (Judgment) ICTR-96-4 (2 September 1998).

[399] United States Holocaust Memorial Museum, 'Rwanda : The First Conviction for Genocide' (*Holocaust Encyclopaedia* , 5 April 2021) <https://encyclopedia.ushmm.org/content/en/article/rwanda-the-first-conviction-for-genocide> accessed 3 February 2022.

the local militia to operate in the commune.[400] On April 18th 1994, following a meeting with the interim government leaders, Akayesu experienced what can only be described as a *volte face,* out went the business suits and normal entire he wore as the mayor and in their place, he wore military uniform. Now instead of offering protection to those in his commune, he adopted a clear strategy of joining the genocidal forces. Eyewitnesses at his trial described seeing Akayesu not only inciting others to commit crimes but joining in the violence and killings. Following the end of the genocide, Akayesu fled to Zaire (now the Democratic Republic of Congo) and later to Zambia where he was eventually arrested in October 1995.

After his arrest in Zambia, Akayesu was taken to Arusha, Tanzania to be tried. He was indicted with one count of genocide, one count of complicity in genocide and one count of direct and public incitement to commit genocide, alongside 13 counts of other crimes including crimes against humanity and violations of Article 3 common to the Geneva Conventions.[401]

The Akayesu indictment was seven pages long and alongside giving a brief background to the conflict and the accused, it outlined the circumstances under which the offences of which he was accused occurred. Paragraph 13 of the indictment stated that:

> 'On or about 19 April 1994, before dawn, in Gisheyeshye sector, a Taba commune, one of whom was named Francois Ndimubanzi, killed a local teacher, Sylvere Karera, because he was accused of associating with the Rwandan Patriotic Front (RPF) and plotting to kill Hutus. Even though at least one of the perpetrators was turned over to Jean Paul Akayesu he failed to take measures to have him arrested'.[402]

In the judgment the trial chamber said that the prosecutor had not '*adduced conclusive evidence to support her allegations'*.[403] Paragraph 19 and 20 further alleged that

> '19. On or about 19 April 1994, Jean Paul Akayesu took 8 detained men from the Taba bureau communal and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled Runda commune and had been held there by Jean Paul Akayesu...

[400] Ibid.
[401] *Prosecutor v Jean Paul Akayesu* (Judgment) ICTR-96-4 (2 September 1998).
[402] Ibid.
[403] Ibid.

> 20. On or about 19 April 1994, Jean Paul Akayesu ordered local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene Phoebe Uwineze and her fiancé (whose name is unknown), Tharcisse Twizeyumeremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba communal bureau'.[404]

Despite attempts to discredit witnesses by the defence, the chamber found that evidence supported the prosecutor's version of events.

> 'The Chamber finds that it has been proved beyond reasonable doubt that Akayesu released eight detained men of Runda commune whom he was holding in the bureau communal and handed them over to the Interahamwe. It has also been proved beyond reasonable doubt that Akayesu ordered the local militia to kill them. It has been proved beyond reasonable doubt that the eight refugees were killed by the Interahamwe in the presence of Akayesu. The Chamber also proved beyond reasonable doubt that traditional weapons, including machetes and small axes, were used in the killings. It has been proved beyond reasonable doubt that the eight refugees were killed because they were Tutsi'.[405]

As genocide had never been tried before at an international tribunal, it was especially important during these trials that clear parameters were set. Paul Behrens in his paper 'A Moment of Kindness? Consistency and Genocidal Intent'[406] discussed the importance of the ad hoc tribunals in developing genocide from a purely academic concept into a codified workable statute. A crucial development that the ad hoc tribunals of the Former Yugoslavia and Rwanda addressed is the significance of specific intent in genocide. Both the ICTY and ICTR had to address whether genocide could be committed through acts of a single perpetrator.[407] Against the historical interpretation of the crime both of the tribunals have made it clear that they have not excluded the possibility that this could be the case. The trial chambers at the ICTY and ICTR have not always approached offences in the same way however, this is clearly important when addressing the issue of specific intent. It is, of course, an essential element of the offence of genocide, to qualify as a genocide, that the perpetrator must intend the destruction in whole or of part of a specified group. This issue has been controversial at the ad hoc tribunals as in a number of cases that have come before the chambers despite damning statements made

[404] Ibid.
[405] Ibid.

[406] P Behrens and R Henham, The Criminal Law of Genocide: International, Comparative and Contextual Aspects (Ashgate Publishing Limited 2007) 125-140.

[407] Ibid.

by the victims, there has also been evidence that showed that the accused has protected or singled out members of the same group for protection, which would seem to contradict their intention to destroy the group.

The ICTY versus the ICTR and negative evidence

The two tribunals of the ICTY and ICTR would approach the crime of Genocide slightly differently. This was in part due to the fact that the UN Security Council had declared the situation in Rwanda as a genocide before the creation of the tribunal itself. The primary case at the ICTY that illustrates the weighting given to evidence against specific intent is Jelisić.[408] There was overwhelming damning evidence against Jelisić when he stood trial at the ICTY. Evidence was heard of statements made by Jelisić that seemed to support his genocidal intent *'[he] hated Muslim women […] wanted to sterilise them all in order to prevent an increase in the number of Muslims'*.[409] Furthermore, the chamber heard that Jelisić kept a tally of the number of Muslims he had killed. This would seem to strongly support that case that Jelisić committed murder contrary to the statute and with the intent to destroy a specific group, Muslims. However, Jelisić also gave *laissez passers* to some detainees including a Muslim. This gave the trial chamber a headache as to how much weighting they should give this negative evidence against the clear evidence of some element of intent. Despite the evidence the trial chamber found that the prosecutor had not sufficiently proven that Jelisić had the specific intent required and instead Jelisić was found guilty of crimes against humanity and violations of law or customs of war, which he had already submitted a guilty plea[410]. This verdict came after Louise Arbour, the then prosecutor of the ICTY had fought to have the case for genocide heard[411], as the ICTY had wished to keep the first genocide ruling for a '*larger fish'*.[412]

[408] *Prosecutor v Goran Jelisic* (Judgment) IT-95-10 (14 December 1999).
[409] Ibid.
[410] United Nations, 'Jelisic Case: Goran Jelisic Acquitted of Genocide and found Guilty of Crimes against Humanity and Violations of Laws or Customs of War' (*United Nations International Criminal Tribunal for the former Yugoslavia*, 19 October 1999) <https://www.icty.org/en/press/jelisic-case-goran-jelisic-acquitted-genocide-and-found-guilty-crimes-against-humanity-and> accessed 3 February 2022.
[411] Geoffrey Nice, 'My legal hero: Louise Arbour' (*The Guardian Newspaper*, 24 November 2010) <https://www.theguardian.com/law/2010/nov/24/legal-heroes-louise-arbour> accessed 3 February 2022.
[412] Ibid.

At the ICTR, the prosecutor had on a number of occasions sought judicial notice of the fact of genocide in Rwanda. The fact was that the UN Security Council had already established the existence of a genocide in 1994. Despite this, the tribunal did not let this fact influence them in cases of individual criminal responsibility. Despite its existence being confirmed, the tribunal found it necessary that formal proof of such was presented at each trial. In fact, in the Karemera[413] case it found that

> '[I]t does not matter whether genocide occurred in Rwanda or not, the Prosecutor must still prove the criminal responsibility of the Accused for the counts he has charged in the Indictment. Taking judicial notice of such a fact as common knowledge does not have any impact on the Prosecution's case against the Accused, because that is not a fact to be proved. In the present where the Prosecutor alleges that the Accused are responsible for crimes occurring in all parts of Rwanda, taking judicial notice of the fact that genocide has occurred in that country would appear to lessen the Prosecutor's obligation to prove this case'.[414]

The Appeals Chamber would ultimately rule on 16th June 2006 that the fact that a genocide occurred in Rwanda should have been recognised as common knowledge.[415]

The nature of specific intent is key to the offence of genocide, it is not merely the establishment of the facts of the acts occurring but proving the genocidal intent of the accused. Thus, despite the Trial Chambers asserting that intent may be garnered from the scale of the atrocities or the manner in which the offences take place, this is not adequate. Consequently, the assertions of the Appeals Chamber in Karemara, that '*proof of a nationwide campaign is a necessary, although not sufficient part of the prosecution's case and [second] that such proof provides the context for understanding the individual's action*'[416] is not as convincing as it initial appears. The first assertion is simply wrong. The occurrence of a nationwide campaign is not a necessary element of the crime, and the existence of such a nationwide campaign does nothing to confirm that the accused is a party to the campaign or commits the acts pursuant to such a campaign. For this reason, the second part of the Appeals Chamber's claim must also fail.

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[413] *Prosecutor v Edouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera* (Judgment) ICTR-98-44 (2 February 2012).
[414] NHB Jorgensen, 'Genocide as a Fact of Common Knowledge' [2007] 56(4) The International and Comparative Law Quarterly 888.
[415] P Behrens and R Henham, Elements of Genocide (Routledge 2013).
[416] *Prosecutor v Edouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera* (Judgment) ICTR-98-44 (2 February 2012).

Within 'The Social and the Legal concept of Genocide' Stefan Kirsch[417] argues that these incorrect assertions made by the ad hoc tribunals should be left aside and instead the practice of the International Court of Justice should be applied.[418] The ICJ has applied a much stricter standard of proof when dealing with the Genocide Convention. In the case of Bosnia and Herzegovina v Serbia and Montenegro[419] concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, within the judgment which was passed down on 26th February 2007, the court recognised that it could not agree with the broad interpretation of the genocidal intent that the ad hoc tribunals had laid as precedent, and it set out the following *'[t]he dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent'*.[420]

Although the ad hoc tribunals were initially cautious of the genocide offence, the desire to see justice done has meant that they have used too broad a reading of the offence. The ICJ has sought to clarify the specific intent aspect of the offence and it is likely that the ICC will seek to apply a much stricter interpretation to the offence than the precedent set by the ad hoc tribunals Appeals Chamber.

Individual Criminal Responsibility – Article 7 of ICTY and Article 6 of ICTR

Article 7 of the ICTY[421] and Article 6[422] of the ICTR statutes break down individual criminal responsibility. Article 7 and 6 (clauses 2-4) expressly state that whatever the position of the accused, be them head of state or a government official, responsibility cannot be waived. Nor though, does a position of a subordinate remove liability. Finally, the fact the act was committed under the order of a

[417] P Behrens and R Henham, Elements of Genocide (Routledge 2013) 19.
[418] Ibid 19.
[419] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serba and Montenegro*) [2007] ICJ 91.
[420] Ibid.
[421] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 as amended UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877.

[422] UNSC Res 955 (8 November 1994) UN Doc S/RES/955 as amended.

superior does not negate the responsibility of the perpetrator but may at the time of sentence mitigate the sentence given.

To the notion of direct participation in crimes, the statute itself states the following: '*A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in article 2-5 of the present Statute, shall be individually responsible for the crime'*.[423]

Planning

Looking firstly at the planning aspect of the provision, here the Musema[424] trial judgment stated that the '*planning of a crime implies that one or more persons contemplate the commission of a crime at both its preparatory and execution phase*'[425], the evidence of the plan can be completely circumstantial. However, in Akayesu[426] it was suggested that for the planning to be punishable the crime planned must have been committed. This decision seems to have been made in the mistaken belief that the principle of individual criminal responsible for an attempt to commit a crime applied only to cases of genocide. Planning in most legal systems is tried as an inchoate offence, an offence of preparing for, or seeking to commit another crime. If planning is tried under this system, there is no need for the planned crime to have actually been committed as the offence is complete once all of its elements are met, without the need for the planned offence to be committed. When the accused has not only planned the offence but also committed the crime then they will only be charged with the actual act and not the planning of the offence, the planning, however, may be used as an aggravating factor in sentencing. Finally, the level of participation of the accused in the planning must be substantial enough to attract criminal

[423] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 as amended UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877.

[424] *Prosecutor v Alfred Musema* (Judgment) ICTR-96-13 (27 January 2000).
[425] Ibid.
[426] *Prosecutor v Jean Paul Akayesu* (Judgment) ICTR-96-4 (2 September 1998).

responsibility. '*Substantial*' has been affirmed in the cases of Bagilishema[427] and Kajelijeli[428] to mean '*formulating a criminal plan or endorsing a plan proposed by another'*.[429]

In addition to playing a substantial part in the planning of the offence, to be held responsible the accused must be shown to possess the required criminal intent for the underlying offence, that is, affirmed in Blaškić[430] '*that he directly or indirectly intended that the crime in question be committed'*.

It should be noted there have been no convictions for the stand-alone offence of planning at either ICTY or ICTR. The ICTY ruled in the Lemaj[431] case that '*a person who plans an act or omission with the intent that a crime will be committed in the execution of that plan, has the requisite mens rea for establishing responsibility under article 7(1) of the statute for planning'*.[432] The tribunal made no further clarification with regard to the degree of intent until the Nahimana et al[433] and Dragomir Milošević[434] where the appeals chamber extended the requisite *mens rea* to reach one of *dolus eventualis*, they stated '*the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned'*[435] is sufficient to be guilty of the offence of planning.

Instigation and the crime of Incitement

The second part of the offence concentrates on instigation of an offence. The crime is often known as instigation or incitement, these two phrases were confirmed as being synonymous with each other in the Akayesu[436] trial at the ICTR. This is seen as meaning '*urging, encouraging or prompting'*[437] another

[427] *Prosecutor v Ignace Bagilishma* (Judgment) ICTR-95-1A (7 June 2001).
[428] *Prosecutor v Juvenal Kajelijeli* (Judgment) ICTR-98-44A (1 December 2003).
[429] Case Law of the International Criminal Tribunal for Rwanda 6.1 C) Participation: that the accused's conduct contributed to the commission of an illegal act ii) Planning https://www.hrw.org/reports/2004/ij/ictr/6.htm last accessed 11/09/2021.
[430] *Prosecutor v Tihomir Blaskic* (Judgement) IT- 95-14-A (3 March 2000).
[431] *Prosecutor v Fatmir Limaj, Isak Musliu, Haradin Bala* (Judgment) IT-03-66- T (30 November 2005)
[432] Ibid 190.
[433] *Prosecutor v Jean Bosco Barayagwiza, Ferdinand Nahimana, Hassan Ngeze* (Judgment) ICTR-99-52-A (28 November 2007).
[434] *Prosecutor v Dragomir Milosevic* (Judgment in Appeal) IT-98-29/1-AR73.1 (12 November 2009).
[435] *Prosecutor v Jean Bosco Barayagwiza, Ferdinand Nahimana, Hassan Ngeze* (Judgment) ICTR-99-52-A (28 November 2007).
[436] *Prosecutor v Jean Paul Akayesu* (Judgment) ICTR-96-4 (2 September 1998).

[437] *Prosecutor v Jean Uwinkindi* (Judgment transferred to National Court) ICTR-01-75-AR72(C) (28 January 2016).

person to commit another crime listed on the statute. The incitement need not be made in public, nor need it be direct in that it does not need to be made directly to a specific person, and it need not incite a specific action or crime. In fact, instigation need not be expressly communicated it can also be implied and it can also be through an omission. The causal link between the act of instigation and actual physical act need not be proved to a '*but-for'* standard. Both the ICTY and the ICTR have argued that instigation is in fact a much broader offence that that of incitement. The instigation offence has been successfully prosecuted at both the ICTY and ICTR. In contrast to the offence of ordering the crime of instigation does not presume any hierarchical relationship between the instigator and the people being instigated.

Ordering

Ordering forms the third part of article 7(1) and Article 6(1). The offence relies on the proving of an authoritative relationship between two or more people, one of which orders the other to commit an offence. The authority can be implied but if it is then the prosecution must prove that the person in receipt of the orders believed the person to be in a position of authority.[438] The authority does not need to be formalised and it may only last for as long as it takes for the order to be given and obeyed. There has been some debate as to whether the position of authority need be equated to that of subordinate and superior as is understood later in the statute at 7(3) and 6(3) respectively. So, if the *actus reus* of the crime is purely the giving of orders, it is possible to be guilty of this offence even if the order-giver is just passing on an order from higher up the chain of command. The simple passing-on of an order can also be considered to be aiding and abetting an offence.

The *mens rea* of the offence is important, and it is of course the *mens rea* of the person giving the order rather than the person that carries it out that is important here. As with the previous offences of planning and instigating, the accused must be proven to possess the required intent, that is that he or she intended for the offence to be committed either directly or indirectly because of the order.[439] According to the

[438] *Prosecutor v Laurent Semanza* (Judgment) ICTR-97-20-A (15 May 2003).
[439] *Prosecutor v Jean Bosco Barayagwiza, Ferdinand Nahimana, Hassan Ngeze* (Judgment) ICTR-99-52-A (28 November 2007).

appeals chamber in the Blaškić,[440] a person is also guilty of the offence if the order is given with the awareness of the substantial likelihood that the crime will be committed in the execution of that order.

Committing

Moving to the committing part of the offence. This is often seen as the most intuitive part of the statute. An individual is seen to have committed an offence when, as was put forward in Kunarac[441] and confirmed multiple times by both the ICTY and ICTR, '*he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule criminal law'*.[442]

To be held accountable for committing a statutory crime the accused must possess the relevant mens rea for the crime he commits. This obviously varies from war crimes to the offence of genocide. The accused must also have committed the relevant conduct or omission.

There may be several perpetrators who may be said to have committed the same crime if the conduct of each one of them is enough to fulfil the requisite elements of the definition of the substantive offence. This does not mean that each must have contributed equally and when it comes to joint criminal enterprise particular rules apply, this will be discussed shortly.

Aiding and Abetting

As mentioned earlier alongside the offences of planning, instigation, and ordering there is the offence of aiding and abetting in the planning, preparation or execution of an offence. The crime of aiding and abetting comes from common law and is a form of accessory liability to the commission of a crime. This is where the *actus reus* of the offence is not carried out by the accused but by another person, this other person is known as the principal. The ad hoc tribunals have on many occasions tried to distinguish between the offences of aiding and of abetting, as distinct and separate parts of participation.

The differences being that aiding is giving the principal offender assistance and abetting is facilitating the commission of an act by being sympathetic thereto. Despite this attempt to separate the two parts

[440] *Prosecutor v Tihomir Blaskic* (Judgement) IT- 95-14-A (3 March 2000).

[441] *Prosecutor v Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic* (Judgment in Appeal) IT-96-23-T & IT-96-23/1 – T (22 February 2001).

[442] Ibid.

of the doctrine, the tribunal has done little to practically help the development of separate offences as it is systematically charged as '*aiding and abetting'* and the prosecution has never had to specify in their indictments which of the two offences the accused is being tried for.

For the *mens rea* of an aider or abettor to be established it must be demonstrated that the accused knew that his own acts assisted in the commission of the specific crime in question by the principal offender. The help that is offered by the accused can be anything that offers sufficient practical support. It is enough that the accused had knowledge of the intent of the principal offender to commit the offence. The Appeals Chamber of the ICTY in the Krstić[443] judgment concluded that this would be enough even for a conviction for aiding and/or abetting genocide. It has been strongly argued that this position is not appropriate for the offence of genocide, intent in a genocide indictment is the hardest aspect to prove and it is argued that for aiding and abetting, it is not enough to argue that the offender should know that the offence is possible as a consequence of his actions, it should be a crime of specific intent.

Joint Criminal Enterprise

Joint criminal enterprise is a complex and difficult to understand concept in law. The form of liability has been described as being from '*an understanding or arrangement amounting to an agreement between two or more persons that they commit a crime'*.[444] It has been a very contentious issue at both of the ad hoc tribunals. It is not explicitly mentioned in the articles of the ICTY or the ICTR. However, the Appeals Chamber of the ICTY has determined that it constitutes a form of commission and while not specifically referred to it is an element of customary international law.

Despite its links to '*commission*' under article 7 and 6 of the tribunals, this liability must be dealt with as a separate issue. There are three forms of joint criminal enterprise, each of which have been identified by the Appeals Chamber.

[443] *Prosecutor v Radislav Krstic* (Judgment) IT-98-33 (19 April 2004).
[444] Tangye v R (1997) 92 A Crim 545 (Aus) sets out the directions that should be given to a jury where a "straightforward joint criminal enterprise" is alleged.

The first is basic,[445] this is for cases where all the participants, acting with a common purpose share the same intent and act to give effect to that same intent. The second is Systematic.[446] This implies that there is an existence of '*an organised system of ill-treatment*'[447]. The third and final category is Extended.[448] This is similar to the basic form, however, then the principal offender commits an act which falls outside the intended enterprise but was of a '*natural and foreseeable consequence'* of the agreed enterprise.[449]

With regard to the *mens rea* of the offence to be guilty of a joint criminal enterprise in the basic form there must be shared intent from all the co-perpetrators. The second systematic form has a slightly different *mens rea,* here the accused must have personal knowledge of the ill-treatment and the intent to further the system of ill-treatment. The final type is where the accused possessed the intention to participate in and further the criminal activity or the criminal purpose of the group and contribute to the enterprise or in any event to the commission of a crime by a group.

Finally, to the *actus reus,* there are three sub-requirements, that occurs in all three categories.

1. A plurality of individuals

2. A common criminal purpose, one which amounts to or involves the commission of a crime provided for in the statute.

3. The participation of the accused therein.

At the ICTY, joint criminal enterprise was famously cited in the indictment against Slobodan Milošević,[450] that he alongside Rodovan Karadžić[451] and others entered into a joint criminal enterprise

[445] *Prosecutor v Jean Uwinkindi* (Judgment transferred to National Court) ICTR-01-75-AR72(C) (28 January 2016).

[446] Ibid.
[447] *Prosecutor v Milan Martic* (Judgment in Appeal) IT-95-11-A (8 October 2008).
[448] *Prosecutor v Jean Uwinkindi* (Judgment transferred to National Court) ICTR-01-75-AR72(C) (28 January 2016).

[449] *Prosecutor v Elizaphan Ntakirutimana, Gerard Ntakirutimana* (Judgment) ICTR-96-10-A and ICTR096-17-A (13 December 2004).
[450] *Prosecutor v Slobodan Milosevic* (Initial Indictment 'Bosnia and Herzegovina) IT-02-54 (22 November 2001).
[451] *Prosecutor v Radovan Karadzic* (Third Amended Indictment) IT-95-5/18 (27 February 2009).

with the purpose of forcibly and permanent removing the non-Serbs, mostly ethnic Bosnian Croats, and Bosnian Muslims from large areas of Bosnia and Herzegovina.

With the wealth of case law from the ICTY and the ICTR joint criminal enterprise was recognised when drafting the Rome Statute of the ICC and although not expressly mentioned Article 25 (3)(d),[452] speaks of the liabilities of individuals acting as part of a group with a common purpose.

The articles that make up the organisation of the Ad hoc Tribunals

Both the ICTY and ICTR are organised in the same way. The organisation is divided into three organs of the tribunal: the Chambers, the Office of the Prosecutor, and the Registry. The Chambers are further divided into the trail chambers and the appeals chamber. There are three trial chambers at each of the tribunals and the ICTY and ICTR share an appeals chamber.

Each of the trial chambers are staffed by three permanent judges with a maximum of six *ad litem* judges. Each trial is presided over by three judges, at least one of whom must be a permanent judge. The trial chambers of both of the ad hoc tribunals are the same.[453] The shared Appeals chamber is staffed by seven permanent judges, 5 of whom are permanent judges of the ICTY and two permanent judges of the ICTR.[454] No more than two of the permanent judges of the tribunals can be from the same state,[455] they are elected by the UN General Assembly from a group of those nominated by the Security Council. Each judge is elected for a four-year term.

The justification for electing judges from different states is that by doing so the tribunals encompasses differing legal systems and also ensures that the chamber benefits from the vast experience of the judges.

[452] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

[453] United Nations, 'Chambers' (*United Nations International Criminal Tribunal for the former Yugoslavia*, Unknown) <https://www.icty.org/en/about/chambers> accessed 3 February 2022.

[454] Ibid.

[455] UNSC Res 955 (8 November 1994) UN Doc S/RES/955 as amended.

Procedure adopted by the ICTY and ICTR

The procedural structure of the ad hoc tribunals differs greatly. There are two procedural structures in court systems, they are the '*adversarial*' system and the '*inquisitorial*' system. In an adversarial system, adopted by common law legal systems, two advocates present their parties case in front of an impartial judge, panel of judges or in the case of jury trials, a selected group from the public. It is for the judge, panel, or jury to then reach a decision on whether the accused is guilty of the crime committed.

In an inquisitorial system the court is acting as an investigator rather than a referee. Rather than pitting two advocates against each other in the inquisitorial system the representatives of each party try and steer the case into accepting their presentation of the evidence and the judge is actively involved in steering the court towards a decision.

Another marked difference between the two systems is the recognition of the rights of the accused. In the adversarial system the rights of the accused are of paramount importance. In contrast the rights of the accused are of secondary importance to the quest for truth in the inquisitorial system.

At the ad hoc tribunals the ICTY is recognised as using both of these systems, blending traditions from both the adversarial and inquisitorial system to create a hybrid court. The ICTR in contrast is an adversarial court, where the judges' role is not to lead the court proceedings but to judge the case on the evidence presented by the two parties. This is in contrast to the national law of Rwanda that, because of its colonial past, is built upon a Civil law basis. However, the Rwandan judicial system is currently undergoing a transformation into a more hybrid system, bringing in Common law systems alongside the existing Civil law traditions.

Workability versus Lawfulness

One of the major sources of discussion at the ad hoc tribunals is the balance between being workable and being lawful. There has been a number of criticisms aimed at both the tribunals that teeter between maintaining a workable tribunal and upholding a lawful body of case law.

The main criticism aimed at both of tribunals is whether they are able to deliver justice to victims. At the end of the conflict in Rwanda more than 100,000 people were being held in Rwanda awaiting

prosecution for crimes committed during the conflict. It is clear that the ad hoc tribunal would not have the capacity to prosecute such huge numbers. The same criticisms were levelled at the ICTY, with large numbers accused of crimes but only a selected few tried at the tribunal. The ability of the tribunals to arrest those indicted has varied wildly, despite the ad hoc tribunals having adopted a vertical co-operation model they still struggled to obtain full state co-operation. It was clear that the ICC would need to address the absence of state co-operation when indicting those suspected of criminality.

Chapter Four - The creation of the International Criminal Court (ICC)

The ad hoc tribunals had set in motion a change in international law. They had also highlighted issues that would affect any future court. The International Criminal Court (ICC) was the first court that was permanent. It holds the widest degree of independence, consensus, and jurisdiction of any of the international criminal tribunals or courts. Following on from the previous chapters' analysis of the procedural and substantive issues that the ad hoc tribunals had encountered, through to modern day, this chapter, will examine the legitimacy deficit that the International Criminal Court has had to address. It will charter the creation of the court though to present day developments that threatens to undermine the ICC effectiveness.

Despite the trials after World War Two it was the change in political climate at the end of the twentieth century that led to discussions at the United Nations as to whether there could be a permanent independent court that would administer international criminal law. This international criminal court would try cases that national courts could not. It was very clear from the beginning that the international court would not be a substitute for national courts and would only intervene when a national court were unwilling or unable to investigate incidents where international criminal law could have been infringed.[456] The Court's primary aim was and remains to this day '*to put an end to the impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes*'.[457] The international community was in a unique position when they were developing the Rome Statute as it was not drafted to address a specific conflict or aggressor, instead it was being drafted pre-emptively, using lessons learnt from the previous trials.

Before the conflict in the Balkans had even begun, in June 1989, Trinidad and Tobago resurrected a pre-existing proposal relating to the establishment of a international criminal court.[458] Following the request, the United Nations General Assembly asked that the International Law Commission (ILC) who

[456] International Criminal Court , 'How the Court works ' (*International Criminal Court* , Unknown) <https://www.icc-cpi.int/about/how-the-court-works> accessed 3 February 2022.
[457] Ibid.
[458] International Criminal Court , 'Statement by the International Criminal Court on the passing of Arthur Robinson' (*International Criminal Court* , 9 April 2014) <https://www.icc-cpi.int/Pages/item.aspx?name=pr992> accessed 3 February 2022.

had previously been asked to draft a statute for an international criminal court to begin drafting again. In 1994 the commission presented its final draft.[459] A further commission was set up to consider the major substantive issues that the draft had highlighted, 'The Ad Hoc Committee on the Establishment of an International Criminal Court' met twice in 1995[460] and completed a report that was passed to the UN General Assembly. The committee chaired by Adriaan Boss of the Netherlands held its first meeting on 3rd April, it last ten days, ending on the 13th of April 1995, with its second meeting held between the 14th and 25th of August 1995. This first phase of meetings saw the committee conduct a review of the major substantive and administrative issues that the draft statute had highlighted[461] while the second phase considered the arrangements for convening a conference of plenipotentiaries.[462] The Committee's report was subsequently discussed during six sessions held at the UN headquarters in New York between 1996 and 1998. The meetings allowed a chance for non-governmental organisations to provide input under an umbrella organisation of the NGO Coalition for an ICC (CICC).

Major Substantive and administrative issues from the draft statute

Establishment and composition of the court

The establishment of a permanent court was broadly seen as an effective way of ensuring that those responsible for serious international crimes be tried and brought to justice.[463] It was also noted that a single and permanent court would remove the need for ad hoc tribunals that addressed particular conflicts, which while helping to bring stability and consistency to the administration of international criminal justice, could also help to establish a more financially viable solution to the situation. However, it was already clear that a number of states were unhappy with the scope of the legal implications as well as the financial obligation members would be under. The hope of those involved was expressed as being '*an independent court free from political pressure, established on a legal basis*

[459] United Nations, 'Draft Statute for an International Criminal Court with Commentaries ' (*United Nations* , 1994) <https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf> accessed 3 February 2022.
[460] General Assembly 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995) A/50/22.
[461] Ibid.
[462] Ibid.
[463] Ibid.

to deal with well-defined crimes and offering maximum guarantees to the defendants, would prevent crises which had adverse effects on entire peoples'.[464] Very early on in discussions the complementary nature of the court was expressed. Despite these discussions, it was evidently clear that a number of states would not be a party to the court and without universal participation the court would be unable to serve the entire global community.

Hierarchy of the Criminal Court

Despite the creation of the ICC in 2002 the hierarchy of international criminal law is distinctly lacking. Most countries recognise the offences of war crimes, crimes against humanity and genocide under their national law, some of these come directly from the ICC legislation and other are separate statutes against the crimes individually. For example, in the United Kingdom the crimes are outlawed by Section 51 (1) of the International Criminal Court Act 2001.[465] This means that the UK can prosecute not only crimes committed in the UK but also by British nationals abroad.

In the United States the War Crimes Act 1996[466] was passed by President Clinton, this recognised the concept of grave breaches of the Geneva Convention as war crimes. The scope of the Act was later narrowed by President Bush Jr under the Military Commissions Act 2006.[467] The criminality of War Crimes and Genocide are also addressed by the US Code,[468] the code is the consolidation and codification of the permanent law of the United States. This means they are recognised by all the states that make up the United States. Despite their recognition of the offences the USA refuse to be a party to the ICC.

A number of states recognise war crimes, crimes against humanity and genocide as crimes that can be tried under the principal of '*universal jurisdiction'*. The term refers to the idea that these crimes are so serious that it is in the interest to the international community for these offences to be tried whenever possible and when there is generally no other way of the cases being tried, for example the accused is

[464] Ibid.
[465] International Criminal Court Act 2001.
[466] War Crimes Act 1996 (USA).
[467] Military Commissions Act 2006 (USA).
[468] Office of the Law Revision Counsel , 'United States Code ' (*United States Code* , Unknown) <https://uscode.house.gov/> accessed 3 February 2022.

not a citizen of a recognised state, or the state is unwilling or unable to try of the accused. Amnesty International have stated that 163 of the 193 UN member states can exercise universal jurisdiction over one or more crimes under international law.[469] It would seem from the principal that the majority of citizens are protected under it, however, in fact it is rarely evoked, and even more rarely does it lead to a successful prosecution. Spain in particular have exercised the principal, to prosecute former Argentine Naval Commander, Adolfo Scilingo, for crimes against humanity during the Argentine '*Dirty War'*,[470] his prosecution and the subsequent sentence of 640 years, was seen as ground-breaking and led to other successful prosecutions for crimes committed, most notably in Guatemala,[471] Despite the limited success of universal jurisdiction and prosecution under national law it is an important layer in the hierarchy of delivering justice for those affected by crimes committed during times of conflict. Due to the method of establishment of the ICC however, the court does not administer law at a higher level than national courts, instead it is complementary to it.

Method of Establishment

The establishment of the court through the use of a multilateral treaty, as recommended by the commission, was agreed. A key reason for this was due to the demand by states to retain their state sovereignty, it was also hoped that by ensuring ratification of the statute, this would assist the court in achieving the legal authority it required. It was also thought, it would be easier to create the court through statute than to establish the court as an official organ of the United Nations.

Relationship with the United Nations

The organs of the UN remain unchanged since their establishment in 1945, they are the General Assembly, the Security Council, Economic and Social Council, the Trusteeship Council, the

[469] International Justice Resource Center, 'Universal Jurisdiction ' (*International Justice Resource Center*, Unknown) <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> accessed 3 February 2022.

[470] RJ Wilson, 'Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity' (*American Society of International Law*, 30 January 2008) <https://www.asil.org/insights/volume/12/issue/1/spanish-supreme-court-affirms-conviction-argentine-former-naval-officer> accessed 3 February 2022.

[471] The Centre for Justice & Accountability , 'Guatemala Genocide Case' (*Genocide of Mayan Ixil Community*, Unknown) <https://cja.org/what-we-do/litigation/the-guatemala-genocide-case/> accessed 3 February 2022.

International Court of Justice, and the Secretariat. The International Court of Justice is the only organ of the UN not located in New York, instead it is found in The Hague, Netherlands. Its role is to settle legal disputes submitted to it by the states, in accordance with international law, it also gives advisory opinions on legal questions referred to it by the other organs of the UN and other agencies,[472] While the Rome Statute was negotiated within the UN, the ICC is an independent judicial body distinct from the UN.[473] The UN-ICC Relationship Agreement governs the cooperation between the two bodies.

Article 2 of the Rome Statute states

> 'The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Stature and thereafter concluded by the President of the Court on its behalf'.[474]

The Agreement itself states the following

> '1. The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
>
> 2. The Court recognizes the responsibilities of the United Nations under the Charter.
>
> 3. The United Nations and the Court respect each other's status and mandate'.[475]

While the UN and the Court work independently of each other, this does not mean that they are both on an even footing. The different organs of the UN hold vastly different relationships with the ICC, due to the differing functions of the organs themselves. Perhaps the most important relationship to address is the relationship between the ICC and the UN Security Council.

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[472] United Nations, 'Main Bodies' (*United Nations* , Unknown) <https://www.un.org/en/about-us/main-bodies> accessed 3 February 2022.

[473] United Nations, 'Courts and Tribunals ' (*Dag Hammarkjold Library* , Unknown) <https://research.un.org/en/docs/law/courts> accessed 3 February 2022

[474] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

[475] United Nations, 'Treaties and International agreements registered or filed and recorded with the Secretariat of the United Nations' (*Treaty Series* , 2006) <https://treaties.un.org/doc/Publication/UNTS/Volume%202283/v2283.pdf> accessed 3 February 2022.

The Security Council and the ICC

The relationship between the ICC and the UN Security Council is a complex one and it could be argued that the ICC allowed the Security Council to influence its judicial procedure, at least in the early years of the court, in order to gain the trust of the Security Council.[476]

The political nature of the decisions made by the ICC have placed considerable strain on the relationship between the court and the Security Council and its members. The independent nature of the ICC is seriously brought into question by its relationship with the Security Council, while it may not seek to interfere directly with judgments made, the ICC is aware that it is somewhat reliant on the Security Council in order to operate effectively in practice. Both organisations also have very differing objectives which of course again places strain on their relationship.

Referral of cases

Article 13 of the Rome Statute, the Exercise of Jurisdiction allows for the referral of situations for investigation by the Security Council to the ICC, under Chapter VII of the Charter. Chapter VII relates to '*Action with Respect to threats to the peace, breaches of the peace, and acts of Aggression'*.[477] This chapter contains specific articles that gives the Security Council the responsibility and power; to determine the existence of any threat and also judge what measures should be taken to maintain or restore international peace and security (Article 39),[478] apply sanctions (article 41)[479] and use force (Article 43).[480]

Alongside the referral by the Security Council, the prosecutor can also take on investigations under his/her own initiative. However, what is clear from Article 13 is that the Security Council can refer instances to the ICC in which one or more crimes appear to be committed, the prosecutor can only investigate specific crimes, not conduct a more general investigation into a situation. As of September

[476] D Sarooshi, 'Aspects of the Relationship between the International Criminal Court and the United Nations' [2001] 32(1) Netherlands Yearbook of International Law 27-53.
[477] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS VII.

[478] Ibid.
[479] Ibid.
[480] Ibid.

2021, the ICC are conducting investigations into 14 separate situations.[481] These have been referred a number of ways, for example an investigation into alleged war crimes and crimes against humanity committed in the context of armed conflict in the Democratic Republic of the Congo (DRC) since 1st July 2002 was opened in June 2004 referred to the ICC by the government of the DRC. The investigation into alleged genocide, war crimes and crimes against humanity committed in Darfur Sudan since 1st July 2002 opened in June 2005 was referred by the Security Council and the ICC Prosecutor opened a proprio motu investigation in March 2010 into alleged crimes against humanity committed in the context of post-election violence in Kenya in 2007/2008.[482] Most recently, the Appeals Chamber of the ICC has unanimously decided to authorise the Prosecutor to investigate alleged crimes committed in relation to the situation in Afghanistan.[483]

At the drafting stage of the Rome Statute general concern was expressed by the states that the court, and specifically the prosecutor, should not be given over-broad powers. It could be argued that this is a two-fold balance check for the ICC. It limits the scope of the prosecutor but also limits any leverage a state may have over a prosecutor to insert deliberate bias upon the court. While limiting the over-broad power of the prosecutor it also does not allow the council to refer individual cases of alleged criminality to the prosecutor. These limits it seems on the face of it, are in place to avoid direct influence of a single powerful state over the court.

While the referral process to the ICC under Chapter VII powers is clear, such a referral does not guarantee that the ICC will act in a certain way,[484] although the opposite can be strongly argued, former US Ambassador at Large for War Crimes Issues (1997-2001) David Scheffer argues that the Security Council has the power to refer situations to the ICC that enables them to shape the jurisdiction to a

[481] International Criminal Court , 'Situations under investigation' (*International Criminal Court* , Unknown) <https://www.icc-cpi.int/pages/situation.aspx> accessed 3 February 2022.
[482] Ibid.
[483] International Criminal Court , 'Afghanistan' (*International Criminal Court* , Unknown) <https://www.icc-cpi.int/afghanistan> accessed 3 February 2022.
[484] D Sarooshi, 'Aspects of the Relationship between the International Criminal Court and the United Nations' [2001] 32(1) Netherlands Yearbook of International Law 27-53.

particular situation.[485] The Security Council, he argues could refer situations while placing certain aspects specifically outside the remit of the ICC.[486] This argument, however, is fatally flawed as it is inaccurate, Security Council decisions do not bind the ICC into disregarding the statute. It is also for the prosecutor to decide what should be prosecuted rather than the Security Council in their referral. While the Security Council can't influence the outcome of an ICC investigation it does have the ability to extend the reach of the ICC to non-state parties. It can do this by making a referral to the ICC that specifically allows for the investigation of non-state parties. Of course, it is extremely unlikely that the permanent members of the Security Council that have not ratified the Rome Statute would allow the ICC to investigate in situation where criminality is suspected by their governments or civilians.

There is no hierarchy in the referral process so the fact that the Security Council has made the referral does not lend more weight to the ICC investigations of the situation, nor does a matter referred by individual states hold lesser weight. The source and principle of legality remain the same for all matters referred to the ICC. The independence of the court means that all evidence is judged on the same merits and so even if the matter is referred by the Security Council it does not guarantee prosecutions nor convictions.

Article 42 of the Rome Statute guarantees the independence of the Office of the Prosecutor. 42.1 states

> 'The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source'.[487]

The freedom from external influences ensures the independence of the office. At the time of writing only three people have held the office of Prosecutor of the ICC; Luis Moreno Ocampo (16th June 2003

[485] D Scheffer, 'Staying the Court with the International Criminal Court' [2001] 35(1) Cornell International Law Journal 47- 100.
[486] Ibid.
[487] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

to 15th June 2012), Fatou Bensouda (15th June 2012 to 15th June 2021) and Karim A.A.Khan (16th June 2021- present day).

The first arrest warrants were issued on 8th July 2005 and included a warrant for Joseph Kony.[488] The warrant outlined thirty-three instances of crimes against humanity and war crimes that the Prosecutor believed had been committed by Kony in Uganda.[489] The first successful arrest under an ICC arrest warrant was that of Thomas Lubanga,[490] who was arrested on 17th March 2006 following the issuing of a warrant on 10th February 2006. His was also the first case completed at the court. Lubanga was charged with the war crime of conscripting and enlisting children under the age of fifteen years and using them to participate in the hostilities. Prosecutor Ocampo oversaw the first trial, which was plagued with problems. The trial was suspended on 13th June 2008 when it was ruled that the Prosecutor's failure to disclose material that was potentially of an exculpatory nature had breached Lubanga's right to a fair trial. The information had been passed to the Prosecutor by the UN together with others on a confidential basis. The sources had refused to pass this information to the defence.[491] The proceedings were stayed until November of 2008 when the Trial Chamber ruled that the reason for the suspension had '*fallen away*'[492] as Ocampo agreed to make all confidential information available to the Trial Chamber. Lubanga was finally found guilty on the 14th of March 2012.[493]

Both Ocampo and Bensouda have been heavily criticised for their prosecution decisions. Bensouda drew criticism for advising the Court to consider whether offences had been committed in the war in Afghanistan by the armed forces of the USA and also by the CIA. This obviously caused a reproachful response from the United States National Security Advisor John Bolton who stated that the ICC had no jurisdiction over USA as it had failed to ratify the Rome Statute. However, the Rome Statute allows the ICC to investigate crimes alleged to have been committed within states that have ratified the statute, Afghanistan ratified the Rome Statute in February 2003.

[488] *Prosecutor v Joseph Kony, Vincent Otti* (Case Information Sheet) ICC- 02/04 – 01/05 (April 2018).
[489] Ibid.
[490] *Prosecutor v Thomas Lubanga Dyilo* (Judgment in Appeal) ICC-01/04 – 01/06 (18 July 2019).
[491] Ibid.
[492] Ibid.
[493] Ibid.

Nature of the proposed court as a permanent institution

The permanent nature of the Court was specifically proposed so that it would be an alternative to the ad hoc tribunals. This was because the ad hoc tribunals were found to be expensive and also difficult to police in relation to the creation of precedent. The two biggest ad hoc tribunals, that for the Former Yugoslavia and Rwanda both ran over time and budget.

As was shown in the previous chapter the ad hoc tribunals had also interpreted the differing statutes in different ways. It was expressed during discussions that the permanence of the court could help to ensure uniformity and consistency in the application and development of international criminal law.[494] This included appointing some of the officials on a permanent full-time basis. At all times of the drafting of the Rome Statute and even from the beginning of talking about a permanent international criminal court, the spectre of Nuremberg loomed large over the discussions. It was clear that the court must establish independence from political interference. The permanence of the institution that was not an organ of the UN was specifically suggested in order to give the court a unique legal personality with the power to bring to justice those accused of the most heinous of crimes and not act as that of victor in a specific conflict administering punishment on a defeated nation.

Appointment of the judges and of the prosecutor

As mentioned above the appointment of full-time permanent staff was imperative to creating an independent court. It was first decided that there would be 18 permanent judges of the Court.[495] A clear process for the nomination and election of judges and the Prosecutor and their deputies was put in place and became Article 36 of the Rome Statute. It laid out the minimum qualifications and pre-requisite qualities all the nominees must have. At the drafting stage of the statute objections were raised about it being too specific regarding the experience that the judges needed to have. Some delegates worried that by being too specific it may mean that the quota for judges would not be

[494] General Assembly 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995) A/50/22.
[495] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

fulfilled.[496] It was agreed that a more flexible approach was required, drawing its inspiration from Article 13 of the Statute of the tribunal for the ICTY that read

> 'The permanent and *ad litum* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chamber and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law'.[497]

The Rome Statute would specifically require '*established competence in criminal law and procedure'*[498] and furthermore '*the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings*'[499] or have the competence in international law '*and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court'*.[500]

It was also stated that the judges must be fluent in at least one of the working languages of the Court. The official languages of the ICC are French and English.

Role of the prosecutor

The role of the Prosecutor was key when drafting the statute. It was discussed whether the Prosecutor would require the consent of state parties to conduct investigations. As discussed earlier in the chapter, only three people have held the role of Prosecutor of the ICC and it is a role that is accompanied by a high degree of difficulty, balancing the aims of the ICC and interests of the states. Both Ocampo and Bensouda have come under intense scrutiny during their time in office and it is likely Khan will experience the same criticisms in due time. Article 15 of the Rome Statute lays out the role of the prosecutor. It gives them jurisdiction to initiate investigations within the jurisdiction of the court, forces

[496] General Assembly 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995) A/50/22.
[497] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 as amended UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877.

[498] General Assembly 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995) A/50/22.

[499] Ibid.
[500] Ibid.

them to analyse the seriousness of the information received and also seek further additional information where required. The Prosecutor does not have a free reign to launch prosecutions instead they must present a case, based on information they have gathered to the Pre-Trial Chamber to request authorisation to conduct a full investigation. It is for the Chamber to decide whether the material presented warrants a full investigation. The role is somewhat more limited than that of the Prosecutor of the ad hoc tribunals as the Prosecutors at the ICTY had the power and responsibility for both investigation and prosecution of those responsible for the violations in the former Yugoslavia from 1st January 1991.[501]

Adoption of the rules of the court

The rules that the court were to adopt were discussed and a '*substantive link between the statute and the rules of the court wildly recognised'*.[502] The rules that had been used by both the ICTY and the ICTR had developed since their inception. A number of rules from the Rules of Procedure and Evidence for the ICTY bear the word *bis*, meaning second or *ter*, meaning third. In all the rules were re-issued 50 times with revisions. The latest revision being IT/32/Rev.50 dated 8th July 2015.[503] The development of the ICTY and ICTR rules often occurred because the judges developed them, a power that had been conferred upon them. This is somewhat unusual and a practice that has not continued at the ICC. It also means that the rules of the ICTY and ICTR differed, as has been outlined in the previous chapter. The committee discussing the establishment of the ICC discussed whether the rules should form part of the actual statute itself or be adopted simultaneously when the statute was adopted. Others felt that rules were a matter for the court itself to decide.

After extensive negotiations the rules for procedure and evidence were finally approved at the Preparatory Commission for the International Criminal Court on June 30th, 2000. The negotiations had been considerably difficult as the objectives of the rules were at some points conflicting – while in part

[501] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 as amended UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877.

[502] General Assembly 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995) A/50/22.

[503] UNICTY Rules of Procedure and Evidence (8 July 2015) IT/32/Rev 50.

it was to safeguard the integrity of the statute, it was also to try and enhance the effectiveness of the court. The Rules remained draft until the required two thirds majority of the members of the Assembly of State Parties adopted them.

The main issue with the adoption of the rules was that the rules had to be a fit all set of circumstances rather than being designed towards a specific conflict. It also, like at Nuremberg, had to bridge legal traditions, even more so than the ad hoc tribunals had done before it. The rules of the ICTY and ICTR had clearly reflected an adversarial model, whereby the court's job is to act as a referee and rule which party has proven their case. However, the court itself had actually comprised a mixed system, combining features from the both the adversarial and inquisitorial traditions.[504] The rules for the ICC do not explicitly state towards which tradition they would sway. Rule 140 of the rules provides guidance on the issue but leaves room for interpretation by the courts, so that they can develop their own approach within its parameters.

The rules remain under constant scrutiny and development, as more trials are completed methods to ensure fairness but also efficiency have been highlighted. The ICC, and the ad hoc tribunals before it, has been criticised for their slow pace,[505] with cases usually taking many years from indictment to conviction. This can be down to a number of reasons but has been attributed to the need to establish and develop legal procedures during the initial years of operation for the court.[506]

The principle of complementarity

It was clear from the outset that the ICC was being developed to be complementary to national courts rather than replacing them. Despite the precedent set by the tribunals for Rwanda and the Former Yugoslavia, where the national courts were put aside by the ad hoc tribunals because of the breakdown of the rule of law in the countries involved and in order to ensure independence of the judiciary, many of the member states insisted up the sovereignty of the national courts. The creation of the ad hoc

[504] S Fernadez De Gurmendi and H Friman, 'The Rules of Procedure and Evidence of the International Criminal Court' [2000] 3(1) Yearbook of International Humanitarian Law 289-336.
[505] J Galbraith , 'The Pace of International Criminal Justice' [2009] 31(1) Michigan Journal of International Law 79-155.
[506] Ibid.

tribunals had signalled a shift in political opinion, a shift that would have been impossible during the Cold War. However, the ICC encourages, where possible, that national courts oversee the administration of justice in relation to crimes committed in conflict.

Significance of the principle of complementarity

The significance of the ICC being developed in a purely complementary state to national courts cannot be overstated. While of course there are positive reasons why a national court should attempt to conduct as many cases as is possible to restore the institutions of state after conflict or help restore civic trust after war or unrest, there are real dangers that the use of national courts will lead to perpetrators avoiding punishment.

Double Jeopardy

The assumption of *non bis in idem*, or double jeopardy does not specifically exist in international law, and there is considerable disagreement about how, if at all, it should be applied to the international tribunals and courts. A clear problem that exists between international and national jurisdiction is whether the offences tried at national level specifically mirror those in the international statutes.

The ICCPR were signed and adopted on the 16th December 1966, it states at Article 14.7[507] '*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'*.[508] This article has subsequently been interpreted by the Human Rights Committee to limit second trials within a single jurisdiction, rather than second trials within several states.

In the case of A.P v Italy,[509] an Italian citizen made a claim against the Italian Government claiming he was a victim of a violation of Article 14.7. The claimant stated that '*he was convicted on the 27th of September of 1979 by the Criminal Court of Lugano, Switzerland, for complicity in the crime of conspiring to exchange currency notes amounting to the sum of 297,650,000 fire, which was ransom*

[507] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[508] Ibid.
[509] *Admissibility case* (A. P. v. Italy) 1986 U.N. Doc CCPR/31/D/204.

paid for the release of a person who had been kidnapped in Italy in 1978. He was sentenced to two years' imprisonment, which he duly served. He was subsequently expelled from Switzerland'.[510] It was subsequently claimed that Italy was in violation of the principle of *non bis in idem* when they sought to punish the claimant again for the same offence when he was indicted and then convicted in the Italian courts.[511] Italy rejected the claim stating that Article 14.7 '*must be understood as referring exclusively to the relationship between judicial decisions of a single State and not between those of different States*'.[512] The Committee sided with Italy and confirmed that Article 14.7 '*prohibits double jeopardy only with regard to an offence adjudicated in a given State*'.[513]

Thus, it is clear that a trial at national level with not prohibit a subsequent trial at an international tribunal. However, many extradition treaties recognise double jeopardy as a very real issue, with many not requiring extradition in cases where a final judgment on an offence has been rendered. The Rome Statute and the statutes for the ad hoc tribunal of both the former Yugoslavia and Rwanda, each contain a similar *non bis in idem* provisions. The ad hoc tribunals contain identical clauses, but the statute of the Rome Statute differs in a number of aspects.

Article 10 of the Statute of the ICTY states the following

> '1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
>
> 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
>
> (a) the act for which he or she was tried characterized as an ordinary crime; or
>
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
>
> 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which

[510] Ibid.
[511] Ibid.
[512] Ibid.
[513] Ibid.

any penalty imposed by a national court on the same person for the same act has already been served.[514]

However, the Rome Statute states at Article 20

'1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes which the person has been convicted or acquitted by the Court

2. No person shall be tried by another court for a crime referred to in Article for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6,7,8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crime within the jurisdiction of the Court; or

(b) Otherwise, were not conducted independently or impartially in accordance with the norms of due process recognised by International Law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[515]

It is clear that the statute of ICC has been written with complementarity in mind. The jurisdiction of the ad hoc tribunals in contrast, ran concurrently with national law and had primacy over it.

Implication of the principle as regard the list of crimes that would fall under jurisdiction

To attempt to prevent the ICC being completely overrun with cases and in order to ensure that the worst atrocities were dealt with in a way that fitted with the aims and objectives of the court, the ICC was established to oversee three key offences – war crimes, crimes against humanity and genocide. These crimes are referred to as '*core crimes'*. All three of the offences required core elements that must be established by the prosecution.

The statute had to address complementarity and issues of conflict in regard to jurisdiction. If national courts were to be (as they have made clear) the court of first resort, then what was to stop nations

[514] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 as amended UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877.
[515] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

carrying out show trials in an attempt to avoid more in-depth investigations being carried out at the ICC. Articles 17 to 20 deal with the admissibility of cases at the ICC.[516]

Article 17 (1) of the Rome Statute lays out the fours situations as to when a case is inadmissible, it states: -

> 'Article 17(1)
>
> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> b) The case has been investigation by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> d) The case is not of sufficient gravity to justify further action by the Court' [517].

The use of terms '*unwilling*' and '*unable genuinely'* give a wide basis on which the ICC can intervene, for example, the Court is currently[518] investigating alleged war crimes that have occurred in Afghanistan since 2003. These crimes are alleged to have been committed by the United States of America, who themselves are not party to the Rome Statute and have been vocal in their unwillingness to investigate allegations of alleged wrongdoing by their agencies and personnel. However, the investigation is a broad one and also encompasses the Afghan government and allegations against the Taliban in the area.

It is interesting that initially the Court rejected the application by the Prosecutor deeming that an investigation would not '*serve the interests of justice'*.[519]

[516] Ibid.
[517] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

[518] As of September 2021.
[519] International Criminal Court , 'Afghanistan' (*International Criminal Court* , Unknown) <https://www.icc-cpi.int/afghanistan> accessed 3 February 2022.

Role of the national jurisdiction

The Court could clearly infringe upon the sovereignty of the national jurisdiction, but the ICC specifically states that a clear aim of the Court is that it helps to restore faith in national institutions. While the crimes that the ICC usually deals with occur in times of armed conflict, it is not limited to times of war. However, even if there has not been armed conflict it is usual that at least one group of people within the country will have lost trust in the national institutions. This can include the courts at national level, the judges and also the police, prosecution services and even the government itself.

Due to the nature of the Court, the role of national jurisdiction is a complicated matter. During discussions into the formation of the ICC the role of national jurisdiction was discussed at length. It was stated it '*was not limited to territorial jurisdiction but also included the exercise of jurisdiction by the States competent to exercise jurisdiction in accordance with established principle and arrangements'*.[520] This meant that it was not only the national jurisdiction of the country in which the offence happened, but jurisdiction was extended to the state whose military were involved.

It was also discussed whether any exceptions to the exercise of national jurisdiction would be acceptable. Lengthy discussions revolved around the wording of the Preamble as to when trials at national courts '*may not be available or may be ineffective'*.[521] The delegates questioned what the standards of determination were for national courts to be deemed ineffective. It was agreed that the preamble foresaw a very high threshold for exceptions to national jurisdiction and it was envisaged that the ICC would only operate where there was '*no prospect that alleged perpetrators of serious crimes would be duly tried in national courts*'.[522] It is clear that the delegates were envisaging a situation such as the one that had been witnessed in the Former Yugoslavia or Rwanda, where they had witnessed the complete destruction of national jurisdiction by the total breakdown of the infrastructure of the countries involved. The exercise of national jurisdiction goes further to extend to a national jurisdiction as to whether or not to prosecute. It is interesting that in recent years the ICC seems to have extended its

[520] General Assembly 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995) A/50/22.
[521] Ibid.
[522] Ibid.

remit to look at cases where national courts have been just unwilling to act, for example the recent opening of an investigation into conflict between Israel and Palestine. Israel is unwilling to look into alleged crimes committed by its own armed forces, including alleged ethnic cleansing.

Other issues pertaining to jurisdiction

Applicable law and jurisdiction of the court

Article 21 of the Rome Statute lays out the applicable law of the ICC, it states a threefold process to show the applicable law stating the following

> '1. The Court shall apply
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'[523]

It is clear from article 21.1 clauses (a) to (c) that the Rome Statute was written in such a way as to try and incorporate as much international criminal law as possible and also leave scope for the development of the jurisdiction through treaty and evolving norms.

Exercise of jurisdiction

Articles 11 to 13 of the Rome statute lay out the jurisdiction of the ICC. When discussing the exercise of jurisdiction of the ICC, the question of inherent jurisdiction was at the forefront of the discussions. '*Inherent jurisdiction*' is the doctrine that a superior court has jurisdiction over any matter that comes

[523] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3.

before it. If the Court was given inherent jurisdiction, it meant that any party to the Rome Statute was agreeing to the Court having the power to try any crime within its remit without further recourse or consent from the state party. It was important to the delegates that the statute was clear in the fact that statute did not strip the state of the ability to exercise their own jurisdiction at a national level.[524] Some believed that the inclusion of the term '*inherent jurisdiction'* went against the concept of complementarity that it had been agreed the Court would operate under. It would seem from earlier discussions that including the term '*inherent jurisdiction'* would be in direct contradiction to earlier agreements on the complementary nature of the ICC and its very limited scope for jurisdiction. It was also argued that it would infringe upon the national sovereignty of a nation. Giving the ICC inherent jurisdiction would in affect give the Court overreaching powers, even if only limited to offences over which it has jurisdiction. Other delegates argued the contra argument that it did not infringe upon national sovereignty as any jurisdiction of the Court would stem from an act of sovereignty, the signing and ratification of the statute itself. Hence, they argued, the point was in fact moot. In the end the term was not included in the Statute. Instead, the jurisdiction of the Court was restricted within the statute to only the limited number of offences contained within the statute and a number of preconditions (set out in Article 12) were agreed upon that limited and controlled the jurisdiction of the Court.

The crimes over which the Court has jurisdiction are inherently international in nature. While the issue of state and national sovereignty is important, they do little to support the promotion of peace and national security. The prosecution of these types of crimes has wide-reaching effects and it was important during the drafting of the statute that the unique nature of international criminal law was discussed. While it was a balancing act to ensure that the Court does not have overreaching powers as this would mean that few if any states would be willing to ratify it, the statute had to be robust enough to ensure that it did have jurisdiction to oversee breaches of international criminal law where it saw that justice was not going to be served. It also needed to be strong enough not be manipulated by politically strong states who would set aside the interests of the international community in favour of their own

[524] General Assembly 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995) A/50/22.

specific interests.[525] It was agreed that the Court would hold concurrent jurisdiction running alongside national courts and would only intervene where it was clear that national courts were unable to function adequately. This again mirrored the situation that developed with the ad hoc tribunals, in that when it was clear that national courts were able to function adequately, jurisdiction was returned to them except in very limited cases.

Jurisdiction and Genocide

A specific aspect of discussion that will become relevant to the model in part two of this thesis is the discussions that were documented regarding the issue of jurisdiction and its consistencies and inconsistences with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[526] Adopted on 9th December 1948 following a declaration by the General Assembly on 11th December 1946, the 1948 Genocide Convention was ratified in recognition of the specific horrific nature of the crime of genocide and the lack of codification of its principles in international law. As of July 2019,[527] 152 countries have ratified the convention, the last being Mauritius in July 2019.

The arguments regarding genocide revolved around whether the clear objectives of the 1948 Convention could be achieved if the ICC was not given inherent jurisdiction. The 1948 Convention stated

> 'The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96(1) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world,
>
> Recognising that at all periods of history genocide has inflicted great losses on humanity, and
>
> Being convince that, in order to liberate mankind from such an odius scourge, international co-operation is required,
>
> Hereby agree as hereinafter provided:
>
> ARTICLE ONE

[525] Ibid.
[526] UNGA Res 260 (9 December 1948) UN Doc A/RES/3/260.
[527] United Nations, 'Legal Framework' (*Office on Genocide Prevention and the Responsibility to Protect*, July 2019) <https://www.un.org/en/genocideprevention/genocide-convention.shtml> accessed 3 February 2022.

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war is a crime under international law which they undertake to prevent and to punish.'[528]

It was this setting of genocide as its own tier of international crime that meant it required the individual attention of its own convention, not simply in its prevention, but also its punishment, and it went further in Part B of the Convention

> '[c]onsidering that, in due course of development of the international community, there will be an increasing need for an international judicial organ for the trial of certain crimes under international law,
>
> Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes…'. [529]

In this thesis it is argued that in fact the writers of the convention clearly intended that any international judicial organ would have full ranging powers to try cases of genocide and that the Law Commission report into the Rome Statute and United Nations have in fact erred in their judgment by making the Court complementary in nature, as it dilutes its power, especially in regard to genocide, to a level that means that the Court is dangerously ineffective. The principle of *jus cogens* applies here, it was argued by delegates in the Report of Ad Hoc Committee on the Establishment of an International Criminal Court that the Commission lagged behind contemporary requirements, this view has only been magnified since the formation of the Court through the abuse of jurisdiction by powerful countries, this will be discussed in Chapter 5 more fully.

[528] UNGA Res 260 (9 December 1948) UN Doc A/RES/3/260.

[529] Ibid.

PART TWO

The previous chapters of this thesis have addressed the progress of international criminal law through the ages and addressed the development of legal theory and political theory relating to the concept of legitimacy. The model this thesis seeks to develop is to address the perceived gaps in legitimacy and application in the current international criminal law system. There are three levels of courts that exist at the current time: national courts, ad-hoc tribunals, and the International Criminal Court. These courts act in horizontal hierarchical jurisdiction, except for the matter of creating precedent, where the ICC takes a vertical hierarchical position. In almost all cases, should a national court be willing and able to try a suspect it is allowed to do so. The concept of state sovereignty therefore weighs heavily upon the application of international criminal law. Chapter 5 will set out the model and explain the tiers and hierarchical organisation and then evaluate the model against the philosophical theories that have been examined in the first part of the thesis. Finally, chapter 6 will be the conclusion, highlighting any benefits or shortcomings of the model.

Chapter Five – The Model

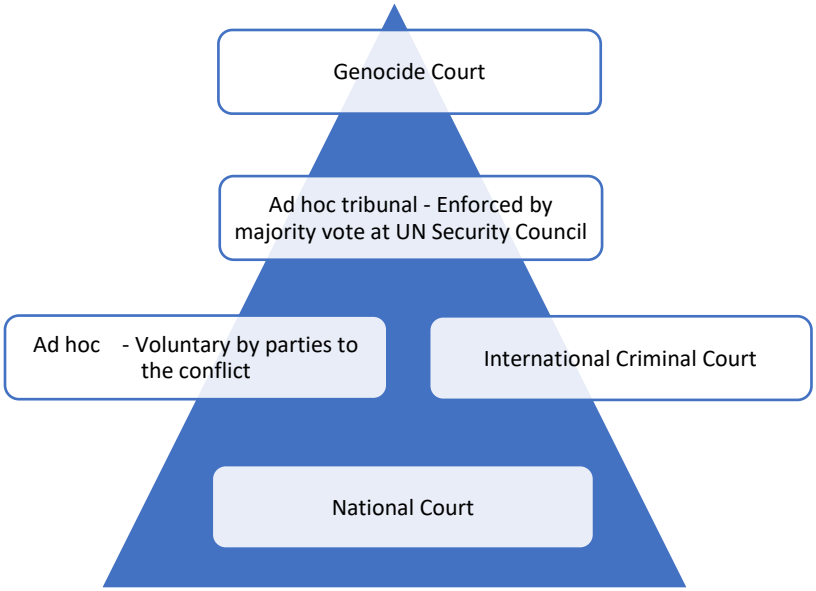
This thesis has so far tracked the development of philosophical legal debate as to how law achieves legitimacy. Alongside this, it has traced the development of international law and how it has administered justice through conflict and peace, from the first recorded instances of international criminal law being administered through to the present day and the problems encountered by the international criminal court as the first permanent court trying international criminal law independently of any sovereign power. By doing so it has identified the key features of legitimacy and how these are challenged at international law level. It has also looked at previous incarnations of the administration of international criminal law and identified their strengths and weaknesses.

This chapter will be in two parts. Firstly, it will look at the model that has been put together and explain why it is structured in the way it is. The second part of the chapter will hold the model up to scrutiny in light of the problems previously identified. It will do this by evaluating the key features of legitimacy through the eyes of notable scholars before holding these features up to the model and evaluating it through their gaze. In a number of cases, the philosophies are grounded in national law, so it will be important to identify if the philosopher addressed international law at all and if they did not, explain how it can be related to international criminal law now. This will all be framed against a background of the world as it stands today in 2021. Against a background of isolationist politics and the political turmoil, can the model withstand political pressure to achieve the goal of bringing all citizens under the protection of international law or is this too lofty of a goal? Is what we have now the best option or is it the only workable option? Is the administration of some justice better than no justice at all and can the international criminal court ever be a success when so many can escape its reach?

The Model

The model is divided into four separate tiers, made up of five different court systems. The aim of the model is that the majority of cases are dealt with in the first two tiers. These first two tiers are made up of national courts and the existing ad hoc tribunals and international criminal court. These already exist in the administration of justice in the global sphere. Each of the first three courts that make up these two tiers deal with situations where there is an element of co-operation between the parties to the conflict or the country of the accused.

Fig.2



The model deliberately includes a vertical hierarchy of courts in a pyramid shape model, with a court that specifically focuses on genocide at the very top. This reflects two things; firstly, that genocide is the most heinous of all crimes and must be recognised as so, and secondly, that there should be very few instances where genocide is indicted, especially on its own. While genocide could be indicted in the lower courts, the genocide court would have no facility for a nation or defendant to opt-out or be protected by a national or political bias of the Security Council. Limitations of prosecutions is a constant frustration of international criminal law; the international legal system has been forced to be complementary in nature. This means it must respect limitations imposed upon it by regimes that fundamentally oppose the court's core aims and objectives. The existence of a court dedicated to genocide also harks back to Nuremberg where the prosecutors were determined that a crime such as the

holocaust should never happen again. It is perhaps too lofty a goal to stop atrocities but is it to lofty to expect at least a semblance of justice when these crimes are committed?

The need for justice is perhaps one of the most primal of human needs. The model addresses this need by attempting to bring as many people as possible under the protection of an international criminal court. This is important because a victim may not be able to rely upon national courts or even on the ICC as it stands today. A key feature of the model is that where the national court is willing and able, it should always be the court of first resort. This, however, could also be a negative. In chapter one it was identified that a key feature of legitimacy was that no defendant should be able to be tried for the same offence twice. The defence, known in common law as '*double jeopardy'* and in civil law as a '*peremptory plea'*, means that where an offence has been tried before a court, the same offence cannot be tried again. However, as was shown in chapter four, the concept of double jeopardy does not exist in international law in that it does not relate to trials in different states instead the concept is to protect from repeated prosecution by the same judicial system. If the principle is to survive it must be clear that the national courts are handing over their sovereignty relating to these offences to the model, this would mean establishing a vertical hierarchy of law that places international criminal courts at the top level so that national courts form a layer of the same structure ensuring that cases are tried in the most effective layer and therefore the defendant cannot be retried at a higher level. If the system runs complementary to national law, then any trial at national level would not bar future prosecution at the international level. The sovereignty of international law must therefore be established.

<u>Establishing the Sovereignty of International Law</u>.

When it comes to international law there is no more hotly discussed topic than its infringement upon national sovereignty. Whether it is in the establishment of criminal courts or the relationships of people within smaller unions, for example the European Union, the issue of national sovereignty is constantly cited by those who wish to promote an isolationist rhetoric. During his inaugural speech, Donald Trump, the 45th President of the United States of America, spoke of re-claiming America, of defending their own borders instead of helping others, and of redistributing wealth within America rather than

around the world.[530] This rhetoric was in stark contrast to previous American policy, and it sought to put the United States out on their own, in fact, more on same footing as countries such as China, Russia and even North Korea. The United States were seemingly pulling up their drawbridges and cutting themselves off from the rest of the world. Donald Trump has on a number of occasions stated that he is taking inspiration from another example of isolationism that of the United Kingdom leaving the European Union, this has become known as '*Brexit*'. In June 2016 Trump, wearing a cap emblazoned with the call '*Make America Great Again'*, arrived in Britain hailing the Brexit vote as a '*Great Victory'*.[531] His reasoning was a call all over the world, he claimed, for independence, for opposition to what he cited as the '*global elite*' who he claimed ran the world. America had until Trump's election positioned itself as the leader of the '*Free World'*. It held positions of privilege at all the major international groups it was a member of. In his first appearance at a NATO[532] summit, Trump used the opportunity during a dedication ceremony to Article 5, which is the principal of collective defence,[533] to openly rebuke the other member states for not reaching the required percentage payment of their GDP to NATO, leaving it to the American taxpayers to pick up the bill,[534] completely overlooking the fact that in most recent history the United States has been involved, as an active participant, in a number of the bloodiest conflicts that have raged across the globe. Conflicts that have dragged many nations in to fight on behalf of and by the side of American soldiers, in protection of a nation or in the case of the second Iraq war, allegedly as revenge for, the World Trade Centre attacks, although President Bush later conceded Saddam Hussian had not played a role in the attacks.

Protecting national sovereignty, however, does not consider the global effect of actions taken by a country on a national level and how these may affect the sovereignty of another nation. Taking

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530 Politico Staff, 'Full text: 2017 Donald Trump inauguration speech transcript' (*Politico*, 20 January 2017) <https://www.politico.com/story/2017/01/full-text-donald-trump-inauguration-speech-transcript-233907> accessed 3 February 2022.

531 E Macaskill, 'Donald Trump arrives in UK and hails Brexit vote as 'great victory'' (*The Guardian Newspaper*, 24 June 2016) <https://www.theguardian.com/us-news/2016/jun/24/donald-trump-hails-eu-referendum-result-as-he-arrives-in-uk> accessed 3 February 2022.

532 NATO – North Atlantic Treaty Organisation.

533 North Atlantic Treaty Organisation , 'Collective defence - Article 5' (*NATO OTAN*, 23 November 2021) <https://www.nato.int/cps/ic/natohq/topics_110496.htm> accessed 3 February 2022.

534 D Boffey, J Rankin , 'Trump rebukes NATO leaders for not paying defence bills' (*The Guardian Newspaper*, 25 May 2017) <https://www.theguardian.com/world/2017/may/25/trump-rebukes-nato-leaders-for-not-paying-defence-bills> accessed 3 February 2022.

decisions in isolation that may be for the good of one nation can have devastating effects on others. This is especially true when the world is struck by events that impact the global population, be it a natural disaster or a pandemic, the lack of action or the over-reaction by a nation can have a devastating effect.

The model will always struggle to overcome the arguments of national sovereignty and that is why when the ICC was established it was decided to go with a complementary system rather than a hierarchical system as the model has. Despite this decision the complementary system, however, is strangely hierarchical inverting the position of national courts from the bottom position on the model to the top of the system. While both approaches anticipate that the majority of cases will be heard by national courts the model attempts to direct cases down from the top to ensure the maximum number of perpetrators face justice rather than national courts deciding that the court are only willing to prosecute a small number of perpetrators.

Despite the model's aim to prosecute as many perpetrators as possible, it is obvious that relying upon ad hoc tribunals or even the ICC means only a small percentage of those who commit atrocities are ever held to account. However, another key feature of legitimacy that was recognised earlier in the thesis was that everyone is equal before the law. Article 14.1 of the International Covenant on Civil and Political Rights states

> 'All persons shall be equal before the court and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[535]

In an ideal world the model would, of course, prefer to see that every perpetrator of an offence was tried before a court which is free from political influence or bias, although this is an almost impossible outcome. The model would prefer as many cases as possible tried at an international level so that a variety of political and national cultures and viewpoints could be represented. The ad hoc tribunals and

[535] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

ICC allow for this. However, their current set up allows too many perpetrators escape justice. Most national courts are also not experienced in issues of international criminal law, and the offences in national law may not be comparable to the offences tried at the ICC. The model does, however, still expect most cases to be tried at national level, leaving the more complex and wide-reaching crimes to be tried at the ICC, ad hoc tribunals, or the genocide court, but the national courts would be applying the offences set out in the statutes of the international courts rather than individual national statutes. These courts due to their position in the model would create a body of binding precedent, which it would expect the national courts to follow. Therefore, the complementary nature of international criminal law currently being tried at the ICC cannot be maintained if the model is going to be successful.

At Nuremberg, a message was given that the laws of nations were not sufficiently harsh to punish those responsible for the crimes perpetrated by the Nazis. However, laws for murder existed in Germany and Poland, and offences related to the waging of aggressive war had been mooted after World War One so there was at least precedent for these. The offences before the court would have warranted death in any of the Allied countries prior to 1945 (although admittedly they may have been under differently named offences), so why then was it so important to codify these new offences at Nuremberg. Perhaps it could be argued that punishing those responsible was not the most important takeaway from the trial, instead it was documenting what happened so that future generations could prevent it from happening again.

While the trials at Nuremberg suffer greatly when examined through a twenty-first century lens, failing to reach almost all the standards of legitimacy this thesis has put forward, it is an important milestone for international criminal law. Up until the trials any '*justice*' imposed upon the losing nation in times of conflict was imposed by the victorious country. While it can be argued Nuremberg is a display of '*victor's justice'*, at its core, it is an attempt to codify the criminality in conflict. It can be argued that the German defendants were offered competent counsel who were able to offer a defence. These were not just '*show trials*' with all defendants found guilty and hanged. The Allies were keen to ensure the offences under which the defendants were tried were recognisable offences under existing international criminal law. The Allies also did not seek to try every single member of the Nazi party, they sought to

prosecute key members of the party or key defendants regarding an event. Prosecutions were only one branch of the Allied plans to ensure that the Nazi ideology died with Hitler, likewise, the model is also only one branch of international politics by which the arm of international criminal law can be strengthened.

When developing the model, it was important to ensure that a balance was met between punishing as many people as possible and helping nations to heal and re-build after conflict. While war crimes and crimes against humanity are heinous and it is important to punish those guilty of offences, especially those in power, to send a clear message to discourage future crimes, it is impossible to punish everyone responsible and this may not be the most effective way of ensuring that there are not future conflicts. It may be enough establishing a set of historical records that truthfully record events, to enable both sides of the conflict to reconcile. It was during the research into other effectives ways for countries to move forward after conflict that it became clear that when a genocide had occurred it was harder to move forward without re-course to a judicial mechanism. This may be because it is imperative that the injured party has recognition of its suffering, or it may be because of the wide-reaching effects of a genocide campaign.

What does international criminal law mean now?

Even with the codification of offences that now exists the doctrine of international criminal law remains incohesive in many respects. Where do the key offences of Crimes of War belong and how do they interact with other crimes that are international in nature. In his book, 'International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law', Bruce Broomhall talks of the '*increasingly narrow concentric rings of doctrine' that international criminal law encompasses*,[536] at the centre of those concentric rings must be genocide. The balancing act is now for states between their own sovereignty and the importance of punishing such acts. The protection of their own sovereignty is a primary concern to states, especially for serious offences that are likely to have political consequences and whose prosecution will also always have political contexts.

[536] B Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (OUP 2004) 10-25.

The ad hoc tribunals that have been created so far have been imposed upon the countries involved. The Tribunal at Nuremberg, the International Military for the Far East, the ICTY and the ICTR all had primary jurisdiction over the situations they were created to prosecute, and all have limited jurisdiction, with the ICTY the only one to punish perpetrators from both sides. The Rome Statute, in contrast, is a treaty and so it is voluntary and not imposed upon any state. It also does not address a particular event nor is it against a particular state. It was important during negotiations for the Rome Statute that the relationship between the treaty and the national courts in relation to certain crimes was clear.[537]

Jurisdiction of the model

From the beginning of negotiations relating to the formation of a permanent international criminal court, it was clear, that primacy jurisdiction would have to remain with the national courts, as the states were not prepared to hand over sovereignty. The entity that holds sovereignty in different nations varies, whether it be a Parliament, House of Representatives or a specific office of president or leader of the government, whether it is democratic or despotic, it is usual that ultimate power is reserved specifically to this entity. Most democratic countries, those with a written constitution especially, have a device within their constitution to protect from dictatorship. The United Nations is obviously created as a different legal entity to a state or nation, it therefore does not have the power of a nation to establish sovereignty. While the Secretary-General is in charge of the UN, they speak as spokesperson for the world's interests rather than a leader.[538] The Secretary-General, therefore, does not wield sufficient power nor have the resources of national leader in order to force co-operation or sublimation of sovereignty from nation to the UN. As has been discussed earlier in the work, the UN Security Council and its veto for the permanent members also creates a huge problem for all international lawyers seeking to legitimise international criminal law and how such law is enforced. How can legitimacy be established for international criminal law if the law is to infringe upon the sovereignty of a nation. Can a law be legitimate when it does not apply to all nations equally in that it can be easily manipulated by

[537] Ibid.

[538] United Nations, 'The role of the Secretary-General' (*United Nations Secretary - General* , Unknown) <https://www.un.org/sg/en/content/the-role-of-the-secretary-general> accessed 3 February 2022.

the national interests of those nations who possess the security council veto and their Allies? These institutions may appear in safe hands to most onlookers while they are governed by nations that share their own world view, but this could be strikingly different should the views of the veto holders change.

While many key offences can be traced back to reflect natural law principles, for example, the protection of human life and the freedom from torture and slavery, what if as before,[539] a section of society were judged to be as sub-human or lesser beings? History can be seen as having abandoned natural law through the years of the slave trade, the treatment of black Africans and those of the Caribbean Island nations went against natural law. However, as they were viewed as sub-human, even animals, natural law would not apply to them; even the current situation in China with their treatment of the Uyghurs could be justified if the ruling party seeks to a create subclasses of humans.[540] The seven basic goods of Thomas Aquinas would protect against such treatment, but he underestimated perhaps the most important human negative qualities greed, and the thirst for power. It is greed and the thirst for power that has the greatest impact on law making and observation.

Natural law and sovereignty

Natural law promotes the notion that there are basic goods and when legislation refers back to these basic goods it is this that brings about a law's legitimacy. It is also fundamental to natural law that it is applied equally to all humans as all human life is seen as having inherent worth. Natural law scholars have addressed the notion of sovereignty. The current international climate demonstrates very clearly the main camps within the sovereignty debate; for example, the Brexit[541] debate in the United Kingdom. The Leave campaigners relied heavily on the argument of returning sovereignty to the elected Parliament in London rather than allowing law-making to be governed by what it called '*unelected officials*' in the European Union. This however is a spurious argument as Britain is a dualist nation and the therefore all British laws are enacted by our parliament. Furthermore, Britain had (at the time before

[539] The Nazis with Jewish and other groups and more recently in Rwanda when Tutsis were described as cockroaches – Rwanda jails man who preached genocide of Tutsi 'cockroaches' – BBC News, 'Rwanda jails man who preached genocide of Tutsi 'cockroaches'' (*BBC*, 15 April 2016) <https://www.bbc.co.uk/news/world-africa-36057575> accessed 3 February 2022.

[540] BBC News, 'Who are the Uyghurs and why is China being accused of genocide?' (*BBC*, 21 June 2021) <https://www.bbc.co.uk/news/world-asia-china-22278037> accessed 3 February 2022.

[541] The British exit from the European Union has become known as Brexit.

the exit from the EU) the power of veto for certain legislation and a 13% sway of the voting power in the EU[542]. The UK, therefore, had a privileged position in the European Union, in that it had the benefits of belonging to a group of nations that the buying power and political sway of a large population, while also possessing a veto power to remove itself from parts of the legislation it did not want to be part of, for example Schengen and the Euro. The argument against the EU was always one of sovereignty, and the lack of understanding of the true global nature of law. Britain now finds itself outside the union and reliant on countries that are also looking towards isolationist ideals, but without the economy of scale that China and the USA possess. While the UK still possesses the power of veto at the Security Council this may be their only bargaining tool, and it could mean that the veto is manipulated as the UK try to push its global seat at the table.

Kant examined the unwillingness of nations to limit their absolute sovereignty and it is this that limits international criminal law as, by submitting to a supranatural authority, sovereignty is limited. The dilemma therefore is that '*any effective international law reaches its limit precisely at the crucial point where sovereign states are not prepared to resign their own authority in favour of a superior international one'*.[543] Hobbes believed and promoted the idea of an absolute sovereign, Kant however, recognised the danger this could create. Sovereignty, therefore, should not be placed on the shoulders of a single person, but instead, through the use of bilateral treaties and agreements, sovereignty could be held by an institution. This institution must however have strict rules to limit an individual's power within the institution, to avoid the dangers of dictatorship.

Positivism and Sovereignty

Positivism also battles with the demands of sovereignty. Kelsen considered that law itself is made up of a hierarchical system with the topmost stone of the pillar being the constitution. '*The constitution stands above the statute, the statute above the ordinance, and norm-setting organ is a higher organ*

[542] C McKinney, 'British influence in the EU Council of Ministers' (*Full Fact fights bad information*, Unknown) <https://fullfact.org/europe/british-influence-eu-council-ministers/> accessed 3 February 2022.

[543] P Schroder, Natural Law, Sovereignty and International Law : A Comparative Perspective. in I Hunter and D Saunders (eds), Natural Law and Civil Sovereignty (Palgrave MacMillan 2002) 204-218.

than one which does not set norms but merely applies them',[544] he further believes that it is international law that tops this hierarchy and not the legal order of states.[545] However, unlike a natural law lawyer, Kelsen is not looking at any immutable rights, he does not recognise human rights as absolute. Instead, he believes that international law is a series of norms that have become customarily recognised over time. These customs have become, over time, *pact sunt servanda*, which in itself is a custom that must be observed. It is through this custom that international law has been recognised and has gained its legitimacy. All law, Kelsen believed, be it national or international could be analysed using the same methods and he posits that a norm is '*an act of compulsion as the consequence of certain factual conditions which are considered illegal actions'*[546] and that in international law '*reprisals and war are those acts of compulsion which are consequences of illegal actions'*.[547]

The question that is posited is, therefore, who creates these norms through which international law can gain some semblance of legitimacy. For Kelsen, it is the members of the international community. By adhering to the customs of international law the international community are lending legitimacy to it. This would of course only lend legitimacy to the tiers of the model where the nations are recognising it and passing some semblance of limited sovereignty to it. By refusing to recognise a court or legal establishment it would remove its legitimacy. Thus, for Kelsen, it is not a legislative body that determines the norms, it is the parties to the dispute and the upon determining guilt the executive body of the wronged party applies a '*measure of compulsion as a consequence of the legal wrong'*.[548] Accordingly to Kelsen, the only way to right a wrong in international law is through reprisal or war. Kelsen however, is a difficult theorist to pin down, he contradicts his own theories even within the same writings. He sees himself as a positivist, a monist and a purist and because of this, many conflicts between natural law and his own positivist tradition are overlooked. His purist notion that a theory of law can exist within a vacuum is soon pushed aside by not only his own fellow positivists but also his

[544] WB Stern, 'Kelsen's Theory of International Law' [1936] 30(4) The American Political Science Review 736-741.
[545] Ibid.
[546] Ibid.
[547] Ibid.
[548] Ibid.

arch-rival Carl Schmitt and later by modern legal theorists who introduce other disciplines to the melting pot of legal theory.

H L A Hart wrote of international law that it lacks a legislature[549] and an effective centralised system through which to issue sanctions. When Hart looked closely at what the definition of law actually meant, he examined three recurrent issues.[550] The first issue is that of obligation; when does an act or omission no longer become optional and in what way is the citizen obliged to abide by such a rule? This issue is especially difficult in international law where at present one nation may be obliged to follow different law to their enemy. It could therefore be argued that in a positivist's view that international law does not in fact have a fully formed legal system. This argument could be further supported by the lack of a clear penal statute declaring such conduct to be an offence and specifying its punishment.[551] Secondly, Hart wrote about the difference between legal and moral rules, while at times these two rules may be the same, they can also be very different and the existence of one does not congruently lead to the existence of the other. Famously, Hart conducted a debate with Patrick Devlin in response to the Wolfenden report.[552] The report was issued by the Committee on Homosexual Offences and Prostitution, and it clearly stated that '*as a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical sanctions. On the other hand, the law is plainly concerned with the outward conduct of citizens in so far as the conduct injuriously affects the rights of other citizens*'.[553]

Hart and Devlin debated whether the law should make a moral judgment on the conduct of citizens. Hart would argue that law and morality share close relations and he, unlike Kelsen, does not seek to place law in a closed system '*in which correct decisions can be deduced from predetermined legal rules by logical means alone'*.[554] Hart does at least admit that law should be subject to continual moral

[549] HLA Hart , 'The Concept of Law' (Clarendon Press 1976) 3-7.

[550] Ibid.
[551] Ibid.
[552] Human Dignity Trust , 'Report of the Committee on Homosexual Offences and Prostitution' (*Wolfenden Report* , Unknown) <https://www.humandignitytrust.org/wp-content/uploads/resources/Wolfenden_Report_1957.pdf> accessed 3 February 2022.
[553] Ibid.
[554] WC Starr, 'Law and Morality in HLA Hart's Legal Philosophy ' [1984] 67(4) Marquette Law Review 673- 689.

scrutiny. He also admits that justice is a desirable outcome of any legal system, that through constancy it gives a moral legitimacy to the law and the legal order.[555] William Frankena (1908-1994) wrote about justice and morality '*there are other things that morality requires of individuals besides justice. However, all that can be required of a society or state is that it be just'*.[556] Justice is defined by the OED as '*to punish or reward appropriately, to try in a court of law; to bring to trial; to punish judicially*'.[557] This definition of justice has helped fuel the use of judicial processes since war crime trials began in 1474, and this is the constant battle of legitimacy and justice that has been fought by legal scholars throughout history. The difficulty the model encounters when seeking legitimacy through the positivist tradition is that the model relies heavily on a morality judgement being made, that due to the damage caused and the number of people affected by crimes committed in conflict redress must be sought. Placing law-making into a vacuum removed from it the interaction with politics or culture is almost impossible, a fact made glaring obviously by Kelsen's attempts at pure law, that are confused and often contradictory. Hans Morgenthau, recognised the limits of positivist legal theory when he wrote

> 'The juridic positivist delimits the subject-matter of his research in a dual way. On the one hand, he proposes to deal exclusively with matters legal, and for this purpose strictly separates the legal sphere to the legal rules from ethics and mores as well as psychology and sociology. Hence, his legalism. On the other hand, he restricts his attention within the legal sphere to the legal rules enacted by the state, and excludes all law whose existence cannot be traced to the statute books or the decisions of the courts. Hence, his etatist monism'.[558]

Morgenthau places positivist theory firmly in a point of history when codification of statutory law was happening across Europe and North America. It fulfilled the purpose it set out to achieve as long as the statutes created were logical ones and recognised standards of society[559] and where they didn't

[555] Ibid.
[556] University of Kansas, 'Some Beliefs About Justice by William K Frankena' (*The Lindley Lecture*, 2 March 1966) <https://kuscholarworks.ku.edu/bitstream/handle/1808/12382/Some%20Beliefs%20About%20Justice-1966.pdf;jsessionid=8788BCE2B36B0D5869295E8090EEBF26?sequence=1> accessed 3 February 2022.
[557] Oxford University Press, 'Justice' (*Oxford English Dictionary* , December 2013) <https://www.oed.com/view/Entry/102199?rskey=B86M2s&result=2#eid> accessed 3 February 2022.

[558] HJ Morganthau, 'Positivism, Functionalism and International Law' [1940] 34(2) The American Journal of International Law 260-284.
[559] Ibid.

recognise these standards, they appeared to be derived from a logical process. '*Through the back door of pseudo-logical interpretation, the outlawed company of natural law and extra-legal value judgments re-entered the legal system'*.[560] It is for this reason that Morgenthau describes positivism as under attack by competing legal systems and even between the competing legal theorists within the theory. Writing in 1940 Morgenthau places positivism as a '*determining influence*'[561] of international law. The failure of international law after World War One to address the criminality that occurred meant that the ideology had to reflect upon its failures and its helplessness. He places the failure of international law to address criminality firmly at the door of the positivist doctrine, talking of the '*disastrous consequences of the genuine weakness of the positivist doctrine*'[562] that are *'doubled by the absence of the conditions which in the domestic domain made juridic positivism at least a temporary and apparent success'*.[563]

In terms of the model, both traditional and neo-positivism create a number of boundaries that hinder the model's ability to be seen as legitimate. The pivotal idea that positivism cannot address, is that international law does not derive from written law of a state or its statute. '*Juridic positivism starts with the assumption that its subject-matter is to be found exclusively in the written law of the state'*.[564] Thus international law and this model holds two conflicting problems for which this is no solution; they are that not all written law is valid in international law and not all international law is codified.[565] Hart tried to claim international law as sufficiently analogous to municipal law.[566] He addressed two fundamental questions; firstly, how international law can be binding upon sovereign states, and secondly how it can be binding when it lacks organised centralised sanctions. Turning to the first question, Hart disregards the sovereignty argument by claiming that sovereign means no more than independent.[567] Anthony D'Amato in his article, 'The Neo-Positivist Concept of International Law',

[560] Ibid.
[561] Ibid.
[562] Ibid.
[563] Ibid.
[564] HJ Morganthau, 'Positivism, Functionalism and International Law' [1940] 34(2) The American Journal of International Law 260-284.
[565] Ibid.
[566] A D'Amato, 'The Neo-Positivist Concept of International Law' [1965] 59(2) The American Journal of International Law 321-324.
[567] Ibid.

stated that there is a need to look at the rules of international law and see if they are independent and how far this independence extends. The model seeks to address the removal of bias that exists in the current system by removing or limiting the power of the UN Security Council. A recurring criticism of the ICC and the ad hoc tribunals that have existed is the presence of clear bias. For example, the ruling by the Security Council that a genocide had occurred in Rwanda, rather than the ruling being made by an independent court. Frequently, the ICC is accused of bias and the Security Council has the obvious inbuilt bias that exists due to the permanent members who hold the veto power in all matters. Hart and D'Amato are clearly attempting to put forward a neo-positivist view of sovereignty. Hart wrote in depth of Austin and Benthams's doctrines on sovereignty, on their similarities and differences. A fundamental belief of Austin's was that the sovereign's power was '*incapable of legal limitation'*,[568] while he did at least recognise that the sovereign could exist as a single person or a body of individuals, it is whether the body of individuals that Austin's theory includes can be used to include the international community and which body would hold the sovereignty, the United Nations General Assembly, the Security Council, or the court itself. If the power of the sovereign is applied to the Security Council, then does Hart's own theory of sovereignty being analogous to independence mean that the Security Council fails to reach the standards of a sovereign? The Security Council as sovereign, would also fails when looking at Austin's requirements for a sovereign – including the ability to make laws, a situation that Austin explicitly excludes. Austin also seems to exclude the possibility that the sovereign power is divided between individuals or bodies that each hold equal and unlimited power. The divisibility of sovereign power is not a topic that was addressed in detail despite it clearly occurring in federal states, including Germany and America. Bentham even cited the Roman Republic as argument against his theory of an absolute sovereign. The unlimited sovereign put forward by Bentham, supported by Austin, has one clear exception that Bentham states to be where the power of the sovereign is limited by '*an express convention'*,[569] thus opening the door that had been so firmly shut in the face of international law. An example of this sort of expressed convention would be, where a state or number of states submit to the terms of an independent agreement, or a group of states submit

[568] HLA Hart, 'Bentham on Sovereignty' [1967] 2(2) Irish Jurist 327-335.
[569] Ibid.

to a federal union such as inside the European Union. Without allowing this exception, a number of the governments of states that existed in Bentham's time would have been disregarded. Since its inception and alongside the growth of international law, the divisibility of power is discussed in detail. Hart himself is more open to the divisibility of power and in fact recognises that it may be the case, even when the express convention does not exist, that divisibility is allowed.

Addressing the second issue, that of the lack of '*arms*' or organised sanctions Hart argues that the lack of sanctions does not necessarily completely remove legitimacy of a rule. In fact, he goes as far as saying that '*there is no necessary relation between the two'*[570] and this is especially true of international law where sanctions '*may lead to widespread and self-defeating international strife'*.[571] It is this constant battle that international criminal law especially wages upon itself. The recognition and punishment of individuals against the punishment of states, where the punishment of states often affects those most vulnerable who were not involved in the criminality itself.

Despite these differences and conflicts that clearly exist between international law and positivism D'Amato argues that international law is '*thought and spoken of as obligatory'*.[572] This he says is clear by the fact nations often refute facts (either that facts are incorrect or that the law does not apply to the fact) rather than the law itself. This, however, is simplifying the argument somewhat, as while the laws may be recognised, the ability of any court or tribunal to enforce them has been questioned many times at the ICC and the ad hoc tribunals. Hart's formal introduction of the rule of recognition comes in his seminal work 'The Concept of Law', in chapter four he addresses the relationship between the sovereign and subject. It is the vertical structure of law that is deemed essential to a functioning society. It is then that Hart analyses why subjects follow rules.[573] The failure of the simplistic positivist theory is that it is clear that an absolute unlimited sovereign's coercive orders do not create a whole legal system. These failures of positivism are not enough for the theory to be completely disregarded however as

[570] A D'Amato, 'The Neo-Positivist Concept of International Law' [1965] 59(2) The American Journal of International Law 321-324.

[571] Ibid.
[572] Ibid.
[573] This has been addressed earlier in the thesis chapter one.

Hart's neo-positivist theory addresses them. He argues that sovereigns are not unlimited as many of the laws apply equally to the sovereign who makes them. In fact, at international criminal law level the laws should be applied to each nation equally. However, it was clear at Nuremberg that only side of the conflict would be held accountable for their criminality. If sovereignty of international criminal law is to be held by the UN Security Council, it would need to be reformed to ensure that the significant bias that currently exists is removed.

Reform of the Security Council

There are five key areas for reform, these are: the categories of the membership, the veto, the representation- especially of large population areas, the size of the Security Council itself and finally the relationship of the Security Council and other organs of the United Nations.

The Categories of Membership

The Security Council remains largely unchanged since its creation in 1945. In fact, the only changes that have been made were the addition of four non-permanent seats in 1965.[574] Many groups feel under or completely unrepresented by the council. The five permanent seats that have remained the same since 1945 enjoy completely unlimited power within the council. The balance of power on the council between the permanent members and the non-permanent members remains completed skewed in favour of the permanent members. The non-permanent members role appears to be only that of rubberstamping the decisions made by the permanent members.

Even in 1945 at its creation concerns were expressed about the veto being given to the permanent members as it effectively violated the quality of the member states, placing the sovereignty of the five permanent members ahead of the others. Sovereign equality is a fundamental principal of international law by which every sovereign state holds the same legal rights as any other sovereign state. Article 2.1 of the UN Charter categorically states this to be the case. If each country in the United Nations

[574] Federal Foreign Office of Germany , 'Reform of the United Nations Security Council – questions and answers' (*Federal Foreign Office*, Unknown) <https://www.auswaertiges-amt.de/en/aussenpolitik/internationale-organisationen/vereintenationen/reformsr-fragen/231618> accessed 3 February 2022.

enjoys full sovereignty, they must hold equal standing. However, this is not the case under the existing Security Council set up.

Kelsen argued that sovereign equality is made up of two features of the states in international law, namely the Principle of State Sovereignty and the Principle of Equality of States.[575] To put it simply each nations sovereignty must be absolute and equal. The five permanent seats at the Security Council fundamentally infringe upon these principals.

The ineffective nature of the Security Council in its current form is perhaps the clearest argument for its reform. The complete failure of the Security Council to prevent large scale conflicts in Somalia, Rwanda and Bosnia, and key interventions in both Iraq and Kosovo have occurred without Security Council approval. This is due to the intervention of permanent member states. Despite being effectively crippled during the Cold War the only reforms that the Security Council are realistically interested in is the expansion of the number of permanent members.

In 1993, the Security Council agreed to the establishment of the Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council and the group began its work in January 1994. In 1998, the working group decided that it would not offer any decision or resolutions in relation to equitable representation or the increase in membership. Later, in 2005, the then Secretary General Kofi Annan submitted the Annan Plan, which called on the Security Council to reach agreement upon the expansion of the membership of the council. He offered two separate ideas

- *Plan A* calls for creating six new permanent members, plus three new non-permanent members for a total of 24 seats in the council.
- *Plan B* calls for creating eight new seats in a new class of members, who would serve for four years, subject to renewal, plus one non-permanent seat, also for a total of 24.

Neither of the plans were adopted and subsequently, other ideas were put forward, including the Uniting for Consensus group who in 2005 put forward the proposal of keeping the five permanent members but

[575] A Ansong, 'The Concept of Sovereign Equality of states in International Law' [2016] 2(1) GIMPA Law Review 3-32.

expanding the non-permanent members to twenty each serving for two years. They also called for the restraint of the use of the veto. This proposal was in contrast to the Group of Four – made up of Japan, Brazil, Germany, and India who are pushing for the expansion of the permanent membership, including expansion of the veto.

In the lead up to the 70th anniversary of the Security Council in 2015, three initiatives were set up to address what this thesis and others see as the main challenge facing the security council and that is its inability to effectively prevent and punish mass atrocities.[576] These three initiatives were the

a) French Initiatives
b) Accountability, Coherence and Transparency Group (ACT) initiative
c) Reform proposal by the Elders

These discussions came after the security council faced controversy due to the Russian use of their veto twice in quick succession in July 2015; firstly, to block a proposed commemoration of the genocide at Srebrenica and secondly, a proposal to set up a criminal tribunal in relation to the downing of Malaysian Airways Flight MH-17.[577] These uses of the veto are controversial but no more so than the continual use of the veto by the USA when proposals relating to the Palestinian question are put forward and the use of the veto by China and Russia again into suspected use of chemical weapons in Syria.

Whether it is an expansion of the non-permanent membership or the indeed the permanent membership it is clear that no one is able to see a future where the veto itself does not exist. It is clear that the permanent members are not willing to handover the veto power, which means that the veto must be reformed in some fashion to allow for a more representative administration of international criminal law.

[576]Security Council Report , 'The Veto ' (*Research Report* , October 2015) <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf> accessed 3 February 2022.
[577] Ibid.

The French Initiatives

On 4th October 2013, Laurent Fabius, the then French Foreign Minister, published an article in the New York Times that argued that the permanent Security Council members should refrain from using their veto with regard to circumstances where mass atrocities are suspected. He laid out a code of conduct that he argued should come into force in these circumstances. The code of conduct, he argued, could be agreed by the Security Council permanent members without a need to change the Security Council charter itself, as the permanent members would be agreeing to limit their veto power voluntarily.[578] A number of human rights groups including the Global Centre for the Responsibility to Protect and Amnesty International wrote an open letter to Mr Fabius a year after his article to welcome and further encourage what had become known as the French Initiative. They urged them to continue to try to build the momentum behind the calls for a substantive discussion between the permanent members to move towards a signed agreement to voluntarily enter into the code of conduct suggested, while also urging them not to make exemptions from the code.

France has continued its calls for reform of the veto but have stopped short of surrendering it. Germany have called on France to surrender the French veto so that a combined EU veto can take its place, as since January 2021 France are the sole EU country to hold veto power.

Enforcement of the Rule under Article 27 (3)

Another form of self-regulation, like those of the French initiative is the call for the enforcement of the Charter as it already exists. Article 27 (3) of the charter states *'... in decisions under Chapter V1, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting'.*[579] The clause means that a permanent member state should refrain from voting if they are party to the dispute in question, this would also mean that the veto would not be available to the state. At this time, this rule is not enforced, and member states have only selectively adhered to the clause. While difficult to enforce a

[578] L Fabius, 'Waiving the right to veto in the event of mass crimes by Laurent Fabius' (*Ambassade De France en Indonesie et au Timor Oriental*, 4 October 2013) <https://id.ambafrance.org/Waiving-the-right-to-veto-in-the> accessed 3 February 2022.

[579] Security Council Report , 'The Veto ' (*Research Report* , October 2015) <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf> accessed 3 February 2022.

strict adherence to the rule would partly ensure that permanent member states are not so abusive with their power. Although on paper this reform would be a positive change in the use of the veto it is highly likely that the strict enforcement of the rule would lead to an increase in the bullying tactics at lower-level discussions which would mean that atrocities are not fully discussed because of intimidation.

Extension of the veto

At this current time the permanent veto has been assigned to five countries, the UK, USA, China, France, and Russia. These countries have held the veto since the Security Council's inception and have been free to use it in an unlimited way. The Security Council is perhaps the most powerful organ of governance in the world, and therefore the five permanent members are the most powerful countries in the world. They have the power to manipulate international law and especially international criminal law to fit their own agendas.

The use of the veto may have decreased in recent years, but this is mainly due to the Security Council debates taking place behind closed door where the threat of the veto can be applied privately. A number of nations have put themselves forward to hold the veto. As mentioned earlier, the Group of Four are the most vocal of the nations. Germany is the most populated country in Europe, they were not considered for permanent membership in 1945 for obvious reasons. Since 1990, it has become a united country leading the European Union and holding a respected chair at the table of global government. Another country that was not considered in 1945 for the same reasons as Germany, was Japan, the 11th most populated country in the world, and one of the world's most technologically advanced countries. Brazil is the 7th most populated country in the world and their inclusion on the Security Council permanent members would bring a further 2.73% of the world's population a veto. Finally, India, the second most populated country in the world behind China, representing 17.70% of world's population. Of course, there are a number of advantages to the addition of the Group of Four to the permanent membership of the Security Council. It would bring nearly 25% more of the world's population under the permanent veto, and it would represent the largest population centres in 4 continents. However, again it would leave the whole African continent unrepresented. It would also mean that one third of the vetoes available would be held by European countries. Using the representation argument, it is clear

that the UK and France cannot justify their veto power. It could be that their vetoes are re-distributed to members of the Group of Four, or an African country. However, it is likely that the extension of the veto power, would lead to stalemate in the Security Council. This proposal still leaves 50% of the world's population unrepresented. The most important aim of the model is also to ensure that each citizen is represented equally under international criminal law rather than allowing their government a veto to excuse themselves from investigation.

If each of the highest populated states in each continent (save for Antarctica which is not populated) held permanent membership, the Security Council would look very different. The United States and China would retain their seats, but Russia is a trans-continental country and so is situated in two separate continents. It would not have the highest population in Asia, as that would be China, but it would be the most highly populated in Europe. The remaining permanent seats would be given to Australia, Brazil, and Nigeria, as the highest populated states in their respective continents.[580] However, the same problem remains, large swaths of population would be under or completely unrepresented and the legal and cultural beliefs differ vastly within the continents, even within countries so there is also the issue that the views progressed by the veto are unrepresentative of the country or continent wielding the veto.

Rolling Veto

Another reform that could be put forward is the removal of the permanent seats on the Security Council to be replaced with a rolling veto. This would mean of the members elected to the Security Council every two years, five would hold the veto. To avoid any member holding the veto for a long period there would be a maximum tenure of four years. This would mean that countries that have avoided investigation for a long time would more than likely be forced to address the situation as they could not avoid investigation by either having a veto or relying on the support of a country that does.

The removal of the permanent veto would also encourage all nations to investigate allegations of criminality more seriously and thoroughly. If they know that they may not have the protection of the

[580] Worldometer, 'Countries in the world by population ' (*Population* , 2019) <https://www.worldometers.info/world-population/population-by-country/> accessed 3 February 2022.

veto, they may be more willing to work with the international community. It may also encourage further international discussions and agreements as it would promote the idea of global negotiations. However, it could also be the cause of tensions if countries use their time holding the veto to further their cause or global ambition.

Majority of Permanent Members to use veto

Another reform idea could be that a majority is needed from the permanent members in order to use for the veto. This would mean at least three of the five permanent members would have to use their vetoes at the same time. Although it is not common for three countries to all use their vetoes it is not unheard of. Where three countries have used the veto, it has always been the USA, the UK and France who have voted together. They have used their veto to vote against affirming the sovereign power of Panama, to continue military manoeuvres off the Libyan coast and the air battle that ensued,[581] and to support the South African apartheid[582] by not supporting the prohibition of weapons and ammunition to South Africa. It is unlikely that requesting a majority would do anything to support the better administration of justice, given when and how three permanent members have used their veto together previously.

Abolition of the Veto

Perhaps the most positive reform that could occur would be complete abolition of the veto and the introduction of the majority vote at the security council. The UN is fully aware that many view the veto power to be unfair and unjust. It is also clear that the veto power has meant that in some situations the Security Council has failed to address atrocities. In fact, in some cases the veto has been used to prevent peacekeeping which is the key aim of the Security Council.

One of the most infamous examples of the veto being used in direct contravention of the aim of the Security Council is in Rwanda in 1994 and the four-month genocide that left at least 800,000[583] people dead. Both the USA and France blocked the establishment of a robust intervention force,[584] and perhaps

[581] UNSC 'Draft Resolution S/20378' (11 January 1989) UN Doc S/20378.
[582] UNSC 'Draft Resolution S/14462' (27 April 1981) UN Doc S/14462.
[583] J Wouters and T Ruys, Security Council Reform : A New Veto for a New Century (Egmont Paper 9 2005) 16.
[584] Ibid.

to further protect themselves and the veto from further scrutiny they used their influence and hidden veto to weaken the definition of the crisis. International players including Belgium, as the former colonial power, France and the USA as well as the UN itself did all it could to protect their own citizens and withdrew staff from embassies and carried out other repatriation of citizens but did nothing to help Rwandans.[585] It was later concluded that as few as 2,500 troops would have been able to stop or limit the massacres.[586] A report further concluded that the failure of the UN response both before and during the genocide was due to a lack of resources and also a lack of will to take on the commitment to prevent or stop the genocide.[587] Despite this report, the Security Council again failed in its duty to protect the peace in 1998 and 1999 in FRY when during large scale fighting between Serbs and ethnic Albanese Kosovars that turned into ethnic cleansing the Security Council failed to act as China and Russia threatened to use their veto to stop any intervention with UN troops. Evidence of further atrocities would eventually lead to NATO intervention, but this was done without Security Council authorisation. In a BBC article discussing military intervention in Syria in 2013 human rights lawyer Geoffrey Robertson QC said *'[T]here has never been any need for a Security Council Resolution approving action to stop, punish or deter a crime against humanity'*[588]Robertson used the intervention in Kosovo as evidence that Security Council approval for intervention is not required. However, later in the article he acknowledges that '*intervention without Security Council approval is not provided for in the UN Charter*',[589] and this would seem to support the argument that all military intervention is expected to be approved by the Security Council. In fact, in Syria since 2011 the Security Council (Russia and China) has vetoed intervention 16 times, not only blocking military intervention but also blocking cross-border delivery of aid.[590]

[585] Human Rights Watch , 'Leave None to Tell the Story' (*Genocide in Rwanda*, 1 April 2004) <https://www.hrw.org/legacy/reports/1999/rwanda//index.htm#TopOfPage> accessed 3 February 2022.
[586] UNSC 'Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda' (15 December 1999) UN Doc S/1999/1257.
[587] Ibid.
[588] BBC News, 'Viewpoints: Is there legal basis for military intervention in Syria?' (*BBC News* , 29 August 2013) <https://www.bbc.co.uk/news/world-23847169> accessed 3 February 2022.
[589] Ibid.
[590] Reuters, 'Russia, backed by China, casts 14th UN veto on Syria to block cross-border aid' (*China*, 20 December 2019) <https://www.reuters.com/article/us-syria-security-un-idUSKBN1YO23V> accessed 3 February 2022.

It is clear that there are two distinct camps in the permanent members, as was stated earlier in the chapter. Where the veto has been used by multiple members, it is usually along clear lines, with the USA, France, and UK on one side and China and the Russian Federation on the other. It is also clear that while these two camps exist, and it is likely they will remain in these two distinct camps, that veto will continue to be used in a way that is contrary to the aims of the Security Council. The current trend in international criminal law seem to indicate that it is moving towards a human-focused approach,[591] which is likely due to the terrible failings in stopping widespread human right abuses.

With Great Power Comes Great Responsibility

Since the codification of the veto the five permanent members have wielded enormous power but with this power comes an even greater amount of responsibility. The permanent five members more than anyone else, it could be argued, should shoulder the burden of protecting and maintaining world peace. As has been shown they are using their vetoes at times when it would appear that intervention would be a better option, so in what other ways are the permanent members shouldering the burden? Financially, the permanent five are putting their money where their mouths are. In 2018 the USA contributed nearly $10 billion to the United Nations, and this made up nearly one fifth of the total UN budget.[592]

As of 28th February 2021,[593] the United Nations is involved in peacekeeping missions in no less than thirteen separate arenas. A total number of 68,574 troops are on the ground, of these the permanent members provide only a small percentage of the personnel and in a number of situations they provide no personnel at all. In fact, in total the USA only provides 28 members of personnel for the whole peacekeeping force of nearly 80,000 personnel. So, the questions being asked are, are the permanent members doing enough to justify the veto, and what if anything would be '*enough*'? The UN works

[591] BBC News, 'Viewpoints: Is there legal basis for military intervention in Syria?' (*BBC News* , 29 August 2013) <https://www.bbc.co.uk/news/world-23847169> accessed 3 February 2022.
[592] A Shendruk, Z Rosenthal, 'Funding the United Nations: What Impact Do US Contributions Have on UN Agencies and Programs?' (*Council on Foreign Reations*, 4 August 2021) <https://www.cfr.org/article/funding-united-nations-what-impact-do-us-contributions-have-un-agencies-and-programs#:~:text=The%20United%20States%20remains%20the,of%20the%20body's%20collective%20budget > accessed 3 February 2022.
[593] See Appendix No 4 for a complete record of the current Peace Keeping Missions that the United Nations are involved in as at 28th February 2021.

under the principle that those who are able to pay, pay the most. That is why the USA's accessed bill makes up 22% of the budget and the UK's 4.5%.[594] The USA's contribution is actually capped at 22% because otherwise they would be expected to pay much more.

The peacekeeping costs of the UN are raised by a separate fund. It is calculated by a formula, again relying on those with the ability to pay a higher amount. The formula puts all its members into a ten-level system with the permanent Security Council members in the highest level 'A'. The remaining levels 'B-J' are divided by their Gross National Product (GNP),[595] the lower their GNP the lower down the list the country appears. The countries in the levels C-J pay less and receive a discount in the amount they pay of between 7.5% and 90%. The permanent members then have to make up any shortfall due to the discounts offered to those countries in levels C-J. On top of the compulsory funding required, there is also a voluntary payment that some countries make.

In 2020-2021 the USA had the largest assessed contributions at 27.89% and China was second at 15.21% followed by Japan (8.56%), Germany (6.09%), United Kingdom (5.79%), France (5.61%), Italy (3.30%), Russian Federation (3.04%), Canada (2.72%) and Republic of Korea (2.26%)[596]. As is clear, despite the formula, the permanent five are not the five biggest contributors to the peacekeeping force financially. Of countries that wish the extension of veto the Group of Four, only Japan and Germany appear in the top ten and in fact Brazil (0.5896%) and India (0.1668%) are in Level H.[597]

It is clear that the veto gives the permanent members exclusive power to manipulate the direction of the UN by blocking intervention in areas with their use of the veto, so their increased contribution is justified in that they will have had to have approved all interventions. Yet their contributions are not even, so some pay less for their veto and others pay more with no veto. As is evident, no African or

[594]United Nations, 'UN briefings: The UN's finances' (*UNA-UK* , 2 July 2017) <https://una.org.uk/news/un-briefings-uns-finances> accessed 3 February 2022.

[595] Gross National Product is now more commonly known as Gross National Income and is the total domestic and foreign output of its citizens, for example if a USA company places their factory in the UK the money made at that plant will be included in the USA GNP not the UK's.

[596] United Nations , 'How we are funded' (*United Nations Peacekeeping*, Unknown) <https://peacekeeping.un.org/en/how-we-are-funded> accessed 3 February 2022

[597] Effective rates of assessment for peacekeeping operations, 1 January 2019 to 31 December 2021, based on the scale of assessments – UNGA Implementation of General Assembly resolutions 55/235 and 55/236' (24 December 2018) UN Doc A/73/350/Add.1.

South American country is represented in the top ten. The highest level a South American country appears on the list of contributors is level F and most South American and African countries appear in H, I or J.

It is clear, the Security Council does not meet Kelsen's ideal of equality of sovereigns. Each sovereign state does not hold equal power, nor do they even hold comparable power. Perhaps the key problem to note here is that the permanent members made it clear they would not be part of the UN if they did not have a guaranteed veto power to ensure their sovereignty was protected. Despite their higher level of financial input with the Security Council it does not justify their veto power. The permanent five also do not contribute personal in higher numbers than the rest of world so they are essentially benefitting from the veto without the risk of losing personnel, and in fact very few peacekeeping personnel from the permanent five have been lost to malicious acts in the last ten years.[598] Of course, one of the reasons for this is the very low number of personnel that the permanent five put forward for peace keeping missions, and in fact it is clear that many of the less economically developed countries make up a large portion of the peacekeeping forces, with Bangladesh (6,608), Rwanda (6,335), Ethiopia (6,245), Nepal (5,674) and India (5,528)[599] supplying the most personnel. All but India appears on the UN 25 least developed countries (LDC) list.[600] There are three criteria to calculate whether a country is to be recognised by the UN as on the least developed countries list. 46 of the world's countries are identified as LDCs and they make up 12% of the world's population. The three criteria for identification of LDCs are; the per capita income, human assets (key indicators of health, education and literacy) and finally, economic vulnerability (this is how robust the economy would be to serious changes in trade both natural and manmade and also the situation of the country and likelihood of exposure to shocks for

[598] Total deaths for the Peacekeeping Staff for the Permanent Five – USA 78, Russian Federation 51, France 114, United Kingdom 106 and China 20. Figures as of 12 April 2021 – Total deaths 4091 from 06/07/1948 to 12/04/2021 figures available at United Nations , 'Peacekeeper Fatalities' (*United Nations Peacekeeping*, Unknown) <https://peacekeeping.un.org/en/peacekeeper-fatalities> accessed 3 February 2022.
[599] United Nations , 'Troop and Police Contributors' (*United Nations Peacekeeping*, November 2021) <https://peacekeeping.un.org/en/troop-and-police-contributors> accessed 3 February 2022.
[600] United Nations , 'UN list of least developed countries' (*United Nations Conference on Trade and Development*, Unknown) <https://unctad.org/topic/least-developed-countries/list> accessed 3 February 2022.

example natural disasters and finally the size and remoteness of the country).[601] Since 1971 when the UN created the list of LDCs, only six countries have been able to move out of the LDC status, Botswana (1994), Cape Verde (2007), Maldives (2011), Samoa (2014), Equatorial Guinea (2017) and Vanuatu (2020)[602]. Identification of the LDCs means that the LDCs are open to benefits including grants and loans, preferential market access or special treatment at trade level and also technical assistance.

The veto wielding countries hold extensive power and although held to higher levels of responsibility financially they do not do more than many other countries in providing personnel, with many of the countries providing the most personnel being economically less developed. The principle of equal sovereignty for sovereign nations does not apply to the Security Council and therefore it fails this clear indicator of legitimacy.

The suggestions for reforming the veto fail to address the concerns of smaller nations. The expansion of the permanent members with or without veto power will do nothing to legitimise the council. A rolling veto power will only further the ability of the veto holders to manipulate the Security Council and it is likely to cause further unrest. The abolition of the veto seems to be the only way of legitimising the Security Council but as the permanent members have made clear this is not a reform they are prepared to accept; it seems that there is little hope of the Security Council achieving equality of sovereign power. It was evident from initial research and formulation of the model that while the Security Council remained the gatekeeper of international justice the stage was left open for atrocities to occur and go unpunished. It is obvious that while the initial aim of the UN to prevent future global conflict has been largely successful, this has had little to do with the UN and more to do with the global superpowers changing the fields of conflict. Wars are less and less likely to be fought with ground troops and more and more likely fought with the use of long-range weapons and unmanned missiles and even more often fought in the political sphere, with economic trade embargoes or sanctions.

[601] United Nations , 'UN recognition of the least developed countries' (*United Nations Conference on Trade and Development*, Unknown) <https://unctad.org/topic/least-developed-countries/recognition> accessed 3 February 2022.
[602] Ibid.

Consistency provides results

The model attempts to move away from a blanket Security Council rule by introducing two additional levels to the current system. Namely, a majority vote ad hoc tribunal and an independent genocide court. A key feature of legitimacy that was explained in chapter one, was that the law must be consistently applied. It would appear, at first, that the different tiers, especially because there is a vertical hierarchical system, apply the law somewhat inconsistently but each level would apply the same statutes and it would be strongly encouraged that the majority of cases remain at the existing levels. However, a clear frustration of the current system is the lack of accountability for the five permanent members; there is a clear abuse of Article 27(c) and level 2 allows for this. An ad hoc tribunal at level 2 voted by a Security Council majority is simply a way of ensuring that the permanent members are held to account. The mechanism that exists already does not work and is frequently abused. However, Article 27(c) could be adapted to ensure when a member of the Security Council was involved in the conflict that their veto was not allowed.

Case Study – Israel and Palestine 2021

The conflict between Israel and Palestine is an example of poorly examined consequences of actions by the international community. Prior to the creation of Israel in 1947, the area known as Palestine was part of the Ottoman Empire and divided between the Mutasarrifate of Jerusalem, the Syria Vilayet and the Beirut Vilayet. The population was mixed but was predominately made up of Sunni Muslims with smaller numbers of Druze Muslims, Circassians and Jews (mainly Sephardic). Since the Balfour Declaration which resulted in 750,000 Palestinians being removed from their homeland and essentially led to a Jewish homeland in Palestine,[603] there has been conflict which has become an almost constant thorn in the side of the UN Security Council. The USA has used its veto no less than 53 times since 1972.[604] The use of the veto has included failure to condemn illegal settlements in the West Bank, and even to stop the investigations into Palestinian deaths at the hands of Israeli forces. The failure of the

[603] Historycom Editors, 'Balfour Declaration' (*History*, 14 December 2017) <https://www.history.com/topics/middle-east/balfour-declaration> accessed 3 February 2022.

[604] C Newton, 'A History of the US blocking UN resolutions against Israel' (*Aljazeera*, 19 May 2021) <https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel> accessed 3 February 2022.

UN Security Council to address the conflicts have been highlighted by the conflict in 2021. The conflict in 2021 has been widely condemned as Israel targeted areas that were heavily populated, and many Palestinians including children have been killed. Despite this, the UN Security Council has failed to address a serious breach of international criminal law. Responding to the outcry by human rights NGOs and charities it was announced in March 2021 by Fatou Bensouda the then Prosecutor of the ICC, that a formal investigation was to be opened into the Situation in Palestine.[605] Why then is the court stepping in now after years of inaction and non-accountability? The head of Amnesty International's Centre for International Justice, Matthew Cannock welcomed what he described as a '*momentous breakthrough'*.[606] What is clear though is that the ICC are, it seems, prepared to act when it sees failure from the Security Council. Palestine has ratified the Rome Statute and it came into force on 1st April 2015 so it is likely any investigations would be limited in their scope to events after such date. Although Palestine did in fact affirm the declaration and acceptance of the exercise of jurisdiction by the court in respect to a crime in question at an earlier date, the Office of the Prosecutor deemed their acceptance to be invalid. Despite signing the Rome Statute, Israel has notified the UN Secretary General that it no longer intends on ratifying the treaty. So, the ICC is moving away from the Security Council rulings and choosing to investigate issues of criminality that would be outside of its scope.

It is interesting that three of the permanent five have not either signed or ratified the Rome Statute so as well as being able to veto any investigation that went against their interests in the Security Council, they also do not wish the ICC to be able to judge their actions in conflict.

While it would seem the only solution to the current inaction is the dissolution of the Security Council as it stands today and instead move to a majority voting system, this is likely to plunge the Security Council into periods of stalemate and inaction that would do little to help the situation. Perhaps the most effective solution would be to retain the current permanent members but remove their veto and

[605] Amnesty International UK, 'Israel / OPT: International Criminal Court will investigate 'war crimes' in Palestinian territories' (*Press Releases*, 3 March 2021) <https://www.amnesty.org.uk/press-releases/israel-opt-international-criminal-court-will-investigate-war-crimes-palestinian?utm_source=google&utm_medium=grant&utm_campaign=BRD_AWA_GEN_dynamic-search-ads&utm_content=> accessed 3 February 2022.
[606] Ibid.

move to a majority voting system with a number of nations sitting as non-permanent members (perhaps extending the number to 20 non-permanent members), as suggested by Kofi Annan, however instead of extending the permanent membership, ensuring that the permanent and non-permanent members all have an equal vote on matters before the Council. It would only be in the event of a tied vote that the votes of the permanent members would be used to decide the final outcome, with a majority vote by the permanent members solving the tie.

The current organisation of the UN and its Security Council seems to invite the growing trend in international relations towards the belief that the world lives in a constant state of anarchy with states struggling with a constant balancing act to ensure their own power while limiting the power of enemy states. Into this anarchic world step the realist philosophers.

The Model and Realism

In the anarchic world of a realist, there is only one inevitability, and that is war. To realists, therefore, all states should prepare for conflict by adequately arming themselves. The realist perspective comes from a Hobbesian approach to humanity, by believing that all human beings are inherently selfish creatures at their core. Realists believe that states and their leaders must act to protect their own best interests. The only major players for realists are the states themselves and the states must act rationally. The realist rationale does not have any moral leanings but instead believes that states have an order of preferences and choose the option that will provide them with the most utility. With no global government nor international police force, the states are constantly stuck in what has become known as the Security Dilemma. The security dilemma is where the heightened security measures of a state lead to heightened security measures of another state, in a spiral model with no state ever able to achieve absolute security. The realist philosophy highlights everything that the model is working to solve. However, in the end, it is working towards a common end goal, a more secure global environment under which all states can operate. The model aims to reduce conflict, however, by criminalising aggressive war and criminal behaviour during conflict. Realists, however, are able to justify the use of force and criminal behaviour during conflict as the state is able to use all means to strengthen its own position.

The model's main aim is to bring as many people as possible under the protection of international criminal law, but realism recognises that there is no global government or international police force under which the model can operate. However, there are instances through history where the realist political theory has been proven to be lacking. Realism by its nature is a pessimistic theory, which assumes like Hobbes had before it, humans will only ever act for their own benefit, but this has been disproven time and time again.

Realism was established as a reaction to the breakdown of the global order following World War One, rising to prominence after the collapse of the global order following World War Two. The Cold War helped realism to become the established political theory, this being especially true of the USA. Europe was still working to try and establish a more liberal approach to international political order through international cooperation and later the formation of the European Union. Realism, however, struggles to explain the end of the Cold War. In fact, it could be viewed as a fatal flaw of realist theory that the Cold War ended with almost no shots fired (at least by the main protagonists), the world did not descend into anarchy following the collapse of such a superpower. This view neglects to look at the global picture, where the end of the Cold War led to both Russia and USA being more secure without all-out war. However, the end of the Cold War did upset the balance of power in Eastern Europe and directly led to the Yugoslav Wars.

As this chapter has shown, on a surface level none of the theories have fully supported nor fully opposed the model, the same is true of realism. Realism is a theory that is incredibly state centric and following realist theory to its logical end the world will either be run by an all-powerful country or completely destroyed by war. The pessimistic nature of realism however means that if state A arms themselves against the perceived threat of state B then it is common sense for B to follow suit i.e. an arms race. A simplistic view may also lead states to believe that by arming themselves they will become the most powerful state, but this is not entirely true. Of the top ten states with the largest armies (based on personnel), only three or four of these states are seen as global superpowers.[607] Other states that have

[607] Army Technology, 'The world's biggest armies' (*Army Technology Analysis*, 13 June 2019) <https://www.army-technology.com/features/feature-the-worlds-biggest-armies/> accessed 3 February 2022.

large armies, for example North Korea and Iran, are seen as isolationist states with little to no seat at the global table. If the states are constantly seeking security, however large their armies are and whatever their available arms, they will still have vulnerabilities. The foreign policies of those states will always be to enhance security while handing over as little power as possible. This is why for the five permanent members of the Security Council this is the ultimate realist power play. They can dictate international relations for all states, and they can ensure that other states are not able to arm themselves. Realism is the predominant international political theory in America[608] and it is clear that it dominants their foreign policy. A realist foreign policy is one that places the national interest of a state and its security above any other ideology.

Realist theory creates a hierarchy of states, those that can afford to buy enough arms to arm themselves or are rich enough in resources, both natural and human, in order to build their own arms and those who are not. The permanent five members have ensured that they are untouchable. A realist approach supports a state's right to maintain their own security however they see fit but it also ensures that no state ever feels secure enough and thereby is constantly trying to arm itself with bigger and more powerful weapons. It is easy to understand, when using such an approach, what led countries in World War Two to use the atomic weapons as their use is wholly justifiable using realist theory.

What realism really struggles to understand is peaceful change, how world order can progress without the use of conflict. The model seeks to address peaceful change by giving non-state actors more power over the states and also managing their interstate relations. By creating a situation where states will be forced to justify not only their conduct during conflict but also what led them to conflict in the first place.

International law scholars since Plato have examined the '*Just War'* theory. Framing conflict in two distinct groups; wars that are morally acceptable and wars that are not. At the current time it is for the security council to make such a judgment call. War is what happens usually when every other eventuality has been exhausted and all peaceful options have been sought. For a realist however,

[608] WC Wohlforth, 'Realism and the End of the Cold War ' [1994] 19(3) International Security 91-129.

conflict is an inevitable consequence of disagreement or change of regime at international level. It does recognise international agreements but only in the context of extending or securing a state's own security and power. So, peace is a useful by-product but not an actual aim.

The thirst for power often leads to states feeling more and more insecure, hence many of the states with the largest armies are insular isolationist states who fear interactions at international level and live in constant worry of imminent war. This is a dangerous way to live and often leads to military escalations where there is no need for them. This supports realist theory of anarchy but is a somewhat of a self-perpetuating theory.

The model seeks to address the security dilemma through cooperation. It acknowledges that all states are seeking security for their citizens, but it balances the rights of the state to security with the rights of other states for equality of security. Instead of a hierarchy of states it seeks for all states to be equal at international level. For each seat at the table has equal footing. However, as the model is not a state centric one, it is instead focused on the people it can and should protect, through cooperation of multi-national corporations and also other non-state actors, including IGOs and NGOs. The model seeks compromise. It is clear that the only certainty following a realist approach, is that all roads will eventually lead to all-out war, the constant and very real threat of World War Three or worse total chemical or nuclear war, is too global a threat to ignore. That threat goes hand in hand with other global pressures, such as climate change, food insecurity, economic uncertainty and now the very real threat of global pandemics. The global community balances on a knife edge. None of these dangers can be tackled using a nationalistic, isolationist realist approach.

Realist theory does not support the model but that is because realism is an insular and inwards looking theory. It seeks to justify states actors and their actions through inevitability and the need to grasp as much power as each state can. The model, however, seeks to remove some power from the states by impartially looking at their actions both during conflict and also in times of peace and judging whether those states are justified using such methods against the backdrop of the well-developed doctrines of international criminal law.

It is perhaps obvious from earlier discussions that political realism is a hurdle for the model, due to the fact that it seems to go against rational foreign policy for many states. It could perhaps be argued that for smaller countries, with less sway on the international community that it is rational for them to in effect hand over some of their own national sovereignty as it does essentially bring them more power to do so. It would be naïve of the writer to apply an ethical judgment upon these smaller nations as more open to international criminal law due solely to this as it would remove the considerable benefits to the smaller nations of having the support of such a large organisation behind them. Conversely the opposite is true of the larger nations, it would be naïve and perhaps even a little perverse to judge that these larger nations are ethically inferior to the smaller nations because they refuse to enter into the court mechanism of international criminal law.

Stripping away the situation of these judgment calls, what remains true is that the rationale behind the nations joining the Rome Statute or accepting the jurisdiction of global organisations is the same, the promotion of national power. How then can countries that currently enjoy high levels of power be persuaded to handover some of their power in order to level the playing field?

While political realism does look at the rationale behind foreign policy of individual countries it does not do so in a vacuum it recognises that these policies do not operate without considerable pressures from both within their own states but also from outside and under the constant threat of large-scale violence. Looking back again then it is clear that, the smaller countries are fully aware of that and are constantly balancing their own isolationist non-antagonising stance with their need to foster relations with countries that could act as protection should global conflict break out. Larger states, balance their need to protect their own interests, building up its own defences, against a policy of isolationism. Perhaps the best example of these opposing policies in action is again that of Israel and the USA. Israel is completely aware of its size and political position globally; its main foreign policy is the fostering of a strong relationship with the USA. Israel realised early into the establishment of the ICC that it would not be in its own interests to join the Rome Statute. This is partly due to the fact that it was and still is, clear that international criminal law was and remains, to seek to extend its power especially over the instances of aggression. Israeli policy of forcible removing native Palestinians from their homes and

the insertion of Israeli families has been cited as ethnic cleansing and on a par of the practise of Stalin and the forced movement of people between 1930 and 1952. Israel has continued its policy of ethnic cleansing since 1948 with little or no interjection from the United Nations due to its relationship with the USA. Benjamin Netanyahu, Israel's present Prime Minister, in power since 1996 has been under an almost constant shadow of corruption. In a recent article in the Guardian, he was described as embodying a '*dishonest, divisive, demagogic ethno-nationalism*'[609] that was echoed around the world by isolationist leaders such as the USA's Donald Trump and Hungary's Victor Orban. The article goes further to say that Neanyahu's government '*showed a contempt for democratic norms, for any restraint on executive power and for truth. It denigrated critics, promoted hacks, thugs and cronies, and was corrupt in its bones'*.[610] It is difficult then to not insert judgment on their actions from a purely ethical stance. While political realism places the model in danger due to the clear overreaching nature of national foreign policy, it is perhaps even more foolish to assume that in any instance of international criminal law, or in fact any law in which there is a '*victim*', that an ethical judgment on the behaviour should not be made. A foreign policy that systematically inflicts constant harm and uncountable deaths upon another state or group of people cannot under any rationale been judged as a reasonable foreign policy. Morganthau did attempt to ground political realism with the use of moral laws that he believes govern the universe, but he pulls back from this by basing his theory firmly in the defined terms of power, removing he says the '*moral excess and that political folly'*.[611]

If, as Morganthau argued, society is to be governed by objective laws that are rooted in human nature, the traits that are fundamental to humankind, it is only by understanding these basic traits and how they benefit society, that realism must assess the balancing act that international criminal law has to complete. It must do so, objectively without the bias caused by emotions. Morganthau wanted to look at all nations as individuals, judging each pursuing their own interests, defined only in terms of power.

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[609] J Freedland, 'Netanyahu embodied dishonest, divisive demagoguery If he's gone, good riddance' (*The Guardian Newspaper*, 4 June 2021) <https://www.theguardian.com/commentisfree/2021/jun/04/netanyahu-exit-israel-problems-coalition-prime-minister> accessed 3 February 2022.
[610] Ibid.
[611] HJ Morganthau, Politics Among Nations: The Struggle for Power and Peace (5th edn, Alfred A Knopf 1978) 4-15.

With all due respect to Morganthau, this is where his theory falls down, international policy cannot be defined only in the terms of power but instead should be defined in terms of justice. This is the only effective way in which to evaluate a nations foreign policy, both in terms of promotion of peace and in terms of conflict management and resolution. No legal theory can be devoid of moral or ethical judgment. As all law is political in its nature it means that any political theory must at least address the issue of the moral or ethical nature of its decision-making process.

The model would fail using Morganthau's theory as no country would rationally invoke foreign policy that may affect their power negatively. The theory does actually elegantly explain why political decisions are made and how they are based, however, it does not allow for instances such as that of the World War Two and the holocaust. While justifying the decisions of the Allied government it offers no protection at all for those most in danger. No judgment is made on the German Third Reich and their policies, as it is a rational foreign policy in order to promote their own power.

Realism does not support the model but a more recent development in political theory, constructivism, might. This looks not only at the how but also the why of the development of state affairs and international relations. It argues that while anarchy does exist it does not create an unavoidable deterministic impact on the behaviour of states. It also recognises the important role played by human actors and their changing norms and behaviours. It is especially important to the model to recognise the role of human rights and how this has influenced international criminal legal theory in the past seventy years.

Equality and Human Rights

The Declaration of Human Rights that was proclaimed by the United Nations General Assembly on 10th December 1948 set out the standards by which every human should expect to live. It set out certain inalienable rights and compelled states to have a positive duty to protect such rights. However, some seventy years after its proclamation many still do not enjoy the basic freedoms set out within it.

Until the end of the Cold War, realism and liberalism were able to explain international relations and argue against a more co-operative international legal theory but with its end the theories began to faulter.

Into the vacuum this left stepped constructivism, a theory that argues that international relations are constantly being shaped and re-shaped by influential human actors and it is through their actions and interactions that global policy is formulated[612]. As the name would suggest constructivism believes that the world is socially constructed. This means that any powerful actor, be it an influential citizen or a powerful leader can shape the international landscape. It also means that groups of people can engineer social change.

In his work 'Anarchy is what states make of it: the social construction of power politics',[613] political scientist Alexander Wendt (Born 1958)[614] questions whether the absence of a centralised political authority actually forces states to play a game of power politics.[615] In a somewhat scathing critique of realism and liberalism both traditional and neo versions of each theory, he argues that the starting point of each theory i.e. that of essentially a '*self-help system*', is fundamentally flawed. This self-help system supports neorealism by creating an inherently competitive dynamic of the security dilemma and the collective action problem.[616] This self-help system is then elevated to a level upon which it stands unaffected by any state interactions. Wendt argues further that by conceding to neorealism the existence of the '*self-help system'* neoliberalists are able to use the argument to instead claim that '*the process can generate cooperative behaviour'*.[617] In this context the process is the interaction and leanings of a state, while the structure is the anarchy and the distribution of power within a state. Liberalism relies heavily on the process, while realism relies on structure.

While some liberals argue for the changing nature of the states and their interest and the changing nature of world politics, it is the changing nature of both process and structure that trip up liberals and realists alike. In order for a state to change identity it must also change its structure; one cannot occur without the other and neither theory allows for both such changes to occur. Constructivists argue rather than

[612] S Theys, Constructivism. in McGlinchey and others (eds), International Relations Theory (E-International Relations Publishing 2017) 36.
[613] A Wendt, 'Anarchy is What States make of it: The Social construction of Power Politics ' [1992] 46(2) International Organization 391-425.
[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Ibid.

power politics being a causal result of anarchy, anarchy in fact creates no inevitable result. Instead, Wendt argues '*Anarchy is what states make of it'*.[618] Anarchy does not dictate how countries will interact, whether a state will view another state's actions as antagonistic or whether they will respect the sovereignty of another state. These factors are all social constructs, that are dictated by individual actors and their influence on policy. For example, if the United Kingdom ceases to view the Taliban as enemies of the country, then their rise to power in Afghanistan is no longer a political and military headache to the government. However, this is where the pillars on which the model are built come into play. While countries allegiances and alliances may change and ebb and flow there are certain unalienable pillars upon which international criminal law must stand. Social actors may change, and opinions may differ on specifics, but broad principles remain in place. At least that would be the case if the global community were concerned with justice rather than wealth-building.

Looking again at the example of Afghanistan. If the model were applied, the removal of the rights of women and children would leave them vulnerable to a number of offences under the banner of international criminal law, as this infringes upon a number of unalienable rights under the International Charter of Human Rights it goes against the pillar of justice that all citizens are treated equally. It could, therefore, be argued that it would be justifiable to apply restrictions on trade, sanctions on offices of the government or even to go to war to ensure these groups are protected. Why then is this not considered with other countries where the same rights are being infringed? It is the choice of the actors involved to view these factors as aggravating factors.

When the September 11th attacks occurred on the World Trade Centre towers in 2001, it was quickly established who was responsible and where the perpetrators were from. However, within hours of the attack, the US government was looking for links to Iraq, to give them reason to launch attacks against both Bin Laden and Saddam Hussein. This reaction to such a terrible situation shows again that war is not an inevitability so much as state actors are looking for justification to advance their own agendas. No evidence was found that Saddam Hussein was involved in the 9/11 attacks. Yet despite the lack of

[618] Ibid.

evidence and also of international agreement, the USA, the UK, Australia, and Poland went to war in Iraq on 20th March 2003 using the justification of the war on terror and alleged evidence of links between Saddam Hussein and Al Qaeda and stockpiles of weapons of mass destruction. No evidence of any such links or stockpiles were ever found. However, the ramifications of the decision to go to war have been long reaching and costly. In contrast, there would appear to be evidence that Saudi Arabia played at least some role in the September 11th attacks[619] the USA continue to sell a large number of weapons to the Saudi government, which suggests that their foreign policies which appear to be motivated by 9/11 are at least in part motivated for other reasons.

The global political landscape plays such a pivotal role in international criminal law. It is very easy to see why it took until 2002 for any type of global court to be set up and from chapter four it is clear that this was set up to ensure the least antagonistic form possible. It is also clear from earlier discussions that whatever philosophical argument is supported, whether it be positivism or realism, natural law or constructivism, there are gaps that confound even the widest ranging of systems. In short, if countries wish there to be less conflict, they must begin with their own foreign policy, rather than seeking regime change and disarming of other countries the focus must be on their own country's reaction to all perceived threats.

The model seeks to apply international criminal law to all states equally but that implies that all states are equal and that all states have the same interests. This is, of course, not true. A large state does not focus on survival like a small state might, it focuses on dominating on the global stage. This is why the permanent seats at the Security Council have caused such imbalance, they do not recognise the rise and fall of influential states. The permanent seats recognise the world as it stood in 1945, not as it stands now in 2021.

The ICC and ad hoc tribunals can remain as they are, or move to be, more of a hierarchical system as the model suggested provides for, but it will remain subject to the same influences as are currently

[619] J Borger, 'FBI offer to release some Saudi files not enough, 9/11 families say' (*The Guardian Newspaper*, 10 August 2021) <https://www.theguardian.com/us-news/2021/aug/10/fbi-offer-documents-families-9-11-saudi-arabia> accessed 3 February 2022.

impeding its working environment. However, it is the current system's inability to police and prevent genocide that runs the largest risk to global peace.

Genocide Court

In chapter four of this thesis the crime of genocide was discussed in relation to the creation of the ICC and how during the discussions into the writing of the Rome Statute the specific nature of the crime of genocide was discussed. In this part of the chapter the writer wishes to highlight and forward the argument for the need for a specific genocide court.

Since 1948 and the signing of the Convention on the Prevention and Punishment of Genocide there have been three documented and legally recognised genocides. These genocides occurred in Cambodia (1975), Bosnia (1992) and Rwanda (1994), and each have attracted individual ad hoc tribunals that have exercised jurisdiction over them.[620] On top of the millions killed, many others have been affected through torture, rape or enforced movement. The effects can be felt by nations for generations and leave lasting scars. However, a number of disputed genocides have occurred that have not been legally recognised by a Court and in fact it can be argued that currently in September 2021 there are at least five instances of genocide occurring; the Rohingya in Myanmar, the Nuer and other ethnic groups in South Sudan, Christians and Yazidis in Iraq and Syria, Christians and Muslims in the Central Africa Republic and the Darfuris in Sudan.[621] Currently however, the ICC is only investigating alleged genocide in Darfur, Sudan although investigations into other crimes continue in Central African Republic and Myanmar.[622]

The aim of the model as discussed is to try and bring as many countries as possible under the jurisdiction of international criminal law, with a sufficient judicial mechanism to try cases, especially those of the gravest nature. At the moment, a criticism of the ICC is that it focuses on Africa while ignoring

[620] J Lindert and others, 'The long-term health consequences of genocide: developing GESQUQ - a genocide studies checklist' [2019] 13(14) Conflict and Health.
[621] M Kranz, '5 genocides that are still going on today' (*Insider*, 22 November 2017) <https://www.businessinsider.com/genocides-still-going-on-today-bosnia-2017-11?r=US&IR=T> accessed 3 February 2022.
[622] International Criminal Court , 'Situations under investigation' (*International Criminal Court* , Unknown) <https://www.icc-cpi.int/pages/situation.aspx> accessed 3 February 2022.

situations in other areas of the world. This is clearly demonstrated by the current investigations taking place in the ICC.

The nature of the crime of genocide is that it destroys whole communities. The lasting effects of the German genocide of the Jews is still felt more than seventy years later, in Cambodia, Bosnia and Rwanda populations are still devastated by not only the loss of life but also the permanent physical and mental health impacts. A number of studies have looked at the impact of genocide on the populations affected, but it is the genocide convention itself that addresses most succinctly the reasons that genocide is a stand-alone crime and why it *always* requires prosecution by a court. The convention describes genocide as an '*odious scourge'* that has '*inflicted great losses on humanity'*.[623] It further confirms that the contracting parties are bound by international law to undertake to prevent and to punish instances of genocide. Thus, it implies the responsibility of the contracting parties to do everything in their power to ensure firstly, that genocides do not happen and secondly, if they do, to punish them, which would suggest that there is a duty to investigate all instances of suspected genocide. All of the permanent five members of the Security Council have ratified the Convention and thus are in direct contravention of their duty when using their veto in instances where genocide is suspected.[624] While the other crimes that make up the key offences of Crimes of War are specifically made up of crimes that members have the duty to punish, genocide implicitly states that the parties have a duty to prevent genocides, meaning they must take affirmative action when a genocide is suspected. At the very least this implies that a swift investigation into the conduct of the suspected parties is instigated and as there is a positive duty to prevent this could also imply that action should be taken against the offending party.

Responsibility to Protect

So far, the key features of the model have been to step into the gap left when the permanent five members of the Security Council use their vetoes. However, since the 1990s there has been a new concept in international criminal law and that is the responsibility to protect, hereafter known as R2P.

[623] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[624] Prevent Genocide International, '50 Nations which are not party to the Genocide Convention' (*Prevent Genocide International*, 14 June 2005) <http://www.preventgenocide.org/law/gencon/nonparties-alpha.htm> accessed 3 February 2022.

The genocides in both Rwanda and Bosnia led to serious international debate about how the international community could effectively react in instances where rights were being systematically violated. Heeding the earlier debate in this chapter as to the limitations of sovereignty the doctrine of R2P looked at whether a nation had unconditional sovereignty when large scale abuses were occurring within their borders, or whether the international community had a duty to intervene.

While recognising that a state had the right to control its own dealings, it also conferred upon it the duty to protect its citizens. The doctrine proposed that when a state failed in its duty to protect, the rest of the international community must intervene to ensure that the citizens were protected. In 2004 the Report of the High-level Panel on Threats, Challenges and Change[625] endorsed R2P and stated

> 'We endorse the merging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violation of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent'.[626]

Unfortunately, by making the deciding factor of invention the Security Council, the United Nations have once again missed an opportunity to push international criminal law to the forefront. While R2P has been used to justify intervention in Yeman, Syria and Central African Republic and other areas respectively, there is absolutely no reason to believe that these situations would have been handled any differently should the doctrine of R2P not have existed. While the doctrine adds an additional arm to those attempting to promote the responsibility of the global community to prevent conflict, it fails for the same reason as the existing mechanism. Failure to remove the permanent five members of the Security Council will continue to inhibit the functionality of international criminal law for years to come and until the veto power is fully removed the permanent five will continue to manipulate the global community and many more citizens will suffer.

[625] UNGA 'Note by the Secretary-General' (2 December 2004) UN Doc A/59/565.
[626] Ibid.

Chapter Six Conclusion

The aim of this thesis was to critical appraise the existing mechanisms available to victims under the umbrella of international criminal law and develop a model that could be used to ensure that as many people as possible by brought under the protection of the law. To do this, firstly the key features of legitimacy were identified for each of the prominent legal theories, this confirmed that while there were common threads through each of the theories, no one individual element legitimised the law. Instead, a number of factors were involved in making a legitimate law and more importantly to international criminal law, none of the factors should be taken in isolation to legitimise a law. Instead, the canon of the law should be examined alongside how states work within their own borders, under the guise of sovereignty and how they work together or against other states, through foreign policy. It is only when examining the concept of sovereignty and balancing it against a just foreign policy that international criminal law can be legitimised.

This can clearly be seen when examining the history of war crime trials, where it is not the formation or codification that pushes the development but rather a clear will from those who wield the most power to punish a perceived offence. It is also clear that while there remains little desire within these states to look at their own actions little will be done to legitimise international criminal law further. The thesis began with the lofty idea of bringing the umbrella protection of international criminal law to all the world's citizens but the stumbling blocks before it are fatal. It is likely it will unfortunately, take another episode of mass atrocity that affects the world's most powerful in order that those in power are willing to submit their sovereignty to the court, be it the ICC or the genocide court suggested in the model.

As became clear during the research on the development of the Crimes of War doctrine and the formation of the ad hoc tribunals and the ICC, these developments were only allowed to happen when there was a clear will of the Security Council's permanent five to allow such developments and within very limited parameters. The permanent five stand in judgment on the rest of the world, judging when and if any matter will be investigated and even though the ICC is currently pushing back to try and investigate more fully all aspects of criminality within its scope and jurisdiction, it is clear that any

developments will be closely managed by the permanent five who are unlikely to be hoodwinked into handing over more power than they are willing to part with.

It became clear throughout the writing of this thesis that there is no '*one size fits all*' solution to the problem of criminality at international level. The solutions that work at national level do not easily translate to the international stage, in some cases due to the lack of international agreement as to what form the mechanism should take, but in other cases due to the lack of interest of international players to be effectively policed as it would negatively affect their own interests.

From the outset the thesis aimed to formulate a workable model that could be used to bring effective judicial relief to those most effected by criminal conduct during conflict, but it struggled to overcome the problem of the permanent members of the Security Council being essentially above the law. Despite mechanisms in place to prevent this, the permanent five have used their vetoes so often to forward their own interests, the protection mechanism within the UN articles are effectively useless. The Security Council is a constant thorn in the side of international criminal law scholars it flies in the face of logic by allowing its permanent members to almost work against its main objective of promoting and maintaining peace. It has failed to address many episodes of criminality at international level and instead is completely reliant upon the extending jurisdiction of the international criminal court, which in turn may damage the future of the court by leaving it open to accusations of abuse of jurisdiction.

The legitimacy of the system lies as much in the collective recognition of the mechanism as any of the legal and political theories that academics and theorists have put forward over hundreds of years of debate and writings. There is no theory that can legitimise every aspect of international criminal law, not least because there are human aspects to every theory. While there are best practices through which laws should be sought to be codified, laws are often reactionary, and though not implicitly codified against there are offences that clearly breach the moral conduct between humans. Law at international level must have a moral leaning in order to prevent these offences going unpunished. Without such moral judgments the international community cannot function and would indeed descend into anarchy.

Constructivism lends itself well to supporting the current developments in international criminal law by encompassing the expansion of the doctrine of human rights but in isolation it is not able to bring legitimacy to every law within it as the theory leans too far into the political and away from the legal. Ultimately, it would seem logical that legitimacy comes from recognition. If a law is recognised and observed by the majority, can it then be seen as legitimate? Are the crimes of war so universally obvious that there is no need to find legitimisation elsewhere, in their codification or the mechanism by which they are tried? Or does this approach allow for too wide a scope to be applied to international criminal law?

When all is said and done, there is no way of avoiding all future criminality nor is there a way to ensure that every single offence is tried before a just and fair court. Justice will never be done for every single victim of criminality during conflict, but the trend must bend towards ensuring that no one state, or party is above the law to such an extent that their behaviour is not judged equally against that of their enemy. Martin Luther King Jr once said, '*The moral arc of the universe is long and it bends towards justice*'[627] and the most important idea this thesis has made clear is that despite all the debate regarding legitimacy and codification the most important thing is that those most affected by crimes of war are able to receive justice. The world must push itself towards ensuring that justice is not only done but is seen to be done for as many people as possible. Only then will international criminal law find the legitimacy it is searching for.

[627] Smithsonian Institute, 'Dr Martin Luther King Jr' (*Dr Martin Luther King Jr*, Unknown) <https://www.si.edu/spotlight/mlk?page=4&iframe=true#:~:text=We%20shall%20overcome%20because%20the,Cathedral%2C%20March%2031%2C%201968.> accessed 3 February 2022.

Appendices

1. Appendix One
2. Appendix Two
3. Appendix Three
4. Appendix Four

Appendix One

TREATY OF PEACE WITH GERMANY

(TREATY OF VERSAILLES)

Treaty and protocol signed at Versailles June 28 1919; protocol signed by Germany in Paris January 10, 1920

PART ONE – THE COVENANT OF THE LEAGUE OF NATIONS

The High Contracting Parties,

In order to promote international co-operation and to achieve international peace and security

By the acceptance of obligations not to resort to war

By the prescription of open, just and honourable relations between nations,

By the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and

By the maintenance of justice and a scrupulous respect for all treat obligations in the dealing of organised peoples with one another,

Agree to this Covenant of the League of Nations

Article 1

The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a Declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

…

PART VII – REPARATION

SECTION 1 – GENERAL PROVISIONS

Article 231

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and

their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

Article 232

The Allied and Associated Governments recognize that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparations for all such loss and damage.

The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex 1 hereto.

In accordance with Germany's pledges, already given, as to complete restoration for Belgium, Germany undertakes, in addition to the compensation for damage elsewhere in this Part provided for, as a consequence of the violation of the Treaty of 1839, to make reimbursement of all sums which Belgium has borrowed from the Allied and Associated Governments up to November 11, 1918, together with interest at the rate of five per cent. (5%) per annum on such sums. This amount shall be determined by the Reparation Commission, and the German Government undertakes thereupon forthwith to make a special issue of bearer bonds to an equivalent amount payable in marks gold, on May 1, 1926, or, at the option of the German Government, on the 1st of May in any year up to 1926. Subject to the foregoing, the form of such bonds shall be determined by the Reparation Commission. Such bonds shall be handed over to the Reparation Commission, which has authority to take and acknowledge receipt thereof on behalf of Belgium.

Appendix Two

United States Holocaust Memorial Museum, 'German Territorial Losses, Treaty of Versailles 1919' (*Holocaust Encyclopaedia* , Unknown) <https://encyclopedia.ushmm.org/content/en/map/german-territorial-losses-treaty-of-versailles-1919> accessed 3 February 2022.

Appendix Three

The Facts of The Nottebohm Case

Application instituting proceedings – 17 December 1951

Oral Proceedings – Sitting held on November 10 and 18th 1953 & February 10th to 24th, March 2nd to 8th and April 6th 1955.

Facts of the Case

Friedrich Nottebohm was a German national born in Hamburg, Germany on 16 September 1881. In 1906[628] he moved to Guatemala where, together with his brothers, he began multiple businesses dealing with amongst other things banking and trade. These businesses were very successful and by 1937 Nottebohm was appointed to head the company.

During his residency in Guatemala Nottebohm did not acquire Guatemalan citizenship. In the early 1930s his brother moved to Liechtenstein and became a citizen. Friedrich would travel from Guatemala to both Liechtenstein to visit his brother and Germany to visit other relatives and friends.

In 1939 Friedrich again visited Liechtenstein and applied for citizenship, in doing so he had to forfeit his German citizenship[629], his application was approved, and he became a citizen of Liechtenstein on the 13th of October 1939[630]. In January 1940, he returned to Liechtenstein and notified the local government of his change of nationality[631]. On the 5th February 1940, he was duly registered as a Liechtenstein citizen by the Guatemalan government.

On the outbreak of war in Europe Guatemala had declared itself as neutral but on the 11th of December 1941 Guatemala formerly declared war on Germany. Alongside other Latin American countries and the USA, Guatemala began a huge programme to round up German citizens and those with German ancestry. Despite Nottebohm's change in nationality at the beginning of the conflict Guatemala treated

[628] *Nottebohm Case* (Liechtenstein v Guatemala([1955] ICJ 1.
[629] Ibid.
[630] Ibid.
[631] Ibid.

him as a German citizen, and on the 20th of November 1943 he was arrested. The next day he was handed over the Americans who placed him on board an American vessel to the United States and then into an internment camp where he remained until 1946.

Shortly after his internment began, the Guatemalan authorities confiscated all of the property of Mr Nottebohm. They justified this behaviour by stating that Mr Nottebohm had been placed on a black list by the British and American governments. It was noted in the annex to application that a report by the Civil Attaché of the British Legations in Central America dated 7 March 1944 stated that

> 'As a result of the investigations, I was satisfied that the charges made against Nottebohm Hernanos, which resulted in its being placed on the Statutory List in 1939, were based on erroneous evidence or confused statements given in good faith. At the same time, I conducted an investigation into the life of the partners, Frederic Nottebohm and Karl Heinz Nottebohm, and came to the conclusion that neither had aided the Nazis in a business or private capacity. From the investigations and from personal knowledge of the partners, I am of opinion that they should be considered Nazi Sympathizers'[632]

On the 26th of January 1946 the Guatemalan Foreign Ministry notified Friedrich Nottebohm's legal team that his registration as a Liechtenstein was cancelled. During the time since his arrest in 1943 to 1947 Nottebohm has been deprived of his property.

Liechtenstein's case rested on the assertion that Guatemala had acted in a way contrary to international law in the way they had treated Nottebohm as a Liechtenstein citizen.

Guatemala objected to the Court's jurisdiction. This objection was overruled in a judgment made on the 18th of November 1953.

In a second judgment laid down on the 6th of April 1955 the Court held that Liechtenstein's claim was 'inadmissable on grounds relating to Mr Nottebohm's nationality'[633].

The court held that 'it was the bond of nationality between a State and an individual which alone conferred upon the State the right to put forward an international claim on his behalf'[634]. It was also held that the recognition of nationality by other States would only be granted if it represents 'a

[632] Ibid.
[633] Ibid.
[634] Ibid.

genuine nationality'[635]. In this case it was found that Mr Nottebohm did not have a genuine link with Liechtenstein and his only objective was to acquire citizenship of a neutral state upon the outbreak of war.

[635] Ibid.

Appendix Four

Current Peace Keeping Missions up to 28th February 2021 information taken from United Nations, 'Troop and Police Contributors' (*United Nations Peacekeeping*, November 2021) <https://peacekeeping.un.org/en/troop-and-police-contributors> accessed 3 February 2022

Mission: UNMISS – United Nations Mission in South Sudan

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	14,263	0	0	1031	0	0
Individual Police	472	0	0	2	0	8
FPU	1,145	0	0	0	0	0
Staff Officers	396	5	6	24	0	2
Experts on Mission	209	0	0	5	0	2
Total	16,485	5	6	1,060	0	12

Mission: MINUSMA – United Nations Multidimensional Integrated Stabilization Mission in Mali

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	12,499	250	0	413	0	0
Individual Police	305	0	0	0	15	0

FPU	1,455	0	0	0	0	0
Staff Officers	515	6	8	16	23	0
Experts on Mission	3	0	0	0	0	0
Total	14,777	256	8	429	38	0

Mission: MONUSCO – United Nations Organisational Mission in the Democratic Republic of the Congo

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	12,069	0	0	218	0	0
Individual Police	372	0	0	0	0	3
FPU	1,076	0	0	0	0	0
Staff Officers	314	3	3	8	4	3
Experts on Mission	158	0	0	7	0	4
Total	13,989	3	3	233	4	10

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Mission: MINUSCA – United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	11,221	0	0	0	0	0
Individual Police	387	0	0	0	6	0
FPU	1,672	0	0	0	0	0
Staff Officers	295	0	8	8	7	10
Experts on Mission	138	0	0	0	0	3
Total	13,713	0	8	8	13	13

Mission: UNAMID – United Nations Mission in Darfur

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	3,781	0	0	318	0	0
Individual Police	44	0	0	0	0	0
FPU	1,096	0	0	0	0	0

Staff Officers	66	0	0	0	0	0
Experts on Mission	12	0	0	0	0	0
Total	4,999	0	0	318	0	0

Mission: UNISFA – United Nations Interim Security Force in Abyei

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	3,164	0	0	0	0	0
Individual Police	45	0	0	0	0	2
FPU	0	0	0	0	0	0
Staff Officers	124	0	0	0	0	0
Experts on Mission	129	0	0	0	0	0
Total	3462	0	0	0	0	2

Mission: UNDOF – United Nations Disengagement Observer Force

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	1,039	0	0	0	0	0
Individual Police	0	0	0	0	0	0
FPU	0	0	0	0	0	0
Staff Officers	54	0	0	0	0	0
Experts on Mission	0	0	0	0	0	0
Total	1,093	0	0	0	0	0

Mission: UNFICYP – United Nations Peacekeeping Force in Cyprus

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	731	233	0	0	0	0
Individual Police	62	0	0	5	0	4
FPU	0	0	0	0	0	0
Staff Officers	53	11	0	0	0	4

Experts on Mission	0	0	0	0	0	0
Total	846	244	0	5	0	8

Mission: MINURSO – United Nations Mission for the Referendum in Western Sahara

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	30	0	0	0	0	0
Individual Police	0	0	0	0	0	0
FPU	0	0	0	0	0	0
Staff Officers	7	0	0	0	0	0
Experts on Mission	197	0	0	11	2	11
Total	234	0	0	11	2	11

Mission: UNTSO – United Nations Truce Supervision Organisation

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	0	0	0	0	0	0
Individual Police	0	0	0	0	0	0
FPU	0	0	0	0	0	0
Staff Officers	0	0	0	0	0	0
Experts on Mission	159	0	3	7	0	5
Total	159	0	3	7	0	5

Mission: UNMOGIP – United Nations Military Observer Group in India and Pakistan

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	0	0	0	0	0	0
Individual Police	0	0	0	0	0	0
FPU	0	0	0	0	0	0
Staff Officers	0	0	0	0	0	0

Experts on Mission	42	0	0	0	0	0
Total	42	0	0	0	0	0

Mission: UNMIK – United Nations Interim Administration Mission in Kosovo

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	0	0	0	0	0	0
Individual Police	0	0	0	0	0	0
FPU	0	0	0	0	0	0
Staff Officers	0	0	0	0	0	0
Experts on Mission	9	0	0	0	0	0
Total	9	0	0	0	0	0

Mission: UNIFIL – United Nations Interim Force In Lebanon

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	9,777	0	0	0	821	0
Individual Police	0	0	0	0	0	0
FPU	0	0	0	0	0	0
Staff Officers	204	0	0	0	14	0
Experts on Mission	0	0	0	0	0	0
Total	9,981	0	0	0	835	0

Mission: ALL CURRENT PEACEKEEPING MISSIONS

Personnel	Total Number	UK	USA	CHINA	FRANCE	RUSSIA
Troops	68,574	485	0	1,980	821	0
Individual Police	1,625	0	0	7	21	17
FPU	6,444	0	0	0	0	0
Staff Officers	1,824	25	25	56	48	19

Experts on Mission	1,056	0	3	30	2	25
Total	79,523	508	28	2,073	892	61

A further 1,251 personnel are currently on other missions with the United Nations, 17 of whom come from the Permanent Member States of the Security Council.

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