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A court guided by the law? What criticisms may be levelled at the International Military Tribunal's court of Nuremberg? Was the IMT even competent to take the actions it did?

LAM6260 Dissertation

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Chapter one: The Factual Context of the IMT

The purpose of this dissertation is to evaluate the International Military Tribunal as it sat in Nuremberg with particular regard to justiciability. This dissertation shall focus on the IMT where the "upper echelon"¹ of the Nazi Regime were tried; due to how it is called back to in modern academia.² My aim is for this dissertation to be placed alongside modern commentaries, specifically those taking a critical view of the conduct of the trials:³ in chapter one, this dissertation will cover the facts and context of the IMT, providing the base information needed to understand the remainder of this dissertation; in chapter two, this dissertation shall move on to evaluate the impact the IMT has had on modern law; in chapter three, this dissertation shall look to the base criticisms of the IMT; in chapter four, this dissertation shall review the IMT's relationship with justiciability before concluding this dissertation.

This dissertation shall first look at the options available to the Allies as to how to deal with the upper echelon of the Nazis'. It is generally accepted that the Allies had three primary options: release, summary execution, or trial.⁴ Of these options, the USSR⁵ and later Churchill,⁶ along with the majority of the British public,⁷ supported summary execution. Despite this, in 1945, the allied powers ratified the London Agreement,⁸ which set the terms for a tribunal charged with the Trial of Nazi war criminals. This Agreement stated that the accused would stand trial "*individually or in their capacity as members of organizations*

¹ McKeown, T. "Nuremberg: Procedural Due Process at the International Military Tribunal." [2013] Victoria University of Wellington Law Review Vol.45(1), 109-132 at 109.

² Sellars, K. "Imperfect Justice at the Nuremberg Trials." [2010] European Journal of International Law, 21(4), 1085-1102, at 1086

³ Sellars, K. "Imperfect Justice at the Nuremberg Trials." [2010] European Journal of International Law, 21(4), 1085-1102, at 1085.

⁴ Lippman, M. "Nuremberg: Forty-Five Years Later." In Guenael Mettraux (ed), *Perspectives on Nuremberg* (1st ed, Oxford: Oxford University Press 2008) at 522.

⁵ Kranzbuhler, O. "Nuremberg Eighteen years afterwards." In Guenael Mettraux (ed), *Perspectives on Nuremberg* (1st ed, Oxford: Oxford University Press 2008) at 444.

⁶ Kranzbuhler, O. "Nuremberg Eighteen years afterwards." In Guenael Mettraux (ed), *Perspectives on Nuremberg* (1st ed, Oxford: Oxford University Press 2008) at 444.

⁷ McKeown, T. "Nuremberg: Procedural Due Process at the International Military Tribunal." [2013] Victoria University of Wellington Law Review Vol.45(1), 109-132 at 110.

⁸ The London Agreement of August 8th 1945 (The London Charter), Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtchart.asp> (last accessed on: 31/08/2021)

or groups." ⁹ The Agreement is significant as it lays the basis for the defendants' liability, as shall be touched upon in chapter three; the Nuremberg Charter was signed on the same day. ¹⁰ Whereas the London Agreement made the base commitments, such as that there would be a trial, the Nuremberg Charter decided specifics of the trial. It shall be called back to throughout this dissertation as the code of practice for the trial.

The Tribunal was formed from four members: Lord Justice Lawrence for the United Kingdom, Francis Biddle for the United States, Professor Henri Donnedieu de Vabres for France, and Major General Iona Nikitchenko for the Soviet Union. ¹¹ The authority of the Tribunal was declared unchallengeable by the Charter. ¹² It is widely recognised that a key aim of the Charter was to protect the defendants' due process rights. ¹³ Due process was so important that it was raised in the opening speech of U.S. chief prosecutor, Justice Jackson. ¹⁴ Due process shall be touched upon more in chapter three of this dissertation. Despite its flawed nature, ¹⁵ the IMT has been accepted to have provided a higher standard than would otherwise be expected of the time. ¹⁶

There were three crimes enforced by the Nuremberg Charter, ¹⁷ with four charges brought at trial. The crimes were: crimes against peace, ¹⁸ meaning planning, preparation, initiation, or the waging of war against the norms of international law or international Agreement.

⁹ Art.1 The London Agreement of August 8th 1945 (The London Charter), Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtchart.asp> (last accessed on: 31/08/2021)

¹⁰ The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

¹¹ McKeown, T. "Nuremberg: Procedural Due Process at the International Military Tribunal." [2013] Victoria University of Wellington Law Review Vol.45(1), 109-132 at 111.

¹² Art.3 The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

¹³ See, Art. 16 Art. 2, The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021) and; McKeown, T. "Nuremberg: Procedural Due Process at the International Military Tribunal." [2013] Victoria University of Wellington Law Review Vol.45(1), 109-132 at 111.

¹⁴ *Daily Transcripts, Nuremberg Trial Proceedings* (21st November 1945) Vol, 2 at 100. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

¹⁵ McKeown, T. "Nuremberg: Procedural Due Process at the International Military Tribunal." [2013] Victoria University of Wellington Law Review Vol.45(1), 109-132 at 109.

¹⁶ McKeown, T. "Nuremberg: Procedural Due Process at the International Military Tribunal." [2013] Victoria University of Wellington Law Review Vol.45(1), 109-132 at 109.

¹⁷ Art.6 The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

¹⁸ Art.6(a) The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

War crimes, meaning violations of the laws and customs of war through military conduct, were not justified by necessity.¹⁹ Thirdly, crimes against humanity included murder, enslavement, extermination, deportation, and "*any other inhumane acts committed against a civilian population.*"²⁰ The four charges were conspiracy to commit crimes against peace,²¹ which included within its bounds the act of creating the Nazi party, and further stated that war crimes committed to breach the peace would be considered under both count one and count two.²² The second count was crimes against peace, and the third count was war crimes,²³ which specifically in its charge limited itself to actions taken from 1st September 1939 and before 8th May 1945.²⁴ Count four was crimes against humanity.²⁵ Count four included the above mentioned time limit for occupied German territories, but when it came to Germany itself, instead said the time limit was simply a "*number of years.*"

²⁶ This time limit is significant as it means potential crimes committed in the annexation of

¹⁹ Art.6(b) The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

²⁰ Art.6(a) The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

²¹ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Count 1. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

²² *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Count 1, paragraph G

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

²³ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Count 3

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

²⁴ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Count 3, Foreword: Statement of Offence.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

²⁵ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Count 4

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

²⁶ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Count 4 Foreword: Statement of Offence

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

Czechoslovakia would not be included within the court's permit. It is further relevant to this point to state the issue of count three; namely, count three allowed the same evidence used in count four to be used in count three.²⁷ This rule is despite the principle of double jeopardy, which generally states that one person may not be charged with two separate crimes for one single action. The IMT had 23 primary defendants,²⁸ with three unable to stand trial²⁹ and one tried in absentia.³⁰ This dissertation shall introduce some base issues regarding the defendants in this section and further look to a specific defence raised by defendant Keitel in chapter three.

The Defendants

The first key issue regarding the defendants is the IMT's questionable dealing of mental states. Namely, on this point, the key two defendants to be looked at are Julius Streicher and Rudolph Hess.³¹ The IMT deemed both Hess and Streicher to be mentally fit to stand trial.³² Both of these decisions have been heavily criticized. Firstly, with Hess, most have

²⁷ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Count 4, Foreword Statement of Offence

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

²⁸ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Appendix 1

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

²⁹ *Certificate of Service on Defendant Gustav Krupp von Bohlen.* (23rd October 1945) Nuremberg Trial Proceedings Vol.1: Declaration of mental state.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 25/08/2021)

³⁰ *Order of the Tribunal regarding notice to Defendant Bormann.* (18th October 1945) Nuremberg Trial Proceedings Vol.1 Order of Notice:

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 21/08/2021)

³¹ "Anti-Semitism and Der Sturmer on Trial in Nuremberg, 1945-1946: The case of Julius Streicher. Thesis. Presented to the graduate council of the University of North Texas in Partial Fulfilment of requirements." (1997) Author: Bridges, L. Accessible at:

https://digital.library.unt.edu/ark:/67531/metadc279213/m2/1/high_res_d/1002656564-bridges.pdf (last accessed on: 30/08/2021)

At page 75.

³² See *Order of the Tribunal rejecting the motion on the behalf of defendant Hess and designating a commission to examine defendant Hess with reference to his mental competence and capacity to stand trial.* (24th November 1945) Nuremberg Trial Proceedings Vol.1 Order on competence:

Accessible via the Avalon project: <https://avalon.law.yale.edu/imt/v1-27.asp> (last accessed on: 30/08/2021)

and; *Order of the Tribunal regarding a psychiatric examination of defendant Streicher.* (17th November 1945) Nuremberg Trial Proceedings Vol.1 Order on competence:

Accessible via the Avalon project: <https://avalon.law.yale.edu/imt/v1-24.asp> (last accessed on: 29/08/2021)

widely accepted that his actions do not provide the image of a sane mind.³³ As for Streicher, worries arose over his sanity over his answers to questions posed by the Soviet prosecutors.³⁴ The prosecutors and the watching public shared these views of Streicher's sanity, with many observers believing Streicher was insane.³⁵ In recent years, academics have pointed out that his treatment in custody likely worsened Streicher's already fragile mental state. Namely, statements by the Chief of Custody that the prisoners' treatment was not entitled to be of the level of the Geneva Convention.³⁶ These points raise significant questions as to the legitimacy of the trials of both Streicher and Hess, potentially highlighting a failure of the IMT to safeguard those it had a duty of care over properly.

A second point relevant to the defendants brings up Streicher again, in comparison with co-defendant Hans Fritzsche. Fritzsche was the chief of radio operations in Nazi Germany, and Streicher was most famous for owning a viral anti-Semitic cartoon. Both defendants made history for being the first defendants charged with the incitement of crimes against humanity.³⁷ Notably, Streicher did not have an official position in the Nazi party;³⁸

³³ "Anti-Semitism and Der Sturmer on Trial in Nuremberg, 1945-1946: The case of Julius Streicher. Thesis. Presented to the graduate council of the University of North Texas in Partial Fulfilment of requirements." (1997) Author: Bridges, L. Accessible at: https://digital.library.unt.edu/ark:/67531/metadc279213/m2/1/high_res_d/1002656564-bridges.pdf (last accessed on: 30/08/2021)

At page 76

³⁴ "Anti-Semitism and Der Sturmer on Trial in Nuremberg, 1945-1946: The case of Julius Streicher. Thesis. Presented to the graduate council of the University of North Texas in Partial Fulfilment of requirements." (1997) Author: Bridges, L. Accessible at: https://digital.library.unt.edu/ark:/67531/metadc279213/m2/1/high_res_d/1002656564-bridges.pdf (last accessed on: 30/08/2021)

At page 74

³⁵ See, Ward, R. *A train of powder*. (1st ed. New York: The Viking Press 1946) at page 5. And; "Anti-Semitism and Der Sturmer on Trial in Nuremberg, 1945-1946: The case of Julius Streicher. Thesis. Presented to the graduate council of the University of North Texas in Partial Fulfilment of requirements." (1997) Author: Bridges, L. Accessible at: https://digital.library.unt.edu/ark:/67531/metadc279213/m2/1/high_res_d/1002656564-bridges.pdf (last accessed on: 30/08/2021) At page 76

³⁶ See "Anti-Semitism and Der Sturmer on Trial in Nuremberg, 1945-1946: The case of Julius Streicher. Thesis. Presented to the graduate council of the University of North Texas in Partial Fulfilment of requirements." (1997) Author: Bridges, L. Accessible at: https://digital.library.unt.edu/ark:/67531/metadc279213/m2/1/high_res_d/1002656564-bridges.pdf (last accessed on: 30/08/2021) At page 76 and; Persico, J. *Nuremberg: Infamy on trial*. (1st ed, New York: Penguin Publishing 1995) at page 151

³⁷ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al*. The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Appendix 1 Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 1/09/2021)

³⁸ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 546 Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

Streicher's membership was cancelled. He was expelled in 1942 when he posted stories purportedly lying about the Nazi leadership.³⁹ Fritzsche, on the other hand, was an under deputy to master of the Gestapo Joseph Goebbels.⁴⁰ Fritzsche was in charge of all newspapers in Germany⁴¹ he was the chief of the radio ministry at the end of the war⁴² and was known to falsify news⁴³ and instruct reporters on how to report on events.⁴⁴ Despite all of the above, it was decided by the Tribunal that Fritzsche was not guilty of incitement for two reasons, firstly that he was promoting patriotism⁴⁵ and that, secondly, that he lacked authority to make actual decisions.⁴⁶ In criticism of this, several points may be raised: Fritzsche was an actual member of the Nazi party who lied to stir up racial hatred; secondly, Fritzsche was in a position of power over Streicher, having tried to shut down his paper twice.⁴⁷ Despite this, the charges against only Fritzsche were dropped.⁴⁸

This lack of parity in treatments highlights further how the decisions of the IMT may be deemed questionable.

As such, this chapter has introduced the IMT's Trial of Nuremberg; through firstly looking at the context around the decision to hold a trial, before then looking to the specifics of the London Agreement and later Nuremberg charge, from there this chapter then discussed the other options available to the Allies briefly before finally discussing specific issues with the

³⁹ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 546
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴⁰ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Appendix 1
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 1/09/2021)

⁴¹ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 582
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴² *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 582
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴³ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 583
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴⁴ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 583
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴⁵ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 583-584
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴⁶ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 582
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴⁷ *Daily Transcripts, Nuremberg Trial Proceedings* (1st October 1946) Vol. 22. At 582
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 27/08/2021)

⁴⁸ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1, Appendix 1
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 1/09/2021)

defendants of the trial. This dissertation shall now discuss the legal impact and significance of the trial.

Chapter 2: The Jurisprudential Significance of Nuremberg

The purpose of the previous chapter was to examine the factual details of the IMT. This chapter shall examine the jurisprudential impact the IMT had; namely, this chapter shall primarily focus on the effects the IMT had on the broader regime of International Criminal Law (henceforth ICL). In assessing this matter, this chapter shall look to an array of academic works that suggest a different form of impact that the IMT has had on ICL.

It can be argued that if the IMT is shown to have a significant impact, then it may further be argued that any criticism of the IMT may itself also apply to the modern law. If contemporary law developed from a flawed interpretation or application of the law, it might be flawed. Thus, if the IMT has had a significant impact on modern law, then the value of the analysis provided by this dissertation may be said to be increased.

In establishing whether the IMT has impacted modern ICL, there seems to be near unanimity in contemporary academic works to the positive.⁴⁹ Therefore, beyond doubt, it may be stated that the IMT has impacted developing ICL. However, despite this unanimity, many sources disagree over the exact impact the IMT has had.

When discussing the contribution of the IMT, the "message" sent by the IMT has often been pointed to.⁵⁰ Namely, the idea that nobody is above the law and that even a head of state

⁴⁹ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844.; "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) ; Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁵⁰ "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

could be held criminally responsible for illegal military actions they order.⁵¹ However, in assessing the validity of the claims that these developments came from Nuremberg, academics have argued that instead, this development was created by the Allies' action after World War One at the "prosecution" of Kaiser Wilhelm II.⁵²

There are issues in regarding this matter as a prosecution;⁵³ Art.227 of the Treaty of Versailles bears little similarity to a legal document. Instead, it simply declared the blame rather than a charge to find fault;⁵⁴ secondly, it did not refer to law but instead referred to international policy.⁵⁵

In this sense, Art.227 lacks key components which are so indicative of trials of criminal law. Namely, it lacks any mention of a right to a fair trial or any mention of the rule of law. These are matters that the IMT did not ignore; however, the idea of a fair trial was so crucial at Nuremberg that a critical part of the prosecution case rested on the fact that the defendants were being given a fair trial. The idea of fairness was so essential to their case that it was one of the first points to be raised in the prosecution's opening argument.⁵⁶ In this sense, the claim that the Nuremberg trial established the principle of prosecuting heads of state, for the most part, can be upheld. The IMT is on this basis the first time in recorded history where a head of state was held liable for war crimes after a 'fair and impartial trial. It is also the first time in the 19th or 20th centuries that any individual soldier had been prosecuted for war crimes.⁵⁷ This point highlights one of the key contributions of the Nuremberg trial, the rejection of previous ideas of international law through the willingness

⁵¹ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

⁵² Tomuschat, C. "The Legacy of Nuremberg." [2006] Journal of International Criminal Justice Vol.4(4) 830-844 at 830.

⁵³ Tomuschat, C. "The Legacy of Nuremberg." [2006] Journal of International Criminal Justice Vol.4(4) 830-844 at 830.

⁵⁴ Tomuschat, C. "The Legacy of Nuremberg." [2006] Journal of International Criminal Justice Vol.4(4) 830-844 at 830.

⁵⁵ Art.227 Treaty of Versailles 1919

⁵⁶ Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants.* (1st ed, London: Her Majesty's stationary office on the authority of the Attorney General 1946) at page 3.

⁵⁷ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

to prosecute individuals for breaches of the law.⁵⁸ Some have explained this change as indicative of a tonal shift from military necessity to human dignity, which has lasted to the current law.⁵⁹

When discussing the contributions of Nuremberg to ICL, some point to a more direct contribution it made to the law, such as the establishment of the International Criminal Court (henceforth ICC).⁶⁰ In this argument, those supporting the view state that Nuremberg was intended to change the status quo, to send the message as mentioned in the first argument, and as such, it was the first step in a series of steps.⁶¹ Those supporting this state that Nuremberg and its principles have been consistently upheld by the ad hoc tribunals that preceded the ICC and which ultimately led to the ICC itself.⁶² The final statement in support of this view is that very simply, it appears the ICC itself agrees that one of the key factors leading to its existence was Nuremberg, via both statements from its President⁶³ and the entire court itself.⁶⁴ Therefore, it is clear that the IMT has had a significant influence on modern ICL through leading to the establishment of the ICC and base principles of law, such as being that individuals would be prosecuted for their violation of international law. However, these arguments do not represent the entire truth of the discussion; namely, there are key areas where the modern ICL has departed from the IMT.

⁵⁸ Lippman, M. "Nuremberg." [1988] *Law in Context: A Socio-Legal journal* Vol.6(2) 20-44 at page 20.

⁵⁹ Lippman, M. "Nuremberg." [1988] *Law in Context: A Socio-Legal journal* Vol.6(2) 20-44 at page 20.

⁶⁰ "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁶¹ "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021) Part I.

⁶² "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021) Part III.

⁶³ "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁶⁴ "The International Criminal Court at a Glance." Unnamed Author. Accessible at: <https://www.icc-cpi.int/resource-library/documents/iccataglanceeng.pdf> (last accessed on: 28/08/2021) at page 1.

The Counter-arguments

The first such evidence that the IMT's contribution to ICL is not as clear cut as otherwise suggested may be found within Art.33 of the statute of Rome,⁶⁵ which allows under certain conditions⁶⁶ the defence of superior orders. The defence is applicable where an individual is given an order they are legally obliged to follow,⁶⁷ which they did not know was unlawful.⁶⁸ Only where the order was not itself manifestly unlawful,⁶⁹ such as if an order was to carry out genocide or a crime against humanity specifically.⁷⁰

This stance is in stark contrast to Nuremberg, which expressly disallowed any such defence.⁷¹ Such a statement of law provides the basis for what has often been described as one of Nuremberg's key messages: anybody who commits a crime shall be prosecuted, even where that individual is a head of state.⁷² However, on this point, arguably, Art.33⁷³ does not depart from the Nuremberg precedent, for the Nuremberg precedent is not as clear cut as otherwise put.⁷⁴

This argument is as follows; firstly, at the time of the drafting of the Nuremberg Charter, the defence of superior orders was considered and for a time included.⁷⁵ Soviet judge General Nikitchenko explained why the defence was not included.⁷⁶ Namely, Nikitchenko explained

⁶⁵ Art.33 the statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

⁶⁶ Art.33(1) statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

⁶⁷ Art.33(1)(a) Statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

⁶⁸ Art.33(1)(b) Statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

⁶⁹ Art.33(1)(c) Statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

⁷⁰ Art.33(2) Statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

⁷¹ Art.8 The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

⁷² "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

⁷³ Art.33 the statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

⁷⁴ Art.8 The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

⁷⁵ Garraway, C. "Superior Orders and the International Criminal Court: Justice delivered, or justice denied", [1990] International Review of the Red Cross Vol.81(836) . 785-794, at 786.

⁷⁶ Garraway, C. "Superior Orders and the International Criminal Court: Justice delivered, or justice denied", [1990] International Review of the Red Cross Vol.81(836) . 785-794, at 786.

that at the IMT, none of those specific defendants could have possibly claimed the defence due to their seniority.⁷⁷ This explanation establishes that the IMT did not include the defence simply because the IMT did not recognize the defence.

As much as the above argument demonstrates the IMT did not reject the defence, it does not establish an acceptance of the defence, therefore leaving it open to say that inclusion of the defence still separated from precedent. However, the future case heard by the IMT known as the *High Command*⁷⁸ case demonstrates precisely that. The relevant facts of the case are that the defendants were significantly lower ranking than those at Nuremberg; thus, consistent with the insistence of Nikitchenko, the actual relevance of this case, however, is that the judges did accept the defence of superior orders.⁷⁹ This case was decided only two years after the judgement at Nuremberg, still under the purview of the International Military Tribunal, the body which chaired the Nuremberg trial. Therefore, it can be argued that the Nuremberg trial was not departed from by Art.33 of the statute of Rome, but rather than being understood as totally disallowing the defence of superior orders Nuremberg trial should be better understood as omitting ruling on the defence.

This dissertation can conclude that modern ICL has not departed from Nuremberg on the grounds of superior orders; however, it should be noted that the confusion that arose is entirely the IMTs own fault. As stated, the decision was explained through the personal statements of General Nikitchenko⁸⁰ before the IMT was convened.⁸¹ As such, the decision was not made in open court. It was not challengeable, meaning the Tribunal had effectively decided a point of law that the defence had no power to challenge, showing an apparent weakening of the defence's abilities, which shall be explored further within chapter three.

This chapter shall raise two more points, suggesting that ICL has moved on from the Nuremberg trial, departing from it somehow, intentional or not. The first way can be seen in

⁷⁷ Garraway, C. "Superior Orders and the International Criminal Court: Justice delivered, or justice denied", [1990] International Review of the Red Cross Vol.81(836) . 785-794, at 786.

⁷⁸ *United States v Wilhelm von Leeb et al* [1948] 11 NMT Case No.72 Under Control Council Law No.10

⁷⁹ *United States v Wilhelm von Leeb et al* [1948] 11 NMT Case No.72 Under Control Council Law No.10 at 506.

⁸⁰ Garraway, C. "Superior Orders and the International Criminal Court: Justice delivered, or justice denied", [1990] International Review of the Red Cross Vol.81(836) . 785-794, at 786.

⁸¹ Art.8 The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

its handling of Sexual Gender-Based Violence (SGBV).⁸² SGBV as a recognized category of ICL has its origin in the trials heard under the IMT, which gave it formal standing.⁸³ Although given a somewhat muted response,⁸⁴ Nuremberg adequately handled these cases; it has been generally accepted.⁸⁵ However, in more recent times, the broader regime of the ICL have been criticized for their handling of SGBV cases⁸⁶, primarily for a pitiful record of prosecution rates.⁸⁷ In this sense, a departure from the Nuremberg principles by modern law has been demonstrated. Such departure does not seem willing or intentional, but rather Nuremberg seems noticeably more successful in this particular area of law.

However, these are not the only areas in which modern law has moved on from Nuremberg. In many senses, Nuremberg was simply a different type of trial; nothing makes this more evident than comparing the evidential standards used within it. Namely, most of the evidence produced at Nuremberg was written.⁸⁸ This stands in stark contrast to modern trials of the ICC⁸⁹ or even the regional tribunals such as the ICTY, wherein its longest-running case, 434 witnesses were called for a single defendant.⁹⁰ This change has been argued to be indicative of a broader shift in the approach of modern ICL.⁹¹

⁸² SaCouto, S. "Collective criminality and sexual violence: fixing a failed approach." [2020] *Leiden Journal of International Law*. Vol 33(1) 207-241

⁸³ See, Askin, K. "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles." *Berkley Journal of International Law*. Vol.21(2) 288-349 at 302; and *United States v Brandt et al (case 1)* [1946] 1 NMT Case No.1 Under Control Council Law No.10; and *United States v Pohl et al* [1947] 1 NMT case No.4 Under Control Council Law No.10.

⁸⁴ Askin, K. "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles." *Berkley Journal of International Law*. Vol.21(2) 288-349 at 302.

⁸⁵ SaCouto, S. "Collective criminality and sexual violence: fixing a failed approach." [2020] *Leiden Journal of International Law*. Vol 33(1) 207-241 at 207.

⁸⁶ SaCouto, S. "Collective criminality and sexual violence: fixing a failed approach." [2020] *Leiden Journal of International Law*. Vol 33(1) 207-241 at 212.

⁸⁷ SaCouto, S. "Collective criminality and sexual violence: fixing a failed approach." [2020] *Leiden Journal of International Law*. Vol 33(1) 207-241 at 210.

⁸⁸ May, R, Wierda M. "Trends in International criminal evidence: Nuremberg, Tokyo, The Hague and Arusha." [1999] *Columbia Journal of International Law* Vol.37(3) 725-765 at 725.

⁸⁹ Chlevickaite, G et al. "Thousands on the Stand: exploring trends and patterns of international witnesses." [2019] *Leiden Journal of International Law*. Vol.32(4) 819-836 at 819.

⁹⁰ See, *Prosecutor v Karadzic* [2016] IT-95-5/18-T and; Chlevickaite, G et al. "Thousands on the Stand: exploring trends and patterns of international witnesses." [2019] *Leiden Journal of International Law*. Vol.32(4) 819-836 at 819.

⁹¹ Chlevickaite, G et al. "Thousands on the Stand: exploring trends and patterns of international witnesses." [2019] *Leiden Journal of International Law*. Vol.32(4) 819-836 at 822 in table 1.

This dissertation now points to the fact that trials such as Nuremberg⁹² and trials more generally dealing with war crimes or crimes against humanity⁹³ are accepted to have a common purpose; namely, they are associated with a civilizing idea⁹⁴ with a specific focus on ideological⁹⁵ "enlightenment." ⁹⁶ Academics have suggested a shift from an "anti-imperial narrative"⁹⁷ to a "poststructuralist"⁹⁸ narrative concerning this enlightenment since Nuremberg.⁹⁹ The change in narratives explains many differences from the IMT to modern ICL, demonstrating the move from focusing on efficiency to the human element. ¹⁰⁰

The departure from the IMT may be demonstrated through the difference in approaches to evidence between the Nuremberg trial and later tribunals, indicating both an ideological and practical shift.

In conclusion of chapter two, it is clear that the modern field of International Criminal Law has a heavy connection with the Nuremberg trial, being significant in the formation of the ICC¹⁰¹ and key in sending the message that nobody is beyond the law.¹⁰² Despite a lack of

⁹² Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 at 803

⁹³ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 at 804

⁹⁴ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 at 804

⁹⁵ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 803-804

⁹⁶ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 at 803

⁹⁷ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 at 803

⁹⁸ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 at 803.

⁹⁹ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 803

¹⁰⁰ Chlevickaite, G et al. "Thousands on the Stand: exploring trends and patterns of international witnesses." [2019] *Leiden Journal of International Law*. Vol.32(4) 819-836 at 821.

¹⁰¹ See, "The International Criminal Court at a Glance." Unnamed Author. Accessible at: <https://www.icc-cpi.int/resource-library/documents/iccataglanceeng.pdf> (last accessed on: 28/08/2021) at page 1 and; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

¹⁰² "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 28/08/2021)

clarity within its precedent,¹⁰³ the trial has set a precedent still followed by modern law.¹⁰⁴ Of the similarities noted, only two noteworthy significant differences between Nuremberg and current practice could be mentioned; the first is clearly unintentional.¹⁰⁵ The second difference in how witnesses are treated is clearly not simply a misunderstanding but rather indicative of a tonal shift within the law.¹⁰⁶ Overall, this chapter finds that the modern ICL is strongly connected with the law established at Nuremberg; the only notable differences are through misinterpretation or a change in the overall theory of how best to approach victims of a crime.¹⁰⁷ However, despite these differences, the strong relationship between the ruling of the IMT and modern ICL can still clearly be seen through the very fact of the ICC's existence.

This chapter concludes that the modern ICL has a strong relationship with the laws established at Nuremberg, as encapsulated in the fact that the modern vessel of ICL¹⁰⁸ owes its existence thanks to the ruling of the IMT.¹⁰⁹ As may be further demonstrated through the fact that it is accepted that the IMT paved the way by deciding individuals would be held liable for their breaches of international law.¹¹⁰ This relationship highlights the value that can be found in an assessment such as that within this dissertation.

¹⁰³ Garraway, C. "Superior Orders and the International Criminal Court: Justice delivered, or justice denied", [1990] *International Review of the Red Cross* Vol.81(836) . 785-794, at 786.

¹⁰⁴ Art.33 the statute of Rome. 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

¹⁰⁵ SaCouto, S. "Collective criminality and sexual violence: fixing a failed approach." [2020] *Leiden Journal of International Law*. Vol 33(1) 207-241

¹⁰⁶ Chlevickaite, G et al. "Thousands on the Stand: exploring trends and patterns of international witnesses." [2019] *Leiden Journal of International Law*. Vol.32(4) 819-836 at 822 in table 1

¹⁰⁷ Alexander, A. "New histories and new laws: crimes against humanity at the international Criminal tribunal for Rwanda." [2019] *Leiden Journal of International Law*. Vol.32(4) 801-818 at 804

¹⁰⁸ "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

¹⁰⁹ "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

¹¹⁰ Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290 or; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844.; "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international->

Chapter three: The IMT and base standards of law

This dissertation has so far covered the factual and legal context of the IMT; however, the key focus of this dissertation is to provide an assessment of the IMT. Chapter three shall be intended to provide such an assessment on general legal principles, leaving out the key issue of justiciability until chapter four. The fundamental purpose of this chapter shall be to provide an understanding of the wider issues associated with the IMT; in doing so, this chapter shall first introduce the concept of justiciability. However, such an introduction shall be brief and only differentiate the matters discussed here from justiciability; a further and far more in-depth introduction shall be given in chapter four.

In dealing with the criticisms of the IMT, three broad categorizations may be given to them, none being exclusive. Firstly, there are criticisms that the IMT did not provide an adequately fair trial; the Allies made it clear that they intended the IMT to provide a fair trial¹¹¹ or at very least hoped to provide such an image to the German populace.¹¹² The second common trend is to attack the IMT's perceived exceptionalism. For instance, the IMT allowed or disallowed a particular defence despite that defences otherwise generally accepted perception.¹¹³ Thirdly are the criticisms that accuse the IMT of dealing with matters that would not properly fall within a court's remit; however, these are matters of justiciability and will be left to chapter four.

This chapter shall now briefly introduce justiciability to clarify what will not be discussed here; justiciability has a strong association with the rule of law.¹¹⁴ A violation of justiciability will demonstrate a breach of the rule of law.¹¹⁵ Justiciability may be

[criminal-law/](#) (last accessed on: 30/08/2021 ; Finch, G. "The Nuremberg Trial and International Law." [1947] The American Journal of International Law Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021

¹¹¹ Smith, B F. *Reaching Judgement at Nuremberg*. (1st ed, New York: Basic Books, Inc. Publishers 1977) at page 300

¹¹² Guidelines on Public interactions, AGWAR to Office, Military Government, United States, October 6th 1946. As may be found in Smith, B F. *Reaching Judgement at Nuremberg*. (1st ed, New York: Basic Books, Inc. Publishers 1977) at page 344.

¹¹³ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] Leiden Journal of International Law. Vol.32(2) 315-331.

¹¹⁴ Endicott, T. "The reason of law." [2003] American Journal of jurisprudence Vol.48(1), 83-106 at 97.

¹¹⁵ Endicott, T. "The reason of law." [2003] American Journal of jurisprudence Vol.48(1), 83-106 at 97.

understood better through the term justiciable. Justiciability is a question of whether a matter is justiciable. An issue is justiciable if it is "*proper to be examined by the courts.*"¹¹⁶ Therefore justiciability can include any argument¹¹⁷ relating to whether the IMT was proper to be dealing with a matter.¹¹⁸

This chapter shall now begin its assessment of the IMT: firstly, through looking at the IMT's confused application of a critical defence; secondly, through an examination of the philosophy and intention behind the IMT; thirdly, this chapter shall look to the specific practice of the court concerning its prosecution; finally, this chapter shall conclude via examining the possible violation of the principle of non-retroactivity by the statutes establishing the court. Thus, exploring the precedent set by the court, the theory behind the court, the court's trial practice, and the court's authority, thus providing a substantive analysis.

The first point this chapter shall raise concerning evaluating the IMT is its confused response to a key defence raised by one of the defendants. Karl Doenitz was the most decorated German admiral at the end of the war,¹¹⁹ who was the chief of Germany's U-boat program¹²⁰ and direct deputy to chief Admiral Raeder.¹²¹ This matter is relevant as it provided the basis for his charging.¹²² The specific indictment in question was count two;

¹¹⁶ "*Justiciable*", Jowitt's Dictionary of English Law 5th ed. 1 August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/I5BF12F72DDE011DF9E3AE052EB33E74D/View/FullText.html> (last accessed on: 28/08/2021)

¹¹⁷ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 983.

¹¹⁸ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 983.

¹¹⁹ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 4.

¹²⁰ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 4.

¹²¹ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 4.

¹²² Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 5.

war crimes¹²³ via engaging in aggressive submarine warfare,¹²⁴ in violation of the London naval treaty.¹²⁵

Tu quoque

The critical issue arises concerning Doenitz's defence, the 'tu quoque' defence, which translates from Latin to 'you too.'¹²⁶ The defence's history begins at Nuremberg;¹²⁷ however, since the events of the IMT has been raised explicitly in trials of international criminal law 'where a victor of a conflict wishes to prosecute the vanquished'.¹²⁸ The summation of the defence is that it would be inequitable¹²⁹ to prosecute a defendant for a crime that the prosecuting power had also committed.¹³⁰ It has been argued that a prosecution that falls foul of this defence demonstrates a bias and ideas of victors' justice.¹³¹ Doenitz's defence is the first widely recognized usage of this principle.¹³²

The controversy of this defence and its treatment by the IMT rests on the fact that the defence is utterly rejected by ICL.¹³³ Yet, it continues to be raised, such as by Slobodan Milosevic and Saddam Hussein.¹³⁴ Each time this defence has been raised, counsel cite the

¹²³ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 .

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

¹²⁴ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at;

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 3.

¹²⁵ Art. 22 The London Naval Treaty 1930.

¹²⁶ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at;

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 1.

¹²⁷ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 316.

¹²⁸ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 315

¹²⁹ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 319

¹³⁰ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 316.

¹³¹ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 316.

¹³² Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 316.

¹³³ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 315.

¹³⁴ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 316

IMT's judgement.¹³⁵ This in itself would not be an issue; however, the defence teams both specifically noted the 'highly unusual'¹³⁶ decision the Tribunal took regarding Doenitz's defence. Doenitz was found guilty on count two of aggressively engaging in submarine warfare, but the Tribunal refused to impose a sentence due to his defence.¹³⁷ The Tribunal accepted evidence that the United States had been involved in comparable actions in the Pacific.¹³⁸ This stands out as even stranger when considering the Ministries trial, which was also held under the IMT only two years later.¹³⁹ The Ministries trial also considered the defence but rejected it in its entirety and imposed the full sentence.¹⁴⁰

Therefore, examining the tu quoque defence clearly demonstrates how the IMT made two contradictory precedential statements. Although despite this, some argue that the IMT made a clear statement of law. These academics refer to the arguments made by the defendants mentioned above as 'shaky'¹⁴¹ and primarily base their analysis on the fact that Doenitz did receive a guilty verdict.¹⁴² The argument of said academics follows that: as Doenitz received a guilty verdict, his defence must have been rejected. However, these academics do not address that the IMT took a different approach only two years later when faced with the same defence.¹⁴³

¹³⁵ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 2.

¹³⁶ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 2.

¹³⁷ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 2.

¹³⁸ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 10.

¹³⁹ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 315.

¹⁴⁰ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 315.

¹⁴¹ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 2.

¹⁴² Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 2.

¹⁴³ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 315.

This differentiated approach implies one of two possibilities. Firstly, that at Nuremberg, the IMT made a mistake by not imposing the full sentence on Doenitz. Secondly, the IMT made no mistake but that the tu quoque defence allows for situations where a court may find a defendant guilty but not impose a sentence, thus making the tu quoque defence a partial defence, for it still betters the defendant's case. The two possibilities are that firstly, the IMT made a mistake or that secondly, the IMT did not make a mistake but did not clearly explain their judgement, both results highlighting the apparent issues with the IMT.

Faced with this, however, there are possible arguments to defend the IMT. Firstly, it could be argued that the Allies did not engage in any actions like that of Germany's and that the tu quoque defence would, for that reason, not apply. However, this argument fails with even the slightest exploration of the war crimes the allied powers have been accused of. Such as the bombing of Dresden, the Katyn forest massacre or the atomic bombings of Japan.¹⁴⁴ Even more damning on this matter is the specific directive to allied troops at the end of the war. They were to intentionally turn to more brutal tactics,¹⁴⁵ with Winston Churchill specifically naming vengeance as their primary aim.¹⁴⁶ All of these represent situations where prima facie, the defence of 'tu quoque,' could well be argued to apply.

However, the tu quoque defence is not merely limited to potential application to war crimes. The Allies can also be argued to have committed crimes against humanity, specifically regarding the internment of Japanese Americans. This process spanned from 1942¹⁴⁷ to 1948,¹⁴⁸ to which even the U.S. president referred to as internment within concentration camps.¹⁴⁹

Further, it should be pointed out that the tu quoque defence is not accepted as a legal defence. However, this does not imply anything upon its practical application in academic criticism. The theory behind the defence applies in line with most conceptions of the rule of

¹⁴⁴ Smith, B F. *Reaching Judgement at Nuremberg*. (1st ed, New York: Basic Books, Inc. Publishers 1977) at 302..

¹⁴⁵ Smith, B F. *Reaching Judgement at Nuremberg*. (1st ed, New York: Basic Books, Inc. Publishers 1977) at 302.

¹⁴⁶ Speech given to London County Council, July 14th 1941, Winston Churchill. As found in Smith, B F. *Reaching Judgement at Nuremberg*. (1st ed, New York: Basic Books, Inc. Publishers 1977) at page 302.

¹⁴⁷ Bingham, T. "Personal Freedom and the dilemma of democracies." [2003] *International Comparative Law Quarterly*, Vol.52(4) 841-858 at 843.

¹⁴⁸ ¹⁴⁸ Bingham, T. "Personal Freedom and the dilemma of democracies." [2003] *International Comparative Law Quarterly*, Vol.52(4) 841-858 at 844.

¹⁴⁹ Persico, J. *Roosevelt's secret war: FDR and World War Two espionage*. (1st ed, New York: Random House 2001 at 169.

law, which state that an individual who is tried should be treated equally to all those in like situations.¹⁵⁰

Therefore, this chapter concludes on the tu quoque defence, highlighting two different weaknesses of the IMT. It demonstrates the failure of the IMT to provide for a fair trial, thus undermining the eventual verdicts. Secondly, this defence, in particular, highlights the weaknesses present within the precedent of the IMT, which, as discussed in chapter two, went on to inform much of modern ICL¹⁵¹ and this way undermines the areas of modern ICL that find their heritage in the IMT.

Victors' Justice

The second issue this chapter shall discuss is the broader issues associated with victors' justice. As already stated, the tu quoque defence has a strong association with victors' justice. However, the defence does not cover all elements of victors' justice. To better understand victors' justice, this chapter shall explore its origins. The term itself may find its origins in the works of historian Robert Minear¹⁵² and may primarily be understood as a critique of a court's intentions.¹⁵³

The focus of the critique is premised on the idea that a just court should primarily be concerned with notions of justice above all else. The critique further states that if a court is demonstrated to have any interest other than justice, this may be criticized. This chapter shall now briefly introduce the idea of justice itself. The primary tenet of justice is that all

¹⁵⁰ "The Rule of Law", Stroud's Judicial Dictionary 10th ed. 1st April 2021. Available on Westlaw at; <https://uk.westlaw.com/Document/I8E3C8600E12B11E1A758F278D4A11216/View/FullText.html> (last accessed on: 28/08/2021)

¹⁵¹ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] Leiden Journal of International Law Vol.34(2) 283-290 or ; Tomuschat, C. "The Legacy of Nuremberg." [2006] Journal of International Criminal Justice Vol.4(4) 830-844. Or ; "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) Or ; Finch, G. "The Nuremberg Trial and International Law." [1947] The American Journal of International Law Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

¹⁵² Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971.

¹⁵³ Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971.

before the court are equal¹⁵⁴ and are therefore pursued with proportionate ferocity to each other.¹⁵⁵ Secondly, justice requires that a court pursues its actions for reasons legitimate to the law.¹⁵⁶ Any deviation from this ideal can be criticized under Minear's works.¹⁵⁷

Specifically, on victors' justice, the critique is primarily raised where one power who has vanquished another¹⁵⁸ now brings prosecutions against the vanquished power.¹⁵⁹ A further requirement of victors' justice is that the motivation behind a prosecution can be demonstrated to be a political one;¹⁶⁰ this on its own would be incredibly damaging to the IMT's reputation for its consistent insistence that it had entirely legal aims.¹⁶¹

However, this is yet another place where a possible defence of the IMT may be shown, for it is true to say that the *tu quoque* defence demonstrates a potential for victors' justice. Still, 'tu quoque' does not speak to the political intention required to demonstrate victors' justice.¹⁶² The intention must now be examined, for there are numerous other potential explanations, such as perhaps misinformation.

In demonstrating that the IMT did have a political motivation behind its prosecutions, this chapter would suppose that it would be enough to establish a lack of legal intention. On the

¹⁵⁴ "Justice", Jowitt's Dictionary of English Law 5th ed. 1st August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/ISBEFA8D0DDE011DF9E3AE052EB33E74D/View/FullText.html> (last accessed on: 28/08/2021)

¹⁵⁵ "Justice", Jowitt's Dictionary of English Law 5th ed. 1st August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/ISBEFA8D0DDE011DF9E3AE052EB33E74D/View/FullText.html> (last accessed on: 28/08/2021)

¹⁵⁶ "Justice", Jowitt's Dictionary of English Law 5th ed. 1st August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/ISBEFA8D0DDE011DF9E3AE052EB33E74D/View/FullText.html> (last accessed on: 28/08/2021)

¹⁵⁷ Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971.

¹⁵⁸ Zolo, D. *Victors' Justice: Frome Nuremberg to Baghdad*. (1st ed, London: Verso Publishing 2009), prelude page xii

¹⁵⁹ Zolo, D. *Victors' Justice: Frome Nuremberg to Baghdad*. (1st ed, London: Verso Publishing 2009), prelude page xii

¹⁶⁰ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331, at 317

¹⁶¹ Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants*. (1st ed, London: Her Majesty's Stationery Office on the authority of the Attorney General 1946) at page 3.

¹⁶² Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331, at 317

basis that with the amount of 'political clout'¹⁶³ required to form an international trial, it would leave a political purpose as the next most likely answer. In evidence of this claim of lack of legal intention, this dissertation submits a memorandum produced by an aide one of the delegations of the London conference;¹⁶⁴ the conference where the London Charter, which laid the blueprints for the Nuremberg Charter, was drafted.¹⁶⁵ The memorandum may be found in the works of Minear, who was not himself a lawyer but, as mentioned, a well-established historian. The particularly damning part of the memorandum is where the aide states that "international law did not permit"¹⁶⁶ the prosecutions. The legality of these prosecutions will be discussed both later this chapter but also in chapter four. However, what can be said now is that clearly, receiving a memorandum as damning as this raises further questions about the intentions behind the court's actions.

This memorandum demonstrates a leaning towards victors' justice because the Allies appeared to be aware of the lack of legal grounds to pursue the defendants yet felt they had the right to pursue them, nonetheless. This further points to a political intention for a state primarily yields either legal or political power.

The trial of organizations

The next matter this chapter shall discuss is the prosecution of organizations before the IMT and the suitability of the defence provided by the IMT. When the London conference declared who would form the categories of defendants before the IMT, it declared 24 men and six organizations.¹⁶⁷ These organizations included the S.S., the Reichskabinett, the leadership of the Nazi party and even the German High Command.¹⁶⁸ On the face of it, these trials were confusing at first, with neither the French nor Russian judges having any

¹⁶³ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 318.

¹⁶⁴ Minear, R. *"Victors' Justice: the Tokyo war crimes trial."* (1st ed, Princeton NJ: Princeton University Press 1971) at page 9.

¹⁶⁵ Minear, R. *"Victors' Justice: the Tokyo war crimes trial."* (1st ed, Princeton NJ: Princeton University Press 1971) at page 9.

¹⁶⁶ Minear, R. *"Victors' Justice: the Tokyo war crimes trial."* (1st ed, Princeton NJ: Princeton University Press 1971) at page 9.

¹⁶⁷ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg.* (1st ed, New York: The Macmillan Company 1967) at page 15.

¹⁶⁸ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg.* (1st ed, New York: The Macmillan Company 1967) at page 553.

domestic precedent on prosecuting organizations.¹⁶⁹ The closest being a Soviet law that allowed the prosecution of the members of an organization.¹⁷⁰ However, that was what was remarkable about the IMT's decision to prosecute these organizations; they were not yet trying the individuals related to the organizations but the organizations themselves as legal entities.¹⁷¹

Before this chapter shall engage with the numerous issues raised by these prosecutions, the process by which each organization were prosecuted shall be outlined.

For each organization, there was a definition given to determine who would be included within the membership of that organization.¹⁷² Each organization was then charged on all four counts of the indictment.¹⁷³ One key point that can be noticed here is the extremely broad nature of some of these definitions; for example, the Korps der politischen, the leadership of the Nazi Party, which included "Political leaders of any grade or rank."¹⁷⁴ Such extremely broad definitions led to extremely high proportions of the German public being impacted by the IMT's rulings. Further, each organization was assigned a lawyer based upon

¹⁶⁹ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 16.

¹⁷⁰ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 16.

¹⁷¹ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 .
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)
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¹⁷² *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 .
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¹⁷³ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 .
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¹⁷⁴ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 .
Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)
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that lawyer's existing client and any perceived relationship between that client and the organization.¹⁷⁵

It is here that this chapter can begin its first analytical point of the prosecution of organizations, namely that the trial of organizations was a waste of time. To start, as noted by the Russian parties to the Tribunal, all 6 organizations had already ceased to exist by the time of the Nuremberg trial.¹⁷⁶ This left open the question as to why these groups were to be prosecuted. However, we know it was not to merely declare the groups criminal as such an argument was handled by General Nikitchenko, who pointed out that the S.S. and S.A. had already been declared criminal organizations by higher authorities.¹⁷⁷ The above highlights a clear failing of the IMT, namely that the prosecution of organizations had little beneficial purpose.

However, the Tribunal gave one other reason: the indictment of the entities as organizations reduced the burden on the IMT.¹⁷⁸ This was because if an organization was found guilty, then when any individual who was deemed a member of that organization was brought to trial, their membership could be used as prima facie evidence of their guilt of the crimes in question.¹⁷⁹ This is a clear violation of the most basic principle of a burden of proof.¹⁸⁰ In such circumstances where an individual was found prima facie guilty, it was up to them to prove their innocence,¹⁸¹ clearly in breach of traditional ideas of justice.

Further, criticisms may be said on this approach to the extent that it engaged the IMT with the practice of collective guilt.¹⁸² This may be seen as to the number of individuals these

¹⁷⁵ Regulation 2(c), *Rules and procedure for the trial of German Major War criminals*. Rules of procedure (29th October 1945) Nuremberg Trial Proceedings Vol.1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtrules.asp> (last accessed on: 28/08/2021)

¹⁷⁶ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 16

¹⁷⁷ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 16

¹⁷⁸ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 553.

¹⁷⁹ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 553.

¹⁸⁰ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 553.

¹⁸¹ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 553.

¹⁸² Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

indictments affected. It has been estimated that by the definitions the Tribunal used of membership of only the S.A. and S.S., nearly 9 million Germans would have been found prima facie guilty.¹⁸³ Meaning up to a quarter of Germany's population was affected by this.¹⁸⁴ Collective guilt is generally looked down upon in this sense regarding how it would be preposterous to claim all 9 million people committed war crimes.¹⁸⁵

This criticism becomes even graver when considering the argument of defence lawyer Kubuschok, being that under the rulings of the IMT, the sentences which would have been liable to these 9 million people included possibly the death penalty.¹⁸⁶ This dissertation does not suggest that the IMT intended to provide the death penalty to 9 million people but merely highlights the ridiculousness of the effect this IMT decision had.

This approach could arguably have a defence, namely, not overwhelming the Tribunal is a valid judicial concern to avoid the risk of the Tribunal ceasing up and not being able to process worthwhile cases. However, one would reject such defence of the IMT's approach unless it could be demonstrated that the IMT protected the right to an adequate and proper defence. For only in such circumstances where a proper defence is given can proper security in prosecution be assured. If the prosecutions provided to the organizations and as such the prima facie findings were unsafe, then no saving of time would have been achieved. For the reasons as shall be discussed, this counter-argument may, however, be rejected.

Notable, the lawyers assigned to the organizations had to split their attention. Many also defended other key defendants in the case, thus burdening them even though there was only a limited time given to defend each organization when compared with their counterparts.¹⁸⁷

Generally, a defence counsel was assigned an organization based on the perceived relationship between their material client and a specific organization. However, as may be

¹⁸³ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

¹⁸⁴ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

¹⁸⁵ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

¹⁸⁶ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

¹⁸⁷ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 555.

demonstrated by the association of Hermann Goring and the Gestapo, this approach had evident failings.¹⁸⁸ Goring had founded the Gestapo but was replaced as its leader in 1936,¹⁸⁹ which meant Goring had only been the organisation's leader for 16% of its existence. This issue of loose relationships has been noted as a cause of specific poor examples of defences,¹⁹⁰ thus demonstrating how it undermined the defence in general.

However, there are further examples of failings in providing rights to the defence, such as demonstrated in the defences' attempts to call witnesses. The defence managed to issue 300,00 affidavits¹⁹¹, a number that, when compared to the 9 million defendants¹⁹², soon sinks into insignificance. Beyond this, there is clear evidence of issues in calling witnesses, as seen in the noted Soviet rejection of witness requests on questionable grounds.¹⁹³ This failing is made all the more damning when considering the cursory relationship many defendants had with organizations, harming the defence's chances at providing proper witnesses to their organizations' actions.¹⁹⁴

The second issue is one of "chief importance,"¹⁹⁵ namely the quality of the witnesses. Many Germans had just lived through 12 years of Nazi rule, where the slightest criticism of the S.S. or S.A. could lead to execution. As such, when put on the stand, many Germans were still in the mindset of being unable to provide honest answers concerning these groups.¹⁹⁶ It has further been suggested that the Nazi disinformation campaign may be to blame for these

¹⁸⁸ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 555.

¹⁸⁹ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 555

¹⁹⁰ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 555

¹⁹¹ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 555

¹⁹² Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 555.

¹⁹³ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

¹⁹⁴ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

¹⁹⁵ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

¹⁹⁶ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556.

witnesses confusion. However, what cannot be confused is that these "hapless defenders"¹⁹⁷ considerably damaged the defence's case.¹⁹⁸

This second criticism demonstrates a clear inability for the defence to put a proper defence argument to the court, for not all the evidence they required to make their case was granted to them.

The third and final criticism that may be levelled at the prosecution of the organizations is the precedent on which the prosecutions were based. The key predication of this dissertation and much of legal academia is that a decision may be judged on the precedent it is based off. This dissertation puts forth that much of the precedent the prosecution of organizations was based off was deeply flawed.

As already stated, neither the USSR nor France had precedent on the criminalization of organizations.¹⁹⁹ As such, the two precedents came from the USA and the U.K., both of which shall be touched upon separately.

Firstly, the precedent of the U.K. was based on the British India Act 1836, which made it a crime punishable by life imprisonment to be a member of the Thuggee.²⁰⁰ However, three matters make this precedent less than ideal for the Nuremberg trial: firstly, the Thuggee were a particular criminal organization that required an individual to commit a violent offence before they would be deemed a member,²⁰¹ a factor which none of the organizations shared at Nuremberg, in fact, the British India Act 1836 mentions the Thuggee by name.²⁰² Secondly, the British India Act did not make it simply punishable to be a member of the Thuggee, for it had to be demonstrated that an individual in question had

¹⁹⁷ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 556

¹⁹⁸ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 557.

¹⁹⁹ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg*. (1st ed, New York: The Macmillan Company 1967) at page 15

²⁰⁰ S.1 British India Act 1836

²⁰¹ See, "Thuggee and the Margins of the state in Early Nineteenth century Colonial India." Tom Lloyd, University of Edinburgh. Accessible at: <http://www.csas.ed.ac.uk/mutiny/confpapers/Lloyd-Paper.pdf> (last accessed on: 26/08/2021) at page 10 and; "Thuggee and the Margins of the state in Early Nineteenth century Colonial India." Tom Lloyd, University of Edinburgh. Accessible at: <http://www.csas.ed.ac.uk/mutiny/confpapers/Lloyd-Paper.pdf> (last accessed on: 26/08/2021) at citation 46

²⁰² S.1 The British India Act 1836

committed a violent offence,²⁰³ a further matter not included within its IMT counterpart. Thirdly, the British India act specifically limited its application to India, demonstrating it was not intended to create broad principles of law.²⁰⁴ Finally, the British rule in India was well known to itself be a violation of modern ICL.²⁰⁵ This chapter supposes that it would be ridiculous that in the prosecution of crimes against humanity,²⁰⁶ an act that is itself a part of the enterprise of crimes against humanity could be listed as proper authority.

The U.S. precedent was based on two laws: first, the set of laws that outlawed the Klu Klux Klan. Secondly, the law passed in 1940 made it a crime for anybody to organize or knowingly join a society with the expressed intention of overthrowing the government by force.²⁰⁷

On the first of these, it is hard to see any resemblance between that and the law employed at Nuremberg, for such laws further required one to understand the organisation's purpose;²⁰⁸ the IMT did not include such an element.²⁰⁹ This is a criticism that may be spread to both American authorities, which the IMT cites. Further, on this point, it was ruled that both American authorities required proof of actual wrongdoing of the individuals in question,²¹⁰ again clearly distinguishing the authorities from the IMT.

Therefore, it may be demonstrated that the IMT did not have the proper authority to pursue the prosecution of organizations. Further, this casts doubt on the ability of the IMT to grant

²⁰³ "Thuggee and the Margins of the state in Early Nineteenth century Colonial India." Tom Lloyd, University of Edinburgh. Accessible at: <http://www.csas.ed.ac.uk/mutiny/confpapers/Lloyd-Paper.pdf> (last accessed on: 26/08/2021) at citation 46.

²⁰⁴ S.3 British India Act 1836.

²⁰⁵ See, Stahn, C. "Reckoning with colonial injustice: international law as culprit and as remedy?" [2020] Leiden Journal of International Law. Vol.33(4) 823-835 at 832. Or; "Saying Sorry to India: Reparations or Atonement" Shashi Tharoor, Harvard International Law Journal (Not published). Accessible at: <https://harvardilj.org/wp-content/uploads/sites/15/Tharoor-Reparations.pdf> (last accessed on: 26/08/2021) at page 3. Or; Evans, C. The right to reparation in international law for victims of armed conflict. (1st ed, Cambridge: Cambridge University Press 2012) at page 143.

²⁰⁶ See, Stahn, C. "Reckoning with colonial injustice: international law as culprit and as remedy?" [2020] Leiden Journal of International Law. Vol.33(4) 823-835 at 832. Or; "Saying Sorry to India: Reparations or Atonement" Shashi Tharoor, Harvard International Law Journal (Not published). Accessible at: <https://harvardilj.org/wp-content/uploads/sites/15/Tharoor-Reparations.pdf> (last accessed on: 26/08/2021) at page 3. Or; Evans, C. The right to reparation in international law for victims of armed conflict. (1st ed, Cambridge: Cambridge University Press 2012) at page 143.

²⁰⁷ Davidson, E. The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg. (1st ed, New York: The Macmillan Company 1967) at page 553.

²⁰⁸ S.6 Enforcement Act (The civil rights act) 1871

²⁰⁹ Regulation 2(c), *Rules and procedure for the trial of German Major War criminals*. Rules of procedure (29th October 1945) Nuremberg Trial Proceedings Vol.1

²¹⁰ *Brandenburg v Ohio* (1969) 395 US 444

a fair defence to the defendants in question. For not only was the prosecution's authority improper, but the defence was not given adequate opportunities to make a proper defence. As further exacerbated by the matter that an improperly applied authority cannot be attacked as easily for its reasoning simply does not follow.

As such, in conclusion on organizations, there are three separate conclusions which may be reached. Firstly, the IMT was clearly in the practice of guilt by association, leading to 9 million people having their rights to remain innocent until proven guilty violated. Secondly, the IMT failed to provide any basis for a proper defence, specifically to the organizations who, as mentioned, bore a heavier burden than the other defendants, for their verdicts affected so many people. Finally, the very precedents that the IMT based these prosecutions off were themselves, in general, in violation of principles of international law.

Non-Retroactivity

This chapter has so far examined the court itself; in both its intention and its conduct. Now, this chapter shall turn its attention to the authority the court based itself on, the Nuremberg Charter and its relationship with the principle of non-retroactivity.

Non-retroactivity is the principle that law should not apply in retrospect, meaning law should only affect situations that occurred after that law's passing.²¹¹ A law that does refer in retrospect is referred to as "ex post facto" law.²¹² The principle that law should not apply in retrospect is widely recognized in the modern world²¹³ and has specific recognition within human rights treaties,²¹⁴ criminal law,²¹⁵ international criminal law²¹⁶ and has even been referred to as "*an essential element of the rule of law.*"²¹⁷ This widely recognized

²¹¹ Kyvoj, Y, Matos, S. "Non-retroactivity as a general principle of law." [2021] Utrecht Law Review. Vol17(1) 46-58 at 46

²¹² Minear, R. "*Victors' Justice: the Tokyo war crimes trial.*" (1st ed, Princeton NJ: Princeton University Press 1971.) at 370.

²¹³ Kyvoj, Y, Matos, S. "Non-retroactivity as a general principle of law." [2021] Utrecht Law Review. Vol17(1) 46-58 at 48

²¹⁴ See, Art.11(2) The Universal Declaration of Human Rights 1948, G.A Res 217A; Art.15(1) The international covenant on civil and political rights 1966

²¹⁵ Kyvoj, Y, Matos, S. "Non-retroactivity as a general principle of law." [2021] Utrecht Law Review. Vol17(1) 46-58 at 50

²¹⁶ Art.24 "Statute of Rome." 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

²¹⁷ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185.

acceptance of the principle demonstrates just how damning it would be if the IMT was found to breach this basic principle.

The principle originated in Roman law²¹⁸ and was primarily concerned with preventing the prosecution of individuals for matters not expressly prohibited by the law,²¹⁹ thus preventing the overreach of a state's power.²²⁰ The issue of whether the IMT breached the principle of non-retroactivity has been explicitly raised regarding crimes against peace and crimes against humanity.²²¹ The critical issue for consideration is whether the London Charter was only declaratory of pre-existing customary law or an ex post facto statement.²²²

This issue can be elaborated on by looking at the case of *Kononov*,²²³ a 2010 human rights case concerning itself with possible war crimes. A key issue in the case was whether the London Charter and, therefore, the law established by the IMT was ex post facto.²²⁴ The summary of the argument in the case was that; the applicant, who was a Russian partisan in 1944, ordered the summary execution of Latvian citizens. Latvian authorities then prosecuted him under numerous different international charters, including the Charter of the IMT.²²⁵ In subsequent of this, he then appealed to the European Court of Human Rights on the ground that the Charter of the IMT was ex post facto and therefore infringed his right to a fair trial.²²⁶

The key issue of the *Kononov* case for our purposes was as to whether the Charter was merely a summary of the previous law, such as the Hague Convention and regulations.²²⁷ In conclusion of their judgement, the European court concluded that the Charter of the IMT

²¹⁸ Kyvoi, Y, Matos, S. "Non-retroactivity as a general principle of law." [2021] Utrecht Law Review. Vol17(1) 46-58 at 49

²¹⁹ Kyvoi, Y, Matos, S. "Non-retroactivity as a general principle of law." [2021] Utrecht Law Review. Vol17(1) 46-58 at 46

²²⁰ Kyvoi, Y, Matos, S. "Non-retroactivity as a general principle of law." [2021] Utrecht Law Review. Vol17(1) 46-58 at 49

²²¹ Minear, R. "*Victors' Justice: the Tokyo war crimes trial.*" (1st ed, Princeton NJ: Princeton University Press 1971.) at 370

²²² "Was Nuremberg a violation of the principle of legality?" Marko Milanovic, Blog of the European Journal of International Law. Accessible at: <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/> (last accessed on: 26/08/2021)

²²³ *Kononov v Latvia* [2010] ECtHR App No. 36376/04

²²⁴ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 see join concurring opinion of judges Rozakis, Tulkens, Spielmann and Jebens at 2

²²⁵ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 32.

²²⁶ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 3.

²²⁷ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 118

was not *ex post facto*²²⁸ and that both it and the Nuremberg principles²²⁹ were merely a summary of the preceding law. In this decision, they cited the long history of the legal persecution of war crimes dating back to the

Lieber code of 1863.²³⁰ However, this majority judgement has faced criticisms from both academics²³¹ and the judiciary.²³²

The majority judgement's opinion summarises that the silence of international law on the matter of individual responsibility for war crimes meant it could not be said that the Nuremberg ruling was a change in the law. That is to say that the absence of a contradictory statement of law means that it cannot be said that the law was any different before the IMT ruled on the matter; the dissenting opinion states that this is wrong.²³³ Both this dissenting opinion and the later dissenting opinion jointly conclude that Nuremberg changed the law to such an extent that it was effectively a new law regarding individual responsibility to war crimes.²³⁴ In support of this, chapter two discussed how the IMT had been the first time individuals were prosecuted for war crimes in the 18th or 19th century.²³⁵

In the assessment of this dissertation; and the assessment of most academics, it seems clear that the IMT at Nuremberg did change how ICL approached these cases;²³⁶ notably, the chief prosecutor, Justice Jackson, pointed to this as the singular most important

²²⁸ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 207

²²⁹ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 208

²³⁰ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 207

²³¹ See "Was Nuremberg a violation of the principle of legality?" Marko Milanovic, Blog of the European Journal of International Law. Accessible at: <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/> (last accessed on: 26/08/2021) and; Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971.) at 370

²³² *Kononov v Latvia* [2010] ECtHR App No. 36376/04 see join concurring opinion of judges Rozakis, Tulkens, Spielmann and Jebens.

²³³ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 see join concurring opinion of judges Rozakis, Tulkens, Spielmann and Jebens at 4.

²³⁴ See *Kononov v Latvia* [2010] ECtHR App No. 36376/04 see join concurring opinion of judges Rozakis, Tulkens, Spielmann and Jebens at 4 or ; *Kononov v Latvia* [2010] ECtHR App No. 36376/04 see join concurring opinion of judges Costa, Kalaydjieva and Poalelungi at 8.

²³⁵ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

²³⁶ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

contribution of the IMT.²³⁷ Moreso, there is also no shortage of academic criticism of the judgement.²³⁸ For instance, academics point to the fact that the IMT's judgement relegated the idea of ex post facto law to a non-binding principle.²³⁹ In examining this, one would question whether such a fundamental principle²⁴⁰ would be trivialized if not directly relevant; this dissertation argues that the IMT's minimalization of the principle was for the fact that the IMT was more than aware it was applying ex post facto law.

This is not to say that there is no defence to relying on ex post facto law. For it has often been documented that statutes of ICL are often inadequate, hence the use of ex post facto statements to fix the issues in ICL to prevent people 'getting away with evil acts.'²⁴¹ However, this argument suggests that ignoring base ideas of fairness are justified to prosecute people who would otherwise not be found guilty.

It is here that this chapter shall conclude. On non-retroactivity, it seems clear through a thorough examination of *Kononov* that the IMT was engaged in ex post facto law through the application of the Nuremberg Charter. It is not in doubt that international law had some conception of war crimes²⁴²; however, it is also clear that international law had not yet held individuals responsible for those crimes.²⁴³ This support may not only be found within the case law but also within the works of many academics²⁴⁴, including the chief prosecutor²⁴⁵, who list the change of such law to be one of the key significant impacts of the Nuremberg

²³⁷ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

²³⁸ See "Was Nuremberg a violation of the principle of legality?" Marko Milanovic, Blog of the European Journal of International Law. Accessible at: <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/> (last accessed on: 26/08/2021)

²³⁹ See IMT judgement (webpage removed) at 38-40 as found in See "Was Nuremberg a violation of the principle of legality?" Marko Milanovic, Blog of the European Journal of International Law. Accessible at: <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/> (last accessed on: 26/08/2021)

²⁴⁰ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185.

²⁴¹ See "Was Nuremberg a violation of the principle of legality?" Marko Milanovic, Blog of the European Journal of International Law. Accessible at: <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/> (last accessed on: 26/08/2021)

²⁴² *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 207

²⁴³ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

²⁴⁴ Lippman, M. "Nuremberg." [1988] *Law in Context: A Socio-Legal journal* Vol.6(2) 20-44 at page 20.

²⁴⁵ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

trial. It is clear on this basis that in respect of the avoidance of non-retroactivity, the IMT at Nuremberg failed to grant a fair trial²⁴⁶ and consistently violated the rule of law.²⁴⁷

In conclusion of chapter three, this dissertation has shown a clear and consistent pattern in which the IMT breached core principles of law. Firstly, through its examination of the tu quoque defence, an area not otherwise touched upon by most academics,²⁴⁸ this chapter has highlighted both issues with the interpretative elements of the IMT's judgement and further with the idea of the trial being fair. This chapter has explored the claims made by the IMT of a purely legal intention behind its prosecution²⁴⁹ and demonstrated a clear choice to ignore the clear statement of the law.²⁵⁰ When reviewing the conduct of the IMT, this chapter has gone on to show the impact the IMT had on defence counsels ability to provide a proper defence and further demonstrated other harmful trends such as a trend towards collective guilt.²⁵¹ In the final part, this chapter has viewed the principle of non-retroactivity and demonstrated both the IMT's violation of it and as follows a clear violation of the rule of law.²⁵²

One common theme emerged among these four elements: the IMT consistently fell below the standards that many academics would hold any modern court to. Consistently failing to meet the standards required by the rule of law, and further consistently failing to provide a fair trial. This chapter has demonstrated the consistent failure of the IMT to provide an adequate trial beholden to the standards expected within the law. Now, this dissertation

²⁴⁶ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 3.

²⁴⁷ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185.

²⁴⁸ Heise, N. "Deciding not to decide: Nuremberg and the Ambiguous History of the Tu quoque defence." (2009, University of Chicago Law School) available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354048 at page 5

²⁴⁹ Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants.* (1st ed, London: Her Majesty's stationary office on the authority of the Attorney General 1946) at page 3

²⁵⁰ Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants.* (1st ed, London: Her Majesty's stationary office on the authority of the Attorney General 1946) at page 3.

²⁵¹ Davidson, E. *The Trial of the Germans: An Account of the twenty-two defendants before the International Military Tribunal at Nuremberg.* (1st ed, New York: The Macmillan Company 1967) at page 556.

²⁵² See Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law*. Vol.32(2) 315-331 at 319 or; Smith, B F. *Reaching Judgement at Nuremberg.* (1st ed, New York: Basic Books, Inc. Publishers 1977) at 301 or; *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185.

shall move to its final point; it has demonstrated that the IMT failed to provide any adequate trial, now it shall challenge whether the IMT had the authority to engage a trial at all.

Chapter four: The IMT and its lack of competence

Chapter four deals with the original element of this analysis, justiciability. This shall be done by defining justiciability more thoroughly than in chapter three. Then the principle of justiciability will be applied to the IMT via assessing whether it had the right to prosecute individuals for their breaches of international law. Finally, this chapter will then conclude with this dissertation's analysis.

Justiciability may have two separate meanings depending on the context. Firstly, it may be understood as a legal rule used by courts primarily for actions involving judicial review;²⁵³ in this respect, the rule should be understood as a distinct area of jurisprudence. As shall be developed upon, there is a second meaning of this term, which places the term within legal philosophy, associating it with other fundamental principles such as the rule of law.²⁵⁴

Justiciability originates from 17th-century²⁵⁵ English constitutional law;²⁵⁶ regarding how foreign matters would be dealt with under domestic courts.²⁵⁷ The principle has been referred to as the embodiment of the "concept that the capabilities of the courts are limited."²⁵⁸ Therefore, it can be understood that the concept has a strong association with analysing courts and their decisions, naturally lending itself to this assessment.

Justiciability in practice is a question of whether a matter is one which a court "may adjudicate on"²⁵⁹ and whether the court is "competent to reach a legally binding decision."

²⁵³ Harris, B V. "Judicial Review, Justiciability and the Prerogative of mercy." [2003] The Cambridge Law Journal Vol.62(1) 631-660 at 631

²⁵⁴ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 981.

²⁵⁵ Eng-Lye, O. "Non-justiciability in private international law: Principle or Discretion?" (2002, Common Law World Review Vol.31(1) at page 35) at part I.

²⁵⁶ Savinder, S J. "The Justiciability of religion." [2017] Journal of Law and Religion. Vol.32(2) 285-310, at 285.

²⁵⁷ See, Savinder, S J. "The Justiciability of religion." [2017] Journal of Law and Religion. Vol.32(2) 285-310, at 285, or; Eng-Lye, O. "Non-justiciability in private international law: Principle or Discretion?" (2002, Common Law World Review Vol.31(1) at page 35) at part I.

²⁵⁸ Harris, B V. "Judicial Review, Justiciability and the Prerogative of mercy." [2003] The Cambridge Law Journal Vol.62(1) 631-660 at 631

²⁵⁹ *Council of Civil Service Unions v Minister for the Civil Service (AKA the GCHQ case)* [1984] UKHL 9 at para 407 as per Lord Scarman

²⁶⁰ In this sense, justiciability is a question asked concerning whether a specific matter "is proper to be examined by the courts." ²⁶¹

Despite its domestic origins, the principle has been recognized by several legal systems.²⁶² And even though certain international courts as a general rule do not recognize there is a limit to the exercise of their power, such as the International Court of Justice,²⁶³ academics have heavily criticized such a position.²⁶⁴ The criticisms follow that as a court, the ICJ only deals with matters of a legal nature, and for that reason, there would therefore be some matters which the court recognizes would be improper for it to deal with.²⁶⁵ Thus it can be said that the courts do recognize at least some principle of justiciability. ²⁶⁶

This is an essential point as it raises the fact that there seem to be two forms of non-justiciability which a matter may fall into. The first being where a court lacks the power to exercise judgement, an example of this would be a head of state, protected by diplomatic immunity.²⁶⁷ In contrast, the second would be where the matter is too trivial to bother the court, such as matters of honour²⁶⁸ or the matters as mentioned above of trivial importance. ²⁶⁹ This distinction is important because a violation of the first shows the court

²⁶⁰ McGoldrick, D. "The boundaries of justiciability." [2010] *International & Comparative Law Quarterly*. Vol.59(4) 981-1019 at 987.

²⁶¹ "Justiciable", Jowitt's Dictionary of English Law 5th ed. 1 August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/I5BF12F72DDE011DF9E3AE052EB33E74D/View/FullText.html> (last accessed on: 31/08/2021)

²⁶² See, John, A. "Inarticulate and Unconscious: Non-Justiciability before the International Court of Justice." [2021] *The Law and Practice of International Courts and Tribunals*, Vol.20(1) 77-118 at 77, or; ²⁶² McGoldrick, D. "The boundaries of justiciability." [2010] *International & Comparative Law Quarterly*. Vol.59(4) 981-1019 at 982 or; *Flast v Cohen* (1968) 392 U.S 83, at 100 or; *Re Pinochet (No.1)* [1998] 4 All E.R. 897 at 934.

²⁶³ John, A. "Inarticulate and Unconscious: Non-Justiciability before the International Court of Justice." [2021] *The Law and Practice of International Courts and Tribunals*, Vol.20(1) 77-118 at 77.

²⁶⁴ John, A. "Inarticulate and Unconscious: Non-Justiciability before the International Court of Justice." [2021] *The Law and Practice of International Courts and Tribunals*, Vol.20(1) 77-118.

²⁶⁵ See, Art. 36 of "Statute of the International Court of Justice" April 18th 1946. Accessible on; <https://www.icj-cij.org/en/statute> (last accessed 07/09/2021), or; *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, at 20, or; *Aerial Incident of 27 July 1955 (Israel v Bulgaria)* [1959] ICJ Rep 127, at 141

²⁶⁶ John, A. "Inarticulate and Unconscious: Non-Justiciability before the International Court of Justice." [2021] *The Law and Practice of International Courts and Tribunals*, Vol.20(1) 77-118 at 78.

²⁶⁷ "Justiciable", Jowitt's Dictionary of English Law 5th ed. 1 August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/I5BF12F72DDE011DF9E3AE052EB33E74D/View/FullText.html> (last accessed on: 31/08/2021)

²⁶⁸ "Justiciable", Jowitt's Dictionary of English Law 5th ed. 1 August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/I5BF12F72DDE011DF9E3AE052EB33E74D/View/FullText.html> (last accessed on: 31/08/2021)

²⁶⁹ John, A. "Inarticulate and Unconscious: Non-Justiciability before the International Court of Justice." [2021] *The Law and Practice of International Courts and Tribunals*, Vol.20(1) 77-118 at 78.

has overreached its powers, whereas the second shows the court has used its powers in a way it was not intended to be used. In short, the first is a violation of powers, and the second is an abuse of powers.

Now that justiciability itself has been introduced, this chapter shall briefly outline several key issues relevant to justiciability; such as its relationship with the rule of law, the effect of finding a matter non-justiciable, the distinction between justiciability and jurisdiction and finally, why the fact the IMT's Charter was ex post facto is irrelevant to an assessment of justiciability.

As mentioned earlier, the concept has a strong association with the rule of law.²⁷⁰

Justiciability originated as a courtroom argument,²⁷¹ primarily specializing in reviewing the acts of a court. The association of the principle with the rule of law makes this principle helpful where others would fail.²⁷² This is through the theoretical weight an argument invoking the rule of law holds, further demonstrating the value of an assessment on justiciable grounds.

Further, it is justiciabilities association with the rule of law that lends so much more value to this assessment. As many argue, the rule of law is one of the most basic principles of English and Welsh Law, forming the basis for the constitution.²⁷³ And this relationship can be highlighted further by assessing what the rule of law means; a key principle of the rule of law is that the courts judge the laws exclusively²⁷⁴ and that judges are the only individuals who may judge the laws.²⁷⁵ Justiciability further requires that judges may not take into account any other matter beyond the law.²⁷⁶ In short, a court's competence only stretches as far as the law and a court may not consider any matter beyond their competence. This

²⁷⁰ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 981.

²⁷¹ Savinder, S J. "The Justiciability of religion." [2017] Journal of Law and Religion. Vol.32(2) 285-310, at 285.

²⁷² McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 983.

²⁷³ "The Rule of Law", Stroud's Judicial Dictionary 10th ed. 1st April 2021. Available on Westlaw at; <https://uk.westlaw.com/Document/I8E3C8600E12B11E1A758F278D4A11216/View/FullText.html> (last accessed on: 31/08/2021)

²⁷⁴ *Prohibitions del Roy* (1607) 77 ER 1342, (1607) 12 Co. Rep 63, at 64.

²⁷⁵ *Prohibitions del Roy* (1607) 77 ER 1342, (1607) 12 Co. Rep 63, at 64.

²⁷⁶ *Prohibitions del Roy* (1607) 77 ER 1342, (1607) 12 Co. Rep 63 at 64.

draws the rule of law even closer to justiciability, for it demonstrates how both principles primarily concern themselves with what is a legitimate matter for a court to judge upon.

A deeper look at justiciability

Now, this chapter shall examine the effect of a finding of non-justiciability, such represents the severity placed upon the principle. As stated before, the role of the principle is to limit the courts²⁷⁷ via judging whether a court is competent to make a legally binding decision.²⁷⁸

It is therefore not surprising that when a judgement is found to be partly or wholly non-justiciable, then such judgement is, for the large part, no longer considered legally binding.

²⁷⁹ This would demonstrate the severity of the result if it was to be found that the IMT's judgement dealt with non-justiciable matters.²⁸⁰

When considering the historical importance of the IMT to ICL as referred to in chapter two, this point gains even further traction²⁸¹ for much of modern ICL may be traced back to the decision of the IMT.²⁸² If a finding of non-justiciability has such a risk for the IMT's decision,²⁸³ then this demonstrates how wide-reaching such a finding would be.

Now, this chapter shall explore the principle of jurisdiction due to its overlap with justiciability. Jurisdiction is a question that a court must ask before it may engage with any matter; it is the question of whether a court has competence over an issue or whether there

²⁷⁷ Harris, B V. "Judicial Review, Justiciability and the Prerogative of mercy." [2003] The Cambridge Law Journal Vol.62(1) 631-660 at 631

²⁷⁸ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 983.

²⁷⁹ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 987.

²⁸⁰ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 988.

²⁸¹ See Sliedregt, E. "*One rule for them – selectivity in international criminal law.*" [2021] Leiden Journal of International Law Vol.34(2) 283-290 or ; Tomuschat, C. "*The Legacy of Nuremberg.*" [2006] Journal of International Criminal Justice Vol.4(4) 830-844. Or ; "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) Or ; Finch, G. "*The Nuremberg Trial and International Law.*" [1947] The American Journal of International Law Vol.41(1), 20-37 ; "*Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement.*" A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

²⁸² Art.33 of the Statute of Rome, "Statute of Rome." 1st July 2002 Accessible On; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed on: 30/08/2021)

²⁸³ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 987.

is another court with greater competence.²⁸⁴ This definition clearly shows its potential overlap with justiciability, namely in the specific question of a court's competence.

However, this dissertation takes the view that jurisdiction and justiciability have apparent differences for reasons, as shall be discussed. Namely, this dissertation argues that jurisdiction is primarily concerned with the court's procedure²⁸⁵ and that further, jurisdiction is a question for the court in question to consider.²⁸⁶ To explain this second element, it was for the IMT to declare it had jurisdiction. In contrast, if the legal issue of justiciability was raised, a higher court would have had to decide the matter, as justiciability is a ground to judge a court on, not a ground for that court to reach a judgement on.

However, the fundamental differences can be seen when the philosophical nature of justiciability is considered. Justiciability has a strong association with principles as mentioned earlier, such as the rule of law,²⁸⁷ as well as further principles such as "democracy and the separation of powers".²⁸⁸ This is not an element that can be seen within jurisdiction. Justiciability is a metric to assess the court²⁸⁹ on a philosophical basis, whereas jurisdiction is a simple matter of facts.

In this sense, jurisdiction is the question of whether a court factually has been granted competence to deal with an issue; justiciability is whether that court should have the competence. An example of this which shall be called back to later is jurisdiction over the prosecution of individuals. Namely, the jurisdictional question would be, did the IMT have the right to prosecute individuals for breaches of international law? The answer is yes;²⁹⁰

²⁸⁴ McGoldrick, D. "The boundaries of justiciability." [2010] *International & Comparative Law Quarterly*. Vol.59(4) 981-1019 at 983.

²⁸⁵ McGoldrick, D. "The boundaries of justiciability." [2010] *International & Comparative Law Quarterly*. Vol.59(4) 981-1019 at 985.

²⁸⁶ McGoldrick, D. "The boundaries of justiciability." [2010] *International & Comparative Law Quarterly*. Vol.59(4) 981-1019 at 985.

²⁸⁷ Endicott, T. "The reason of law." [2003] *American Journal of Jurisprudence* Vol.48(1), 83-106 at 97.

²⁸⁸ McGoldrick, D. "The boundaries of justiciability." [2010] *International & Comparative Law Quarterly*. Vol.59(4) 981-1019 at 985

²⁸⁹ McGoldrick, D. "The boundaries of justiciability." [2010] *International & Comparative Law Quarterly*. Vol.59(4) 981-1019 at 986

²⁹⁰ See, Art.7 of the Nuremberg charter, as found on The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021) or; Art.8 of the Nuremberg charter, as found on The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 1/09/2021)

however, an assessment of justiciability would assess the relevant article and any reasoning provided by the IMT through general legal principles to see if such a right is justified. It is on this basis that justiciability allows for assessment where jurisdiction would not,²⁹¹ hence demonstrating the added value from the use of justiciability.

The final matter this chapter shall deal with before beginning its analysis is the matter of "ex post facto" law.²⁹² As has been discussed within chapter three, the IMT's Charter did beyond question apply "ex post facto."²⁹³ This must be addressed to avoid later confusion; for the fact, the Charter applied ex post facto means that the Charter did provide the IMT with the right to try the individuals before it. However, such would only satisfy jurisdiction, not justiciability, for the reasons as stated above.

Justiciability and how it applies to Nuremberg

In the first stage of analysis, one must first explore the relationship between justiciability and non-retroactivity. Both principles share a strong association with the rule of law,²⁹⁴ specifically concerning the avoidance of retroactive law in regard to retroactivity.²⁹⁵ This chapter states that it would be absurd if charged with dealing with matters that were not properly justiciable that the IMT could rely on retroactive law, which would itself violate the rule of law.²⁹⁶ For this reason, this chapter will not accept the "ex post facto"²⁹⁷ argument with respect to establishing the ground for justiciability.

The assessment of the IMT in this chapter shall primarily focus on whether the IMT had legitimate competence. Based on the above reasoning, this would mean whether the IMT had any competence which was not simply granted by retroactive laws. On examination of this point, this chapter points to the strong relationship between justiciability and the rule

²⁹¹ McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 986

²⁹² Minear, R. "*Victors' Justice: the Tokyo war crimes trial.*" (1st ed, Princeton NJ: Princeton University Press 1971.) at 370.

²⁹³ Minear, R. "*Victors' Justice: the Tokyo war crimes trial.*" (1st ed, Princeton NJ: Princeton University Press 1971.) at 370.

²⁹⁴ See, *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185. And; McGoldrick, D. "The boundaries of justiciability." [2010] International & Comparative Law Quarterly. Vol.59(4) 981-1019 at 981.

²⁹⁵ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185.

²⁹⁶ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185.

²⁹⁷ Minear, R. "*Victors' Justice: the Tokyo war crimes trial.*" (1st ed, Princeton NJ: Princeton University Press 1971.) at 370.

of law.²⁹⁸ Such a principle forms the basis of nearly all academic discussions of law;²⁹⁹ this chapter believes such a focus would naturally increase the value of this assessment.

Further, the rule of law has a notable abstract philosophical nature.³⁰⁰ Through this element, this chapter shall, in turn, look beyond the simple law in its examination, the rule of law, thus justifying an assessment on a deeper level.

In examining this point, as can be seen through the memorandum above³⁰¹ and further the accounts of those who worked at Nuremberg, Nuremberg was unique and new.³⁰² This chapter would argue that it is widely recognised that there was a lack of "established judicial action."³⁰³ Stated plainly within the memorandum³⁰⁴ and explained through the views of those who worked at Nuremberg that Nuremberg is often described as unique and original,³⁰⁵ terms generally not associated with a matter that has had a long history.

As such, it can be demonstrated that the IMT at Nuremberg lacked much, if any, legal precedent, although this is not to say that the IMT did not at least claim legal precedent for their actions. This chapter shall now explore exactly how the IMT raised supposed justifications and explain why the IMT's justifications were improperly applied.

²⁹⁸ *Kononov v Latvia* [2010] ECtHR App No. 36376/04 at 185.

²⁹⁹ "The Rule of Law", ", Jowitt's Dictionary of English Law 5th ed. 1 August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/I8E3C8600E12B11E1A758F278D4A11216/View/FullText.html> (last accessed on: 31/08/2021)

³⁰⁰ "The Rule of Law", ", Jowitt's Dictionary of English Law 5th ed. 1 August 2019. Available on Westlaw at; <https://uk.westlaw.com/Document/I8E3C8600E12B11E1A758F278D4A11216/View/FullText.html> (last accessed on: 30/08/2021)

³⁰¹ Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971) at page 9.

³⁰² Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 148.

³⁰³ Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 147.

³⁰⁴ Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971) at page 9.

³⁰⁵ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844.; "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) ; Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

As discussed within chapter two, the IMT was one of the first times in history that individuals had been prosecuted at the international level for their breach of international law.³⁰⁶ However, similar prosecutions had been conducted at the domestic level of certain states where a violation of international law had occurred.³⁰⁷ Many countries had domestic precedents to state that international law imposed obligations on the individual level,³⁰⁸ however, such had only been applied domestically.³⁰⁹

As a result, one key issue stressed by the IMT at its judgement was its attempt to justify the claim of jurisdiction over individuals;³¹⁰ this shall be the primary point this chapter assesses. As mentioned within chapter three, the IMT did not recognize that it was applying ex post facto law and therefore attempted to find a justification for its prosecution of individuals within international law. This chapter would hold that if it were shown that the IMT's reasoning was faulty, then it would follow that the prosecutions would be naturally non-justiciable. This argument is simply that the central question of both jurisdiction and justiciability is whether the court holds the competence to judge on a matter.

It will also be mentioned that the question of whether the prosecution of individuals was justiciable is a question with a specific view towards international law. This limitation is

³⁰⁶ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

³⁰⁷ *Ex Parte Quirin* (1942) 317 US 1

³⁰⁸ *Ex Parte Quirin* (1942) 317 US 1 at 27

³⁰⁹ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290 or ; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844. Or ; "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) Or ; Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

³¹⁰ Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 147

placed as statements made by the IMT,³¹¹ the constitution of the IMT³¹² and, the treatment of the IMT by academia³¹³ have all placed the IMT within international law.

Therefore, this chapter would argue that the standing of the IMT and the law it used could not be justified on any domestic legal grounds merely because a domestic court stated it. Instead, this chapter would argue that the IMT would need to demonstrate the reasons why that domestic law is suitable for use in the international theatre. Such may be demonstrated through the fact that it has been conclusively ruled that domestic courts recognizing a legal principle does not earn it recognition as a rule of international law.³¹⁴

This chapter, when examining justiciability, has chosen to focus on the jurisdiction of the IMT to prosecute individuals for two main reasons: firstly, it seems an area of much controversy; secondly, the entire proceedings of the IMT are premised on the idea that the IMT had jurisdiction to prosecute individuals for breaches of international law, if this matter is shown to be non-justiciable then the whole trial shall be shown to be non-justiciable.

For clarification, the remainder of this chapter refers to jurisdiction as it is the IMT's arguments over jurisdiction where this chapter shall make its analysis. But, on this point, the jurisdiction of the IMT is met by the ex post facto status of the Nuremberg Charter. This chapter is unwilling to accept such a defence because justiciability is a strong component of the rule of law, which, as mentioned, ex post facto law is a violation of.

³¹¹ *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 .

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021)

³¹² The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, 8th August 1945.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 30/08/2021)

³¹³ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290 or ; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844. Or ; "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) Or ; Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

³¹⁴ *The SS Lotus* (1927) PCIJ 10 at para 156.

In approaching the question of jurisdiction, there have been two parts identified; each must be satisfied for jurisdiction to be satisfied. These are jurisdiction to prescribe and jurisdiction to enforce.³¹⁵ With jurisdiction to prescribe meaning, the jurisdiction of an entity to make statements of law and jurisdiction to enforce meaning the capacity of a state or entity to enforce said laws.³¹⁶ The IMT identified separation within their judgement.³¹⁷

The Kellogg-Briand Pact

On the first half of the jurisdiction to prescribe, the IMT attempted to answer this requirement via the Kellogg-Briand Pact.³¹⁸ The Pact is claimed to have "established that war was no longer a legal recourse."³¹⁹ This is argued to be seen where the Treaty states that the contracting parties "agree that the settlement or solution of all disputes or conflicts of whatever nature or origin... shall never be sought except by pacific means."³²⁰ The Kellogg-Briand Pact has been said to be so significant towards the IMT's argument, in so far as it is the only authority named to provide a jurisdiction to prescribe, that it has been supposed that without it, the IMT would have lacked jurisdiction altogether.³²¹ This chapter suggests that by demonstrating the flaw in the usage of this Pact, major questions may be cast as to the claimed competence.

In assessing the claim that the Kellogg-Briand Pact established a precedent for outlawing aggressive war, there are numerous issues in this argument that may be raised.

Firstly, in generally assessing the IMT's usage of the Pact, they argued that anybody breaching the Pact was "committing a crime in doing so"³²² even though the Pact did not

³¹⁵ S.6 A.L.I Restatement of Law (1962) as may be found within Nerone, F R. "The legality of Nuremberg." [1965] Duquesne Law Review. Vol.4(1) 146-162 at 148.

³¹⁶ S.6 A.L.I Restatement of Law (1962) as may be found within Nerone, F R. "The legality of Nuremberg." [1965] Duquesne Law Review. Vol.4(1) 146-162 at 148.

³¹⁷ As can be found within Nerone, F R. "The legality of Nuremberg." [1965] Duquesne Law Review. Vol.4(1) 146-162 at 148.

³¹⁸ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³¹⁹ Nerone, F R. "The legality of Nuremberg." [1965] Duquesne Law Review. Vol.4(1) 146-162 at 148.

³²⁰ Art.2 Treaty between the United States and other powers providing for the renunciation of war as an instrument of national policy 1928 (AKA; Kellogg-Briand Pact)

³²¹ Nerone, F R. "The legality of Nuremberg." [1965] Duquesne Law Review. Vol.4(1) 146-162 at 148.

³²² *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

itself reference crimes. As best contrasted by laws specifically designed to provide regulation to the conduct within war³²³, such as the Geneva Convention.³²⁴ The Geneva Convention specifically stated which actions would be allowed and prohibited within warfare. The Pact made no such statements of the conduct of individuals but rather of nations; such has been argued to be a paradoxical approach.³²⁵ This, as is argued by many, would place the Pact within the laws of 'jus ad bellum', meaning laws before war; these laws generally cover the rules of transitioning from peace to warfare. This second element's relevance shall become clear in a moment.

As such, it can be demonstrated that the Kellogg-Briand Pact causes some issues as authority for statements that engaging in aggressive war would be criminal. The issue arises through the fact that at no point did the Pact actually state aggressive war would be a crime, instead when exploring this matter; the IMT argued that a breach of the Pact was a crime using analogy to the Hague conventions.³²⁶ The IMT states, "But it is argued that the Pact does not expressly enact that such wars are crimes... the same is true for the with regard to the laws of war contained within the Hague Convention" in their argument that breaching the Pact does, in fact, constitute a crime.

Their argument continues that a breach of the Hague Convention was well-accepted to constitute a crime and that, therefore, the same could be said about the Pact. However, such an argument is blind to the matter above regarding the Pact; the Pact was 'jus ad bellum.' The Convention, on the other hand, was 'jus in bellum', meaning rather than regulating the entrance into conflict, it regulated the actions of soldiers within a conflict. This chapter would argue that by its very nature 'jus in bellum', through the regulation of

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³²³ Sandoz, Y. "Max Huber and the Red Cross." [2007] European Journal of International Law. Vol.18(1) 171-197 at 184.

³²⁴ Sandoz, Y. "Max Huber and the Red Cross." [2007] European Journal of International Law. Vol.18(1) 171-197 at 184.

³²⁵ Sandoz, Y. "Max Huber and the Red Cross." [2007] European Journal of International Law. Vol.18(1) 171-197 at 184.

³²⁶ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

actions, the Convention naturally leaned towards criminalization, whereas the Pact did not. This difference in 'jus ad bellum' and 'jus in bellum' is not dealt with by the IMT at any point. Further, as this chapter shall explore, it has been accepted that there was little if any precedent predating Nuremberg. Despite their passing in 1907, an attempted 'prosecution' of an individual in 1918 for breaches of international law that did not refer to the Hague conventions. That, this chapter would argue, shines further doubt as to whether the Hague conventions even provided for the prosecution of individuals as the IMT so claims.

This approach highlights that the Kellogg-Briand Pact, although clearly attempting to outlaw war to some extent,³²⁷ was too vague, as is highlighted by the criticisms of academics,³²⁸ the influence and understanding of the Pact throughout the years since its creation can be heavily doubted.³²⁹

However, this is not the only criticism that may be levelled at the IMT's usage of the Pact. As stated, the IMT argued that the Pact "unconditionally condemned recourse for war";³³⁰ this simply is not true. The Pact allowed for several situations which academics have stated would constitute an aggressive war.³³¹ For instance, it noted that any state would have a defence where their war was claimed to be launched to defend the international order.³³² However, included within this was expressly stated any application of force within the USA's, U.K.'s, France's, or Japan's peripheries.³³³

³²⁷ Art.2 Treaty between the United States and other powers providing for the renunciation of war as an instrument of national policy 1928 (AKA; Kellogg-Briand Pact)

³²⁸ Sandoz, Y. "Max Huber and the Red Cross." [2007] *European Journal of International Law*. Vol.18(1) 171-197 at 184.

³²⁹ Von Bernstorff, J. "The use of force in international law before World War I: on imperial ordering and the ontology of the nation state." [2018] *European Journal of International Law*. Vol.29(1) 233-260 at 258

³³⁰ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³³¹ Von Bernstorff, J. "The use of force in international law before World War I: on imperial ordering and the ontology of the nation state." [2018] *European Journal of International Law*. Vol.29(1) 233-260 at 258

³³² Von Bernstorff, J. "The use of force in international law before World War I: on imperial ordering and the ontology of the nation state." [2018] *European Journal of International Law*. Vol.29(1) 233-260 at 258

³³³ Von Bernstorff, J. "The use of force in international law before World War I: on imperial ordering and the ontology of the nation state." [2018] *European Journal of International Law*. Vol.29(1) 233-260 at 259.

This is despite the fact that the IMT claimed that "war is therefore outlawed by the Pact".³³⁴ This is a gross oversimplification, which leaves out both of the situations above,³³⁵ as well as the fact that the Pact did not prevent the justification of self-defence.³³⁶ This omission, although basic, clearly makes the representation incorrect.

This demonstrates that the IMT was simply not applying the law as it was otherwise understood. They compared the Pact to the Hague Conventions. Even though each occupied different spaces within the international order, further they seem to have misquoted the Pact, making it appear as if it had some effect not otherwise intended. To make matters worse on this point, in interpreting the Pact, the IMT makes specific reference to the 1923 Treaty of Mutual Assistance,³³⁷ a treaty never passed into law. This chapter would argue that when dealing with the first prosecutions of their type in modern history, the IMT should have been more careful when choosing its fundamental authorities.

The IMT attempted to use the Kellogg-Briand Pact to satisfy its jurisdiction to prescribe, on the grounds that they claimed the Pact had made it a crime to engage in aggressive war, this has been demonstrated not to be the case, or at the very least the authorities the IMT claimed, do not represent this argument. Further, the view that the Pact did not establish the breach of international law as a crime has been widely accepted.³³⁸ Now, this chapter shall turn its attention to the second part of its claim to jurisdiction, jurisdiction to enforce.³³⁹

³³⁴ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³³⁵ Von Bernstorff, J. "The use of force in international law before World War I: on imperial ordering and the ontology of the nation state." [2018] *European Journal of International Law*. Vol.29(1) 233-260 at 259

³³⁶ Von Bernstorff, J. "The use of force in international law before World War I: on imperial ordering and the ontology of the nation state." [2018] *European Journal of International Law*. Vol.29(1) 233-260 at 258

³³⁷ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³³⁸ Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 149

³³⁹ Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 148

The Treaty of Versailles

In attempting to show jurisdiction to enforce the IMT on two separate justifications. The first was a justification provided on the Treaty of Versailles. The second was an approach made on the domestic case law of the United States; this chapter shall firstly deal with the court's brief usage of the Treaty.

The IMT referenced Art.227 and Art.228 of the Treaty of Versailles in their reasoning, stating that Art.227 had provided the precedent for the establishment of an international tribunal, they further stated that Art.228 allowed for the specific trial of individuals for "violation of the laws and customs of war."³⁴⁰ Specifically, they argued that Art.228 "illustrated"³⁴¹ their argument that they could prosecute individuals for breaches of international law.

However, to make the statement that the Treaty illustrated said points would be overly simplistic and ignore much academic commentary.³⁴² As referenced in chapter two, Art.227 of the Treaty allowed for Kaiser Wilhelm II to be 'arraigned'³⁴³ by the international community. The article³⁴⁴ specifically mentioned the Kaiser by name, it did not name the crimes, but moreso said he was being 'arraigned for supreme offence against international morality.'³⁴⁵ Academics have recognized this statement as entirely unlike any form a legal prosecution would be expected to take.³⁴⁶ Furthermore, the prosecution of the Kaiser is generally accepted to be a failure;³⁴⁷ some have even listed the fact the prosecution failed as a reason to see the significance of the Nuremberg trial.³⁴⁸

³⁴⁰ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³⁴¹ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³⁴² Tomuschat, C. *"The Legacy of Nuremberg."* [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844 at 830.

³⁴³ Art.227 Treaty of Versailles 1919

³⁴⁴ Art.227 Treaty of Versailles 1919

³⁴⁵ Art.227 Treaty of Versailles 1919

³⁴⁶ Tomuschat, C. *"The Legacy of Nuremberg."* [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844 at 830.

³⁴⁷ Tomuschat, C. *"The Legacy of Nuremberg."* [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844 at 830.

³⁴⁸ See, *"Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement."* A speech by the president of the

The second element the IMT relied upon was article 228,³⁴⁹ which stated that 'The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons...'³⁵⁰ thus was mentioned in support of the argument that Germany had, therefore 'expressly recognized the right'³⁵¹ of the Tribunal. However, such is ignoring the fact that Germany had also unequivocally withdrawn from the Treaty of Versailles on 14th October 1919. Such withdrawal was allowed for under several conditions of the Treaty,³⁵² yet the IMT does not refer to Germany's withdrawal.

In conclusion, two things may be gathered from an examination of the IMT's treatment of the Treaty of Versailles. Firstly, the IMT clearly misapplied the law; the Treaty specifically named a defendant, time period, and mode of trial,³⁵³ similarly, it failed to mention any specific offence the defendant was tried for, explore the components for any defence or, establish an appropriate sentence.³⁵⁴ Beyond this, the Treaty has not been viewed as a trial in any sense³⁵⁵ and, as noted, failed to procure any such trial.³⁵⁶ Therefore the IMT was attempting to justify the general application of an authority, even though that authority limited its own applicability and was further generally misinterpreting the Treaty. At the very least, its interpretation is not supported by academic discussion. Secondly, regarding Art.228, the IMT simply seems to misapply the law; Germany had given an unequivocal departure from the Treaty, yet at no point did the IMT deal with this.

International Criminal Court Judge Phillipe Kirsch at Washington University. September 30th 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021) and; "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (Last accessed on: 30/08/2021)

³⁴⁹ Art.228 Treaty of Versailles 1919

³⁵⁰ Art.228 Treaty of Versailles 1919

³⁵¹ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³⁵² See Art.1, Art.1 (Annex 2) and Art.431 (Annex 2) Treaty of Versailles 1919

³⁵³ Art.227 Treaty of Versailles 1919

³⁵⁴ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³⁵⁵ Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844 at 830.

³⁵⁶ Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844 at 830.

This chapter finds no issue in stating that the Treaty of Versailles may be discounted as appropriate authority for the claims the IMT sought to justify.

Quirin and Lotus

In the IMT's attempt to demonstrate a jurisdiction to enforce, they relied upon the case of *Quirin*.³⁵⁷ This is despite the fact that the case was presided over by the domestic courts of the United States, a matter that shall be discussed. The case itself concerned German spies, who had been caught within the continental United States.³⁵⁸ Once caught within the United States, the applicants were charged with various charges, notably including 'violations of the laws of war.'³⁵⁹ The most notable ground of the appeal for our purposes is that the applicants were tried for their individual breaches of international law.³⁶⁰ This matter had not been accepted in the international application of international law.³⁶¹

At this point, this chapter shall briefly cover a fundamental matter, notably that individuals had not been held personally liable for violations in international law³⁶², but, despite this, individuals had been held liable in domestic law, as noted above.³⁶³ This is significant when considering the most fundamental basis of the difference: a court of domestic law may only establish domestic law, and that a court of international law establishes principles of international law. This raises the concern of why the IMT, an international court identified by its own statements,³⁶⁴ raised as authority a case that did not have an international effect. The U.S. supreme court is not a court of an international character and, as such, may not

³⁵⁷ See *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021), and; *Ex Parte Quirin* (1942) 317 US 1

³⁵⁸ *Ex Parte Quirin* (1942) 317 US 1 at 2, para 4.

³⁵⁹ *Ex Parte Quirin* (1942) 317 US 1 at 2, para 3.

³⁶⁰ *Ex Parte Quirin* (1942) 317 US 1 at 27-28.

³⁶¹ "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

³⁶² "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021)

³⁶³ *Ex Parte Quirin* (1942) 317 US 1.

³⁶⁴ See, *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 .

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021) or;

generally be raised as authority in international law. As such, this chapter shall now explore the suitability of *Quirin*³⁶⁵ for being raised by the IMT.

The reasoning behind the court's application of *Quirin*³⁶⁶ rests almost entirely on the case of *Lotus*.³⁶⁷ Although the case of *Lotus*³⁶⁸ is not mentioned by name at any point throughout the IMT's judgement, academics have recognized that the principles the IMT refers to are the principles of international law established by that case.³⁶⁹ Namely, the IMT faced the challenge of justifying the application of domestic law within Germany. The argument made by the IMT was that Germany had unconditionally surrendered to the Allies³⁷⁰ and that, secondly, under limited circumstances, a state could impose its domestic laws upon the citizens of another.³⁷¹ One such circumstance was where one state had vanquished another during a time of war³⁷² and, therefore, the IMT argued it was entitled to apply the ruling of *Quirin*.³⁷³ However, this raises a number of issues; firstly, both the cases of *Quirin* and *Lotus* are arguably misrepresented by the IMT; secondly, the IMT was a court of international law as recognized by academics³⁷⁴ and its own statements,³⁷⁵ it stands therefore that, if the

³⁶⁵ *Ex Parte Quirin* (1942) 317 US 1.

³⁶⁶ *Ex Parte Quirin* (1942) 317 US 1.

³⁶⁷ *The S.S. Lotus* (1927) PCIJ 10

³⁶⁸ *The S.S. Lotus* (1927) PCIJ 10

³⁶⁹ Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at page 150.

³⁷⁰ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³⁷¹ *The S.S. Lotus* (1927) PCIJ 10 at 46

³⁷² See Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 150 or; *The S.S. Lotus* (1927) PCIJ 10 at 64

³⁷³ *Ex Parte Quirin* (1942) 317 US 1

³⁷⁴ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290 or ; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844. Or ; "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) Or ; Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

³⁷⁵ See *Indictment International Military Tribunal, The United States, The French Republic, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al.* The Nuremberg Indictment. (18th October 1945) Nuremberg Trial Proceedings Vol.1 . Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 01/09/2021) and; The Constitution of the International Military Tribunal, AKA; The Nuremberg Charter, August 8th 1945. Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/imtconst.asp> (last accessed on: 31/08/2021)

Allies intended to apply domestic law, they should have convened a domestic occupation style court, as domestic legal matters are generally not suitable for a court that must consider international law.³⁷⁶

This chapter shall now present an examination of each case³⁷⁷ to demonstrate how they are unsuitable for the application the IMT employed them for, starting with the case of *Quirin*.³⁷⁸ In dealing with the appeal as mentioned earlier, the U.S. Supreme Court quashed the appeal, holding that the United States was entitled to charge individual citizens with their breaches of international law.³⁷⁹ In the case's treatment by the IMT, this matter is quoted as the authority; the IMT does not further explain at all how this case is suitable in its application.³⁸⁰

However, a simple exploration of the *Quirin*³⁸¹ judgement demonstrates how flawed this reasoning is. In the critical segment of the decision, dealing with international liability, the Supreme Court stated that "from the very beginning of its history, this court"³⁸² had recognized individual liability. In support of this statement, the U.S. Supreme Court cite specific statements of the U.S. Congress,³⁸³ the powers of the President of the U.S.³⁸⁴ and, the U.S. constitution.³⁸⁵ All 3 of these cited authorities clearly only apply within the United States. From the beginning of that specific court's history³⁸⁶, the statement seems further to highlight this point. As has been stated by academics,³⁸⁷ the IMT's application of this case can face heavy criticism because the case appears particular to the context of the USA. In short, the case refers explicitly to so many matters specific to U.S. jurisprudence that one could argue that applying it under international law bears little if any, sense. One would expect that if the IMT wished to apply a U.S. judgement, they would demonstrate the

³⁷⁶ See Nerone, F R. "The legality of Nuremberg." [1965] Duquesne Law Review. Vol.4(1) 146-162 at 151.

³⁷⁷ See *Ex Parte Quirin* (1942) 317 US 1, and; *The S.S. Lotus* (1927) PCIJ 10

³⁷⁸ *Ex Parte Quirin* (1942) 317 US 1

³⁷⁹ *Ex Parte Quirin* (1942) 317 US 1 at 27.

³⁸⁰ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

³⁸¹ *Ex Parte Quirin* (1942) 317 US 1

³⁸² *Ex Parte Quirin* (1942) 317 US 1 at 27

³⁸³ *Ex Parte Quirin* (1942) 317 US 1 at 28

³⁸⁴ *Ex Parte Quirin* (1942) 317 US 1 at 28

³⁸⁵ *Ex Parte Quirin* (1942) 317 US 1 at 28

³⁸⁶ *Ex Parte Quirin* (1942) 317 US 1 at 27

³⁸⁷ Nerone, F R. "The legality of Nuremberg." [1965] Duquesne Law Review. Vol.4(1) 146-162 at 150.

general principles of law which were shared by both the international theatre and the U.S. judgement. Instead, the IMT simply applies a domestic U.S. case without explaining at any point why that domestic case is suitable for an application on the international level. This chapter would state that the case in question is clearly not suitable for application at an international level; its argument rests too heavily on specific matters of the United States' jurisprudential history. In short, yet again the IMT applied a matter which restricted itself in a way beyond its scope.

Now that this chapter has explored *Quirin*³⁸⁸, it shall explore the second and final authority raised by the IMT, or at least implied by the IMT,³⁸⁹ the case of *Lotus*.³⁹⁰ As mentioned before, through the use of *Quirin*,³⁹¹ the IMT was attempting to apply the domestic law of one state to another state's citizens. This eventuality, applying one state's domestic law to the citizens of another state, is the primary focus of the *Lotus*³⁹² judgement.³⁹³ Specifically, *Lotus*³⁹⁴ states that in a limited number of circumstances, a state may apply its domestic law to the citizens of another state.³⁹⁵ It further states that one of these set circumstances is where one party is vanquished by another in a time of war, leading the dominating party to exert sovereignty over the vanquished.³⁹⁶ Therefore, it would seem that through this principle, the IMT could defend its application of the law of the United States. Indeed, it is through this principle that academics have seen defence to this view.³⁹⁷ This, however, does not stand up to proper criticism.

The first point of criticism that may be levied at this approach is the remainder of the *Lotus*³⁹⁸ judgement. One key point of the judgment is that the sovereignty states and their independence should not be limited, except where international law recognises limitations.³⁹⁹ This, as discussed, was not the case before the IMT. *Lotus*⁴⁰⁰ further states

³⁸⁸ *Ex Parte Quirin* (1942) 317 US 1

³⁸⁹ See Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 150

³⁹⁰ *The S.S. Lotus* (1927) PCIJ 10

³⁹¹ *Ex Parte Quirin* (1942) 317 US 1

³⁹² *The S.S. Lotus* (1927) PCIJ 10

³⁹³ *The S.S. Lotus* (1927) PCIJ 10 at 9.

³⁹⁴ *The S.S. Lotus* (1927) PCIJ 10

³⁹⁵ *The S.S. Lotus* (1927) PCIJ 10 at 209

³⁹⁶ *The S.S. Lotus* (1927) PCIJ 10 at 49

³⁹⁷ See Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 151

³⁹⁸ *The S.S. Lotus* (1927) PCIJ 10

³⁹⁹ *The S.S. Lotus* (1927) PCIJ 10 at 44

⁴⁰⁰ *The S.S. Lotus* (1927) PCIJ 10

that the only limits any state should experience within its law-making capacity should be jurisdictional;⁴⁰¹ this again stands at odds with the overall verdict of the IMT. *Lotus*⁴⁰² goes on to state the significant limitations on criminal jurisdiction present within international law⁴⁰³, and yet these parts of the judgement are utterly ignored by the IMT;⁴⁰⁴ the placing of significant limitations on criminal liability is a matter which is directly relevant to the IMT, the fact the IMT utterly ignored this point is heavily damning.

Now for the crucial point on the *Lotus*⁴⁰⁵ case, as mentioned earlier, the IMT was a court of international character,⁴⁰⁶ meaning it made, applied, and interpreted international law;⁴⁰⁷ further, it has been held to have established international law.⁴⁰⁸ Despite this, it did not cite any international legal authority, instead citing domestic law of the U.S., seemingly justifying raising this domestic U.S. law to the level of international legal authority through this use of *Lotus*.⁴⁰⁹ This is not, however, how *Lotus*⁴¹⁰ should be properly applied. For explanation, the IMT effectively used *Lotus*⁴¹¹ to raise *Quirin*⁴¹² to the level of international law, using it as the basis for establishing individual criminal responsibility in international law. *Lotus*⁴¹³ does state at several points that one state may apply its domestic law to another state's

⁴⁰¹ See, *The S.S. Lotus* (1927) PCIJ 10 at 46 and 47.

⁴⁰² *The S.S. Lotus* (1927) PCIJ 10

⁴⁰³ *The S.S. Lotus* (1927) PCIJ 10 at 64

⁴⁰⁴ *Judgement of the International Military Tribunal: "Judgement: The law of the charter."* (30th September, 1946) Nuremberg Trial Proceedings, Vol 1.

Accessible via the Avalon Project: <https://avalon.law.yale.edu/imt/judlawch.asp> (last accessed on: 31/08/2021)

⁴⁰⁵ *The S.S. Lotus* (1927) PCIJ 10

⁴⁰⁶ See Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 151

⁴⁰⁷ See Nerone, F R. "The legality of Nuremberg." [1965] *Duquesne Law Review*. Vol.4(1) 146-162 at 151

⁴⁰⁸ See Sliedregt, E. "*One rule for them – selectivity in international criminal law.*" [2021] *Leiden Journal of International Law* Vol.34(2) 283-290 or ; Tomuschat, C. "*The Legacy of Nuremberg.*" [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844. Or ; "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) Or ; Finch, G. "*The Nuremberg Trial and International Law.*" [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "*Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement.*" A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁴⁰⁹ *The S.S. Lotus* (1927) PCIJ 10

⁴¹⁰ *The S.S. Lotus* (1927) PCIJ 10

⁴¹¹ *The S.S. Lotus* (1927) PCIJ 10

⁴¹² *Ex Parte Quirin* (1942) 317 US 1

⁴¹³ *The S.S. Lotus* (1927) PCIJ 10

citizens,⁴¹⁴ but at no point does this case state that this application raises the law in question to the level of international law. In short, the IMT acted as if, through its application of *Lotus*⁴¹⁵ that *Quirin*⁴¹⁶ became authority of international law; this is not the case. As stated, this chapter shall primarily deal with justiciability in international law. Suppose the IMT did not provide any relevant international law beyond the already discounted Treaty of Versailles. In that case, this chapter has no way to conclude other than to conclude against the IMT.

It is on that point that this chapter shall conclude on the cases of *Quirin*⁴¹⁷ and *Lotus*.⁴¹⁸ In each case, the IMT has applied the cases outside of the areas they should be used. Firstly with *Quirin*,⁴¹⁹ the IMT did not explain how a domestic U.S. case became appropriate for usage within ICL, nor did it explain how the reasoning for the court, which rested upon the very specific details of U.S. jurisprudence, made the case at all relevant to the issues before the IMT. The case is simply a domestic case that the IMT claimed as an authority without explaining why. Secondly, with *Lotus*,⁴²⁰ it is true to say that the court's application of domestic U.S. case law could have been justified; at the domestic level, *Lotus*⁴²¹ does not raise an authority to the level of international law. The IMT required an authority of international law to demonstrate they had jurisdiction to prosecute individuals for breaches of international law. Instead, they took a domestic case and applied it as if it had become some principle of international law using *Lotus*.⁴²² This is not the case and demonstrates a deep misuse of *Lotus*.⁴²³ This is all the more damning, considering how the IMT has often been cited as a strong authority of ICL.⁴²⁴ In short, the IMT was required to show authority

⁴¹⁴ *The S.S. Lotus* (1927) PCIJ 10 at 46. 49. 64 and 209

⁴¹⁵ *The S.S. Lotus* (1927) PCIJ 10

⁴¹⁶ *Ex Parte Quirin* (1942) 317 US 1

⁴¹⁷ *Ex Parte Quirin* (1942) 317 US 1

⁴¹⁸ *The S.S. Lotus* (1927) PCIJ 10

⁴¹⁹ *Ex Parte Quirin* (1942) 317 US 1

⁴²⁰ *The S.S. Lotus* (1927) PCIJ 10

⁴²¹ *The S.S. Lotus* (1927) PCIJ 10

⁴²² *The S.S. Lotus* (1927) PCIJ 10

⁴²³ *The S.S. Lotus* (1927) PCIJ 10

⁴²⁴ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290 or ; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844. Or ; "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) Or ; Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at

in international law for their actions; they instead used domestic law and treated it as international law without ever explaining why. This clearly demonstrates that the IMT had no basis within international law to find itself competent to try individuals for their breach of the law.

Concluding Remarks

In conclusion, this dissertation has reached three distinct findings concerning the IMT's trial held at Nuremberg. In chapter two, this dissertation demonstrated the strong relationship between the Nuremberg trial and the remainder of ICL, specifically about how much of modern ICL owes its existence to the precedent as made by Nuremberg. Such which is widely accepted by the academic community.⁴²⁵ In chapter three, this dissertation has demonstrated the highly flawed nature of the trial itself; such as flaws of the most basic principles of law, like the precedential clarity and strength, defects of victors' justice, application of retroactive laws and finally, failure to provide an adequately fair defence. Finally, in the fourth chapter, this dissertation has demonstrated that the matters before the IMT cannot be said to have been justiciable within the realm of international law.

Therefore, in answer to the question set by this dissertation, the IMT clearly had the right to try the defendants under domestic US law, through *Lotus*⁴²⁶, which clearly sanctioned

the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁴²⁵ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844.; "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021) ; Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁴²⁶ *The S.S. Lotus* (1927) PCIJ 10

such.⁴²⁷ However, as declared both by the IMT⁴²⁸ and academics reviewing the IMT,⁴²⁹ the IMT was a body of international law, and within international law, it held no competence. The only competence that it can be said to have would have been through *Lotus*.⁴³⁰

These criticisms upon the IMT may be taken as all the more damning when considered alongside the IMT's insistent claims that it was a court of law,⁴³¹ even though there is strong evidence to suggest that the IMT was aware of its shortcomings in this matter.⁴³²

In summary, in the modern academic light, alongside the assessments of many academics,⁴³³ the court of the IMT convened at Nuremberg should be seen in a highly

⁴²⁷ *The S.S. Lotus* (1927) PCIJ 10 at 209

⁴²⁸ See Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants*. (1st ed, London: Her Majesty's Stationery Office on the authority of the Attorney General 1946) at page 3 Or; Guidelines on Public Interactions, AGWAR to Office, Military Government, United States, October 6th 1946. As may be found in Smith, B F. *Reaching Judgement at Nuremberg*. (1st ed, New York: Basic Books, Inc. Publishers 1977) at page 344

⁴²⁹ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844.; "The Influence of the Nuremberg Trial on International Criminal Law." Writings of Robert H Jackson Nuremberg Prosecutor, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021); Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁴³⁰ *The S.S. Lotus* (1927) PCIJ 10

⁴³¹ See Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants*. (1st ed, London: Her Majesty's Stationery Office on the authority of the Attorney General 1946) at page 3 Or; Guidelines on Public Interactions, AGWAR to Office, Military Government, United States, October 6th 1946. As may be found in Smith, B F. *Reaching Judgement at Nuremberg*. (1st ed, New York: Basic Books, Inc. Publishers 1977) at page 344.

⁴³² Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971) at page 9.

⁴³³ See SaCouto, S. "Collective criminality and sexual violence: fixing a failed approach." [2020] *Leiden Journal of International Law*. Vol 33(1) 207-241 or; Askin, K. "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles." [2003] *Berkley Journal of International Law*. Vol.21(2) 288-349 or; Braithwaite, J. "Challenging Just Deserts: Punishing White Collar Criminals." [1983] *Journal of Criminal Law and Criminology*, Vol.73(2), 723-763 or; Stahn, C. "Reckoning with colonial injustice: international law as culprit and as remedy?" [2020] *Leiden Journal of International Law*. Vol.33(4) 823-835 or; Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290.

critical light. Not only did the court fail to provide a fair or adequate trial or any accurate and clear precedents, but the trial dealt with matters which it simply did not hold the competence to rule upon. As demonstrated, the prosecution of individuals under international law was not justiciable, and in fact, can only be justified under the principles of retroactive laws. This dissertation aims not to undermine the "progress"⁴³⁴ which the IMT has stood for in its shaping of ICL⁴³⁵ but rather to ensure that the quality of the trial in question is thoroughly and adequately understood. The Nuremberg trial undoubtedly had a clear impact on the law, sending the message that individuals would face punishment for their serious violations of international standards.

However, it is essential to recognize it only as intellectually honest to state that despite reaching a conclusion most would agree with and shaping ICL for the better, the IMT reached said conclusion by blatantly ignoring the law.⁴³⁶ Not only did the IMT make blatant misrepresentations such as through the Kellogg-Briand pact, but it outright acknowledged it lacked legal authority, as demonstrated through the memorandum as found within Minear's works.⁴³⁷ This dissertation states that the IMT should be seen as a rejection of the legal standards expected of a court. Instead, in favour of standards adopted to achieve

⁴³⁴ See Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants.* (1st ed, London: Her Majesty's Stationery Office on the authority of the Attorney General 1946) at page 3 Or; Guidelines on Public Interactions, AGWAR to Office, Military Government, United States, October 6th 1946. As may be found in Smith, B F. *Reaching Judgement at Nuremberg.* (1st ed, New York: Basic Books, Inc. Publishers 1977) at page 344.

⁴³⁵ See Sliedregt, E. "One rule for them – selectivity in international criminal law." [2021] *Leiden Journal of International Law* Vol.34(2) 283-290; Tomuschat, C. "The Legacy of Nuremberg." [2006] *Journal of International Criminal Justice* Vol.4(4) 830-844.; "The Influence of the Nuremberg Trial on International Criminal Law." *Writings of Robert H Jackson Nuremberg Prosecutor*, edited by Tove Rosen. Accessible at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last accessed on: 30/08/2021); Finch, G. "The Nuremberg Trial and International Law." [1947] *The American Journal of International Law* Vol.41(1), 20-37 ; "Applying the Principles of Nuremberg at the ICC. Keynote address at the conference "judgement at Nuremberg" held on the 60th anniversary of the Nuremberg Judgement." A speech by the president of the International Criminal Court Judge Phillipe Kirsch at Washington University. 30th September 2006. Accessible at: https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf (last accessed on: 30/08/2021)

⁴³⁶ Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971) at page 9

⁴³⁷ Minear, R. "Victors' Justice: the Tokyo war crimes trial." (1st ed, Princeton NJ: Princeton University Press 1971) at page 9

"progress,"⁴³⁸ an approach that has led to much confusion in the modern application of the IMT's principles.⁴³⁹

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⁴³⁸ See Unnamed Author. *The Trial of German War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November 1945): Speeches of the chief prosecutors for the United States of America, The French Republic, The United Kingdom of Great Britain, and Northern Ireland; the Union of Soviet Socialist Republics at the close of the case against the individual defendants.* (1st ed, London: Her majesty's stationary office on the authority of the Attorney General 1946) at page 3 Or; Guidelines on Public interactions, AGWAR to Office, Military Government, United States, October 6th 1946. As may be found in Smith, B F. *Reaching Judgement at Nuremberg.* (1st ed, New York: Basic Books, Inc. Publishers 1977) at page 344.

⁴³⁹ Borrelli, K. "Between show-trials and Utopia: a study of the tu-quoque defence." [2019] *Leiden Journal of International Law.* Vol.32(2) 315-331 at 316

Appendices

Appendix One: Bibliography

Appendix Two: The Charter of the International Military Tribunal

Appendix Three: The Defendants

Appendix One: The Bibliography

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