How Adequate have War Crimes Trials been in Providing a Legitimate Response to Mass Atrocities, Concentrating on Charges of Genocide, Crimes Against Humanity and War Crimes?

by

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Abstract

This thesis analyses the issues surrounding legitimacy of War Crimes Trials, in relation to the substantive laws applied at the Trials, such as, Genocide, Crimes against Humanity and War Crimes. In addition, this thesis will provide an analysis of the trial processes in the aftermath of the Second World War.

The historical period for this analysis includes the attempted international war crimes trials and Allied Powers debates in the wake of the First World War. Attempts were made to secure punishment of the Axis Powers for waging an aggressive war and war crimes. In addition to this, potential war crimes trials were discussed in relation to the Turkish Government for the Armenian Massacres carried out prior to and during the First World War. Following the timeline, this thesis also seeks to address the International War Crimes Trials held in the aftermath of the Second World War in Nuremberg and Tokyo, developing the body of international criminal law, and addressing the legal issues that were raised during these trials. This enables the analysis to determine whether the War Crimes Trials were legitimate to their aims.

The methodological framework to be deployed throughout this thesis involves taking both a realist and a liberal cosmopolitan approach. Both theories are often opposing, however, can aid further understanding of the creation and development of the substantive laws and the war crimes trials process. By deploying both theories for this analysis, some of the pitfalls of taking an either / or approach can be avoided.

This thesis opens with an introduction that sets out its main aims and objectives. This chapter is followed by the methodology chapter, this sets out the methodology to be applied throughout the thesis.

The thesis then moves onto to its supporting legal developments chapter, in which the relevant legal instruments in existence at the outbreak of the First World War are set out. Further to this, the Leipzig and Constantinople chapters analyses the attempted War Crimes Trials in the aftermath of the First World War, deploying the realist and liberal cosmopolitan framework.

The succeeding chapter goes on to set out the developments in the law relating to War Crimes Trials after the First World War; this allows for the effective analysis of the Nuremberg International Military Tribunal and the International Military Tribunal chapters.

This thesis concludes with a critical reflection drawn from the analysis of the applied methodology, highlighting the recent developments in the substantive laws surrounding War Crimes Trials.

Contents

Chapter 1. Introduction.

In order to analyse the legitimacy of War Crimes Trials, and the developed substantive laws of War of Aggression, Genocide, Crimes against Humanity and War Crimes, this thesis begins with a discussion surrounding the attempted International War Crimes Trials in the aftermath of the First World War. Following the historical timeline, the discussion will then move onto the International War Crimes Trials carried out after the Second World War. The main focus on each chapter will be the substantive laws that were developed and created, and, in terms of the Second World War, the International War Crimes Trials processes and procedures. This aims to highlight whether the aims of carrying out such trials were legitimate to the Allied Powers goals.

The Two World Wars saw the unprecedented atrocities of loss of life and property. Modern technologies in fighting wars were being created throughout the world, resulting in widespread devasting destruction, including the Submarine warfare, indiscriminate bombings, the use of biochemical and bacterial agents and atomic bombs were just some of warfare used throughout both World Wars.[1] The Armenian massacres in the First World War and the Holocaust in the Second World War were government policies that were created to execute those nations' own citizens, causing widespread outrage amongst the Allied Powers and the public.

[1] Bassiouni, MC. *World War I: The War to end all Wars and the Birth of a Handicapped International Criminal Justice System,* 30 Denv. Journal of International Law and Policy, 244. Page 246.

Debates between the Allied Powers for the international criminal jurisdiction for the devastating consequences of the wars were starting to take root among the Allies in the aftermath of the First World War. For the first time in history, the challenge of bringing the perpetrators of the war and its ensuing atrocity crimes before an international criminal court started to enter debates. However, these attempts were not without their problems, the legislation in place at the time did not extend to the atrocity crimes committed, often being so horrific, that the law simply could not take these actions into account at the time of its creation.

In 1919, debates regarding holding international war crimes trials started among the Allied Powers. This is an important development in the history of War Crimes Trials. The Commission on Responsibility of the Authors of the War was the first investigative commission of its kind. Lengthy debates took place between the Allied Powers, often involving much disagreement.[2] The Commission then published its findings, with dissents from the US and Japanese Powers. The Commission Report resulted in the Treaty of Versailles between the Allied Powers and Germany. The Treaty of Versailles contained several clauses to establish a War Crimes Trial, outlining the charges that would be brought against the German Kaiser Wilhelm and other significant contributors to the waging of aggressive war and war crimes. However, the proposed international War Crimes Trials did not take place due to several contributing factors, in which this thesis seeks to analyse.

[2] Willis J. *Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War,* first edition, Greenwood Press 1982, page 69.

It had become evident to the Allies during the First World War, that Turkey, who entered the war on the side of the Axis Powers had begun a policy of massacring their Armenian population. Causing widespread outrage among the Allies and the public, the Allies attempted to secure international War Crimes Trials for the main perpetrators of the massacres. Several issues arose from this situation, there was much disagreement over the existing laws and whether this would cover these atrocity crimes. Debates also took place as to whether the Allies could attempt to bring justice to the Turkish government for these crimes, as they were against their own nationals[3]. The laws in place only covered wartime crimes committed against nationals of opposing states in the war.

In 1945, the Allied Powers established the Nuremberg International Military Tribunal to try some of the leading members of the German Nazi Party for waging an aggressive war, crimes against humanity and war crimes. Presenting a commitment on behalf of the international community to bring perpetrators to justice for war crimes and crimes against humanity.

The Trial was negotiated at the London Conference of 1945, This Conference created the Nuremberg International Military Trial. The Trial provided the keystone for the modern development of international criminal law and War Crimes Trials.

This thesis aims to analyse the issues surrounding the legitimacy of War Crimes Trials, with particular focus on the substantive laws developed. The application of the methodology seeks to provide further clarification and understanding of the issues raised within each trial. This thesis will apply two, often opposing methodologies of realism, and liberal cosmopolitanism.

[3] Debated in the Commission on Responsibility of the Authors of the War

The realist theories of EH Carr,[4] Hans Morgenthau[5] and Car Schmitt[6] and the liberal cosmopolitan theories of Immanuel Kant[7] and Hans Kelsen[8] will be analysed against the abortive attempts at international War Crimes Trials in the aftermath of the First World War and the international War Crimes Trials held at Nuremberg and Tokyo in the aftermath of the Second World War.

The realist theories selected for this thesis are often referred to as 20th century classical realism. This approach was developed as an alternative to the liberal perspectives that had dominated international relations after the First World War. The realist approaches of EH Carr and H Morgenthau were developed to oppose idealism with a realpolitik approach. 'They argued that national interest, rather than legal rules, should guide foreign policy, and that power relationships, rather than legal institutions, proved the ultimate determinants of international affairs.'[9] As a methodological approach to War Crimes Trials, realism advances cynical perspectives of the likelihood of state cooperation, including the ability for international institutions to be successful. At the core of realism is self-interest, power, and conflict, however, some space is allowed for non-realist elements, this type of realism is advanced by EH Carr and H Morgenthau. For Carr, 'We cannot ultimately find a resting place in realism.'[10] The Realist approaches believe that states will act in anarchy within the

[4] Carr EH, *The Twenty Years Crisis*, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016.
5 Morgenthau, H. *Politics Among Nations; The Struggle for Power and Peace*, 1948 & 1964 (New York; knopf).
6 Schmitt, C. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum,* translated and annotated by Ulmen, G. L, 2006, Telos Press Publishing, New York. Schmitt, C. *Writings on War*, Nunan, T (trs & ed), English Edition, Polity Press, 2011, Schmitt, C. *The Concept of the Political*, (Chicago: Chicago University Press, 2007).
7 Kant, I. *Perpetual Peace*, Lewis White Beck (ed) New York: Liberal Arts Press, 1957.
8 Kelsen, K, *Peace through Law*. Chapel Hill: University of North Carolina Press, 1944.
[9] Beck, Robert J, Arend, Anthony Clark & Vander Lugt, Robert D. *International Rules: Approaches from International Law and International Relations*, Oxford University Press, Oxford, 1996, page 94.
[10] EH Carr, *The Twenty Years Crisis, 1919-1939*, Cox M (preface) first edition, Macmillan Publishers Limited 2016 page 89.

international domain due to the absence of government, as the law cannot be enforced, and disputes cannot be resolved. Realism places much importance on national interests and state borders, being sceptical of international relations and believing that states will only cooperate to further their own national interests. The realist viewpoint leads to a distrust of international coalitions which claim to enforce universal principles because these can be manipulated to achieve individual state goals rather than broader principles, therefore realism includes establishing justice by ensuring that predominance of the nation state as the sole guarantor of real justice. For Morgenthau, the creation of a world state may have developed more effective mechanisms to ensure world peace, while his understanding was that the 'state is indispensable for peace' he also argued 'that the power of the state is essential, but not sufficient, to keep the peace of national societies is demonstrated by the historic experience of civil wars.' [11]

The realists doubt whether the law can play a productive role in international relations. Carl Schmitt critiqued the development of International Criminal Law in the aftermath of the First and Second World Wars. Schmitt's realism holds the nation state and sovereignty at its centre, and is highly sceptical of international institutions, subscribing to the opinion that States will almost always seek to prioritise their own national interests. [12]

One of the major challenges to the realist theory, is the liberal cosmopolitan theory, advanced by Immanuel Kant and Hans Kelsen. Liberal Cosmopolitanism seeks to break away from state centred interests and notions of sovereignty. Immanuel Kant advances his perspectives and sets out a cosmopolitan world in which armies could be abolished and people could be

[11] Morgenthau, Politics among Nations, 1st edition, 1948, page 397
[12] Schmitt, C. Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 175

governed by a representative world state. Kelsen sees the role of the judiciary as central to his international institution. Liberal cosmopolitans argue that people share basic universal moral ideas, however they do leave some room for national integrity. The methodological framework will be utilised against the substantive chapters throughout this thesis, aiming to provide a full account and analysis of the subject and highlighting issues present.

While many studies have analysed the role of War Crimes Trials within international criminal law, only few existing works have considered this subject in the light of both a realist and liberal cosmopolitan approach,[13] much of this utilises and either / or approach. Applying the framework of both methodologies serves to highlight the issues surrounding the establishment and creation of the War Crimes Trials, including the substantive laws developed throughout the process. This thesis seeks to provide a multi-dimensional analysis, overcoming some of the shortfalls that may appear when using a single methodology.

Thesis Structure.

This thesis includes a chapter on the methodology selected for analysis against the succeeding War Crimes Trials chapters. The methodology chapter sets out the elements of each of the theorists' perspectives and opposing themes that will be analysed against each of the trial

[13] Bass G, Stay the Hand of Vengeance, first edition, Princeton University Press 2002 provides an analysis of war crimes against a liberal legalist and realist framework, Zolo D, Victors' Justice From Nuremberg to Baghdad, (Weir M trs) First English Edition, Verso, 2009, Zolo D, Cosmopolis; Prospects for World Government, (McKie, D trs), First Edition, Polity Press 1997, Zolo D, Invoking Humanity, War, Law and Global Order, (Poole F & Poole G trs) First Edition, Continuum, 2002, Shklar. J, Legalism; Law, Morals and Political Trials, First Edition, 1986, Harvard University Press

chapters. This seeks to highlight the issues that the Allies faced while attempting to secure justice for the atrocity crimes committed throughout both World Wars.

This chapter is followed by the historical developments of the legislation and is aimed at setting out the foundations for this work with a historical background to the existing legislation in place prior to the outbreak of the First World War. Outlining the existing framework highlights the limitations of the law in place at this time. This enables further understanding of the issues to be addressed in the further chapters and seeks to provide the legal aspects and the issues faced by the Allied Powers when attempting to bring the perpetrators of the atrocity crimes committed throughout the First World War to justice.

Following on from the historical developments chapter, this thesis then turns to the outbreak of the First World War. This chapter will outline the political situation, including how the war began and the atrocity crimes committed. Included within this chapter is an analysis of how the substantive laws were developed, highlighting negotiations between the Allied States regarding the interpretation of existing laws, and whether any precedent existed for an international criminal court to indict individuals and Heads of State. Eventually the issue of holding international war crimes trials was dropped, largely because the law was not in place and disagreements between the Allies compounded this.

Chapter four sets out the issues raised in Turkey during the First World War, this provided issues for the Allied Powers as the Armenian massacres that were carried out both prior to and during the war were widescale and was carried out against its own citizens. The substantive law of Crimes against Humanity is particularly important for this chapter and the issues the Allied Powers faced in trying to secure justice for the Armenian people. International War Crimes Trials did not take place, and the Allied States were unable to secure

justice for the Armenian massacre. The attempts to hold International War Crimes Trials in response to the Armenian massacres failed, this was largely because the law had not been developed adequately.

Before moving on the aftermath of the Second World War, chapter five sets out the historical developments in the legislation after 1920. The Allied Powers, after the First World War had the opportunity to update and codify further provisions for war crimes. This chapter aims to provide the legal background for the succeeding chapters and highlight the main changes emanating from the First World War. Again, this sets the context for the outbreak of the Second World War.

Chapter six then deals with the Second World War, giving a brief account of the political situation leading up to the war and details the atrocity crimes committed prior to and during the war. This chapter outlines the creation and development of the substantive laws of waging aggressive warfare / crimes against peace, crimes against humanity and war crimes and moving on to the establishment and creation of the International Military Tribunal for the Nazi war crimes committed. The issues and criticisms of the substantive laws and the trial process will be dealt with utilising the methodology framework outlined in the methodology chapter.

Chapter seven then goes on to outline the International Military Trial for the Far East, held in 1946, following the Nuremberg Charter. This chapter set out Japan's entry into the war and the atrocity crimes committed. The main issues faced by the Allies and the criticisms will be dealt with, again, utilising the methodological framework as outlined previously.

This thesis then concludes, outlining the findings and the outcomes of the analysis. This chapter will also identify further scope for development in modern War Crimes Trials.

Chapter 2. Methodology.

Introduction

This chapter aims to explain the methodology to be adopted and applied throughout this thesis, in the context of War Crimes Trials by specific reference to realist and liberal cosmopolitanism perspectives and their treatment in existing literature. The existing literature in this area has also been reviewed including how this thesis will add to the literature. This thesis will explore the possibility of developing a theory that can overcome the challenges and shortfalls of a distinctly liberal cosmopolitan or realist approach to the subject matter. The two methodologies, realism and liberal cosmopolitanism and their main themes will be outlined below and further assessed throughout each case study chapter.

The methodology developed throughout this thesis will centre on both the Realist and Liberal Cosmopolitan theories. Much of the existing literature in this area[14] deploys a Realist or a Liberal Cosmopolitan theory to produce an analysis of War Crimes Trials. However, this literature often uses the theories interchangeably, that is, taking an either-or approach. This thesis aims to develop a framework that will combine the two approaches commonly thought of as mutually exclusive, highlighting any limitations and seeking to recalibrate some of the harsher perspectives of realism with liberal cosmopolitanism. Both approaches will be selectively integrated into a newly formed approach, seeking to embody the best elements of both. This thesis seeks to challenge the traditional historical narrative of War Crimes Trials by avoiding the either / or approach while developing a deeper understanding of the nature

[14] Ibid.

and operation of both theories in their application to War Crimes Trials, aiming to situate international legal doctrine and institutions within their political context. This methodology will result in the bridging of a gap in the existing literature by exploring both the realist and liberal cosmopolitan agenda simultaneously. In so doing, this will facilitate the formulation of an innovative and distinct blend of both agendas, offering a novel perspective into the legal legitimacy of War Crimes Trials.

It is not possible within the scope of this thesis to include every theorist who has contributed to the development of Realism and Liberal Cosmopolitanism, but some of the most influential have been selected for analysis. This chapter will highlight some of the main themes of twentieth century Realism and move on to explaining the perspectives of E H Carr,[15] Hans Morgenthau,[16] and Carl Schmitt[17], whose theories fall within the definition of Classical Realism. The Chapter will then move onto the Liberal Cosmopolitan perspectives, outlining the main themes of this perspectives and will then address the perspectives of Immanuel Kant[18] and Hans Kelsen.[19]

Realism.

[15] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016.
[16] Morgenthau, H Politics Among Nations; The Struggle for Power and Peace, 3rd edition, New York; knopf, 1964, Scheuerman W, *Hans Morgenthau; Realism and Beyond*, first edition, Polity Press.
[17] Schmitt, C, *Writings on War* (translated and edited by Timothy Nunan) (Cambridge: Polity Press, 2011), Schmitt, C, *The Concept of the Political*, (George Schwab trs.) The University of Chicago Press, 2007, Schmitt, C The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, translated and annotated by Ulmen, G. L, Telos Press Publishing, New York, 2006.
[18] Kant, I. Perpetual Peace, Lewis White Beck (ed), New York: Liberal Arts Press, 1957.
[19] H. Kelsen, *Peace through Law.* Chapel Hill: University of North Carolina Press, 1944, Hans Kelsen, Principles of International Law, The Law Book Exchange, New York, 2012, H. Kelsen, 'Will the judgment in the Nuremberg trial constitute a precedent in international law?', International Law Quarterly, 1 (2) (1947.,

Twentieth century realism gained popularity in response to the idealist perspectives that had dominated international relations during the aftermath of the First World War.[20] Realism, in general is a view of international politics that places emphasis on its competitive and conflictual sides, a realist will consider the principal actors in the international arena to be states, which are concerned with their own security, act in the pursuit of their national interest and struggle for power. Classical realists argue that 'national interest, rather than legal rules, should guide foreign policy, and that power relationships, rather than legal institutions, proved the ultimate determinants of international affairs.'[21] This perspective regards war as central; this means that realists may refuse to condemn using force than the liberal cosmopolitan perspective. The realist perspective is a powerful approach to international criminal law, they 'emphasise the constraints on politics imposed by human selfishness (egoism) and the absence of international government (anarchy), which require the primacy in all political life of power and security.'[22] Realism will look towards a more fact-based approach and in some instances can be seen as more empirically accurate as it captures elements of concrete historical and contextual analysis that liberal cosmopolitanism does not always take into account.

E H Carr.

EH Carr was a British historian, diplomat, and international relations theorist, and is best known for his writing on realism within international relations. He began his career as a diplomat and joined the Foreign Office in 1916. He played a minor role in the drafting of the

[20] Beck, Robert J, Arend, Anthony Clark, Vander Lugt, Robert D, International Rules: Approaches from International Law and International Relations, Oxford: Oxford University Press, 1996 P. 94.
[21] Ibid.
[22] Birchill, Scott, Linklater, Andrew, Devetak, Richard, Donnelly, Jack, Paterson, Matthew, Reus-Smit, Christian & True, Jacqui, Theories of International Relations, 3rd edn, Hampshire: Palgrave Macmillan, 2005, P.30.

Versailles Peace Treaty 1919. He later became the Woodrow Wilson Professor in the Department of International Politics at the University College of Wales, Aberystwyth, and later caused controversy when he then began to criticise the League of Nations. The position of Woodrow Wilson Professor was intended to increase public support for the recently created League of Nations.[23]

E H Carr's best-known work is the *Twenty Years Crisis,*[24] written in 1939, shortly after the start of the Second World War and deals with the subject of international relations between the years 1919 and 1939. This work initiated the idealist-realist debate.[25] For Morgenthau, when reviewing Carr's analysis, he wrote ' The experiences of the inter-war years revealed the weakness of the utopian approach to international politics and made its realistic analysis both possible and imperative. Yet a mature political science must combine utopian and realistic thought, purpose and analysis, ethics and politics.'[26] In order to set out his idealist -realist debate, Carr divided international thinkers into two groups, the realists, and the utopians. For Carr, the utopians were supporters of the League of Nations who strongly believed this institution would be beneficial to an improved international structure. In addition, this work was also critical of the British and American intellectuals for ignoring the role of power in international politics,[27] arguing that their agenda paid little attention to the world around them and concentrated on how it should be. He believed that the international law cannot be

[23] EH Carr, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016 P xxv.
[24] Ibid.
[25] Beck, Robert J, Arend, Anthony Clark, Vander Lugt, Robert D, International Rules: Approaches from International Law and International Relations, Oxford: Oxford University Press, 1996, page 95.
[26] Morgenthau, Hans "The Political Science of E. H. Carr" pages 127–134 from World Politics Volume 1, Issue 1, October 1948, page 29.
[27] Mearsheimer, J. E.H Carr vs. Idealism. The Battle Rages On, International Relations, SAGE Publications (London, Thousand Oaks, CA and New Delhi), Vol 19(2): 2005 139–152 page 142.

understood independently from political interests. For Carr, there is always a necessary political background behind all law.

Carr wanted to explain how sovereign states behaved towards one another, he believed that nearly all the people writing about international relations after the First World War were mainly looking for ways of preventing another war, thus creating a utopian view, that Carr believed failed to resemble the real world; he explains the realist position of several issues, most importantly, the balance of power, the role of morality including the laws of war and his scepticism of the criminalisation of war and of the ability of international institutions to prevent future wars. Carr's perspective on these issues will be discussed, in turn, below.

E H Carr constructed his realist theory by describing Machiavelli[28] as the first important political realist. He states that there are 'three essential tenets implicit in Machiavelli's doctrine which are the foundation stones of the realist philosophy. In the first place, history is a sequence of cause and effect whose course can be analysed and understood by intellectual effort, but not (as the utopians believe) directed by 'imagination'. Secondly, theory does not (as the utopians assume) create practice, but practice theory and, thirdly, politics are not (as the utopians pretend) a function of ethics, but ethics of politics. Men are kept honest by constraint.[29] Machiavelli recognised the importance of morality but thought that there could be no effective morality where there was no effective authority. 'Morality is the product of power.'[30]

[28] Machiavelli, N. The Prince, George Bull (trans), Penguin, London 1961.
[29] EH Carr, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 62-63.
[30] Machiavelli, N. The Prince, George Bull (trans), Penguin, London 1961.

The balance of power is a core principle of the realist agenda. Carr believed that power is always an essential element of politics and that the main interests of the Great Powers after the First World War, was the preservation of the status quo. Moreover, he asserted that 'the *ultima ratio* of power in international relations is war, which led him to conclude that of all the instruments of statecraft the military is of 'supreme importance.'[31] He notes that the 'Utopian writers from the from the English speaking countries seriously believed that the establishment of the League of Nations meant the elimination of power from international relations, and the substitution of discussion for armies and navies.'[32] Carr believed this was because, the Great Powers' main interest was the preservation of the status quo, which, at that time, gave them a monopoly on power. Early drafts of the covenant of the League of Nations initially intended that only the Great Powers should be members of the Council of the League of Nations, essentially meaning that the Great Powers would control the agenda of the League of Nations. Carr is also sceptical of the pursuit of 'security' by those powers who are satisfied with the status quo, claiming that this has 'often been the motive of flagrant examples of power politics.'[33] He argues that:

> 'In order to secure themselves against the revenge of a defeated enemy, victorious Powers have in the past resorted to such measures as the taking of hostages, the mutilation or enslavement of males of military age or, in modern times, the dismemberment and occupation of territory or forced disarmament. It is profoundly misleading to represent the struggle between satisfied and dissatisfied Powers as a struggle between morality, on one side and power on the other. It is a clash in which, whatever the moral issue, power politics are equally predominant on both sides.'

[31] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 102.
[32] Ibid page 97.
[33] Ibid page 99.

For Carr, the failure to recognise that power is an 'essential element of politics has hitherto vitiated all attempts to establish international forms of government and confused nearly every attempt to discuss the subject. Power is an indispensable instrument of government. To internationalise government in any real sense means to internationalise power; and international government is, in effect, government by that state which supplies the power necessary for the purpose of governing.'[34] Carr divides political power in the international sphere into three categories:

- Military Power, Carr deems military power as the 'supreme importance' as the ultima ratio of power in international relations is war. 'Every act of the state, in its power aspect, is directed to war, not as a desirable weapon, but as a weapon which it may require in the last resort to use.'
- Economic Power is closely associated with the military power element. 'The wealthiest city-state could hire the largest and most efficient army of mercenaries; and every government was therefore compelled to pursue a policy of designed to further the acquisition of wealth.'
- Power over opinion, for Carr, this category includes the art of persuasion being a necessary part of the equipment of a leader. 'Rhetoric has a long and honoured record in the annals of statesmanship. But the popular view which regards propaganda as a distinctly modern weapon is, none the less, substantially correct.'[35]

Carr also deals with international morality, expressing that for realists morality plays no part in relations between states and for the utopians, the same standard of morality for the

[34] Ibid page 101.
[35] The three categories of power are discussed in Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, pages 102 – 120.

individual is also applicable at state level, highlighting Woodrow Wilson's address to congress on the American declaration of war in 1917 'in which it will be insisted that the same standards of conduct and responsibility for wrong shall be observed among nations and their governments that are observed among the individual citizens of civilised states.'[36]

In line with the general realist agenda, the view of law is that it is an expression of the will of the 'state and is used by those who control the state as an instrument of coercion against those who oppose their power.'[37] International law, for Carr, is 'the function of the political community of nations' and that any defects that may occur are due to 'the embryonic character of the community in which it functions. Just as international morality is weaker than national morality, so international law is necessarily weaker and poorer in content than the municipal law of a highly organised modern state.'[38] Once it is understood that law is a 'function of a given political order, whose existence alone can make it binding, we can see the fallacy of the personification of law implicit in popular phrases such as 'the rule of law' or the 'government of laws and not of men.'[39] Carr argues that the law cannot be understood independently of the political foundation on which it rests and of the political interests of which it serves.'[40] Furthermore, Carr sees the international treaties as only binding insofar as states wanted them to be, some states will repudiate them once it is in their interest to do so. This led Carr to state that the:

[36] Public pages of Woodrow Wilson; War and Peace, I, p II, Carr, EH The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016 page140.
[37] Carr, EH The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 163.
[38] Ibid page 165.
[39] Ibid page 165.
[40] Ibid page 166.

> 'Respect for law and treaties will be maintained only in so far as the law recognises effective political machinery through which itself can be modified and superseded. There must be a clear recognition of that play of political forces which is antecedent to all law. Only when these forces are in stable equilibrium can the law perform its social function without becoming a tool in the hands of the defenders of the status quo. The achievement of this equilibrium is not a legal, but a political task.'[41]

Carr stresses the importance of power, self-interest and conflict, but does allow for some acknowledgement for some non-realist concerns,[42] which deserves further analysis throughout this thesis in its application to each of the trials discussed. As Carr has stated: 'We cannot ultimately find a resting place in pure realism.'[43] Mearsheimer summarises the two main points from Carr's book:

> 'States being the principal actors in international politics, care greatly, although not exclusively, about power. This perspective is, of course, what makes Carr a realist. Second, he maintained, that British academics and intellectuals were idealists who neglected the crucial role of power when thinking about international politics.'[44]

Carr criticises utopianism and questions its claim to moral universalism and its idea of harmony of interests, stating that 'morality can only be relative, not universal,'[45] and that the doctrine of harmony of interests is invoked by privileged groups to 'justify and maintain their dominant position.'[46] Carr points out in one of his most prominent quotes on this subject:

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[41] Ibid page 176.
[42] Included in Carr's work The Twenty Years Crisis is a chapter titled 'The Limitations of Realism' P84.
[43] *Ibid* page 187.
[44] Mearsheimer, J. E.H Carr vs. Idealism. The Battle Rages On, International Relations Copyright © 2005 SAGE Publications (London, Thousand Oaks, CA and New Delhi), Vol 19(2): 139–152 [DOI: 10.1177/0047117805052810].
[45] EH Carr, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 19.
[46] Ibid page 75.

> 'Theories of international morality are the product of dominant nations or groups of nations. For the past hundred years, and more especially since 1781, the English-speaking peoples have formed the dominant group in the world; and current theories of international morality have been designed to perpetuate their supremacy and expressed in the idiom particular to them.'[47]

In addition, Carr has also argued that politicians often use the language of justice to hide the particular interests of their own countries, or to create negative images of other people to justify acts of aggression. Carr's central idea is that the interests of a given party always determine what the party regards as moral principles, and therefore, these principles are not universal. He claims that states will often use their idealistic agenda to explain their actions, those actions are often usually based on balance of power calculations:

> 'The exposure of the real basis of the professedly abstract principles commonly invoked in international politics is the most damning and most convincing part of the realist indictment of utopianism...What matters is that these supposedly absolute and universal principles were not principles at all, but the unconscious reflections of national policy based on a particular interpretation of national interest at a particular time.'[48]

According to Carr, the political purpose of the Versailles Treaty of 1919[49] signed by the Allied Powers and Germany at the end of the First World War, was not world peace and the good of the nations, although this motive was heavily advertised, but the elimination of one great power by the victors of the First World War. Peace and harmony were sound in principle, but in politics they had to be backed up by authority. The Realist perspective states that principles could not command, and people did not willingly submit to the will of others because the

[47] Ibid page 78.
[48] Ibid, page 80.
[49] The Versailles Treaty [1919] UKTS 4 (Cmd 155).

others were right or good but because they were stronger[50]. In this sense, politics was always power politics. Carr applied the term political to those issues that involved, or were thought to involve, the power of one state in relation to another. The realist perspective rejects the notion that any court of law could prosecute violations of the 'laws or principles of humanity', on the ground that such violations were moral rather than legal breaches and were non justiciable, further arguments would include the conviction that to prosecute a head of state outside of his national jurisdiction would violate basic ideas and privileges of sovereignty.

For Carr, the difficulty of the League of Nations 'lies not in the lack of machinery for international legislation, but in the absence of an international political order sufficiently well integrated to make possible the establishment of a legislative authority whose decrees will be recognised as binding on states without their specific consent.'[51]

Carr puts forward his thought on how peaceful change can be brought about and lists several instances throughout history of how the use of force or threat of the use of force. He suggests that force has been a critical factor in effecting peaceful change. For Carr:

> 'The use or threatened use of force is a normal and recognised method of bringing about important political change and is regarded as morally discreditable mainly by those 'conservative' countries whose interests would suffer from change. The largest operation of 'peaceful change' in the nineteenth century was that performed by the Congress of Berlin, which revised the treaty imposed by Russia on Turkey at San Stefano. But this revision took place only under the tacit threat of a declaration of war against Russia by Great Britain and Austria-Hungary.'[52]

[50] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 93.
[51] ibid page 194.
[52] ibid page 197.

Although it can be said that Carr does reject a pure realism, he maintains throughout his works that power calculations matter to most states and they will act accordingly, while acknowledging that there is room for consideration of other 'non realist' agendas and that some 'utopian' influences may benefit this. Carr's book *The Twenty Years Crisis*[53] acknowledges that realism did not go far enough and states that there is room for some non-realist or utopian considerations:

> 'Consistent realism excludes four things which appear to be essential ingredients of all effective political thinking: a finite goal, an emotional appeal, a right of moral judgement and a ground for action.'[54]

Hedley Bull argues that the 'central difficulty of Carr's position is that though he sets out in search of such a moral spring for action he is prevented by his own relativist and instrumentalist conception of morals from finding one that is effective.'[55]

Hans Morgenthau.

Hans Morgenthau was a German American jurist and a political scientist. He was one of the major twentieth century figures in the study of international relations and is considered one of the most influential realists of the post-World War II period.[56] Morgenthau authored his most influential work, *Politics Among Nations: The Struggle for Power and Peace* in 1948, three years after World War II, this was revised several times during its life.[57] This work

[53] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016.
[54] ibid page 113.
[55] Bull, H. The Twenty Years Crisis Thirty Years On, International Journal, Autumn, 1969, Vol. 24, No. 4, 1969, pp. 625- 638, page 628.
[56] Schueurman W, Hans Morgenthau: Realism and Beyond, Polity Press: UK, 2008 page 3.
[57] Ibid page 102.

emphasised the centrality of power and the national interest, this book indicates his concern, not only with the struggle for power but the ways in which it is limited by ethics, norms and law.

Morgenthau's conception of the balance of power confirms that since power is always changing, states will seek to increase their own power at the expense of others. This creates a conflict situation in which competition and rivalry form the basis of international relations. However, states will form alliances with others on the assumption that they will enhance their own powers. Morgenthau:

> 'Devalued the place of morality and even law in international affairs. And he evinced deep animosity towards the quest for novel modes of political and legal organisation beyond the nation state. He disdained moralism, legalism and especially utopianism in international thought. Morgenthau applied a rather old-fashioned defense of the Westphalian system and traditional power politics to the novel exigencies of the cold war.'[58]

The second edition of Morgenthau's *Politics Among Nations*[59] truly positioned Morgenthau as a realist. He established six principles of political realism, which together forms his basis of political realism. These principles are pivotal in the understanding of this approach, as summarised below.

1. Political realism, as Morgenthau sees it, is politics and like society in general, is governed by objective laws that have their roots in human nature.
2. Political realism finds its way through the landscape of international politics and is the concept of interest defined in terms of power. This is the assumption that political leaders will both think and act in terms of interest defined as power.

[58] Schueurman W, Hans Morgenthau: Realism and Beyond, Polity Press: UK, page 4.
[59] Morgenthau, H. Politics among Nations: The Struggle for Power and Peace, 2nd edn, New York, 1954.

3. Realism assumes that its key concept of interest defined as power is an objective category that is universally valid but does not endow that concept with a meaning that is fixed once and for all.
4. Political realism is aware of the moral significance of political action. It is also aware of the tension between the moral command and the requirements of successful political action. Morgenthau states that while realists are aware of the moral significance of political action, they are also aware of the tension between morality and the requirements of a successful political action. Universal moral principles cannot be applied to the actions of states in their abstract universal formulation, but they must be filtered through the concrete circumstances of time and place.[60]
5. Political realism refuses to identify the moral aspirations of a particular nation with the moral laws that govern the universe.
6. The difference between political realism and other schools of thought is real and profound. Politics cannot be subordinated to ethics. However, ethics does still play a role in politics. 'A man who has nothing, but 'political man' would be a beast, for he would be completely lacking in prudence. A man who has nothing, but 'moral man' would be a fool, for he, would be completely lacking in prudence.'[61]

To expand further on the above, the first principle, for Morgenthau, politics was always a struggle for power, in which competing forces sought to gain control over their rivals. Power here does not necessarily mean military force, he understood the most important aspect to the quality of diplomacy, since diplomacy combined powers raw materials, therefore national

[60] The Stanford Encyclopaedia of Philosophy (International Relations) https://www.plato.stanford.edu/entries/realism-intl-relations/.
[61] Morgenthau, H, Politics among Nations: The Struggle for Power and Peace, 2nd edn (New York, 1954), page 11.

power included geography, natural resources, industrial capacity, military preparedness, population, national character and quality of government into an integrated whole. The second principle is key to Morgenthau's realism, and, in his view, the pursuit of the national interest was not only both the politically right thing to do, but it alone was rational and objective as well, and therefore the key instrument in any scholarly toolkit purporting to offer an objective and scientific i.e., free of self-satisfying ideological and moral illusions view of international politics.[62] The third principle confirms the view that interest defined as power was necessarily determined by historical circumstances 'the kind of interest determining political and cultural context within which foreign policy is formulated.'[63] Morgenthau understood that national interest was a changing concept, changing in both political and social environments. With this in mind, national interest defined in terms of national power will require continuous analysis for realistically analysing the course of international relations. Morgenthau did put forward some basic foundations of a possible world state, it can be pointed out here that, in this regard, he almost assimilates to a cosmopolitan world order. The fourth principle realises the importance of moral principles but claims that this cannot be applied to state actions. The moral significance of political action is undisputed, but the universal moral principles cannot be applied to the actions of states, unless these are analysed in the light of specific conditions of time and space. Moral principles do not determine the policies and actions of states. They are, however, a source of some influence. It accepts that moral principles can exercise an influence on state actions as such their role and significance must be analysed and evaluated. 'Universal moral principles must be filtered through the concrete circumstances of time and space and only then these should be prudently applied

[62] ibid page 7, also quoted in Schueurman W, Hans Morgenthau: Realism and Beyond, Polity Press: UK, page 105.
[63] ibid page 8.

to the actions of states.' The fifth principle refuses the identify the moral aspirations of a particular nation with the moral principles that govern the universe. It refuses to accept that the national interests and policies of any particular nation reflect universally applied moral principles. For Morgenthau, a foreign policy is always based on national interest and national power, and not on morality, therefore, the policy of a nation cannot be equated with and should not be confused with universal moral principles. The sixth principle, Morgenthau states that the realist 'maintains the autonomy of the political sphere, as the economist, the lawyer, the moralist maintain theirs.[64] For Scheurman, Morgenthau's 'emphasis in the sixth principle on the autonomy of politics sat at best uneasily alongside the fourth and fifth principles and their emphasis on Realism's moral preoccupations. How could Realism be 'aware of the moral significance of political action' and simultaneously respect the strict autonomy of politics as distinguished from Morality.'[65]Morgenthau's political realism is concerned with national interest defined in terms of power as its primary concern.

Morgenthau describes three types of international policies; the status quo policies were aimed at maintaining an existing power constellation, imperialism referred to attempts to gain more power and disturb the international status quo and, prestige was the demonstration or exhibition of power for its own sake, to support the status quo or imperialism policies.[66] For Morgenthau, the status quo policies were often justified in the international sphere by appeals to peace and international law, he believed those attributes meshed well with the status quo powers' interest in preserving the existing power relations.

[64] Morgenthau, H, Politics among Nations: The Struggle for Power and Peace, 2nd edn (New York, 1954), page 10.
[65] Schueurman W, Hans Morgenthau: Realism and Beyond, Polity Press: UK, 2008, page 106.
[66] Ibid page 63.

In his work, Politics among Nations, Morgenthau does emphasise some of the limitations of the balance of power for preserving peace, stating:

> 'Since no nation can be sure that its calculation of the distribution of power at any particular moment in history is correct, it must at least make sure that, whatever errors it may commit, they will not put the nation at a disadvantage in the contest for power. In other words, the nation must try to have a least a margin of safety which will allow it to make erroneous calculations and still maintain the balance of power. To that effect, all nations actively engaged in the struggle for power must actually aim not at a balance, that is, equality of power, but at a superiority of power in their own behalf.' [67]

Although Morgenthau analysed the balance of power throughout his works, in Politics among Nations, he did reject the celebration of the balance of power:

> 'Superior power gives no right, either moral or legal, to do with that power all that is physically capable of doing. Power is subject to limitations, in the interest of society as a whole and in the interests of its individual members, which are not the results of the mechanics of the struggle for power but are superimposed upon that struggle in the form of norms or rules of conduct by the will of members themselves.' [68]

Morgenthau believed that if lasting world peace were to be firmly secured, a world state would have to emerge. However, it could only be successful on the basis of a highly developed international society capable of performing far reaching integrative functions. He believed that Hobbes fatal error was to overestimate the states integrative capacities and miss the social and moral presuppositions of effective state action. Morgenthau worried that too many well-meaning proponents of global reform tended to commit the same mistake. They pushed hard for the more or less imminent realisation of cosmopolitan government,

[67] H Morgenthau, Politics among Nations: The Struggle for Power and Peace, 2nd edn (New York, 1954), page 4
[68] ibid page 206.

conveniently downplaying the fact that many of its basic presuppositions were still missing.[69] As discussed, sovereignty is central to the realist perspective, Morgenthau analysed the possibility of a supranational government and stated:

> 'We have heard it time and time again that we must surrender past of our sovereignty to an international organisation for the sake of world peace, that we must share our sovereignty with such an organisation, that the latter would have a certain limited sovereignty while we would keep the substance of it. We shall endeavour to show that the conception of a divisible sovereignty is contrary to logic and politically unfeasible.'[70]

Morgenthau was sceptical about international institutions such as the League of Nations and the United Nations, he believed that they were insufficient to reduce international anarchy. From his perspective:

> 'National sovereignty demands that the governments of individual countries decide for themselves the domestic and international issues that concern them. An international organisation, in order to be effective, requires a transfer of that power of ultimate decision, at least in certain matters from the national to the international authority.'[71]

Morgenthau was sceptical of the ability to achieve effective international government while states maintained their sovereignty. He maintained that these institutions were attempts to place international government into the hands of the great powers: 'International government is at best a mirage and at worst a recipe for the political hegemony of those Great Powers able to mask their aspirations in humanitarian and universalistic legal norms.'[72]

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[69] Ibid page 123.
[70] Ibid page 303.
[71] Hans J Morgenthau, 'Threat to - and Hope for – the United Nations' [1961], in RAP, 279.
[72] D. Zolo, Cosmopolis; Prospects for World Government, (McKie, D trs), First Edition, Polity Press 1997, page 8-9.

Rather than take the route of the traditional realist perspective of who view the international institutions as deeply flawed, Morgenthau puts forward the idea that these institutions may need to pursue more ambitious alternatives, indicating that the 'necessity of a world state in which the main institutional source of modern warfare, national sovereignty has been radically abrogated.'[73]

> What is needed in order to save the world from self-destruction is not the limitation of the exercise of national sovereignty through international obligations and institutions, but the transference of the sovereignties of the individual states to a world authority… What is needed, then, is a radical transformation of the existing society of sovereign nations into a supranational community of individuals.'[74]

Morgenthau argues that in the 'struggle between the two world wars the struggle for and against the status quo, was in the main fought either by defending or opposing the territorial provisions of the Treaty of Versailles.

For Simpson, writers like 'Hans Morgenthau were thoroughly disaffected by what they viewed as the misguided utopianism of interwar proposals for treaties abolishing war or institutions that sought to tame human inclinations. It was simply naïve, they believed, to assume that diplomacy could be subject to legal control.'[75]

Morgenthau put forward his opinion regarding why he deems international law as ineffective and put this down to being 'a primitive type of law primarily because it is

[73] Schueurman W, Hans Morgenthau: Realism and Beyond, Polity Press: UK, 2008, page 118.
[74] Morgenthau, Politics among Nations: The Struggle for Power and Peace, 2nd edn (New York, 1954), page 470.
[75] Simpson, G. Law, War & Crime, Cambridge, Polity Press, 2008, page 145.

almost completely decentralised law.' Morgenthau explains its decentralisation in each of its three basic functions, legislation, adjudication and enforcement:

> 'Governments are always anxious to shake off the restraining influence which international law might have upon their international policies, to use international law instead for the promotion of their national interests, and to evade legal obligations which might be harmful to them. They have used the imprecision of international law as a ready-made tool for furthering their ends. They have done so by advancing unsupported claims to legal rights and by distorting the meaning of generally recognised rules of international law.'[76]

In addition to EH Carr and Morgenthau, Carl Schmitt also put forward a realist approach, the approach more extreme than the classical realist position, but, nevertheless, with important insights. Carl Schmitt has been described as 'someone who sought the coming of a new global political order to arrest a global wave of cosmopolitanism and universalism in the 20th century'[77]

Carl Schmitt.

Carl Schmitt was a member of the Nazi party and in 1933 was appointed to a chair in law in Berlin. He became the President of the Union of National Socialist Jurists and provided legal and intellectual justification for the Night of the Long Knives[78] as well as the expulsion of Jews from the legal profession in Germany. He later concentrated on a study of Thomas Hobbes

[76] Ibid 378.
[77] Hooker, William, Carl Schmitt's International Thought (Cambridge: Cambridge University Press ,2009),10.
[78] Adolf Hitler feared that the SA were a threat to his leadership. The Night of Long Knives was the purge of the SA leadership and other political opponents from 30 June 1934 to 2 July 1934. Over one hundred people were murdered. Information taken from https://www.theholocaustexplained.org/ accessed 20/04/2022.

and contemporary international jurisprudence. After the Second World War, Schmitt was detained by Allied forces, but was never charged with a crime.[79]

It is important to note that Schmitt's realism subscribes heavily to the Westphalian System, this system is the original framework of the international legal system established in Europe at the end of the Thirty Years War. This framework was significantly amended after the Second World War. The Westphalian system contains certain characteristics, Zolo[80] has outlined these:

1. The subjects of international law are exclusively states, individuals play a secondary role. Any collective entities other than states, such as peoples, nations, ethnic groups, economic organisations or voluntary associations are not recognised as international legal subjects.
2. There is no international legislator with the power to decree norms that are automatically valid *erga omnes*. The source of international law is the sovereign authority of states in so far as the latter sign bilateral and multilateral treaties and recognise the customary norms.
3. The international legal system is made up almost exclusively of primary or material norms, while secondary or organisational norms are lacking. This lack differentiates the international legal system from that of states, within which there are normative bodies that regulate both the production and also interpretation and implementation of laws. In other words, the Westphalian model does not envisage any binding jurisdiction that has the power to identify violations of international law, or a police

[79] Schmitt, C, Writings on War (translated and edited by Timothy Nunan) (Cambridge: Polity Press, 2011), 2.
[80] Danilo Zolo, Cosmopolis: Prospects for World Government, (trans David McKie), 1997, Polity Press, London, page 94-95.

qualified to repress illegality preventatively or consequent to its identification. The interpretation and implementation of international law is entrusted either to domestic institutions of each state or to international procedures, such as arbitration with respect to which the parties involved have already come to a provisional agreement.

4. The sovereignty of states and their legal equality are absolute, unconditional principles. International law does not decree norms concerning the domestic legal structures of individual states or their behaviour towards citizens, nor does it envisage the power of a state or international organisation to interfere in the domestic affairs of another state. The *de facto* inequality that distinguishes the great powers from the other states, or the industrialised countries from those that are less developed, is of no importance legally.
5. Every state has the full right to resort to war or to analogous coercive measures to protect its own rights or interests. On an international level, illegal acts are a kind of private affair between the state which is the author of the illegality and its opponent. No other state or international organisation has the right or the formal duty to intervene on behalf of one or other of the contenders

Schmitt's realism has these characteristics in mind when constructing his theory, the Westphalian system underpins much of his thought process.

Schmitt's *Writings on War*[81] gives his insights into some of the major questions in international law. *Writings on war* contains three of Schmitt's works, written between 1937

[81] Schmitt, C, Writings on War (translated and edited by Timothy Nunan) (Cambridge: Polity Press, 2011), page 2.

and 1945: The Turn to the Discriminating Concept of War, The Grossraum Order of International Law, and The International Crime of the War of Aggression and the Principle *nullum crimen, nulla poena sine lege*. Schmitt criticised the Versailles Treaty and the League of Nations for attempting to criminalise war, and therefore, for him, creating the notion of the just and unjust wars distinction, and the authority to declare this decision binding on all neutral parties. highly critical of universalistic organisations, he argues that the Versailles Treaty created the League of Nations as a 'tool for American, British and French imperialism to define opponents of their foreign policy aims as murders, robbers or pirates and exterminate them in just wars.'[82]

A further relevant work of Schmitt's is *The Concept of the Political,*[83] in this, Schmitt claimed that making a friend/enemy distinction was vital to the existence of a political community, and that an alternative to doing this would be to either surrender its sovereignty to another collective entity that would protect it against foreign enemies and, make the friend/enemy distinction for it or, the political community would disappear. He argues that the League of Nations, or similar organisations would deny political communities the ability to make the friend/enemy distinction, namely by pretending to encompass all countries of the world under the banner of humanity. Schmitt, however, did acknowledge that the distinction between friend and enemy would cease to exist 'if the different states, religions, classes and other human groupings on earth should be so unified that a conflict between them is impossible.'[84] The real issue for Schmitt was that organisations, such as the League of Nations depicted themselves as champions of mankind, generated a murderous self-righteousness,

[82] ibid page 6.
[83] Carl Schmitt, The Concept of the Political, trans. With an introduction by George Schwab (Chicago: The University of Chicago Press, 1996).
[84] Ibid, page 53.

since their enemies, as the enemies of humanity, were by definition 'hostis generis humanis' and had to be exterminated. He added further that, these organisations attempting to be universalistic could, in theory, conquer the world and so bring in a new age of which there would no longer be any wars between the nations of the world, neither just nor unjust. But this could only be realised if the League of Nations developed a huge military force and waged a final war of humanity, 'a war of annihilation' against all nations that placed themselves outside the League of Nations definition of 'humanity.' Schmitt deals at length with the notion of 'humanity' in '*Concept of the Political*' in this he argues that the 'political entity presupposes the real existence of an enemy and therefore coexistence with another political entity. As long as a world state exists, there will thus always be in the world more than just one state. A world state which embraces the entire globe and all of humanity cannot exist.'[85] Schmitt was critical of the liberal cosmopolitan's stance regarding a world state and was sceptical of whether this could ever be work in practice:

> 'The political entity cannot by its very nature be universal in the sense of embracing all of humanity and the entire world. If the different states, religions, classes, and other human groupings on earth should be so unified that a conflict among them is impossible and even inconceivable and if civil war should forever be foreclosed in a realm which embraces the globe, then the distinction of friend and enemy would also cease. What remains is neither politics nor state, but culture, civilisation, economics, morality, law, art, entertainment, etc. If and when this condition will appear. I do not know. At the moment, this is not the case. And it is self-deluding to believe that the termination of a modern war would lead to world peace- thus setting forth the idyllic goal of complete and final depoliticalisation – simply because a war between the great powers today may easily turn into a world war.'[86]

[85]Ibid page 53.
[86] Carl Schmitt, The Concept of the Political, (Chicago: Chicago University Press, 2007) page 54.

Schmitt was also critical of the use of the term humanity by liberal cosmopolitans, particularly regarding wars fought under the notion of humanitarian intervention.

> 'Humanity as such cannot wage war because it has no enemy, at least not on this planet. The concept of humanity excludes the concept of the enemy because the enemy does not cease to be a human being – and hence there is no specific differentiation in that concept. That wars are waged in the name of humanity is not a contradiction of this simple truth; quite the contrary, it has an especially intensive political meaning. When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilisation in order to claim these as one's own and to deny the same to the enemy.'[87]

In Schmitt's nomos, he continues that, when historically examined, the concept of humanity could not allow the notion of Justus hostis, of a 'just enemy', who is recognised as someone with whom one can make war but also negotiate peace. Schmitt further noted that only when 'man appeared to be the embodiment of absolute humanity, did the other side of this concept appear in the form if a new enemy; the inhuman.[88] The concept of humanity, therefore, reintroduces substantive causes of war because it shatters the formal concept of *justis hostis*,[89] allowing the enemy now to be designated substantively as an enemy of humanity as such. In discussing the League of Nations, Schmitt highlights that, compared to the kinds of wars that can be waged on behalf of humanity:

> 'The interstate European wars from 1815 to 1914 in reality were regulated; they were bracketed by the neutral great powers and were completely legal

[87] Ibid page 54.
[88] C Schmitt, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, translated and annotated by G . L. Ulmen, Telos Press Publishing, New York, 2006.
[89] Translated in English as 'righteous enemy.'

> procedures in comparison with the modern and gratuitous police actions against violators of peace, which can be dreadful acts of violation.'[90]

To confiscate the word humanity, to invoke and monopolise such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.'[91]

For Schmitt, the liberal cosmopolitans conceal their use of politics in the usages of terms such as humanity.

Carl Schmitt's most famous work '*The Nomos of the Earth*'[92] this establishes Schmitt as an expert in international law and is one of his most compelling regarding the realist thought of the development of international law, this was one of Schmitt's later books, published in 1950, and made available in English in 2003. For Schmitt, the nomos of the earth is the 'community of political entities united by common rules. It is the spatial, political, and juridical system considered to be mutually binding in the conduct of international affairs a system that has obtained over time and has become a matter of tradition and custom. Ultimately, the nomos of the earth is the order of the earth.'[93] From the "Age of Discovery" until the end of the 19th century, the nomos of the earth was embodied in European "international law" (Uus gentium in Latin, Volkerrecht in German). It was grounded in European public law (*jus publicum Europaeum*), as distinguished from domestic or constitutional law. Throughout this

[90] Schmitt, C, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, translated and annotated by G. L. Ulmen, 2006, Telos Press Publishing, New York, page 186.
[91] Schmitt, C, The Concept of the Political, (Chicago: Chicago University Press, 2007) page 54.
[92] Schmitt, C, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, translated and annotated by G. L. Ulmen, 2006, Telos Press Publishing, New York.
[93] ibid page 10.

text, Schmitt criticises the criminalisation of war through the doctrine that wars of aggression are legal crimes. Schmitt is a strong defender of sovereignty but does not reject the international legality entirely.

Schmitt criticises international law, as this lacks the spatial aspect which is central to the *jus publicum Europaeum* position attempting to offer a universal account of international order and blurring the distinction between European and non-European worlds. In addition to this, Schmitt see international law as a progressive liberal project which is subject to the same critique as he delivers against liberalism in general, that it undermines the political and acts as a cover for special interests.'[94]

Power politics and the struggle for power is central to the realist position and will be addressed from both perspectives and relevant to each of the war crime trials' particular political circumstances. Realism will show that states act to further their own interests and will make alliances when necessary to further their own aims. International Institutions along with their creation and development will be assessed against this, a realist agenda will have little faith that these institutions will actually work in practice.

hen speaking about the League of Nations Schmitt was highly sceptical of international institutions, analysing the League of Nations he states:

> 'That it should properly be called a society of nations. This body is an organisation which presupposes the existence of states, regulates some of their mutual relations, and even guarantees their political existence. It is neither universal nor even an international organisation. 'The Geneva League of Nations does not eliminate the possibility of wars, just as it does not abolish states. It introduces new possibilities of wars, just as it does not abolish states. It introduces new possibilities for wars, permits wars to take place sanctions

[94] Chris Brown, From Humanised War to Humanitarian Intervention, page 61, in L Odysseos & F Petito (eds) The International Political Thought of Carl Schmitt: Terror, liberal war and the crisis of global order, London: Routledge 2007.

> coalition wars, and by legitimizing and sanctioning certain wars sweeps away many obstacles to war.'[95]

Much of the liberal cosmopolitan challenge has been directed toward notions of the Westphalian system whose emphasis on state centrality and sovereignty had, to them, prevented the emergence of cosmopolitan law and world peace. Overcoming the sovereign nation state is the corner stone of liberal cosmopolitan perspectives, arguing that we no longer live in a world of discrete national communities.

Sovereignty is a key concept for realism and Schmitt puts his perspectives forward throughout his works, often referring to Westphalia. The Treaty of Westphalia (1648) concluded Europe's wars of religion, Schmitt uses this terminology to mean a unitary political entity, such as, a monarchy or a democracy is recognised by other political units as an equal and interacts with them on the basis of certain norms, laws and treaties. Realism sees the nation state and sovereignty as a key concept to its main agenda.

Schmitt's agenda maintains the sole prerogative of sovereign nation states and fights against international law restrictions on aggressive war by denouncing the League of Nations, The Kellogg-Briand Pact and Woodrow Wilson for criminalising war.

Schmitt is not simply the theorist of agonistic and contentious politics but the theorist of the rights of states to conduct war for their own preservation and also the theorist who rejects concepts such as human rights and crimes against humanity as being moralising glosses on superpower politics[96]

[95] Schmitt, C, The Concept of the Political, (Chicago: Chicago University Press, 2007) page 56.
[96] Benhabib, S, Carl Schmitt's Critique of Kant: Sovereignty and International law, Political Theory, vol. 40, 2012, Sage Publications Inc, page 700.

Liberal Cosmopolitanism.

The term cosmopolitanism is derived from the Greek *cosmopolis* (citizen of the world). It refers to a cluster of ideas and schools of thought that sees a natural order in the universe (the cosmos) reflected in human society, particularly in the polis or city state. More broadly, it presents a political – moral philosophy that posits people as citizens of the world rather than of a particular nation state.[97]

Cosmopolitanism has its philosophical roots in Immanuel Kant and the Kantian enlightenment traditions. Kant introduced the idea of 'cosmopolitan law' involving a third element of public law that supplements the domestic constitutional law and international law. Immanuel Kant's perspective puts forward a cosmopolitan world where armies were abolished, and humans were governed under a representative global institution. In all instances, this perspective of cosmopolitanism shares an emphasis that all humans should form one cohesive and united community.

Cosmopolitanism is linked to the liberal school of thought, 'like Liberalism, it sees international institutions as useful, but for cosmopolitans, international institutions are steps down the evolutionary road toward vesting full sovereignty in people rather than in states. Over time, the society of states will evolve into societies of people.'[98] The term Liberal Cosmopolitanism has been utilised throughout this thesis to encompass the context of modern liberalism. Liberalism is founded upon individual rights and their ethical obligations, liberalism believes that individuals should be 'free from arbitrary State power, persecution and superstition. It has advocated political freedom, democracy and constitutionally

[97] Definition taken from https://www.Cosmopolitanism (Stanford Encyclopaedia of Philosophy) accessed 21/10/2021.
[98] https://www.Cosmopolitanism | international relations | Britannica accessed 12/03/2023.

guaranteed rights and privileged the liberty of the individual and equality before the law.'[99] Cosmopolitanism subscribes to the same principles and seeks to adopt these at a universal level.

Immanuel Kant.

Immanuel Kant was a German philosopher and one of the central Enlightenment thinkers. He published a number of works in philosophy and the natural sciences and, in 1770 became Professor of Logic and Metaphysics at the University of Konigsberg.[100]

For Kant, Perpetual Peace is the starting point of liberal internationalism. Kant's idea of Perpetual Peace contained federalism as a model, including making individuals, as well as states, subjects in international law.[101] Peace, for Kant, requires the rule of just laws, within the state, between states and between states and foreigners, and it requires that this condition be a global one.

Kant argues that relations between the people throughout the world have developed so much that they:

> 'Have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere. The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only

[99] Birchill, Scott, Linklater, Andrew, Devetak, Richard, Donnelly, Jack, Paterson, Matthew, Reus-Smit, Christian & True, Jacqui, Theories of International Relations, 3rd edn, Hampshire: Palgrave Macmillan, 2005, page 55.
[100] Kleingeld, P (ed), Colclasure, Dm(trls), Waldron, J, Doyle, M & Wood, A, Toward Perpetual Peace and Other Writings on Politics, Peace, and History: Immanuel Kant, London, Yale University Press 2006, p1.
[101] Kant, I, Perpetual Peace; A philosophical essay, (translated by Smith, Mary C), Project Gutenberg.

under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace.'[102]

In his work *Perpetual Peace*[103], Kant formulated and proposed his concept of a peace programme to be implemented by governments in order to achieve 'Perpetual Peace'. Kant's 'Preliminary Articles' described the steps to be taken immediately by governments:

- No secret treaty of peace shall be held valid in which there is tacitly reserved matter for a future of war.
- No independent states, large or small shall come under the dominion of another state by inheritance, exchange, purchase or donation.
- Standing armies shall in time be totally abolished.
- National debts shall not be contracted with a view to the external friction of states.
- No state shall by force interfere with the constitution or government of another state.
- No state shall, during war, permit such acts of hostility which would make mutual confidence in the subsequent peace impossible; such are the employment of assassins, poisoners, breach of capitulation, and incitement to treason in the opposing state.[104]

Kant then went on to draft 'Definitive Articles' to provide a cessation of hostilities and a foundation on which to build peace, of which were to be undertaken by governments after the preliminary articles above had been established:

- The civil constitution of each state shall be republican.

[102] Kant, I, Perpetual Peace; A philosophical essay, (translated by Smith, Mary C), Project Gutenberg, 2005 p 108.
[103] Ibid p 120-128.
[104] Ibid section 1.

- The law of nations shall be founded on a federation of free states.
- The rights of men, as citizens of the world, shall be limited to the conditions of universal hospitality.

Kant defines republican states as having representative governments, in which the legislature is separated from the executive. Kant makes the claim that the republics will be at peace with each other, as they tend towards pacifism more so than other forms of governments. Kant argued against a world government, adding that it could be prone to tyranny, its unchecked sovereignty would be unnecessary to maintain ordered governance, instead, he considers that peace can only be achieved through peace treaties and organisations among liberal states, defined by three conditions:

1) represented, republican government.
2) a principled respect for human rights.
3) social and economic independence

The preferable solution to anarchy in the international system was to create a league of independent republican states. Kant 'provided for a normative ethical global order without the existence of a world government. Instead, the combination of treaty law is an effective deterrent to aggression by non-liberal states.'[105] However, Kant did admit that, in the state of war, 'where no tribunal empowered to make judgements supported by the power of law exists, judgements would rest on power; neither party can be declared an unjust enemy (since

[105] Bergsmo, M, J Buis, Emiliano, (eds) Philosophical Foundations of International Criminal Law: Correlating Thinkers, Torkel Opsahl Academic EPublisher, Brussels, 2018. Page 289.

this already presupposes a judgement of right) and the outcome of conflict (as if it were a so called judgement of god) determines the side on which justice lies.'[106]

In the main, Kant's world state does accommodate state sovereignty, his idea of federalism is a society of nations and not individuals. The right of hospitality, for Kant, is a right to be enjoyed in a state context. It gives no right to permanent residence in another state, only as a right not to be treated as an enemy and with hostility. The preliminary and definitive articles appear to reinforce ideas of sovereignty.

Kant's states continue to live in international anarchy, in the sense that there is no world government, but this anarchy is kept tame and made subject to law, rather than to fear and threat of war. Kant's state of nature is a state of war. International law constitutes no guarantee of justice in these circumstances. States therefore have the right to make war in this condition when they are injured (and legal proceedings do not provide satisfaction). But they also make war when they believe they are injured (and legal proceedings fail to satisfy their grievance) or when a state experiences a threat as another state makes preparation for war or when another state achieves an alarming increase in power. The rights of peace include neutrality, rights to guarantees, and defensive alliances. During war all means of conflict (jus in bello) are allowed except those that render one's own citizens 'unfit to be citizens' of a possible eventual peace based on international law. Thus spies, assassins, poisoners, sharpshooters, propaganda are all banned, So, too are war aims (jus ad bellum) that involve punishment, permanent conquest, subjugation, or extermination. Just wars are defensive in nature. Conquest for the sake of reforming an unjust enemy state is permitted, forcing it to

[106] Kant, I, 'To Perpetual Peace: A philosophers Sketch, in perpetual peace and other essays (indianapolis: Hackett, 1983) Ted Humphrey Trans., page 110.

'accept a new constitution, one which according to its nature is unfavourable to the inclination to wage war.' But no peace should constitute a violation of the fundamental rights of the citizens of a conquered state.

Boucher states that Kant's constitution 'must be republican because it comes the nearest to the moral ideal of individual freedom. Both are premised on the idea that obedience to external laws involves consenting to them.'[107] Universality of the law is not undermined by being subject to the principle of consent because it is a rational universal criterion associated with the freedom and autonomy of the individual in a kingdom of ends. 'Republicanism is the best form of constitution to bring about perpetual peace because the consent of the citizen of the state is required to determine the question of whether to go to war'[108]

Kant advocated the establishment of a League of States, and he has often been credited with influence on the creation of the League of Nations and the United Nations, although the resulting institutions only 'partially corresponds to the league proposed by Kant, most notably because standing armies were not abolished.'[109]

In Kant's view, politics and morality are closely associated, with politics being subordinate to morality.

[107] Boucher, D Political Theories of International Relations, First Edition, Oxford University Press, 1998, page 281.
[108] Ibid page 282.
[109] Kleingeld, P (ed) Toward Perpetual Peace and Other Writings on Politics, Peace and History, David L. Colclasure (trans), Jeremy Waldron, Michael W. Doyle & Allen W. Wood (contributors) 2006, Yale University Press, London. Page 4.

For Kant, the establishment of 'republican forms of government in which rulers were accountable and individual rights were respected would lead to peaceful international relations because the ultimate consent for war would rest with the citizens of the state.'[110]

Kant's metaphysical elements of justice (1799) presents the argument to limit the jus in bello (right in war) but this also contain certain elements that appear to justify some humanitarian intervention to enable the building of a liberal international order.

Hans Kelsen.

Hans Kelsen was an Austrian jurist and, legal and political philosopher. By the 1940's Kelsen was a well-established philosopher in the US, known for his defence of democracy and his pure law theory. In his work, Peace through Law, Kelsen puts forwards his thoughts for attaining world peace. He includes 'peace guaranteed by compulsory adjudication of international disputes,' (Part I): the formation of a world court with the authority to resolve international conflicts, and "peace guaranteed by individual responsibility for violations of international law," (Part II): that individual statesmen take personal moral and legal responsibility for war crimes and other acts of violation committed by their country.[111] He outlines three ways in which national and international law may interrelate; superiority of national law over international law, superiority of international law over national law and coordination, Kelsen explores the first two options in detail.[112] He deems international law as being incompatible with the idea of the sovereignty of national, territorial states and their

[110]Kant, I, Groundwork of the Metaphysics of Morals, Mary Gregor (ed) Christine M. Korsgaard (introduction) Cambridge University Press 1997 p.100.
[111] Kelsen, H, Peace through Law. Chapel Hill: University of North Carolina Press, 1944.
[112] Kelsen, H. Principles of International Law, The Law Book Exchange, New York, 2012 page 403.

legal systems: this idea must be 'radically eliminated.'[113] For Kelsen, the only instrument capable of achieving and maintaining a universal peace is the law. He believed that the presence of no more than four great powers not intent making excessive territorial claims, would be able to negotiate agreements among these powers, therefore, making it possible to achieve 'the idea of international peace through international law.'[114]

Kelsen states:

> 'One of the most effective means to prevent war and guarantee international peace is the enactment of rules establishing individual responsibility of the persons who, as members of government have violated international law. It is a fundamental principle of general international law-not war is permitted only as a reaction against a wrong suffered – that is to say, as a sanction – and that only war which does not have this character is a delict, i.e., a violation of international law- this is the substance of the principle of *bellum justum* (just war). Almost all the states are contracting parties to the Kellogg-Briand Pact, by which war as a means of national policy is outlawed.'[115]

Kelsen puts forward a theoretical justification for such international war crimes trials in his famous manifesto, Peace through Law*,* first published in 1944,[116] where Kelsen had expounded an institutional strategy to attain peace, borrowing from Kant the ideal of perpetual peace[117], the federal model, and the notion of 'cosmopolitan law'. Kelsen felt that the post-war situation was such that the project of a 'Permanent League' for the keeping of peace stood a good chance of being accepted by the great powers. This project was based on

[113] H. Kelsen, Peace through Law, The Lawbook Exchange LTD, New Jersey, 2008, page 9.
[114] Ibid.
[115] ibid page 71-72.
[116] Kelsen, H. Peace through Law, The Lawbook Exchange LTD, New Jersey. 2008.
[117] Kant, I. Perpetual Peace, Lewis White Beck (ed) New York: Liberal Arts Press, 1957.

the old model of the League of Nations, with an important new feature that judicial functions had a more important role than executive and legislative functions.'[118]

For Kelsen, 'the ideal solution of the problem of world organisation … is the establishment of a world federal state composed of all or as many nations as possible.'[119] Peace through Law highlights some issues with the establishment of his world federal state. Central to this is the 'international judiciary' Kelsen suggests 'an international treaty concluded by as many states as possible.'[120] This means that both 'victors and vanquished', establish an international court endowed with compulsory jurisdiction, 'this means that all the states of the league constituted by this treaty are obliged to renounce war and reprisals as a means of settling conflicts to submit all their disputes without exception to the decision of the court, and to carry out its decisions in good faith.'[121] Kelsen believes that it should be compulsory for states to refer their disputes to for court adjudication. Further setting out the steps to establish this, Kelsen states: Such a treaty can be concluded immediately after the war has come to an end; it can be concluded also with the vanquished states, whereas more ambitious agreements concerning world organisation, especially with the defeated states, can be negotiated only after a rather long-lasting transitional period during which the Axis powers, after complete disarmament are kept under the political and military control of the United Nations.'[122]

For the elimination of war, the judicial approach must precede any other attempts at international reform. 'When the possibility of war is really eliminated from international relations, when no government has to fear any disadvantage, and no government has to hope

[118] H. Kelsen, *Peace through Law. The Lawbook Exchange LTD, New Jersey, page* 13-15.
[119] Ibid page 5.
[120] Ibid page 14.
[121] Ibid page 14.
[122] H Kelsen, Peace through Law, 2008, The Lawbook Exchange LTD, New Jersey, page 15.

for any advantage whatever brought about by the war, the greatest obstacle in the way to a reasonable reform of the economic situation will disappear, at least insofar as the improvement of the economic situation is an international and not national problem.'[123] For Kelsen, 'conflicts of national economic interest may indeed lead to war, but they are not the root cause.'[124]

Ensuring that the international court can enforce its orders and judgements, was an issue that Kelsen would need to overcome. For this, he suggests 'a centralised executive power, an international police force, different and independent from the armed forces of the member states, and to place this armed force at the disposal of a central administrative agency, whose function is to execute the decisions of the court. An international police force is effective only if based on the obligation of the member states to disarm or radically to limit their own armament, so that solely the league is permitted to maintain an armed force of considerable strength.'[125] Kelsen requires that any police force of this nature would be international 'only with respect to its legal basis, the international treaty. It is, however, 'national' with the respect to the degree of centralisation.'[126] Kelsen understands that this is incompatible with the principles of 'sovereign equality and that the creation and organisation of a centralised executive power would pose the most difficult, and therefore cannot be established before the international court. Providing reasons for the importance of establishing the international court first, Kelsen states 'that the majority vote procedure of the international court, would not be considered incompatible with the sovereignty of a state.'[127] For Kelsen, treaties of arbitration have proved to be the most effective, seldom has a state refused to execute the

[123] Ibid page 16.
[124] Ibid page 17.
[125] Ibid page 19.
[126] Ibid page 19.
[127] Ibid page 21.

decision of a court whose authority it has submitted itself in a treaty. The idea of law, in spite of everything, still seems to be stronger than any other ideology of power.'[128]

The distinction between legal and political conflicts for Kelsen, is often made 'to justify the exclusion of some international disputes from the jurisdiction of international tribunals'[129]

Although Kelsen advocated the creation and development of the Nuremberg Trials, he later became one of the trials' harshest critics, advancing a critical argument in an important essay, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?'[130] This work is an analysis of both the decisions and procedures in the Nuremberg trial, in which Kelsen argued against the prospect that the Nuremberg Trial and the sentences imposed upon the convicted defendants might set a legal precedent. He argued that if they did, at the end of any ensuing wars, the governments of the victorious states would be entitled to judge the members of the defeated states for having committed what the winners would retroactively and unilaterally define as crimes, and this was something Kelsen hoped would not occur.[131] The punishment of war criminals should be an act of justice and not a continuation of the hostilities in forms which, while justiciable, are actually perpetuated through notions of revenge, Kelsen felt that it was incompatible with the judicial function for only the defeated states to be forced to subject their citizens to the jurisdiction of a criminal court, furthermore this violates the principle of *nullem crimen sine lege* (no crime without a law) which forbids retroactive laws, Kelsen's position regarding the Nuremberg Tribunal's violation of the

[128] Ibid page 21.
[129] Ibid page 23.
[130] H. Kelsen, 'Will the judgment in the Nuremberg trial constitute a precedent in international law?', International Law Quarterly, 1 (2) (1947).
[131] Ibid p. 115.

principle of non-retroactivity of criminal law here is ambiguous. He claims that although no positive international norm existed, the Nazi War Criminals could not have possibly been unaware of the immorality of their behaviour, and therefore the retroactive character of the law that was applied in the tribunal could hardly be considered incompatible with justice.[132] According to Kelsen, it was beyond doubt that the Allies had also violated international law. Only if the winning nations had submitted to the authority of that same law, they intended to apply to defeated nations would justice truly be served. From a liberal perspective the Tokyo Trials were criticised much more harshly,[133] on account of its deliberative procedures, disregard of the rights of the defence, the professional incompetence of the judges and the dissension that exploded between members of the court, which did not prevent death sentences from being handed down by a simple majority of the judges present. There were 24 defendants indicted at the Nuremberg IMT, with 12 of the defendants receiving the death penalty for their crimes, the Tokyo IMT indicted 28 defendants with 7 defendants receiving the death penalty for their crimes.

The cosmopolitan perspective regarding institutions such as the League of Nations placed importance of the role of the judicial being central in such institutions, Kelsen believed that the League of Nations failure was down to the political government being central rather than a court of justice. For Kelsen, the League of Nations failed due to an international government being at the core to its establishment and not an international court:

> If the main organ of the international league for the maintenance of peace is an international court with compulsory jurisdiction, the constitution of the

[132] Ibid p110.
[133] Dissenting opinions of Pal et al, Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971.

> league must guarantee to this court, the highest standards of independence and impartiality.'[134]

Kelsen points out that the League of Nations Permanent Court of International Justice has no compulsory jurisdiction and that the independence and impartiality of the judges from their governments needs to be assured more effectively than that of the Permanent Court of International Justice:

> 'Which concedes to the governments too much influence as regards to the selection of the judges. It should be possible to organise the new court in such a way that public opinion in the countries concerned would have faith in its independence and impartiality. We could reasonably hope that the governments concerned would ratify a treaty establishing such a court.'[135]

Liberal cosmopolitanism has at its core, the perspective that peace can only be guaranteed by a court of justice able to settle international disputes by applying international law objectively, free of any political conditioning.[136] Kelsen remained true to the Kantian conception of international law as cosmopolitan law and considered it crucial that it was necessary to establish the individual penal responsibility of whoever violated international law in carrying out government activities or directing military operations:[137] 'The state acts only through individuals acts of states are acts performed by individuals in their capacity as organs of the state and therefore acts imputed to the state.'[138] Establishing individual criminal responsibility, for Kelsen, is 'one of the most effective means to prevent war and to guarantee

[134] Kelsen, H. Peace through Law, The Lawbook Exchange LTD, New Jersey, 2008.
[135] Ibid page 57.
[136] Kelsen H, Law and Peace in International Relations, Cambridge, MA: Harvard University Press, 1948, page 145-68.
[137] Kelsen, H. Peace through Law, The Lawbook Exchange LTD, New Jersey, 2008, Page 87-85
[138] ibid page 73.

international peace, is the enactment of rules establishing individual criminal responsibility of the persons who, as members of governments have violated international law by resorting to or provoking war.'[139]

Conclusion.

In summary, this chapter has set out the main theoretical frameworks from Carr, Morgenthau, Schmitt, Kant and Kelsen. The theoretical framework to be adopted throughout this thesis will comprise the main themes from both theories explained above and will be applied to each case study chapter. This will provide a well-rounded analysis of the substantive elements of each case study, in particular the core crimes created and developed throughout and including the trial process and the interpretation of the core crimes by the trial judges.

Several themes have emerged from the outlined theorists, the further analysis and application will be explored further in each chapter. The theme of law as political will be analysed throughout this thesis. Cosmopolitanism will adopt a perspective of international law being a system of separate legal norms of conduct, remaining strictly legal and separated from an analysis of the politics of their creation, application and reform. This perspective sees international law as a discrete and strictly non-political standalone. On this theme, realism sees international law as a subset of the interplay between international relations and politics and therefore should be studied in this wider context as an interdisciplinary field of study with

[139] Ibid page 71.

broader research required to contextualise issues within international relations. The situation in politics at a particular given point in time is important, as this will give an indication of the particular political interests. Shklar[140] is concerned not whether politics are in play in the creation of war crimes trials but more about the type of politics in play and not whether politics underpin the legal processes. She argues:

> 'That some political trials may actually serve liberal ends, when they promote legalistic values in such a way as to contribute to constitutional politics and a decent legal system. The Trial of the Major War Criminals by the International Military Tribunal at Nuremberg probably had that effect. To be sure, within a stable constitutional order political trials may be a disgrace, a reversion to the politics of repression, but it is not the political trial itself but the situation in which it takes place and the ends that it serves which matter. It is the quality of the politics pursued in them that distinguishes one trial from another.'[141]

For Shklar, politics being involved in the creation of war crimes trials does not necessarily lead to illiberal results. Her work examines whether liberal results can be achieved despite certain types of politics playing a part in the negotiations.

Both realist and liberal cosmopolitan have a perspective on the international institutions that have been created, such as the League of Nations, which came into effect in 1920, its creation was stipulated in the Treaty of Versailles 1919 and its successor, the United Nations created in 1946 will also be analysed throughout this thesis.

The creation and development of war crimes trials from a synthesized realist and cosmopolitan perspective will be analysed throughout paying particular attention to the

[140] Shklar. J, *Legalism; Law, Morals and Political Trials*, First Edition, Harvard University Press, 1986 page 145.
[141] Ibid.

issues and controversies throughout both the creation and process of the trials such as individual and state responsibility, the creation of the international core crimes and processes relating to the trials. Bass puts forward an argument using the liberal/illiberal distinction that liberal states are more likely to pursue war crimes trials than illiberal states. This is not always the full case, and this element will be explored further throughout this thesis, analysing whether it has just been liberal states that have pursued war crimes trials and whether these were for liberal reasons. From the cosmopolitan stance Kelsen stayed true to the Kantian conception of international law as 'cosmopolitan law'. Kelsen thought it necessary to establish the individual penal responsibility of whoever violated international law in carrying out government activities or military operations. The Court was to indict the individual citizens who were guilty of war crimes, and their countries were to be held responsible for making them available to the courts. From the realist perspective all rights are contextually mediated, concrete and specific to and relative times and places and contexts of application. Nuances and criticisms of the trials will be analysed through the lens of the framework, including criticisms of retrospective application of the law, victor's justice, selectivity of both the defendants and the applicable laws, including how well they have stayed true to the trials own mandate including discussions of the rule of law. Realism sees international law as only being understood via the political circumstances of that time and behind the international law lies a political background. For Carr: 'International legal approaches to political problems are misguided.' [142]

Historical Change for cosmopolitanism is an aspirational model of evolutionary progress towards a predefined goal of the globalised rule of law and liberal democracy and world

[142] Carr EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016.

peace. International law has involved the triumph of reason over the power of state-based forms of organisation. For a cosmopolitan, international criminal law has developed into an enforcement mechanism for international human rights with emphasis on the successful prosecutions in international criminal law.

Universal values, for cosmopolitanism emphasis is placed on truly universal values of human rights, humanity, civilisation, human dignity and world peace, from this viewpoint individuals' citizens owe their primary duty to obey international law standards even where these contradict national laws. Individuals owe their primary loyalty to domestic national laws reflective of a political process of self-determination. Victims are not universalistic abstractions but always concrete and particular individuals and groups. International criminal law should limit itself to protecting those individuals not abstractions such as peace. Issues of transnational security, war and peace are essentially political/extra judicial and hence the sole responsibility of the United Nations Security Council.

Although realism is able to offer some important insights into international relations, it often falls short by claiming that power is central, it often fails to take social relations into account, and often falls silent when states can be seen to work together in the interests of other states. The understanding of the balance of power and sovereignty is vital and can explain many of the situations this thesis aims to analyse, however this is one dimensional. The liberal cosmopolitanism, on the other hand, often fails to take into account that states often do strive to further their own interests, acting to further their own state-based interests.

Realism often has difficulties in explaining world events in politics, such as the two World Wars, as they only measure the role of states and the balance of power between them in

world politics. Other theories are often more expansive and consider the roles of non-governmental organisations and domestic politics into their explanation of world politics. The First World War presented a major challenge to realism.

Chapter 3. International Criminal Law prior to the First World War.

Introduction

This chapter illustrates the legal landscape relating to international war crimes in force at the time of the outbreak of the First World War. The below outlined legal documents have been selected as they highlight the origins of the evolving concept of what would later become International Criminal Law, attracting individual criminal responsibility. Several of the below legal documents were regarded as precedents for efforts to create an International War Crimes Trial at the end of the First World War and the International War Crimes Trials conducted in the aftermath of the Second World War.

To understand how the Allies were potentially able to conduct war crimes trials, it is vital to outline the relevant legal instruments the Allied states had at their disposal in order to prosecute the perpetrators of the atrocity crimes committed during the First World War. This also explains how the Allies attempted to develop and interpret the law in the aftermath of the First World War. At the turn of the twentieth century, the modern law of war and war crimes began to take shape; this included progress in humanitarian principles and delimitation of the conduct of soldiers during wartime. This chapter seeks to identify and explain the legislative framework in place and highlights some of the legal issues that the Allies would need to overcome in order to secure justice for the victims of the atrocities committed. This chapter aims to outline the main provisions of General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (hereafter the Lieber Code) and deal with the legal instruments in chronological order, including the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1864 and 1868 (hereafter the Geneva Conventions), the Declaration Renouncing the Use, in Time

of War, of Explosive Projectiles Under 400 Grammes Weight (hereafter the Saint Petersburg Declaration) and the Hague Conventions 1899 and 1907. These instruments were all significant to the history of international efforts to use the law to limit conduct during war, the *jus in bello*. Attempts to limit war as a recourse to international disputes *jus ad bellum* was discussed, however these were not successful at this time.

Treaty-based sources of international criminal law, either directly or as an aid to interpretation, include the 1907 Hague Regulations, 1949[143] Geneva Conventions (and their Additional Protocols) and the 1948 Genocide Convention. They form the basis for many of the criminal charges included in the jurisdictions of the Nuremberg International Military Tribunal (IMT) and the Tokyo IMT, including the two ad hoc Tribunals and the International Criminal Court (ICC). Almost all military manuals and criminal codes refer to both customary law and applicable treaty law violations.[144]

Customary Law, together with treaties, is one of the principal sources of international humanitarian law (IHL). This results from a general and consistent practice of States that they follow from a sense of legal obligation; the significance is that it binds States that are not parties to the treaty in which the customary norm is restated. It is not the treaty provision but the customary norm with identical content that binds such States. Customary law is vital for filling the lacunae inadequately covered by humanitarian law treaties.[145]

[143] Including the earlier Conventions of 1864 and 1868.
[144] Henckarts, Jean Marie & Doswald-Beck, Louise, Customary International Humanitarian Law (Cambridge, 2005) 572.
[145] Explanation of Customary Law taken from Meron, T, The Geneva Conventions in Customary Law, The American Journal of International Law, 1987, page 348-370.

The following will be analysed to outline the laws available to the Allied states when considering the feasibility of bringing those responsible for the atrocity crimes committed during WWI before an international war crimes tribunal.

The 1863 Lieber Code.

Named after the primary author, Francis Lieber, the Lieber code is often described as 'the first modern codification of the laws of war.'[146] Furthermore, it was introduced as a military order rather than a statutory codification which would have required legislative approval.[147] The Lieber Code strongly influenced further codification of international law.[148] Francis Lieber was a Professor at Columbia University; in 1863, he was commissioned by US President Lincoln during the American Civil War to write the document;[149] the philosophy of Immanuel Kant heavily influenced Lieber. The Code represents the first historical attempt to codify the laws of war, although the Code was binding on the forces of the US, however, it did not have the legal status of an international treaty between nation-states. The Lieber code was a lengthy set of instructions consisting of 157 articles split into ten sections and aimed to limit soldiers' actions during the war in relation to each other and civilians. The first section of 30 articles affirmed that laws of war existed and set limits as to what soldiers were permitted to do. The laws forbade plunder, murder and enslavement of civilians.[150] The defence of 'military necessity' governed what was permitted, reprisals were allowed, and some collateral damage

[146] R. R. Baxter, "The First Modern Codification of the Law of War: Francis Lieber and General Orders No 100", in International Review of the Red Cross, 1963, vol 3 no. 25, pp. 171-89, 217-36.
[147] Ibid.
[148] Paust JJ, Dr Francis Lieber and the Lieber Code Proceedings of the Annual Meeting (American Society of International Law),2001, Vol. 9, pp. 112-115, Cambridge University Press, page 113
[149] Ibid, page 112.
[150] Instructions for the Government Armies of the United States in the Field, General Orders No.100, Section I, Article 60, Prisoners of War, Hostages, Booty on the battlefield.

to the innocent was judged inevitable.[151] This was a broad concept as it authorised a commander to direct his troops to 'give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners'[152]. Section 2 contains 17 articles that assured the protection of civilians' private property and the protection of persons, especially women and children. The Code also provided for wartime protection of religion and the arts. It warned American troops that violations would bring about the most severe punishment. Paust[153] states in his article regarding the Lieber Code:

> 'The Code undoubtedly lessened human suffering during the Civil War. It formed an authoritative exposition of the laws of war for the prosecution of soldiers and civilians then and for years to come. Interestingly, in the face of an ex post facto challenge, it was recognised:
>
> Where an accused is charged with a violation of the laws of war, as laid down in paragraph 86 of General Orders No. 100, it is no defence that the actual offence for which he was tried was committed before the date of the order; the latter being merely a publication and affirmance of the law as it had previously existed.'[154]

The Code was then transcribed into the German military manual ('German war book') in 1870, almost word for word. France (1877), Serbia (1879), Spain (1882), Portugal (1890), Italy (1896) and Great Britain (1884)[155] also followed the Code when preparing their own army manuals which Congress formally adopted much of the Code for the

[151] Ibid.
[152] Ibid Section III.
[153] Paust JJ, Dr Francis Lieber and the Lieber Code Proceedings of the Annual Meeting (American Society of International Law), APRIL 4-7, 2001, Vol. 95 (APRIL 4-7, 2001), pp. 112-115, Cambridge University Press on behalf of the American Society of International Law.
[154] Digest of Opinions of JAG, Army 244 (1866), quote taken from Paust JJ, Dr Francis Lieber and the Lieber Code Proceedings of the Annual Meeting (American Society of International Law), APRIL 4-7, 2001, Vol. 95 (APRIL 4-7, 2001), pp. 112-115, Cambridge University Press on behalf of the American Society of International Law.
[155] Paust JJ, Dr Francis Lieber and the Lieber Code Proceedings of the Annual Meeting (American Society of International Law), APRIL 4-7, 2001, Vol. 95 (APRIL 4-7, 2001), pp. 112-115, Cambridge University Press on behalf of the American Society of International Law, page 114.

Hague Conventions in 1899 and 1907.[156] This demonstrates that although not previously a part of the law for these countries, the Code was integrated by custom and practice, which is an essential source of origin for international criminal law. It is important to note the recognition of attempts to standardise the practices of war from the experiences of the previous century. The Code was primarily humanitarian in nature, addressing methods and means of combat and the protection of persons.

The Geneva Conventions 1864 and 1868

The Geneva Convention 1864 was closely associated with the Red Cross, whose founder Henri Dunant initiated international negotiations that produced the Geneva Conventions and defined 'the basis on which rest the rules of international law for the protection of the victims of armed conflicts.'[157] This would comprise the first international humanitarian framework. The principal author of this reform was Henri Dunant, a Swiss philanthropist. The Swiss government was the convenor of the first Geneva meeting in 1863; an international reforming body emerged from this. This committee convened the international conference of 1863. The 'Convention for the Amelioration of the Condition of the Wounded Armies in the Field' was created in 1864 and came into force in 1865. The original document contained ten Articles. Some of the critical Articles of this Convention will be outlined below. Article 1 established that ambulances and military hospitals should be acknowledged as neutral and therefore protected as long as any sick or wounded were being cared for; this neutrality would cease,

[156] Convention With Respect to the Laws and Customs of War on Land, 29 July 1899, 32 Stat 1803, Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat.2277.
[157] Pictet, Jean S. (1951), 'The New Geneva Conventions for the Protection of War Victims, The American Journal of International Law, 45 (3): 462-75.

however, if the hospitals or ambulances were being held by military force. Article 2 affirmed that all those employed in caring for the sick, including chaplains, should have the benefit of neutrality. Article 5 affirmed that any inhabitants of the country who assisted in caring for the sick and wounded be respected as neutrals, even when care was in a private home. Article 6 stated that sick and wounded soldiers of all sides should be cared for by all parties; if they were deemed unfit to serve after recovery, they were to be sent home. If they were fit and well, they should be sent home on the condition that they agreed not to bear arms in that war. Article 8 affirmed that the Convention should be regulated and enforced by the commanders-in-chief of the belligerent armies themselves, as distinct from higher international courts acting as a higher and neutral third party. The Geneva Convention 1868 was a second Red Cross Convention; this issued resolutions further elaborating the role of medical staff and outlined procedures for quartering prisoners of war; it extended the same privileges for the casualties on the sea. Article 6 provided that passengers and crew of sinking ships should be rescued, ships that did this should be legally defined as 'hospital ships' until they have delivered their prisoners to a safe port. The Articles defined above provide important context for the First World War chapters; during this war, many of these Articles were breached. A second diplomatic conference was convened at Geneva in October 1868 in order to clarify some provisions of the 1864 Convention and, particularly, to adopt the principles of the Convention to sea warfare. However, the additional Articles, adopted in October 1868, were never ratified, so did not enter into force. The Convention of 1864 was later revised and replaced by the Geneva Conventions of 1906, 1929 and 1949.

The Saint Petersburg Declaration of 1868.[158]

This Declaration prohibited the use in international armed conflict of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

Approximately eighteen states adopted the Saint Petersburg Declaration on 20 November 1868.[159] This Declaration was the first formal international agreement to prohibit the use of a particular weapon in a time of war between civilised nations. It applied a prohibition on the use of means or methods of warfare that were of a nature to cause unnecessary injury or suffering to a specific weapon.

The Declaration's first paragraph reflects the fundamental understanding that 'the necessities of war ought to yield to the requirements of humanity' at specified 'technical limits.' The Declaration outlines several principles that inform its weapon-specific prohibition:

- 'The progress of civilisation should have the effect of alleviating as much as possible the calamities of war.'
- 'The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.'
- In order to weaken the military forces of the enemy, 'it is sufficient to disable the greatest possible number of men'

[158] Full title Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Accessed at https://ihl-databases.icrc.org/.
[159] Austria-Hungary, Bavaria, Belgium, Denmark, France, United Kingdom, Greece, Italy, the Netherlands, Portugal, Prussia, the North German Confederation, Russia, Sweden-Norway, Switzerland, the Ottoman Empire, and Württemberg.

- The employment of ‘arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable’ goes beyond the legitimate object of weakening the military forces of the enemy, and
- Consequently, the use of arms that have these effects are ‘contrary to the laws of humanity’.

In application of these principles, State Parties to the Declaration decided to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances. The weight limit (400 grams) is based on the weight of the smallest artillery shell available at the time. Whereas state parties considered explosive rifle bullets unacceptable, they were unwilling to relinquish artillery shells deemed militarily useful against material and groups of persons.[160]

The Hague Conventions 1899 and 1907.

The first real international breakthrough for the laws of war and the limitation of conduct was embodied in The Hague Conventions. The first conference was convened at the invitation of Count Mikhail Nikolayevich Muravyov, the minister of foreign affairs of Tsar Nicholas II of Russia, at The Hague in 1899.[161] Twenty-six States[162] participated in the discussions at the First Hague Convention of 1899. This Convention consisted of three main treaties and three additional declarations; its main aim was to bring about an arms reduction and to discover

[160] Information taken from http://www.weaponslaw.org/ accessed 03/01/2022.
[161] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982, page 4.
[162] The twenty-six state representatives were Germany, Austria-Hungary, Belgium, China, Denmark, Spain, the United States, Mexico, France, the United Kingdom, Greece, Italy, Japan, Luxembourg, Montenegro, the Netherlands, Persia, Portugal, Romania, Russia, Serbia, Siam, Sweden and Norway, Switzerland, the Ottoman Empire, and Bulgaria.

more peaceful ways of settling international disputes. The conference contained the below three topics for discussion:

- A limitation on the expansion of armed forces and a reduction in the deployment of new armaments.
- The application of the principles of the Geneva Convention 1864 to naval warfare.
- A revision of the unratified Brussels Declaration of 1874 regarding the laws and customs of land warfare.

The 1899 Convention did not achieve its primary aim on the limitation of armaments;[163] states were not ready to relinquish any part of their rights to expand their military capability, electing to maintain their sovereignty in this area. However, the Convention defined and adopted conditions of belligerency and other customs relating to war on land and sea.

The Convention for the Pacific Settlement of International Disputes 1899 required signatory powers to resort to non-binding mediation before friendly powers prior to resorting to arms. This was not a court, but a 'standing panel from which suitable arbitrators could be selected by states desiring to resort to arbitration.'[164]

A second Hague Convention was convened at the Hague in 1907, in which 44 government representatives attended. This followed a request from Tsar Nicholas II of Russia, with American support. No overall agreement was reached in relation to general disarmament.[165]

[163] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982, page 5.
[164] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 178.
[165] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993.

This Convention indicated a renewed interest in naval warfare. Britain led the request to limit armaments; however, this element of the Convention failed as Germany objected to this limitation. Germany believed that this was an attempt to limit the growth of its naval fleet. Britain maintained the world's largest naval fleet, and seeking to implement a limitation, would mean that Britain's dominant position would be maintained. By October 1907, fourteen more detailed conventions had been issued. The most important note here was the 1907 'Respecting the Laws and Customs of War on Land,' containing detailed regulations in its Annex. The fundamental principles of *jus in bello*, that is, the body of international law regulating the conduct of combatants during the war in order to minimise unnecessary damage and suffering, are to be found in Article 22, which states that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'. The Regulations forbade poisoned weapons, the killing or wounding of those belligerents who are *hors de combat,* that is*,* those who have surrendered and are no longer a threat), means of warfare 'calculated to cause unnecessary suffering, the destruction or seizure of enemy property unless 'imperatively demanded by the necessities of war,' and the attack of undefended towns, villages, dwellings or buildings. The list of war crimes that were later included in the Nuremberg Charter was based on those listed in the key provisions of the 1907 Hague Conventions.[166]

The Martens Clause was codified in the preamble to the 1899 Hague Convention and then updated in the 1907 Hague Convention; this was named the Martens Clause after its drafter, the Russian delegate to the Hague Peace Conference, jurist F. F de Martens. The 1899 Convention contained the first version, which stated:

[166] Stahn C. *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019, page 76.

> ‘Until a more complex code of the laws of war is issued, the High Contracting Parties think it is 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 civilised nations, from the laws of humanity and the requirements of the public conscience.'[167]

In 1899, this conference unanimously adopted the Clause as part of its Preamble to Convention (II) with respect to the Laws and Customs of War on Land. This unanimous acceptance by participating states implies that its core principles were already generally accepted. This Clause was not the origin of the principles of humanity; instead, it signified the specific acceptance by states in treaty form that these rules already existed outside of treaty law in the form of natural law principles. According to natural law principles, the individual has ‘independent of any positive legal order, some rights which can be deduced directly from nature in general.’[168] These rights usually include freedom, equality, property and self-preservation. Eight years later, a revised, updated, and more influential version was inserted into the Hague Convention (IV) 1907,[169] which read,

> 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.'

Salter,[170]outlines several potential interpretations of the Martens Clause and states:

[167] Convention with Respect to the Laws and Customs of War on Land (Hague II), 29 July 1899, 32 Stat. 1803, Treaty Series 403, preamble.
[168] Kelsen, H, Principles of International Law, The Law Book Exchange, New York, 2012, page 149.
[169] Preamble, Paragraph 7, Convention (IV) respecting the Laws and Customs of War on Land, and Annex (opened for signature 18 October 1907, entered into force 26 January 1910) (1908), AJIL (supp) 90.
[170] Salter, M. Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause, Journal of Conflict and Security Law. Vol 17. No 3 (2012) Oxford University Press, pages 403-437.

> ‘Despite its lofty rhetoric echoing natural law abstractions, the Clause also contains a measure of pragmatic realism. It recognises that the absence of a world law-making body means that there will inevitably be a disparity and time lag between the state practices and legal principles. In particular, a mismatch between, on one hand, *de facto* state practices and treaty law provisions motivated by politically defined national self-interest and, on the other, the necessary normative requirements of any justifiable and viable system of international law protecting basic human rights.’

The Martens Clause was introduced as a compromise in the dispute between the delegates, who considered *francs-tireurs*, that is, civilians who took up arms against an occupying force, to be unlawful combatants subject to execution on capture and the smaller states who maintained that they should be considered lawful combatants.

However, it was difficult to identify any noteworthy significant differences in meaning, stemming from the alterations to the language used.[171] The Martens Clause is an important aspect of the developments of international criminal law. Any further alignment to the analysis of the war crimes tribunals will be analysed throughout the succeeding chapters, where necessary.

The Hague Convention of 1899 consisted of three main treaties and three main declarations:

1) Convention for the Pacific Settlement of International Disputes
2) Convention with Respect to the Laws and Customs of War on Land
3) Convention for the Adaption to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864

[171] ‘Right to declare’ in the 1899 version was later changed in the 1907 version to ‘expedient to declare, ‘belligerents,’ changed to ‘inhabitants,’ ‘protection and empire of the principles of international law’ was changed to ‘protection and rule of the principles of the law of nations,’ ‘civilised nations’ to ‘civilised peoples’ and ‘requirements to ‘dictates.’

IV 1 Declaration concerning the prohibition of the discharge of projectiles and explosives from balloons or by other new analogous methods

IV 2 Declaration concerning the prohibition of the use of projectiles with the sole object to spread asphyxiating poisonous gases

IV3 Declaration concerning the prohibition of the use of bullets that can easily expand or change their form inside the human body, such as bullets with a hard covering that does not completely cover the core or contain indentations.

Although the1907 Hague Convention agreed to the above listing of war crimes, the Convention failed to create an International Court of Justice, the US took the lead in the opposition of the creation of this Court would be possible, the US representative at the Hague Conference stated 'The great obstacle to the extension of arbitration , is not the unwillingness of civilised nations to submit their disputes to the decision of an arbitral tribunal; it is rather an apprehension that the tribunal selected will not be impartial.'[172] Carr believed that the 'potential personal bias of the international judge is not the real stumbling block. The popular prejudice against submitting matters of national concern to the verdict of a 'foreigner' is based primarily, not on the belief that the foreign judge will be biased as between the parties, but on the fact that there are certain fundamentals of a political character which are not prepared to have challenged by any foreign authority, whether judicial or political.'[173] Some debate did take place at the 1907 Hague conference regarding expanding the remit of the Permanent Court of Arbitration, however concerns were raised regarding whether finding an

[172] Proceedings of the Hague Peace Conference (English translation,: Carnegie Endowment) Conference of 1907, ii. P.316.

[173] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 181.

impartial judge The Hague Conventions marked the beginning of attempts to limit the right of war as an instrument of law and as a recognised means of changing legal rights.[174]

Conclusion.

This was the position of the relevant laws and conventions at the time of the outbreak of the First World War. The Two Hague Conventions broke new ground in humanitarian law, limiting the conduct during war, however they left some areas unaddressed, this would later cause problems in the aftermath of the First World War. A State resorting to war did not violate the Conventions. This created the notion of *jus ad bellum*, the law in war. Resorting to war was not in violation of the conventions. Instead, it was Heads of State who were the only authority able to decide if that war was justified. The legislation so far, did not stipulate individual criminal liability for violations was not created under the existing conventions; this includes Heads of State. Furthermore, there were no provisions for international criminal trials. A State was not required to hand over its citizens for a trial to be conducted by another state. The only subject in law, as it stood, was the State. Only a State could be liable for international wrongdoing. Any sanctions imposed, whether economic, financial, territorial, military, or other, had nothing to do with international criminal law. The Martens Clause has been subject to many interpretations, and this becomes vital in understanding the development of crimes against humanity, outlined in the succeeding chapters. Conventions were agreements between states, however, only binding upon the states that had actually signed and ratified

[174] Lauterpacht, *Oppenheim's International Law,* X 179.

them. They were not binding on any other states that were not a party to the agreement. Sovereignty, at this time, was still high on the agenda; States only signed up to the conventions and treaties that they wanted to, therefore, were not bound by any governing legislation that was not in their interests to do so.

Chapter 4. Leipzig.

Introduction.

This chapter will focus on international debate and the attempted creation of international War Crimes Trials in the wake of World War I (WWI). International prosecution for war crimes was largely unexplored in 1919. As discussed in the historical developments chapter, the first real international breakthrough regarding codifying conduct during war occurred at the Hague Conventions in 1899 and 1907, with the Convention with Respect to the Laws and Customs of War on Land. These Treaties showed an intention for States to cooperate and address the conduct of warfare and limit the atrocities committed during wartime.[175] However, there is evidence of a realist agenda, in that States wanted to retain their sovereignty, particularly in relation to armaments. Attempts to limit armaments, prior to the outbreak of the First World War failed as States did not want to fetter their own military capabilities, with each wanting to maintain a dominant position. It should be noted that the legal framework in place, at this time, did not address individual criminal responsibility for citizens or Heads of States.[176] Responsibility for breaches of existing Treaties would lie with the State and penalties for such breaches would equate to a State paying reparations for damages. There was no requirement, in law, for a State to hand over its citizens to another State for a domestic trial. The Treaties in place did limit the conduct during war but to declare war was still a sovereign right of a nation State. This evidences a realist agenda towards the substantive content of the Conventions, as States did not want to reduce their security

[175] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982, page 4.
[176] The Hague Conventions as discussed in Chapter 3 remained silent regarding Individual Criminal responsibility and were aimed at State responsibility.

(reduce their arms) or lose their sovereign right to declare war. States wanted to retain sovereignty.

Although lengthy debates took place between the Allies after the First World War regarding the potential creation of international War Crimes Trials,[177] attempts to create such trials were ultimately unsuccessful. However, the discussions between the Allies in developing and expanding international criminal law in response to German and Turkish conduct throughout WWI are vital to the eventual expansion of this area of law. The application of the theoretical framework of liberal cosmopolitan and realist perspectives, outlined in the Methodology Chapter, will highlight, and apply some of the key themes from each theory against the backdrop of the surrounding political circumstances and Allied states responses.

Historical Account.

The First World War started in 1914, with the assassination of Archduke Franz Ferdinand (heir to the throne of Austria-Hungary) and lasted until 1918. During the conflict, Germany, Austria-Hungary, Bulgaria, and the Ottoman Empire (the Central Powers) fought against Great Britain, France, Russia, Italy, Romania, Japan and the United States (the Allied Powers).[178]

The First World War witnessed one of the largest military mobilisations in history, with the Allied Powers mobilising over 40 million soldiers and the Central Powers mobilising close to 20 million soldiers.[179] The total cost in human life was estimated at 33 million dead and 8

[177] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982, page 68.
[178] Bassiouni The War to End all Wars and the Birth of a Handicapped International Criminal Justice System. Page 245.
[179] Jackson Nyamuya Maogoto, The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction, in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds), Historical Origins of International Criminal Law, Vol 1, page 171.

million casualties. In monetary terms, the war cost US$202 billion, with property destroyed in the war topping US$56 billion.[180] WWI lasted just over four years (July 1914 to November 1918). During this time, there were many reports of atrocity crimes. The U Boat warfare was brutal, Germany attacked civilian and hospital ships in clear violation of the Hague Conventions. The zeppelin raids and the use of poisonous gasses in WWI was the first time that asphyxiating and mustard gas were utilised as a weapon in warfare,[181] causing painful deaths, immediate illness, and permanent injuries; many people later died as a result of these gases.[182] The violation of a neutral Belgium by Germany including the actions taken against Belgium's citizens often included rape, using citizens as human shields, and cutting off children's hands. The sinking of the Lusitania, the British ocean liner, caused outrage in the US, as several US citizens were killed,[183] this ultimately led to the US joining the war. The war finally ended in November 1918 when the German delegation signed the Armistice Agreement on behalf of Germany. The countries that had suffered the most during the war pushed most insistently for prosecutions,[184] those being Britain, France, and Belgium. America became involved when they became aware of the U-boat warfare against American civilians. During the First World War, Germany executed two British civilians, leading to further outrage by the British and American public. Before the outbreak of the war, Edith

[180] For war costs see Charles Horne (ed.), *The Great Events of the Great War,* vol II, National Alumni, New York 1923. A table of the cost in human life and money is reproduced in Harold Elk Straubing (ed.), *The Last* Magnificent War: Rare Journalistic and Eyewitness Accounts of World *War I,* Paragon House, New York, 1989, pp. 402-3.

[181] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War*,* first edition, Greenwood Press 1982 & Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002.

[182] Bassiouni M C, World War I: 'The War to End all Wars' and the Birth of a Handicapped International Criminal Justice System, 30 Denv. J. Int'l L. & Pol'y 244 (2002),page 246.

[183] Bass Gary, Stay the Hand of Vengeance*,* first edition, Princeton University Press 2002. Cryer Robert, Friman, H, Robinson D & Wilmhurst E, An Introduction to International Criminal Law and Procedure, third edition, Cambridge University Press 2014. Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War*,* first edition, Greenwood Press 1982.

[184] Bass Gary, Stay the Hand of Vengeance*,* first edition, Princeton University Press 2002. Page 58.

Cavell was the matron of a nurse training school in Brussels. After the city was captured and occupied by the Germans, Cavell remained in her post, helping German and Belgian wounded soldiers. In 1915, German authorities arrested her and accused her of helping British and French Prisoners of War, as well as Belgians hoping to serve with the Allied armies, to escape Belgium for Holland. During her trial, Cavell admitted she was guilty of the offences and was sentenced to death, despite pleas from diplomats of the neutral countries US and Spain to have her sentence commuted. Cavell's execution led to a rise in anti-German feeling in the US as well as Britain.[185] The second execution, was that of Captain Charles Fryatt. He was the captain of the passenger ferry SS Brussels that sailed between Horwich and neutral Holland. In February 1915, following the outbreak of the war, the German government announced that merchant ships operating in British waters would be attacked without warning. The SS Brussels was approached by a German submarine during a routine trip to Rotterdam and ordered to stop. Captain Fryatt ordered the crew to proceed at full speed and attempted to ram the submarine, forcing it to crash dive to avoid destruction. Captain Fryatt was later praised by the British government for ensuring the safety of his crew and ship. Over a year later, whilst back on duty, the SS Brussels was surrounded by five German destroyers. Fryatt was ordered to stop; the ship was then taken to Bruges in occupied Belgium. Fryatt was charged by the German authorities with attempting to sink a German submarine. He was a non-combatant and accused of being a *franc tireur*, that is, a civilian engaged in hostile military action, Fryatt was found guilty and sentenced to death, executed by firing squad the same evening.[186] Again, this execution caused widespread public outrage and British protests.

[185] Information taken from https://www.history.com/this-day-in-history/british-nurse-edith-cavell-executed accessed 13/04/2022.
[186]Information taken from Captain Fryatt: forgotten martyr of the First World War - The National Archives blog accessed 10/04/2022.

The violation of Belgium's neutrality by Germany was in breach of the Treaty of London 1839. Neutrality is an international law concept used to describe states that do not take sides in an armed conflict involving other states. Several European states remained neutral during the First World War, including Denmark, Luxemburg, Sweden, Switzerland, and Spain. One way of securing neutrality was by Treaty, as Belgium did with the Treaty of London 1839, Britain, Austria, France, the German Confederation, Russia and the Netherlands agreed to respect Belgium neutrality in the event of a conflict. Belgium's neutrality was violated by Germany in 1914, provoking Britain to enter the war. Dutch neutrality was not guaranteed by a treaty, it was their government policy. The Convention on the Rights and Duties of Neutral Powers and Persons in Case of War on Land, adopted at the 1907 Hague Conference, declared the territory of a neutral state to be inviolable. The League of Nations sought to further consolidate the neutrality of certain states, Schmitt has argued[187] that the League of Nations claim to decide otherwise neutral states' positions towards the war amounted to nothing less than the wrestling away of those states' sovereignty.

Shortly after the war, the German Kaiser and Commander-in-Chief of the German armed forces, Wilhelm II, abdicated the throne in 1918 and sought asylum in the Netherlands on the assurance that he would not engage in any political activity. Any prosecutions would require his extradition from the Netherlands. The Allies did not believe that they would have any problems arranging the extradition of the Kaiser from the Netherlands. The Treaty of Versailles provided for no effective solution for arranging the surrender of the Kaiser. The

[187] Schmitt, C, The Concept of the Political, (Chicago: Chicago University Press, 2007) page 54.

Netherlands refused to hand the Kaiser over for trial stating that they did not recognise the laws under which he had been indicted and that individual responsibility did not exist.

Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties 1919

During the war, the Allied governments had decided to try defeated leaders whom they considered responsible for violations of international law and the laws of war. Following the War, the Allies[188] at the Paris Peace conference of January 1919 created the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties[189] (hereafter 'the Commission') to inquire into culpable conduct during WWI by the Central Powers. Activists for Kurdish, Armenian and Jewish were also drawn to Paris in order to lobby for their interests. In addition to the activists, Schabas points out that:

> 'Feminists lobbied … to advance their concerns, including calls to ensure that post-war criminal prosecutions focussed on the rape and enforced prostitution of girls and women in some of the territories occupied during the war in Belgium, parts of northeast France, eastern Europe, and Asia Minor.'[190]

This shows that some Non-Governmental Organisations were applying pressure to the representatives to ensure that atrocities were investigated. The British representative was a strong advocate for referring the question of war crimes to a commission, this can be seen

[188] The US, the UK, France, Italy and Japan. Other Allied and Associated Powers were also invited, they consisted of the smaller States that had contributed to the victory, namely, Belgium, Greece, Montenegro, Serbia, Portugal, Romania, Canada, Australia, New Zealand, South Africa, India and Siam.
[189] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. American Journal of International Law. 14: 95-154.
[190] Schabas, W, Trial of the Kaiser, Oxford University Press, 2018, page 99.

from a liberal cosmopolitan perspective, insofar as they wanted to investigate the atrocity crimes, hold individuals accountable and, negotiate a world peace, while securing justice for the atrocity crimes committed during the war and ensuring that any legal process, including the potential creation of an 'international criminal court' able to uphold rule of law principles. The liberal cosmopolitan Kantian agenda included retaining world peace, by asserting jurisdiction. The creation of an international institution, such as the League of Nations and an International Criminal Court was also a liberal cosmopolitan Kantian goal. However, referral of the issue to a Commission would take time and potentially never lead to a resolution. Whilst having the appearance of appeasing public pressure for justice, doubts have been raised as to the motivations of the Commission investigation, Bassiouni highlights these doubts and states, 'based on the subsequent developments in the administration of the Commission's mandate, however, it is reasonable to question whether the Allies' intention were to pursue justice or whether they only intended to use symbols of justice to achieve political ends.'[191] Carr, for the realist view, understands this as the Allied Powers wanting to maintain the status quo at all costs. He states that 'respect for law and sanctity of treaties will not be increased by the sermons of those who, having most to gain from the maintenance of the existing order, insist most firmly on the morally binding character of the law.'[192] Contrary to the agenda of the Allies throughout the Commission negotiations, Morgenthau argued that there was not a 'common interest in peace. Countries after the First World War, such as Britain, the US and France were victors who wanted to preserve the status quo, whereas countries such as Germany, Italy, the Soviet Union and Japan were clearly not happy with the

[191] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997 page 15.
[192] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 176.

balance as it stood. For that reason, the war was a means of changing the balance of power and was inevitable when one or more countries saw it as the only way of changing their unjustified inferior status. International peace and security are the ideology of satisfied powers, not shared idealism.'[193]

Debates throughout the Conference and Commission were often heated between the Allied Powers and, very little agreement was reached regarding the substantive laws to be applied.[194]

This Commission was to be the first investigative body of its kind. The mandate given to the Commission to inquire into and report on was:

1. The responsibility of the authors of the war:
2. The facts as to the breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the Central Staffs, and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.

[193] Morgenthau, H, Politics among Nations, 2nd edition, 1948, page 83.
[194] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982, page 73.

5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the commission finds it useful and relevant to take into consideration.[195]

The Commission divided into three sub-commissions which dealt with the questions of war crimes, the legal ramifications of war guilt and the prospects for prosecution before a tribunal. The Commission was composed of fifteen members who were distinguished lawyers from five of the victorious powers, two members each for Great Britain, the United States, France, Italy, and Japan. In addition, one member attended from each of the lesser powers. Discussions were held in closed meetings for approximately two months,[196] in which all members deliberated the mandate given to them. Great Britain and France had suffered the majority of losses during the war and were strong advocates of wanting to refer the question of war crimes trials to a Commission. The three liberal states of Britain, France and America took a broadly legalist attitude toward the punishment of Germans for war crimes.[197] During the Commission investigation, debates over the notion of individual criminal responsibility for crimes of war and several ideological and pragmatic objections emerged. The American delegation led many of the objections and took issue with the idea that state sovereignty, reaffirmed by realism could be broken so dramatically. Objections mainly centred around the idea of holding heads of state and other state actors liable for the collective actions of their sovereigns. They pointed out the lack of legal precedence for such accountability, highlighting the lack of support in substantive law. As shown, individual accountability did not exist at this time. The Hague Conventions conferred state accountability but did not deal with criminal

[195] *Ibid* page 95.
[196] Bass Gary, Stay the Hand of Vengeance*,* 1st edition, Princeton University Press 2002. Willis J, *Prologue to* Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982.
[197] Bass Gary, Stay the Hand of Vengeance*,* 1st edition, Princeton University Press 2002, page 59.

trials of individuals for breach of the Hague Conventions. A further argument during the Commission was that any trials may have lengthened the war if the threat of prosecution was hanging over the parties. Realists argued that trials may have exacerbated the fragile political situation and interfere with the establishment of international order.[198] Carr 'always thought the Versailles Treaty to have been little short of disastrous and a major factor in both bringing Hitler to power in 1933 and causing the war a few years later.'[199] The debates at the Commission culminated in the drafting of the Commission Report on its findings.

The Commission reported at the end of March 1919[200] that the outbreak of the war was the fault of the Central Powers, together with their Allies, Turkey and Bulgaria[201] The Commission further determined that Germany, along with Austria-Hungary, 'deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war'[202] The Report documented 'outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and of the laws of humanity.'[203] However, it also determined that this question was complex and 'might be more fitly investigated by historians and statesmen than by a tribunal.'[204] The report also stated that violations of the laws of war and humanity had occurred, contrary to the Martens Clause contained in the Preamble to the Hague Conventions. A full list of the

[198] Kissinger, H, A World Restored, Metternich, Castlereagh and the Problems of Peace: 1812-1822, Houghton Mifflin, Boston 1973, page 140.
[199] Carr EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page xxxii.
[200] Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 AJIL 95.
[201] *Ibid* page 107.
[202] *Ibid* Page 130.
[203] *Ibid* page 113.
[204] *Ibid* page 119.

atrocity crimes committed during the war was recorded in the report.[205] The Commission also recommended that high officials including the Kaiser, be tried for issuing unlawful orders and on the basis of command responsibility.[206] This was an innovative concept at this time in history; never before had a Head of State been indicted for war crimes nor had individual responsibility been attached to the carrying out of war crimes. There was no precedent to be found for such a development in international criminal law. In addition to this, the Commission also recommended the establishment of an Allied 'High Tribunal' with members from all the Allied countries, to try violations of the laws and customs of war and the laws of humanity. The Commission also suggested that the law to be applied to the tribunal should be 'the principles of the laws of nations as they result from the usages established among civilised peoples from the laws of humanity and from the dictates of public conscience.'[207] The origins of the 'Laws of Humanity' were codified in the Preamble to the Hague Convention 1899, with a slight wording change in the 1907 Hague Convention. The preamble to the Hague Convention 1899 contained the 'Martens Clause'. This was drafted by the Russian delegate to the Hague Peace Conference, jurist F. F de Martens.

> 'The clause has ancient antecedents rooted in natural law and chivalry[208]. It is articulated in strong language, both rhetorically and ethically, which goes a long way toward explaining its resonance and influence on the formation and interpretation of the law of war and international law'.[209]

[205] *Ibid* page 114-115.
[206] *Ibid* page 116-17.
[207] Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 AJIL 95, page 122.
[208] In 1643 the Articles and Ordinances of War for the Present Expedition of the Army of the Kingdom of Scotland concluded with a provision that established not only custom but also the law of nature; 'Matters, that are clear by the light and law of nature are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs of and constitutions of war; or may upon new emergent, be expressed afterward.' see Francis Grose, Military Antiquities 127, 137 (1788) taken from Theodor Meron as below reference page 79.
[209] Meron, T. The Martens Clause, Principles of Humanity, and Dictates of Public Conscience. The American Journal of International Law, vol 94, 2000 Page 79.

Martens proposed this declaration after delegates failed to agree on the status of civilians who took up arms against an occupying force.[210] Bassiouni puts forward the argument that, 'the Commission felt justified in relying upon the Martens Clause to develop the charge of 'crimes against the laws of humanity.' The United States and Japan, however, specifically opposed it on the grounds that the Commission's mandate was to investigate violations of the laws and customs of war and not the uncodified, so called 'laws of humanity.'[211] This recommendation confirmed liability directly under international law, rather than under the domestic legal order of a particular state. Britain, France, and Belgium suffered the largest losses during the war and were strong advocates for using International Law to punish the states responsible for the war. The Commission also found that the Central Powers had, with premeditation, 'launched a 'war of aggression'' in violation of treaties, but that this conduct did not provide the basis for a criminal charge under existing international law.

Just days after the Report was submitted the American delegation, Robert Lansing and Dr James Brown Scott, scholars in international law, submitted their Memorandum of Reservations in response to the Report. 'Lansing did not really believe in any supranational law and opposed any international punitive action against the Kaiser or the establishment of international courts for war crimes trials'[212]. The US submitted four fundamental reservations to the Report's recommendations rejecting the Report and reaffirmed some objections, aligning with the liberal cosmopolitan agenda, to the idea of international trials for the new types of offences being proposed. This Memorandum officially dissented from four of the

[210] Pustogarov, VV, 'The Martens Clause in International Law' (1999) 1 Journal of the History of International Law 125–35.
[211] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J. 11 1997 page 17.
[212] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 15.

points raised in the Report as they knew 'of no international statute or convention making violation of the laws and customs of war, not to speak of the laws or principles of humanity, an international crime'.[213] In total the US made four objections to the Commission's findings, rejecting them as unprecedented:

1) An International Court where they objected to the proposal of creating an international criminal tribunal, stating that there was no 'no precedent, precept, practice, or procedure'[214] instead of coordinating existing national military tribunals.
2) The limitations of justice were invoked when they argued that nations could not legally take part in the prosecution of crimes committed against the subjects of other nations.
3) They rejected the notion that any court of law could prosecute violations of the 'laws or principles of humanity', on the ground that such violations were moral rather than legal breaches and were as such, nonjusticiable. The US delegates declared that there were two classes of responsibilities 'those of a legal nature and those of a moral nature. Legal offences were justiciable and liable to trial and punishment by appropriate tribunals, but moral offences, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.'[215]
4) The prosecution of a head of state outside of his national jurisdiction would violate basic ideas and privileges of sovereignty. The US did not reject negative criminality entirely but affirmed that 'the applicable criteria must be not the knowledge of or the

[213] *Ibid* page 122.
[214] Ibid page 142.
[215] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 128.

ability to prevent a crime but the clear duty and authority of a commander to act in particular circumstances.[216]

The US delegates believed that an act could not be a crime in the legal sense of the word unless it were made so by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted invoking the *nullem crimen sine lege nulla poena sine lege* principle. The US leading case of United States v Hudson[217] held that 'the legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offence.' While it is true that the *nullem crime sine lege nulla poena sine lege* principle was entrenched into the domestic legal orders of the US, Britain and France, it had not yet been established as a principle in the international legal order. The US delegation was of the opinion that the creation of an international court of tribunal to try people for war crimes would be unconstitutional as there was no precedent, and instead proposed the use of military tribunals of the country affected. The US maintained the position that to create an international tribunal to try war crimes committed during world war 1 'would be extra-legal from the viewpoint of international law …contrary to the spirit both of international law and of the municipal law of civilised states… and would in reality, be a political and not a legal creation.'[218] The US in this regard chose the practical principles and looked closely at the laws that were in place at that time, often excluding the moral or ideological considerations. The US reservations were predominantly in line with the liberal cosmopolitan agenda being

[216] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982 Page 76.
[217] 7 Cranch 32.
[218] Memorandum by Miller and Scot, ca. 18 January 1919, published in David Hunter Miller, Mt Diary at the Conference of Paris with Documents, vol 3 (New York: Printed for the author by the Appeal Printing Company, 1921), 456-457.

unwilling to hold individuals liable for a crime that was not in force at the time of carrying out the act. They were therefore not willing to extend or create law that was not in force at the time of the outbreak of the First World War, this aligns with a legalist view most associated with the liberal cosmopolitan agenda.

It proves useful here to revisit the Hague Conventions of 1899 and 1907 in order to analyse the laws in force at the time of the outbreak of the war. The Hague Conventions on land warfare forbade the bombardment of undefended cities, but London was not undefended; the separate 1907 Hague Convention prohibiting the discharge of explosives from 'balloons or by other new methods of a similar nature' was not in force, as neither Germany nor France had signed it. No international agreement governing submarine operations had been adopted, and except for hospital ships, German U-boat attacks on enemy shipping violated no international law, save in the few cases in which survivors of a sinking ship were attacked. However, the use of poison gas was much less defensible, as the Hague Convention on land warfare explicably forbade the use of 'poison or poisoned arms.' But even here, questions might be raised under the Hague Convention on 'asphyxiating or deleterious gases,' which was limited to their diffusion by 'the use of projectiles.' The neutrality treaty violated by the German invasion of Belgium did not embody criminal sanctions, and as soon as Belgium resisted, she ceased to be neutral. The Hague Convention's legal rules were clearly violated by German soldiers throughout WWI; however, the Conventions did not specify any criminal punishment for the violations. Carr points out the difficulties when relying on Treaties:

> 'A Treaty, whatever its scope and content, lacks the essential quality of law: it is not automatically and unconditionally applicable to all members of the community whether they assent to it or not. Attempts have been made from time to time to embody customary international law in multilateral treaties

> between states. But the value of such attempts has been largely nullified by the fact that no Treaty can bind a state which has not accepted it.'[219]

The Peace Treaty of Versailles 1919.

After much deliberation and disagreement, the Allied representatives drafted the terms of the Treaty of Peace between the Allied and Associated Powers and Germany ('Peace Treaty of Versailles') concluded at Versailles in June 1919.[220] The Treaty of Versailles was signed in 1919 and brought an end to the war between the Allied powers and Germany. The Treaty is known for being one of the most important peace treaties and contained 440 Articles, outlining Germany's punishment for the war. The Commission Report was drafted to enable the creation of the Treaty of Versailles 1919, but there is little evidence to suggest that the Commission Report had any influence over the content of the Treaty of Versailles, as most of its recommendations were not incorporated into the final Treaty. The Treaty has been 'widely criticised as being imposed by the victors on the vanquished,'[221] and imposing incredibly harsh terms upon Germany. The Treaty contained several articles relating to war crimes, the most noteworthy will be analysed in turn below.

Article 227 came under section VII of the Treaty under the heading 'Penalties' and states:

> 'The Allied and Associated Powers publicly arraign William II of Hohenzollern, formally German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five

[219] Carr EH, The Twenty Years Crisis, 1919-1939*,* Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 160.
[220] Peace Treaty of Versailles [1919] UKTS 4 (Cmd. 153).
[221] Carr EH, The Twenty Years Crisis, 1919-1939*,* Cox M (preface) first edition, Macmillan Publishers Limited 2016 page 47.

> judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
>
> The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.'[222]

This Article presents several issues for analysis. Article 227 is directed at the Kaiser, as head of state. For the first time in history, a Head of State was to be charged with a new international crime. At this time, this was an innovative step for international criminal law because Article IV of the fourth Hague Convention of 1907 required that only states could be called to answer for violations of the laws of warfare. These laws of warfare and the *jus in bello* concerned the belligerents that had infringed the proper conduct of war on land, or at sea and the rights of prisoners etc… Any sanctions for violating the Hague Convention were to be economic, financial, territorial, military or others had nothing to do with criminal law. The existing law did not recognise the international jurisdiction of one State over another State or over a Head of State of another sovereign State. Under the existing law states retained a sovereign right to declare war over another state. Article 227 names the Kaiser in the charge itself, Schmitt arguing that this 'publicly charges the Kaiser through the peace treaty itself. The Kaiser is the only defendant and is named personally.'[223] The language used within the Article, namely *'a supreme offence against international morality and the sanctity of treaties,'* points towards a moral offence rather than a legal offence and appears to

[222] The Treaty of Versailles, [1919] UKTS 4, Article 227.
[223] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 137.

introduce the crime of aggression as a political crime. Kelsen notes that this wording 'is insincere and inconsistent' and points out that the real reason for demanding the Kaiser's submission to a criminal court 'was that he was considered the main author of the war, and resorting to this war was considered a crime.'[224] This would be the first time the concept of a crime of aggression has been debated and formalised in a treaty, and again was another innovative step in the development of a body of international criminal law, proving vital for the Allies in their construction of the law after the Second World War. Bassiouni was sceptical about the wording used in Article 227 and argued that: 'The Allies were not ready to create the precedent of prosecuting a Head of State for a new international crime. Indeed, this was evident in the choice of words used by the Allies in drafting Article 227, authored primarily by the representatives of Great Britain.' [225]

Article 227 then goes on to state that 'in its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.' Schmitt, provides a realist analysis of the Article and argues that: 'The court should be led by the highest motives of international policy,' and here, 'international policy' and not 'international law,' is stated in consciousness of the fact that hitherto existing law does not recognise this crime.'[226] Article 227 was contentious for several reasons, as this article expanded the scope of the existing international law, and used wording linked to morality and politics rather than any law currently in place. For the liberal cosmopolitan view, Kelsen argued that individual criminal

[224] Kelsen, H, Peace through Law. Chapel Hill: University of North Carolina Press, 1944, page 89.
[225] Bassiouni, From Versailles to Rwanda in seventy-five years; The Need to Establish a Permanent International Criminal Court, 10 Harv.Hun. RTS J. 11. 19 (1997) page 18.
[226] Ibid page 137.

responsibility 'was established with the consent of the state for whose acts individual criminal responsibility was to be established, Germany ratified the Peace Treaty of Versailles and thus gave its consent to the provision of Article 227.'[227] He believed this consent to be essential, 'for there exists a general rule that no state has criminal or civil jurisdiction (i.e., jurisdiction exercised by its criminal or civil courts) over the acts of another state without the consent of the latter.'[228]

Article 227 was very likely to fail the extradition standards of 'double criminality' which requires that the offence for which extradition is sought must be a crime in both countries. Such a law did not exist in Dutch law, nor could it be said that this crime existed anywhere outside of the scope of the Versailles Treaty. The British may have suspected that the Netherlands would be unlikely to extradite the Kaiser and therefore, it was a reasonable expectation that the trials, in any event, were unlikely to take place. This appeared to enable the British delegation to present themselves as favouring public opinion and supporting the French and Belgium position. The blame could, therefore, be apportioned to the Netherlands for refusing to extradite the Kaiser.

The entirety of Article 227 has received much criticism, and it was thought that the British 'were not eager to prosecute a crowned head, particularly when the family lineage of that crowned head was related to their own monarchy.'[229] For Schmitt the naming of Wilhelm specifically in the charge, including the uncertain facts of the case and the threat of an indefinite punishment 'Article 227 received the odium of an all too personal exceptional

[227] Kelsen, H, *Principles of International law,* The Lawbook Exchange LTD, New York, 2012, page 133.
[228] Ibid.
[229] Schabe, Wilson. Revolutionary Germany and Peacemaking, 1918-1919, Missionary Diplomacy and the Realities of Power (Rita Kimber and Robert Kimber trans,1985) 294.

justice.'[230] This highlights the opinion that Article 227 was a political charge, it's mention of morality did little to disguise this. The US Secretary of State, Lansing, was 'of the opinion that the British were forced by public pressure to champion the trial of the Kaiser and were actually relying on the Americans to prevent the occurrence of such a proceeding'.[231] Article 227 was added to the Treaty under the heading 'Penalties', Schmitt arguing that, 'here, the qualification of a punishable act is already consciously articulated through the heading.[232] As this analysis has shown, it is difficult to understand how this Article would have worked in practice, and whether the Allied Powers ever actually intended this to be followed through. No right of appeal was mentioned in this article. It is possible that, had a trial occurred, the charge may have been defined throughout the proceedings. The realist agenda would be incredibly dubious regarding the entirety of Article 227, believing that the use of the term 'international morality' was not a fixed or certain concept but often used to cover power motivations, in this case, the maintenance of the status quo for the Allies and ensuring that Germany was no longer a threat to the stability of the international order. However, morality is central to the goals of the liberal cosmopolitan, this theory, would also be dubious about the Allied motivations behind this Article and the unclear wording adopted.

Article 228 of the Treaty states:

> 'The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals' persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision

[230] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 138.
[231] Bassiouni, From Versailles to Rwanda in seventy-five years; The Need to Establish a Permanent International Criminal Court, 10 Harv.Hun. RTS J. 11. 19 (1997).
[232] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 136.

> will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
>
> The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.'

This Article rendered Article III of the Hague Convention 1907 obsolete.[233] It provided for states (and not individuals) to be summoned to answer for violations of the laws of war. The wording for this Article was taken from the US delegation reservations submitted to the Commission.[234] The US advocated the use of military commissions or tribunals, in contrast to the creation of a new international criminal court, that had jurisdiction to try violations of the laws and customs of war.[235] Prior to WWI, it had already been established that a belligerent nation had the right to try persons charged with violating the laws and customs of war if they fell into its custody and had committed such offences on its soil or against its nationals on their property.[236] Article 228 prosecutions were restricted to 'violations of the laws and customs of war,' due to the US having substantial concerns regarding the 'laws of humanity' The US delegation was also able to prevent the intended creation of an International Criminal Court as the Commission had proposed. The Allies, 'however missed the opportunity to establish a system of justice that would have functioned independently of political considerations to ensure uncompromised justice.'[237] Germany was angry at the Article 228

[233] Article III outlined mediation for States if a dispute arose. Article III referenced https://www.J:\Office Managers\Basic Documents English\2d ed\Revised\1907ENG.wpd (pca-cpa.org) accessed 13/03/2023
[234] Bassiouni the war to end all wars and the birth of a handicapped, page 272.
[235] Division of International Law, Carnegie Endowment For International Peace, Pamphlet No. 32, Violations of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 70-71 (1919).
[236] The Hague Conventions contained standards for the conduct of war.
[237] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011page 21.

requirement to deliver its own citizens for trial. For Schmitt, Article 228 was an innovation in terms of the international law that governed prior to 1914, namely that the vanquished state was obligated to turn over to the enemy state its own citizens who committed war crimes. This constituted a 'serious and fundamental change with respect to a basic legal institution: amnesty. Until 1918, amnesty normally was an integral part of a peace treaty, be it explicitly stated or implicitly assumed as an accepted practice of the peace process between two mutually recognised partners.'[238] Information had reached the Allies that compliance with such demands would threaten the stability of the new government in place, the Weiner Republic. It had become obvious to the Allies that any revolution in Germany would jeopardise reparations and have other serious consequences, but the Allies still proceeded with delivering over to Germany of a list of 854 individuals for trial. Due to the increasingly unstable political order of that time, Germany then proposed the national Leipzig trials.

Article 229 states that:

> 'Persons guilty of criminal acts against the nationals of one of the Allied or Associated Powers will be brought before the military tribunals of that Power.
>
> Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.
>
> In every case the accused will be able to name his own counsel.'

[238] Schmitt, C, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, translated and annotated by G. L. Ulmen, 2006, Telos Press Publishing, New York, page 261.

This Article stipulates that those individuals would be prosecuted before a domestic tribunal of the state against whose nationals the alleged crimes were committed and would involve Germany handing over its citizens for potential prosecution of war crimes.

The Treaty imposed some harsh reparations upon Germany through the concept of state responsibility through the treaty articles 231 – 247. This concerned both the financial and economic demands of the Allied Powers, namely the legal demands that had been 'derived from the legal responsibility of the defeated.'[239] As the Allies had already found Germany to have led an unjust war, and the charge under Article 227 was directed at the Kaiser for this. These further Articles included demands that Germany was to hand over all its Merchant ships, plus one quarter of its fishing fleet and to deliver huge quantities of coal to numerous Allied nations as well as benzol coal tar and ammonium sulphate to France. Germany lost 13% of its land and 12% of its population to the Allies[240]. Despite the famine conditions in Germany, they were also to provide the Allies with a substantial proportion of its livestock. Germany accepted the limitation of military power to an amount that gave them inferior status among the Allied Powers.

As stated above, international war crimes trials did not take place after the First World War. Germany requested that the trials be held at national level in Leipzig, and there were long delays before the German national trials began, with only a handful of sentences being handed down. Those who were found guilty received short sentences, the 'two most notorious war criminals soon escaped from prison and disappeared and, the German Court subsequently reversed itself and found even those two men innocent.'[241] The result was that

[239] Schmitt, C, *Writings on War*, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 141
[240] www.holocaustexplained.org accessed 24/04/2022.
[241] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press, 1982 page 126.

only six defendants were ever convicted before the German court and given light sentences. The failure of the Allies to establish an international tribunal would later be recalled more than two decades later when Allied representatives were preparing for the war crimes trials after WWII. The British representatives allowed the entire issue to fade away and, by this time, they had employed a policy of reconciliation with Germany. For Bassiouni, 'The Leipzig trials exemplified the sacrifice of justice on the altar of international and domestic politics of the Allies, The Treaty committed to try and punish offenders if Germany failed to do so was never carried out.'[242]

The League of Nations was formed at the Paris Peace Conference and brought into existence by the Treaty of Versailles.[243] The first 26 clauses of the Treaty of Versailles were to be the Covenant of the League of Nations.[244] Its goals were to prevent another global conflict like the First World War and to maintain world peace. Articles 10-17 contained prescriptions for the prevention of war. States would break the peace, according to the Covenant, if they resorted to war without following certain procedures. Article 16 lay out the sanctions for those states it would deem to have broken the peace, namely financial, economic and military measures by the other members.[245] Nothing was said about the criminalisation of war. The League of Nations was the first organisation of its kind and built upon the liberal cosmopolitan ideals. The League was drawn up with specific constituent elements such as an Assembly, Council, Permanent Secretariat and Court of Justice. Its stated primary goals contained in the covenant included preventing wars through collective security and disarmament and settling

[242] Bassiouni M C, *Crimes against Humanity in International Criminal Law*, 200 (1992) page 202.
[243] Treaty of Versailles Article 1.
[244] https://www.Peace Treaty of Versailles - World War I Document Archive (byu.edu) accessed 21/09/2022.
[245] Ibid.

international disputes through negotiation and arbitration. The Assembly comprised of representatives of the governments of all member states. Germany was initially excluded from entry to the League of Nations but would join later. Each state was given one vote, and unanimity of the members present was required to implement any decisions of a political nature, including those concerned with peace-threatening international disputes. The Council was made up of permanent and non-permanent members, nominated by the Assembly. The rule of unanimity applied here too. Four of the great powers, joined later by Germany and the Soviet Union were permanent members. The Covenant of the League of Nations introduced several new innovations in the sphere of limiting recourse to war. Article 12 bound the States to submit all serious disputes to peaceful settlement or to inquiry by the council and in no case could States resort to war until these procedures had time to lead to a settlement, in the event that no settlement could be reached, the States promised they would then wait a further three months before resorting to war. Article 14 set up the Court of International Justice,[246] this court could advise on international law and arbitrate in disputes, although this was a court as such, it exercised jurisdiction only with the consent of the parties, 'whether that consent was expressed in an ad hoc agreement relating to the particular dispute or in a general agreement between the parties to submit to the Court all disputes falling within certain categories.'[247] The Court confirmed this position in one of its judgement's: 'It is well established in international law, that no state can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration or

[246] Articles taken from https://www. Peace Treaty of Versailles - World War I Document Archive (byu.edu) accessed 13/03/2023.
[247] Carr EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 178.

to any kind of pacific settlement.'[248] In addition to the required state consent, the court also had no power to enforce its decisions. The League of Nations was an independent organisation without an army of its own, and thus depended on the Great Powers to enforce its resolutions. The realist would suggest here that military force was required to enforce its agenda and laws. Carr provides an example of this, 'the Weimar Republic broke down because many of the policies it pursued – in fact, nearly all of them … were unsupported, or actively imposed, by effective military power. The utopian, who believes that democracy is not based on force, refuses to look these unwelcome facts in the face.'[249] The members were often reluctant to do so, leaving the League powerless to intervene in disputes and conflicts. At this time the belief was held that The League of Nations would bring about a new world order and would prevent future wars. 'The Allies, however missed the opportunity to establish an international system of justice that would have functioned independently of political considerations to ensure uncompromised justice.'[250] The U.S. Congress was resistant to joining the League, as doing so would legally bind the U.S. to intervene in European conflicts. In the end, the U.S. did not join the League, despite being its main architect. The League failed to intervene in many conflicts leading up to WWII, including the Italian invasion of Abyssinia, the Spanish Civil War and the second Sino-Japanese War. Germany later withdrew from the League as did Japan, Italy, Spain, and others. The onset of WW2 evidenced that the League had failed in its primary purpose to prevent any future world war. The League lasted for 26 years; the United Nations (UN) replaced it after WWII in 1946 and inherited a number of

[248] Permanent Court of International Justice, Series 2, No 5, p.27, quoted in EH Carr, The Twenty Years Crisis; 1919-1939 page 178.
[249] Carr EH, The Twenty Years Crisis, 1919-1939*,* Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 92-93.
[250] Bassiouni, M C, From Versailles to Rwanda in seventy-five years; The Need to Establish a Permanent International Criminal Court*,* 10 Harv. Hun. RTS J. 11. 19 (1997) page 21.

agencies and organisations founded by the League. Kelsen argues that the failure of the League of Nations is due to the fact that its central body was a council, similar to an international government. For Kelsen, it was vital that the central role in an international institution should be a Court of Justice. The League of Nations was unable to bind any member state to its decisions that had not been unanimously agreed to.[251] This was a real fatal error of design since the most serious lacuna in international law is the very absence of a judicial authority. Therefore, for Kelsen, peace could only be guaranteed by an international court of justice which operates in relation to disputes between states as a higher, impartial third party with an international police force under its command. The International Court of Justice, proposed by the League of Nations was tasked with the liberal cosmopolitan Kantian goal of 'retaining peace' by asserting jurisdiction

Morgenthau believed international governments such as the League of Nations to be an:

> 'Insufficient quest to square the circle of international anarchy. National sovereignty demands that the governments of individual states decide for themselves the domestic and international issues that concern them. An international organisation, in order to be effective, requires a transfer of that power of ultimate decision, at least in certain matters from the national to an international authority.'[252]

Morgenthau also stated that 'the paradox of every hitherto existing experiment in international government was that it tried to preserve national sovereignty while establishing a common global authority resting on a shared conception of justice and aspiring to preserve peace.'[253] In contrast to the liberal cosmopolitan position, realism devalues the place of morality and law in international affairs and often shows animosity towards the novel ideas

[251] Kelsen, H, Peace through Law. Chapel Hill: University of North Carolina Press, 1944 page 49.
[252] Morgenthau, H. Threat to and hope for the United Nations, KAP, 279, 1979.
[253] Scheuerman W, Hans Morgenthau; Realism and Beyond, first edition, Polity Press, 2008, Page 117.

of political and legal organisation beyond the nation state. Schmitt's realist agenda regarded the Versailles Treaty and the League of Nations as revolutionising the concept of war, turning it into a 'discriminating concept of war' and claimed that the League of Nations held the right to define which side of a conflict was objectively just and unjust, including the authority to declare this decision binding on all neutral parties.[254] The failure of the League of Nations can be explained by the:

> 'Obsessive tendency of the Great Powers. France, above all, to employ it as a means towards rigid preservation of the status quo … given its objective of holding all states from the most down to the least powerful, to a strict adherence to the terms of the Treaty of Versailles … this adherence entailed the permanent disarmament of Germany and its relegation to a reduced political ranking.'[255]

The US withdrew from the Treaty of Versailles and drafted its own peace agreement with Germany, which did not contain any of the war crimes articles outlined above. The US did not become a member of the League of Nations. At this time, the US policy was isolationism, that is, a diplomatic and economic doctrine that aimed at self-advancement to make the United States economically self-reliant and retaining peace with other nations, opposing the involvement in the political affairs, and especially the wars, of other countries. The First World War was the first time that the US had departed from its policy of isolationism, this US policy stemmed from the Monroe Doctrine of 1823, this warned the Europeans against establishing any new colonies or interfering in the affairs of independent nations in the Western Hemisphere. In addition, this doctrine reaffirmed that the US would stay out of Europe's

[254] Schmitt C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011.
[255] Zolo D, Cosmopolis; Prospects for World Government, (McKie, D trs), First Edition, Polity Press 1997, page 6.

alliances and wars except for if American rights were threatened. This policy ended in the US with the bombing of Pearl Harbour in December 1941. For Schmitt, the efforts to create a new spatial order between the years 1919 and 1939, critical of the League of Nations and the US relationship with this:

> 'Once the priority of the Monroe doctrine - the traditional principle of Western Hemisphere isolation, with its wide-ranging interpretations - was asserted in Geneva, the League abandoned any serious attempt to solve the most important problem, namely the relation between Europe and the Western Hemisphere. Of course, the practical interpretation of the ambiguous Monroe Doctrine - its application in concrete cases, its determination of war and peace, its consequences for the question of inter- allied debts and problem of reparations - was left solely to the United States American affairs, the League's role in European affairs . . . was codetermined by these American member states.'[256]

Conclusion.

In conclusion, the attempted international trials, after the First World War, had failed. This was mainly due to the fact that the Allies could not agree on the law to be applied, and as a result, the failure of the extradition of the Kaiser. Another aspect of this failure was that the Allies were not in occupation of Germany, the governing body of Germany at that time was growing weaker by the day with many threats to its existence. Much of Germany was angry at the harsh policies the Treaty of Versailles imposed, further threatening Germany's political stability. Bass[257] provides a word of caution that 'War crimes tribunals risk the acquittals of history's bloodiest killers in order to apply legal norms that were, after all designed for lesser

[256] Schmitt, C, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, translated and annotated by G. L. Ulmen, 2006, Telos Press Publishing, New York, page 254-55.
[257] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press 2002 page 31.

crimes.' The Allied efforts to punish German and Turkish war criminals after World War I ended in fiasco, in large part because of the law.' The debated creation of the substantive laws was proved to be too much of a leap forward in terms of the already existing legal framework in 1919. The drafters of the Hague Conventions could not have foreseen the atrocity crimes that would be perpetrated during the First World War, here the facts drove the development and attempted creation of the laws. Carr stated that:

> 'Prior to 1914 resorting to war was not deemed illegal for the purpose of changing the existing legal order; and no legally constituted machinery existed for bringing about changes in any other way. After 1918 opinions condemning aggressive war became almost universal, and nearly all the nations of the world signed a pact renouncing resort to war as an instrument of policy. While therefore resort to war for the purpose of altering the status quo now usually involves the breach of a treaty obligation and is accordingly illegal in international law, no effective international machinery has been constituted for bringing about changes by pacific means.'[258]

Carr therefore believed that the League of Nations and any attempts at criminalising war would fail. Article 227 Shows an eagerness on the side of the Allies to avoid concrete wording, instead talking about abstract generalisations. There appears to be a gap here in the words used in the article and the actual actions of what happened.[259] For Bassiouni, 'Article 227, quite possibly was intended to fail. It offered a concession to the European masses, who saw the Kaiser as an ogre of war, and to the French and Belgian Governments who wanted to humiliate Germany for initiating the war.'[260] It appears, that as far as Article 227 is concerned,

[258] Carr EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, page 175.
[259] Ibid, page 31.
[260] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997, page 19.

neither the realists nor the liberal cosmopolitans could reconcile this with their international criminal law theories.

As outlined above, the steps taken to develop international criminal law in the aftermath of the First World War proved to be too much of a step forward for the existing international system. The majority of the Allied Powers held sovereignty as their priority and wanted to uphold the status quo at all costs and ensure that Germany paid for the damage caused during the war. Trachtenberg opined that 'Wilson repudiated the balance of power; he failed to see why a relatively strong Germany was necessary as a counterweight to Russia; and as a result, a moderate, negotiated peace with Germany was ruled out.'[261] The pursuit of justice for the atrocity crimes committed during the war, eventually came second to the politics at that time. For Schmitt, the idea of the 'equality of rights of all states on the basis of equal sovereignty remained so strong in 1919 that the League Covenant was able to contain a criminal prohibition of war only implicitly.'[262]

[261] Trachtenberg, M, Versailles after 60 years, journal of contemporary history, vol 17, no 3 page 494.
[262] Schmitt, C, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum, translated and annotated by G. L. Ulmen, 2006, Telos Press Publishing, New York, page 270.

Chapter 5. Constantinople.

Introduction

This chapter will explore attempts to prosecute atrocity crimes committed against the Armenian population of the Ottoman Empire and the Allied Prisoners of War during World War I. The political situation in Turkey at the beginning of World War I was that the Turkish Government controlled the Ottoman Empire. The Turkish Government (known as The Young Turks) were the ethnic majority that ruled the Ottoman Empire. Armenia was a territory within the Ottoman Empire. The Armenian population had their own culture and language. [263] This chapter seeks to analyse the pivotal role of political debates and attempted developments in international criminal law. Starting with a historical account, this chapter will then move on to the development and application of the laws of humanity based on the Martens Clause contained in the Preamble to the Hague Conventions 1899 and 1907 which will be analysed against the backdrop of the political debates that took place during The Commission on Responsibility, including the United States and Japanese representative dissents relating to the laws of humanity. This chapter also aims to explore the concept of individual criminal responsibility. The Creation of the Peace Treaties between the Allies and Turkey, namely the failed Treaty of Sevres and the later replacement of the Treaty of Lausanne, will also be discussed. The eventual failure of the Allied attempts to secure war crimes trials to prosecute the Ottoman Empire under international criminal law for the

[263] Information taken from https://www.Armenian Genocide: Facts & Timeline - HISTORY - HISTORY accessed 16/11/2022.

atrocity crimes committed against the Armenian Population and Allied Prisoners of War will also be analysed against the realist and liberal cosmopolitan framework. The international criminal trials at Constantinople 'had they not fallen apart, would have been remembered as comparable only to Nuremberg and Tokyo.'[264]

Historical Account.

The Young Turk government of the Ottoman Empire entered the First World War as an ally of Germany in November 1914; they then began their programme of the systematic destruction of the Armenian population. The Armenian population had faced decades of persecution from the Ottoman Empire, with massacres of their population also conducted during 1894-1896 and 1909.[265] Five months after the start of the war, an imperial rescript cancelled the Armenian Reform Agreement of February 1914, also known as the Yenikoy Accord, was a reform plan created by the Russia and the Ottoman Empire between 1912 and 1914.[266] The Armenian Reform Agreement created autonomous administrative rights in the six provinces of Turkey, in which the majority of the Armenian population resided. Appointed by agreement between Russian, France, Britain and Italy, two inspector generals were established to hold judicial authority over the Armenian provinces. The Agreement was the result of the long campaign by the Armenians to gain recognition and equality within the Ottoman Empire, after suffering years of political oppression as a result of their Christian religion. The cancellation of this Agreement 'reflected a general determination during the war to abrogate the international treaties that had resulted from the application of the principle of 'humanitarian

[264] Bass, Gary Jonathan. Stay the Hand of Vengeance, The Politics of War Crimes Tribunals, 1st ed, Princeton University Press, London, 2002, page 106.
[265] Historical information taken from https/www.The Ottoman Empire Enters World War I (1914) (jewishvirtuallibrary.org) accessed 14/01/2022.
[266] Taken from https/www.Armenian Genocide: Facts & Timeline - HISTORY – HISTORY.

intervention.'[267] The Ottoman Government also declared null and void the Paris Treaty of 1856, The London Declaration of 1871 and the Berlin Treaty of 1878,[268] the Foreign Minister for the Ottoman Government cited that 'all three of these international treaties had imposed political shackles on the Ottoman State which the Porte intended to get rid of.'[269] Further to these cancellations, the created a new law, The Temporary Law of Deportations, citing treason and other acts by the Armenians, the Ottoman authorities ordered the deportation of Armenians for national security reasons. 'The execution of this order actually masked the execution of the Armenian population.'[270] The atrocity crimes committed against the Armenians were planned and carried out by the Turkish Government against the Armenian population. It is estimated that between one and one and a half million[271] Armenians were killed between 1915 and 1923. The Armenian massacres were carried out and implemented in two phases: the wholesale killing of the able-bodied male population through massacre and subjection of army conscripts to forced labour, followed by the deportation of women, children, the elderly and infirm on death marches leading to the Syrian desert.[272] In addition to the Armenian massacres, the British Prisoners of War in Turkey were treated with brutality and neglect, which led to the deaths of 'half of the thirteen thousand soldiers captured at Kut-el-Amara.'[273] The crimes created widespread public outrage throughout the world.

[267] Jackson Nyamuya Maogoto, War Crimes and Realpolitik: International Justice from World War I to the 21st Century, 2004, Lynne Rienner Publishers, London, page 43.
[268] Trumpener, U, *Germany and the Ottoman Empire 1914-1918, 1968*, Princeton University Press, Princeton, page 134.
[269] Ibid.
[270] Nyamuya Maogoto, J, War Crimes and Realpolitik: International Justice from World War I to the 21st Century, 2004, Lynne Rienner Publishers, London, page 43.
[271]The numbers of people killed vary slightly in texts, taken from Marten Bergsma, Cheah Wui Ling, Sang Tioying and Yi Ping (eds) Historical Origins of International Criminal Law, 2015, Torkel Opsahl EPublisher, Brussels. P. 563.
[272] Paylan, Sheila and Klonowiecka-Milart, Agnieszka, Examining the Origins of Crimes against Humanity and Genocide, contained in Marten Bergsma, Cheah Wui Ling, Sang Tioying and Yi Ping (eds) *Historical Origins of International Criminal Law*, 2015, Torkel Opsahl EPublisher, Brussels, Page 562.
[273] Willis J, *Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War,* first edition, Greenwood Press 1982, page 154.

Following Turkey's defeat in the war, the Allies allowed it to maintain its own Government. International justice efforts after WWI were mainly focused on Germany. However, the British representatives were outraged at the attacks on the Armenian population, firmly believing in a liberal concept of human rights, applicable to all people; the fact that the Armenians were not British did not exclude them from the protection of the law.[274] Winston Churchill, noting the massacre of the Armenian population stated:

> 'In 1915 the Turkish Government began and ruthlessly carried out the infamous general massacre and deportation of Armenians in Asia Minor, the clearance of the race from Asia Minor was about as complete as such an act, on a scale so great, could well be. There is no reasonable doubt that this crime was planned and executed for political reasons. The opportunity presented itself for clearing Turkish soil of a Christian race opposed to all Turkish ambitions, cherishing national ambitions that could be satisfied only at the expense of Turkey, and planted geographically between Turkish and Caucasian Moslems.'[275]

Bass[276] puts the argument forward that 'Britain was also self-serving. During World War I, Ottoman authorities often abused British prisoners of war. This spurred Britain on to demand justice for its own soldiers.'

This situation created difficulties for the Allied states in 1915. Whereas the Commission on Responsibility debated the legal offences to be established, these legal offences were directed at crimes committed during wartime and carried out by the armies of the perpetrating state against the armies of the Allied states. The atrocity crimes committed by the Young Turk Government were against their own citizens that is those, under Ottoman

[274] Bass, G, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002, page 49.
[275] Churchill, Winston, The World Crisis: The Aftermath, 1929, Thornton Butterworth, London, page 405.
[276] Bass, G, Stay the Hand of Vengeance, The Politics of War Crimes Tribunals, 1st edn, Princeton University Press, 2002 page 107.

sovereignty, and although arguably carried out during wartime, there was some belief that the massacres may have started earlier than the outbreak of the First World War.[277] A proportion of the Armenian massacres had been carried out during peacetime; these massacres were not debated nor included as part of any later Treaty to indict any of the perpetrators. While international law had been established to attribute responsibility to the State for breaches of the existing Hague Conventions; assigning criminal responsibility to individuals for their part in carrying out a state policy of crimes against humanity against their own citizens, was an innovative step in 1915 for the Allied states and would mean reaching into a state's sovereignty which was certainly a new concept at this time. However, the scale of this atrocity crime was immense and the Allies, particularly Britain wanted justice for the perpetrators of the Armenian massacres.[278] Britain was of the opinion that the laws of humanity found their roots in the Martens Clause and were therefore justified in extending this Clause. The US did not believe that any precedent existed for this crime and that 'humanity' was an uncertain term. The legal issue that became evident for the Allied Powers in this respect was that no specific legal offence existed for this scope of atrocity crime, the hope was that the Allies could bring the law into line with the demands for justice. The atrocities would have to be put into a new category of war crime i.e., crimes against humanity. This would later become an issue at the Nuremberg International Military Trials held at the end of the Second World War.

Joint Declaration 1915

[277] Laurinaviciute, L, Paulose, R & Rogo R, The Forgotten: The Armenian Genocide 100 Years Later, in Bergsmo, M, Wui Ling, C and Ping, Y (eds), The Historical Origins of International Criminal Law: Vol 1, Torkel Opsahl Academic EPublisher, Brussels, 2014, page 381.
[278] Bass G, Stay the Hand of Vengeance, first edition, Princeton University Press 2002 & Willis J. *Prologue to* Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press.

In May 1915, the Allied governments of Britain, France and Russia issued a Joint Declaration denouncing the massacres against the Armenians in the Ottoman Empire, calling them a 'Crime against Humanity and Civilisation'. The below telegram was sent to the Ottoman Empire:

> 'For about a month, the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often the assistance of Ottoman authorities. Such massacres took place in April at Erzerum, Dertchun, Eguine, Akn, Bitlis, Mush, Sassun, Zeitun, and throughout Cilicia. Inhabitants of about one hundred villages near Van were all murdered. In that city Armenian quarter is besieged by Kurds. At the same time, in Constantinople, Ottoman Government ill-treats the inoffensive Armenian population. In view of those new crimes of Turkey against humanity and civilisation, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.'[279]

The 1915 Declaration was an expression of *opinio* juris;[280] however, this proved to be ineffective for the immediate situation and was not followed by action, and it did not stop the atrocities from continuing. The Declaration shows that the Allies were contemplating holding trials for the individuals found to be responsible for the Armenian massacres. This would be the first time the term 'Crimes against Humanity' was used and would later become 'one of the most powerful concepts in international law – Crimes against Humanity.'[281] The Turkish Government responded to the Declaration, stating that the Government 'considers its principal duty to resort to any measures it deems appropriate for safeguarding the security of its borders, and feels, therefore, that it has no obligation whatsoever to give an account to

[279]Joint Declaration wording taken from https://www.armenian-genocide.org/ accessed 28/02/2022.
[280] An opinion on law.
[281] Schabas, W, Genocide in International Law, Cambridge University Press, Cambridge, 2000, page 16-17.

any foreign government,'[282] thus relying on the international rule of law that 'the state is entitled to treat its own citizens at its discretion.'[283] This Declaration marked the first time in history that the phrase, 'Crimes against Humanity,' was used, this later becoming one of the most significant concepts of international criminal law. The Joint Declaration made a specific threat of individual sanctions and accountability of government officials involved in atrocities against their own citizens. This, if acted upon, would have resulted in a departure from entrenched notions of sovereignty and the immunity of Heads of State and, for the first time, decided to take the route of judicial intervention. The jurisdiction status at this point was that no international institution had ever attempted to sanction individual behaviour; individuals were not regarded as subjects of international criminal law. International criminal jurisdiction was not binding on states, let alone individuals. The Hague Conventions stated that reparations should be paid by the responsible state; it should be noted here that the Hague Conventions dealt with acts that had been committed during wartime by soldiers of one nation against those of another nation and not a state's treatment of its own citizens. This had then been deemed not subject to another government's jurisdiction. The Armenians were citizens of the Ottoman Empire; there was no formal state of war between Armenians and Turks, and so the Hague Conventions were wholly inapplicable. Taylor describes this as 'a concept quite outside the scope of any treaties or recognised doctrine'.[284]

The Mudros Armistice was signed in October 1918,[285] by the British Government and the Ottoman Empire. This marked the defeat of the Ottoman Empire in the First World War.

[282] Uras, E, The Armenians and the Armenian Question in History, 2nd ed, 1976, p. 621.
[283] Oppenheim, L & Lauterpacht, H, International Law, 7th ed, 1948, p.583.
[284] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993. page 13.
[285] Accessed https://www.Mudros, Armistice of | International Encyclopedia of the First World War (WW1) (1914-1918-online.net) 12/11/2021.

Under the terms of this Armistice, the Ottomans surrendered their troops in Hejaz, Yemen, Syria, Cyrenaica, Tripolitania, and Mesopotamia. The Allies were to occupy the Straits of the Dardanelles and the Bosporus, Batum, and the Taurus tunnel system; and the Allies won the right to occupy "in case of disorder" the six Armenian provinces in Anatolia and to seize "any strategic points" in case of a threat to Allied security. The Ottoman army was demobilized, and Turkish ports, railways, and other strategic points were made available for use by the Allies.

Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties 1919.

The investigative Commission on the Responsibility of the War, and on Their Punishment was set up four years after the 1915 Declaration was sent by the Allies to Turkey. In addition to the German War crimes, The Commission on Responsibility also discussed the massacre of the Armenians, albeit in no great detail, and the potential applicable legal instruments available at the time.[286]

Atrocities committed during the First World War deemed to be war crimes were listed in the Commission Report,[287] however, the laws of humanity were not described or expanded further for clarification. The wording relating to the laws of humanity contained in the Joint Declaration originates in the Martens Clause. The Martens Clause is contained in the Preamble of the 1899 Hague Convention II with respect to the Laws and Customs of War on Land and then slightly reworded and placed in the Preamble of the 1907 Hague Convention IV on the same matter.[288] The object of the Clause as worded in the Preamble to the Hague

[286] Bassiouni the birth of a handicapped international justice system.
[287] Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 AJIL 95.
[288] Origins of the Martens Clause are detailed in the preceding Leipzig chapter.

Convention states that cases not provided for in the Convention 'should not for want of a written provision be left to the arbitrary judgement of the Military Commanders. The 1919 Commission recommended that the Central Powers be tried for 'Crimes against Humanity.' The Martens Clause states:

> '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 civilised nations, from the laws of humanity and the requirements of the public conscience.'

This Clause is thought to represent the origins of one of the first cosmopolitan laws, its application being universal to all peoples. In this instance, the Allied states were attempting an innovative leap forward by discussing the role of international criminal law concerning a state's treatment of its own citizens. There is no accepted interpretation of the Martens Clause; therefore, it is subject to many narrow and expansive interpretations.[289] The most restrictive interpretation serves as a reminder that customary international law continues to apply after the adoption of a treaty norm. A broader interpretation reads that, as few international treaties relating to the laws of armed conflict are ever complete, the Clause, therefore, provides that something not explicitly prohibited by a treaty is not ipso facto permitted. The most expansive interpretation is that conduct in armed conflicts is judged according to treaties and custom and the principles of international law referred to by the

[289] Salter, M, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' 3 OUP 403, 2012.

Clause. The Martens Clause has been analysed by several academics.[290] Salter[291] discusses the various interpretations of the Clause and states that:

> 'Despite its lofty rhetoric echoing natural law abstractions, the Clause also contains a measure of pragmatic realism, and it recognises that the absence of a world law-making body means that there will inevitably be a disparity and time-lag between state practices and legal principles. In particular, a mismatch between, on the one hand, de facto state practices and state practices and treaty law provisions motivated by politically defined national self-interest, and on the other, the necessary normative requirements of any justifiable and viable system of international law protecting basic human rights.'

Some members of the Commission on Responsibility were unable to agree that the Armenian massacre constituted a war crime, which could be legitimately punished. In '1919, adherence to time-honoured notions of sovereignty placed limitations upon the scope of the traditional laws and customs of war.'[292] Again, this shows evidence of the realist agenda of the need to retain sovereignty above all else. The Hague Conventions of 1899 and 1907 dealt with acts committed during the war by soldiers of one nation against those of another nation, not with a state's treatment of its own citizens. 'From this perspective, Turkish action against the Armenians was an internal matter, not subject to the jurisdiction of another government.'[293]

It was the Greek representative, Nicolas Politis, who asked the Allies to adopt the laws of humanity as a new category of war crimes 'Technically, these acts did not come within the

[290]Salter, M, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' 3 OUP 403, 2012; Theodor Meron, The Martens Clause, Principles of Humanity, and Dictates of Public Conscience, The American Journal of International Law, 2000, Vol. 94, No. 1 p. 78-89 accessed 21/01/2022 at https://www.The Martens Clause, Principles of Humanity, and Dictates of Public Conscience on JSTOR.
[291] Salter, M, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' 3 OUP 403, 2012.
[292] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982 Page 157.
[293] Ibid.

provisions of the penal code, but surely they were such an affront to civilisation as to offend what might be called the law of humanity or the moral law.'[294] Many of the Commission representatives were in agreement with Nicolas Politis. They relied on the justification underlying the Hague Conventions declaration that, where its written Declaration fell short, persons were still protected by the laws of nations resulting 'from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience.'[295] The preliminary report by the Commission listed the following atrocities against its civilian population as falling with their definition of laws of humanity: systematic terror; murder; massacres; dishonouring of women; confiscation of private property; pillage; seizing of goods belonging to communities, educational establishments and charities; arbitrary destruction of public and private goods; deportation and forced labour; execution of civilians under false allegations of war crimes; and violations against civilians as well as military personnel.

Laws of humanity are deemed to be cosmopolitan law because humanity is deemed to be universal and applicable to all people. Simpson[296] argues that 'crimes against humanity captures the idea that certain acts of persecution are offences against the whole of humanity. They shock the conscience of mankind, regardless of their location or the identity of the victims. This ground on international criminal law is also linked to the idea of a cosmopolitan law with crimes against humanity at its heart.' However, realists would argue that this limits a sovereign's right to treat its citizens how it wants and deem the laws of humanity ambiguous and open to a range of interpretations, preferring to deal with concrete expressions of the

[294] *Ibid* 157.
[295] Summary of examples of offences committed by the Authorities or Forces of the Central Empire and Their Allies meeting of 7 February 1919 page 81-82, Polk papers.
[296] Simpson, G, Law, War and Crime, Cambridge, Polity Press, 2008, page 45.

law. Abbott[297] points out 'realists would hew closely to actual practice and unambiguous expressions of the consent of major states. They would be deeply suspicious of efforts to establish customary law through mere verbal formulations, pronouncements of international institutions or scholarly writing. Morgenthau's realist view states that 'universal moral principles cannot be applied to the actions of states, in their abstract universal formation and maintained that they must be filtered through the concrete circumstances of time and place.'[298] Owing to the substantial nature of the atrocity crimes committed in Turkey, the Commission felt justified in their endeavours to extend the notion of war crimes as laid out in The 1907 Hague Convention to internal conduct to conduct by a state against its own citizens. The Commission argued that they should afford the same protection as the civilian population of a combatant state and extend this to cover the domestic civilian population of a state that is at war with one state. Therefore, the Commission stated that this was not the creation of a new international crime but a jurisdictional extension of an already extant international crime to cover an unprotected civilian population. For Schmitt, writing in 1945, crimes against humanity were not the same as the crime of aggression, he argues that:

> …It is, rather necessary to develop the inner problematic of the new crime and to show that while the points of view of a creative precedent, and a *malum in se* may well apply to crimes against humanity – in other words for the real atrocities – they do not apply for the new international crime of the war of aggression. The atrocities in the special sense that were committed before the last world war and during this war must indeed be regarded as *mala in se.* Their inhumanity is so great and so evidence that it suffices to establish the facts and their perpetrators in order to ground criminal liability without any regard for hitherto existing positive penal laws. Here, all arguments of natural sensation, of human feeling, of reason and of justice concur in a practically elemental way to justify a conviction that requires no positivistic norm in any formal sense. Nor must one enquire here as to the extent to which the perpetrators had a

[297] Abbott K. *International Relations Theory, International Law and the Regime Governing Atrocities in Internal Conflicts,* The American Journal of International Law. 1999, vol 93. page 365.
[298]Morgenthau, H. Politics among Nations; The Struggle for Power and Peace. (New York: Knopf, 1964) 3rd edition, page 10.

> criminal intent. All of this goes without saying. Whoever raises the objection of *nullum crimen* the face of such crimes, whoever would want to refer to the hitherto existing positivistic penal legal determinations would put himself in a suspicious light.'[299]

The majority of the Commission felt that it was not infringing on the principles of legality, which prohibit ex post facto crimes:

> 'The trials were driven at first by a striking display of British idealism and universalism. Even though the Armenian victims of the 1915 massacres were foreigners (albeit Christians), the British public and much of its elite were outraged. The British Government was egged on by an influential pro-Armenian lobby. This all rested on a liberal concept of universal rights; Britons did not think that the fact Armenians were not British citizens excluded them from the protection of the law.'[300]

The majority of the Commission called for the establishment of a Tribunal that would try 'all persons belonging to the enemy countries, however high their position may have been, without distinction of rank, including chiefs of state, who have been guilty of offences against the laws and customs of war or the laws of humanity.'[301]

The Commission also recommended the establishment of a High Tribunal to try the enemy offenders. The Tribunal was composed of persons appointed by the Allied and Associated Powers and set its own procedures. Significantly the law to be applied by the High Tribunal was to consist of 'the principles of the law of nations as they result from the usages

[299] Schmitt, C The International Crime of the War of Aggression, Page 135 in Schmitt, C, *Writings on War*, Nunan, T (trs & ed), English Edition, Polity Press, 2011.
[300] Bass, G, Stay the Hand of Vengeance, 1st edition, Princeton University Press 2002. Page 106.
[301] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.' American Journal of International Law. 14: 95-154, page 95.

established among civilised peoples, from the laws of humanity and from the dictates of public conscience.'

Britain's foreign secretary asked that Talaat's[302] name be added to a declaration calling for the Kaisers' trial.[303] The commission members were not keen on this idea and did not want to combine efforts to try the Kaiser. As discussed in the previous Leipzig chapter, The Commission on Responsibility at Chapter II, 'Violations of the Laws and Customs of War' also included and discussed the 'Massacres of the Armenians 'by the Turks systematically organised with German complicity.' The Report states that '200,000 victims were assassinated, burned alive or drowned'[304] and referred to some of the evidence they had collated regarding the Armenian massacre. Chapter II of the Report concluded:

> 1. The war was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity.
>
> 2. A commission should be created for the purpose of collecting and classifying systematically all the information already had or to be obtained in order to prepare as complete a list of facts as possible concerning the violations of the laws and customs of war committed by the forces of the German Empire and its Allies, on land, on sea and in the air, in the course of the present war.

The US dissenting opinions are contained in Annex II to the Report with Japanese dissenting opinion contained in Annex III to the Report. The inclusion of the wording 'laws of humanity' became the subject of the US representatives' most significant objections. The US were

[302] Mehmed Talaat Pasha was Turkish Interior Minister during World War I, along with Ismail Enver Pasha and Djemal Pasha, Talaat completed the triumvirate that ruled Turkey during the war.
[303] Bassiouni, Crimes Against Humanity in International Criminal Law 2000 (1992) page 170.
[304] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.' American Journal of International Law. 14: 95-154, at page 17-18.

concerned that adding the word 'humanity' may include acts that were not violations of the laws and customs of war.[305] They were concerned that there was no accepted definition of what the laws of humanity were, with no clear definition being provided. Therefore, anyone using this charge would contravene the principle of legality, or *nullum crimen sine lege*. The dissent distinguished between moral and legal responsibilities and further stated that only legal responsibilities were to be justiciable by an international criminal court. The US insisted that the mandate of the Commission was confined to 'laws and customs of war'. If the term 'laws of humanity' added something additional to this, then the Commission was going beyond its mandate.

The American representatives stated:

> 'Going beyond the terms of the mandate declares that the facts found, and acts committed were in violation of the laws and of the elementary principles of humanity. The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason should exclude them from consideration in a court of justice, especially are charged with the administration of criminal law.'[306]

Therefore, the American representatives objected to the references to the laws and principles of humanity, both based on the basis that there was no precedent for such a crime and that this finding was going beyond the mandate for the Commission. The US declared that there was no universal standard of humanity and that judicial processes can only be dependent on the existing law. The US maintained their position throughout the Commission to the Peace

[305] Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, Annex III, 4 April 1919, reprinted in 14 AM, Journal of International Law, 127, 144-151 (1920).
[306] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.' American Journal of International Law. 14: 95-154, Page 134.

Conference, resulting in the final penalty provisions in the Treaty of Versailles and the phrase 'laws of humanity' did not appear in the final treaties.[307]

The Report of the Commission on the Responsibilities of the War, and on their Punishment contained Annex IV Provisions for insertion in Treaties with Enemy Governments. This provided for the punishment of 'those who had been guilty of a violation of the principles of the law of nations, as these result from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience.'[308] The wording 'laws of humanity' was not included within the Versailles Treaty, largely due to the US and Japanese objections. The US and Japanese objections were based on the issue that no legal precedent existed in either international or municipal law.[309] These dissenting views highlighted a struggle between legality and realpolitik between the Commission representatives, with the US and Japanese representatives being apprehensive in finding the charge of 'Crimes against Humanity' within the Martens Clause.

As Britain had taken the lead in the discussions relating to the Armenian massacres and the mistreatment of British Prisoners of War, domestic standards of British due process would be called into service in demands for trials, rather than summary punishment. The British later realised that finding sufficient evidence, such as testimony from scattered Armenian witnesses and documents hidden away in ottoman archives, would be incredibly difficult.

[307] Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, Annex III, 4 April 1919, reprinted in 14 AM, Journal of International Law, 127, 144-151 (1920).
[308] Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 AJIL 95.
[309] Bassiouni, MC. World War I: The War to end all Wars and the Birth of a Handicapped International Criminal Justice System, 30 Denv. Journal of International Law and Policy, 244, 2002.

The Treaty of Sevres 1920.

In August 1920, Britain, Italy, and France signed the Treaty of Sevres on behalf of the victorious Allies.[310] Setting out both the establishment of military tribunals to prosecute war crimes and international trials to prosecute the massacres, Part VII of the Treaty, under the heading 'Penalties,' stated:

Article 226 provided:

> 'The Turkish Government recognises the right of the Allied Powers to bring before military tribunal's persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Turkey or in the territory of her allies.'[311]

Article 230 addressed the mass killings and made provisions for:

> The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory that formed part of the Turkish Empire 1 August 1914.
>
> The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such Tribunal.
>
> In the event of the League of Nations having created in sufficient time a tribunal competent to deal with said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such Tribunal, and the Turkish Government undertakes equally to recognise such Tribunal.

[310] The Treaty of Peace between the Allied and Associated Powers and Turkey, 10 August 1920, (Treaty of Sevres), reprinted in American Journal of International Law, 1921, vol 15 pg 179.
[311] Ibid.

Therefore, the Treaty of Sevres provided for international adjudication of the crimes perpetrated by the Ottoman Empire against the Armenians during World War I. The Treaty has been deemed as vague as to both the law to be applied and the legal mechanism with which to do so.[312] Article 230 outlined above, made special provisions for dealing with individuals who perpetrated the Armenian massacres. It called for their surrender 'but specified neither the law nor the court by which they would be tried.'[313] References to the laws of humanity were absent from the Treaty (as with the other peace treaties) primarily due to the US and Japanese dissent.

It has been noted that 'by providing for separate modes of punishment for the massacres and for the war crimes, The Treaty of Sevres demonstrated that the massacres – that is, these new crimes of Turkey against Humanity and civilisation – were viewed as distinct from war crimes.'[314]

The Treaty of Sevres also included terms such as the obligation to pay for 'all loss and damage suffered by civilian nationals of the Allied Powers, in respect of their persons or property, through the actions or negligence of the Turkish authorities during the war and up to the coming into force of the present Treaty.'[315] Other terms included the carving up of the territories of the Ottoman Empire among the Allies, gaining control over Turkey's finances and turning the Dardanelles Strait into international waters. The terms of the Treaty were

[312] Bergsmo, M, Cheah, Wui Ling, Song, Tianying and Ping, Y (eds), Historical Origins of International Criminal Law, page 567.
[313] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982, page 157.
[314] Historical Origins of International Criminal Law, Bergsmo, M, Cheah, Wui Ling, Song, Tianying and Ping, Y (eds) page 564.
[315] The Treaty of Peace between the Allied and Associated Powers and Turkey, 10 August 1920, (Treaty of Sevres), reprinted in American Journal of International Law, 1921, vol 15. Article 235.

harsh, angering many Turkish Officials, including the military officer and leader of the Turkish national movement, Mustafa Kemal Ataturk, who insisted on ensuring the safeguarding of Turkey's interests and independence. Due to this ongoing political instability in Turkey, Turkey was able to renegotiate with the Allied Powers. The Allied Powers allowed the Turkish officials to maintain their own Government following their defeat in the war. The Kemalist regime that eventually gained power in post-war Turkey successfully relied on principles of national sovereignty to reject the authority of the European Powers to intervene in the trials. In the meantime, Britain had arrested and jailed in Malta several Ottoman officials to be indicted for international war crimes under the Treaty of Sevres. Political tensions within the Allied Powers and nationalistic passions in Turkey eventually led to the scrapping of the Treaty of Sevres. No international prosecutions took place for the Armenian massacres.

The Treaty of Lausanne 1923.

The Allies and Turkey signed the Treaty of Lausanne in 1923, at this time Turkey was in a much stronger position. This Treaty contained no war crime clauses and was accompanied by a 'Declaration of Amnesty' covering all the offences committed during the wartime period. Part of the amnesty agreed by the Treaty of Lausanne was Article 119, which contained a clause for the prisoner swap to take place between the British and Ottoman states. The Ottoman Empire was holding several British armistice control officers as hostages. Article 119 of the Treaty of Lausanne stated:

> 'The High Contracting Parties agree to repatriate at once the prisoners of war and interned civilians who are still in their hands.

> The exchange of prisoners of war and interned civilians detained by Greece and Turkey respectively forms the subject of a separate agreement between those Powers signed at Lausanne on the 30 January 1923.'[316]

Professor Dadrian summaries the Realpolitik of the Allies following the First World War:

> 'As World War I ended, the Allies focused attention on punishment for the war crimes committed against the Armenians. At first, the Allies attempted to apply principles of international law to the perpetrators of the massacres. However, the initial impulse to seek justice faded in the months after the war and eventually gave way to political expediency. The Turkish Government's attempts to bring its own nationals to justice also faltered. The rise of nationalism, and the Turkish populace's increasingly defiant attitude toward the Allies, weakened the Government's resolve in its quest for justice. This weakened resolve and the Allies' own waning interest sabotaged the efforts to punish those responsible for the Genocide.'[317]

The instability of Turkey at this time impeded the Allied efforts to secure justice for the Armenian population. The majority of the Allies at the Paris Peace Conference were attempting to put into effect policies that were rooted in liberal cosmopolitanism, developing the 'laws of humanity' and an International Criminal Trial, in which individuals would be prosecuted for their part in the massacres.

The Treaty of Sevres was later to be replaced by the Treaty of Lausanne. As a result, no international prosecutions for the Armenian massacres ever occurred. However, at the national level, a series of prosecutions took place and were held in Constantinople between 1919 and 1920. The national Istanbul trials were no more successful than the Leipzig trials. The leadership of the Committee of Union and Progress and selected former officials were

[316] Treaty with Turkey and Other Instruments (Peace Treaty of Lausanne), 24 July 1923, reprinted in American Journal of International Law, 1924, vol.18, suppl. 18.
[317]Dadrian, V, N, Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications 14 YALE J international L 221, 223 page 309.

court-martialled for subversion of the constitution, wartime profiteering and the massacres of the Armenians and Greeks. Many of the defendants were absent, the sentences were light, and the proceedings never gained any popular support. For their part, the Turkish Government denied that crimes against humanity had been committed against the Armenians between 1915 and 1917.

The Treaty of Lausanne (1923) contained no equivalent clauses regarding punishment and was accompanied by a declaration of amnesty. There were a few Turkish national trials of high-ranking officials instigated under Allied, particularly British pressure. The Turkish national trials took place between 1919 and 1922, which resulted in the execution of three minor officials for crimes against humanity.[318] This would later cause political turmoil in Turkey, and the process began to be wound down. As a result of this, the UK took a number of suspects into custody, while further Turkish court-marshals appeared to be tilting towards acquittal. All attempts at prosecution ceased in 1921. 'The death knell of any possible further accounting was sounded in 1923, with the Treaty of Lausanne.'[319] Articles 226 to 229 followed the pattern of the Versailles Treaty for cases involving the mistreatment of prisoners of war and similar incidents. The articles repudiated the Turkish trials and promised for surrender to Allied national or mixed military tribunals of all persons charged with offences against the laws and customs of war. Article 230 made special provisions for dealing with individuals who perpetrated the Armenian massacres. It called for their surrender but specified neither the law nor the court by which they would be tried. Instead, it reserved to the Allies 'the right to designate the Tribunal which shall try the persons so accused. For Carr, The Treaty of

[318] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002, page 140.
[319]Cryer, R. Prosecuting International Crimes; Selectivity and the International Law Regime. First edition 2011, Page 33.

Lausanne is an example of the threat or use of force bringing about change. Arguing that: The Lausanne Treaty of 1923 was a revision, extorted by the use and threatened use of force, of the treaty signed with Turkey in Sevres in 1920. It was denounced by Lloyd George as 'an abject, cowardly and infamous surrender'; and this opinion was widely held at the time.'[320]

British progress here was impeded by the desire to mend relations with the nationalists and the fact that the Turkish nationalists themselves held several British armistice control officers as hostages. As far as prosecution of the murderers of the Armenians was concerned, there was also a legal problem. While crimes against POWs were indictable under the traditional rubric of the 'laws and customs of war,' the prosecution of a state's mass murder of its own civilians had not yet found a legal name or been framed within appropriate legislation and was arguably not subject to the jurisdiction of international law. Sevres was vague about both the law and the forum that would be used for such a trial. As outlined above, the US and Japanese representatives dissenting opinions relating to the legal argument that no 'Crime against Humanity' existed in international law eventually won over.

However, as Bassiouni points out, 'the political motivations behind this compromise could not disguise the facts that amnesties are only granted for crimes, which even if not prosecuted does not negate their legal existence.'[321] The question is here is whether Lausanne could be interpreted as an affirmation that the international community recognised that crimes against humanity had been committed in the first place.

Several Armenians took their own vengeance upon the former Turkish leaders, assassinating approximately six between the years 1921-1922. Although, these actions were no substitute

[320] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, p 197.
[321] Bassiouni, MC, Crimes against humanity in international criminal law, (1992) pages 175-176.

for justice, the Armenians had no recourse to justice. The Allies had abandoned the war crimes trials.[322]

Conclusion.

In conclusion, the Allies allowed the Turkish officials to maintain their own Government following their defeat in the war. British forces in occupation in Turkey were substantially minimised after the war.[323] By the time the Allies had got round to dealing with the issues in Turkey, the government which had been assisting the Allies with arrests and potential trials no longer governed much of Turkey. The Nationalist Revolution gained power, established a new government, and forced the Allies to abandon their efforts of potential prosecutions. As a result, the Turkish Government blocked efforts by the Allies to punish the perpetrators of the Armenian massacres by asserting its sovereign rights. Political instability in the region also did not help matters.[324] The 1915 Joint Declaration provided a basis for international jurisdiction over the Armenian massacres. However, the Allied powers were still unable to secure retribution for the crimes. Instead, their efforts floundered on political divisions between the countries and an inability, or an unwillingness, to usurp the Ottomans' sovereign right to punish their own people for acts committed against Ottoman subjects on Ottoman soil.

[322] Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982, page 163.

[323] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002.
& Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982.

[324] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002, Constantinople chapter page 139

No international war crimes trials took place after WWI; the domestic trials did take place with varying degrees of success. The major point of international criminal law was the attempts at codifying the laws of humanity. Unfortunately, it was just not ready to take the leap of jurisdiction over another state's treatment of its own civilians. Eventually, the self-interested tendencies of the states won out. With the ensuing unstable political situation in Turkey, the Allies allowed the Turkish Government to remain in power,[325] Eventually, Britain turned their attention to their soldiers that were being held captive in Turkey. Schmitt[326] warns that 'whoever says humanity wants to cheat.' The interests in the protected subject, here the Armenians, are coupled with self-interest.[327] For this case study, this argument rings true; in the end, Britain was more interested in securing the release of the British Prisoners of War held in Turkey. They eventually walked away with the much weaker Treaty of Lausanne, partly due to Turkey's unstable political situation and partly because the Allied states could not agree on the law to be applied in this situation. It was deemed too controversial to hold governments officials accountable for the mistreatment of their own citizens. The need to retain sovereignty came first. Bassiouni calls the attempts at justice after the First World War 'a dismal failure' and goes on to highlight 'Despite ample Allied resources, the availability of the exhaustive investigative findings of the Commission, and an enemy prostrate from war, hunger, and internal revolution, very few prosecutions were ever undertaken, and of those that were, the sentences handed down were either comparatively

[325] In contrast to Germany after the Second World War, in which the Allies occupied.
[326] Schmitt, C, The Concept of the Political, (Chicago: Chicago University Press, 2007) 54.
[327] The argument is made in Stahn, C, A Critical Introduction to International Criminal Law (Cambridge: Cambridge University Press, 2019) page 421.

light or never fully executed. The value of justice had not penetrated the practices of realpolitik.'[328]

The international efforts of the European Powers to bring the perpetrators of the Armenian massacre to justice fell victim to the overarching principle of national sovereignty and realpolitik. By allowing the Ottoman government to remain in place following its defeat in the war, the European Powers gave up the authority that they needed to effectuate retribution for the massacre. The presence of a sovereign government in Turkey not only impeded the initiation of international trials through legal barriers, such as issues of jurisdiction, and practical impediments, such as difficulties in securing the evidence needed for international prosecution[329] but also led to the waning support among the Allies for securing prosecution. Bassiouni has highlighted that due to the Allied concern 'about the stability of Turkey and eager not to alienate the new Turkish ruling elite, which was partial to the Western Powers, Turkish officials were given impunity for war crimes.'[330]

The majority of the Allies at the Paris Peace Commission struggled to cement their ideas of 'laws of humanity' using the Marten's Clause as a precedence for this. The US and Japanese representatives were incredibly reluctant to find precedence for this charge at either international or municipal level. Instead, looking to the concrete legal documents that were in place. This effectively stunted the development of the 'laws of humanity.'

The Allies would again grapple with this issue in the aftermath of the Second World War. The Treaties and Agreements signed between States at the end of the First World War required

[328] Bassiouni M C, World War I: 'The War to End all Wars' and the Birth of a Handicapped International Criminal Justice System, 30 Denv. J. Int'l L. & Pol'y 244 (2002) page 290.
[329] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002, page 140.
[330] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997 page 17.

enforcement action to ensure the perpetrators of the Armenian massacres could be prosecuted, in addition the Allies need to agree and decide the course of action to be taken in unison. To this effect, Dadrian highlights 'one of the most daunting lessons of the Armenian Genocide' and goes on to argue that 'when international actors intervene in response to persecutions in another state without firm coordination and commitment, any actions they take may do more harm than good.'[331] The European Powers, during the nineteenth and twentieth centuries were able to secure a number of statutory provisions for ensuring the equal rights of the non- minorities:

> 'These Statutes raised the moral consciousness of the Armenian population, who began to press for the actual implementation of these reforms. Unfortunately, the Ottomans had no intention of enforcing these Statutes; they had adopted them merely to appease the Europeans. The European Powers were wiling to accept the Statutes at face value and never truly attempted to force Ottoman compliance; nor did they offer the Armenians the military or political support that they would need to actually acquire these statutory rights.'[332]

The ideals of liberal cosmopolitanism were present at the Paris Peace Conference, however without the resource to enforce their jurisdiction and an unstable political position in Turkey these attempts failed to make any traction. The Allied Powers could not agree on the substantive laws to be applied and the unstable political situation in Turkey all contributed to this failure.

Turkey, to date, has not admitted to the Genocide, despite numerous international attempts to persuade them. In 1985, the United Nations Sub commission on Human Rights, voted 14-

[331] Dadrian, V N, Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications 14 YALE J international L 221, page 227.
[332] Ibid.

1 in favour of the historical fact of the Armenian Genocide.[333] The UN Commission on Human Rights followed this acceptance of the historical fact of genocide. In June 1987, the European Parliament declared the Turkish massacres of the First World Was to be a crime of Genocide[334]. The European Parliament set down the requirement that Turkey must recognise the genocide before they would consider Turkey's application for membership. The European Parliament labelled Turkey's refusal to adhere to this requirement an 'insurmountable obstacle' to the consideration of the possibility of Turkey's accession to the European Community. [335]

The Convention on the Prevention and Punishment of the Crime of Genocide came into force in 1948 and was the first legal instrument to codify Genocide as a crime. The Genocide Convention was the first human rights treaty unanimously accepted by the United Nations General Assembly. The Convention defines Genocide as 'international effort to completely or partially destroy a group based on its nationality, ethnicity, race or religion, recognising several acts as constituting genocide, such as imposing birth control and forcibly transferring children and further criminalises complicity, attempt of incitement of its commission.' Member States are prohibited from engaging in genocide and obligated to pursue the enforcement of this prohibition. All perpetrators are to be tried regardless of whether they are private individuals, public officials or political leaders with immunity. It is now accepted that the Armenian massacre would come under the definition of Genocide within the Convention.

[333] U.N ESCOR Commission on Human Rights, sub commission on Prevention of Discrimination and Protection of Minorities (38th session) (item 57) at 7, UN Doc, E/CN.4/sub.2/1985/SR.36 (1985) (summery record of 36th meeting 29 August, 1985).
[334] Under the Convention on the Prevention and Punishment of Genocide, December 9, 1948, 78 U.N.T.S 227.
[335] Resolution on a political solution to the Armenian Question, EUR.PARL.Resolution.Doc-A2-33/87, No 10 (Armenian Question), at 31 (1987).

Chapter 6. Legal developments between the World Wars.

Introduction.

In the aftermath of the First World War, the legal landscape continued to evolve. It is important to outline the legislation as it stood, before the outbreak of the Second World War, this seeks to set out the potential legal precedents and laws in force to enable the Allies to secure prosecutions of the perpetrators of the atrocity crimes committed during the war and highlight any changes to the Conventions in place during the First World War. The relevant legislation has been outlined below to illustrate the developments before the outbreak of the Second World War, some were cited by the Allies as precedents for the charges developed in the Nuremberg and Tokyo Charters. This enables the analysis to be made regarding how far the Allies went in either developing existing laws or creating new laws entirely.

Due to the disagreements between the Allied States regarding the laws to be applied to the perpetrators of the atrocity crimes committed during the First World War, some discussions and developments took place in this area of the law. The development of the relevant legal instruments after the First World War is laid out below, highlighting any changes to the law in place. This will show the legal landscape, as it stood, at the time of the outbreak of the Second World War.

After the First World War, it became evident that new developments in warfare, such as the aeroplane, the submarine and poison gas, had profoundly affected the conduct of war and caused devastating losses for all states involved. These relatively new weapons were, in the main, untouched by the Hague Conventions of 1899 and 1907. The Allies made several

attempts to limit certain acts of warfare. The relevant Conference discussions and Conventions are laid out below.

Article Eight of the League of Nations Covenant[336] gave the League the task of reducing armaments 'to the lowest point consistent with national safety and the enforcement by common action of international obligations.' As a result of this article the Washington Conference was set up as below.

The Washington Conference.

The first effort towards disarmament after World War I were discussed at the Washington Conference,[337] this was requested by the US and was held from November 1921 to February 1922.[338] The Conference agenda included naval disarmament. The representatives at this Conference were the US, Belgium, Britain, China, France, Italy, Japan, the Netherlands, and Portugal. First, these countries had been victorious in the First World War, with the exception of the Netherlands, which had remained neutral. The three major powers, US, Britain and Japan played the most significant role in the negotiations, as they had the largest naval powers after the First World War. In terms of naval issues, the conference negotiated the Five-Power Treaty, the first ever naval disarmament treaty that practically limited the total tonnage and quality of capital ships (battle ships over 10,000 tons) and aircraft carriers possessed by great powers.[339] The treaty was signed by the three major naval powers, the US Britain and Japan and included France and Italy.[340] Although the Washington Conference did

[336] League of Nations Covenant, accessed at https://www.The Covenant of the League of Nations | UN GENEVA.
[337] https://www.Conference on Disarmament, Washington, 1921-1922 - UN Archives Geneva (ungeneva.org).
[338] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 18.
[339] The Washington Conference achievements taken from https://www.Washington Conference 1921-1922 | International Encyclopedia of the First World War (WW1) (1914-1918-online.net) accessed 15/04/2023
[340] Ibid.

manage to limit the construction of large warships, it did not affect smaller ships and submarines; therefore, several states continued to add small ships to their fleets. The Washington Conference failed in its attempts to limit armaments and aerial warfare with no agreements being reached. For Carr, The Washington Naval Treaty of 1922 'was a more or less conscious bid by Great Britain for an equal partnership with the with the United States in the management of the world. The hope was reiterated again and again, with the reserves and the caution dictated by American susceptibilities, by British statesmen between the two world wars.'[341]

The 1923 Draft Treaty on Mutual Assistance of the League of Nations.

The 1923 Draft Treaty on Mutual Assistance of the League of Nations,[342] this draft Treaty proposed to make a war of aggression illegal; if a Country were attacked, all Countries of the League would send troops to defend it. In the year 1923 the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the Treaty declared 'that aggressive war is an international crime,' and that the parties would 'undertake that no one of them will be guilty of its commission.' The draft treaty was submitted to twenty-nine States, about half of whom were in favour of accepting the text. The principal objection appeared to be in the difficulty of defining the acts which would constitute 'aggression,' rather than any doubt as to the criminality of aggressive war.[343] The League of Nations Assembly of

[341] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016 page 214.
[342] https://www.Draft Treaty of Mutual Guarantee - Opinion of the Government of France - C.T.A. 297 - 459 - C. 422. M.160.1924.IX. - UN Archives Geneva (ungeneva.org).
[343] Taken from the Nuremberg IMT Charter Vol 1 accessed https://www.The Avalon Project : Judgment : The Law of the Charter (yale.edu).

September 1923 discussed the Draft Treaty; however, this was rejected after objections from Britain, who feared to commit troops which were needed to defend the Empire.[344]

Protocol for the Pacific Settlement of International Disputes (The Geneva Protocol) 1924.

The Geneva Protocol of 1924[345] was a proposal that was presented to the League of Nations, this contained outlines to set up compulsory arbitration of disputes and created a method to determine the aggressor in international conflicts. All legal disputes between nations were to be submitted to an international court. The threatened sanctions were economic, financial and military and directed only at the state. This Protocol failed due to resistance from the British representatives.

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (The Geneva Protocol of 1925).

The Geneva Protocol of 1925[346] was more successful; this was regarding the prohibition of using poisonous gas. The 1925 Geneva Protocol was signed at a conference held in Geneva under the auspices of the League of Nations and entered into force in 1928. The Protocol contained the prohibition against the use of poison gas and was soon ratified by most nations and generally recognised as legally binding. The Geneva Protocol stated:

> '…the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world;'
>
> '…the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties'

[344] Taken from https://www.johndclare.net/league_of_nations4_disarmament.htm#:~:text=The Commission on Armaments presented a draft Treaty, discussed at the League's Assembly of September 1923. Accessed 14/03/2023.
[345] Accessed at https://www.Refworld | Protocol for the Pacific Settlement of International Disputes 14/03/2022.
[346] Accessed at https://www.1925 Geneva Protocol – UNODA 17/03/2022.

> 'To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;'[347]

The US did not ratify until 1975, and Britain expressed its reservations about its application to tear gas and herbicides.[348]

After the war, new peace treaties and different land and military concessions created an uncertain world. In Russia, Bolshevism and communism had taken root. The new spread of communist ideologies frightened many Western nations, who saw it as a threat to democratic ideals. The costly war depleted global and national economies. The League of Nations offered little stability, as it had no internal leadership, therefore, no international authority.

The Locarno Treaties.

The Locarno Treaties[349] were seven agreements negotiated at Locarno, Switzerland during October 1925 and formally signed in London on 1st December, in which the First World War Western European Allied powers and the new states of central and eastern Europe sought to secure the post-war territorial settlement, in return for normalising relations within the defeated Weimar Republic. The agreements concluded at Locarno included: a treaty of mutual guarantee between Germany, Belgium, France Great Britain, and Italy. Arbitration treaties between Germany and France and between Germany and Belgium were also agreed.[350] A note from the former Allies to Germany explaining the use of sanctions against a covenant-breaking state as outlined in Article 16 of the League of Nations Covenant.

[347] Ibid.
[348] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 19.
[349]Accessed at https://www.UN Archives Geneva (ungeneva.org) 18/02/2022.
[350] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 18.

Arbitration treaties were also signed between both Germany and Poland and Germany and Czechoslovakia.[351] Treaties of guarantee were signed between France and Poland and France and Czechoslovakia. Germany's participations in these agreements would later be highlighted in the Nuremberg Trials.[352] Carr's realist perspective was highly critical of arbitration agreements contained in Article 13 of the League Covenant, Article 36 of the Permanent Court of Arbitration and the Locarno Treaty arguing:

> 'The Locarno formula is an attempt to give an objective character to the distinction between justiciable and non-justiciable disputes by identifying it with the distinction conflicts of legal right and conflicts of interest. This formula has little practical value. It merely binds the parties to recognise as justiciable any dispute which they agree to regard as an issue of law. Either party can withdraw any dispute from arbitration by the simple process of placing itself on some other ground than that of a legal right.'[353]

Carr was critical of the effects of any agreements of this nature, they were almost always voluntary for States, with States being able to release themselves from this agreement at any time. For Kelsen, the Locarno Treaties by defining the distinction between legal and political conflicts as legal disputes being disputes in which the parties are in conflict as to their respective legal rights, whereas all other disputes are political disputes:

> 'This formula creates the false impression that the difference between legal and political disputes refers to the matter of the conflict and, consequently, that legal disputes can be distinguished from political ones by an objective ascertainable quality inherent in the conflict. This is not true. The difference consists in the way the parties to the conflict justify their respective attitudes. The criterion is, therefore, purely subjective. Legal disputes are disputes in which both parties base their respective claims and their rejection of the other party's claim on positive international law; whereas political disputes are

[351] https://www.The Cabinet Papers | Inter-war treaties and pacts (nationalarchives.gov.uk) accessed 20/02/2022.
[352] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 191.
[353] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016 p 179.

> disputes in which at least one-party basis its claim or its defense, not on positive international law but on other principles or on no principle at all.'[354]

Kelsen believed that there was no easy distinction between legal and political disputes, and this area would cause uncertainty between States should they ever raise a dispute.

The 1928 Kellogg-Briand Pact.

The Kellogg-Briand Pact (or Pact of Paris, officially General Treaty for Renunciation of War as an Instrument of National Policy),[355] was concluded outside of the League of Nations Covenant, in 1928, this attempted to strengthen the prohibition of war. The Pact was an international agreement, signed by more than sixty states, including Germany.[356] the Pact is named after its authors, United States Secretary of State Frank B. Kellogg and French foreign minister Aristide Briand. The Kellogg-Briand Pact is an international agreement in which signatory states promised not to use war to resolve 'disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them' The principal provisions of the Pact were:

> 'Article I. 'The High Contracting Parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another. Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever kind or nature or of whatever origin may they be, which may arise among them, shall never be sought, except by pacific means.'[357]

[354] Kelsen, H, Peace through Law, Chapel Hill: University of North Carolina Press, 1944, page 28.
[355] Accessed at https://www.UN Archives Geneva (ungeneva.org) 19/02/2022.
[356] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 20.
[357] The Kellogg-Briand Pact, Article 1, accessed https://www.UN Archives Geneva (ungeneva.org) 19/02/2022.

There were no mechanisms for enforcement contained within the Pact and no reference in there to any 'crime' or related and associated ideas such as 'punishment', 'individual accountability' or elements of the 'crime' itself as would be expected from an authentic criminal law statute. 'It condemns only a certain kind of war which it, in doing so, presupposes to be an unjust war, while it even sanctions just war through this same act.'[358] 'The Kellogg Pact is a pact without definitions, without sanctions and without organisation'.

Carr states of the Kellogg-Briand Pact,

> 'It is not, as is sometimes loosely said, a legislative act prohibiting war. It is an agreement between a large number of states to renounce war as an instrument of national policy in their relations with one another. International agreements are contracts concluded by states with one another in their capacity of subjects of international law and not laws created by states in the capacity of international legislators.'[359]

Carr was sceptical that the Kellogg-Briand Pact would constitute a legislative act and thought that some of the terms were not concrete enough. This issue would later be discussed in the aftermath of the Second World War, when the Allies looked for a precedent for the charge of crimes against peace. Schmitt devotes several pages in his work to exploring the Pact and its potential application and argues that 'with its lack of definitions, sanctions, and organisation, and finally, with its use of public opinion as a fundamental sanction, cannot be legal foundation for the criminal punishment of a novel crime.'[360]

The Pact was unable to prevent the outbreak of the Second World War. The Kellogg-Briand Pact was a weak argument for the legal basis of what was to become the charge of 'crimes

[358] Schmitt, C, *Writings on War*, Nunan, T (trs & ed), English Edition, Polity Press, 2011, p 158.
[359] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox (M) (preface) first edition, Macmillan Publishers Limited, 2016. P.160.
[360] Schmitt, C, Writings on War, Nunan, T (trs &ed) English Edition, Polity Press, 2011, page 164.

against peace' at Nuremberg and Tokyo, this is partly because of the situation that arose when Italy attacked Abyssinia in 1935. This issue was escalated to the League of Nations, the members voted against Italy and economic sanctions were imposed. These sanctions were never formally applied, and Italy was able to avoid payment and then quit the League of Nations entirely. Italy then annexed and occupied Abyssinia. This situation weakened the Allies' argument in the Second World War to use the Kellogg-Briand Pact as a legal precedent for crimes against peace.[361]

The Geneva Conventions of 1929.

Two new Geneva Conventions were signed in 1929; the Convention relative to the Treatment of Prisoners of War and the Geneva Convention on the Wounded and Sick. The Convention relative to the Treatment of Prisoners of War is outlined by the International Red Cross.[362]

This Convention was signed and ratified by 53 States. The Convention on the Wounded and Sick, 1929. The previous Geneva Conventions on the Wounded and Sick were dated 1864 and 1906. The new Convention was based on the experiences of the First World War, the amendments made in the 1929 revision were of lesser importance of those included in the 1906. New provisions were included for the protections of medical aircraft, similar to those of hospital ships. Article 30 of the 1929 Geneva Convention was later used as a precedent for

[361] Schmitt, C, Writings on War, Nunan, T (trs & ed) English Edition, Polity Press, 2011, page 170.
[362] Accessed https://www.Geneva Convention of 27 July 1929 relative to the treatment of prisoners of war - ICRC 28/04/2022.

individual criminal responsibility at the Nuremberg International Military Tribunal. Article 30 stated 'on the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.'[363] The 1929 Geneva Convention did not break new ground in terms of doctrine or general scope to that previously signed in the 1907 Hague Convention.[364]

The London Naval Treaty 1930.

The London Naval Treaty of 1930,[365] officially known as the Treaty for the Limitation and Reduction of Naval Armament, was initially signed by eleven nations and by the time the Second World War broke out forty-eight nations had signed up.[366] The London Naval Treaty included some of the following limitations and requirements; Article 22 of the London Treaty[367] included 'with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subjected and explicitly required that, unless the merchant ship failed to stop or attacked the submarine, it could not be sunk unless the passengers, crew and ships papers' had first been put 'in a place of safety with due regard to location and sea and weather conditions.

For air warfare, there were no further treaty developments.

[363] Article 30 of the Geneva Convention 1929 accessed https://www.Geneva Convention of 27 July 1929 relative to the treatment of prisoners of war - ICRC 28/04/2023.
[364] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 20.
[365] Accessed https://www.UN Archives Geneva (ungeneva.org) 28/01/2023.
[366] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 19.
[367] Article 22 of the London Treaty accessed https://www.UN Archives Geneva (ungeneva.org) 28/01/2023.

Conclusion.

In summary, at the time of the outbreak of the Second World War, several agreements were drafted in order to forbid and restrict submarine warfare, the use of poisonous gases and bacteriological warfare. The Geneva Convention were thoroughly revised and updated, However, several of the treaties to bring the conduct of war under the rule of law went unratified when the humanitarian concerns at the time appeared likely that they may interfere with their potential military advantage. Therefore, the declared and generally accepted laws of war were not fundamentally different from those embodied in the Hague and Geneva conventions, these conventions had already proved to be inadequate when raising the question of legality after the First World War. The Kellogg-Briand Pact, as discussed, was an international agreement to renounce war as recourse to disagreements between nations rather than to criminalise war. And was introduced as the US believed the League of Nations Covenant did not go far enough in its aim to prohibit states' recourse to war. Notions of sovereignty and the nation state were still too strong to make progress, this would later provide several issues for the Allied Powers in the aftermath of the Second World War. As will be shown in the Nuremberg and Tokyo chapters, the Kellogg-Briand Pact was cited as a precedent for the war crimes tribunals and the substantive laws for the atrocity crimes committed in the Second World War. The opportunity to extend and develop the laws after the failure of the Allies to secure justice for the atrocity crimes committed in the First World War was missed. Notions of realpolitik hampered efforts to develop the laws in this area.

Chapter 7. The Nuremberg International Military Tribunal.

Introduction.

This chapter will begin with a historical account of how the Second World War broke out, including the States involved and will move on to outlining the most relevant Allied Declarations issued during this time. The Declarations selected were issued during the ongoing hostilities and have been selected to highlight the Allied States intentions to prosecute the perpetrators of the war and the war crimes committed. This chapter will then go on to address the London Charter and the substantive laws developed and created in the aftermath of the Second World War. The ensuing Nuremberg International Military Trial (IMT) process, indictments, sentences, and some of the criticisms it has faced will also be explained and analysed. The Nuremberg IMT was predominantly created and developed by the United States (US) along with the Allies, Britain, France, and the Soviet Union. Negotiations for the development of the laws and trial processes would often prove difficult for the Allies, owing to their differences in legal procedures throughout their own states, Britain and the US procedures were adversarial and based on common law, France had a civil law system, and the Soviet Union had its own style of socialist justice, adding complexity into the negotiations.[368] The atrocity crimes and the relevant details of the Second World War are outlined below.

[368] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997, page 25 & Zolo D, Victors' Justice From Nuremberg to Baghdad, (Weir M trs) First English Edition, Verso, 2009.

This chapter seeks to explain and analyse the IMT against the realist and liberal cosmopolitan theoretical framework.[369] The Nuremberg IMT was the real breakthrough for international criminal law and saw, for the first time, an international criminal tribunal for the perpetrators of the war and the atrocity crimes that occurred within and preceding it. The existing laws of war were developed and expanded. The concept of war crimes trials in the aftermath of war follows the liberal cosmopolitan perspectives, for Kelsen, the Nuremberg and Tokyo trials held in 1945 and 1946 marked the beginning of 'judicial internationalism' meaning that the trials were the very first of their kind to hold individuals accountable for the atrocity crimes committed during the war. The theoretical justification for such tribunals was Kelsen's famous manifesto, *Peace through Law,* published in 1944,[370] in which Kelsen had expounded an institutional strategy to attain peace, borrowing from Kant the ideal of perpetual peace[371], the federal model, and the notion of 'cosmopolitan law.' Individual criminal responsibility is key to the liberal cosmopolitan theory. The central premise of the liberal cosmopolitan perspective holds international law as its priority. The realist theory of both Carr[372] and Morgenthau[373] requires us to look at the broader context of such issues and would therefore be critical of attempts of finding individual criminal responsibility in the legal instruments where it was not explicitly stated. The realist perspective would be deeply sceptical of international war crimes trials and see these efforts as a disguise for the Great Powers to maintain the status quo among nations and could be manipulated to achieve individual state

[369] Framework as laid out in the Methodology chapter of this thesis.
[370] Kelsen, H. Peace through Law, The Lawbook Exchange LTD, New Jersey, 2008.
[371] Kant, I. Perpetual Peace, Lewis White Beck (ed) New York: Liberal Arts Press, 1957.
[372] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox (M) (preface) first edition, Macmillan Publishers Limited, 2016.
[373] Morgenthau, H. Politics Among Nations; The Struggle for Power and Peace, 3rd edition, New York; knopf, 1964.

goals.[374] The idea of holding international war crimes trials for perpetrators of the atrocity crimes carried out during the Second World War attempts to alter the realist notions of Westphalia sovereignty, in which national borders were of ultimate importance and all states were equal. The intervention of another state, in a state's right to go to war cut against the grain of the realist perspectives. The Nuremberg IMT was created to change the anarchic context in which nations and peoples of the world related to one another.

Historical Account.

The Second World War broke out in 1939 after Germany invaded Poland, leading Britain, and France to declare war on Germany. During this war and prior to this war, atrocity crimes were committed on an unprecedented scale. Approximately fifty-seventy million people were killed during World War II. The Holocaust saw the death of approximately six million Jews, including over one million Jewish children,[375] this being a programme of systematic state-sponsored murder by Nazi Germany. The Second World War was the first time that bacteriological and atomic weapons were used systematically. In addition, Germany invaded Austria, Denmark, Norway, Belgium and the Netherlands and seized Czechoslovakia. The aggression Germany committed against Poland, Yugoslavia and Greece, the aggressive war Germany raged against the Soviet Union and the war against the US was deemed by the Allies to be in violation of the Hague Conventions of 1899 and 1907, The Versailles Treaty, the Treaties of Mutual Guarantee, Arbitration and Non-Aggression and the Kellogg-Briand Pact of 1928. The Second

[374] Morgenthau, H. Politics Among Nations; The Struggle for Power and Peace, 3rd edition, New York; knopf, 1964.
[375] Figures are taken from World War 2 Facts - Key Facts & Events on World War II, WWW.Worldwar2.org.uk accessed 30/11/2021.

World War finally ended in May 1945, with Germany and the Allies signing the formal surrender documents. The St James Declaration of 1942 had already been issued.

The St James Declaration of 1942.

The St James Declaration of 1942[376] was one of the most important declarations issued during the ongoing war, stating the Allies' goals and principles. The representatives of nine governments-in-exile[377] organised and issued the Declaration of St. James requiring the Allied powers to:

1) affirm that acts of violence thus inflicted upon the civilian populations have nothing in common with the conceptions of an act of war or of a political crime as understood by civilised nations,
2) take note of the declarations made in this respect on 25th October 1941, by the President of the United States of America and by the British Prime Minister,[378]
3) 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 to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.[379]

During this time, the phrase ‘United Nations' was starting to gain traction and referred to the Allied States of Britain, the US, Soviet Union, China, and twenty-two other nations against Germany, Italy, and Japan. In October 1942, Britain and the US proposed the establishment

[376] St James Declaration 1942 accessed https://www.January 1942: Declaration of St. James’s (ebrary.net) 15/05/2021.
[377] Representatives of the Government’s-in-exile included monarchs and ministers who fled to London due to German invasions of Norway, Belgium, the Netherlands, Czechoslovakia, France, and other European countries, taken from Bassiouni M C, World War I: ‘The War to End all Wars’ and the Birth of a Handicapped International Criminal Justice System, 30 Denv. J. Int'l L. & Pol'y 244 (2002).
[378] These Declarations from the President of the US and the British Prime Minister were statements condemning the German execution of innocent hostages and other atrocities in occupied territories. Retribution was mentioned, but the statements did not address how this would work in theory.
[379] Taken from the St James Declaration at https://www.jewishvirtuallibrary.org/ accessed 20/03/2022.

of a United Nations Commission for the Investigation of War Crimes (UNWCC) to collect and organise evidence relating to war crimes and to identify suspects. The UNWCC was a fourteen-member body comprising the nine governments in exile, the United Kingdom, United States, China, Australia and India.[380] The Soviet Union did not become part of the Commission. The UNWCC was thought to be politically weak,[381] with the majority of its members being currently in exile and were not certain when or if they would be restored to power. As the UNWCC was being organised, the Moscow Declaration was issued.

The Moscow Declaration of 1943.

The Moscow Declaration was signed in 1943 by British Prime Minister Winston Churchill, US President Franklin Roosevelt, and the Soviet Union Premier Josef Stalin,[382] representing the Allied powers; this Declaration removed the major Nazi War Criminals from the United Nations War Crimes Commission's (UNWCC) jurisdiction, by declaring that the Major Nazi War Criminals would be dealt with at an international level,[383] but did not address what method of punishment would be used by the Allies for these individuals. The Declaration warned that Germans 'responsible for, or who have taken a consenting part in the above atrocities, massacres and executions, will be sent 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 the free governments which will be created therein.'[384] The

[380] UNWCC information taken from Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997 page 22.
[381] ibid page 22.
[382] Accessed https://www.The Avalon Project:The Moscow Conference, October 1943 (yale.edu) 01/03/2023.
[383] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002 page 149.
[384] Accessed https://www.The Avalon Project:The Moscow Conference, October 1943 (yale.edu) Statement of Atrocities.

Holocaust was only spoken of briefly as 'the slaughters inflicted on the people of Poland,'[385] therefore containing no reference to the Jews who had suffered enormous human and economic losses. There was no concern for 'legal niceties; the Germans were to be judged on the spot by the people whom they outraged.'[386] The Declaration further stated that it was 'without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Allies' Governments.'[387] There was no mention in the Moscow Declaration of the judicial process to be followed by the Allies. The decisions regarding judicial process had not been decided by the Allies at this point.

While the Allied States displayed and promoted principles of liberal cosmopolitanism, in its agenda to ensure that the perpetrators would receive an international trial in line with legal due process and the rule of law. There were also elements of realism being displayed. As outlined above the UNWCC had sought to create its own institution for the war criminals of the Second World War and sent a memo to this effect to the Allies.[388] The Allies were not convinced by this approach, in its response, the British stated that it wished to try those who committed offences against Great Britain in its own courts, but would find multinational tribunals useful, suggesting their creation after the occupation of Germany. Britain's position was in line with that of the US', illustrating the necessity for international cooperation in the formation of these courts.[389] This shows a realist agenda for both Britain and the US, in their

[385] Smith, Bradley F. The American Road to Nuremberg, New York, Basic Books, 1981, page 13.
[386] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002, Page 149.
[387] Ibid page 150 and Smith, Bradley F. The American Road to Nuremberg, New York: Basic Books, 1981, page 14.
[388] United Nations War Crimes Commission Draft Convention for the Establishment of a United Nations War Crimes Court, 30 September 1944.
[389] Memorandum by the British Embassy, 'United Nations War Crimes Court,' 30 October 1944.

efforts not to use the United Nations. Their plans involved the less expansive route, preferring to control the trial themselves, ensuring they could assert dominance in the trial.

The London Agreement.

Finally, on 8th August 1945, the victorious Allied forces, consisting of France, the United States, Great Britain, and the Soviet Union, signed the London Agreement providing for the 'punishment of the Major War Criminals of the European Axis,' initiating the first international Tribunal for the prosecution of war crimes in the 20th Century.

The US had reversed its position entirely on its war crime policy during World War II, from that held during World War I. In the aftermath of World War I, the US did not believe that any precedent existed to try the Kaiser and that an international criminal court should not be created. Britain had also reversed its position but in the opposite direction. During World War II, Britain believed the perpetrators should be dealt with by executive decision, that is, summary execution. In October 1941, Anthony Eden, the British Foreign Secretary, argued that:

> 'I am convinced that we should avoid commitments to 'try the war criminals and hang the Kaiser (alias Hitler), I am fortified in this opinion by the experience of that ill-starred enterprise at the end of the last war. The Allies prepared long lists of war criminals in accordance with the Treaty of Versailles, but when the carrying out of the provisions for trial by Allied courts was considered, the difficulties were seen to be insuperable, and the scheme was abandoned.' [390]

[390] CAB 66/19, Eden Memorandum, 5th October 1941, W.P. (41) 233, quoted in Bass Gary, *Stay the Hand of Vengeance,* 1st edition, Princeton University Press 2002 page 184.

It should be noted that at one time, most of the Allies advocated summary execution, primarily due to the failures to prosecute after WW I. The Soviet Union proposed show trials. The Allies eventually agreed to follow the route of judicial process for Germany and Tokyo in the aftermath of WW II. This shows that by considering summary execution, states were aligning to one of the realist proponents, Morgenthau, when writing his realist thoughts stated 'I am doubtful of the whole setup under which these Nuremberg trials will be conducted. What, in my opinion they should have done is to set up summary courts martial. Then they should have placed these criminals on trial within 24 hours of being caught, sentenced them to death and shot in the morning.'[391]

Germany surrendered in May 1945, bringing an end to six years of wartime atrocities. The Surrender document signed by Germany and the Allies stated:

> 'The German Government and German High Command, recognising and acknowledging the complete defeat of the German armed forces on land, at sea and in the air, hereby announce Germany's unconditional surrender.'[392]

The surrender document contained several articles related to the surrender of weapons and all Germany's power and authority to the Allies. The London Agreement was to be prepared to create the Nuremberg International Military Tribunal (IMT) and its substantive laws.

On 8th August 1945, the Allies signed the London Agreement, three months after the unconditional surrender of Nazi Germany to the Allies. By this time, the Allies were already the occupying force of Germany and had captured many of the former leaders of Nazi Germany. The Allies made the decision that they would address the legal culpability of the

[391] Morgenthau, H, Politics among Nations; The Struggle for Power and Peace (New York; Knopf, 1964 3rd edition page 276.
[392] Germany's Surrender taken from https://www.historytoday.com/ accessed 07/11/2021.

individuals by criminal prosecution rather than summary execution. The London Agreement was a relatively short document and created the IMT and its Charter. In addition, it outlined the procedure for other nations to subscribe to the undertaking, including defining the Tribunal's period of operation and continuing national jurisdictions over other war criminals. The Nuremberg Charter was to be the first legal foundation of international criminal responsibility.

The Charter of the Nuremberg IMT had some limited legal instruments to draw upon; these included the 1929 Geneva Prisoner of War Convention and the 1907 Fourth Hague Convention.[393] It was considered that these Conventions created the substantive law that was to be applied at the Nuremberg IMT, as the general principles and customary law and norms of state and individual responsibility. For the charge of crimes against peace, the Charter looked to the 1928 Kellogg- Briand Pact and the Covenant for the League of Nations. The Tribunal asserted that at least since the Kellogg-Briand Pact, there has been an express rejection of war as an instrument of state policy and a way to solve international conflicts by the contracting parties.

The issue of individual responsibility arose during the London Conference when deciding the terms of the Charter.[394] Some early drafts of the Charter, particularly Article 6, made no specific reference to individual responsibility. This then would have been left to the judges to determine whether the violations rested with the individual or with states, states being deemed the traditional subjects of international criminal law. While considering the criminal responsibility of individuals, Jackson wrote:

[393] These are detailed in the development of legal instruments before World War I Chapter.
[394] The London Conference transcripts accessed https://www.The Avalon Project:International Conference on Military Trials:London, 1945 - Preface (yale.edu) 01/04/2022.

> 'This principle of individual responsibility is a negation of the old and tenacious doctrine of absolute and uncontrolled sovereignty of the state and of immunity for all who act under its orders. The implications of individual accountability for violation of international law are far-reaching and many old concepts may be shaken thereby.'[395]

The final draft of the London Charter at Article 1 now made it explicit that individuals, as well as States would be made responsible for their crimes during the Second World War.[396]

Hans Kelsen, who was at the time advising the Treaty Section of the Judge Advocate General's Department, sent a memo to Robert Jackson in London. Kelsen advised on the subject of how to create new law and how to 'posit the innovative concept of individual responsibility under international law. He argued that it was important to establish certain guarantees.'[397] Robert Jackson took note of Kelsen's advice and from then on insisted that the Charter clearly identified that individuals were to be held responsible for their atrocity crimes:

> 'We must declare that the accused are answerable personally, and I am frank to say that international law is indefinite and weak in our support on that, as it had stood over recent years. The Tribunal might very reasonably say that no personal responsibility resulted if we failed to say it when we are making an agreement between the four powers which fulfils in a sense the function of legislation.'[398]

[395] Jackson, RH, Foreword, Kinter, EW (ed), Trial of Alfons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber, and Philipp Blum; The Hadamor Trial, William Hodge, London, 1949, page xv-xvi
[396] The London Charter, Article 1, accessed https://www.The Avalon Project:London Agreement of August 8th 1945 (yale.edu) 10/03/2023.
[397] Sellars, K Founding Nuremberg: Innovation and Orthodoxy at the 1945 London Conference, contained in, M Bergsmo, C Wui Ling and Y Ping (eds) Historical Origins of International Criminal Law, Volume 1, (Torkel Opsahl Academic EPublisher: Brussels, 2014, page 543.
[398] Ibid page 544, taken from the London Conference, Report of Robert H. Jackson, United States Representative, to the International Conference on International Trials, Department of State, Washington DC, 1949, page 331.

In line with the liberal cosmopolitan perspectives of Kelsen, this would be the first time in history that individual criminal responsibility was to be attached to war crimes carried out in the Second World War.

In contrast to the liberal cosmopolitan position for individual criminal responsibility at international level, for Schmitt, the State remained the sole subject of international law:

> 'Individual state agencies and the individual state citizen are cut off from every direct responsibility of international law. They do not have any interstate (international) but rather only an intra-state (national) status. For the strictly dualistic interpretation that dominates in both theory and praxis in Germany and other continental European countries today, the individual state citizen cannot, as a result of this theory, commit an international crime. Only as an organ of the state can he effect international responsibility for his state as such, with respect to other states. The lone perpetrator of a delict of international law can, therefore, only be the state as such.'[399]

For Schmitt, the finding of individual criminal responsibility within international law was a sharp departure from established notions of State sovereignty.

The Charter of the Nuremberg IMT.

The Charter of the Nuremberg IMT was issued in August 1945 and set out the laws and procedures by which the IMT was to be conducted. Article 6 of the of the IMT Charter established the jurisdiction of the Tribunal over three crimes, stated as follows:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances,

[399] Schmitt, C Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011 Page 175.

or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not limited to, murder, ill-treatment or deportation to the slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder or public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of 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. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.[400]

As specified above, the Charter provided for the punishment of individuals under international criminal law. Historically, the main consensus was that States were to be held accountable for violations of international criminal law, with the punishments being financial reparations,[401] with no international legal documents explicitly stating that individuals would be held responsible for any breaches, the Hague Conventions of 1899 and 1907, and the Kellogg-Briand Pact did not include provisions for individual criminal responsibility. The post WWI Treaty of Versailles did imply that violations of international criminal law may give rise to individual responsibility.[402] The Nuremberg Judgement ultimately went further in holding that 'crimes against international law are committed by men, not by abstract entities, and

[400] Article 6 of the Nuremberg IMT Charter accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) 20/02/2023.
[401] Zolo D, Victors' Justice From Nuremberg to Baghdad, (Weir M trs) First English Edition, Verso, 2009 page 23.
[402] Particularly Article 227 of the Versailles Treaty.

only by punishing these individuals who commit such crimes can the provisions of international law be enforced.'[403]

Taking the substantive laws in turn for discussion and analysis, the charge of Crimes against Peace[404] was stated in the London Agreement to have precedent in the Kellogg-Briand Pact of 1928 and the League of Nations Covenant. The Nuremberg IMT Judgement stated:

> 'The charges in the indictment that the defendants planned, and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[405]

This statement emphasised the importance placed, at the Nuremberg IMT, on the charge of Crimes against Peace. This enabled the Allies to justify the development of international law to include such charges.

The US representatives had changed position from that held in the First World War and now led the discussions for the charge of 'Crimes against Peace' they relied on the Kellogg-Briand Pact as precedent for this charge. In justification for this charge Robert Jackson addressed the Conference with:

> 'Germany did not attack or invade the US in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from the outset, as an illegitimate attack on the international peace and order. And throughout the efforts to extend aid to the peoples that were under attack, the justification was made by the Secretary of State, by the Secretary of War, Mr. Stimson, by myself as Attorney General,

[403] IMT Judgement (1947) 41 AJIL 172, 221.
[404] Often referred to as a 'Crime of Aggression.'
[405] IMT Judgement (1947) 41 AJIL 172, 221.

> that this war was illegal from the outset and hence we were not doing an illegal thing in extending aid to people who were unjustly and unlawfully attacked.'[406]

It was the representatives for the US that insisted on the crime of aggression; Jackson maintained that 'aggression was the crime that comprehends all lesser crimes.'[407] This was thought to be for a few reasons; the US stated that it would provide a framework for the interpretation of events that occurred both in the planning of and during the Second World War and enabled the prosecution to target the highest-level planners of the war. In addition, the charge addressed the US problem of isolationism:

> 'The laying of this charge of aggression against the Germans provided a justification for the United States' abandonment of neutrality in 1940-1941, thereby respectively exonerating the Roosevelt Administration, and connected to that, countering the anticipated resurgence of isolationist sentiment against Truman's post-war shouldering of responsibilities in Germany and elsewhere.'[408]

The US representatives felt it necessary to further justify their engagement in the Second World War at a time they were following a policy of neutrality. The US officially entered the Second World War after the Japanese attack on Pearl Harbour.[409]

The charge of Crimes against Peace is seen to be the most controversial, with many differing opinions. Simpson refers to this as the 'criminalising of politics'[410] The Kellogg-Briand Pact

[406] London Conference, Report of Robert H. Jackson, United States Representative, to the International Conference on International Trials, Department of State, Washington DC, 1949, P 383-84.
[407] Ibid 331.
[408] Sellars, K Founding Nuremberg: Innovation and Orthodoxy at the 1945 London Conference, contained in, M Bergsmo, C Wui Ling and Y Ping (eds) Historical Origins of International Criminal Law, Volume 1, (Torkel Opsahl Academic EPublisher: Brussels, 2014, page 545.
[409] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971, page 5.
[410] Simpson, G. Law, War & Crime, Cambridge, Polity Press, 2008 page 132-133.

did not provide for individual responsibility and did not specify that breach of the Pact would lead to criminal prosecution and was, therefore uncertain on these points. Carl Schmitt has argued, from a realist perspective that, 'The Kellogg-Briand Pact with its lack of definitions, sanctions and organisation, and finally with its use of public opinion as a fundamental sanction cannot be a legal foundation for the criminal punishment of a novel crime.'[411] The Liberal Cosmopolitan position would be equally opposed to the potential creation of new laws, favouring well-established principles and precedents for the charges.[412] For Kelsen, 'A war waged in violation of treaties prohibiting resort to war, especially in violation of the Briand-Kellogg Pact, is certainly illegal. It is not necessarily a 'war of aggression', as the London Agreement assumes the Kellogg-Briand Pact was.'[413] Here, Kelsen also grapples with the Allied argument for the Kellogg- Briand Pact being a precedent for the charge of 'War of Aggression.' For the realist, the Crimes against Peace charge can also be seen to limit a state's sovereignty and its right to declare war *jus ad bellum.*[414] Schmitt doubts whether 'the international criminalisation of the war of aggression, as claimed by the American side, had already been implemented by 1939.'[415] For Schmitt, States had, until this point, the sovereign right to wage war. This use of this charge may therefore open itself up to the 'universally and internationally recognised clause of *nullum crimen, nulla poena sine lege.'*[416] This legal principle is the prohibition of recognising a criminal punishment if the act was not threatened with punishment at the time of its perpetration. Some authors[417] have suggested here that

[411] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 164.
[412] Kelsen, H, 'Will the judgment in the Nuremberg trial constitute a precedent in international law?', International Law Quarterly, 1 (2) (1947).
[413] Ibid,page 155.
[414] The body of international law governing the right of one state to resort to war against another.
[415] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 129.
[416] Ibid page 129.
[417] Kelsen, H, 'Will the judgment in the Nuremberg trial constitute a precedent in international law?', International Law Quarterly, 1 (2) (1947).

the legal principle may not be as entrenched throughout all states; an alternative argument could be made because of the embargo on ex post facto law was not thoroughly entrenched in all Allied states, and that it was viable to 'create' the crime of waging aggressive war. Looking to the Kellogg-Briand Pact, it could be concluded that it was 'the waging of aggressive war' that the States were trying to prevent, however uncertain the terms of the Pact were. It was evident throughout the Allied debates that the charge of crimes against peace was to take precedence at the trial, Robert Jackson stated the below, confirming that this charge was to take priority over the crimes against humanity charges:

> 'The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal was. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were part of the preparation for war or for making an illegal war in so far as they occurred outside of Germany and that makes them our concern.'[418]

This statement makes clear that there is a strong connection between the charge of 'Crimes against Peace' and 'Crimes against Humanity.' The result of this connection would mean that any Crimes against Humanity that had occurred during peacetime would not be considered by the Nuremberg IMT.

The charge of war crimes at (6) b) is probably the least controversial of the charges, as the foundations for this can be found in the Hague Conventions of 1899 and 1907.[419] The war crimes charge states 'such violations shall include but not be limited to' therefore, the

[418] Justice Robert Jackson, International Conference on Military Trials: London, 1945.
Minutes of Conference Session of July 23, 1945, https://www.The Avalon Project : International Conference on Military Trials : London, 1945 - Minutes of Conference Session of July 23, 1945 (yale.edu).
[419] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997.

Nuremberg IMT was entitled to add any other violations of the laws and customs of war it felt fell within this category of crimes.

There was a lengthy debate regarding the charge of crimes against humanity among the attendees at the London Conference[420]. The definition proved to be the most difficult. There was much discussion on the topic of crimes against humanity in peacetime; a compromise had to be made, which resulted in limiting this charge to those also linked with the other crimes in the Charter. The Charter only gave the IMT the jurisdiction to punish Crimes against Humanity that had been committed 'in connection with any crime within the jurisdiction of the Tribunal.' The US wanted to prevent establishing a rule that would give an international court jurisdiction over a government's treatment of its own citizens. This was to avoid the allegations of 'tu quoque' than fears about potential retrospectivity. The Judges at the Nuremberg IMT interpreted Crimes against Humanity narrowly; they determined that crimes against the German Jews before 1939 were not under its jurisdiction because the prosecution had not proven a connection to aggressive war.[421] The Nuremberg Charter's definition of crimes against humanity stated that they included acts committed 'before or during the war.' The Nuremberg Judges then decided that they could only consider crimes against humanity committed during the war.[422] The IMT Judges did, however, acknowledge that Nazi Germany committed atrocity crimes before the war, including the persecution of the Jews; they did not judge the defendants for their role in any pre-war crimes relating to this charge, the Nuremberg IMT judges stated that pre-war Nazi atrocities 'had not been satisfactorily proven

[420] Cryer, R, Prosecuting International Crimes; Selectivity and the International Law Regime. First edition, 2011, page 248.
[421] The Nuremberg IMT Charter accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) accessed 20/02/2023.
[422] Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993, page 583.

that they were done in execution of, or in connection with the Provisions of Article 6 (a)'[423] and therefore 'The Tribunal cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter.'[424] Cryer notes that 'an important legacy of the Nuremberg Charter and the IMT is that they established crimes against humanity as crimes under international law.'[425] However, the Nuremberg IMT did not differentiate between war crimes and crimes against humanity; as a result, the IMT judgement did not provide a solid precedent for distinguishing crimes against humanity from war crimes. 'Crimes against peace' and 'war crimes' align with notions of nation-state sovereignty, whereas 'crimes against humanity' contradict these notions by overriding national sovereignty and seeking to formulate the liberal cosmopolitan outlook in legal categories. Ulrich, in his work, states that the trial judges and prosecutors had difficulty getting to grips with this new crime 'After all, what was being introduced was not just a new law or a new principle but a new legal logic which broke with the existing nation-state logic of international law.'[426] Precedents for the charge of crimes against humanity were sparse, as discussed in previous chapters, the first time this concept was used was in the Martens Clause, which refers to 'principles of the law of nations, as they result from the laws of humanity, and the dictates of the public conscience.'[427] There appears to be no clear basis for inferring criminal responsibility from this. Goldstone, when writing about the charges of crimes against humanity, stated:

[423]Judgement: The Law Relating to War Crimes and Crimes against Humanity, accessed at https://www.The Avalon Project : Judgment : The Law Relating to War Crimes and Crimes Against Humanity (yale.edu) 26/09/2021.
[424] Ibid 26/09/2021.
[425] Cryer, R, Prosecuting International Crimes; Selectivity and the International Criminal Law Regime, Cambridge, Cambridge University Press, 2011. Page 248.
[426] Beck, U, Cosmopolitan Vision, (trs by Ciaran Cronin), 2006, Polity Press, Cambridge, page 169.
[427] The Hague Convention 1907.

> 'Prior to World War II, the subjects of international law were not individuals but nations; individual human beings had no standing. However, the Holocaust changed this. It was a change first manifested in the London Agreement of August 1945, which established the Military Tribunal at Nuremberg and recognised a new offence: the 'crime against humanity.' It was for the first time in legal history that certain crimes were identified as being of such magnitude that they injured not only the people in the country or on the continent where they were committed but also all of humankind. It was the first formal recognition of a universal jurisdiction over certain heinous crimes. People who committed crimes against humanity could be brought to account by courts, both national and international, regardless of the nationality of the perpetrators or their victims.'[428]

This highlights the importance of establishing individual criminal responsibility for international criminal law, and the departure from established norms of State based responsibility. For the liberal cosmopolitan, this was significant.[429]

For Schmitt, 'mankind is obliged to pass a sentence upon Hitler's and his accomplices' '*scelus infandum.'* This sentence must be solemn in its form and striking in its effect … Today, the condemnation of Nazism ought to be such a degree more strict and impressive as the crimes of Hitler are greater than those of Napoleon… furthermore, it is evident, that Hitler's '*scelus infandum*' and especially the monstrous atrocities of the SS and the Gestapo, cannot be classified in their essence by the rules and the categories of the usual positive law; neither with the help of the old municipal criminal or constitutional law, nor with the help of the present international law, that has its origins in the *jus publicum Europaeum,* i.e. the relations between the Christian sovereign of Europe from the sixteenth to the nineteenth century.'[430]

[428] Goldstone, Richard J. For Humanity, reflections of a War Crimes Investigator, Yale University Press, London, 1998. Page 75.
[429] Kelsen, H. Principles of International Law, The Law Book Exchange, New York, 2012.
[430] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 197-198.

Further noteworthy Articles in the Nuremberg IMT Charter are outlined below, they have helped shape International Criminal Law in modern times.

Article 7 dealt with the official position of defendants; 'whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.' With this Article, it should be noted that had Hitler still been alive, there was no doubt that he would have faced trial before the Nuremberg IMT, because Article 7 formally states that Heads of States would be held liable for the atrocity crimes committed. This was a substantial development to the body of international criminal law at this time, expanding upon Article 227 of the Versailles Treaty in which international war crimes trials were never held. A Head of State has never before been charged with an international criminal offence for waging an aggressive war. For Kelsen, individual criminal responsibility including for Heads of State is key to his perspectives on reaching peace through law.[431] In contrast, realism would see this as a political manoeuvre by the Allied Powers in advancing their interests in maintaining the status quo and ensuring, as far as possible, that the current status quo will not be challenged again.[432]

Article 8 stated that the 'Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'[433]

[431] Kelsen, H. Principles of International Law, The Law Book Exchange, New York, 2012.
[432] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011.
[433] Articles 8, 9 & 11 of the Nuremberg IMT Charter accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) accessed 20/02/2023.

Article 9 stipulated that the Nuremberg IMT could declare certain Nazi organisations as illegal. This Article is discussed further below, including the Nazi organisations that were held to be criminal at the Nuremberg IMT.

Article 11 outlined that persons convicted by the Tribunal could be separately charged and punished by a national, military or occupation court; three of the Nuremberg IMT defendants were prosecuted in German Courts following prosecution by the Nuremberg IMT.

The Charter also provided for and defined 'fair trial procedures' including defendants' rights to particular indictments, to testify, to have the assistance of counsel, to present evidence, and to cross-examine prosecution witnesses.

The defendants were given no right to appeal; however, the defendants did have a right to seek clemency and pardons before senior military officials.

It is worth noting that although the term genocide was mentioned several times during the London Conference it did not make its way into the Charter. The term genocide was created after the atrocities of the Holocaust and officially used in 1944, coined by the Polish Jewish lawyer Raphael Lemkin and included in his work *'Axis Rule in Occupied Europe'*[434] The term is composed of the Greek word 'geno' meaning tribe or race and the Latin verb 'caedere' meaning to kill.[435] Lemkin had witnessed the Holocaust. Genocide is the destruction of groups, to include destruction of political and social institutions, culture, language, national feelings, religion and economic existence. One of the 'features of genocide is that groups are

[434] R Lemkin, Axis rule in Occupied Europe, 1944, Washington DC: Carnegie Endowment for International Peace.

[435] Cryer, R, Prosecuting International Crimes; Selectivity and the International Law Regime. First edition, 2011 page 79.

attacked for being rather than for doing.'[436] Lemkin persuaded the Prosecution to include genocide in the Nuremberg indictment, however this was not under count four (crimes against humanity) but rather, under count three (war crimes). In the Nuremberg judgement, genocide was not specifically mentioned. The Holocaust was punished under the notion of crimes against humanity, which includes persecution and extermination. The absence 'may be explained by a number of factors, the relatively new nature of the crime and the reluctance to deal with victims' groups rather than individuals.'[437] After the Nuremberg IMT, Lemkin campaigned for the universal prohibition of genocide. Just one year after the Nuremberg IMT, the United Nations General Assembly adopted a resolution in which it affirmed that genocide is a crime under international law. The crime was defined for the first time in the UN Convention on the Prevention and Punishment of the crime of Genocide. The legal definition adopted by the UN is narrower in scope than the definition advocated by Lemkin. Carsten Stahn has written 'that the historical contribution of international criminal courts and tribunals is that they brought the concept of genocide to life.'[438] When viewing the legal definition of genocide, it is argued that the Holocaust and the Armenian massacres would fit within its definition. Although the term genocide was coined in 1944, it wasn't until the early 1990's that this would be used in the ad hoc international tribunals for the Former Yugoslavia and Rwanda.

The crimes against peace charges took centre stage at the Nuremberg IMT as this was the crime that hurt the Allies the most and brought the US into the Second World War,

[436] Stahn C. A Critical Introduction to International Criminal Law, 2019, Cambridge University Press, Cambridge page 34.
[437] Ibid page 34.
[438] Ibid.

concentration on this charge is thought to justify the US joining of the war and to develop the argument that this was to return the world order to the status quo.

Liberal Cosmopolitans would see this rapid development of international criminal justice as a positive result:

> 'The international legal system, it is argued, is adapting quickly to a global scenario in which state sovereignty is in decline, new subjects are emerging, and the principle of the exclusion of individuals as subjects of international law is being superseded.'[439]

For Liberal Cosmopolitans, such as Kelsen, they hold international criminal jurisdiction as central to their perspectives on attaining world peace, notions of individual criminal responsibility are a welcome departure to the realist notions of State sovereignty.

The Nuremberg IMT, in its Judgement, gave the following explanation for the crimes against peace charge at 6 (a) of the Indictment:

> 'In the opinion of the tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war, with its inevitable and terrible consequences, are committing a crime in doing so. But it is argued that the Pact does not expressively enact that such wars are crimes or set up courts to try those who make such wars. To the extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Conventions of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the dates of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal nor is any sentence proscribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally

[439] Zolo, D. Victors Justice; From Nuremberg to Baghdad, (trans M. W. Weir) London, Verso. Page 139.

> illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.'[440]

A realist would question the requirement of war crimes trials at all, as adherence to due process and legality principles may risk acquittals of some of the worst criminals ever known.[441] Realists would be sceptical of the ability of the law to play a central role in international relations and war crimes, they believe states have the sovereign right to wage war, however, any action emanating from this should be political i.e., sanctions and financial reparations.

Article 2 of the Nuremberg IMT Charter sets out that the Tribunal should consist of four members, each with an alternate. One member and one alternate shall be appointed shall be appointed by each of the signatories. The alternatives shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place. Therefore, the four members would be from Britain, the US, the Soviet Union and France. All members were from the victorious Allies.

The Nuremberg International Military Trial.

A total of twenty-four men were indicted. Robert Ley, the Head of the Nazi Labour Movement, committed suicide before the trial began, and Gustav Krupp, an Industrialist, was deemed too ill to stand trial. Martin Bormann, Hitler's Adjutant, was tried in absentia. Therefore, twenty-

[440] Judgement of the International Military Tribunal for the Trial of German Major War Criminals. (Presented by the Secretary of State for Foreign Affairs to Parliament by Command of His Majesty, Cmd, 6964, London [1946], page 39-40.

[441] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002.

one of the most senior, surviving leaders of Nazi Germany in the political, military and economic spheres stood trial. Six German organisations were also to stand trial at the Nuremberg IMT.[442] All defendants pleaded not guilty**.**

Justice Jackson's famous opening speech to the Nuremberg IMT:

> '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 civilisation 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 hands of vengeance and voluntarily submit their captive enemies to the judgement of the law, is one of the most significant tributes that Power ever has paid to reason.'[443]

This highlights, for the first time in history, that waging an aggressive war and the atrocity crimes committed as part of that war would be dealt with by an international court. Placing significant importance on the charge of Crimes against Peace. Crimes committed during the Second World War were so significant, that the development of international law and principles of individual criminal responsibility was justified.

In opposition to this, the defence maintained that no precedent for these charges existed in international criminal law and that individual criminal responsibility had not yet been established, therefore these elements were being applied retrospectively. The defence opening statement claimed:

[442] Information taken from Sprecher, D, Inside the Nuremberg Trial: A Prosecutors Comprehensive Account, vol 1, University Press of America, 1999.
[443] Nuremberg IMT opening speeches, 21 November 1945, vol 1:98 accessed from https://www.The Avalon Project: Nuremberg Trial Proceedings Vol. 2 - Second Day (yale.edu).

> ‘No new legal maxim was created under which an international tribunal would inflict punishment upon those who unleashed an unjust war. The present trial, can, therefore, as far as Crimes against Peace shall be avenged, not invoke existing international law, it is rather a proceeding pursuant to a new penal law enacted only after the crime.’[444]

Responding to this position in the IMT judgement, the Allies argued that ‘the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but it is, in general, a principle of justice.’ The Allies went on to argue that:

> ‘It would be unjust if his wrong were allowed to go unpunished… the defendants must have known of the Treaties signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were acting in the defiance of all international law when incomplete deliberation they carried out their designs of invasion and aggression. On this view alone, it would appear that the maxim has no application to the present facts.'[445]

The Nuremberg IMT went on to reinforce its case by the consideration of the relevant international law in place specific to aggressive war. The Allies argued that the Kellogg-Briand Pact of 1928 was binding on all sixty-three nations that had signed it, including Germany, Italy and Japan, at the outbreak of the Second World War in 1939. The Allies stated:

> ‘The law of war is to be found not only in treaties, but in customs and practices of states which generally obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. The law is not static, but by continual adaption follows the need for a changing world.’[446]

[444] Taken from the Transcript of the Nuremberg IMT’s Proceedings dated 21st November 1945, accessed https://www.sahistory.org on 4/01/2021.
[445] Nuremberg IMT Judgment accessed from https://www.The Avalon Project: Nuremberg Trial Proceedings Vol. 22 - Monday, 30 September 1946 (yale.edu) vol 22:461 23/05/2021.
[446] Nuremberg IMT Judgement Nuremberg IMT Judgment accessed from https://www.The Avalon Project: Nuremberg Trial Proceedings Vol. 22 - Monday, 30 September 1946 (yale.edu) vol 22:463.

The Nuremberg IMT separated the crimes within the Charter into four counts, these were stated as:

- Count 1. Charges the defendant with conspiring or having a common plan to commit crimes against peace.
- Count 2. Charges the defendant with committing specific crimes against peace by planning, preparing, initiating and waging wars of aggression against a number of other states.
- Count 3. Charges the defendant with war crimes.
- Count 4. Charges the defendant with crimes against humanity.

The below table sets out the defendants charged, including sentences imposed by the Nuremberg IMT.

Name	Position	Charged with	Found guilty of	Sentence
Hermann Goering	Hitler's former deputy	All 4 counts	All 4 counts	Death by hanging
Rudolf Hess	Deputy leader of the Nazi Party	All 4 counts	Counts 1 and 2	Life imprisonment
Joachim von Ribbentrop	Foreign Minister	All 4 counts	Guilty of all 4 counts	Death by hanging
Wilhelm Keitel	Head of the Armed forces	All 4 counts	Guilty of all 4 counts	Death by hanging
Wilhelm Frick	Minister of the Interior	All 4 counts	Guilty of counts 2, 3 and 4	Death by hanging
Ernst Kaltenbrunner	Head of Security Forces	Counts 1, 3 and 4	Guilty on counts 3 and 4	Death by hanging
Hans Frank	Governor-General of occupied Poland	Counts 1, 3 and 4	Guilty of counts 3 and 4	Death by hanging
Konstantin von Neurath	Governor of Bohemia and Moravia	All 4 counts	Guilty of all 4 counts	15 years imprisonment
Erich Raeder	Head of the Navy	Counts 1,2 and 3	Guilty of counts1,2 and 3	Life imprisonment
Karl Doenitz	Raeder's successor	Counts 1, 2 and 3	Guilty of counts 2 and 3	10 years imprisonment
Alfred Jodl	Armed Forces Command	All 4 counts	All 4 counts	Death by hanging

Alfred Rosenberg	Minister for occupied Eastern Territories	All 4 counts	All 4 counts	Death by hanging
Baldur von Schirach	Head of the Hitler Youth	1 and 4	Guilty of count 4	20 years imprisonment
Julius Streicher	Radical Nazi antisemitic publisher	1 and 4	Guilty of count 4	Death by hanging
Fritz Sauckel	Head of forced-labour allocation	All 4 counts	Guilty of counts 3 and 4	Death by hanging
Albert Speer	Armaments Minister	All 4 counts	Guilty of 3 and 4	20 years imprisonment
Arthur Seyss-Inquart	Commissioner for the occupied Netherlands	All 4 counts	Guilty of counts 2, 3 and 4	Death by hanging
Martin Bormann	Hitler's adjutant	Counts 1, 3 and 4	Guilty of counts 3 and 4	Tried in absentia – death by hanging
Walther Funk	Minister of Economics	All 4 counts	Guilty of counts 2, 3 and 4	Imprisonment for life
Hjalmar Schacht	President of the Reichsbank	Counts 1 and 2	Not guilty	Not guilty
Franz von Papen	Ambassador to Turkey	Counts 1 and 2	Not guilty	Not guilty
Hans Fritzsche	Head of the Radio Division of the Propaganda Ministry and Plenipotentiary for the Political Organization of the Greater German Radio	Counts 1, 3 and 4	Not guilty	Not guilty[447]

The Judgement found that there was a premeditated conspiracy to commit crimes against peace. A compromise was struck between the judges, and the charge of conspiracy was narrowed to a conspiracy to wage aggressive war.[448] The Judges found that the charter did

[447] All information in the table has been taken from https://www.Avalon Project - Nuremberg Trial Proceedings Vol. 1 (yale.edu) accessed 15/04/2022.
[448] Ibid.

not define conspiracy to commit war crimes and crimes against humanity and therefore only considered the charge of conspiracy in relation to waging an aggressive war.[449] Eight defendants were convicted on that charge. All twenty-two defendants were charged with crimes against peace, and twelve were convicted.[450] The war crimes and crimes against humanity charges held up the best, with only two of the defendants charged with these offences being acquitted of them.[451] No attempts were ever made to overturn the ruling at the Nuremberg IMT.[452] There was one dissenting opinion at the Nuremberg IMT from the Soviet representative, Major General Nikitchenko, who dissented on all the acquittals and the life sentence of Hess. He would have declared all the defendants and organisations guilty and sentenced Hess to death.[453]

Bassiouni notes that 'All of the defendants were German and no other defendants from the European Axis Powers were indicted or tried before the IMT. No Allied Military personnel were prosecuted for any war crimes against Germans.'[454] This element feeds into the victor's justice criticism highlighted below.

As well as individuals being charged, Article 10 of the Nuremberg Charter also stipulated that:

> 'In cases where a group or organization is declared criminal by the Tribunal. the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national. military or

[449]Information taken from https://www.Avalon Project - Nuremberg Trial Proceedings Vol. 1 (yale.edu) accessed 13/04/2022.
[450] Ibid.
[451] Ibid 02/02/2023.
[452] Cohen, Laurie A. Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia, UCLAS Journal of International Law and Foreign Affairs, Vol. 2, No. 1 (1997), page 143.
[453] Dissenting opinion at Nuremberg Judgement.
[454] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997, page 29.

> occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.'[455]

The Nuremberg IMT dealt with the criminality of the Nazi organisations mentioned below:

- The Reich Cabinet.
- The Leadership Corps of the Nazi Party.
- The Schutzstaffel (often referred to as the SS, meaning 'protection squadron')
- The SS intelligence service is called the Sicherheitsdienst (often referred to as the SD of the Security Service of the Reichsfuhrer SS).
- The Geheime Staatspolizi (known as the Gestapo or Secret State Police)
- The Sturmabteilungen (referred to as the SA or Stormtroopers)
- The General Staff and High Command of the German Armed Forces.

Four of these organisations were ruled to be criminal, those being the Leadership Corps of the Nazi Party, the SS, the Gestapo and SD, although some lower ranks and subgroups were excluded.[456] The Nuremberg IMT Judgement described this element of the trial as 'a far-reaching and novel procedure. Its application, unless perfectly safeguarded, may produce great injustice.'[457]

There have been criticisms levelled at the procedural fairness of the Nuremberg IMT; Simpson has called the trials 'procedurally dubious.'[458] Furthermore, he points out some of the procedural elements which the IMT of both Nuremberg and Tokyo share with show trials:

> 'There was no right to appeal to a higher court. At the Nuremberg IMT, the defence was not furnished with evidence in the possession of the prosecution,

[455] The Nuremberg Charter accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) 02/02/2021.
[456] Information taken from Taylor, T, The Anatomy of the Nuremberg Trials; A Personal Memoir, First Edition, Skyhorse Publishing 1993.
[457] Nuremberg IMT Judgement, https://www.The Avalon Project: Nuremberg Trial Proceedings Vol. 22 - Monday, 30 September 1946 (yale.edu) 250:498.
[458] Simpson, G. Law, War & Crime, Cambridge, Polity Press,2008 Page 115.

> nor was the defence even made aware of the existence of some crucial documentation. The accused at Nuremberg were tried and convicted based on largely ex post facto laws either improvised for the trial itself (crimes against humanity) or imported from the United States (conspiracy). The Charters in both case studies explicitly removed the standard procedural protections available to defendants in the Western States.'[459]

This highlights some of the procedural flaws that had occurred during the Nuremberg IMT, despite the criticisms that these trials attracted, they broke new ground in international law and cemented some of the ideas that had previously failed in the aftermath of the First World War.

The Nuremberg IMT trial process attracted several criticisms,[460] both during the trials and shortly afterwards. In an attempt to understand whether the trial met its own claims of justice and fairness, these criticisms will be discussed and analysed in turn.

Victors' justice is a term that has often been used to describe both the substantive elements of the Charter and the Nuremberg IMT trial process. Victors' justice is frequently tied to the fact that the IMT was set up by the occupying force; the judges and prosecutors for the IMT were all from the Allied States and there were no neutral states invited to take up a position of judge or prosecutor.[461] In addition to this, all defendants were German, there were no defendants from any of the Allied States were included in the trial proceedings.[462] Kelsen

[459] Ibid page 115.
[460] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002, Willis J, Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War, first edition, Greenwood Press 1982.
[461] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press, 2002, Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997 page 15 & Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971.
[462] Ibid.

heavily criticised the Nuremberg IMT process and argued that 'the punishment of war criminals should be an act of justice and not the continuation of hostilities in forms which are ostensibly legal but in reality, based on the desire for revenge.'[463] Although liberal cosmopolitanism holds the international judicial process as central to their main theme for attaining world peace, the precedents used by the Nuremberg IMT and the principle of individual criminal responsibility were too uncertain at this time. Kelsen believed that the victorious states should have consented to any of its citizens who may have been guilty of war crimes standing trial before an international court. Although this raises a valid argument, the Allied actions during the Second World War were not on the scale of those of Nazi Germany. Kelsen, an advocate for the judicial process of 'individuals putatively guilty of atrocity crimes during the war, turned out to be one of the prominent critics of the entire process.'[464]

Tu quoque is a term meaning 'you likewise.'[465] and is often a retort made by a defendant implying that the accuser is also guilty of the same crime. The charges in the Charter, as shown above, were structured in such a way to avoid the allegation of *tu quoque*. This ties in with the charge of Crimes against Humanity needing a jurisdictional connection to the war; Cryer states that 'if the jurisdictional limit to war was not introduced, not only could colonialism (embarrassing for France and the United Kingdom), or the Gulags (still a secret in the USSR) be evaluated with reference to the law, so could the segregationist policies in the United States.'[466] For instances in which the law was relatively clear, such as the war crimes charges,

[463]Kelsen, H. Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law, International Law Quarterly, 1 (2) (1947), page 115.
[464] Zolo D, Victors' Justice From Nuremberg to Baghdad, (Weir M trs) First English Edition, Verso, 2009.
[465] Collins English Dictionary online: https://www.Collins Online Dictionary | Definitions, Thesaurus and Translations (collinsdictionary.com).
[466] Cryer, R. Prosecuting International Crimes: Selectivity and the International Law Regime. Cambridge, Cambridge University Press. 2011. Page 206. Provost, International Human Rights and Humanitarian Law, Page 227-35.

however, the Allies had also undertaken some of these acts, such as the bombing of civilian-populated areas but, charges were not brought against them. Immanuel Kant admitted that in the state of war:

> 'where no tribunal empowered to make judgements supported by the power of law exists, judgement would rest on power: neither party can be declared an unjust enemy (since this already presupposes a judgement of right) and the outcome of the conflict (as if it were a so-called judgement of god) determines the side on which justice lies.'[467]

It was the Tribunal that decided to exempt the Soviets from being charged with conspiring with the Germans to partition Poland after their mutual agreement to invade, despite German Generals Jodl and Keitel, along with Joachim Ribbentrop, being charged with crimes against humanity for being part of the same conspiracy.[468] Cryer has argued that 'the fact that the law was not applied to both sides in the Second World War has led many to consider the legacy of the Nuremberg IMT as flawed, and its legitimacy tarnished.'[469] Kelsen was also of this opinion with regard to the IMT, for liberal cosmopolitans, ensuring the individual perpetrators were tried by a court and punished ; the realist would also be hostile to this, seeing this as an act of power on behalf of the Allied states.

The criticism of retrospectivity, discussed above with regards to the substantive laws governing the Nuremberg IMT came under much criticism for the ex post facto creation and application of those provisions, most notably with crimes of aggression and crimes against

[467] Bass, Gary Jonathan. Stay the Hand of Vengeance, The Politics of War Crimes Tribunals, 1st edn, Princeton University Press, 2002, page 9.
[468] Ibid page 200.
[469] Cryer, R. Prosecuting International Crimes: Selectivity and the International Law Regime. Cambridge, Cambridge University Press. 2011. Page 206.

humanity, for which there was insufficient precedent or foundation for them. Liberal cosmopolitans and realists would, generally, be hostile to breach of the *nullem crimen sine lege* principle. In realist terms, Schmitt advances his argument against the ex post facto nature of the laws when analysing the Crimes against Peace indictment contained in the Charter:

> 'To bring a normal citizen who does not belong to the political ruling class into such a conflict, and to add on top of this a retroactive effect for the past, would violate every equity. In light of the creation of a not only new but also completely novel international crime, the power of the principle '*nullum crimen, nulla poena sine lege'* grows. It is not only a principle of valid positive law, but also a maxim of natural law and morality that the citizen who is not party to atrocities can unconditionally call upon.'[470]

For Schmitt, the waging of aggressive war charge aimed at individuals was a new crime that was enacted retrospectively.

The liberal cosmopolitans would see this as a fundamental breach of the legality principle. Upholding the rule of law and legality are central to the liberal cosmopolitan perspective. War Crimes Trials are rooted in liberal theory, this element cuts against the grain of the upholding the rule of law. The precedents relied on within the Nuremberg IMT were too uncertain for liberal cosmopolitanism. Realism sees the law as reflecting the preferences of the powerful, once the distribution of power has changed, so will the law.

Conclusion.

[470] Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011, page 196.

The Nuremberg IMT is often referred to as the cornerstone of international criminal law. This was the first time that trials were held holding individuals accountable for their part in the atrocity crimes committed. The Tribunals reasoning for the development and extension of the substantive law was flawed, there was no reasonable connection from the pre-existing law for the leap from state responsibility to individual responsibly, furthermore, the identified precedents remained silent on several important matters.[471] The Nuremberg IMT sought to address atrocity crimes on an unprecedented level. However, the IMT has manged to withstand the criticism that had attacked the legitimacy of both the substantive laws used and the procedural processes. Despite these criticisms, the Nuremberg IMT was able to initiate many of the legal principles debated in the aftermath of the First World War. Firm legal precedents were created, making certain that international criminal law would be applicable to individuals, including highly placed governmental leaders and Head of State. In addition to this, the Nuremberg IMT also created precedents for the defences available in such trials, such as superior orders. The realists would view this as States acting in their own interests and looking to secure power, both militarily and economically, therefore the law will reflect the preferences of the powerful, when the power changes, then the law would also.[472] The Allies were in occupation of Germany, the defendants were apprehended easily, and there was a wealth of documentary evidence and eyewitnesses that could be called upon. In this instance, there were no military or significant economic drawbacks to the trial.[473] It should be noted here, particularly with regards to the charge of crimes against humanity, that

[471] As discussed throughout this chapter, the precedents for individual criminal responsibility, waging an aggressive war and crimes against humanity all contained uncertain terms.
[472] Bassiouni M C, World War I: 'The War to End all Wars' and the Birth of a Handicapped International Criminal Justice System, 30 Denv. J. Int'l L. & Pol'y 244 (2002).
[473] Zolo D, Victors' Justice From Nuremberg to Baghdad, (Weir M trs) First English Edition, Verso, 2009, page 139.

the political situation was vastly different at the end of the Second World War, to that of the First World War and attempts to indict members of the Ottoman Empire for their part in the Armenian massacres. As discussed earlier, Germany was forced to surrender, unconditionally to the Allies, the Allies ran the German Government, and assumed sovereign legislative power over Germany[474] thus removing any claim to sovereignty that Germany may have had. This effectively mitigated any claim of self-interest that Germany may have had during the trials, and enabled effective trials to be carried out, the Allied States were the clear victor's and were in a much better position to find and secure the defendants for trial. This is in contrast with the position at Constantinople after the First World War, in which the Allies allowed the Turkish Government to remain in control resulting in them asserting their sovereign rights and blocking Allied efforts to punish the perpetrators of the Armenian massacres. Dadrian asserts that 'seeking retributive justice against the Nazi's promoted the Allies' self-interests, since much of the Nazi persecution was directed at the Allies' own nationals under German occupation.'[475] Liberal cosmopolitanism would also be concerned that limited precedents existed for the trial in the failed Leipzig trials and the weak framework that existed in the Hague Conventions and various treaties.

Morgenthau doubted that much could be gained from the Nuremberg IMT and dealing with the acts committed during the war in an international court room, they do not fit with realism's general power and State interest perspectives.

[474] Kelsen, H, 'Will the judgment in the Nuremberg trial constitute a precedent in international law?', International Law Quarterly, 1 (2) (1947), page 12.
[475] Dadrian, VN, Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramification,s 14 YALE J international L 221, page 226.

The realist interest-based approach is at risk of both undermining the entire process of the Nuremberg IMT, as this does not consider other factors that have proven vital. When politics are found to be a part of the trial process, does this necessarily equal illiberal results.[476] The Nuremberg IMT, for all its criticisms fared better than the Tokyo IMT, as discussed in the next chapter.

In the development of the Nuremberg IMT, the United Nations was created to replace the League of Nations, the creation of this function was true to the Kantian notion of treaties preventing war rather than reacting to it, here, limited state sovereignty is surrendered. For both Kant and Kelsen, international institutions would require an international court at its centre. The realist perspective harbours a deep mistrust of international coalitions because, on a state level, coalitions can be manipulated to achieve individual states' goals instead of broader principles.

One of the most important legal principles arising from the Nuremberg IMT, as discussed above, was the principle of individual accountability for war crimes. Support for this development in law can be found in liberal cosmopolitanism, Kelsen rejected the traditional stance of only States being liable for war crimes as 'untenable:'

> 'The subjects of international law, too, are individuals. The statement that that the subjects of international law are states as juristic persons does not mean that the subjects of international law are not individuals; it means that individuals are subjects of international law in a specific way, in another than the ordinary way in which individuals are subjects of national law.'[477]

[476] Shklar. J, Legalism; Law, Morals and Political Trials, First Edition, Harvard University Press. 1986 provides an analysis.
[477] Hans Kelsen, Principles of International Law, The Law Book Exchange, New York, 2012, page 97.

The Nuremberg IMT was the first of its kind in history, many issues, as discussed, arose as to the development of the substantive laws and the procedure. The large amount of detailed evidence submitted to the Nuremberg IMT regarding the crimes carried out in the Second World War were so great, that in this case, the facts drove the law.

In 1950, the Nuremberg Principles,[478] as recognised in the Charter and Judgement for the Nuremberg IMT, were codified by the International Law Commission and submitted to the General Assembly of the United Nations.[479] The Nuremberg Principles included the concepts of individual criminal accountability for crimes under international law, an end to impunity, equality before the law, fair trial rights were universally recognized. In addition, the substantive laws of crimes against peace, war crimes and crimes against humanity were defined.[480]

Chapter 8. The International Military Tribunal for the Far East.

Introduction.

This chapter will utilise the International Military Tribunal for the Far East (IMTFE) as its case study to analyse the substantive laws utilised in the indictment and the trial process against the liberal cosmopolitan and realist framework identified in the Methodology Chapter. Elements of the IMTFE have been selected, with both realism and liberal cosmopolitan agendas being central. In the main, this Tribunal followed the Nuremberg, with slight

[478] Information taken from https://www.Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, 1950, accessed 29/01/2023.
[479] Ibid.
[480] Information taken from https://www.History: International Nuremberg Principles Academy (nurembergacademy.org) accessed 29/01/2022.

amendments. Again, as with the Nuremberg IMT, the IMTFE was, in the main, a US creation.[481] There was no Conference to debate the substantive and procedural elements of the IMTFE, therefore, the London Conference negotiations were used for the trial.[482] As with the Nuremberg IMT, the IMTFE was set up with a liberal cosmopolitan outlook, judicial intervention and the criminalisation of individuals, however high ranking was a liberal cosmopolitan ideal.[483] For realism, judicial intervention does not play a central role in their perspectives. Realists would maintain the principal of equality of sovereign states and that they have a right to wage war, for them, war had not been criminalised at this point in time. For Schmitt:

> The lone perpetrator of a delict of international can only be a state as such. That which was a delict of international law in the hitherto existing praxis and theory is therefore something fundamentally different from a delict in the criminal sense of the word. It is only the facts of a case that trigger certain financial, economic, or political consequences in international law (liability for damages, sanctions, backlashes, war) in the relations of state to state. States as such exist as equal and sovereign subjects in international law. This equal status consists fundamentally in that fact that every party has the same right to war (*jus ad bellum*) and the same right to neutrality.'[484]

Schmitt highlights his position that States have the right to go to war, and that this action, is not characterised as a crime. Arguing for notions of State based sovereignty. Schmitt was critical of the principle of individual criminal responsibility in international law and believed that there was no existing precedent for this.[485]

[481] Minnear, R. *Victors' Justice. The Tokyo War Crimes Trial,* Princeton University Press, Princeton, New Jersey, 1971, page 10.
[482] Ibid page 20.
[483] Further discussed in the Nuremberg Trials Chapter 7.
[484] Carl Schmitt, *Writings on War*, Nunan, T (trs & ed), English Edition, Polity Press, 2011, p 175.
[485] Ibid.

Often deeply cynical, realism would see the IMTFE as powerful states dominating the vanquished and attempting to maintain the status quo in their favour.[486] This chapter will highlight historical account including the atrocity crimes committed by Japan during the Second World War, including the most relevant Allied Declarations, highlighting the States intentions on how they will deal with the atrocity crimes carried out during the Second World War. The IMTFE process and the dissenting opinions will also be analysed including the criticisms this trial has attracted.

Historical Account.

Japan entered the Second World War in September 1940, making this official by signing the Tripartite Pact with Germany and Italy. The Tripartite Pact created a defence alliance between the countries stating that its signatories were to 'assist one another with all political, economic and military means when one of them was attacked by a 'Power at present not involved in the European war or in the Sino-Japanese Conflict.'[487] This was primarily intended to deter the United States from entering the conflict.[488] Japan invaded China and then attacked the US Naval military base Pearl Harbour. Within two hours, the attack on Pearl Harbour sunk or damaged twenty-one US warships destroyed 188 aircraft and killed over two thousand American servicemen and women.[489] These actions led to the US joining the Second

[486] Carr, EH, The Twenty Years Crisis, 1919-1939, Cox M (preface) first edition, Macmillan Publishers Limited 2016, Morgenthau, H. Politics Among Nations; The Struggle for Power and Peace, 3rd edition, New York; knopf, 1964 & Schmitt, C, Writings on War, Nunan, T (trs & ed), English Edition, Polity Press, 2011.
[487] Accessed https://www.The Avalon Project : Summary of the Three-Power Pact Between Germany, Italy, and Japan, Signed at Berlin, September 27, 1940. (yale.edu) 12/05/2022.
[488] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971, page 141.
[489] Figures taken from https://www.iwm.org.uk/ accessed 03/02/2021.

World War. It should be noted that until this point, the US had remained neutral.[490] Atrocity crimes committed by Japan were widescale. The invasion of China's capital city Nanking resulted in the murder of approximately 300,000 civilians and soldiers in the city.[491] This atrocity lasted approximately six weeks and was later to become known as 'The Rape of Nanking.' The Prisoners of War were transported to remote locations on the outskirts of Nanking and murdered. Women and children in Nanking were raped and murdered on an unprecedented scale.[492] Biological and chemical warfare experiments were being carried out by the Japanese Military on both Chinese and Allied Prisoners of War by the Japanese Unit 731.[493] The victims were delivered to the Unit 731 compound by the occupying Japanese police force, who claimed their captives were criminals and police activists.[494] Allied and Russian prisoners of war were also among the victims as were children. The victims were subjected to both field and in house experiments, including live dissection without anaesthesia, intentional infection with diseases and, exposure to the testing of germ bombs that were intended to spread the bubonic plague and injection with animal blood. The list of conditions tested on unwilling human subjects is alarming, plague, cholera, anthrax, smallpox, dysentery, tuberculosis, typhoid, tetanus, frostbite, and gangrene.[495] Imperial Japan was a signatory, although never ratified until 1970, the 1925 Geneva Protocol, containing the international ban on chemical and biological weapons. Those involved with the Unit 731

[490] Ibid accessed 03/02/2021.
[491] Information taken from https://www.Genocide And War Crimes - The Worst Japanese Massacres of WWII (warhistoryonline.com) accessed 09/02/2022.
[492] Picart, C, J, Attempting to go Beyond Forgetting: The Legacy of the Tokyo IMT and Crimes of Violence against Women, University of Pennsylvania East Asia Review, Vol 7, 2012, page 26.
[493] Account of the atrocity crimes committed taken from Hickey, D, Sijia Li, S, Morrison, C, Schulz, R, Thim, M Sorensen, K, Unit 731 and Moral Repair, Journal of Medical Ethics, Vol 43, No.4, April 2017, pp. 270-276.
[494] Ibid.
[495] Hickey, D, Sijia Li, S, Morrison, C, Schulz, R, Thim, M Sorensen, K, Unit 731 and Moral Repair, Journal of Medical Ethics, Vol 43, No.4, April 2017, pp. 270-276.

atrocities knew they were violating an explicit global agreement against these weapons.[496] Toward the end of the war with Japan, the US dropped the first atomic bomb on Hiroshima, Japan, on 6 August 1945; this killed tens of thousands of non-combatants immediately and tens of thousands more from injuries and radiation sickness that followed. Three days after this, the US dropped a second bomb on Nagasaki; the US gave no prior warning to enable civilians to evacuate.[497]

The Cairo Declaration 1943.

The first multilateral Declaration came in 1943. This was the Cairo Declaration of 1 December, in which the United Kingdom, United States and China stated:

> 'The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific that she has seized or occupied since the beginning of the first World War in 1914 and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories that she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that Korea shall become free and independent in due course.'
>
> 'With these objects in view, the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan.'[498]

[496] Ibid.
[497] Information taken from https://www.The Atomic Bombs That Ended World War 2 | Imperial War Museums (iwm.org.uk) accessed 18/03/2022.
[498] Taken from the Cairo Declaration https://www.[Cairo Communiqué](Text) | Birth of the Constitution of Japan (ndl.go.jp) accessed 29/09/2021.

This declaration made the Allies position clear that following the Second World War, territories seized by Japan would be returned to China. The further Potsdam Declaration was then issued in 1945.

The Potsdam Declaration 1945.

One of the most important Declarations was the Potsdam Declaration of July 1945. Within this Declaration, the United States, the United Kingdom, and China set out their terms of surrender for Japan. The Declaration contained the terms of unconditional surrender for Japan, including terms of disarmament, occupation, and territorial sovereignty. The Declaration made no mention of the criminal culpability of the Emperor. The most important part of this Declaration was Principle 10, stating:

> 'We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.'[499]

While this Declaration did not clearly mandate an international judicial process, given the timing and its reference to 'stern justice,' a criminal trial in the aftermath of the Second World War seemed likely.

In addition, the terms of surrender for Japan also stated:

> 'The authority of the Emperor and the Japanese Government to rule the State shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender. We hereby command all civil, military, and naval officials to obey and enforce all proclamations, orders, and directives deemed by the Supreme Commander

[499] Taken from the Cairo Declaration http://www.[Cairo Communiqué](Text) | Birth of the Constitution of Japan (ndl.go.jp) accessed 29/09/2021.

> for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority.'[500]

On 11 August, the UK, US, China, and the USSR clarified General MacArthur's powers as Supreme Commander for the Allied Powers (SCAP) by defining them to include the power to 'take such steps as he deems proper to effectuate the surrender terms.'[501] At first, the Japanese Government rejected the Declaration; however, after the US bombed both Hiroshima and Nagasaki, the Declaration was then accepted.[502]

The Far Eastern Commission.

The Far Eastern Commission (FEC) was agreed in Moscow in December 1945. This Commission was to formulate plans to enforce the provisions of surrender for Japan. The FEC was controlled mainly by the US and consisted of eleven states[503] the four main Allies, The UK, US, China, and the Soviet Union held veto powers. The FEC transmitted its directives to an advisory group known as the Allied Council for Japan. The four main Allies were the only members of the Allied Council for Japan, overseeing the occupational policies and practices for Japan. The FEC was not an investigative body but a political one; it was to establish a policy of occupation for Japan and coordinate Allied policies in the Far East.[504] The FEC played an

[500] Ibid.
[501] 13 US Department of State Bulletin (12 August 1945) p.206 accessed at https://archive.org/details/sim_department-of-state-bulletin.
[502] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971,page 95.
[503] The United Kingdom, the United States, the Soviet Union, Republic of China, France, the Netherlands, Canada, Australia, New Zealand, India and the Philippines.
[504] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997, page 31.

important role in providing the Allies a political umbrella for prosecution and other policies related to suspected war criminals, trials, sentencing and release.[505] Article 6 (a) provided for:

> The Supreme Commander for the Allied Powers (a) should promptly establish an agency, acting under his Command to investigate reports of war crimes, to collect and analyse evidence, to arrange for the apprehension and prompt trial of suspects, to prepare, supervise and conduct the prosecution of individuals and organizations before international military courts or tribunals, and to recommend to the Supreme Commander which individuals and organizations should be prosecuted, before what courts they should be tried and what persons should be secured as witnesses.[506]

Participants in the FEC, and in the Tokyo IMT were chosen on a representational basis, not an individual capacity, therefore, injecting politics into the proceedings. 'This led to a politicisation of the FEC and the Tokyo Tribunal and affected the internal workings of these bodies as well as the quality of justice they administered.'[507]

The Tokyo Charter.

The Tokyo Charter replicated the Nuremberg Charter, in terms of the charges to be brought. For these reasons, the record of the London Conference stands as evidence of the Allies' intent and their development of international criminal law and legal procedure, not only for the Nuremberg Trial but also for the Tokyo Trial.[508] No similar conference was established to negotiate the contents of the Tokyo Charter, as had been the case for Nuremberg. Instead, the Tokyo Charter was created by an executive decree of General Douglas McArthur, acting

[505] Ibid.
[506] The Secretary General of the Far Eastern Commission (Johnson) to the Secretary of State, Foreign Relations of the United States, 1946, The Far East, Volume VIII, Foreign Relations of the United States, 1946, The Far East, Volume VIII - Office of the Historian accessed 13/04/2021.
[507] Jackson Nyamuya Maogoto, War crimes and realpolitik; international justice from World War I to the 21st Century, 2004, Lynne Rienner Publishers Inc; UK. Page 102.
[508] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971, page 20.

under orders from the US Joint Chief of Staff. In the main, the Charter had been drawn up by the US Chief Prosecutor, Joseph B. Keenan.[509] Only minor amendments were needed from the Nuremberg Charter. These amendments included eleven justices with no alternatives (Nuremberg specified four justices with an alternative), a chief prosecutor and ten associate prosecutors (four chief prosecutors at Nuremberg). As with the Nuremberg IMT, the Judges chosen for the Tokyo IMT were all from the Allied States, leaving a question surrounding impartiality of the Judges.[510] Priority was given to the charge of crimes against peace, the trial was restricted to those whose charges included crimes against peace, Article 5 of the Tokyo Charter categorised the charges as follows; Class A were crimes against peace with class B and C crimes being war crimes and crimes against humanity respectively. This suggested a hierarchy of charges, evidenced by the fact that those who were charged with crimes against peace were to stand trial at the Tokyo IMT, with war crimes and crimes against humanity being prosecuted under national proceedings. There was to be no trial for any criminal organisations and two languages instead of four (English and Japanese). The Tokyo Charter, as amended, called for the 'just and prompt trial and punishment of the major war criminals in the Far East.'[511]

Throughout the debates during the London Conference, the Allies had found it very difficult to agree on the current status of international law and what should be included in the Charter.[512] The Tokyo Charter established that the charge of crimes against peace was a

[509] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997, page 31.
[510] Ibid.
[511] The Charter for the Military Tribunal for the Far East, April 1947, Section 1, Article 1, page 27.
[512] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971, page 35.

threshold charge, meaning, that the charge of crimes against peace was necessary before any other charges could be lodged against a defendant.[513] This had the effect of crimes against peace taking centre stage at the IMTFE, and aggression being the prime motivation for the US prosecutors. The relevant sections of the Charter for the IMTFE are laid out below.

Article 5 sets out the contents of the proposed indictments:

Jurisdiction Over Persons and Offences. 'The Tribunal shall have the power to try and punish Far Eastern war criminals who, as individuals or as members of organisations, are charged with offences that include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:'[514]

a. Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b. Conventional War Crimes: namely, violations of the laws or customs of war.

c. Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in the execution of 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. Leaders" organisers, instigators and accomplices participating in

[513] The Nuremberg Charter did not contain this threshold charge principle.
[514] The International Military Tribunal for the Far East, Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946, Article 5.

the formulation or execution of a common plan or conspiracy to commit any or' the foregoing crimes are responsible for all 'acts performed by any person in execution of such a plan.

Article 5 (a), did not define 'aggression'[515] It was only later in 1974 that the United Nations offered the following definition:

> 'Aggression is the use of armed force by a state against their sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.'[516]

The conspiracy charges gave the prosecution complete scope to extend the net as wide as possible to secure conviction of the defendants indicted for this offence. The British representative stated:

> 'I want words that will leave no doubt that men who have originated the plan or taken part in the early stages of the plan are going to be within the jurisdiction of the tribunal.'[517]

There was a concentration on the charges of conspiracy in the IMTFE, this was due to a lack of evidence found to link the defendants to specific events.[518] Minnear has put forward the opinion that the decision to concentrate on the charges of conspiracy could be that in domestic law many procedural safeguards, including rules of evidence are relaxed.[519] This required an indirect approach. The prosecution established a defendant's connection to the

[515] Minnear, R. *Victors' Justice. The Tokyo War Crimes Trial,* Princeton University Press, Princeton, New Jersey, 1971, Page 55-60.
[516] United Nations Resolution 3314 (XXIX), 1974 accessed https://www. Definition of Aggression General Assembly resolution 3314 (XXIX) (un.org).
[517] International Conference on Military Trials : London, 1945.
Minutes of Conference Session of July 19, 1945, accessed at https://www.The Avalon Project : International Conference on Military Trials : London, 1945 - Minutes of Conference Session of July 19, 1945 (yale.edu).
[518] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971.
[519] Ibid page 38.

conspiracy, then using this link to the conspiracy to signal personal culpability to the substantive crimes.[520] In addition, this also paved the way for defendants in the national trials to be charged by virtue of their involvement in the conspiracy. The focus on the conspiracy charges has been criticised as these trials:

> 'did not consider it so much its task to attribute responsibility for acts committed in international life, as to disclose the existence of a criminal design directed toward such and that this emphasis arose because of the lack of evidence linking defendants to specific events necessitated an indirect approach, first establishing an individual's connection to the conspiracy and then using membership of the conspiracy to signal personal responsibility for substantive crimes. Conspiracy was appealing because it provided the conceptual framework for the consideration of discrete policies and a diverse group of defendants, but it worked only if it could be proved that every defendant had played their part in the grand plan.'[521]

The first draft of the Tokyo charter was dated January 1946, this was later amended in April 1946, three days before the Tokyo IMT was due to start. The main amendment was with regards to Article 5 (c) of the Charter, the wording *against any civilian population* was removed,[522] this broadened the scope of crimes against humanity by expanding the class of persons beyond civilians to large scale killings of military personnel. This amendment enabled the Allies to prosecute the defendants for the bombings at Pearl Harbour and the inhumane treatment and killings of Allied prisoners of war. The Nuremberg Charter Article 6 (c) retained the wording *against any civilian population.*[523]

Article 6 outlined the extent of the Accused's criminal liability. 'Neither the official position, at any time, of an accused nor the fact that an accused acted pursuant to an order of his

[520] Ibid.
[521] K Sellars, Imperfect Justice at Nuremberg and Tokyo, European International Law Journal, 1085 p.6
[522] The International Military Tribunal for the Far East, Special proclamation by the Supreme Commander for the Allied Powers at Tokyo 1946; charter dated April 1946.
[523] The Nuremberg Charter Article 6 (c).

government or of a superior was, of itself, sufficient to free such accused from responsibility for any crime with which he was charged.' However, such circumstances could be considered in mitigation of punishment if the Tribunal determined that justice so required. The Allies wished to establish individual responsibility for acts of State; only by doing so could the Allies hope to prosecute the wartime leaders of Japan. There was much debate regarding individual criminal responsibility at the London Conference and whether any such precedent existed for this.[524] In Keenan's speech at the opening of the Tokyo IMT, he declared:

> 'Individuals are being brought to the bar of justice for the first time in history to answer personally for offences that they have committed while acting in official capacities as chiefs of state. We freely concede that these trials are, in that sense, without precedent. And we are keenly conscious of the dangers of proceeding in the absence of precedent, for tradition crystallised into precedent is always a safe guide. However, it is essential to realise that if we waited for precedent and held ourselves in a straitjacket by reason of lack thereof, grave consequences could ensue without warrant or justification. Today we are faced with stark realities involving in a certain sense the very existence of civilisation.'[525]

Article 9 of the Charter sets out procedures whereby a fair trial for the accused would be guaranteed by the following provisions 'public indictments, a plain, concise and adequate statement of each offence charged' available in the Japanese language. Although the Tokyo Charter claimed to provide procedural due process, the trial fell short; these flaws are discussed further below. The evidentiary standard substantially deviated from the customary rigours of criminal trials.

[524] For a full discussion on individual criminal responsibility at the London Conference, please see the Nuremberg chapter.
[525] Ibid page 31.

Article 13 (a) sets out the rules surrounding evidence: 'The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence that it deems to have probative value. All purported admissions or statements of the accused are admissible.'[526] The Tokyo Charter provided that evidence against any of the defendants could include any document 'without proof of its issuance or signature.'[527] as well as diaries, letters, press reports, and sworn and unsworn out of court statements relating to the charges. 'There seems to have been no document so unreliable as to render it inadmissible.'[528] Any evidence relating to the US Atomic bombing of Japan was rejected by a majority decision of the judges and there deemed inadmissible.[529] The rules of evidence appeared to be heavily weighted in favour of the prosecution. Minnear[530] lists the evidence that the defence wanted to use but was deemed inadmissible by the Tokyo IMT, favouring the prosecution.

The Tokyo IMT, in contrast with the Nuremberg IMT dealt with the issue of command responsibility, the principle of liability was discussed at length to enable the IMT to apply this to both military and civilian defendants. On the facts found, the judges at the Tokyo IMT had reached the decision that there was an overarching conspiracy to initiate aggressive war and impose Japanese authority over China.

The influence of realpolitik on the selection of defendants was evident in the Far East Commission (FEC) policy decision in February 1950 not to prosecute the Emperor Hirohito of

[526]International Military Tribunal for the Far East, taken from https://www.un.org/ accessed 12/09/2021
[527] Ibid Article 13 (c) (1).
[528] Smith, CA, The Rise and Fall of War Crimes Trials; From Charles I to Bush II.
[529] R. John Pritchard, The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, (The Edwin Mellen Press, 1998) Vol 38 page 17.
[530] Minnear, R. *Victors' Justice. The Tokyo War Crimes Trial,* Princeton University Press, Princeton, New Jersey, 1971 page 118.

Japan as a war criminal.[531] The US representative wanted to keep the Emperor as a figurehead of Japan, to enable the surrender procedures to be carried out effectively.[532] General MacArthur believed that if Hirohito were indicted and hanged as a war criminal, a military government would have to be instituted throughout Japan, the emperor's name had therefore been struck from the list of defendants.[533] Therefore, Hirohito and all members of the imperial family were not prosecuted for their involvement in any of the three categories of crimes contained in the IMTFE. This can be contrasted with Article 6 of the Nuremberg Charter which states:

> 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.'[534]

General MacArthur believed the occupation reforms would be implemented smoothly if they used Emperor Hirohito to legitimise their changes.

At the conclusion of the war, the staff of Unit 731 negotiated their freedom by offering their biological research to the US government. It was accepted, and they escaped punishment.[535]

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[531] The Secretary General of the Far Eastern Commission (Johnson) to the Secretary of State, Foreign Relations of the United States, 1946, The Far East, Vol VIII, April 1946. Accessed https://www.Foreign Relations of the United States, 1946, The Far East, Volume VIII - Office of the Historian.
[532] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997 page 33.
[533] Douglas, MacArthur, reminiscences, (New York: McGraw-Hill, 1964, page 287-288, also in Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971 page 112.
[534] Article 6 of the Nuremberg Trial Proceedings, vol 1, Charter of the International Military Tribunal, accessed at https://www.The Avalon Project:Charter of the International Military Tribunal (yale.edu.).
[535] Bernard V. A Roling and Antonio Cassese, The Tokyo Trial and Beyond (Cambridge: Polity, 1992), P.18 and Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, (Cambridge: Cambridge University Press, 2011), P. 208.

At least 3000 people, not just Chinese but also Russians, Mongolians and Koreans, died from the experiments performed by unit 731 between 1939 and 1945.[536] The perpetrators of Unit 731's atrocity crimes, including human experimentation, were never brought to trial. The US wanted the data collected from the experiments and, therefore, made a plea bargain to obtain this information; in return, no prosecutions were to be sought against the perpetrators. In 1946 General MacArthur granted all the Japanese scientists' immunity from war crimes prosecution in exchange for the germ warfare data gathered from experiments in Harbin (as explained in an internal War Department Memorandum dated June 1947).[537] This would be unacceptable selectivity to the Liberal Cosmopolitan, its selection of defendants based on the nation-states' interests, that is to keep that information for themselves, a nations political interest taking priority over the requirement to hold individuals accountable for war crimes. To a realist this would be a foreseeable consequence, nation-states acting in their own best interests by making deals in return for the Japanese biological and chemical warfare reports and seeking to potentially further their own military interests and, in the case of the emperor, not facing trial, the realist would understand that this was to ensure stability once the trials had ended. Realism is often concerned that war crimes trials could destabilise peacetime efforts, potentially carrying over hostilities into peace time.

Since it was believed that the USSR possessed only a small portion of the technical information, and since the ensuing war crime trial would completely reveal such data to all nations, it was felt that such publicity must be avoided in the interests of defence and security

[536] Account of the atrocity crimes committed taken from Hickey, D, Sijia Li, S, Morrison, C, Schulz, R, Thim, M Sorensen, K, Unit 731 and Moral Repair, Journal of Medical Ethics, Vol 43, No.4, April 2017, pp. 270-276.
[537] Official documents and memorandums accessed https://www.archives.gov/files/iwg/japanese-war-crimes/select-documents.pdf (archives.gov) 12/01/2023. US memorandum for exchange of Japanese biological warfare information accessed https://www.The United States and the Japanese Mengele: Payoffs and Amnesty for Unit 731 | The Asia-Pacific Journal: Japan Focus (apjjf.org) 01/03/2023.

of the U.S.[538] Cryer notes that this was a 'double imposition of unacceptable selectivity in the Tokyo IMT',[539] and goes on to state that 'it is difficult to see this as anything other than an illegitimate use of discretion.'[540] The crimes were serious, and the evidence and potential defendants were available to the prosecuting states.

> 'The law was enforced only against the losing nation in the Pacific sphere of the Second World War and only against those not immunised from prosecutions for reasons entirely extraneous to those that guide prosecutorial discretion, such as the availability of evidence. Those immunised were both high ranking and responsible for some of the most shocking offences in the conflict. The legacy of the Tokyo IMT has been severely tarnished by the refusal to prosecute such people.'[541]

Douglas MacArthur secretly granted immunity to the scientists of Unit 731 in exchange for providing America with their research on biological weapons. Presented with evidence that downed US airmen had been victims of grotesque experiments, MacArthur suppressed this information.

The International Military Tribunal for the Far East.

The IMTFE began on the 4th of June 1946, less than a year after Japan's surrender to the Allies. The Trial was opened in the former headquarters of the Imperial Army in Japan and lasted for two and a half years.[542] There were eleven justices (one each from Australia, Canada, China, France, GB, India, the Netherlands, New Zealand, the Philippines, the Soviet Union & the US)

[538] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997, page 32.
[539] Cryer, R. Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, Cambridge, Cambridge University Press, 2011, page 209.
[540] Ibid page 208.
[541] Ibid, page 209.
[542] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997.

at Tokyo, each representing one of the nations that brought Imperial Japan to defeat.[543] The IMTFE convened in April 1946 and were held in the War Ministry Office in Tokyo. The trial continued for more than two and a half years, hearing testimony from 419 witnesses and admitting 4,336 exhibits of evidence, including depositions and written statements from 779 other individuals.[544] A total of twenty-eight defendants were indicted; this included former prime ministers and former military commanders, of these, seven were sentenced to death by hanging, those were:

General Kenji Doihara, Chief of the Intelligence Services in Manchukuo

Koki Hirota, Prime Minister (later Foreign Minister)

General Seishiro Itagaki, War Minister

General Heitaro Kimura, Commander Burma Area Army

Lieutenant General Akira Muto, Chief of Staff, 14th Area Army

General Hideki Tojo, Commander, Kwantung Army (later Prime Minister)

General Iwane Matsui, Commander Shanghai Expeditionary Force and Central China Area Army[545]

It is noted that of those sentenced to death by hanging, the majority were charged with one or more of the counts of waging aggressive war. However, Iwane Matsui, Commander in Chief, was acquitted of all counts of waging aggressive war, but found guilty of Count 55,

[543] The Tokyo Charter accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) 16/05/2022.
[544] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971, page 5.
[545] Information taken from https://www.The Tokyo Trial | Peace Palace Library.nl/research-guide/Tokyo-trial & Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971, page 71.

regarding the Disregard of a duty to secure observance of and prevent breaches of Laws of War, this charge was applied for his part in the 'Rape of Nanking' A further sixteen were sentenced to life in prison, one received twenty years imprisonment, one received seven years imprisonment, one was declared unfit for trial, and two died before the trial came to an end. The crimes alleged against the defendants were some of the most serious and were not just conventional war crimes but were crimes against humanity and crimes against peace. Conventional war crimes were those deeds covered under the various conventions signed at The Hague and Geneva. For Fujita Hisakazu, who recognised that of all those who were sentenced to death by hanging, were convicted of waging aggressive war against one of more of the Allied Powers, they were also all found guilty of one of the conventional war crimes charges contained in counts 54 and 55… 'if giving the death penalty signifies something about the gravity of the offences, it was not waging aggressive war or participating in a common plan or conspiracy that weighed most heavily with the Tribunal, but participation in conventional war crimes.'[546]

There was a total of fifty-five specific counts to the indictment at Tokyo: thirty-six of these represented crimes against peace, sixteen represented murder (being at the same time, crimes against peace, conventional war crimes and crimes against humanity) and three represented conventional war crimes and crimes against humanity. Out of the thirty-six charges describing crimes against peace, the first outlined a broad conspiracy over the eighteen years involved to 'secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans and all of the countries bordering thereon and islands therein.' The fifth count charged a conspiracy covering the same period of eighteen

[546] Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited, Martinus Nijhoff Publishers, 2011) p.12.

years whereby ‘Germany, Italy and Japan should secure the Military, naval, political and economic domination of the whole world. The remaining thirty-four counts were then broken down according to lesser versions of the first conspiracy count, according to the victims of aggression, those included the member nations of the tribunals plus Thailand, the Mongolian People’s Republic, and the British Commonwealth of Nations and according to specific groups of the accused. The Japanese attack on the Chinese city of Nanking was written into the indictment at Count forty-five; this was a charge of 'murder' and not a 'crime against humanity.' However, as the trial progressed, this watered the initial twelve defendants down to just two defendants; this 'count soon disappeared from view and the bench, in the end, chose not to rule on it.'[547] Evidence for the atrocities committed at Nanking was instead put forward for 'conspiracy to commit war conventional war crimes and crimes against humanity under counts fifty-four and fifty-five of the indictment. Therefore, convictions for these atrocities were 'argued on general grounds rather than specific grounds.' Over the course of the proceedings, the ‘court ruled that 45 of the counts, including all the murder charges, were either redundant or not authorised under the IMTFE Charter.’[548]

As with the Nuremberg IMT, the crime of aggression took centre stage at the Tokyo IMT. That is, the crime that most hurt and angered the Allies. The Tokyo trials also went to these lengths to put the Japanese Leaders in the dock for aggression; even though Japan had not committed a Genocide, the most notorious Japanese atrocity against the Chinese, the rape of Nanking, was not the focus of Allied prosecutions. The concentration of the crime of aggression in the Tokyo IMT as opposed to crimes against humanity had the effect of almost obscuring the

[547] Brook, Timothy, The Tokyo Judgement and the Rape of Nanking, The Journal of Asian Studies, Vol. 60, No 3, 2001, pp 673-700.
[548] https:// www.peacepalacelibrary accessed 01/05/2021.

extent of the Japanese atrocities during the war.[549] Thirty-six counts out of a total of fifty-five counts in the indictment focused on crimes against peace; this amount reflects this type of offence at the Tokyo IMT and highlights the prosecution's strategy to itemise the different types of aggressive war in order to allow multiple avenues for establishing the individual defendants' responsibility.

The Tokyo IMT resorted to a form of liability for an omission in order to convict the members of the Japanese army.[550] These convictions were strongly criticised as forms of collective or strict liability, where the personal guilt of the defendants was not adequately established.[551] Criticism aimed at the conviction of General Yamashita Tomoyuki, who was sentenced to death for massacres committed against the Filipino civilians by his troops. The charges against him were not that he had ordered the crimes committed but that he failed to prevent them from being committed. Yamashita's knowledge of the crimes was not adequately proved. The judges affirmed that he 'must have known of the crimes.' For the first time, a military commander had been made accountable for the crimes committed by his subordinates on the sole basis of his failure to discharge his military duty to control his troops.[552]

The list of defendants at the IMTFE included premiers, foreign ministers, ambassadors, and generals, among others. After more than two and a half years, they all were found guilty on at least one charge. Three of those imprisoned returned to the Government positions after

[549] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial*,* Princeton University Press, Princeton, New Jersey, 1971, page 69.
[550] Minnear, R. *Victors' Justice. The Tokyo War Crimes Trial,* Princeton University Press, Princeton, New Jersey, 1971, page 35.
[551] Ibid.
[552] Bergsmo, M, Wui Ling, C, Tianying, S, Ping, Y, Historical Origins of International Criminal Law, Torkel Opsahl Academic Epublisher, Brussels, 2015, Page 689.

their release, as minister of justice, foreign minister, and prime minister, respectively.[553] That development suggests that public opinion saw the imprisoned men not so much as criminals as victims of the vindictive Allies. The Tokyo IMT closed in October 1948; by this time, it had become clear that the US and Britain had lost enthusiasm for further prosecutions of the Japanese class-A war criminals, owing to the length of the trial.[554] By approximately 1947, the objectives of demilitarisation and democratisation appeared to be achieved, and the US then sought to transform Japan into an ally in the fight against communism. Defendants held in custody for the anticipated second round of trials were released. In February of 1949, General MacArthur announced the official policy regarding the ceasing of prosecutions against the major war criminals in Japan.

There were seven challenges to the Tokyo IMT's jurisdiction that were rejected within four days of their submission, with no reasons given and which were then dealt with in the final Judgement.[555] The first challenge was that the Allied Powers acting through the Supreme Commander, had no authority to include in the Charter and to designate as justiciable 'crimes against peace.' The second was that aggressive war was not illegal, and the Kellogg-Briand Pact of 1928 renouncing war as an instrument of national policy did not enlarge the meaning of war crimes nor constitute a war crime. The third was that war was an act of a nation for which there was no individual responsibility under international law. Forth was that the provisions of the Charter were *ex post facto* legislation and therefore illegal. The fifth

[553] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971, page 68.
[554] Ibid.
[555] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971 page 26 lists the seven challenges.

challenge was that the Declaration of Potsdam concerned only conventional war crimes; the Tribunal holding that: 'Aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam, and there is no ground for the limited interpretation of the Charter which the defence seek to give it.'[556] The sixth argued that killing in a war was not murder. The final challenge concerned the rights of prisoners of war, and specifically that the Geneva Convention 1929 applied only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war. All the defence challenges were rejected by the judges; the Tokyo IMT took its reasoning for this from the Nuremberg IMT that the 'Charter is not an arbitrary exercise of power on the part of the victorious nations but is the expression of international law existing at the time of its creation.'[557]

The defendants at Tokyo challenged the legality of the Tribunal under the Potsdam Declaration and the Instrument of Surrender on some fundamental grounds of international law, namely, whether aggressive war was a crime in international law.[558]

The three dissenting judges on the Tribunal, France, India and the Netherlands, centred their objections on the novel charges of conspiracy to wage and the waging of aggressive war. Keenan addressed these – according to him, aggressive war could only be defined and recognised in terms of natural law philosophy:

> 'What makes a war aggressive, by natural law standards, is that it is a violent attempt to alter the political and geographic status quo. To be sure, natural

[556] The Tokyo Judgement accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) 12/06/2022.
[557] The Tokyo War Crimes Trial page 457 THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES 435, (R.J. Pritchard & S.M. Zaide eds., 1981) [from now on THE TOKYO WAR CRIMES TRIAL].
[558] Minnear, R. *Victors' Justice. The Tokyo War Crimes Trial,* Princeton University Press, Princeton, New Jersey, 1971.

> law does not stand against evolution or historical accident. The dominant position of the Western powers in the modern world is due to their cultural superiority, and their rule, if not perfect, was justified. Thus, any war to alter the balance of power in the Far East was aggressive, irrational and against the law of nature. While this definition of aggressive war – violent attacks on international positions – is conventional, its derivation is not.'[559]

Judge Pal provided the strongest dissent; running to over one thousand pages and was highly critical of the entire trial. Judge Pal raised the issue of selectivity in his dissent and reserved his most critical comments for the atomic bombings, which the prosecution had tried to ignore completely. Any evidence submitted for the atomic bombings was held to be inadmissible.[560]

Criticisms were raised concerning the emperor's absence from the trials. One of the Tokyo IMT Judges was Delfin Jaranilla; 'he was a victim of the Japanese atrocities and had been on the Bataan death march, he was unsympathetic to Pal's dissent and of the defendants – he criticised the sentences stating that they were too lenient and not exemplary.'[561] Justice Pal's dissent included criticisms of victor's justice; he argued that Article two of the Charter excluded Japan and neutral countries from a place on the bench; objecting to this element, he stated 'It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness, but the one thing the victor cannot give to the vanquished is justice. At least, if a tribunal is rooted in politics as opposed to the law, no matter what its form and pretences, the apprehension thus expressed would be real unless 'justice is really nothing else

[559] Tokyo Judgement accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) 12/06/2022.
[560] Tokyo Judgement Tokyo Judgement accessed https://www.The Avalon Project : Charter of the International Military Tribunal (yale.edu) 12/06/2022.
[561] Cryer, R. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge, Cambridge University Press, 2011. page 46.

than the interest of the stronger.'[562] For Kelsen, the punishment of war criminals should not be an act of revenge. He argues:

> 'It is not compatible with the idea of international justice, that only the vanquished states should be obliged to surrender their subjects to the jurisdiction of an international tribunal for the punishment of war crimes. The victorious states too, should be willing to transfer their own subjects who have offended the laws of warfare to the same independent and impartial international tribunal.'[563]

Publication of Pal's dissenting opinion at the Tribunal was prohibited during the Occupation years. Even after the allied occupation was over and Japan had regained her independence, it failed to draw the attention of the Japanese except for a few who had a special interest in the Tokyo Military Tribunal.

The Dutch Jurist, Bert Roling, included in his analysis of the Tokyo IMT, stating in no uncertain terms that the 'objective of both the Nuremberg and Tokyo IMTs had not been the exercise of justice; they had been deliberately used by the victors for propaganda purposes and to conceal their own misdeeds.'[564]

Cryer states that 'the major difference between the Nuremberg IMT and the Tokyo IMT was that the Tokyo IMT dealt with command responsibility and discussed the principle of liability in some detail and applied it to both Military and civilian defendants. In relation to the facts, the judgement decided that there was an overarching conspiracy to initiate aggressive wars and impose Japanese authority over Asia. It also, less controversially, determined that war

[562] A portion of Pal's judgement as reprinted in Brook, Timothy, The Tokyo Judgement and the Rape of Nanking, The Journal of Asian Studies, Vol. 60, No 3, 2001, pp 673-700.
[563] Kelsen, K, Peace through Law. Chapel Hill: University of North Carolina Press, 1944 page 114.
[564] Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971.

crimes were committed both against Allied prisoners of war and civilians, perhaps most notably in the rape of Nanking in 1937.'[565]

Allegations of Tu Quoque were not permitted, as per the Charter; however, the argument was given some purchase by the bombing of Hiroshima and Nagasaki. This was mentioned by some of the defence counsel during the trial; however, the judges made clear that this was outside of their remit and that they were only able to rule on the Charter.[566] For Kelsen, this would not be compatible with his perspectives:

> 'It is not compatible with the idea of international justice that only the vanquished states should be obliged to surrender their subjects to the jurisdiction to of an international tribunal for the punishment of war crimes. The victorious states too, should be willing to transfer jurisdiction over their own subjects who have offended the laws of warfare to the same independent and impartial international tribunal.'[567]

The Tokyo Charter contained a provision for review by the Supreme Commander for the Allied Powers in Japan, General MacArthur. In contrast with the Nuremberg Charter which did not include the provision for review of sentences given. The defence submitted their right to appeal to General MacArthur within one week of the sentencing. The defence counsel submitted one joint review for all those found guilty; the defence review covered the following points of note:

The trial came under much criticism for being unfair, several reasons were submitted for this. In summary, under this heading, it was stated, 'The Tribunal established rules of procedure

[565] Cryer, R. Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, Cambridge, Cambridge University Press, 2011. page 122.
[566] Tokyo Judgment accessed https://www.The Avalon Project:Charter of the International Military Tribunal (yale.edu) 12/06/2022.
[567] Hans Kelsen, *Principles of International Law,* The Law Book Exchange, New York, 2012 p.9.

for the prosecution, changed them and made them stricter when the defence was being presented and changed them back again when the prosecution's evidence in rebuttal was offered.'[568]

Criticisms arose regarding the verdict, and it not being based on the evidence presented, 'Not only does the verdict give no indication that any of the evidence produced by the defence was taken into consideration, but the great mass of evidence from prosecution witnesses and documents favourable to defendants is never acknowledged.'[569]

Guilt has not been proven beyond a reasonable doubt; under this heading, the defence argued:

> 'The verdict is not that of the Tribunal, but a clique of it. It has been disclosed that the seven-judge majority excluded from the deliberations and decision not only Messrs. Justices Pal and Bernard, who dissented generally, but Mr Justice Roling, who dissented in part and concurred in part, and the President, Sir William Webb, who expressed grave doubts concerning several points of the result but recorded no dissent. It is known that death sentences were imposed by a vote of six to five in some cases, of seven to four in others, but in no case by a vote of more than seven judges. The law of most of the civilised world requires unanimity for imposing a sentence of death.'[570]

The verdict will not achieve the Allied Powers' purposes,

> 'The State of international law relating to crimes against peace is not clarified but muddled by this verdict. The Tribunal produced six separate opinions from consideration of all of which is impossible for even an international lawyer to determine what law is being applied. Not only dissenting judges, but judges

[568] All points raised are taken from Defence Appeal to General MacArthur dated 21 November 1948, also raised in Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971 page 205.
[569] Ibid.
[570] All points raised are taken from Defence Appeal to General MacArthur dated 21 November 1948, also raised in Minnear, R. Victors' Justice. The Tokyo War Crimes Trial, Princeton University Press, Princeton, New Jersey, 1971 page 205.

concurring in the result, have written opinions expressing grave doubts concerning some of the doctrines adopted by the majority.'

The Tokyo IMT followed the same outline that was agreed by the Allied Powers at the London Conference for the Nuremberg IMT. However, some differences in substance and procedure appeared. As discussed, the Tokyo indictment encompassed 55 counts, therefore making it more extensive than Nuremberg's 4 counts. Article 5 (c) of the Tokyo Charter stated that crimes against humanity involved persecution on racial and political grounds, the Nuremberg Charter contained crimes against humanity at Article 6(c) and included persecution on religious grounds, this was a necessary inclusion for the Nuremberg Charter with regards to the Holocaust against the Jewish people.[571] For Boister and Cryer the 'silent casualty at Tokyo of the mismatch between the German and Japanese crimes was the charge of crimes against humanity, which had been framed to address the German crimes against Axis populations. Although the crime was listed in the Tokyo Charter along with crimes against peace and war crimes, it was mentioned just once in the majority judgement.'[572]

Conclusion.

The Tokyo IMT has been analysed, including its questionable legal foundations and precedents and its flawed selectivity and evidence procedures. The Tokyo IMT has since been widely criticised for these contributing factors and faired much worse than its Nuremberg counterpart.[573] The political character of the trial was widely felt, this saw realism emerging

[571] Bassiouni, international law and the holocaust, Bassiouni, crimes against humanity in international criminal law, 34.
[572] N Boister & Cryer R, Imperfect Justice at Nuremberg and Tokyo, European International Law Journal, 2010, p.386.
[573] Bassiouni M C, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts. J 11 1997.

as the US national interests dominated the decision making at the London Conference and throughout the Nuremberg and Tokyo IMTs. There were numerous criticisms of the IMTFE being an example of victor's justice, some coming from the Judges themselves,[574] Kelsen argues that 'only if the victor's submit themselves to the same law which they impose upon the vanquished states, will the idea of international justice be perceived.'[575] Throughout the course of history, it is the Nuremberg IMT that is most often quoted as a precedent for the substantive elements of the law; Tokyo added nothing further to the development or clarification of the substantive laws that were made part of the trial. Shklar call this Tokyo IMT 'a complete dud'[576] Justice Pal's dissent objected to the entirety of the proceedings and Charter; he saw the Tokyo IMT as a failure due to, among other points, the exclusion from the trial of Western colonialism and the atomic bombs from the court's considerations. Brook puts forward further reasons why the Tokyo IMT received such a negative reception:

> 'More important to their unequal reception was their timing, whereas the Tokyo trial dragged on for two and a half years, it had become a second-rate show that no longer commanded public interest. Not only was popular tolerance for the interminable proceedings flagging, but the political environment that had made the Tribunal possible was dissolving under the growing pressure of the Cold War.'[577]

The IMTFE remains in the shadow of the Nuremberg IMT and has received much criticism in the succeeding years after the Trial. Political interests of the nation state interrupted both the

[574] Bassiouni M C, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J 11 1997.
[575] Hans Kelsen, Peace through Law, page 115.
[576] Judith Shklar, Legalism, *Law, Morals and Political Trials* Harvard University Press, Cambridge, 1964, page 181.
[577] Timothy Brook, The Tokyo Judgement and the Rape of Nanking, The Journal of Asian Studies, Vol. 60, No 3, 2001, pp 673-700.

application of the substantive laws and the trial proceedings. Nevertheless, the IMTFE is an important milestone in the history of International Criminal Law despite its many criticisms.

Chapter 9. Conclusion.

To conclude, this thesis has undertaken an analysis on the attempted war crimes trials after the First World War and the War Crimes Trials held after the Second World War. Concentrating on the substantive laws developed and, in the case of the Second World War, the procedural elements of the Nuremberg and Tokyo IMT's.

As shown, the overall development of the body of international criminal law has often been developed in response to the atrocity crimes committed during both World Wars, the facts have quite often led the law.

Prior to the outbreak of the First World War, the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1864 were in place as a means to limit conduct during war, the *jus in bello*. However, the view was still held that war, as part of state sovereignty was still a legitimate act of state. 'So long as the war making body had the authority to act, and followed the correct legal procedures, a proper declaration of war, for example, war could be waged lawfully and without any legal interest in the reasons for this act of state.'[578] As shown the legal framework in place was unequipped to deal with the scale and scope of the atrocity crimes carried out during the war. Nation States still had the sovereign right to go to war with other States, the law was silent in this aspect. Notions of State sovereignty and the nation-State was too high on the agenda for the states negotiating the Conventions to make any real

[578] Brown, C, Understanding International Relations, Basingstoke: Macmillan 2001) p.117.

progress on the limitation of war. The Nuremberg IMT Judges pointed out that in 1946 'The Hague Convention nowhere near designates such warfare (methods of waging war as criminal), nor is any sentence prescribed, nor any mention made of a court to try and punish offenders.'[579] However, they did outlaw certain conduct during wartime. During the First World War, the provisions of the Hague and Geneva Conventions were breached many times.

The outbreak of the First World War saw unprecedented atrocity crimes carried out and for the first time in history, the Allied Powers sought to bring the perpetrators before an international court for the atrocity crimes carried out. The attempted War Crimes Trials after the First World War failed due to several reasons. The Allied Powers tried to establish the trials in line with the liberal cosmopolitan perspectives, attempting to uphold the rule of law and principles of legality. However, this was frustrated due to notions of sovereignty which soon became apparent during Allied negotiations.

The methodological framework developed throughout this thesis has highlighted the contributing factors that led to this failure. In the main, the relevant legislation in place was wholly inadequate to deal with the level and scope of the atrocity crimes carried out during the war. This resulted in a situation in which, the Allied Powers would need to extend the scope of the laws already in place or develop new laws. In addition to the issues surrounding the substantive laws, certain legal principles of international law had not yet been developed. Principles relating to individual criminal responsibility, particularly in relation to Heads of State and, state responsibility, the legislation in place did not specify an international criminal court that held jurisdiction over breaches of the existing legislation. At the time of the First World War, the principle of equality of sovereign states was still strong among the Allies.

[579] International Military Tribunal (Nuremberg) Judgement, 1st October 1946, page 53.

An investigative Commission was established to investigate the authors of the war and the atrocity crimes committed after the First World War. The Commission would be the first investigative commission of its kind. Debates between the Allied Powers regarding the substantive laws to be applied were often fraught with tension. The majority of the Allies wanted to develop and extend the laws in place, due to the nature of the atrocity crimes committed, however constrained by liberal cosmopolitan perspectives, the Allies found this to be a challenge, disagreements over the substantive laws to be applied without breaching the principle of *nullum crimen sine lege, nulla poena sine lege* proved to be difficult. The Commission's Report placed the blame for starting the war firmly with Germany and her Allies. The US and Japan dissented to the recommendations of the commission report, basing their dissent on several factors. The US were not prepared to stretch the existing laws to fit the crimes, citing that there was no precedent for 'laws of humanity,' individual criminal responsibility, particularly that of a Head of State and no precedent for the establishment of an international criminal court. The Versailles Peace Treaty emerged from the commission report, and contained several war crimes clauses, the most contentious was the Article 227 charge. This charge was directed at the Kaiser citing charges of '*a supreme offence against morality and the sanctity of treaties.'* This is thought to be the beginning of the charge of 'waging aggressive war' the *jus ad bellum*. The wording of this Article spoke of morality, but however, was the political crime of 'waging an aggressive war.' Until this point states had the sovereign right to wage war, as shown throughout this thesis, realism supports this assumption. Kant admitted that in the state of war 'Where no tribunal empowered to make judgements supported by the power of the law exists, judgment would rest on power. Neither party can be declared an unjust enemy (since this already presupposes a judgment of right) and the outcome of the conflict (as if it were a so-called judgment of God) determines the

side on which justice lies'[580] Realism would wonder why War Crimes Trials were advocated in the first place, they would prefer a political solution or summary execution. Bass argues that the Article 227 charge against the Kaiser 'is the most glaring example ever put up by liberal states and makes a mockery of the method of a trial. There are charges so unfair that they undo any notions of due process. But such excesses are usually checked by the judges who will eventually hear such cases.'[581] The kaiser fled to the Netherlands, Allied requests for the Netherlands to hand him over for trial were refused, the Netherlands stated that they did not recognise the laws and that individual criminal responsibility did not exist. Further Articles contained the Versailles Treaty required Germany to hand its citizens over for trial. At this point there was no legal precedent for this, the Hague Conventions only conferred state responsibility and did not specify an international war crimes trial. The Allied failed to achieve their goals of international justice in the aftermath of the First World War, a liberal cosmopolitan War Crimes Trial could not take place, the law was not yet in place to support this. The US did not ratify the Versailles Treaty and later, did not join the newly established League of Nations.

The League of Nations brought into existence by the Treaty of Versailles. The first 26 clauses of the Treaty of Versailles were to be the Covenant of the League of Nations. Its goals were to prevent another global conflict like the First World War and to maintain world peace. Articles 10-17 contained prescriptions for the prevention of war. States would break the peace, according to the Covenant, if they resorted to war without following certain procedures. Article 16 lay out the sanctions for those states it would deem to have broken the peace, namely financial, economic and military measures by the other members. Nothing

[580] Kant, I, A philosophical Sketch in Perpetual Peace and Other Essays (Indianapolis: Hackett, 1983) p.110.
[581] Bass Gary, Stay the Hand of Vengeance, 1st edition, Princeton University Press 2002 p. 25.

was said about the criminalisation of war. The League of Nations was the first organisation of its kind and built upon the liberal cosmopolitan ideals. The League was drawn up with specific constituent elements such as an Assembly, Council, Permanent Secretariat and Court of Justice. Its stated primary goals contained in the covenant included preventing wars through collective security and disarmament and settling international disputes through negotiation and arbitration. The Assembly comprised of representatives of the governments of all member states. Germany was initially excluded from entry to the League of Nations but would join later. The League lasted for 26 years; the United Nations (UN) replaced it after WWII in 1946 and inherited a number of agencies and organisations founded by the League. Kelsen argues that the failure of the League of Nations is due to the fact that its central body was a council, similar to an international government. For Kelsen, it was vital that the central role in an international institution should be a Court of Justice. The League of Nations was unable to bind any member state to its decisions that had not been unanimously agreed to. Schmitt's realist agenda regarded the Versailles Treaty and the League of Nations as revolutionising the concept of war, turning it into a 'discriminating concept of war' and claimed that the League of Nations held the right to define which side of a conflict was objectively just and unjust, including the authority to declare this decision binding on all neutral parties.

The thesis then moved on to analyse the Armenian massacres by the Turkish government, the Ottoman Empire. The massacres of the Armenians were carried out both prior to and during the First World War. Once the Allies had become aware of this, the 1915 Declaration was sent to Turkey, this used the term 'Crimes against Humanity' for the first time in history. The term had been taken from the Preamble to the Hague Convention of 1907. The Allies attempted to secure justice for the Armenian people, however, this caused several issues. The Allies could not agree on the law to be applied, nor the interpretation of the Martens Clause. The principle

of equality of states was still dominant and the principle of indicting a state over treatment of their own citizens were not yet realised in law. The Treaty of Sevres was drafted which included several war crimes trials Articles, in line with the Versailles Treaty, however, due to the unstable political situation in Turkey, this was not ratified. Turkey was able to dominate negotiations and relied heavily upon their sovereignty. In the end, the Allies placed priority over securing the release of their Prisoners of War, Bass argues that 'to the realist … if there is a trade-off between protecting soldiers and protecting the innocent, the innocent are liable to get the worst of it'[582] The replacement Treaty of Lausanne was ratified however, contained no war crimes clauses. Eventually these attempts failed, with an amnesty for offences during the war and a British and Turkish Prisoner of War swap. For Morgenthau, 'The principle of human rights cannot be consistently applied in foreign policy, because it can, and it must come in conflict with other interests that are maybe more important than the defence of human rights in a particular instance.'[583] This failure was catastrophic for the Armenian population.

After the failure to establish War Crimes Trials in the aftermath of the First World War, several agreements were drafted to further limit conduct in war and to take into account new technologies for fighting wars that had begun to emerge. However, there was no agreement to outlaw war entirely. One important update to the laws in place was the Kellogg-Briand Pact, this was signed by 60 states in 1928 in a bid to strengthen the League of Nations Covenant. The Pact is an international agreement in which signatory states promised not to use war to resolve disputes or conflicts of whatever nature or of whatever origin they may

[582]Bass G, Stay the Hand of Vengeance, 1st edition, Princeton University Press 2002 page 29.
[583] Morgenthau, H, Human Rights and Foreign Policy in Kenneth W Thompson (ed), Moral dimensions of American Foreign Policy (New Brunswick: N.J, 1984) p. 344.

be, which may arise among them. The most relevant provision of the Pact is Article 1 which stated:

> 'The High Contracting Parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another. Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever kind or nature or of whatever origin may they be, which may arise among them, shall never be sought, except by pacific means.'

The Kellogg-Briand Pact would later be used as a precedent for the charge of Crimes against Peace in the Nuremberg Charter. However, this did not outlaw war entirely and did not mention individual criminal responsibility The methodological framework has highlighted that notions of sovereignty and state interest were still too high to make any real progress. The Allied Powers would again grapple with these issues in the wake of the Second World War.

The trial was held in Nuremberg's Palace of Justice and lasted for 293 days, in which the newly drafted laws were presented. The legal framework in place at the outbreak to the Second World War had not changed significantly from the First World War, however, the US were keen to develop and extend the laws in place due to the gravity of offences committed, while several Allies, remembering the failures of the First World War advocated for show trials or summary execution of the Nazi leaders. Morgenthau was 'doubtful of the whole set up under which these trials will be conducted. What in my opinion, they should have done is to set up a summary courts martial. Then they should have placed these criminals on trial within 24 hours after they were caught, sentenced them to death and shot them in the morning.' The realism perspective would be cynical of the attempts to establish international War Crimes

Trials. The analysis has shown that although the defendants were given a fair trial, realpolitik often crept into scope. The emphasis on the charge of waging aggressive war highlights the Allied Powers desire to maintain the status quo and to punish any state that may try to alter this. The scope of the Crimes against Humanity charge was limited by the trial judges to those acts that were carried out during wartime only, this is an indication that the Allies still did not want to breach sovereignty of a states conduct with its own national during times of peace. The Nuremberg IMT did provide justice after the Second World War and upheld the rule of law to a degree. Kelsen, whose perspective favoured War Crimes Trials after the war became one of Nuremberg's harshest critics. He argued that to avoid the criticism of victor's justice and to ensure the trials were fair, the Allies should have been charged for their war crimes during the war. In addition, the Nuremberg Charter's reference to "crimes against peace," "war crimes," and "crimes against humanity" represented the first time these terms were used and defined in an adopted international instrument. These terms and definitions were adopted nearly verbatim in the Charter of the IMTFE but have been replicated and expanded in a succession of international legal instruments since that time. In 1950, the Nuremberg Principles as recognised in the Charter and Judgement for the Nuremberg IMT were codified by the International Law Commission and submitted to the General Assembly of the United Nations. The Nuremberg Principles included the concepts of individual criminal accountability for crimes under international law, an end to impunity, equality before the law, fair trial rights were universally recognized. In addition, the substantive laws of crimes against peace, war crimes and crimes against humanity were defined.

Although the Nuremberg IMT was subject to some criticism, it fared much better in relation to the IMTFE. The IMTFE was held for the Japanese war crimes carried out during the Second World War.

The IMTFE was established in 1946, the Charter carefully followed the Nuremberg Charter, anomalies are discussed further in the Tokyo Chapter of this thesis. The trials were an American creation and although they followed the Nuremberg Charter, the IMTFE has attracted much more criticism than the Nuremberg IMT. One of the differences at Tokyo, was the selection of judges, the Charter was amended three days before the trial began to add two further judges. The conspiracy charge was dealt with at length in the Tokyo IMT, owing to the differences in situation between that of the Nuremberg IMT. Crimes against peace were central to the Tokyo IMT, as at Nuremberg, this resulted in the charges of war crimes and crimes against humanity charges were almost treated as an afterthought. Selectivity of the defendants raised criticisms as the US had agreed that the Japanese Emperor did not have to stand trial, the US believed that the Emperor would be able to integrate the conditions of surrender in Japan effectively. The perpetrators of the atrocity crimes at Unit 731 never stood trial, the US wanted to acquire the information they had collated through their human experimentation. One of the judges selected had personally been a victim of the atrocity crimes committed in Germany. Effectively, realpolitik entered the IMTFE resulting in verdicts that could be deemed unfair.

The crimes against peace charge and conspiracy charges took centre stage at both the Nuremberg and Tokyo IMT's, the Allied decision to give priority to this charge was political, they wanted to prove that the Axis Powers had waged an aggressive or 'unjust war' to ensure that their actions during the war were justified on the world stage as defended themselves against hostilities and aggressive war. This would essentially justify the US decision to enter the war and the Allies indiscriminate atomic bombings of Hiroshima and Nagasaki in Japan

What has become evident throughout this thesis, is that all too often, realpolitik has influenced the international criminal law discussions and trial processes, often resulting in ideas being abandoned and justice coming second to the interests of particular states. Although the War Crimes Trials were influenced by realpolitik. The War Crimes Trials, however imperfect, provided justice for the atrocity crimes carried out

This thesis presents a tension between the realist power politics position and the liberal cosmopolitan position. Where Allied states attempted to conduct international war crimes trials after the First World War, they did so to maintain their power positions, i.e., to maintain the status quo, that is, their place as a great power. Motivations of liberal cosmopolitan ideals and universal rights etc were often stated, however, realpolitik crept into the discussions, and negotiations became fraught. The Allied powers could not agree on the laws to be applied, the existing laws simply did not go far enough, Schmitt's Westphalian notions were too strong to dramatically change the legal landscape with respect to war crimes trials and the right for a state to wage war remained within the state's decisions.

This thesis has examined the attempted war crimes trials after the First World War and the War crimes Trials established after the Second World War at Nuremberg and Tokyo from the realist perspectives of Carr, Morgenthau, Schmitt and the liberal cosmopolitan perspectives of Kant and Kelsen. The theoretical model derived from the two opposing perspectives have analysed and interrogated the different ways in which the substantive laws have been created and applied at the trials. In utilising this theoretical framework, the analysis has proved to be a multi-dimensional account of the trials, highlighting some of the issues faced and provides an explanation for why the Allies tried to create what they did at the trial. Liberal cosmopolitan motives were often advertised; however, the realpolitik worked its way

through. For the Nuremberg IMT, the overall result appears that this was a fair trial, carried out under extraordinary circumstances. An entirely realist perspective of the subject area is often short sighted, the central theme for 20th century realists is the struggle for power and the conflict of interests, this fails to take into account the role values of international relations, states can, and often do work together and are not solely in pursuit of their own interests. The perspectives have helped to supplement and challenge the assumptions that are often made regarding the war crimes trials

Looking forward

The Nuremberg and Tokyo tribunals contributed significantly to the development of international criminal law, then in its infancy. As a result of the realisation that the laws in place in 1946 did not extend to such atrocity crimes as the Armenian massacres in the First World War and the Holocaust in the Second World War. Liberal cosmopolitan perspectives took root, establishing several universal agreements to enable prevention and punishment of any further atrocity crimes.

In response to the horrors of the Armenian massacres the Holocaust, Raphael Lemkin, A Polish lawyer coined the term Genocide from the ancient Greek prefix *genos* meaning race or tribe and *cide* meaning killing. The led to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the Genocide Convention was unanimously adopted by the United Nations Security Council in 1948 and entered into force in 1951. The definition contained within the Convention concerned the requirement of a coordinated plan to destroy the essential foundations of the life of a group, with the aim of annihilating it. The Convention defines genocide as an 'intentional effort to completely or partially destroy a group based on its nationality, ethnicity, race, or religion. It recognizes several acts as

constituting genocide, such as imposing birth control and forcibly transferring children, and further criminalizes complicity, attempt, or incitement of its commission'. Member states are prohibited from engaging in genocide and obligated to pursue the enforcement of this prohibition. All perpetrators are to be tried regardless of whether they are private individuals, public officials, or political leaders with sovereign immunity. The Convention stipulated that Genocide could take place in wartime or peacetime and is binding on all states, whether they have ratified this or not, making the Genocide Convention the first true universal instrument of law protecting human rights. The Armenian massacres and the Holocaust would fit into the definition stipulated within the Genocide Convention.

A further development in the law regarding the protection of human rights was adopted by the UN General Assembly in 1948. The Universal Declaration of Human Rights was drafted due to the experiences of the Second World War. This Declaration formalises rights and protections for all human beings. This provided the cornerstone for universal rights and protections of the individual.

For several decades, these tribunals stood as the only examples of international war crimes tribunals, but they ultimately served as models for a new series of international criminal tribunals that were established in the 1990s.

It would be almost 50 years later that the Genocide Convention would be used in the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The United Nations set up two ad hoc tribunals to bring the perpetrators of the wars to justice.

The methodological framework developed in this thesis could be developed and applied to the ad hoc tribunals for the Former Yugoslavia and Rwanda and the hybrid national /

international tribunals of Sierra Leone, Cambodia and East Timor and onto the International Criminal Court, in order to provide a thorough analysis of both realism and liberal cosmopolitanism in the light of modern international criminal law.

Liberal cosmopolitan ideals were extended further when the Rome Convention created the International Criminal Court, coming into effect in 2002. For the first time in history, a permanent court sits with jurisdiction over international criminal law. This creation fits with the liberal cosmopolitan perspectives, further analysis would be required to establish whether its rulings are subject to realpolitik concerns. To date, the US has not joined the International Criminal Court, however they participated in the negotiations for Rome Convention 2002.

Bibliography.

Books.

Arendt, H, *Eichmann in Jerusalem*, Penguin 1963.

Bassiouni, M. C, *Crimes Against Humanity: Historical Evolution and Contemporary Application,* Cambride University Press, 2014.

Beck, J, Arend, A & Vander Lugt, *International Rules: Approaches from International Law and International Relations*, Oxford University Press, 1996.

Beck, Ulrich, Cosmopolitan Vision, (trs by Ciaran Cronin), Polity Press, 2006.

Bergsmo M, Cheah Wui Ling, Sang Tioying and Yi Ping (eds) *Historical Origins of International Criminal Law*, Torkel Opsahl EPublisher,2015.

Bergsmo, M, J Buis, Emiliano, (eds) *Philosophical Foundations of International Criminal Law: Correlating Thinkers,* Torkel Opsahl Academic EPublisher, 2018.

Bass Gary, *Stay the Hand of Vengeance*, 1st edition, Princeton University Press 2002.

Boucher, D *Political Theories of International Relations*, First Edition, Oxford University Press, 1998.

Burchill S, Linklater A, Devetak R, Donnelly J, Paterson M, Reus-Smit C & True J, *Theories of International Relations* 3rd ed, Palgrave Macmillan, 2005.

Carr EH, *The Twenty Years Crisis, 1919-1939*, Cox M (preface) first edition, Macmillan Publishers Limited 2016.

Cassese, A, *International Criminal Law*, Oxford University Press, 2003.

Churchill, Winston, *The World Crisis: The Aftermath*, 1929, Thornton Butterworth, 1929.

Cryer, R. Prosecuting International Crimes; Selectivity and the International Law Regime. First edition, 2011.

Cryer Robert, Friman, H, Robinson D & Wilmhurst E, *An Introduction to International Criminal Law and Procedure*, third edition, Cambridge University Press 2014.

Cryer, R (ed) *International Criminal Law Documents*, Cambride University Press, 2019.

Doyle, M, *Ways of War and Peace: Realsim, Liberalism and Socialism,* W W Norton and Company, 1997.

Goldstone, Richard J. *For Humanity, reflections of a War Crimes Investigator*, Yale University Press, 1998.

Harris, S *Factories of Death: Japanese Biological Warfare, 1932-1945, and the American Cover-up*, Routledge, 2002.

Henckarts, Jean Marie & Doswald-Beck, Louise, *Customary International Humanitarian Law* Cambridge, 2005.

Hooker, William, Carl Schmitt's International Thought (Cambridge: Cambridge University Press 2009).

Horne, C (ed.), *The Great Events of the Great War,* Vol II, National Alumni, 1923.

Jackson Nyamuya Maogoto, War Crimes and Realpolitik: International Justice from World War I to the 21st Century, Lynne Rienner Publishers, 2004.

Jackson, R. H Foreword, EW Kinter (ed), *Trial of Alfons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber, and Philipp Blum; The Hadamor Trial*, William Hodge, London, 1949.

Kant, I. *Perpetual Peace*, Lewis White Beck (ed) New York: Liberal Arts Press, 1957.

Kant, I, *The Groundwork of the Metaphysics of Morals,* Mary Gregor (ed) Christine M. Korsgaard (introduction), Cambridge University Press, 1997.

Kant, I '*To Perpetual Peace: A philosophers Sketch, in Perpetual Peace and other Essays,* Ted Humphrey Trans Hackett, 1983.

Kant, I. *Perpetual Peace*, Lewis White Beck (ed) New York: Liberal Arts Press, 1957.

Kant, I, *Towards Perpetual Peace and Other Writings on Politics, Peace and History*, P Kleingeld (ed and introduction) D Colclasure (translate) Waldron J, Doyle, M & Wood, A (contributors), Yale University Press, 2006.

Kelsen, K, *Peace through Law*. Chapel Hill: University of North Carolina Press, 1944.

Kelsen, H. *Principles of International Law,* The Law Book Exchange, New York, 2012.

Kissinger, H, *A World Restored, Metternich, Castlereagh and the Problems of Peace*: 1812-1822, Houghton Mifflin, Boston 1973.

Kleingeld Pauline (ed) *Toward Perpetual Peace and Other Writings on Politics, Peace and History,* David L. Colclasure (trans), Jeremy Waldron, Michael W. Doyle & Allen W. Wood (contributors) Yale University Press, 2006.

Lauterpacht, *Oppenheim's International Law*, X 179.

Lemkin, R. *Axis rule in Occupied Europe*, Washington DC: Carnegie Endowment for International Peace, 1944.

Locke, J, *Second Treatise of Government*, Hackett, 1980.

MacArthur, D, *Reminiscences*, New York: McGrawhill, 1964.

Minnear, R. *Victors' Justice. The Tokyo War Crimes Trial,* Princeton University Press, Princeton, New Jersey, 1971.

Morgenthau, H. Politics among Nations: The Struggle for Power and Peace, 2nd edn New York, 1954.

Morgenthau, H. *Politics Among Nations; The Struggle for Power and Peace,* 3rd edition, New York; knopf, 1964.

Machiavelli, *The Prince*, Chapters 15 and 23, English Translation, Everyman's Library.

Pritchard, John, R. The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, The Edwin Mellen Press, 1998.

Robinson D & Wilmhurst E, *An Introduction to International Criminal Law and* Procedure, third edition, Cambridge University Press 2014.

Rockwood, L. Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility, University of Massachusetts Press, Amherst, 2007.

Salter, M. *'Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services.'* Abingdon: Routledge-Cavendish, 2007.

Salter, M & Julie Mason, *Writing Law Dissertations; An Introduction and Guide to the Conduct of Legal Research*, Pearson Longman, England, 2007.

Schabas, William, *The Trial of the Kaiser*, Oxford University Press, 2018.

Schabe, Wilson. *Revolutionary Germany and Peacemaking, 1918-1919, Missionary Diplomacy and the Realities of Power* (Rita Kimber and Robert Kimber trans,1985) 294.

Schmitt, C. *The Concept of the Political*, (Chicago University Press, 2007).

Schmitt, C. *Legality and Legitimacy,* Jeffrey Seitzer (trs & ed) John P McCormick (introduction), Duke University Press, 2004.

Schmitt, C, *Writings on War*, Nunan, T (trs & ed), English Edition, Polity Press, 2011.

Schmitt, C *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum,* translated and annotated by G. L. Ulmen, Telos Press Publishing, 2006.

Scheuerman W, *Hans Morgenthau; Realism and Beyond*, first edition, Polity Press, 2008.

Sellars, K *Founding Nuremberg: Innovation and Orthodoxy at the 1945 London Conference*, contained in, M Bergsmo, C Wui Ling and Y Ping (eds) *Historical Origins of International Criminal Law,* Volume 1, (Torkel Opsahl Academic EPublisher: Brussels, 2014.

Shklar. J, *Legalism; Law, Morals and Political Trials*, First Edition, Harvard University Press. 1986.

Simpson, G. *Law, War & Crime*, Cambridge, Polity Press, 2008.

Smith, Bradley F. *The American Road to Nuremberg*, Basic Books, 1981.

Smith, Charles, Anthony. *The rise and fall of war crimes trials; From Charles I to Bush II*, Cambridge University Press, 2012

Sprecher, D, *Inside the Nuremberg Trial: A Prosecutors Comprehensive Account*, vol 1, University Press of America, 1999.

Sprecher, D, *Inside the Nuremberg Trial: A Prosecutors Comprehensive Account,* vol 2, University Press of America, 1999.

Stahn C. *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019.

Straubing, Harold Elk (ed.), *The Last Magnificent War: Rare Journalistic and Eyewitness Accounts of World War I,* Paragon House, New York, 1989.

Taylor, T, *The Anatomy of the Nuremberg Trials; A Personal Memoir*, First Edition, Skyhorse Publishing 1993.

Trumpener, Ulrich *Germany and the Ottoman Empire 1914-1918*, Princeton University Press, Princeton, 1968.

Tusa A & Tusa J, *The Nuremberg Trial,* Skyhorse Publishing, 2010.

Uras, E *The Armenians and the Armenian Question in History*, 2nd ed, 1976.

Watkins D & Burton M (eds) *Research Methods in Law*, Routledge, 2013.

Willis J, *Prologue to Nuremberg; The Politics and Diplomacy of Punishing War Criminals of the First World War,* first edition, Greenwood Press 1982.

Zolo D, *Victors' Justice From Nuremberg to Baghdad*, (Weir M trs) First English Edition, Verso, 2009.

Zolo D, *Cosmopolis; Prospects for World Government*, (McKie, D trs), First Edition, Polity Press 1997.

Zolo D, *Invoking Humanity, War, Law and Global Order*, (Poole F & Poole G trs) First Edition, Continuum, 2002.

Journal Articles.

Abbot, K. International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts. The American Journal of International Law, Vol.93, No 2 1999 pp361-379

Algosaibi, Ghazi A. R. *The Theory of International Relations: Hans J. Morgenthau and His Critics*, Background, 1965, Vol. 8, No. 4 pp. 221-256, The International Studies Association.

Armstrong, D. *Evolving Conceptions of Justice in International Law,* Review of International Studies, 2011, Vol. 37, No. 5 (December 2011), pp. 2121-2136

Bassiouni M C, *Crimes against Humanity in International Criminal Law*, 200 (1992)

Bassiouni M, Richard A. Falk and Yasuaki Onuma, Nuremberg: Forty Years After, Proceedings of the Annual Meeting (American Society of International Law),1986, Vol. 80 pp. 59-68

Bassiouni M C, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts. J 11 1997

Bassiouni M C, World War I: 'The War to End all Wars' and the Birth of a Handicapped International Criminal Justice System, 30 Denv. J. Int'l L. & Pol'y 244 (2002)

Baxter, R. R. "The First Modern Codification of the Law of War: Francis Lieber and General Orders No 100", in International Review of the Red Cross, 1963, vol 3 no. 25, pp. 171-89, 217-36.

Benhabib, S, Carl Schmitt's Critique of Kant: Sovereignty and International Law, Political Theory , 2012, Vol. 40, No. 6, pp. 688-713 Sage Publications, Inc

Bielefeldt, Heiner, *Deconstruction of the "Rule of Law": Carl Schmitt's Philosophy of the Political*, Archives for Philosophy of Law and Social Philosophy, 1996, Vol. 82, No. 3 (1996), pp. 379-396

Brook, Timothy, The Tokyo Judgement and the Rape of Nanking, The Journal of Asian Studies, Vol. 60, No 3, 2001, pp 673-700

Brown, C. From Humanised War to Humanitarian Intervention, page 61

Brown, Philip Marshall. The Monroe Doctrine and the League of Nations, The American Journal of International Law, 1920, Vol. 14, No. 1/2, pp. 207-210, Cambridge University Press

Bull Hedley, *The Twenty Years' Crisis Thirty Years On*, International Journal, Autumn, 1969, Vol. 24, No. 4 (Autumn, 1969), pp. 625- 638

Burleigh T. Wilkins, *Kant on International Relations*; The Journal of Ethics, June, 2007, Vol. 11, No. 2 (June, 2007), pp. 147-159

Capps, Patrick and Julian Rivers, *Kant's Concept of International Law,* Cambridge University Press 2011, (2010), 229–257. Cambridge University Press 2011

Cheng, B. Reviewed Work(s): *The Law of the United Nations, a Critical Analysis of Its Fundamental Problems by Hans Kelsen; A Commentary on the Charter of the United Nations* by Norman Bentwich and Andrew Martin, The Modern Law Review, Vol. 14, No. 3 (1951), pp. 367-369

Cohen, Laurie A. *Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia*, UCLAS Journal of International Law and Foreign Affairs, Vol. 2, No. 1 (1997), pp. 113-170

Dadrian, Vahakn N. *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications* 14 YALE J international L 221, 223

Drumbl, M, collective violence and individual punishment: The Criminality of Mass Atrocity, 2005, Northwestern University Law Review, 99:2, 539-610

Drumbl, M. Atrocity, Punishment and International Law. 2007, Cambridge: Cambridge University Press.

Futamura, M War Crimes Tribunals and Transitional Justice 52 (2008) page 56 citing government memorandum SWNCC 150/4/A,

Gutman, Roy, David Rieff & Anthony Dworkins (ed) Crimes of War; What the Public should know, 2007, W.W Norton & Company, London.

Held, D *Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's "Perpetual Peace" Alternatives: Global, Local, Political*,1995, Vol. 20, No. 4 pp. 415-429

Henckarts, Jean Marie & Doswald-Beck, Louise, Customary *International Humanitarian Law* (Cambridge, 2005) 572.

Hickey, D Scarllet Sijia Li, Celia Morrison, Richard Schulz, Michelle Thiry and Kelly Sorensen, *Unit 731 and moral repair, Journal of Medical Ethics*, Vol. 43, No. 4 (April 2017), pp. 270-276

Hooker, William, *Carl Schmitt's International Thought* (Cambridge: Cambridge University Press ,2009),10.

Horne, Charles (ed.), *The Great Events of the Great War,*vol II, National Alumni, New York 1923.

Howe, Paul "*The Utopian Realism of E.H. Carr*" pp. 277–297 from Review of International Studies, Volume 20, Issue No. 3, 1994

Ingham, D. *Law: Key Concepts in Philosophy*, 2006, New York, Continuum.

Kelsen, H, '*Will the judgment in the Nuremberg trial constitute a precedent in international law*?', International Law Quarterly, 1 (2) (1947)

Kelsen, H *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals, California Law* Review, Dec., 1943, Vol. 31, No. 5 (Dec., 1943), pp. 530-571

Koskenniemi, M, *The Politics of International Law*, 2011, Oxford, Hart Publishing.

Krasner, Stephen D, *Realist Views of International Law*, 2002, American Society of International Law, 96, p265-268

Levy, A, *The Law and Procedure of War Crimes Trials,* The American Political Science Review, Vol. 37, No. 6, 1943, pp. 1052-1081

Lu, C *Justice and Moral Regeneration: Lessons from the Treaty of Versailles,* International Studies Review, 2002, Vol. 4, No. 3, pp. 3-25

Luban, D, *The Legacies of Nuremberg*, Social Research,1987, Vol. 54, No. 4, pp. 779-829

Luban, D, *A Theory of Crimes against Humanity*, 2004, 29 Yale Journal of International Law. 85-167

Magruder, Thomas P. "*Arbitration of Differences at Conferences on Reduction and Limitation of Armaments."* The Annals of the American Academy of Political and Social Science, vol. 144, [Sage Publications, Inc., American Academy of Political and Social Science], 1929, pp. 137–39, http://www.jstor.org/stable/1017351

Mearsheimer, J. *E.H Carr vs. Idealism. The Battle Rages On*, International Relations 2005 SAGE Publications (London, Thousand Oaks, CA and New Delhi), Vol 19(2): 139–152

Megret F, *The Politics of International Criminal Justice*, European Journal of International law, 13 (5) 1261-1284

Meron, T *Reflections on the Prosecution of War Crimes by International Tribunals,* The American Journal of International Law, 2006, Vol. 100, No. 3, pp. 551-579

Meron, T. *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience.* The American Journal of International Law, vol 94, 2000

Meron, T, *The Geneva Conventions in Customary Law*, The American Journal of International Law, 1987, page 348-370

Moghalu, K. *Global Justice: The politics of War Crimes Trials.* 2006, California: Stanford Security Studies.

Morgenthau, Hans "*The Political Science of E. H. Carr*" pages 127–134 from World Politics Volume 1, Issue 1, October 1948

Morgenthau, H. *Threat to and hope for the United Nations* [1961], in KAP, 279

Nardin, T Realism, *Cosmopolitanism, and the Rule of Law*, American Society of International Law), APRIL 8-11, 1987, Vol. 81 (APRIL 8-11, 1987), pp. 416-420, Cambridge University Press on behalf of the American Society of International Law

Nussbaum, Martha C. *The Cosmopolitan Tradition; A Noble but Flawed Ideal,* Harvard University Press, 2019.

Oren I, *The Unrealism of Contemporary Realism: The Tension between Realist Theory and Realists'* Practice, Perspectives on Politics, 2009, Vol. 7, No. 2, pp. 283-301, American Political Science Association

Orend, Brian, *Kant's Just War Theory*, Journal of the History of Philosophy, Volume 37, Number 2, April 1999, pp. 323-353

Paust JJ, Dr Francis Lieber and the Lieber Code Proceedings of the Annual Meeting (American Society of International Law),2001, Vol. 9, pp. 112-115, Cambridge University Press

Pictet, Jean S. (1951), *'The New Geneva Conventions for the Protection of War Victims*, The American Journal of International Law, 45 (3):

Pulos M, *'Hiding Corpses' within Sovereign Borders: Why the World Fails to Prosecute Genocide*, UCLA Journal of International Law and Foreign Affairs, Vol. 11, No. 1 (2006), pp. 161-187

Pustogarov, V '*The Martens Clause in International* Law' (1999) 1 Journal of the History of International Law 125–35;

Ratner, S. R and Abrams, J. S. *Accountability for human rights atrocities in international law: beyond the Nuremberg Legacy*, 2001, Oxford, Oxford University Press.

Rockwood, L *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility*, University of Massachusetts Press, Amherst, 2007, pp. 11-44

Roach, S *Governance, Order, and the International Criminal Court; Between Realpolitik and a Cosmopolitan Court*, Oxford University Press, 2009

Robertson, G *Crimes against Humanity: The Struggle for Global Justice*. 2002, London, Penguin

Robinson, D. *The Identity Crisis of International Criminal Law,* 2008 Leiden Journal of International Law, 21, pp. 925-963

Rudolph, C, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, International Organisation, Vol. 55, No. 3 2001, pp 655-691

Salter, M. '*Intelligence Agencies and War Crimes Prosecution Allan Dulles' Involvement in Witness Testimony at Nuremberg'* 2004, Journal of International Criminal Justice 2:3, 826-854

Salter, M, '*Unsettling Accounts: Methodological issues within the Reconstruction of the Role of a US Intelligence Agency within the Nuremberg War Crimes Trials'* 2003 Law and History 6, 375-405

Salter, M '*Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause'* [2012] 3 OUP 403

Schabe, Wilson. *Revolutionary Germany and Peacemaking*, 1918-1919, Missionary Diplomacy and the Realities of Power (Rita Kimber and Robert Kimber trans,1985) 294

Schick, F. B, *The Nuremberg Trial and the International Law of the Future,* The American Journal of International Law, 1947, Vol. 41, No. 4, pp. 770-794

Sellars, K *Founding Nuremberg: Innovation and Orthodoxy at the 1945 London Conference,* contained in, M Bergsmo, C Wui Ling and Y Ping (eds) Historical Origins of International Criminal Law, Volume 1, (Torkel Opsahl Academic EPublisher: Brussels, 2014, page 543

Speer, J, *Hans Morgenthau and the World State,* World Politics, Vol. 20, No. 2 1968, pp 207-227

Straubing H (ed.), *The Last Magnificent War: Rare Journalistic and Eyewitness Accounts of World War I*, Paragon House, New York, 1989, pp. 402-3

Tamanaha, B.Z. *On the Rule of Law: History, Politics, Theory*, 2004, Cambridge: Cambridge University Press.

Tanaka, Yuki Tim McCormack and Gerry Simpson (eds) *Beyond Victor's Justice*? The Tokyo War Crimes Trial Revisited, 2010, Martinus Nijhoff publishers, Boston

Trachtenberg, M *Versailles after Sixty Years*, Journal of Contemporary History, Jul., 1982, Vol. 17, No. 3 (Jul., 1982), pp. 487-506

Vernon, R. *What is Crime against Humanity?* The Journal of Political Philosophy: Volume 10, Number 3, 2002, pp. 231–249

Williams, J F. *Recent Interpretations of the Briand-Kellogg Pact*, International Affairs (Royal Institute of International Affairs 1931-1939), 1935, Vol. 14, No. 3, pp. 346

Williams, M *Hobbes and International Relations: A Reconsideration,* International Organisation, vol 50, no 2, pp 213-236

Zolo, D. '*The Re-Emerging notion of the Empire and the Influence of Carl Schmitt's Thought*' in Odysseos, L and Petito, F eds. *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of the Global Order*, 2007, Routledge.

Legal Instruments.

Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 AJIL 95.

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.' American Journal of International Law. 14: 95-154.

The Treaty of Peace between the Allied and Associated Powers and Turkey, 10 August 1920, (Treaty of Sevres), reprinted in American Journal of International Law, 1921.

Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

Treaty with Turkey and Other Instruments (Peace Treaty of Lausanne), 24 July 1923, reprinted in American Journal of International Law, 1924, vol.18, suppl.

Preamble, Paragraph 7, Convention (IV) respecting the Laws and Customs or War on Land, and Annex (opened for signature 18 October 1907, entered into force 26 January 1910) (1908), AJIL (supp) 90.

Treaty of Versailles, [1919] UKTS 4.

1864 Convention for the Amelioration of the Condition of Wounded in Armies in the Field, 1 Bevans 7.

Convention With Respect to the Laws and Customs of War on Land, 29 July 1899, 32 Stat 1803, Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat.2277.

Peace Treaty of Versailles [1919] UKTS 4 (Cmd. 153).

London Conference, *Report of Robert H. Jackson, United States Representative, to the International Conference on International Trials,* Department of State, Washington DC, 1949.

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties'. American Journal of International Law. 14: 95-154.

Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 AJIL 95.

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, The American Journal of International Law 1920, Vol. 14, No. 1/2, pp. 95-154, Cambridge University Press.

Digest of Opinions of JAG, Army 244 (1866).

Online Resources

http://www.AvalonProject.org

http://www.weaponslaw.org/

https://www.history.com/this-day-in-history/

https://www.armenian-genocide.org/

https://www.jewishvirtuallibrary.org/

https://www. [Cairo Communiqué](Text) | Birth of the Constitution of Japan (ndl.go.jp)

https://www.iwm.org.uk/

https://www.Tripartite Pact | Definition, History, Significance, & Facts | Britannica

https://www.un.org/

https://www.unit731.org

https://plato.stanford.edu/entries/realism-intl-relations/

https://www.theholocaustexplained.org

https://www.Treaties, States parties, and Commentaries - Geneva Convention on Prisoners of War, 1929 (icrc.org)

https://www.Worldwar2.org.uk

https://www.jewishvirtuallibrary.org/

https://www.History: International Nuremberg Principles Academy (nurembergacademy.org)

https://www.Tripartite Pact | Definition, History, Significance, & Facts | Britannica

https://www.Foreign Relations of the United States, 1946, The Far East, Volume VIII - Office of the Historian