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**CHIEF AMONGST THE ANGELS?  
INTERNATIONAL PROSECUTORS  
AND THE MODERNIST PROJECT**

A thesis submitted in fulfilment of the requirements for the  
Degree of Doctor of Philosophy of Law at the University of Waikato

by

**Damien Robert Rogers**



THE UNIVERSITY OF  
**WAIKATO**  
*Te Whare Wānanga o Waikato*

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## **Chief amongst the angels?**

Damien Rogers

I hereby acknowledge this entire thesis, excepting those sources duly cited, as my own work.

*For my mum*

*And the little one who never arrived*

## ***ABSTRACT***

This thesis argues that three successive generations of prosecutors—each of whom at some moment in time belong to a major institution designed specifically to enforce international criminal law—are best understood as agents of the law, politics and war. By examining the relevant institutional arrangements, including formal prosecutorial mandates, the thesis recognises that these prosecutors play vital roles in the enforcement of international criminal law. By critically examining prosecutorial performance during the pre-trial and trial phases this thesis contends, firstly, that these prosecutors are also political actors serving, unwittingly or otherwise, in the interests of economic liberalisation, expressed as neo-capitalism during the middle of the twentieth century or as neoliberalism in the late twentieth century. By foregrounding the material and ideational conditions giving rise to those major enforcement institutions this thesis contends, secondly, that international prosecutors also help wage a mostly silent and largely unacknowledged war fought by proponents of various utopian movements. In order to support these two main contentions the thesis situates the development of international criminal law and its major institutions as a significant temporality of a discourse against *politico-cruelty*, a term used here to refer to cruel acts committed as a means of achieving some substantive end. It also contextualises the collective prosecutorial efforts within the project of modernity and, more specifically, what is described here as a *politico-cultural civil war* fought for control over that project. Using international criminal law as a means of confronting humanity's worst excesses and curbing modernity's most violent pathologies, international prosecutors of war crimes, crimes against humanity, crimes of genocide and crimes of aggression might represent the vanguard in the quest for international criminal justice and be regarded by many as featuring among humanity's better angels. Indeed, they might well be characterised in world affairs as chief amongst the angels. But, at the same time, these politico-legal actors, whose mandates are derived from, and re-inscribe, particular configurations of power emerging in the aftermath of global conflict, need to be recognised as the auxiliary combatants of those seeking to maintain their control over the modernist project.

## ***ACKNOWLEDGEMENTS***

Although it is commonplace to privilege one's thesis supervisor ahead of all others when acknowledging key sources of inspiration and support, such a custom was unnecessary in this case. My supervisor, Professor Neil Boister, exemplifies the very best of academic tradition, scholarly inquiry and genuine interest in the study of law in its broadest and most meaningful sense. As a very modest contribution to a rapidly evolving and endlessly fascinating area of the law, this thesis would have been unlikely to have commenced, and been far less rewarding to complete, without his involvement and guidance. I am particularly grateful for the congenial manner in which Professor Boister treated me more as a colleague than as a postgraduate research student.

Gay Morgan, also of the Te Piringa Faculty of Law at the University of Waikato, offered her powerful insights and constructive comments at particularly crucial phases of this research. Highly valued too was the collegial support offered by my colleagues and friends within Massey University's Politics Programme and the Centre for Defence and Security Studies; all made researching within the academy a delightful and worthwhile endeavour. My students, whose searching questions and palpable dissatisfaction with the state of world affairs in general, also deserve a brief mention here, providing a constant reminder of why academia matters.

Gerry Simpson's *Law, War & Crime: War Crimes Trials and the Reinvention of International Law* (Polity, Cambridge, 2007) deserves special mention as it was this work that immediately reignited my interest in this topic, inspiring me to further my understanding of it through a formal course of study. That book remains essential reading for anyone interested in this area of the law. Its influence on this thesis is difficult to exaggerate. Valuable too, especially as an easily-plundered rich archive, was the timely publication in 2012 by Oxford University Press of *International Prosecutors*, edited by Luc Reydam, Jan Wouters and Cedric Ryngaert. As this thesis was emerging a collection of essays entitled *Critical Approaches to International Criminal Law: An Introduction*, edited by Christine Schwöbel, was published in 2014 by Routledge, not only mapping out the emerging contours of a

sub-field of critical international criminal law scholarship, but also demonstrating the existence of an active and vibrant community of scholars—a much needed comfort for this solitary antipodean heretic!

My gratitude extends to the librarians of the Macmillan Brown Library at the University of Canterbury, who facilitated access, often at very late notice, to the Justice Erima Harvey Northcroft Tokyo War Crimes Trial Collection; this archive is an under-recognised and under-utilised national treasure. Although much of the information gathered during the course of this research project was found on the Internet, the University of Canterbury's Law Library supplied me with key secondary-source material, all the while tolerating my perpetual tardiness in returning overdue books. On that note I also appreciated the staff at the Victoria University of Wellington's Law Library, who granted me access to their holdings when earthquakes damaged and closed the University of Canterbury's Law Library. A former employer's generous provision of a half-day's study leave each week provided me with invaluable intellectual space as well as an all-too-brief reprieve from the oftentimes dreary demands of public service life, itself at times no more than an intellectual prison.

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## ***ACRONYMS AND ABBREVIATIONS***

ASP	Assembly of State Parties (International Criminal Court)
BWCE	British War Crimes Executive
CAICL	Critical Approaches to International Criminal Law
CAR	Central African Republic
CICC	Coalition for an International Criminal Court
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West Africa States
FAR	Rwanda Armed Forces
FDLR	<i>Forces Démocratiques de Libération du Rwanda</i>
FEC	Far Eastern Commission
FNI	Nationalist and Integrationist Front (DRC)
FPLC	<i>Forces Patriotiques pour la libération du Congo</i>
FRPI	Front for Patriotic Resistance of Ituri (DRC)
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991
IHL	International Humanitarian Law
ILC	International Law Commission
IMF	International Monetary Fund

IMT	International Military Tribunal for the Trial of German War Criminals
IMTFE	International Military Tribunal for the Far East
IPS	International Prosecution Service of the International Military Tribunal for the Far East
JEM	Equality Movement Collective (Sudan)
LRA	Lord's Resistance Army (Uganda)
MICT	United Nations Mechanism for International Criminal Tribunals
MLC	<i>Mouvement de Liberation du Congo</i>
MRND	National Republican Movement for Democracy and Development
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NMT	Nuremberg Military Tribunal
NSDAP	National Socialist German Workers Party
ODM	Orange Democratic Movement (Kenya)
OTP	Office of the Prosecutor (International Criminal Court)
P-5	Five Permanent Members of the United Nations Security Council
PNU	Party of National Unity (Kenya)
PRC	Peoples' Republic of China
RPF	Rwandese Patriotic Front
R2P	Responsibility to Protect
SCAP	Supreme Commander of the Allied Powers
SLA	Sudan Liberation Army
SOFA	Status of Forces Agreement
SPLA	Sudan People's Liberation Army
SWNCC	State, War, and Navy Departments Coordinating Committee (United States)
TRC	Truth and Reconciliation Commission
UN	United Nations Organisation
UNAMIR	United Nations Assistance Mission for Rwanda
UNPROFOR	United Nations Protection Force
UNOMUR	United Nations Observer Mission Uganda-Rwanda

UNWCC	United Nations War Crimes Commission
UPC	Union of Congolese Patriots
UK	United Kingdom
US	United States of America
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organisation

“And Devils to adore for Deities”

John Milton *Paradise Lost* (1667) Book 1, 373

# INTRODUCTION

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Given the origins, complexity and significance of their mandates, international prosecutors of the most serious international crimes—namely war crimes, crimes against humanity, crimes of genocide and crimes of aggression—deserve sustained and in-depth examination. Although these formal mandates are articulated in legal instruments establishing institutions designed specifically to enforce international criminal law (ICL), prosecutors have, through their own ideas and actions, breathed life into these at times ambiguous instructions. During the pre-trial phase of their work international prosecutors are authorised to prepare indictments, warrants of arrest or summonses to appear, choosing sets of particular details concerning alleged crimes committed by certain individuals at specific times and places. The content of these indictments, warrants or summonses is usually based upon extensive investigations, various analyses of information and close examination of available evidence. These legal documents hold the essence of the prosecution’s case, serve as the primary means of transforming a suspect into an accused and tend to commence formal proceedings leading to trial. At trial prosecutors are expected to build on the content of those indictments when making opening statements outlining their cases against the accused. These statements provide international prosecutors with an opportunity to showcase the legal character of their role and can be the apex of prosecutorial performance, deploying forceful rhetoric on the courtroom’s stage to deliver a theatre-like experience for an appreciative, though not altogether disinterested, audience-at-large. As part of trial proceedings prosecutors also select evidence to present in support of their cases, as well as rebut defence counsels’ arguments, cross-examine witnesses and make closing statements. Their performance at trial has a direct bearing on both the enforcement of ICL within particular institutions and, by contributing to case law, the ongoing development of this evolving set of rules prohibiting the commission of the most serious international crimes.



In addition to performing these and other trial-related functions international prosecutors manage relatively large and dynamic organisations, the associated administrative duties of which can occupy a considerable amount of their time and energy.<sup>1</sup> As strategists these prosecutors can shape aspects of their respective ICL institutions while informing the justice delivered through their prosecutorial effort. These prosecutors can also produce, or contribute to, formal accountability documents, such as the annual reports of the tribunal or court to which they belong.<sup>2</sup> They can also release press statements and make public remarks with a view to providing some degree of accountability for their own decisions and actions in their quest for international criminal justice.<sup>3</sup> For some perpetrators of serious

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<sup>1</sup> Gregory Townsend “Structure and Management” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 171 at 173.

<sup>2</sup> International Conference on Military Trials *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials* (International Organization and Conference Series II, European and British Commonwealth 1, Department of State Publication 2090, Washington DC, 1949); United Nations *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (A/49/342; S/1994/1007, 29 August 1994); United Nations *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994* (A/51/399; S/1996/778, 24 September 1996); International Criminal Court *Report of the International Criminal Court for 2004* (A/60/177, 1 August 2005).

<sup>3</sup> Robert H Jackson “The Trials of War Criminals: An Experiment in International Legal Understanding” (1946) 32 *ABAJ* 319; Richard J Goldstone “World Peace Through Justice Award Lecture” (2009) 8(4) *Wash. U. Global Stud. L. Rev.* 619; Louise Arbour “The Prosecution of International Crimes: Prospects and Pitfalls” (1999) 1(13) *Wash. U. J. L. & Pol’y* 13; Serge Brammertz “The Impact of Criminal Prosecutions on Compliance with IHL: Challenges and Perspectives on the Way Forward” (2015) 39(1) *UWA Law Review* 4; Hassan B Jallow “Prosecutorial Discretion and International Criminal Justice” (2005) 3 *Journal of International Criminal Justice* 145; Carla Del Ponte “The Role of International Criminal Prosecutions in Reconstructing Divided Communities” Public lecture given at the Centre for the Study of Global Governance at the London School of Economics, 20 October 2003, available at

international crime, international prosecutors represent an appreciable risk to be avoided; for many victims of these crimes they represent hope that justice will be done.<sup>4</sup>

Beyond the courtroom international prosecutors are often “the public face of international criminal justice,”<sup>5</sup> generating appreciable impacts in specific locales. The naming of a particular individual as a suspect can, for example, curtail that individual’s ability to engage in local, domestic or international politics; this is even more acute when the list of those indicted includes state leaders. Prosecutors can foster outreach relationships with domestic justice sectors and their related institutions. These prosecutors deal with, and seek support from, government officials and officials of intergovernmental organisations, though this kind of diplomacy is not necessarily *open diplomacy* as prosecutors may, in fact, choose to deal with diplomats behind closed doors.<sup>6</sup> As the personification of international criminal justice within the wider international community, international prosecutors are living objects around which others, such as those belonging to a nongovernmental organisation (NGO), social movement or mainstream media organisation, can cohere and at times mobilise into action. This occurs even though some policymakers, diplomats, journalists and academics are intimidated by international prosecutors

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<http://eprints.lse.ac.uk/23448/>; Luis Moreno-Ocampo “The International Criminal Court: Seeking Global Justice” (2015) 40 *Case W. Res J. Int’l L Rev* 215; and Fatou Bensouda “Looking Back, Looking Ahead—Reflections from the Office of the Prosecutor of the ICC” (2012) 11(2) *Wash. U. Global Stud. L. Rev* 437.

<sup>4</sup> Luc Reydam, Jan Wouters and Cedric Ryngaert “Introduction” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 1 at 2.

<sup>5</sup> At 2.

<sup>6</sup> Richard J Goldstone *For Humanity: Reflections of a War Crimes Investigator* (Yale University Press, New Haven & London, 2000) at 91; and Carla Del Ponte in collaboration with Chuck Sudetic *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (Other Press, New York, 2009) at 10, 43-44 & 101-102.

when they make “self-assured comments about the imperatives of customary international law, often couched in confident resort to mysterious Latin maxims.”<sup>7</sup>

The pool of these prosecutors continues to grow as successive generations of lawyers cut their professional teeth within various ICL institutions. As Mark Drumbl explains:<sup>8</sup>

These lawyers have become specialists, whose expertise in international criminal law and procedure is no longer just of academic value—it is marketable and the market values it. These lawyers now have an interest in maintaining the value of their expertise. Within the college of international law, an energetic, transnational and networked epistemic community of international criminal lawyers has arisen.

These prosecutors share a deep repugnance for the internationalised culture of impunity that Carla Del Ponte describes as *muro di gomma*.<sup>9</sup> This so-called *rubber wall* is constructed not so much by the criminals themselves, but more by those in positions of power who, for various reasons, wish to shield particular individuals and the groups they represent from the full glare of international criminal justice. This culture of impunity, prosecutors routinely maintain, warrants instant redress by those holders of positions of power and influence in contemporary world affairs, from international leaders and policymakers to domestic law-makers, advocacy groups and researchers alike. Forming part of “an industry of international criminal law practice populated by judges, lawyers and administrators who move from tribunal to tribunal,”<sup>10</sup> some prosecutors emerge from, or go on to obtain, employment in the senior ranks of the public service or international organisations. After moving among the courtrooms of various institutions others contribute to the production of scholarly

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<sup>7</sup> William Schabas *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, Oxford, 2012) at 3.

<sup>8</sup> Mark Drumbl “International Criminal Law: Taking Stock of a Busy Decade” (2009) 10(1) *Melbourne Journal of International Law* 1 at 4.

<sup>9</sup> Del Ponte with Sedutic, above n 6, at 18.

<sup>10</sup> Sara Kendall “Critical orientations: A critique of international criminal court practice” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014) 54 at 55-56.

knowledge through research and university teaching, “generating ever more students of mass atrocity jurisprudence for a legal market incapable of absorbing them.”<sup>11</sup> As a burgeoning cadre of professional litigators, these prosecutors are a growing force to be reckoned with in local, international and global settings, having impact far beyond the courtroom. For these reasons alone, then, international prosecutors of serious international crime deserve critical scholarly treatment.

This thesis explores the efforts of *prosecutors* ahead of the defence counsel and members of the bench because, as legal actors, prosecutors do more to assert that evolving body of rules seeking to end the culture of impunity enjoyed by perpetrators of serious international crime, searching out the limits of ICL’s enforceability. As Marieke Wierda and Anthony Triolo point out the prosecutor’s mandate is “the *raison d’être* of the tribunal.”<sup>12</sup> More specifically, the thesis concerns those prosecutors belonging to major *international* institutions of ICL; namely those established by the order of an occupying power, through a United Nations (UN) Security Council resolution or through a treaty or an international agreement among states.<sup>13</sup> These international institutions are prioritised here ahead of domestic and special national courts, or hybrid and internationalised tribunals, because the former are the most forceful and, almost certainly, most consequential expression of the international community’s collective will to punish those responsible for serious international crimes through the rule of ICL. Prosecutors who belong to these international institutions derive their authority from those state-makers that design and establish these courts. When these prosecutors perform various law-related functions and confront, in an adversarial manner, those accused of committing serious international crimes, their efforts echo the intentions of the executives on whose behalf they prosecute. In many instances, the prosecutors articulate and reproduce reigning official versions of events before those versions encounter opposition from the defence and mediation from the bench.

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<sup>11</sup> At 56.

<sup>12</sup> Marieke Wierda and Anthony Triolo “Resources” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 113 at 114.

<sup>13</sup> Reydam, Wouters and Ryngaert, above n 4, at 2.

This is not to suggest, however, that the bench or the defence are undeserving topics of inquiry in their own right, or to imply that domestic and hybrid courts are unimportant to ICL enforcement. Rather, it merely acknowledges that any conceptual mapping of the ICL field would be incomplete without featuring the prosecutors belonging to the International Military Tribunal for the Trial of German War Criminals (IMT), the International Military Tribunal for the Far East (IMTFE), the International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (ICTR) and the International Criminal Court (ICC). It is these landmark institutions—or, more specifically, the three successive generations of prosecutors who belong to these five major ICL institutions—which are the primary focus of this thesis.

## ***I Central Argument***

By examining the relevant institutional arrangements, including formal prosecutorial mandates, this thesis recognises that three successive generations of international prosecutors play vital roles in the enforcement of ICL from the immediate aftermath of the Second World War up until the present day. There is, however, very little that is new or particularly unique in recognising international prosecutors as agents of the law. Indeed, recent scholarship gives a great deal of attention to such legal agency in terms of, *inter alia*, prosecutors' formal mandates, independence, discretion and trial functions.<sup>14</sup> This recent work forms part of a burgeoning field of legal scholarship

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<sup>14</sup> Luc Reydam and Jed Odermatt “Mandates” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 81; Luc Côté “Independence and Impartiality” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 319; Frederiek de Vlaming “Selection of Defendants” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds)

which, while acknowledging the politico-strategic circumstances that, in part, give rise to this law and its key enforcement institutions, tends to view the law as an apolitical set of rules proscribing the commission of serious international crime.<sup>15</sup> Much of that scholarship is informed by an assumption that a dichotomy exists between politics and law; that is, while one informs and shapes the other, politics and law are, in effect, two very separate domains. That dichotomy underpins the view held by Del Ponte, the well-known former prosecutor at the ICTY and the ICTR, who thinks that although diplomacy all-too-often disabled and all-too-seldom enabled the arrest of those who stood accused of serious international crime, the law itself is not a form of international politics.<sup>16</sup> As we shall see, this is a view shared by most, if not all, the prosecutors considered in this thesis.

Separating politics and law into two distinct domains serves obvious academic, professional and material interests. Yet the sharp focus given to the legal aspects of enforcing ICL tends to blur significant political dimensions, offering only a highly provisional and fragmentary comprehension of the field of international criminal justice. While appreciating that the complexities of trial advocacy remains important

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*International Prosecutors* (Oxford University Press, Oxford, 2012) 542; Hiroto Fujiwara and Stephan Parmentier “Investigations” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 572; Jeffrey Locke “Indictments” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 604; and Sergey Vasiliev “Trial” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 700.

<sup>15</sup> Antonio Cassese *International Criminal Law* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2008); Antonio Cassese *Cassese’s International Criminal Law* revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting (3<sup>rd</sup> ed, Oxford University Press, Oxford, 2013); Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst *An Introduction to International Criminal Law and Practice* (3<sup>rd</sup> ed, Cambridge University Press, Cambridge, 2014); Richard J Goldstone and Adam M Smith *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (Routledge, London and New York, 2009); and Ronald C Slye and Beth Van Shaack *International Criminal Law: The Essentials* (Aspen Publishers, New York, 2009).

<sup>16</sup> See Del Ponte with Sedutic, above n 6.

to understanding the pursuit of international criminal justice, much relevant mainstream scholarship does not fully account for the injustices endemic to most circumstances in which serious international crime occur. As Immi Tallgren explains:<sup>17</sup>

Focusing on the idea of international criminal justice helps us forget that an overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by criminal law. The ideology of a disciplined, mathematical structure of international criminal responsibility serves as a soothing strategy to measure the immeasurable. The seemingly unambiguous notions of innocence and guilt create consoling patterns of causality in the chaos of intertwined problems of social, political, and economic deprivation.

The notion that we are all equal before the law, a dogma central to the quest for international criminal justice, frequently obfuscates the inequalities prevailing within any society, among societies and within the international society of states.<sup>18</sup>

By critically examining the prosecutorial performance during the pre-trial and trial phases this thesis contends, firstly, that the three generations of international prosecutors which have thus far emerged are, in fact, also political actors. There are many definitions of politics and defining politics is, of course, something of a political act in itself because it determines what is—and, by corollary, what is not—relevant to particular forms of inquiry and analysis. Some scholars define politics as the art of government, whereas others define politics as occurring within public affairs, or as the practice of compromise and consensus, or, more simply, as the exercise of power.<sup>19</sup> The definition used in this thesis is taken from Ralph Pettman, who suggested that politics refers to “all those things we do, individually and in

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<sup>17</sup> Immi Tallgren “The Sensibility and Sense of International Criminal Law” (2002) 13(3) *EJIL* 561 at 593.

<sup>18</sup> At 594. Contrast that with Del Ponte’s view that “social conditions and culture do not produce war crimes. People commit war crimes, people egged on by political and military leaders.” Del Ponte with Sudetic, above n 6, at 36.

<sup>19</sup> Andrew Heywood *Politics* (Palgrave, New York, 2013) at 3-12.

concert, to get and use power over others for non-trivial purposes. Politics is always about trying to get our way to some substantive end. It is always a verb.”<sup>20</sup>

Pettman’s definition is preferred here over all others because it is inclusive yet limited. It is inclusive because it can be applied to any situation where power, broadly conceived, is used over others, yet it is limited too because that power must be used in relation to some discernible ends that matter. Moreover, Pettman’s definition is not necessarily fixated on official forms of power exercised by governments or other institutions and organisations. This helps to signal the inter-relationships among and across the important politico-strategic, politico-economic, and politico-social dimensions of local and international affairs. This is important because the politico-strategic dimension is fundamental to explaining the establishment and design of major ICL enforcement institutions, just as the politico-economic dimension is fundamental to explaining post-conflict reconstruction transformations. Similarly, the politico-social dimension is fundamental to explaining the construction of certain groups and the targeted destruction of others through mass atrocity, as well as the ways in which cosmopolitanism saturates ICL’s development and enforcement. This also brings into focus the definition’s use of *we*, which is used here to speak, in the general sense, on behalf of all of us who act politically at certain moments and, in the specific context of this thesis, all of us who seek to better understand the various roles played by three successive generations of international prosecutors. *We* is not meant in the sense that Tallgren means when she discusses *we* in terms of either the international community or humanity and the collective pursuit of international criminal justice because this usage excludes critical ICL scholars.<sup>21</sup>

But, perhaps even more importantly, Pettman’s definition enables the thesis to bring into focus the broader and more profound politico-cultural context of modernity and the rivalry among its ancillary, or subsidiary, utopia movements. In other words, this definition of politics—which is, at once, inclusive yet limited—enables a bifurcated analysis of the prosecutors’ collective efforts, signalling moments of

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<sup>20</sup> Ralph Pettman *World Politics: Rationalism and Beyond* (Palgrave, New York, 2001) at 6.

<sup>21</sup> Immi Tallgren “The Voice of the International: Who is Speaking?” (2015) *Journal of International Criminal Justice* 1 at 21.



consonance and longer periods of dissonance between their more immediate, specific politico-strategic circumstances and the broader material and ideational conditions prevailing within the politico-cultural project of modernity. Other definitions of the political preclude this kind of analysis and eschew explanations that suggest that there is more to atrocity crime trials than the performance of justice or the exercise of state-centric power.

Since prosecutors make political choices,<sup>22</sup> obtaining various degrees of power over the accused, their defence, the bench and other prosecutors, the concept of an international prosecutor as a juridical actor who is above all political considerations is a fiction. Even though prosecutors may couch their decisions in terms of objectivity and universality and then “simply pretend that politics is alien to the pursuit of justice, dismissing it as a vile taint to be shunned rather than one that is to be mastered and understood,”<sup>23</sup> these decisions are always partial and subjective, helping to create or sustain certain types of political communities.<sup>24</sup> This is not to suggest that international prosecutors who identify themselves primarily or exclusively as agents of the law are deliberately dissembling, but rather, to acknowledge, as Tor Kvever does, that:<sup>25</sup>

[I]t is at the ideological level that law, trial, and text operate to constrain consciousness—to create, in other words, a social consensus that can persuade people to accept the legitimacy but also the apparent inevitability of the status quo, with its existing hierarchical arrangements. The ideological function of legal text and discourse is thus not so much to ‘enforce’ existing social relations as it is to legitimatise them.

This first contention challenges mainstream ICL scholars to reconsider the relationship between politics and law by recognising that politics need not only

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<sup>22</sup> Schabas, above n 7, at 88.

<sup>23</sup> At 3.

<sup>24</sup> Martti Koskenniemi *The Politics of International Law* (Hart Publishing, Oxford and Portland, Oregon, 2011) at 260.

<sup>25</sup> Tor Kvever “International Criminal Law: An Ideology Critique” (2013) 26(3) *LJIL* 701 at 707.

animate and saturate the law, but that the law, particularly ICL enforcement, constitutes a kind of international politics in and of itself. As Gerry Simpson puts it, ICL becomes a kind of “juridified diplomacy” which “involves the translation of political conflict into legal doctrine, and, occasionally, the resolution of these conflicts in legal instruments.”<sup>26</sup> This contention also challenges critical ICL scholars, of which there is a small but vibrant community,<sup>27</sup> to broaden their notion of the political. Too often politics is conceptualised, unduly narrowly, as only cohering around the state-maker and his or her prerogatives. When this happens, law—especially its enforcement—is routinely seen as a by-product of state-based politics. While states are undoubtedly important to the conduct of contemporary world affairs, including as makers of international law as well as its subject and object, states are not the only entities through which people, acting as individuals or in concert, seek to obtain and use power over others for substantive ends. Focusing on the state as the primary entity of contemporary world affairs neglects the importance of economic and social actors. It can blind analysts and scholars to the ways in which international prosecutors of serious international crime express their preferences not only for democracies, but also for markets without fetters and individuals as sovereigns unto themselves. These expressions are important because enemies, rivals and opponents who do not share these preferences can find themselves transformed initially into suspects and then into the accused standing in the dock at ICL trials.

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<sup>26</sup> Gerry Simpson *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity, Cambridge, 2007) at 132.

<sup>27</sup> Kamari Maxine Clarke *Fiction of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, Cambridge, 2009); Kevin Jon Heller and Gerry Simpson (eds) *The Hidden Histories of War Crimes Trials* (Oxford University Press, Oxford, 2013); Koskenniemi, above n 24; Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, London and New York, 2014); Simpson, above n 26; and Danilo Zolo *Victors' Justice: From Nuremberg to Baghdad* trans MW Weir (Verso, London, 2009), as well as Sara Kendall “Donor’s Justice: Recasting International Criminal Accountability” (2011) 24(3) *LJIL* 585; Martti Koskenniemi “Between Impunity and Show Trials” (2002) 6 *Max Plank UNYB* 1; Tallgren above n 17 and n 21; and Krever above n 25.

As this thesis will demonstrate, international prosecutors of serious international crime are, by and large, political actors serving in the interests of *economic liberalisation*. The political movement of economic liberalisation emerges from the nineteenth century, as John Gray explains:<sup>28</sup>

Mid-nineteenth century England was the subject of a far-reaching experiment in social engineering. Its objective was to free economic life from social and political control and it did so by constructing a new institution, the free market, and by breaking up the more socially rooted markets that had existed in England for centuries. The free market created a new type of economy in which prices of all goods, including labour, changed without regard to their effects on society. In the past, economic life had been constrained by the need to maintain social cohesion. It was conducted in social markets—markets that were embedded in society and subject to many kinds of regulation and restraint. The goal of the experiment that was attempted in mid-Victorian England was to demolish these social markets, and replace them by deregulated markets that operated independently of social needs. The rupture in England's economic life produced by the creation of the free market has been called the Great Transformation.

In the middle of the twentieth century, economic liberalisation found favour in Northern America and parts of Western Europe and was expressed as a form of *neo-capitalism*, which, as Franco Archibugi explains, is “characterised by mass production and, therefore, mass consumption” and has witnessed a dramatic expansion of the state's provision not only of health and educational services, but also of public housing and transportation goods, particularly where private firms have been reluctant to operate.<sup>29</sup> (The prefix *neo* acknowledges the changes occurring within capitalism from its nineteenth-century origins.<sup>30</sup>) Within the US, it is more commonly referred to as New Deal-ism, named after US President Franklin D

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<sup>28</sup> John Gray *False Dawn: The Delusions of Global Capitalism* (Granta Books, London, 1998) at 1.

<sup>29</sup> Franco Archibugi “Between neo-Capitalism and post-Capitalism: A Challenging Turn for Societal Reform” (2008) 18(3) *International Review of Sociology* 505 at 509.

<sup>30</sup> S Michael Miller “Notes on Neo-Capitalism” (1975) 2 *Theory and Society* 1 at 2.

Roosevelt's policy response to the Great Depression where his administration used counter-cyclical spending to disrupt boom-and-bust patterns seen in the economy. Neo-capitalism and its concomitant Keynesian policy prescriptions had its "heyday"<sup>31</sup> in the immediate aftermath of the Second World War before giving way to the rise of neoliberalism in the 1970s. By *neoliberalism*, I mean here a set of ideas, practices and policy preferences which are based on an assumption, drawn from classical political liberalism, that adult individuals possess an inalienable right to make choices about how to pursue their welfare, regardless of whether or not those choices are poor.<sup>32</sup> More specifically, these ideas, practices and policy preferences seek to apply so-called market mechanisms into areas of social life hitherto organised, governed and conducted in other ways.<sup>33</sup> By displacing traditional social paradigms with a set of reified market relations neoliberalism privileges individual economic imperatives ahead of collective human wellbeing.<sup>34</sup> As variations of economic liberalisation both *neo-capitalism* and *neoliberalism* fall within what John Gray describes as the "faith in a global free market" which is "as damagingly utopian as any earlier grand design for humanity."<sup>35</sup> These various expressions of *economic liberalisation* reflect important historical shifts in the material and ideational conditions underlying modernist world politics.

The politico-strategic, politico-economic and politico-social preferences shared among state-makers who establish, resource and defend institutions designed specifically to enforce ICL partly explain why these prosecutors are, unwittingly or otherwise, agents of economic liberalisation. The actions undertaken by prosecutors, and the work of those legal scholars that offers uncritical treatments of those actions, could play a role in limiting the politico-legal consciousness of many participants in,

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<sup>31</sup> Ernest Mandel "The Economics of Neo-Capitalism" (1964) *The Socialist Register* 56 at 56.

<sup>32</sup> Clive Hamilton *Growth Fetish* (Pluto Press, London, Sterling, Virginia, 2003) at 63-64.

<sup>33</sup> Maria Bargh (ed) *Resistance: An Indigenous Response to Neoliberalism* (Huia Publishers, Wellington, 2007) at 1.

<sup>34</sup> Jane Kelsey *Serving Whose Interests? The Political Economy of Trade Services Agreements* (Routledge-Cavendish, Oxon, 2008) at 2-3.

<sup>35</sup> John Gray *Black Mass: Apocalyptic Religion and the Death of Utopia* (Penguin, London, 2007) at 75.

and observers of, atrocity crime trials. This is because the values informing prosecutorial action are reflected and re-inscribed through a Gramscian process of cultural hegemony whereby the interests of the powerful became the values inherited by the weak. Another, less overt, reason lies in international law's origins. Martti Koskenniemi has done much, firstly, to "trace the emergence of a sensibility about matters international in the late nineteenth century as an inextricable part of the liberal and cosmopolitan movements of the day"<sup>36</sup> and, secondly, to deconstruct the liberal theory of politics that informs international law, thereby undermining legal practitioners' claims to objectivity and impartiality.<sup>37</sup> The growth of international law, including ICL, occurs as part of a liberal movement which, emerging during the nineteenth century,<sup>38</sup> is still evident today even if other factors, such as nationalism, are at play too.<sup>39</sup> In other words, ICL institutions not only help form part of a particular utopian movement,<sup>40</sup> but they also help transform the world order from one where states are considered co-equal to one where states are distinguished by their conformity and allegiance to a particular utopian movement.<sup>41</sup> Although all trials of serious international crimes are political trials to the degree that they reflect, re-inscribe and extend existing power relations in any society, including the society of states, they are also show trials which "implicate larger political transformations and are efforts to influence and dictate these transformations. Not merely political or legal proceedings, they are world-historical trials."<sup>42</sup> ICL enforcement thus becomes a particular form of modernist world politics, which, concerning the ongoing rivalry among various utopian movements, is understood here more broadly than the diplomacy of state-makers, though such diplomacy remains important.

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<sup>36</sup> Martti Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge, 2001) at 2.

<sup>37</sup> Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge, 2005) at 600.

<sup>38</sup> Koskenniemi, above n 36, at 2.

<sup>39</sup> Simpson, above n 26, at 24.

<sup>40</sup> At 20.

<sup>41</sup> At 142.

<sup>42</sup> At 113.

Modernist world politics involves contests played out among proponents of contending utopian movements, which are not necessarily aligned with particular states, though “[e]conomists, environmentalists, and human rights experts are just as divided among themselves as Finns, Frenchmen, or Fijians about how to understand the world and what to do with it.”<sup>43</sup> While the forces of economic liberalisation have dominated modernist world politics since at least the end of the Second World War, these forces have been routinely and, at times, fiercely contested by various rival utopian movements: these include Nazism; Shinto-Imperialism; Soviet-styled Communism; Christoslavism; Hutu supremacy; and Islamic fundamentalism; each of which is a by-product of the European Enlightenment in particular<sup>44</sup> and of the politico-cultural project of modernity more generally.<sup>45</sup> Each of these utopian movements, elaborated in more detail in subsequent chapters, is an amalgam of nationalism and either race, ethnicity, class or religion, or some combination thereof. Each of these movements, moreover, seeks to use organised violence, usually through the state and its machinery of government, as a means of radically transforming society in terms of some hierarchy of sorts. These utopias can never be achieved in practice, but are hugely costly for the human species when examined in terms of those killed by them, those who die for them and the enormity of human potential never realised; as described by Gray “[u]topias are dreams of collective deliverance that in waking life are found to be nightmares.”<sup>46</sup> Here, then, the specific sets of politico-strategic circumstances within which certain institutions designed to enforce

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<sup>43</sup> Koskenniemi, above n 24, at 69.

<sup>44</sup> Gray, above n 35, at 37 & 69.

<sup>45</sup> SN Eisenstadt “Multiple Modernities” (2000) 129(1) *Daedalus* 1 at 9 & 11; see also John Gray *Al Qaeda and What it Means to be Modern* (Faber and Faber, London, 2003) at 3. Similar arguments are now made in relation to the Islamic State; see, for instance, John Gray “A Point of View: ISIS and what it means to be modern” (2014) *BBC News*, 11 July available at <http://www.bbc.com/news/magazine-28246732>; and Karen Armstrong “Wahhabism to ISIS: how Saudi Arabia exported the main source of global terrorism” (2014) *New Statesman*, 27 November available at <http://www.newstatesman.com/world-affairs/2014/11/wahhabism-isis-how-saudi-arabia-exported-main-source-global-terrorism>.

<sup>46</sup> Gray, above n 35, at 17.

ICL are established are distinguished from the more general material and ideational conditions prevailing within the politico-cultural project of modernity. This bifurcation is important because atrocity crime trials are explicable not only in terms of politico-strategic calculations, but also in terms of rival utopian movements fighting for control over the governance architecture used to manage modernist world affairs.

By foregrounding the material and ideational conditions giving rise to those institutions designed specifically to enforce ICL the thesis contends, secondly, that successive generations of international prosecutors help wage a mostly silent and largely unacknowledged war. This second contention challenges critical ICL scholars to reconsider the relationship between law (as a type of politics) and war. Yet the character of war is understood here in a very different way to the description of war offered by the nineteenth-century Prussian soldier, Carl von Clausewitz. For Clausewitz, war is politics by other means and is a clash of arms, or a series of clashes of arms, which result from the failure of politics.<sup>47</sup> According to Michel Foucault, however, modernist politics itself is a continuation of war by other means because relationships of *politicised* power emerge from relationships of armed force established through conflicts occurring at particular places and times. These new power relationships help transform a condition of conflict into a condition of peace, preserving the result of conflict in “a sort of silent war” that enshrines (uneven) relationships of force, re-inscribing that relationship in institutions, economic inequalities, social relations’ language and, in some cases, individual’s bodies. Such a peace masks the ongoing *political* rivalries over access to power which are best understood “as so many episodes, fragmentations, and displacements of the war itself. We are always writing the history of the same war, even when we are writing the history of peace and its institutions.”<sup>48</sup> Although Foucault did not fully explore the consequences of his inversion of Clausewitz’s dictum, instead moving on quickly into

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<sup>47</sup> Carl von Clausewitz *On War* (Penguin, Auckland, 1974), especially “Book One: On the Nature of War.”

<sup>48</sup> Michel Foucault “*Society Must Be Defended*”: *Lectures at the College De France, 1975-76* Trans David Macey (Picador, New York, 2003) at 15-16.

his investigations of biopower, biopolitics and governmentality, the implications of his inversion remain profound. As Julian Reid puts it:<sup>49</sup>

War figures ultimately for Foucault not as a primitive state of being against which modern societies and their power relations can be differentiated, nor simply as a utile instrument for the pursuit of the grand strategies of state in paradoxical compromise of the civil condition of modern societies, but, rather, as a ‘condition of possibility’ for the constitution of modern power relations in which the aleatory condition of species life is variably recruited, set free, manipulated, and put to work in the development of modern social arrangements.

In this important sense, war is a phenomenon larger than armed conflict, extending beyond the clash of arms or series of clashes of arms. Hence, modernist world politics represents a transformation of war’s routine conduct as the formal cessation of hostilities becomes less meaningful when configurations of power transcend battle. In this sense, too, modernist world politics thus represents an enlargement of war’s province as the battleground is no longer to be understood as some geographically-bound territory, but rather, as the entire politico-cultural project of modernity. More specifically, it is fought for control over the key institutional architecture governing the politico-strategic, politico-economic and politico-social dimensions of international life and by policing international society’s norms and related rules of behaviour. And, this war is also waged, in part, through the reconstruction of local politico-strategic and politico-economic institutions in the aftermath of armed conflict and, in part, through the enforcement of ICL in the aftermath of mass atrocity. Law (as a type of politics) thus becomes war’s means; the old maxim *silent enim leges inter arma* (law is silent in war<sup>50</sup>) needs to be revised so that war is now a silent spectre in law.

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<sup>49</sup> Julian Reid “Life Struggles: War, Discipline and Biopolitics in the Thought of Michel Foucault” in Michael Dillon and Andrew W Neal (eds) *Foucault on Politics, Security and War* (Palgrave Macmillan, New York, 2008) 65 at 66.

<sup>50</sup> See Cryer and others, above n 15, at 267.



By placing representatives of discredited utopian movements in the dock of five ICL enforcement institutions, trials of those accused of committing serious international crimes occur as an internal frontline in this silent war, which I call hereafter *politico-cultural civil war*. Politico-cultural civil war is more than a militarised politico-strategic affair; these wars are fought among proponents of larger and more complex utopian movements, which are articulated through, but never constrained by, politico-strategic policy. Since each utopian movement pursues its own path towards a perfected humanity—but which is, at the same time, an inconclusive path—at stake in politico-cultural civil war is nothing less than the determination of what it means to be human. This notion of politico-cultural civil war, then, is more than a form of politics for it seeks to obtain and maintain control over modernity by delegitimising, degrading and destroying its perceived enemies, rivals and opponents by any available means. The violence accompanying economic liberalisation can only be described as extreme and brutal. Under the conditions of economic liberalisation, over 1 billion people—that is, over 1/6 of humanity—live in poverty, experience the brunt of armed conflict, disease and ignorance reminiscent of the fourteenth century, and have access only to US\$1 per day or less.<sup>51</sup> For Zygmunt Bauman, this widespread misery and systemic squalor is the “collateral damage” flowing from social and economic inequality.<sup>52</sup> As Paul Rogers explains too “the real drivers of current global insecurity are [...] deepening socio-economic division, which lead to the relative marginalization of most people across the world, and the prospect of profound and lasting environmental constraints, caused by climate change.”<sup>53</sup>

Politico-cultural civil war differs markedly from those more well-known understanding of civil war as internal armed conflict fought over the institutions of

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<sup>51</sup> Paul Collier *The Bottom Billion: Why the Poorest Countries Are Failing and What Can be Done About It* (Oxford: Oxford University Press, Oxford, 2007).

<sup>52</sup> Zygmunt Bauman *Collateral Damage: Social Inequalities in a Global Age* (Polity, Cambridge, 2011).

<sup>53</sup> Paul Rogers *Irregular War: ISIS and the New Threat from the Margins* (IB Tauris, London and New York, 2016) at 5.

government and the authority to rule over a particular territory, such as the English, US and Spanish Civil Wars: for Eve La Haye, for instance, internal armed conflict lies somewhere between internal disturbances and full-blown international armed conflict.<sup>54</sup> It differs too from the type of European civil war “in which religious belief and ‘godless’ secularism are understood as irreconcilable opponents, an understanding that was long fed by memories of the burning of Protestant ‘martyrs’ in sixteenth-century England, by the legend of the Spanish Inquisition and by a ‘holy alliance’ between churches (especially the Roman Catholic Church) and socially conservative forces in reaction to the French Revolution.”<sup>55</sup> Nor is it a global civil war understood by Carl Schmitt as occurring over the self-enclosing structures of the states-based system, which he refers to as the second *nomos* of the earth, with its land “divided into states, colonies, protectorates, and spheres of influence.”<sup>56</sup>

The selective enforcement of ICL is a form of *lawfare*, but not in the sense meant by Laurie R Blank when he seeks to delegitimise the Palestinian cause by criticising the Goldstone Report’s “misapplication of international humanitarian law” when examining Israel’s use of armed force against civilians.<sup>57</sup> Rather, it is *lawfare* in the sense that David Luban means when he writes that it “is the use of law as a weapon of war against a military adversary. Law can be weaponized in many ways, but easiest is accusing the adversary of war crimes, thereby subjecting him to harassment through litigation and bad publicity.”<sup>58</sup> It is a tactic of war available for

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<sup>54</sup> Eve La Haye *War Crimes in Internal Armed Conflicts* (Cambridge University Press, Cambridge, 2008) at 6; and Lindsay Moir *The Law of Internal Armed Conflict* (Cambridge University Press, Cambridge, 2002).

<sup>55</sup> Larry Sledentop *Inventing the Individual: The Origins of Western Liberalism* (Belknap Press of Harvard University Press, Cambridge Massachusetts, 2014) at 349.

<sup>56</sup> Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, New York, 2006) at 352.

<sup>57</sup> Laurie R Blank “Finding Facts but Missing the Law: The Goldstone Report, Gaza, and Lawfare” (2010) 43 *Case W. Res J. Int’l L* 280; and Charles J Dunlap “Lawfare Today: A Perspective” (2008) *Yale Journal of International Affairs* 146.

<sup>58</sup> David Luban “Carl Schmitt and the Critique of Lawfare” (2010) 43 *Case W. Res J Int’l L Rev* 457 at 457.

use by the strong against their perceived enemies, rivals and opponents, rather than by the weak that almost always lack the material power required to establish, operate and defend viable enforcement institutions. Those individuals who find themselves transformed into the accused are not necessarily the ‘enemy target’; they are merely representatives of a movement comprising a group, state, or alliance of states that pursue a rival utopian vision of modernity.

Arguing that prosecutors of serious international crime enforce law, conduct politics and help wage politico-cultural civil war is not to suggest that they always have their way in non-trivial matters. While trials can serve to legitimise a particular collective, group or state leading a prosecution, or endorse the underlying rule of international law, such trials can also create the interstices required to express views unauthorised by that collective, group or state.<sup>59</sup> “The trial,” Simpson explains, “also can be a trial of the accusers and their political projects.”<sup>60</sup> In other words, ICL’s substantive and procedural dimensions have created spaces inviting resistance not just to the evolving law itself, but also to the politics of enforcing that law.

Contempt towards prosecutorial authority is, perhaps, best exemplified by Hermann Göring’s initial advice to his co-accused at Nuremberg: that is, to “confine their evidence to three words, ‘Lick my arse.’”<sup>61</sup> Soon after proffering that advice, however, Göring participated in the trial in accordance with the terms laid out for him as a defendant. Former President of Yugoslavia, Slobodan Milošević, refused to recognise the authority of the ICTY before publicly criticising the tribunal as being an extension of the politico-strategic circumstances that overwhelmed him. Milošević argued that his trial was, in fact, a trial of the Serbian people since his actions were merely an episode of the Serbian nation’s contemporary history. In this way Milošević demonstrated that his trial was underpinned by an interpretation of a set of politico-strategic circumstances, which were themselves at the very heart of his actions, and he “aimed to avoid conducting his defence under conditions laid down

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<sup>59</sup> Simpson, above n 26, at 92.

<sup>60</sup> At 13.

<sup>61</sup> Geoffrey Robertson *Crimes Against Humanity: The Struggle for Global Justice* (3<sup>rd</sup> ed, Penguin, London, 2008) at 249.

by his adversaries.”<sup>62</sup> Agreeing to either Milošević’s or the prosecutor’s interpretation is to privilege the interpretation of one of those among which the initial political struggle was conducted.<sup>63</sup> For one particularly astute scholar, the defence team chosen by Milošević—which included Jacques Vergès, former defence counsel for Klaus Barbie and Ilich Ramirez Sanchez—signalled a defence strategy which, cohering around the *trials of rupture* theory, attacks the political system upon which the prosecutor’s case in particular, and the prevailing regime of law in general, is based.<sup>64</sup> Other defensive ploys include refusing defence counsel and asserting the right to self-representation throughout trial proceedings, a tactic used not only by Milošević but also by former President of Republika Srpska, Radovan Karadžić, during his trial at the ICTY.<sup>65</sup>

Resistance to ICL enforcement efforts have also taken place beyond the major enforcement institutions as alternative forms of justice, such as the *Gacaca* courts in Rwanda or the *Achillio* courts in Nigeria. Legal scholarship, particularly critical ICL scholarship, is another site where resistance has taken shape. Such resistance might be part of an “insurrection of subjugated knowledges,” which are, according to Foucault:<sup>66</sup>

blocks of historical knowledges that were present in the functional and systematic ensembles, but which were masked, and the critique was able to reveal their existence by using, obviously enough, the tools of scholarship... When I say “subjugated knowledges” I am also referring to a whole series of knowledges that have been disqualified as nonconceptual knowledges, as insufficiently elaborated knowledges: naïve knowledges, hierarchically inferior knowledges, knowledges that are below the required level of erudition or scientificity... it is the

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<sup>62</sup> Koskenniemi, above n 24, at 171.

<sup>63</sup> At 183.

<sup>64</sup> At 190.

<sup>65</sup> Steven Kay and Gillian Higgins “The Right of Self-Representation—The Lawyers in the Eye of the Storm” (2010) *International Criminal Law Bureau* available at <http://www.internationallawbureau.com/index.php/author/steven-kay/page/6>.

<sup>66</sup> Foucault, above n 48, at 7.

reappearance of what people know at the local level, of these disqualified knowledges, that the critique is made possible.

“Whether or not such counterhegemonic discourses stand any chance of destabilizing the dominant ideology is, of course, another matter,” Krever acknowledges.<sup>67</sup> These forms of resistance do not locate themselves beyond the politico-strategic, politico-economic and politico-social dimensions of modernist world affairs, nor beyond modernity’s epistemological biases and ontological preferences. At trial the accused and their defence counsel seldom, if ever, draw upon contending versions of modernity as a means of countering the prosecutorial effort. Unsurprisingly, even when they play the role of technical policy advisors serving hegemonic interests by naturalising a particular economic system, international prosecutors can, but almost never do, embrace an ethical commitment that helps them to reimagine international law as a means of resistance where “the inner anxieties of the Prince is less a problem to resolve than an objective to achieve.”<sup>68</sup>

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<sup>67</sup> Krever, above n 25, at 723.

<sup>68</sup> Koskenniemi, above n 24, at 130. While all princes are equal, some are more equal than others. The princes here include the political and military leaders put on trial as well as the political and military leaders who arrange these trials.

## ***II Research Method and Analytic Approach***

The research undertaken for this thesis was fairly unremarkable, relying upon documents and other materials gathered from publicly available sources. No interviews with international prosecutors were sought nor were any conducted; I did not meet or converse with any prosecutor or even observe a prosecutor at work. For the most part primary source material—namely statutes and charters founding the enforcement institutions, as well as various indictments, warrants of arrest, summonses to appear and prosecutorial opening statements—was obtained from academic journals, official websites or online archives.<sup>69</sup> Much of the secondary source material was found in mainstream legal scholarship, as either peer-reviewed articles published in learned journals or book-length studies issued by reputable publishing presses offering general treatments of ICL and specific treatments of its important aspects.<sup>70</sup> Those same types of publications offered alternative perspectives on international law too.<sup>71</sup> As the research progressed, a body of critical ICL scholarship began to emerge: firstly, at the inaugural Critical Approaches to International Criminal Law (CAICL) Conference in Liverpool in December 2012 (which I did not attend); secondly, on a website which, following that Conference, offers a working bibliography of critical ICL scholarship; and more recently as a publication, edited by Christine Schwöbel, suitably entitled *Critical Approaches to International Criminal Law: An Introduction*.<sup>72</sup> Other critical works were consulted,

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<sup>69</sup> The two exceptions here lie in the prosecutor’s opening statement at the IMTFE, which I obtained from the Justice Erima Harvey Northcroft Tokyo War Crimes Trial Collection at the Macmillan Brown Library of the University of Canterbury, and the prosecutor’s opening statement at the ICTR, which Professor Boister located on my behalf and then provided to me.

<sup>70</sup> See, especially, the *European Journal of International Law*, *Leiden Journal of International Law* and the *Journal of International Criminal Justice*, as well as Cambridge University Press’s Cambridge Studies in International and Comparative Law and Routledge’s Contemporary Security Studies Series.

<sup>71</sup> Makau Matua “Never Again: Questioning the Yugoslav and Rwanda Tribunals” (1997) 11 *Temp. Int’l & Comp. L.J.* 167; and Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005).

<sup>72</sup> Schwöbel, above n 27.

some of which were only very recently published.<sup>73</sup> In order to buttress these mainstream and critical pools of scholarly literature the research for this thesis also drew on works from disciplinary International Relations, political philosophy, sociology, anthropology, literary criticism and history.<sup>74</sup> Useful insights were also cautiously drawn from the memoirs produced by some of the prosecutors themselves.<sup>75</sup>

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<sup>73</sup> Simpson, above n 26; Koskenniemi, above n 24; Zolo, above n 27; as well as Krever, above n 25, and Tallgren, above n 17.

<sup>74</sup> International Relations scholars included: Pettman, above n 20; Ralph Pettman *World Affairs: An Analytical Overview* (World Scientific, New Jersey, 2010); Pettman *Psychopathology and World Politics* (World Scientific, Singapore, 2012); Michael McKinley *Economic Globalisation as Religious War: Tragic Convergence* (Routledge, Milton Park, Abingdon, Oxon, 2007); Jim George *Discourses of Global Politics: A Critical (Re)Introduction to International Relations* (Lynne Rienner Publishers, Boulder, Colorado, 1994); and Robert W Cox “Social Forces, States and World Orders: Beyond International Relations Theory” (1981) 10(2) *Millennium—Journal of International Studies* 216; for political philosophy Gray, above n 28 and Gray, above n 35; and Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963; Penguin Classics, New York, 2006); for sociology Zygmunt Bauman *Modernity and the Holocaust* (Cornell University Press, New York, 1989) Anthony Giddens *The Consequences of Modernity* (Stanford University Press, Stanford, 1990); and Clarke, above n 27; for literary criticism Terry Eagleton *On Evil* (Yale University Press, New Haven and London, 2010); and for specific histories Richard H Minear *Victors’ Justice: The Tokyo War Crimes Trial* (University of Michigan, Michigan, 2001) and Herbit P Bix *Hirohito and the Making of Modern Japan* (HarperCollins, New York, 2000) and for general histories Norman Davies *Europe at War, 1939-1945: No Simple Victory* (MacMillan, London, 2006) and Martin Gilbert *History of the Twentieth Century* (HarperCollins, London, 2001).

<sup>75</sup> Telford Taylor *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf, New York, 1992); Goldstone, above n 6; Louise Arbour *War Crimes and the Culture of Peace* (University of Toronto Press, Toronto, Buffalo, and London, 2002); Del Ponte with Sedutic, above n 6. See also the following article-length reminiscences: Robert Donihi “War Crimes” (1992) 66(3) *St John’s Law Review* 733; Grant Niemann “The Life and Times of a Senior Trial Attorney at the ICTY from 1994 to 2000” (2004) 5(2) *Journal of International Criminal Justice* 435; and Benjamin Ferencz “A Prosecutor’s Personal Account: From Nuremberg to Rome” (1999) 52(2) *Journal of International Affairs* 455.

If the thesis's research method was quite ordinary and simple, then its analytic approach was more unique and sophisticated. Firstly, the argument situates the development of ICL as a significant temporality of a discourse against *politico-cruelty*, a term used here to refer to cruel acts committed as a means of achieving some non-trivial end.<sup>76</sup> Put another way, the modernist discourse against politico-cruelty is a significant driving force behind the codification of substantive ICL and the politics of enforcing that law as propitious politico-strategic circumstances are, in and of themselves, insufficient to account for the establishment of ICL institutions. The relationship between the immediate politico-strategic circumstances in which the tribunals were established and the discourse against politico-cruelty (that is, the material and ideational conditions rooted in nineteenth-century liberalism) is complex and dynamic, shifting from brief moments of consonance to longer periods of dissonance. The discourse against politico-cruelty encourages an expansion of the law, but in practice this expansion occurs only insofar as the prevailing politico-strategic circumstances permit. This interpretation helps account for ICL's uneven development and its even more selective enforcement.

Secondly, the argument assumes a wide lens and contextualises the prosecutorial efforts, which occur inside those enforcement institutions, within the politico-cultural project of modernity and what has already been described as a politico-cultural civil war fought for control over that project. The thesis differs from the work of critical ICL scholars through its bifurcation of the discourse against politico-cruelty and the politico-cultural civil war, both of which are a novelty to critical ICL scholarship. In other words, this thesis makes a modest contribution to

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<sup>76</sup> As Chapter One will explain these acts, generally speaking, help constitute mass atrocity or what is referred to here as atrocity crime, a term coined by David Scheffer. These cruel acts tend to be committed by members of groups against members of other groups for some substantive end. Since the commission of these acts is usually of deep concern to the international community, perpetrators of these acts tend to be denounced by the international community as *hostis humani generis*. The discourse is best characterised by its compulsive denouncing of those who commit acts of politico-cruelty, repeated application of the trope *hostis humani generis* and the desire to expel such figures from humanity's ranks through the rule of law.



the small but growing pool of critical ICL scholarship through its synthesis of existing knowledge and, more importantly, its specific analytic treatment of the international prosecutor. It differs from much mainstream scholarship that offers criticism of ICL, which is “pragmatic, instrumental, and policy-oriented” with a view to “making institutions of international criminal justice ‘the best they can be.’”<sup>77</sup> That is the kind of scholarship which Krever correctly sees as largely “focused on doctrinal exegesis and self-affirming genealogies.”<sup>78</sup>

The thesis is critical, then, not in the sense of being negative or hostile towards the prosecutor for negativity’s or hostility’s sake. Nor is it critical for a constructive and pragmatic purpose, either to ensure the smoother enforcement of ICL or to facilitate a more expeditious pursuit of international criminal justice; but rather, it is critical for it illustrates that this law and its major enforcement institutions do not just spontaneously appear without cause. It recognises, to rephrase Robert W Cox, these ICL institutions as existing in order to serve someone’s, or some groups’, purpose; it is critical “in the sense that it stands apart from the prevailing order of the world [to the extent possible] and asks how that order came about... [and] does not take institutions and social and power relations for granted but calls them into question by concerning itself with their origins.”<sup>79</sup> This thesis thereby offers a unique analysis of an important vanguard actor in the quest for international criminal justice. Its analysis goes beyond the narrow focus of many state-based paradigms of mainstream legal scholarship to offer its reader a more complex, nuanced and profound understanding of the interrelationships between the development and enforcement of ICL and the conduct of modernist world affairs. In so doing, the thesis uncovers “the political economies that undergird violence and [brings] to the fore both the conditions that sustain violence and those that enable change.”<sup>80</sup> By using an

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<sup>77</sup> Frédéric Mégret “International criminal justice: a critical research agenda” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014), 17 at 18.

<sup>78</sup> Krever, above n 25, at 702.

<sup>79</sup> Cox, above n 74, at 129.

<sup>80</sup> Clarke, above n 27, at 239.

expansive definition of politics the thesis offers its reader a fresh way of understanding ICL and, more specifically, a more sophisticated comprehension of the conduct of those whose job it is to prosecute the most serious of international crimes. Yet the thesis pretends to be neither an exhaustive treatment of the topic at hand, nor a call to arms, nor a roadmap for change; I leave the latter in particular to others with more vision, pragmatism and material resources. My essential purpose here is to better understand and more fully explain the conduct of an important politico-legal actor in contemporary world affairs. My particular aim was to undertake research into, and conduct analysis of, the efforts of three generations of international prosecutors of serious international crime in a way constituting a critical investigation of a significant topic, demonstrating expertise in the methods of research and scholarship, displaying intellectual independence while making an original contribution to the study of law, particularly the subfield of ICL.<sup>81</sup>

Notwithstanding its benefits, this critical approach reveals an unresolvable problematique which, lying at the heart of this thesis, warrants explicit acknowledgement here. In particular, the research method and related analytic techniques used in this thesis are predominantly distal, reifying the conduct of international prosecutors. Yet such a rationalist epistemology is a limited, and limiting, way of knowing, as Ralph Pettman explains:<sup>82</sup>

Standing back to look at world affairs in an objectifying, analytic fashion is certainly the preferred approach in these post-Enlightenment times. It is part of our Enlightenment heritage. It is what rationalism is supposed to allow us to do. Looking from a mental distance with the light of the mind can certainly illuminate the subject. The point to note here, however, is that it can also blind us to what is going on. It can set limits to what we otherwise might know.

A rationalist epistemology cannot, for example, help me to feel, to understand and then to explain what it is like to be a victim of the most serious of all international

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<sup>81</sup> This reflects the criteria set out for a PhD thesis at the University of Waikato under its own regulations entitled Regulations for the Degree of Doctor of Philosophy and available at <http://calendar.waikato.ac.nz/regulations/higher/phd.html>.

<sup>82</sup> Pettman, above n 20, at 8.

crimes, to be on trial as an accused or to carry out the responsibilities associated with being a prosecutor or a member of the bench. Even though some prosecutors—such as Telford Taylor, Richard Goldstone, Louise Arbour and Carla Del Ponte—have constructed first-hand book-length accounts of their experiences as prosecutors,<sup>83</sup> these accounts are artefacts to be objectified, looked at and considered from a mental distance.

As a by-product of the modernist world affairs that I, myself, seek to interrogate, I reify not only criminal acts, but also prosecutorial actions articulated through indictments, warrants, summonses and opening statements, as well as the related scholarship attending to these matters. By critically analysing one aspect of ICL, this thesis forms part of the broader episteme underpinning the liberal utopian movement and shares the rationalising habits of the modernist mind that I have attempted to critique here. Much of the academic literature informing this thesis is, moreover, produced in western universities, particularly within the Anglo and American traditions and almost certainly carries with it various euro-centric, liberal biases. Put simply, as the author of this thesis I too am captured and weighed down by my preferred epistemologies, ontologies, theories and concepts. Unless I become a mystic “endowed with divine luminous wisdom”<sup>84</sup> I must remain a prisoner of certain metaphysics, entrenched in the mundane *thought world* defining and dominating modernist world affairs. My understanding of this social reality derives, to a large extent, from what Jürgen Habermas would likely describe as my proximal participation in the social world that I seek to describe, analyse and interpret.<sup>85</sup> Since it relies heavily upon a rationalist epistemology deeply entrenched within the modernist project—and, more specifically, within the subsidiary utopian movement that this thesis seeks to critique—the critical approach here places itself in something of a conceptual bind. While on the one hand this conceptual bind is unresolvable, on the other hand it represents at least some of the tension animating the conduct of

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<sup>83</sup> Reydam, Wouters and Ryngaert, above n 4, at 1.

<sup>84</sup> Pettman, *Psychopathology and World Politics*, above n 74, at 203.

<sup>85</sup> Michael J Struett *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, New York, 2008) at 32.

contemporary world affairs. This seems to me to be more problematic than any subsequent (and specious) accusations—made, potentially, by those who form part of that industry of ICL practice already mentioned—that such a critique endorses the initiation of armed conflict or the commission of mass atrocities.<sup>86</sup> As this thesis demonstrates, it is possible and meaningful to simultaneously critique the perpetration *and* the prosecution of serious international crimes, as well as those involved in the production of scholarly knowledge that, as an unquestionable matter of routine, demonise those perpetrators *and* valorise those prosecutors. Without these kinds of tensions, debates and negotiations a further Dark Age looms with what Charles Freeman might describe as another “closing of the Western mind.”<sup>87</sup>

### ***III Thesis Structure***

The thesis’s first chapter begins by suggesting mass atrocities represent a serious and urgent politico-social problem for victims, their local communities and those at the helm of contemporary world affairs. The chapter then situates the origins of a discourse against politico-cruelty as part of the rise, spread and entrenchment of liberal regimes within the broader politico-cultural project of modernity. It argues that this discourse, characterised by a compulsive denouncing of those who commit cruel acts in the service of some substantive end, coheres around its preoccupation with the conceptual figure of *hostis humani generis*. This trope is used as a means of excommunicating certain individuals from humanity’s ranks. The chapter notes ICL’s substantive elements and introduces key enforcement institutions before suggesting the discourse gives rise to a demotic concept of atrocity crime. Subjecting this discourse to analysis helps to “explain how power is constituted and how its premises and givens are replicated at all levels of society and to reveal its exclusionary practices in order to create space for critical thought and action.”<sup>88</sup> This is especially important because knowing the ways in which discourse influences norm creation and

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<sup>86</sup> Schwöbel, above n 27, at 3.

<sup>87</sup> See Charles Freeman *The Closing of the Western Mind: The Rise of Faith and the Fall of Reason* (Vintage Books, New York, 2005).

<sup>88</sup> George, above n 74, at 30.

interpretation is central to understanding the development of ICL, but is something which few professional lawyers (especially with civil law backgrounds) appear inclined to reflect upon.<sup>89</sup>

The remainder of this thesis comprises three main parts, each of which explores the quest for international criminal justice arising from within particular politico-historical settings. Whereas Part I concerns the period immediately following the Second World War, Part II concerns the aftermath of the Cold War. Part III concerns our contemporary moment marked by the ongoing War on Terror. The first chapter of each part gives focus to the relationship between the discourse against politico-cruelty and a particular set of politico-strategic circumstances which together give rise to ICL institutions. As mentioned, this evolving relationship is characterised by moments of consonance and periods of dissonance. While the discourse against politico-cruelty encourages an expansion of the law, this expansion occurs only insofar as the prevailing politico-strategic circumstances permit. These first chapters also illuminate the interplay between that discourse and the evolution of substantive ICL as well as situating the courtrooms among broader post-conflict reconstruction efforts. The subsequent chapters of each part critically examine the ways in which generations of international prosecutors strut and fret their hour upon the courtroom's stage by preparing indictments, warrants or summonses, as well as by making opening statements. These chapters highlight important linkages between the ongoing evolution of substantive international criminal *law*, the indictments used by prosecutors to commence proceedings towards trial and the self-consciously *legal* rhetoric finding expression in their opening statements. Highlighted too are linkages between the *politics* of enforcing ICL through holding trials and the prosecutors' selection of suspects and expression of their own *political* preferences. The relationship between global conflicts shaping politico-strategic circumstances that gave rise both to trials and efforts to reconstruct economies in the aftermath of armed conflict and the *war* rhetoric articulated in five opening statements also receives attention here. By examining the multiple registers in which prosecutors speak

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<sup>89</sup> Mayeul Hiéramente "The Myth of 'International Crimes': Dialectics and International Criminal Law" (2011) 2(3) *GJIL* 551 at 558.

within their relevant institutional settings as well as within their specific politico-strategic and politico-economic circumstances, these chapters reveal a new, and more profound, interpretation of what is actually taking place in these trials. These latter chapters demonstrate that prosecutorial silences can, at times, speak louder than flamboyant rhetorical flourishes. These utterances and omissions need to be understood within a deeper politico-cultural context. Taken together, the three parts of this thesis demonstrate a large degree of inter-generational conformity in the interplay among *law*, *politics* and *war*. While Krever is correct to suggest that “by foregrounding individual acts abstracted from their social context, legal discourse naturalizes and legitimizes the political-economic social structures in which the crime is rooted,”<sup>90</sup> it is possible not only to uncover those politico-economic structures, but also—as Chapters 3, 6 and 9 demonstrate—to reveal the political preferences of prosecutors and to signal the utopian movement they serve.

Of particular salience to the shifting politico-strategic circumstances that underpin the various ICL enforcement institutions are the United States (US) strategic thinkers and foreign policymakers who played, and continue to play, crucial roles in maintaining the current world order. The US took the lead in establishing both international military tribunals in the aftermath of the Second World War, and, as the most powerful member of the UN Security Council, both ad-hoc tribunals in the aftermath of the Cold War by advocating for their establishment and encouraging the cooperation of other states, as well as by providing significant funds and staff to these institutions.<sup>91</sup> The US also supported the idea of establishing the ICC during the early days of drafting the Rome Statute, without which the prospects of the ICC would have been less bright.<sup>92</sup> Although the US initially opposed the ICC’s establishment, it now actively supports it in its work.<sup>93</sup> In some important respects the evolution of ICL can be articulated as a history of US engagement with international criminal

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<sup>90</sup> Krever, above n 25, at 704.

<sup>91</sup> Yvonne Dutton *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge, London and New York, 2013) at 48.

<sup>92</sup> At 50.

<sup>93</sup> At 60.

justice, though, somewhat quizzically, William Schabas remains sceptical of the literature depicting the US playing a dominant role, suggesting it is a product of “cultural bias.”<sup>94</sup> Notwithstanding such scepticism the US is worthy of our attention for, as Michael McKinley explains, the US:<sup>95</sup>

has been the prime mover and principal determinant of outcomes in so many of the developments under the rubric of economic globalisation, as it was, and is in global politics more generally.... Furthermore, quite apart from the fact that the United States is capitalist, neo-liberal, and the sole superpower, it is the only global actor with the power to initiate and implement a revolution of the type which neoliberalism demands; conversely, it is the only global actor with the power to effect a negative veto on such developments and to ensure that whatever regime might emerge without its blessing would be ineffective. Thus, although numerous other actors have supported the US in the neo-liberal project, and their support undoubtedly contributed to its progress, the contours of the neo-liberal world would have been questionably global and its regulatory regime virtually discretionary without the US as the motor of change.

As this thesis demonstrates, ICL enforcement is inextricably bound up with US foreign policy—especially its use of organised armed force on a global scale and its efforts to construct, control and defend the global free market through economic liberalisation—which shapes and reshapes the politics of modernist world affairs.<sup>96</sup> When the US desires international criminal justice, it can exercise the power to shape the environment for this to occur, thereby signalling a moment of consonance between a specific set of politico-strategic circumstances and the more general ideational and material conditions that constitute the discourse against politico-cruelty.

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<sup>94</sup> Schabas, above n 7, at 10.

<sup>95</sup> McKinley, above n 74, at 9.

<sup>96</sup> For a well-known account of US foreign policy vis-à-vis genocide in particular, see Samantha Power *“A Problem from Hell”: America and the Age of Genocide* (Flamingo, London, 2003).

Concluding this thesis, Chapter 8 reflects on the implications of the thesis's two major contentions, both of which hold significance for those who study the law, particularly those scholars, researchers and analysts interested in better understanding the various roles international prosecutors play when confronting the most serious international crimes. Focus is given here to the complicity between prosecutorial efforts and the production of related scholarly knowledge within academia.



## CH. 1: DISCOURSE AGAINST POLITICO-CRUELTY

### *I Introduction*

This first chapter explores the material and ideational conditions that shape responses to the problem of mass atrocity. The chapter opens by acknowledging that mass atrocities generate important politico-social consequences for victims, their local communities and those at the helm of contemporary world affairs. It then argues that a discourse, characterised by a compulsive denouncing of those who commit such cruel acts in the service of some non-trivial end, coheres around a preoccupation with the trope *hostis humani generis*.<sup>97</sup> This trope is used not only to refer to those persons who commit mass atrocity, but also as a means of excommunicating those persons from humanity's ranks through a public process of abjection. The chapter goes on to situate the origins of this discourse against politico-cruelty as part of the rise, spread and entrenchment of liberal regimes within the broader politico-cultural project of modernity. It also posits that the most powerful and enduring manifestation of this discourse is its conceptualisation of mass atrocities as serious international crimes. The chapter draws to a close by claiming that this discourse is a prime factor spurring on the quest for international criminal justice, a claim resonating throughout the ensuing three main parts of this thesis. While the discourse against politico-cruelty encourages an expansion of international criminal law, in practice this expansion occurs only insofar as the prevailing politico-strategic circumstances permit.

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<sup>97</sup> By *discourse*, I mean here what Foucault means when he writes that a discourse “is made up of a limited number of statements for which a group of conditions of existence can be defined” and “is, from beginning to end, historical—a fragment of history, a unity and discontinuity in history itself, posing the problem of its own limits, its divisions, its transformations, the specific modes of its temporality rather than its sudden irruption in the midst of the complicities of time.” See Michel Foucault *The Archaeology of Knowledge* (first published 1969, Routledge, London and New York, 2002) at 131.

## ***II The Problem of Mass Atrocity***

Mass atrocities feature in the earliest records of human history, reaching back prior to the early modern period.<sup>98</sup> Mass atrocities committed as part of Europe's religious wars of the seventeenth century helped usher in the state-based system of the Westphalian peace.<sup>99</sup> Where governments are unable or unwilling to protect their people from mass atrocity, and where mass atrocity becomes mundane, endemic and a feature of everyday experience, life is rendered in all its grim Hobbesian eloquence to be nasty, brutish and exceedingly short for humanity's most vulnerable members. Cultures of injustice and impunity rise and flourish amidst conditions of such insecurity. They invoke fear, inflict injury and cause death among entire populations which, in turn, encourage internal displacement and refugees to spill across state borders. Sometimes the mass atrocity itself spills over borders, turning localised armed violence into wider, more complex regional armed conflicts, as occurred recently in Sub-Saharan Africa.<sup>100</sup> In these circumstances state capability to enforce the rule of law can be seriously eroded. However, mass atrocities frequently involve the state, whose oft-cited purpose is to offer protection to its citizenry.<sup>101</sup> While governments have led and conducted mass atrocities on their own citizens, as well as on the citizens of other states during situations of international armed conflict, these atrocities are worse than armed conflict and "ought to be understood as among our time's most pressing and systematically produced political problems. They should be at the centre of security discussion in the United Nations and in other international and domestic forums concerned with security, the international order, and justice."<sup>102</sup>

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<sup>98</sup> Ben Kiernan *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (Yale University Press, New Haven and London, 2007) at 43.

<sup>99</sup> For an excellent account of the religious wars, including atrocities committed therein, see generally Peter H Wilson *The Thirty Years War: Europe's Tragedy* (Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2009).

<sup>100</sup> Gérard Prunier *Africa's World War: Congo, The Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press, Oxford, 2009).

<sup>101</sup> Schabas, above n 7, at 22.

<sup>102</sup> Daniel Jonah Goldhagen *Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (Little Brown, London, 2009) at 55.

Notwithstanding these very important politico-strategic dimensions, mass atrocity is best characterised as a politico-social problem in the sense that individuals and groups struggle against one another in order to establish and maintain a collective sense of self.<sup>103</sup> Struggles over identity formation inform the commission of mass atrocity where perpetrators lead, form part of or foster social groups whose central purpose is to antagonise others. That social relations are torn asunder is almost always an objective informing the commission of mass atrocity. Victims of mass atrocity are cast in the reductive and narrow terms of their national, racial, ethnical, class, religious or tribal affiliations. As Simpson points out “[t]he subject is not ‘man’s inhumanity to man’ but the inhumanity to specific categories of men (Serbs in Bosnia but not Americans or Iraqis in Fallujah, Hutus but rarely Tutsis, Sudanese or Ugandans but not the Northern Alliance or the Russians in Chechnya.)”<sup>104</sup> Thus, describing mass atrocities as affecting “humanity as a whole” and suggesting “that humanity is a victim” is a step too far.<sup>105</sup> Mass atrocities are vehicles by which particular social groups are augmented while others are seriously harmed or destroyed. Understanding mass atrocity as a politico-social problem challenges the conventional view of politics as something done by states and state-makers, as these social groups exist within the state and across its borders; such a perspective opens up the empirical field of inquiry beyond the fiction of states as the primary entity conducting world affairs.

The enormity of human suffering generated by mass atrocity is intensified by the knowledge that these problems are man-made and are, therefore, all-too-often avoidable; there is nothing attractive about mass atrocity nor is there anything particularly dignified or heroic in committing these acts. The persistence of mass atrocities affecting hundreds of thousands of individuals and their immediate families and communities must surely rank among the most serious and urgent of contemporary world affairs' myriad problems. By almost any reckoning, the trauma

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<sup>103</sup> Pettman, above n 20, at 26.

<sup>104</sup> Simpson, above n 26, at 51.

<sup>105</sup> Allison Martson Danner “Constructing a Hierarchy of Crimes in International Criminal Law Sentencing” (2001) 87(3) *Virginia Law Review* 415 at 476-477.

experienced by victims of mass atrocity must surely be the closest one can come to experiencing the depths of hell though, as Michael Walzer reminds us, “in hell, presumably, only those people suffer who deserve to suffer, who have chosen activities for which this punishment is the appropriate divine response, knowing that this is so.”<sup>106</sup> Moreover, explaining experiences of mass atrocity as trauma and through the language of medical-psychiatric science tends to render them less disturbing and, in some ways, naturalised.<sup>107</sup> As Roberto Beneduce explains “[f]or many societies, for many minorities, the notion of ‘trauma’ itself, of an event (dramatic but singular), does not fit well with the collective experience of regular, chronic conditions of violence, death, exploitation, uncertainty and poverty in which individuals and groups are forced to survive.”<sup>108</sup> These experiences and the ways in which they are described can serve political interests, especially in terms of delineating the boundaries of international criminal jurisdiction while simultaneously imposing the powerful distinction between the *civilised* and the *barbarian*.<sup>109</sup> Such descriptions have also prompted and shaped a plethora of responses from the international community.<sup>110</sup>

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<sup>106</sup> Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (first published 1977, Basic Books, New York, 2006) at 30.

<sup>107</sup> Roberto Beneduce “Contested memories: Peace-building and community rehabilitation after violence and mass crimes—A medico-anthropological approach” in Béatrice Pouligny, Simon Chesterman and Albrecht Schnabel (eds) *After Mass Crime: Rebuilding States and Communities* (United Nations Press, Tokyo, 2007) 41 at 56.

<sup>108</sup> At 58.

<sup>109</sup> Ann Sagan “African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law” (2010) 39(3) *Millennium—Journal of International Studies* 3 at 14.

<sup>110</sup> Foremost among these responses is the emergence of the Responsibility to Protect (R2P); see generally Alex J Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge, 2009); Gareth Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington, DC, 2008); and Richard H Cooper and Juliette Voïnov Kohler (eds) *Responsibility to Protect: The Global Moral Compact for the 21<sup>st</sup> Century* (Palgrave Macmillan, New York, 2009).

### III Hostis humani generis

Many legal scholars, political analysts and policymakers concerned with mass atrocity proclaim that acts, such as those conveyed above, shock the conscience of humanity because these acts embody humanity's most intense inhumanity towards itself and are understood "with a peculiar horror deriving from the fact that fellow human beings are capable of conceiving and committing [them], thereby diminishing us all."<sup>111</sup> The extent to which these kinds of acts do in practice shock humanity's conscience might be somewhat overstated, however. For starters it would be extremely difficult to measure, empirically, the extent of this collective shock in any meaningful way; and, as Schabas points out, "a single murder or a single rape also shocks the conscience."<sup>112</sup> The frequency with which these acts occur throughout recorded time helps erode any moral restraints which may curb at least some of those persons intending to commit these acts or, worse, enjoy such "festivals of cruelty."<sup>113</sup> Moreover, the velocity at which images of these acts circulate within contemporary world affairs probably helps to engender a shock fatigue now widespread among many of those with the power to respond. The law of diminishing returns, it seems, applies to the CNN effect; these kinds of acts would be more shocking if more rarely discussed and, perhaps, unimaginable if images of them were not so prevalent in the twenty-four hour news cycles managed by contemporary media corporations.<sup>114</sup>

For others of a more sacral, rather than secular, outlook these kinds of acts are described as evil. According to Robert Shnayerson, for instance, the Nazis responsible for the Holocaust were "satanic men" and "messengers of evil" whose acts were a "road to Armageddon," "epidemic evils" and "diabolic achievement[s]."<sup>115</sup> For Hannah Arendt the banality of evil could be seen in the role

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<sup>111</sup> Robertson, above n 61, at xxv.

<sup>112</sup> Schabas, above n 7, at 42

<sup>113</sup> Jonathon Glover *Humanity: A Moral History of the Twentieth Century* (Pimlico, London, 2001), particularly Ch 6.

<sup>114</sup> Alan Wolfe *Political Evil: What It Is And How To Combat It* (Alfred A Knopf, New York, 2011) at 8.

<sup>115</sup> Robert Shnayerson "Judgement at Nuremberg" (1996) *Smithsonian* 124 at 124 & 128.

played by Adolf Eichmann, an ambitious bureaucrat serving within a genocidal totalitarian state.<sup>116</sup> Arendt understood that evil “need not be committed only by demonic monsters but—with disastrous effect—by morons and imbeciles as well, especially if, as we see in our own day, their deeds are sanctioned by religious authority.”<sup>117</sup> More disturbing, however, is the role played by the *everyman* in the commission of evil deeds. Arendt explains further:<sup>118</sup>

The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral standards of judgement, this normality was much more terrifying than all the atrocities put together, for it implied—as had been said at Nuremberg over and over again by the defendants and their counsels—that this new type of criminal, who is in actual fact *hostis humani generis*, commits his crimes under circumstances that make it well-nigh impossible for him to know or feel that he is doing wrong.

The problem here, of course, is that if one is born evil, then he or she is “no more responsible for this condition than being born with cystic fibrosis. The condition which is supposed to damn them succeeds only in redeeming them.”<sup>119</sup>

While the kinds of acts described above are not necessarily evil, “[b]ringing the problem of evil down from the heavens into the world of politics and policy offers advantages that can help make atrocities we face in the world more intelligible.”<sup>120</sup> For Alan Wolfe political evil “*refers to the wilful, malevolent, and gratuitous death, destruction, and suffering inflicted upon innocent people by the leaders of movements and states in their strategic efforts to achieve realizable objectives.*”<sup>121</sup> Yet Wolfe is

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<sup>116</sup> Arendt, above n 74, at 252.

<sup>117</sup> Amos Elon “Introduction” in Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963, Penguin Classics, New York, 2006) at xi.

<sup>118</sup> Arendt, above n 74, at 276.

<sup>119</sup> Eagleton, above n 74, at 5.

<sup>120</sup> Wolfe, above n 114, at 5.

<sup>121</sup> At 4. (Emphasis in original.)

not so much defining acts of political evil as he is describing acts of politico-cruelty. Rather than being evil it is the cruel nature of these acts, when undertaken as a means to a substantive ends, which renders them unique. In other words, acts of politico-cruelty encompass those acts which might be considered evil in and of themselves—acts referred to by orthodox criminal law theory as *malum in se*—but only when these acts provide those who commit them with some form of utility at another human being’s expense. And by *cruelty* I mean an indifference to, or gratification derived from, suffering deliberately inflicted on others. The prefix *politico* is used here because politics is understood in this thesis—as mentioned in the Introduction—as all those things we do, as individuals or in concert, to obtain and use power over others for non-trivial, or substantive, purposes.<sup>122</sup> Specifically, then, acts of politico-cruelty are acts or omissions which, intentionally causing pain and suffering for others, are performed in the pursuit of some non-trivial—that is, substantive—ends. These acts tend to be committed by members of groups against members of other groups and tend to be of deep concern to, and denounced by, the international community as being committed by *hostis humani generis*.

The conceptual figure, or trope, of *hostis humani generis* is central to, if not the defining characteristic of, a discourse against politico-cruelty. A Latin term, *hostis humani generis* was probably first used by Pliny the Elder to refer to Nero’s tyranny in the first century, thereby preceding the advent of modernity by some fifteen centuries. In addition to its Roman usage the term has an important Christian heritage where it referred to the devil from about the ninth century onwards.<sup>123</sup> Linking *hostis humani generis* to the devil, whose diabolical nature posed an immediate danger to each and every soul, meant urgent and severe action could be taken against anyone categorised as such.<sup>124</sup> Christianity’s enemies were not the only targets, however, as “this supreme degree of hostility could now be projected onto

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<sup>122</sup> Pettman, above n 20, at 6.

<sup>123</sup> Dan Edelstein “*Hostis Humani Generis*: Devils, Natural Right, and Terror in the French Revolution” (2007) 141 *Telos* 57 at 63.

<sup>124</sup> At 65.

whoever filled the semantic requirements of the phrase,” including Goth, Vandal and Hun barbarian tribes that were seen as enemies of civilisation.<sup>125</sup>

This concept of *hostis humani generis* also found application during the high modern period. The near universal revulsion at the horrifying means used frequently by pirates—or “sea brigands”<sup>126</sup> as Geoffrey Robertson refers to them—convinced many that these acts were “heinous” and, as such, belonged in “the pantheon of peremptory norms.”<sup>127</sup> The outlaw status ascribed to pirates was due partly to the fact that piracy took place beyond the reach of most states, meaning its victims were particularly vulnerable.<sup>128</sup> It was also partly because piracy was understood during the late eighteenth and early nineteenth centuries as “the scourge of nations, at times devastating commerce and exploration.”<sup>129</sup> Piracy directly threatened the expanding system of states while illuminating the limits of sovereign jurisdiction on the high seas. Consequently, any person with an interest in international commerce was entitled to punish a pirate, who was in this sense less an enemy of humanity than an enemy of *homo economicus*. Ever since the seventeenth century the concept’s intrinsic hyperbole has evaded the critical scepticism of those who deploy it as “‘a legal fiction’... that demands that we treat the pirate, whether or not there is any such thing ‘as if he were the enemy of all mankind,’ even as we recognise that such a designation is more literary than literal.”<sup>130</sup>

The application of the term *hostis humani generis* to those who commit acts of politico-cruelty certainly matters for those designated within this category since, once denounced as enemies of mankind, they are subjected to a process of abjection. According to Julia Kristeva:<sup>131</sup>

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<sup>125</sup> At 66.

<sup>126</sup> Robertson, above n 61, at 240.

<sup>127</sup> Goldstone and Smith, above n 15, at 12.

<sup>128</sup> Robertson, above n 61, at 240.

<sup>129</sup> Goldstone and Smith, above n 15, at 12.

<sup>130</sup> Jody Greene “*Hostis Humani Generis*” (2008) 34(4) *Critical Inquiry* 683 at 691-692.

<sup>131</sup> Julia Kristeva *Powers of Horror: An Essay on Abjection* trans Leon S Roudiez (Columbia University Press, New York, 1982) at 1.



There looms, within abjection, one of those violent, dark revolts of being, directed against a threat that seems to emanate from an exorbitant outside or inside, ejected beyond the scope of the possible, the tolerable, the thinkable. It lies there, quite close, but it cannot be assimilated. It beseeches, worries, and fascinates desire, which, nevertheless, does not let itself be seduced. Apprehensive, desire turns aside; sickened, it rejects. A certainty protects it from the shameful—a certainty of which it is proud holds on to it. But simultaneously, just the same, that impetus, that spasm, that leap is drawn toward an elsewhere as tempting as it is condemned. Unflaggingly, like an inescapable boomerang, a vortex of summons and repulsion places the one haunted by it literally beside himself.

The process of abjection, then, is a process of purification through excising certain traits of the human character, albeit dark and deplorable ones, from the human community. Abjection stigmatises that which it expels and, at the level of the group, takes the form of an excommunication of sorts. There is a vision here, in other words, of a perfected humanity where certain traits, behaviours or acts have been eliminated. This vision is to be realised not through eugenics or other forms of elimination on the grounds of biological determinism. It is realised by constructing a particular category of persons based not upon some perceived or actual *identity marker* specific to an individual, group, community or society, but rather, on their choice of violence as a means of achieving a particular substantive end. Acts of politico-cruelty thus provide those who prevail in the conduct of contemporary world affairs with an opportunity to identify the behaviours which ought, in their view, to be forever denounced while also casting out their opponents, rivals or enemies beyond an immediate community, group or society. Deeming one's adversary as *hostis humani generis* is tantamount to exiling "the offender from the ranks of men and from all the rights and privilege ostensibly and often sanctimoniously attached to being human."<sup>132</sup> As Jody Greene puts it:<sup>133</sup>

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<sup>132</sup> Greene, above n 130, at 702.

<sup>133</sup> At 701.

The phrase had always, by definition, been tied to the status of the human and the nonhuman, denoting not only a relationship between two groups of beings—those who are humans and those who make war on humans—but also a characteristic unique to the latter group, the fact that they may not themselves be part of humankind at all.

Put simply, this discourse engages in opprobrium, imposing strict bounds on what it means to belong to the human community.

The discourse against politico-cruelty is an intensely political discourse because its primary purpose is to rid humanity of the will and capability to commit acts of politico-cruelty that prove traumatic for those who are victims and intolerable for those who, bearing witness, possess the necessary power to detect and deter those who commit such acts. Although the politico-cruelty exhibited by war criminals, perpetrators of crimes against humanity and *genocidaires* is seemingly aloof from the daily contest among political, economic and social rivalries, like the pirate, he or she is constructed as “the enemy, not of mankind, but of particular men with particular political projects.”<sup>134</sup> In this sense *hostis humani generis* is a legal fiction subject to those who control legal interpretations and deploy power according to hegemonic values and interests.<sup>135</sup> It has been reconstituted to suit certain contemporary purposes, though as Koskeniemi points out, despite the symbolism of a criminal trial providing the prosecuting community with opportunities to affirm its guiding principles and develop into a “‘moral’ community,” the conduct of these prosecutors affirms only an “elusive and self-congratulatory ‘international community.’”<sup>136</sup>

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<sup>134</sup> Simpson, above n 26, at 161.

<sup>135</sup> Greene, above n 130, at 694.

<sup>136</sup> Koskeniemi, above n 24, at 178.

#### *IV Modernist Origins*

The discourse against politico-cruelty is informed by the principle of humanitarianism. Although Luc Reydam and Jan Wouters suggest that the early 1990s were “the dawn of the age of human rights, humanitarianism, and global governance”<sup>137</sup> and Anne Orford suggests that a “new kind of international law and internationalist spirit seemed to have been made possible in the changed conditions of a world no longer structured around the old certainties of a struggle between communism and capitalism,”<sup>138</sup> the roots of humanitarianism reach further back than the ending of the Cold War. The willingness to rescue people in desperate need—but only in circumstances where the costs of doing so are relatively low—can be traced back to *The Bible*’s parable of the Good Samaritan who, happening across a victim of an attack, renders immediate assistance by bandaging his or her wounds, moving him or her to a nearby inn and paying for his or her convalescence there. This humanitarian duty applies among distant strangers with nothing in common besides their shared humanity.<sup>139</sup> While the origins of humanitarianism probably lies somewhere between the birth of Christianity and the end of the Cold War, Gary Bass points to the late nineteenth century when:<sup>140</sup>

[h]umanitarian intervention emerged as a fundamentally liberal enterprise, wrapped up with the progress of liberal ideals and institutions. Ideologically, it grew out of the radical ideas of freedom and the rights of man, a driving force in world politics since the French Revolution in 1789; institutionally, it grew up along with the rise of mass media, public opinion, and responsive government.

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<sup>137</sup> Luc Reydam and Jan Wouters “The Politics of Establishing International Criminal Tribunals” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) at 19.

<sup>138</sup> Anne Orford *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge, 2003) at 2.

<sup>139</sup> Matthew J Gibney *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, Cambridge, 2004) at 231-232.

<sup>140</sup> Gary J Bass *Freedom’s Battle: The Origins of Humanitarian Intervention* (Alfred A Knopf, New York, 2008) at 7-8.

The growth of liberal regimes within Europe and North America tended to be supported by institutions, such as the free press and civil society, which could stimulate public opinion to the degree that governments faced sustained pressure to defend human rights beyond their territories.<sup>141</sup> The foreign policies of nineteenth-century Britain, the US and France, for example, were shaped by the enjoyment of home-grown freedoms and a free press willing and able to report on atrocities unfolding abroad to an attentive civil society disturbed by such acts and who, in turn, were able to apply pressure on politicians seeking to harness their moral outrage. According to Bass “governments had to sit up and take notice when their so-called atrocitarians demanded heroic rescues of suffering populations, even though the mission would be in some obscure part of the world that served no strategic purpose—or undermined the government’s realpolitik policy.”<sup>142</sup>

Significant here too is the anti-slavery campaign contemporaneously occurring in Victorian Britain. Other key moments similarly manifesting this humanitarian urge might include 1859, when Henry Dunant stumbled across the Battle of Solferino’s bloody aftermath before helping found the International Committee of the Red Cross (ICRC) as a means of ameliorating the suffering of wounded combatants. Dunant’s contemporaries—Florence Nightingale who served as a nurse tending to wounded British soldiers during the Crimean War (1853-56) before helping to professionalise nursing, Francis Lieber who drafted the *Instructions for Government of Armies of the United States in the Field* (1863) which provided for the conduct of President Lincoln’s Union Troops during the US Civil War and Clara Barton who helped found the American Red Cross (1881)—were each similarly cognisant that “[a]rmed conflict was becoming less and less a chivalrous jousting contest for the few, and more and more a mass slaughter.”<sup>143</sup> For Michael Barnett such “[h]umanitarianism is

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<sup>141</sup> At 28.

<sup>142</sup> At 6-7.

<sup>143</sup> David P Forsythe *The Humanitarians: The International Committee of the Red Cross* (Cambridge University Press, Cambridge, 2005) at 16.

nothing less than a revolution in the ethics of care,”<sup>144</sup> though it is also a reaction to the increasingly destructive power of weapons designed and manufactured in the mid-nineteenth century.<sup>145</sup> The spread of this humane worldview, particularly during the nineteenth century when the decline of the Holy Roman Empire had been followed by the development of nationalism and the concomitant growth of the nation-state as the primary entity of world affairs, gave rise to the laws of armed conflict.<sup>146</sup> This was “... the same force of modernity that forged a sense of common British political identity between impoverished Welsh villagers and London aristocrats, or between French citizens in metropolitan Paris and slowly integrating Lorraine, [and] could also create a weaker but still politically important sense of solidarity with foreigners facing massacre.”<sup>147</sup> Central here is the notion of a common humanity worth protecting, even from itself.<sup>148</sup>

While it is my contention that the origins of the discourse against politico-cruelty can be situated within the rise, spread and entrenchment of liberal regimes, at a deeper level the discourse has its origins firmly rooted in modernity. And by modernity I mean the “modes of social life or organisation which emerged in Europe from about the seventeenth century onwards and which subsequently became more or less worldwide in their influence.”<sup>149</sup> Richard Tarnas captures the character of modernity well when he explains the foundations of its worldview:<sup>150</sup>

And so between the fifteenth and seventeenth centuries, the West saw the emergence of a newly self-conscious and autonomous human being—curious about the world, confident in his own judgements, sceptical of orthodoxies, rebellious against authority, responsible for his own beliefs

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<sup>144</sup> Michael Barnett *Empire of Humanity: A History of Humanitarianism* (Cornell University Press, Ithaca and London, 2013) at 18.

<sup>145</sup> Struett, above n 85, at 51.

<sup>146</sup> Taylor, above 75, at 5.

<sup>147</sup> At 27.

<sup>148</sup> Simpson, above n 26, at 45.

<sup>149</sup> Giddens, above n 74, at 1.

<sup>150</sup> Richard Tarnas *The Passion of the Western Mind: Understanding the Ideas that Have Shaped Our World View* (Plimco, London, 1991) at 282.

and actions, enamoured of the classical past but even more committed to a greater future, proud of his humanity, conscious of his distinctiveness from nature, aware of his artistic powers as individual creator, assured of his intellectual capacity to comprehend and control nature, and altogether less dependent on an omnipotent God. The emergence of the modern mind, rooted in rebellion against the medieval Church and the ancient authorities, and yet dependent upon and developing from both these matrices, took three distinct and dialectally related forms of the Renaissance, the Reformation, and the Scientific Revolution. These collectively ended the cultural hegemony of the Catholic Church in Europe and established the more individualistic, sceptical, and secular spirit of the modern age. Out of that profound cultural transformation, science emerged as the West's new faith.

Notwithstanding many ambiguities surrounding the concept of modernity and various contending dates offered for its rise, an underlying consensus exists, resting upon a shared assumption concerning the role of rationalism in the development and spread of new ways of thinking about nature and human society.<sup>151</sup> The impact of using rationalism in this way resulted in a Scientific Revolution that gave rise to a burgeoning body of reliable knowledge and an Industrial Revolution that gave a few European governments advanced military power which they used to build empires of global reach. The legacies of these empires are discernible in the ways sovereign statism creates order, global capitalism creates wealth and individualism and nationalism constructs forms of civic identity.<sup>152</sup> Barry Buzan and George Lawson claim the apex of modernity is to be found in material and ideational consequences of a “global transformation” that occurred during the nineteenth century, by which they mean the practical application of the Scientific and Industrial Revolutions as well as the ascendancy of ideologies as diverse as liberalism, nationalism, socialism and

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<sup>151</sup> Stephen Toulmin *Cosmopolis: The Hidden Agenda of Modernity* (University of Chicago Press, Chicago, 1990) at 9.

<sup>152</sup> Ralph Pettman “Psychopathology and world politics” (2010) 32(3) *Cambridge Review of International Affairs* 475 at 475.

racism, though each has roots dating back much earlier.<sup>153</sup> For the most part the politics of modernity are informed by a strong belief in the perfectibility of humanity through civilising instruction and the power of knowledge to deliver humanity from evil through progress, a belief which stimulated the major political revolutions that defined the nineteenth and twentieth centuries.<sup>154</sup>

Describing modernity as a *project* does not imply that modernity was planned, organised and controlled from its outset, but merely suggests “that what began as an elite movement became over time a recognizable ambition for whole societies and by now involves a discrete set of politico-cultural activities and aims... [in] a world in which rationalism is the central cultural objective. This is a world where the use of reason as an end in itself *en masse* is accorded the highest cultural priority.”<sup>155</sup> This use of reason as an end in itself *en masse* is a defining feature of modernity, distinguishing it from pre-modern modes of living and post-modern practices. Modernity has obviously spread beyond Europe: relevant here were Christopher Columbus’s and Vasco da Gama’s voyages of discovery at the close of the fifteenth century, dramatically expanding Europeans’ reach into the non-European world.<sup>156</sup> Even though those societies subsequently dominated by modern Europeans “broke free” through anticolonial revolutions in America, Africa and Asia, they did not shed their modernity. As SN Eisenstadt explains:<sup>157</sup>

The idea of multiple modernities presumes that the best way to understand the contemporary world—indeed to explain the history of modernity—is to see it as a story of continual constitution and reconstitution of a multiplicity of cultural programs. These ongoing reconstructions of multiple institutional and ideological patterns are carried forward by specific social actors in close connection with

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<sup>153</sup> Barry Buzan and George Lawson *The Global Transformation: History, Modernity and the Making of International Relations* (Cambridge University Press, Cambridge, 2015) at 1.

<sup>154</sup> Gray, above n 35, at 14.

<sup>155</sup> Pettman *World Affairs: An Analytical Overview*, above n 74, at 193. (Emphasis in original.)

<sup>156</sup> Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (first published 1977, Palgrave, New York, 2002) at 20.

<sup>157</sup> Eisenstadt, above n 45, at 2.

social, political, and intellectual activists, and also by social movements pursuing different programs of modernity, holding very different views on what makes societies modern. Through the engagement of these actors with broader sectors of their respective societies, unique expressions of modernity are realized.

As the politico-cultural project currently prevailing in contemporary world affairs, modernity is engaged in “‘deep’ politics on a global scale, since it is about human beings getting their way on planet earth. It is about the human capacity that has made us highly successful in Darwinian terms, at least, for the moment.”<sup>158</sup> These modernist world affairs are so wide ranging that they are almost all encompassing and include, inter alia, our need as humans for some kind of nurturing as a way of living, examples of our different ways of living and our specific sub-cultures with potential to generate civilisations of global proportions. As human beings seek to obtain power over others in order to have their specific conception of *culture* prevail not only do they illuminate the context for modernist world affairs, but they also constitute the dynamics of world affairs itself.<sup>159</sup> The development and expansion of the modernist project was, of course, accompanied by much violence. More than a recurring feature of modernity, atrocities seem to be an intrinsic part of the making and re-making of the modernist project. Notwithstanding promises of enlightened progress, various articulations of modernity were violently expressed in armed conflict and mass atrocity which, while hardly new historical phenomena, “became radically transformed, intensified, generating specifically modern modes of barbarism.”<sup>160</sup>

Defined by its penchant for rationalist ways of knowing the modernist project arose in opposition to claims of knowledge based on revelation or spiritual belief,<sup>161</sup> evolving “as an antidote to revealed forms of truth” which, given those claims cannot be scientifically tested, are deemed unreliable and suspect.<sup>162</sup> Yet notwithstanding modernity’s enormous material success and its secularising consequences, religion—

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<sup>158</sup> Pettman, above n 20, at 42.

<sup>159</sup> At 46.

<sup>160</sup> Eisenstadt, above n 45, at 12.

<sup>161</sup> Pettman, *World Affairs: An Analytical Overview*, above n 74, at 245.

<sup>162</sup> At 26.



and, by religion, I mean “a system of beliefs and practices relative to the sacred that unite those who adhere to them in a moral community”<sup>163</sup>—continues to play an important and, in some cases, fundamental role in people’s lives.<sup>164</sup> The modernist project has itself emerged from a larger sacral context, “bearing many of the marks of its religious origins.”<sup>165</sup> For Gray, modernity’s politics are merely “a chapter in the history of religion” and radical politics in particular have shaped much of world affairs over the past two centuries and are better understood as “episodes in the history of faith—moments in the long dissolution of Christianity and the rise of modern political religion.”<sup>166</sup> The more radical politics of modernity are thus a continuation of Judaeo-Christian sacral traditions by other means.<sup>167</sup> Saturated with traces of Judaeo-Christianity, the politico-cultural project of modernity, then, constitutes a set of material and ideational conditions that, shaping responses to the problem of mass atrocity, have given rise to a discourse which opposes any and all acts of cruelty committed in pursuit of non-trivial matters. By including that which is signalled through writing, speech and other performances at a particular point of time and space, and by determining who should be the subject of such signals, a discourse “encompasses more than speech, text, and act; it is the very order under which such disciplines and exercises are made possible, and institutions established.”<sup>168</sup> More than just a form of representation, then, discourse is the material and ideational conditions which at once enables and constrains thought and action, weaving the two together so intensely that the difference between thinking and acting is obscured.<sup>169</sup> While the discourse under examination here is obviously larger than conversations occurring among international prosecutors, or between those prosecutors and the accused or members of the bench, it animates the minds of political leaders, leading

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<sup>163</sup> Robert N Bellah *Religion in Human Evolution: From the Paleolithic to the Axial Age* (Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2011) at 1.

<sup>164</sup> Pettman, *World Affairs: An Analytical Overview*, above n 74, at 250.

<sup>165</sup> At 26-27.

<sup>166</sup> Gray, above n 35, at 1.

<sup>167</sup> At 2.

<sup>168</sup> McKinley, above n 74, at 87.

<sup>169</sup> At 87.

to a wide array of responses to the problem of mass atrocity. The most potent of these responses has been the collective effort to criminalise mass atrocity through the rule of international law that punishes persons responsible for committing serious international crime. By calling for the prosecution of those who commit such acts, this discourse has given rise to the rule of ICL as well as various institutions to enforce that rule.

### *V ICL Enforcement Institutions*

The discourse against politico-cruelty has enabled the enforcement of this evolving body of rules through domestic courts which, according to Richard J Goldstone and Adam M Smith, “have long been, and continue to be, one of the most vibrant and active locations for the furtherance of international justice.”<sup>170</sup> Domestic enforcement remains attractive due to lower prosecution and sentencing costs, as well as the relative ease of gathering evidence and hearing witness testimony.<sup>171</sup> Peter von Hagenbach's trial in 1474 in Austria is often cited as the first domestic prosecution of an individual for war crimes, crimes against the law of God and humanity though earlier, in 1305, an English court prosecuted and executed William Wallace, warrior and Scottish national hero, for fighting the English and “sparing neither age nor sex, monk nor nun.”<sup>172</sup> Following the First World War domestic courts were used to try suspected German war criminals even though the Treaty of Versailles envisaged a court comprising of an Allied bench. Of the 895 Germans accused by the Allies, only 45 were selected for prosecution. Of these only twelve relatively minor suspects faced trial before the German Imperial Court of Justice and six of them were acquitted. Contemporaneous attempts to try those persons responsible for mass atrocity targeting Armenians also saw only a few minor figures face prosecutions in a domestic court.<sup>173</sup>

ICL enforcement following the Second World War occurred through significant

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<sup>170</sup> Goldstone and Smith, above n 15, at 68.

<sup>171</sup> Hiéramente, above n 89, at 555.

<sup>172</sup> Slye and Shaack, above n 15, at 18-19.

<sup>173</sup> Cassese, *Cassese's International Criminal Law*, above n 15, at 254.

trials in domestic courts, though much of the evidence for these trials was gathered by the United Nations War Crimes Commission (UNWCC), itself comprising of seventeen Allied Governments. In the five years following the end of the Second World War, a quarter of the suspected 36,529 persons and 281 groups were brought to trial in domestic courts. As Goldstone and Smith observe, “few countries involved in the war failed to have any trials.”<sup>174</sup> Other high-profile cases prosecuted under ICL in domestic courts include Adolf Eichmann, kidnapped in Argentina by Israeli Government agents and tried in Jerusalem in 1961, who stood accused of four counts of crimes against the Jewish people, eight counts of crimes against humanity and one count of war crimes.<sup>175</sup> Arrested in Bolivia and extradited to France in 1983, Klaus Barbie, known as the Butcher of Lyon, was put on trial in May 1987 for crimes against humanity and was found guilty.<sup>176</sup> More recently Saddam Hussein, arrested in Tikrit, was tried by the Iraqi High Tribunal in 2005 for crimes against humanity committed after 1982 in the town of al-Dujail. Found guilty of wilful killing, forcible deportation and torture, Hussein was sentenced to death and hanged on 30 December 2006.<sup>177</sup> The decision to proceed to national trials often emerges as a result of debates within the relevant society about the most appropriate response to acts of politico-cruelty.

A few domestic criminal justice systems, which were seriously weakened if not destroyed by armed conflict, have been bolstered with international expertise and experience. Established in 2000 by the United Nations Transitional Authority in East Timor, the Special Panels in East Timor operated from within the District Court and the Court of Appeals in Dili as a means of prosecuting serious international crimes, including the crime of genocide, war crimes and crimes against humanity as well as murder, sexual offences, and torture committed between 1 January and 28

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<sup>174</sup> Goldstone and Smith, above n 15, at 69-70.

<sup>175</sup> At 73-75.

<sup>176</sup> At 80-82.

<sup>177</sup> Miranda Sissons and Marieke Wierda “Political Pedagogy, Baghdad Style: The Dujail Trial of Saddam Hussein,” in Ellen L Lutz and Caitlin Reiger (eds) *Prosecuting Heads of State* (Cambridge University Press, Cambridge, 2009) 233.

October 1999.<sup>178</sup> This internationalisation of a domestic judiciary also occurred in Kosovo during 2000, though the United Nations Interim Administration Mission in Kosovo did not specify which offences were to be the prosecutors' priorities.<sup>179</sup> A Special Department for War Crimes also began functioning within the court system of Bosnia and Herzegovina, the genesis of which was a 2003 joint proposal by the internationally-appointed High Representative and the ICTY, which was endorsed in UN Security Council Resolution 1503.<sup>180</sup>

The discourse against politico-cruelty has also enabled the rise of a specific type of domestic justice, known as *transitional justice*. By transitional justice, I mean what Pierre Hazan means when he explains that it is a concept that takes “account of the multiple and heterogeneous processes by which, practically simultaneously, states as different as Mauritania, Mongolia and El Salvador were experiencing political liberalization and some hundred countries seemed to be ‘in transition’ towards democracy.”<sup>181</sup> These states are transitioning towards democracy from situations of armed conflict, authoritarian regimes or socialist control. The transition is usually signified by the introduction or resumption of free-and-fair elections. Here, ICL enforcement serves very clear domestic political objectives, though, as Pádraig McAuliffe warns, focusing on high-profile cases in transitional justice while neglecting justice sector reform can be short-sighted and may invite a reversal of democratic processes, a slide into armed conflict or the resumption of despotic rule.<sup>182</sup>

The discourse has enabled the establishment of ICL institutions within a host state and staffed by a mix of international and domestic personnel. Whereas some of

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<sup>178</sup> Reydemans and Wouters, above n 137, at 59.

<sup>179</sup> At 63.

<sup>180</sup> At 64-65.

<sup>181</sup> Pierre Hazan ‘Transitional Justice After September 11: A New Rapport with Evil’ in Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds) *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, Stanford, 2010) 49 at 50.

<sup>182</sup> Pádraig McAuliffe *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Routledge, London and New York, 2013).

these so-called hybrid tribunals—such as the Special Court for Sierra Leone,<sup>183</sup> the Extraordinary Chambers in the Courts of Cambodia<sup>184</sup> and the Special Tribunal for Lebanon<sup>185</sup>—are creatures of consent by virtue of agreement between the UN and the certain sovereign states as host government, others—such as the abovementioned Special Panels in East Timor and Kosovo—are creatures of coercion, imposed in those instances on locals by UN transitional authorities.<sup>186</sup> International these institutions may be; they exist, however, only as a result of politico-strategic policy at the hands of state-makers, acting either individually or in concert through intergovernmental organisations, such as the UN Security Council.<sup>187</sup>

The discourse has, moreover, enabled the establishment of international institutions designed specifically to enforce ICL, though the law does not require these institutions just as public international law in general does not require a world court; the rule of international law far precedes the rise of its enforcing institutions.<sup>188</sup> Gustave Moynier, ICRC co-founder, was among the first to propose an international

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<sup>183</sup> Established in 2002 by the UN and the Government of Sierra Leone, the Special Court for Sierra Leone was designed in order to hold trials of those accused of committing serious international crimes against civilians and UN peacekeepers during the country's decade-long internal armed conflict (1991-2002). See generally Charles Chernor Jalloh *Sierra Leone Special Court and its Legacy: The Impacts for African and International Criminal Law* (Cambridge University Press, Cambridge, 2015).

<sup>184</sup> The Extraordinary Chambers in the Courts of Cambodia, comprising of 17 Cambodian and eight international judges and prosecutors, was established in July 2006 by the UN and the Royal Government of Cambodia in order to hold trials of senior leaders of Democratic Kampuchea and others believed to be the most responsible for grave violations of national and international law committed in Cambodia between 17 April 1975 and 6 January 1979. Reydams and Wouters, above n 137, at 54.

<sup>185</sup> Established on 10 June 2007 by the UN Security Council under Chapter VII of the UN Charter at the request of Prime Minister Siniora, the Special Tribunal for Lebanon was designed in order to hold trials for persons accused of conducting the 14 February 2005 attack killing former Lebanese Prime Minister Rafiq Hariri, 21 others and injuring many more. Reydams and Wouters, above n 137, at 44-45; and Goldstone and Smith, above n 15, at 108.

<sup>186</sup> Slye and Schaack, above n 15, at 59-64 & 69-71.

<sup>187</sup> Schabas, above n 7, at 3.

<sup>188</sup> At 21.

court back in 1872.<sup>189</sup> A similar court was proposed in 1920 by an Advisory Committee of Jurists to the Assembly of the League of Nations who subsequently rejected the idea. While NGOs, such as the Inter-Parliamentary Union and the International Law Association, drafted statutes for an international criminal court in 1915 and 1916 respectively, none gained the traction among states needed to sign and ratify them.<sup>190</sup> During the First World War a concept of an international court, which would judge state-makers and other leaders who stood accused of trespassing international law, began to take hold in the minds of persons and organisations seeking a more peaceful world; the concept did not materialise as a world court at that time, however.<sup>191</sup> Since the First World War was the first major international armed conflict in which all participants actively documented their enemies' crimes, it is not surprising that the victors would use these records against those enemies in the aftermath of conflict.<sup>192</sup> Having documented serious international crimes committed by German forces, the Allies convened a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in 1919 as a means of ascertaining the extent of the Central Powers' culpability. Chaired by US Secretary of State, Robert Lansing, that Commission presented its final report to the Paris Peace Conference in March 1919, concluding that outrages committed on land, at sea and in the air by the Central Powers against the laws and customs of armed conflict should be prosecuted before an international tribunal comprising representatives of the Allied and Associated Powers, or before national tribunals; acts of aggression, however, should not be the subject of such prosecution.<sup>193</sup>

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<sup>189</sup> Christopher Keith Hall “The First Proposal for a Permanent ICC” (1988) 322 *International Review of the Red Cross* 57 at 57.

<sup>190</sup> Cassese, *Cassese’s International Criminal Law*, above n 15, at 254-255.

<sup>191</sup> James F Willis *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press, Westport, Connecticut, 1982) at 3; See also Zolo, above n 25, at 22-23.

<sup>192</sup> Goldstone and Smith, above n 15, at 19.

<sup>193</sup> Kirsten Sellars *‘Crimes against Peace’ and International law* (Cambridge University Press, Cambridge, 2013) at 5; See also M Adatci “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties” (1920) 14 *Am. J. Int’l L.* 5.

According to the Lansing Commission, no pre-existing international legal framework, which could have been used to try the Kaiser for acts of aggression, existed at that time.<sup>194</sup> Japanese representatives also queried whether or not a penal law, which applied to those guilty persons, existed in international law.<sup>195</sup> In the meantime the Kaiser absconded to The Netherlands, where he remained until his death in 1941. Pointing to its custom of granting political asylum, and that it would not extradite the Kaiser in order for him to be prosecuted for acts that were not crimes under Dutch law, the Dutch authorities refused to extradite the German leader for trial.<sup>196</sup> By leaving the Kaiser untried, Articles 227—230 of the Treaty of Versailles—which provided the legal basis to arraign the former German Emperor and to try him for acts of aggression under a special tribunal comprising judges appointed by the US, United Kingdom (UK), France, Italy and Japan—became, for all intents and purposes, dead letters and with that “the hopes of Lloyd George and other European statesmen to use the victorious peace as an occasion for confirming and expanding the international law of war founded on the rocks of American opposition.”<sup>197</sup> Nevertheless, this was the moment when international institutions capable of enforcing ICL on state leaders first became a realistic possibility.<sup>198</sup> While the League of Nations did adopt the Convention against Terrorism in 1937, not enough states ratified the instrument leaving its Protocol, which contained a Statute for an international criminal court, dead in the water.<sup>199</sup>

After the IMT and the IMTFE concluded, the UN General Assembly asked the International Law Commission (ILC) “to study the desirability and possibility of establishing an international juridical organ for the trial of persons charged with [grave violations of the Geneva Conventions of 1949].”<sup>200</sup> While a draft statute for a

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<sup>194</sup> Simpson, above n 26, at 19.

<sup>195</sup> Cryer and others, above n 15, at 116.

<sup>196</sup> Slye and Schaack, above n 15, at 24.

<sup>197</sup> Taylor, above n 74, at 16.

<sup>198</sup> Simpson, above n 26, at 59.

<sup>199</sup> Cherif Bassiouni *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinius Nijoff Publishers, Bordrecht, Boston, Lancaster, 1987) at 2.

<sup>200</sup> As cited in Goldstone and Smith, above n 15, at 7.

permanent court was produced in 1950 the issue was postponed by the General Assembly until the definition of aggression was fully considered and the draft Code of Offences was completed.<sup>201</sup> Separating the process of drafting a statute for a tribunal from the process of drafting the international criminal code over which that tribunal would have jurisdiction was an unwise course of action, unless, of course, the objective sought was to preclude both a statute and a code.<sup>202</sup> Cassese suggested that the “lack of synchronisation was... the result of a practical will to delay the establishment of an international criminal court, due to the fact that the world was then sharply divided and frequently at risk of war.”<sup>203</sup> At the time France appeared to be the only permanent member of the UN Security Council supporting the establishment of a permanent court. While the US, UK and the Union of Soviet Socialist Republics (USSR) each indicated the potential desirability for such a court, none was prepared to take the practical steps needed. Ongoing discussion of the prospects of a court occurred in lieu of practical steps, probably because none of the five permanent members of the United Nations Security Council (P-5) wanted to suffer the consequences of vetoing the idea. Given the US, UK and USSR had established the IMT and played key roles in holding the IMTFE, their abandonment of the court proposal would have called into question their credibility as agents of international criminal justice. It would have given succour to those arguing the international military tribunals were little more than examples of what Tojo called and Justice Pal considered, and both Richard H Minear and Danilo Zolo, among others, subsequently describe as, victor’s justice.<sup>204</sup>

In 1979 the Human Rights Commission drafted a statute for the establishment of an international jurisdiction as a means of implementing the Apartheid Convention

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<sup>201</sup> Cryer and others, above n 15, at 146-147.

<sup>202</sup> Bassiouni, above n 199, at 5.

<sup>203</sup> Cassese, above n 15, at 323-324. This point was omitted from the revised 2013 edition.

<sup>204</sup> “Judgment of the Hon’rble Mr Justice Pal Member from India” as cited in Neil Boister and Robert Cryer *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, Oxford, 2008) at [809-1421]; and Minear, above n 74, Zolo, above n 25, as well as Bassiouni, above n 199, at 4-5.



(1972),<sup>205</sup> Article V of which envisages the creation of an international court. Of all the international criminal conventions applicable to serious international crime, only the Genocide Convention anticipates the jurisdiction of an international criminal court for the crime of genocide, but it stops short of mandating the establishment of such a court.<sup>206</sup> Following Iraq's invasion of Kuwait in 1991, the US and UK considered establishing an ad-hoc military tribunal, very much in line with the precedents offered by both the IMT and the IMTFE. Once Kuwait was liberated without US-led coalition forces capturing Saddam Hussein, consideration of this option ceased, however. Had that tribunal been established it would have been "Nuremberg's true successor" since the underlying armed conflict began with an invasion and annexation of territory, was fought by regular armies and was concluded by territorial liberation: a US-led coalition would have again defeated, through sheer force of arms, a brutal authoritarian dictator and, in the immediate aftermath of that victory, established a tribunal and conducted a trial signalling the rise of a new world order dominated by the US.<sup>207</sup>

Given the common purpose of these domestic, transitional, hybrid and international institutions is to enforce ICL, taken together they comprise an international criminal justice system which is "a fortress of its own, with its own laws and policy."<sup>208</sup> In all of these instances, the discourse against politico-cruelty begs for the law to be expanded as far as possible while politico-strategic calculations tend to hamper ICLs lopsided and uneven growth. As already mentioned, the ensuing argument gives focus to the prosecutorial efforts occurring within the IMT and the IMTFE established in the immediate aftermath of the Second World War, the ICTY and the ICTR established in the aftermath of the Cold War and the ICC established as the War on Terror was beginning.

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<sup>205</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, UNTS 1015 (entering into force 18 July 1976).

<sup>206</sup> Bassiouni, above n 199, at 10.

<sup>207</sup> Reydam and Wouters, above n 137, at 20.

<sup>208</sup> Tallgren, above n 17, at 567.

## *VI Conceptualising Atrocity Crime*

The most powerful and enduring manifestation of the discourse against politico-cruelty lies in its conceptualisation of mass atrocities as serious international crimes. As the body of rules prohibiting the commission of war crimes, crimes against humanity, crimes of genocide and crimes of aggression, ICL has evolved since the nineteenth century by drawing from its various sources: primarily treaties, customary international law, general principles of law, but also juridical decisions and legal scholarship.<sup>209</sup> This evolving body of rules is something of a nexus between public international law, with its focus on regulating the conduct of states (and state-makers) within the international system of states, and domestic criminal law, with its focus on regulating the conduct of individuals within particular jurisdictions.<sup>210</sup> ICL has evolved only recently; since the turn of the twenty-first century it “ripples through the imaginative space of post-conflict justice and, thereby, aspires to fill the sullen void of impunity.”<sup>211</sup>

Re-conceptualising war crimes, crimes against humanity and crimes of genocide—widely understood to be ICL’s core crimes—as *atrocity crime* acknowledges that certain acts of politico-cruelty are common among these crimes.<sup>212</sup> It also signals the need for these acts to reach a significant magnitude to “meet the

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<sup>209</sup> Slye and Schaack, above n 15, at 85-106. Relevant treaties include the London Agreement of 8 August 1945, to which the Charter of the International Military Tribunal was annexed, and the Rome Statute of the International Criminal Court, UNTS 2187 (entered into force 1 July 2002); customary international law is reflected in judicial decisions comprising case law, such as the Tadić and Furundžija judgments; equality of arms and the presumption of innocence are two salient general principles of international criminal law; judicial decisions include the Judgement of the International Military Tribunal; and Neil Boister and Robert Cryer *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, Oxford, 2008) is an instructive example of legal scholarship. Cassese goes even further, distinguishing among these sources as primary, secondary, or subsidiary. Cassese, *Cassese’s International Criminal Law*, above n 15, at 9-18.

<sup>210</sup> Slye and Schaack, above n 15, at 2.

<sup>211</sup> Drumbl, above n 8, at 2.

<sup>212</sup> Danner, above n 105, at 455.

substantiality test developed by the international and hybrid criminal tribunals.”<sup>213</sup> For Schabas “[s]ounding the alarm every time a few dozen people are massacred in the course of a political conflict is like a doctor sending for a battery of sophisticated tests every time a patient sneezes.”<sup>214</sup> Significantly, Scheffer’s concept of *atrocious crime* provides:<sup>215</sup>

terminology that remains faithful to the requirements of international criminal law (particularly in the work of international and hybrid criminal tribunals and of national criminal courts) and at the same time enables timely public discourse (by governments, activists, the media, scholars, and the common man and woman) and that actually stands some chance of leading to greater understanding of what is occurring and how effective responses might be facilitated.

For interested scholars, analysts and policymakers this re-conceptualisation helps “emphasize that analysis and intervention in these contexts must take into account the totality of such acts and their consequences, beyond the actual massacres.... [pointing] to a profound crisis of the various institutions that regulate social and political interaction.”<sup>216</sup> This, in turn, brings into sharper focus the leadership roles played by state-makers and leaders of other social groups perpetrating *administrative massacres* organised for achieving some substantive end.<sup>217</sup> Yet at the same time, as Mark J Osiel explains, “[t]o disaggregate this program into its components, that is, into the minutia of specific acts by particular defendants against individual victims, [is] to

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<sup>213</sup> David Scheffer “Atrocious Crimes: Framing the Responsibility to Protect” in Richard H Cooper and Juliette Voinov Kohler (eds) *Responsibility to Protect: The Global Moral Compact for the 21<sup>st</sup> Century* (Palgrave MacMillan, New York, 2009) 77 at 82.

<sup>214</sup> Schabas, above n 7, at 99.

<sup>215</sup> David Scheffer “The Merits of Unifying Terms: ‘Atrocious Crimes’ and ‘Atrocious Law’” (2007) 2 *GSP* 91 at 91; David Scheffer “Genocide and Atrocious Crimes” (2006) 1(3) *GSP* 229 at 238; and David Scheffer *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, Princeton and Oxford, 2012) at 428-432.

<sup>216</sup> Béatrice Pouligny, Simon Chesterman and Albrecht Schnabel (eds) *After Mass Crime: Rebuilding States and Communities* (United Nations University Press, Tokyo, 2007) at 2.

<sup>217</sup> Mark J Osiel “Why Prosecute? Critics of Punishment for Mass Atrocious Crime” (2000) 22 *HRQ* 118 at 146.

misconceive the nature of the wrong in a way that diminished its full horror and heinousness.”<sup>218</sup>

The conflation of these three categories of serious international crime into *atrocious crime* enables some authors to deliberately mislead their readership by referring to genocide, with its powerful rhetorical resonance echoing among the world community, when they, strictly speaking, should be referring to crimes against humanity. The Report entitled *Preventing Genocide: A Blueprint for US Policymakers* uses genocide as a term to encompass other atrocious crimes, for example. For Schabas this:<sup>219</sup>

is really a form of deception: the report uses one term, whose definition is well recognized and well accepted in international law, to replace another. Both genocide and crimes against humanity began their terminological careers as international crimes. Criminal law insists upon rigorous definitions for a number of reasons, not the least of which is a requirement of precision that is deeply rooted in fair trial standards.

Moreover, where genocide is determined not to have occurred, as the *UN Report of the International Commission of Inquiry on Darfur to the Secretary-General* found with respect to the Sudanese Government,<sup>220</sup> this may lead policymakers to suppose that somehow only lesser international crimes may have occurred. “The notion that this was probably not a ‘genocide’ in the most strict sense of the word,” Prunier explains, “seemed to satisfy the Commission that things were really not too bad.”<sup>221</sup> The Commission did, of course, establish that the Sudanese Government and the Janjaweed were responsible for indiscriminate attacks, including the killing of

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<sup>218</sup> At 121.

<sup>219</sup> William A Schabas “‘Definitional Traps’ and Misleading Titles” (2009) 4(2) *GSP* 177 at 179; and Madeleine K Albright and William S Cohen *Preventing Genocide: A Blueprint for US Policymakers* (United States Holocaust Memorial Museum, Washington DC, 2008).

<sup>220</sup> United Nations *Report of the International Commission of Inquiry on Darfur to the Secretary-General* (S/2005/60 1 February 2005) at 4.

<sup>221</sup> Gérard Prunier *Darfur: The Ambiguous Genocide* (Cornell University Press, New York, 2007) at 158.

civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement; that is, particular acts that amount to a prima facie case of war crimes and crimes against humanity. Evidence gathered by the Commission was subsequently handed over to Luis Moreno-Ocampo, the first ICC prosecutor, for further investigation, resulting in the indictment of Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman and Omar Hassan Ahmad Al Bashir as well as a summons to appear for Bahar Idriss Abu Garda.<sup>222</sup> A second warrant of arrest for Al Bashir, issued by the ICC Pre-Trial Chamber on 12 July 2010, included three counts of the crime of genocide.<sup>223</sup> “At the practical level,” Schabas explains, “it makes no difference whatsoever whether Al-Bashir is charged with crimes against humanity or with genocide: one way or another, he is threatened with prosecution and, if convicted, will go to jail for a very long time.”<sup>224</sup> Former UN Secretary-General Kofi Annan sums it up well when he writes:<sup>225</sup>

For the suffering of the civilians it did not matter what the situation was called, or what motive had led to their desperate situation. They were still dying, and in vast numbers, as a result of a government’s decisions and the actions of its armed proxies. This was a crime—whatever its form. What Darfur demonstrated, and hopefully should never have to be demonstrated to world leaders ever again, is that the ‘genocide’ label does not hold a monopoly over the most heinous crimes against humanity, and should not be the sole trigger for action. The sheer numbers that were made to suffer and die in Darfur is proof enough of that.

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<sup>222</sup> *Prosecutor v Harun (Indictment)* ICC Pre-Trial Chamber I ICC-02/05-01/07, 27 April 2007; *Prosecutor v Al Bashir (Indictment)* ICC Pre-Trial Chamber I ICC-02/05-01/09, 4 March 2009; and *Prosecutor v Garda (Summons)* ICC Pre-Trial Chamber I ICC-02/05-02/09, 1 May 2009.

<sup>223</sup> *Prosecutor v Al Bashir (Indictment)* ICC Pre-Trial Chamber I ICC-02/05-01/09, 12 July 2010.

<sup>224</sup> Schabas, above n 219, at 179.

<sup>225</sup> Kofi Annan with Nader Mousavizadeh *Interventions: A Life in War and Peace* (Penguin Press, New York, 2012) at 131.

The disingenuous use of the term genocide does, however, signal the crime of genocide is seen by many people as the supreme atrocity crime and it has, therefore, more denunciatory power than war crimes or crimes against humanity, illustrating the affective function of ICL as an opprobrium proscribing no less than what it means to belong to the human community. It also signals the political uses to which the discourse against politico-cruelty can be put.

According to Robertson “declaring and waging aggressive wars in which millions of combatants and civilians may be killed” is the “worst war crime of all.”<sup>226</sup> Such crimes of aggression can generate enormous consequences, as Martin Gilbert explains with respect to the European theatre:<sup>227</sup>

The death tolls of the Second World War were still being calculated as 1945 came to an end, and were never finally ascertained. As many as fifteen million soldiers, sailors and airmen had been killed in action. At least ten million civilians had been murdered in deliberate killings—six million of them Jews. Between four and five million civilians had been killed in air raids. Four million prisoners of war had been killed or allowed to die in situations of the utmost cruelty after capture—three and a half million of them Soviet soldiers in German captivity. Was the total death toll thirty-three million, or even more?

The consequences of the Asia-Pacific War (1931-1945) were similarly profound; more than sixty thousand Western Allied lives, more than 3 million Japanese lives and a total approaching twenty million Asian lives were lost.<sup>228</sup> However, while it is a serious international crime, a crime of aggression is not necessarily, in and of itself, considered an atrocity crime within this thesis. This is because even though the use of force in international affairs is usually conducted in the pursuit of some substantive ends it is not necessarily a cruel act, though its collateral damage might be. Moreover, while crimes of aggression are committed by members of one group against members of another, these groups are normally trained as a military group to use deadly force as a matter of course, rather than by exception. Finally, while crimes

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<sup>226</sup> Robertson, above n 61, at 438.

<sup>227</sup> Gilbert, above n 74, at 318-319.

<sup>228</sup> Bix, above n 74, at 4.

of aggression are, of course, of concern to the international community, those who commission them might receive censure or sanction, but are not denounced by the international community as *hostis humani generis*. For those who wield power in contemporary world affairs this renders the initiation of armed conflict somewhat more acceptable than the commission of atrocity crime. State-makers, it seems, want to be war-makers when it suits their purposes.

Other international crimes—such as arms, drug or human trafficking, or money laundering—are often referred to as crimes of international concern or as *treaty* crimes and are best understood as being transnational in character.<sup>229</sup> This is because the transfer of objects contravenes at least one domestic regulatory regime. The harm caused by these crimes impact negatively upon individuals and the communities to which they belong, can retard economic growth, especially in poorer economies where combating transnational crime soaks up scarce resources and, in extreme cases, can challenge the authority of the state by corrupting its police forces and judiciary systems and providing alternative sources of authority.<sup>230</sup> Yet as Neil Boister explains:<sup>231</sup>

Transnational crimes are difficult to classify tidily on the basis of harm. Transnational crimes can be categorized using an orthodox criminal law taxonomy based on the values protected. Harms against personal interest might include slavery, human trafficking, piracy, and terrorism. Harms against property interest might include piracy, transnational organized crime, corruption, and money laundering. Harms against social interests might include terrorism and corruption. Considerable overlap in these categories suggest that a more tenable division might be made between essentially violent crimes directed at human's bodily integrity, such as terrorism, and essentially non-violent crimes based on contraband, such as drug trafficking.

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<sup>229</sup> Neil Boister "Transnational Criminal Law?" (2003) 14(5) *EJIL* 953.

<sup>230</sup> Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 7.

<sup>231</sup> At 8.

While transnational crimes' consequences are of a disturbing scale and, as collective action problems, deserve the immediate and concerted efforts of the international community, they are pursued in and of themselves, rather than as a means towards some larger substantive end in the way that war crimes, crimes against humanity and crimes of genocide are. As individuals acts, many are essentially trivial and do not attract widespread condemnation. These criminal groups also represent more limited political projects, which do not seek to remake the modern world through violence as advocates of utopias are wont to do. The fact that no person responsible for trafficking in arms, humans, drugs or for laundering money has yet to be prosecuted at an international tribunal or court for their criminal deeds suggests a lesser level of repugnance to international criminal justice than that invoked by the impunity enjoyed by those who commit war crimes, crimes against humanity and crimes of genocide. These transnational crimes differ from atrocity crimes also because, while they might be conducted by an organised group, their crimes are not committed against members of a particular group and are not denounced by members of the international community as *hostis humani generis*. Here, then, the concept of atrocity crime distinguishes war crimes, crimes against humanity and crimes of genocide from other serious international crimes, such as crimes of aggression and transnational treaty crimes, because the former are cruel and this cruelty is performed in the pursuit of substantive ends.



## ***VII Conclusion: Spurring on the Quest for International Criminal Justice***

Emerging from within the modernist project, the discourse against politico-cruelty constructs its own reality of what is, and what is not, meaningful in the context of confronting the problem of mass atrocity. It provides for an evolving body of rules, which were designed not only to proscribe certain acts of politico-cruelty—such as those that help comprise war crimes, crimes against humanity and crimes of genocide—but also to make criminally liable those engaging in this violence.<sup>232</sup> This body of rules now looks set to cover the crime of aggression. Significantly, this process of criminalisation helps foster the sense of international community and, in Michael J Struett’s words, “is constitutive of global society.”<sup>233</sup> Since criminalising acts of politico-cruelty allows perpetrators of those acts to be prosecuted and punished, and enables the expression of intense disapproval surrounding the “*unworthiness*” of certain types of violence,<sup>234</sup> ICL enforcement is always political. Just as this discourse provides a certain degree of legitimacy for enforcing ICL through domestic, transitional, hybrid and international trials, it also empowers the efforts of three successive generations of international prosecutors. The discourse is at its sharpest when it is manifest as the active will to undertake trials, best demonstrated through prosecutorial responses to serious international crimes committed in Europe and Asia during the Second World War, in Europe and Africa during the aftermath of the Cold War and in Africa during the so-called War on Terror. Yet as Greene notes, “[i]n its self-appointed task of speaking for the civilised and the human, international law [including its lawyers] has been unable to move beyond categories like *hostis humani generis*, even though in using them it founded what some still want to believe is a genuine legal science on a legal fiction, a fiction that nonetheless retains the power to haunt us.”<sup>235</sup> This is a radically political

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<sup>232</sup> Cassese, above n 15, at 3.

<sup>233</sup> Struett, above n 85, at 19.

<sup>234</sup> BVA Röling and Antonio Cassese *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity, Cambridge, 1994) at 94. (Emphasis in original.)

<sup>235</sup> Greene, above n 130, at 703.

enterprise that plays on “the interrelationship between the spectre of justice—the victim—and the spectacularization of the law in such a way that produces a representational domain in which performances on the world stage are institutionalized through the ethical cultivation of human rights principles and the crowding out of others.”<sup>236</sup> This, in turn, obfuscates the importance of economic marginalisation and social dislocation in the initiation of armed conflict and the commission of atrocity crime, illuminating instead the role played by “unexceptional people often acting under the authority of a state, or, more loosely, in accordance with political objectives of a state or other entity.”<sup>237</sup> The ensuing three main parts of this thesis shifts focus to the various complexities and complicities of this pursuit of international criminal justice.

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<sup>236</sup> Clarke, above n 27, at 6.

<sup>237</sup> Tallgren, above n 17, at 575.

**PART I**

**THE QUEST FOR INTERNATIONAL CRIMINAL JUSTICE  
IN THE AFTERMATH OF THE SECOND WORLD WAR**

## CH. 2: INTERNATIONAL MILITARY TRIBUNALS

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### *I Introduction*

Rooted in the material and ideational conditions of nineteenth century liberalism, a high point of modernity, the discourse against politico-cruelty offered a useful paradigm for state-makers wishing to punish those persons who committed serious international crimes during the Second World War. Nevertheless, a set of propitious politico-strategic circumstances was also required to establish the first major institutions for enforcing ICL. This chapter argues, firstly, that while the discourse against politico-cruelty informed the consensus for establishing the IMT and the IMTFE, that consensus also reflected the US's new status as *primus inter pares* (first among equals) during the middle of the twentieth century. This was a rare moment of consonance between the underpinning discourse and the prevailing politico-strategic circumstances. The chapter argues, secondly, that these tribunals were never envisaged by their designers as durable mechanisms for enforcing all aspects of ICL as it stood at that time. Primarily designed to try and then to punish those persons responsible for initiating, and then losing, the Second World War, these tribunals were a form of victor's justice, helping secure the peace by inscribing post-conflict power relations among victorious state-makers as the new status quo in international affairs. The chapter argues, thirdly, that these tribunals also fostered local attitudes embracing individualism ahead of belligerent forms of nationalism based on race. As US foreign policymakers sought to reconstruct German and Japanese states as peace-loving democracies, and their respective economies as overseas markets for US goods and services, they took the first crucial steps towards building a neo-capitalist free market of near global proportions. The design of, and support given to, the international military tribunals cannot be fully appreciated without reference to US-led efforts to reshape the overarching rules governing world affairs in its own interests during what Henry R Luce dubbed—prophetically, but far too parochially—the “American Century.”<sup>238</sup> These post-conflict reconstruction efforts, then, are both an extension of a global conflict and the beginning of a politico-cultural civil war

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<sup>238</sup> Henry R Luce “The American Century” 1941 (17 February) *Time* 61.

fought by proponents of economic liberalisation for control over certain national and international governance arrangements.

## ***II Politics: Grand Coalition Consensus***

As the first major international attempts to successfully prosecute those persons initiating international armed conflict and committing atrocity crime, both the IMT and the IMTFE relied heavily upon a consensus forged by the US, UK and the USSR—members of the so-called Grand Coalition (or Big Three)—during the heat of battle against the German, Italian and Japanese Axis Powers. The emergence of this victorious war-fighting coalition reflects a significant politico-strategic shift in world affairs as Japan was no longer allied with the US and the UK against German forces, as it had been during the First World War. Central to this coalition was the US and its status as *primus inter pares*. Norman Davies explains:<sup>239</sup>

[T]he USA alone possessed the space and time to make systemic plans for a future world order. Untouched by the fighting, and daily growing in confidence, power, wealth and prestige, the Americans must have sensed that the era of their supremacy was fast approaching. Their armies were victorious in the Pacific, as in Western Europe. Their navy and air force could hardly be challenged. Their nuclear project would soon make them the world's sole atomic power. Their economic clout was in a league of its own. Above all, their only possible rivals were contending with varying degrees of disruption, debilitude and devastation. So there was no reason to hesitate. In 1944, before the war was won, and before Roosevelt was re-elected as president for a third term, the foundations were laid for the United Nations Organization, for the World Bank, for the International Monetary Fund and, by extension, for the reconstruction of Europe. No one else could have drawn up such proposals. No one else could have financed them. The USA was gearing up for world leadership. It had not made the largest military contribution to the war—at least not in Europe. But it would be the chief beneficiary.

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<sup>239</sup> Davies, above n 74, at 41-42.

A consensus among the Big Three for establishing the IMT was not arrived at immediately. International pressure to act began when nine Governments-in-exile—namely Belgium, Czechoslovakia, Greece, Luxemburg, The Netherlands, Norway, Poland, Yugoslavia and the Free French Republic—organised themselves into the Inter-Allied Commission on the Punishment of War Crimes. Meeting at St James’s Palace in London, this Commission issued an Inter-Allied Declaration on the Punishment of War Crimes (often referred to as the *St James Declaration*) on 12 June 1941, explicitly repudiating acts of vengeance by the public and requiring governments to place the punishment of war criminals among their principal war aims.<sup>240</sup> High-level discussions among the Big Three concerning the prospects of bringing justice to bear on Germany’s wartime leadership commenced only once an Allied military victory appeared highly likely during the final phases of hostilities. However in mid-1945 the US President and the British Prime Minister did not see eye-to-eye on how to proceed as Truman favoured an international tribunal whereas Churchill still sought summary executions. Churchill’s Foreign Secretary, Anthony Eden, claimed the Nazi leadership’s guilt was so black that it fell beyond the scope of juridical process.<sup>241</sup> “It was a deadlock,” Robertson explains, “broken by the casting vote of Joseph Stalin, who loved show trials as long as everyone was shot in the end.”<sup>242</sup> Stalin, it seems, had moved beyond his earlier musings when the Big Three had met at Tehran and he suggested, probably mischievously, shooting 50,000 Germans without trial.<sup>243</sup> As Reydams and Wouters observe “one cannot fail to notice the paradoxical situation of the leaders of the liberal nations supporting summary executions and Stalin favouring juridical trial.”<sup>244</sup> In the end the US prevailed as the Big Three and France agreed to meet in London in order to draft a Charter for a tribunal.

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<sup>240</sup> Taylor, above n 75, at 25-26.

<sup>241</sup> At 10.

<sup>242</sup> Robertson, above n 61 at 246.

<sup>243</sup> Martin Gilbert *Churchill: A Life* (Pimlico, London, 1991) at 821.

<sup>244</sup> Reydams and Wouters, above n 137, at 12.

Starting on 26 June 1945 the London Conference spanned 15 sessions and concluded on 8 August 1945.<sup>245</sup> The consensus arrived at through the Conference produced the London Agreement of 8 August 1945—with the Charter of the International Military Tribunal (hereafter London Charter) annexed to it—which authorised the establishment of the IMT “for the just and prompt trial and punishment of the major war criminals of the European Axis.”<sup>246</sup> “The emphasis” here, Luc Reydam and Jed Odermatt explain, “is clearly on punishment, as the term appears no less than ten times. In stark contrast to the Statutes of later international tribunals, defendants a priori are labelled criminals—rather than presumed innocent.”<sup>247</sup> The Charter was drawn up in six weeks and contained only 30 articles. The Charter’s negotiation was built on a fragile consensus as the “Allies stumbled and compromised their way into the business of a major trial of war criminals.... There was much talk of the need for a trial, together with an admonition about possible hazards, but few expected that it would open a Pandora’s Box so wide that the proceedings would threaten to pass beyond the control of the governments.”<sup>248</sup>

The establishment of the IMTFE was foreshadowed by Roosevelt’s warning to the Japanese Government shortly after Pearl Harbour was attacked on 7 December 1941. Roosevelt warned Japan that it should comply with the laws of armed conflict, particularly in relation to US prisoners of war. The US was not alone in its condemnation as, on 13 January 1942, China stated its intention to apply the principles designed to punish German wartime leaders to the Japanese occupying China. Compared to its public declarations concerning the IMT, the US Government’s public declarations concerning the IMTFE were less frequent and later, and were usually accompanied by statements focusing on the Nazis.<sup>249</sup> The Allies

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<sup>245</sup> Townsend, above n 1, at 175.

<sup>246</sup> International Military Tribunal *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946 I* (Nuremberg, Germany, 1947) at [10].

<sup>247</sup> Reydam and Odermatt, above n 14, at 83.

<sup>248</sup> Bradley F Smith *Reaching Judgement at Nuremberg* (Andre Deutsch, London, 1977) at xvii.

<sup>249</sup> Zachary D Kaufman “The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations,” (2010) 43 *The John Marshall Law Review* 753 at 757.

stated their intention to prosecute Japanese wartime leaders only after the European theatre had closed and Japan's defeat was assured.<sup>250</sup>

Accepted by the Japanese Government on 2 September 1945, the Instrument of Surrender provided the basis for establishing the IMTFE, which was formally established on 19 January 1946 by a special proclamation of General Douglas MacArthur, Supreme Commander Allied Powers (SCAP), when he approved the Charter of the International Military Tribunal for the Far East (hereafter *Tokyo Charter*).<sup>251</sup> Whereas the IMT was established by agreement of the Big Three plus France, the IMTFE was established by SCAP.<sup>252</sup> There was nothing akin to the London Conference and, significantly, SCAP received a directive from Washington DC on 10 November 1945 ordering him to proceed with the trial irrespective of whether or not those Allies who had been approached to participate in the tribunal chose not to or delayed unduly.<sup>253</sup> Despite 13 fewer Articles it closely resembled the London Charter. For the most part the drafting of the Tokyo Charter followed the structure and approach of the London Charter, drew upon the US State, War and Navy Departments Coordinating Committee (SWNCC) Directive of 6 October<sup>254</sup> and had been drawn up exclusively by the US through the SCAP legal section.<sup>255</sup>

Here, then, the decision taken by members of the Grand Coalition, and their allies, to proceed to international trials as a means of punishing vanquished foes from Germany and Japan was by no means inevitable. Rather, the consensus was informed, and informed to a large extent, by the discourse against politico-cruelty. Salient here is the notion that certain serious international crimes—specifically war

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<sup>250</sup> Minear, above n 74, at 8.

<sup>251</sup> *Charter of the International Military Tribunal for the Far East (as Amended—26 April 1946)* as cited in Neil Boister and Robert Cryer *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, Oxford, 2008) at [7-11].

<sup>252</sup> Kaufman, above n 249, at 757.

<sup>253</sup> Boister and Cryer, above n 209, at 22-24. The IMTFE did, however, receive post facto endorsement from the Far Eastern Commission.

<sup>254</sup> Reydam and Wouters, above n 137, at 18.

<sup>255</sup> Townsend, above n 1, at 211.



crimes and crimes against humanity—are to be renounced as having no place in world affairs and that those persons and groups who commit such acts are to be excommunicated from the human community via a process of abjection. The rule of ICL is the favoured means of this abjection, requiring the establishment of institutions to enforce that evolving body of rules. Significantly, initiating and then losing the international armed conflict separated the accused from the accusers. While Grand Coalition strategic thinking and foreign policymaking was significantly shaped by, and gave effect to, the discourse against politico-cruelty, US ascendancy in world affairs was vital to making both the IMT and the IMTFE possible. The propitious set of politico-strategic circumstances in which the US—by virtue of its force of arms, its geographic remove from major theatres of conflict (excepting, of course, Hawaii), its industrial capacity and the size of its domestic market—was emerging, if it had not already emerged, as *primus inter pares*, were needed for a consensus for trials to be forged in the immediate aftermath of the Second World War. Following a long period of dissonance between the underlying discourse and the prevailing politico-strategic circumstances, this was a rare moment of consonance. As Gretje Baars explains, the international military tribunals were a fundamental part of the Allies’ policy in the aftermath of the Second World War, which not only served to justify the enormous sacrifice of human and material resources, but also helped to conceal the failure to act sooner in the face of aggressive Nazi expansionism, Jewish refugees and the Holocaust.<sup>256</sup> The international military tribunals were established as a means of providing justice, but that justice was so selective in its reach that it can only be understood as a form of victor’s justice.

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<sup>256</sup> Gretje Baars “Capitalism’s Victor’s Justice? The Hidden Stories Behind the Prosecution of Industrialists Post WWII” in Kevin Jon Heller and Gerry Simpson (eds) *The Hidden Histories of War Crimes Trials* (Oxford University Press, Oxford, 2013) 163 at 168.

### *III Law: Victor's justice*

The consensus to put German and Japanese wartime leaders on trial led to the establishment of the IMT and the IMTFE. The London and Tokyo Charters envisaged a tripartite structure—namely the bench, defence and prosecution—for the IMT and the IMTFE, respectively. The third pillar of these tribunals, the prosecution, is the most important for this thesis. The purpose of the Committee for the Investigation and Prosecution of Major War Criminals, whose mandate was provided for in the London Charter,<sup>257</sup> was to agree upon the Chief Prosecutors' work plans, finalise the list of major war criminals to be tried and approve and lodge the indictment, including any accompanying documents, with the IMT. The Committee was also to draft rules of procedure for the tribunal's approval. It fell to the Chief Prosecutors, acting individually or as a committee, to investigate, collect and produce all necessary evidence before or during the trial. The Chief Prosecutors also prepared the above-mentioned indictment for approval by the Committee, conducted preliminary examinations of all witnesses and of those who stood accused and, of course, argued the case against the accused during the trial itself. The Tokyo Charter, which states that the Chief of Counsel will investigate and prosecute charges against war criminals within the IMTFE's jurisdiction, was slightly narrower than Nuremberg's prosecutorial mandate.<sup>258</sup> Whereas the IMT had four Chief Prosecutors leading four separate prosecution teams, the IMTFE had a single Chief Prosecutor with ten associate prosecutors, together forming a unified prosecution approach within a multinational International Prosecutions Service (IPS).<sup>259</sup> Despite these differences, it is clear that the drafters of both the London and Tokyo Charters intended to design institutions with strong prosecutorial functions, meaning the prosecutor would be vital to the trial process and, thereby, the enforcement of ICL.

The discourse against politico-cruelty's significance is signalled not only by the consensus to establish the two international military tribunals, but also by the IMT and the IMTFE designers' recourse to ICL's substantive elements. As part of both

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<sup>257</sup> See International Military Tribunal, above n 246, at [13].

<sup>258</sup> See Boister and Cryer *Tokyo International Military Tribunal*, above n , at [8].

<sup>259</sup> Kaufman, above n 249, at 760-761.

tribunals' design phases the definition of war crimes underwent negotiation. US delegates to the London Conference suggested that the IMT's jurisdiction be focused exclusively on crimes against peace, though UK delegates insisted that war crimes and crimes against humanity be included. The resulting text meant an accused must first be charged with crimes against peace before the tribunals' jurisdiction over atrocity crimes could be triggered.<sup>260</sup> For the IMTFE designers "[w]ar crimes charges were almost an afterthought"<sup>261</sup> as "the question of definition obviously did not concern the Charter's drafters overmuch."<sup>262</sup> Whereas the Tokyo Charter offers no elaboration on the category of war crimes beyond violations of the laws or customs of armed conflict, article 6(b) of the London Charter explains such violations as acts including "murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages or devastation not justified by military necessity."<sup>263</sup>

Nearing the close of the London Conference, US Justice Robert Jackson suggested that crimes against humanity be used to refer to "atrocities, persecutions, and deprivations."<sup>264</sup> It was a phrase recommended to him by Professor (later Sir) Hersch Lauterpacht, an international lawyer of distinction and a member of the British War Crimes Executive (BWCE).<sup>265</sup> At this time crimes against humanity meant acts of murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before, or during, the war, or persecutions on political or racial (or, in the case of the IMT, religious) grounds in execution of, or in connection with, any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country perpetrated. Article

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<sup>260</sup> Boister and Cryer, above n 209, at 25.

<sup>261</sup> At 175.

<sup>262</sup> At 176.

<sup>263</sup> International Military Tribunal, above n 246, at [11].

<sup>264</sup> Schabas, above n 7, at 51.

<sup>265</sup> John Cooper *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave MacMillan, New York, 2008) at 66.

5(c) of the Tokyo Charter goes on to state that leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan. The Nuremberg definition was narrower than it might have been as any acts that could be considered to help form a crime against humanity needed to be committed in direct association with the initiation of international armed conflict—a deliberate ploy intended to insulate the Grand Coalition from the types of charges used to prosecute their vanquished German foes.<sup>266</sup> Whereas the London Charter stated that crimes against humanity were inhumane acts committed against any civilian population, the Tokyo Charter omitted reference to civilian populations, impliedly but significantly expanding the scope of this category of crime to include any “large-scale killing of military personnel in an unlawful war.”<sup>267</sup>

For the IMT, genocide was understood to be a crime against humanity, which had to be linked to the other charges of crimes against peace. This meant that the scope of these crimes was restricted to those relevant events that occurred after German forces had invaded Poland on 1 September, 1939.<sup>268</sup> The crime of genocide did not feature in the Tokyo Charter.

Although these atrocity crimes could have been committed anywhere in the world—offences with no particular geographical location, as the London Charter puts it—the IMT’s jurisdiction did not extend to crimes committed before the commencement of armed hostilities on 1 September 1939 or following the conclusion of armed hostilities in Europe on 8 May 1945. The Tokyo Charter is silent on the temporal jurisdiction to be enjoyed by the IMTFE, though as we shall see in Chapter 3 the indictment only covers serious international crimes committed by Japanese wartime leaders between 1928 and 1948. In a strictly literal sense the IMTFE could

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<sup>266</sup> Schabas, above n 7, at 56.

<sup>267</sup> Röling and Cassese, above n 234, at 3.

<sup>268</sup> Donna E Arzt “Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal” (1995) 12(3) *New York Law School Journal of Human Rights* 689 at 698.

have focused on atrocity crimes committed by Allied military forces, though the politics of enforcing ICL in the aftermath of the Second World War “renders such an interpretation absurd.”<sup>269</sup> (Strictly speaking, both Charters fail to explicitly specify each tribunal’s temporal jurisdiction.<sup>270</sup>) Due to the seriousness of these crimes the accused remained liable for their actions even though such actions might not be crimes in the locations where they were committed. According to Goldstone and Smith “[p]erhaps subconsciously, what the London drafters were doing was speaking to the notion of both *jus cogens* and customary international law, arguing that no matter the neglect of a municipal juridical system to criminalize certain wrongs, the international system had the power *and* obligations to do so.”<sup>271</sup> However, these atrocity crimes—war crimes, crimes against humanity and genocide—were very much defined in the shadow of crimes against peace.<sup>272</sup>

While atrocity crimes were included in their respective Charters, both the IMT and the IMTFE gave their main focus to crimes against peace. Both tribunals were designed with an eye firmly fixed on punishing those who were responsible for initiating the most deadly international armed conflict in human history. As Donna E Arzt explains “[t]he Nuremberg trial was primarily about the Nazi war machine and only secondarily about the Holocaust.”<sup>273</sup> Although both the IMT and the IMTFE were designed with a remit that included putting on trial those who were responsible for committing atrocity crime—and as we have seen the justiciable categories of atrocity crimes were, specifically, war crimes and crimes against humanity—these tribunals were not designed as enforcement mechanisms for all ICL as it stood in the middle of the twentieth century. The tribunals’ remit had jurisdictional limits as, according to their respective Charters, the purpose of both tribunals was, in fact, to try and, if possible, punish persons who had helped initiate and/or conduct Germany's

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<sup>269</sup> Reydams and Odermatt, above n 14, at 86-87.

<sup>270</sup> At 86.

<sup>271</sup> Goldstone and Smith, above n 15, at 45. (Emphasis in original.)

<sup>272</sup> Schabas, above n 7, at 12.

<sup>273</sup> Arzt, above n 268, at 695.

wars of aggression in Europe from late 1939 and Japan's wars of aggression in Asia from the early 1930s, respectively.

The notion that initiating international armed conflict was punishable by ICL was raised during various international conferences held between the First and Second World Wars. However, during this time there were no significant formalised legal advances towards the criminalisation of aggression. It was not until the Second World War was drawing to a close that serious consideration was given to this question by state-makers and jurists.<sup>274</sup> Two important works were written by the western-trained Soviet professor of criminology, Aron Trainin: *The Defense of Peace and Criminal Law* (1937), which “criticised the League of Nations for failing to make provocation of aggressive war a criminal offence and for failing to create an international criminal court to punish aggressors,” noting that “hunting rabbits unlawfully is punished more severely than organising the military destruction of people”; and *The Criminal Responsibility of the Hitlerites* (1944), which argued in favour of prosecuting crimes against peace, gave the concept its definitive formulation, and would later serve as a basis for the crime as it appeared in the London Charter.<sup>275</sup> Crimes against peace, according to Trainin, included acts of aggression, propaganda of aggression, the conclusion of agreements with aggressive aims, the violation of treaties which serve the cause of peace, provocation designed to disrupt peaceful relations between countries, terrorism and support of armed bands (fifth column). Translated into English, French and German, *The Criminal Responsibility of the Hitlerites* also elaborated the concept of conspiracy in relation to the crime against peace, suggesting that the US was not the only proponent of it, despite much commentary to the contrary. This concept of conspiracy was discussed at the UNWCC as well as at the US State and War Departments, and was cited by Bernays in his already-mentioned memorandum on the topic to the White House. Jackson and Fyfe had also read Trainin's book prior to the London Conference,

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<sup>274</sup> Sellars, above n 193, at 45-46.

<sup>275</sup> Francine Hirsch “The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order” (2008) *AHR* at 705-707.

which Trainin attended, as he did the first Nuremberg trial, as an advisor to the Soviet delegation.<sup>276</sup>

During Conference negotiations the inclusion of crimes against peace within the London Charter was openly contested by both the Soviet and French representatives, though all delegates did not want the causes of the Second World War to be considered and scrutinised by the IMT.<sup>277</sup> The Soviets sought to restrict the application of this crime to only those acts committed by Nazis, thereby avoiding scrutiny of their role in initiating international armed conflict.<sup>278</sup> Meanwhile the French argued that crimes against peace violated the general rule of international law against retroactive legislation, *nullum crimen sine lege* (“no crime without law”), an argument used also by the German defence team, as well as by many of the IMT’s critics. The concept of a common plan or conspiracy was foreign to French code-based jurisprudence too. According to Bradley F Smith “the Russians and French seemed unable to grasp the implications of the concept; when they finally did grasp it, they were genuinely shocked... the Soviets seem to have shaken their heads in wonderment—a reaction, some cynics may believe, prompted by envy.”<sup>279</sup> In the end the negotiators agreed that crimes against peace meant planning, preparing, initiating or waging a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the above.<sup>280</sup> In so doing, as Benjamin Ferencz puts it: “Nuremberg made plain that aggressive war was not a national right but an international crime.”<sup>281</sup>

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<sup>276</sup> At 708.

<sup>277</sup> Sellars, above n 193, at 94.

<sup>278</sup> Bernard D Meltzer “Robert H Jackson: Nuremberg’s Architect and Advocate” (2005) 68 *Albany Law Review* 55 at 57.

<sup>279</sup> Smith as cited in Simpson, above n 26, at 120.

<sup>280</sup> International Military Tribunal, above n 246, at [11].

<sup>281</sup> Benjamin B Ferencz “Telford Taylor: Pioneer of International Criminal Law” (1999) 7 *Columbia Journal of Transnational Law* available at <http://www.benferencz.org/1990-1999.html>.

Drafters of the Tokyo Charter followed this lead, with only two significant deviations. The varying wording reflects key differences between Germany's and Japan's initiation of armed hostilities and the evolving status of international law. The inclusion of “declared and undeclared war of aggression” in the Tokyo Charter covers Japan's lack of warning for its armed attacks, from its invasion of Manchuria in 1931 to its aerial attack on Pearl Harbour a decade later. The inclusion of “international law” within the Tokyo Charter signalled the emerging consensus that acts of aggression and initiating international armed conflict were considered criminal under international customary law, and not merely by international treaties, agreements or assurances which might lack the binding power of law.<sup>282</sup> The drafting of these two Charters was the first time a war of aggression was treated as a serious international crime perpetrated by individuals, rather than as a transgression of international law involving the state.<sup>283</sup>

By predicating ICL enforcement on crimes against peace, members of the Grand Coalition also found a means of shielding themselves from the atrocity crimes they may have committed during the Second World War. As they did not commence armed hostilities such sharpening of jurisdictional focus deliberately excluded a range of actions which, in some instances, “was a careful, cynical choice intended to insulate the four ‘great’ powers from the criminal liability for the racist, colonialist, and repressive policies of their own regimes.”<sup>284</sup> As the London Charter was proofread in English, French, Russian and German, and then checked for accuracy of translation, the *Enola Gray* dropped an atomic bomb on the Japanese city of Hiroshima,<sup>285</sup> a few days before Nagasaki was also obliterated by another US atomic bomb. The timeliness of this wanton destruction of a city, strongly argued by Daniel

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<sup>282</sup> Yuma Totani *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Centre and Harvard University Press, Cambridge Massachusetts, 2008) at 81.

<sup>283</sup> Zolo, above n 27, at 25.

<sup>284</sup> Schabas, above n 7, at 75.

<sup>285</sup> Taylor, above n 75, at 74.



Goldhagen as unjustified by military necessity,<sup>286</sup> raises important questions over the use of the London Charter as a jurisdictional shield for the Coalition's own war crimes.

More than gratifying the desire to punish their enemies for creating a situation of international armed conflict, which consumed much of their blood and treasure, this focus on crimes against peace also reflects the security concerns shared by members of the Grand Coalition. Once their ability to wage armed conflict was destroyed and the major wartime leaders were captured or killed, Germany and Japan no longer posed a viable military threat to the US, UK or USSR. The Grand Coalition's military superiority within the politico-strategic dimension of world affairs was not to be placed at risk, however, by the potential for other powers aspiring to revise (in their own interests) the terms of this new post-conflict settlement within international society. In this sense the consensus to punish those responsible for crimes against peace sent a powerful deterrent to any *would-be revisionists* of the power relations determining the new status quo in international affairs. Moreover, the consensus to punish these crimes through the rule of international law also helps further insulate the state-based system of international affairs from alternative ways of organising world affairs, whether through a return to empire, the emergence of a single world government or the birth of a world proletariat, to name but a few possibilities. It does so because states, as subjects of international law, entrench their primacy through any application of international law even where the objects of that law are individuals and groups. Thus, as Kirsten

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<sup>286</sup> Goldhagen, above n 102, at 3. For arguments to the contrary, see generally: Barton J Bernstein "Research note: Writing, Righting, or Wronging the Historical Record: President Truman's Letter on his Atomic-Bomb Decision" (1992) 16 *Diplomatic History* 163; and J Samuel Walker "History, Collective Memory, and the Decision to Use the Bomb" (1995) 19(2) *Diplomatic History* 319. These arguments, of course, offer a pious rendition of the Truman Administration's policy justifications found in "Press release by the White House, 6 August 1945" available at [www.trumanlibrary.org/whistlestop/study\\_collections/bomb/large/documents](http://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents).

Sellars opines, “Nuremberg law on aggression was innovative, but it was innovation in the service of the post-war *status quo*.”<sup>287</sup>

Never envisaged as durable mechanisms for enforcing all aspects of ICL as it stood at that time, both the IMT and the IMTFE were therefore designed primarily in order to try and then punish those persons responsible for initiating, and then losing, the Second World War. In so doing both the IMT and the IMTFE helped inscribe post-conflict power relations among state-makers as the new *status quo*, deterring aspiring revisionist powers and insulating the state-based system ahead of other possible ways of organising international society. Establishing institutions to pursue the quest for international criminal justice was not the Grand Coalition’s primary end. As the Big Three decided to deal with the defeated leaders of Germany and Japan through ICL enforcement, they did so in a way that, serving their own national interests, would restore order in their respective geographic areas of interests through a combination of armed force, maintenance of law and order, and the provision of social services.<sup>288</sup> However, as Minear argues “[t]he appointment of justices only from among the aggrieved and victor nations itself may not have invalidated the tribunal’s judgement, but it raises serious questions about the tribunal’s impartiality.”<sup>289</sup> “Just as the justices at Tokyo came only from aggrieved and victor nations,” Minear continues, “so the accused were all Japanese.”<sup>290</sup> The victorious powers in the Pacific War almost certainly committed certain types of acts for which Japanese were prosecuted.<sup>291</sup> (Unsurprisingly, the USSR’s declaration of war on Japan and the US’ use of atomic bombs against Japan did not feature in the Tokyo indictment; probably without wishing to appreciate the irony, the American and Russian justices voted to convict the Japanese leaders of waging aggressive war and committing war crimes.<sup>292</sup>) For some legal analysts this criticism is weak as a matter

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<sup>287</sup> Sellars, above n 193, at 118. (Emphasis in original.)

<sup>288</sup> At 82.

<sup>289</sup> Minear, above n 74, at 80.

<sup>290</sup> At 93.

<sup>291</sup> At 94-95.

<sup>292</sup> At 102.

of law because international law provides for belligerents to prosecute offences committed against them as long as the trials comport with the standards applicable at the time.<sup>293</sup> In corollary, Japan's acceptance of the Potsdam Declaration and the subsequent Instrument of Surrender rendered impotent any challenges to the IMTFE's lawfulness.<sup>294</sup> Yet to characterise the victor's justice critique narrowly in terms only of a legal defence is to miss the very point on which this criticism rests; namely that the structures, processes and enforcement of the law itself is a form of politics—an extension of the politico-strategic circumstances establishing the international military tribunals. As one of the Japanese defendants, Okawa, said during his trial, “this trial is not the realization of justice, it is the continuation of war.”<sup>295</sup>

Both the IMT and the IMTFE were key features of the Allied war effort, a by-product of the Grand Coalition's military victory and resourced by the military.<sup>296</sup> The IMTFE was more military in character than the IMT as, similar to US courts martial, the IMTFE's primary actor was the region's commanding officer, authorised to convene the court and granted the power to act upon its decisions.<sup>297</sup> Although some of the tribunal's key components, such as its lawyers and bench, were civilian,<sup>298</sup> the IMTFE remained military in character. The IMTFE's summary procedures, which denied the accused the advantages inherent in Anglo-American evidential and procedural rules, were based on an American military commission established to try non-US citizens.<sup>299</sup> The *military* in international military tribunal indicated the legal basis for, as well as the summary procedure of, the tribunals and was, therefore, useful in distinguishing these trials from other trials occurring within

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<sup>293</sup> Boister and Cryer, above n 209, at 33.

<sup>294</sup> At 48.

<sup>295</sup> As cited in Rölling and Cassese, above n 234, at 33.

<sup>296</sup> Wierda and Triolo, above n 12, at 115.

<sup>297</sup> Goldstone and Smith, above n 15, at 58.

<sup>298</sup> At 21; and Richard Overy “The Nuremberg Trials: International Law in the Making” in Philippe Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press, Cambridge, 2003) at 6.

<sup>299</sup> Boister and Cryer, above n 209, at 75.

pre-existing court systems.<sup>300</sup> Built upon a consensus that emerged from a set of propitious politico-strategic circumstances arising in the aftermath of the Second World War, the establishment of two tribunals to enforce ICL was, in fact, an extension of that clash of arms. It was, as Reydams and Wouters point out, the continuation of war by other means, with Nuremberg, in particular, forming “part of a strategy of total war and total victory.”<sup>301</sup> If this was not a case of victor’s justice, where law is used to serve the political purposes of having one’s way over one’s former but defeated enemies, then the term itself is unlikely to ever find use. Indeed, ICL enforcement in the immediate aftermath of the Second World War becomes its own form of politics, which, as this chapter’s next section will argue, serves the interests not just of certain state-makers, but also of proponents of neo-capitalism.

#### ***IV War: Rebuilding After International Armed Conflict***

The decisions on where the IMT and the IMTFE would sit signalled the new local reality of occupying forces controlling Germany and Japan. Although the delegates to the London Conference agreed on the final day of negotiations and as the last item on their agenda that Berlin was to be the IMT’s permanent seat,<sup>302</sup> they also agreed that its first trial would be held in Nuremberg, Northern Bavaria. Providing a veritable breeding ground for the Nazi Party and the venue of many Nazi propaganda rallies, Nuremberg is also remembered for its imposition of race laws targeting Jews, as an industrial centre producing war munitions and for being the personal fiefdom of one of the accused, Julius Streicher. Nuremberg was also, during the Middle Ages, the Holy Roman Empire’s *de facto* capital.<sup>303</sup> Yet for Smith “the city of Nuremberg would be primarily associated not with Wagner’s opera *Die Meistersinger Von Nurnberg*, nor with Hitler’s massive rallies, but with what all of us took to be *the* trial of War Criminals.”<sup>304</sup> MacArthur’s decision to seat the

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<sup>300</sup> Reydams and Wouters, above n 137, at 14.

<sup>301</sup> At 15.

<sup>302</sup> Townsend, above n 1, at 178.

<sup>303</sup> Schabas, above n 7, at 1.

<sup>304</sup> Smith, above n 248, at xiii.

IMTFE in Tokyo, the capital city of Japan and centre of national political power—and, in particular, at the Ichigaya Court, which was formerly the Japanese military academy and, during the war, the home of the Imperial War Ministry and the Headquarters of the Imperial Japanese Army—would enable the trial to play a role in educating the Japanese public about its leaders’ commission of serious international crimes.<sup>305</sup>

As occupiers of defeated enemy territory, US military forces assumed sovereignty over parts of Germany and all of Japan, seeking to administer and enforce international law in these newly-occupied territories. (This was not an extension of US sovereignty, however; but rather, accorded with the laws of occupation.<sup>306</sup>) Particular zones of post-war Germany and certain sectors of Berlin were occupied and administered variously by the military forces belonging to the Allies; Nuremberg fell within the US zone of occupation. Despite eleven states being signatories to the Japanese Instrument of Surrender, Japan was almost exclusively occupied and administered by the 350,000 US troops that had arrived in Japan by the close of 1945.<sup>307</sup> Unsurprisingly, the rules and procedures of the IMTFE closely resembled the American legal system and, when compared against the London Charter, the Tokyo Charter gave SCAP extensive power and authority; in practice, however, the preeminent body authorising policies concerning occupied Japan was the Far Eastern Commission (FEC) which, based in Washington DC, comprised representatives of the Allied powers. As Neil Boister and Robert Cryer explain:<sup>308</sup>

As a result of the tangled, time-fractured procedure by which MacArthur promulgated the Tokyo IMT's Charter, and the spaghetti-plate relationship that existed between him, as SCAP and as an American military officer, the Joint Chiefs of Staff and the FEC, it is

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<sup>305</sup> Totani, above n 282, at 8-9.

<sup>306</sup> See generally Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds) *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press, Oxford, 2014).

<sup>307</sup> Goldstone and Smith, above n 15, at 57.

<sup>308</sup> Boister and Cryer, above n 209, at 28.

perhaps unsurprising that the question of the international, or American, status of the Tokyo IMT became a matter of contention.

“In the end,” Yuma Totani explains, “the Tokyo trial turned out to be one of the rare events in occupied Japan that retained little of MacArthur's imprint.”<sup>309</sup>

The decision-making around the seats of these two tribunals also reflects changing configurations of power within international affairs, particularly its important politico-strategic dimension. As Smith recalls from his experiences at Nuremberg, “many of the significant forces that shaped the European and American transition from war to peace and then to Cold War appeared in microcosm during that trial. The changes that World War II and its aftermath provided in American values and policy show up in striking clarity at Nuremberg.”<sup>310</sup> Francine Hirsch explains the IMT in particular:<sup>311</sup>

functioned as a medium for postwar cooperation among states with different visions and goals—and also how it became the battleground for an intense political and ideological struggle among those same states about the meaning of WWII and the shape of the new international order... In Nuremberg we see not just the “intimation of the coming Cold War” but in fact one of the Cold War’s first major battles, taking place at a critical moment when the postwar relationship between the United States and the USSR was still unformed and before the USSR had achieved the status of an international superpower.

Present here too were broader and more profound transformations of world affairs illustrated by the decline of European empires and, in particular, the waning influence of Britain’s power, the decolonisation of large parts of Africa and South Asia and the concomitant emergence of vibrant, emancipatory anti-colonial and pro-nationalist movements. The trans-Atlantic shift in the centre of gravity for global decision-making, from European capitals such as London, Paris, Berlin, Rome and Moscow to Washington and New York is also evident.<sup>312</sup>

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<sup>309</sup> Totani, above n 282, at 32.

<sup>310</sup> Smith, above n 248, at xvi.

<sup>311</sup> Hirsch, above n 275, at 702-703.

<sup>312</sup> Buzan and Lawson, above n 153.

Both the IMT and the IMTFE were complemented by other trials held within and beyond occupation zones. Once the first trial of the IMT was completed a consensus among the Grand Coalition for further joint trials was not reached, though the occupying powers did agree to Control Council Law No 10, the purpose of which was to authorise within respective zones of occupation unilateral trials of German war criminals. After Jackson returned to his position at the US Supreme Court, fellow American, Brigadier General Telford Taylor, was appointed Chief of Council for a series of twelve *thematic trials* within Germany.<sup>313</sup> These thematic trials conducted under the auspices of the Nuremberg Military Tribunal (NMT) created 177 defendants—35 of whom were acquitted—and gave focus to those “medical doctors responsible for illegal human experiments, jurists who distorted law to achieve Nazi goals, high-ranking military officers responsible for atrocities, Foreign Ministry officials who helped plan aggression and industrialists who seized foreign properties and worked concentration camp inmates to death.”<sup>314</sup> These trials were conducted under the US Army’s authority and cannot be understood as *international* in any meaningful sense.<sup>315</sup> Significant to these trials was the underlying objective of prosecuting German industrialists as a means of disciplining the German economy, though the appetite among US policymakers for this shifted in the long aftermath of the Second World War.<sup>316</sup> However, many culpable Germans not only escaped trial at Nuremberg, but were also not extradited to the countries where they had committed their crimes. Thus, justice was never brought to bear on most German war criminals; and, even on those occasions when they did go to trial in German courts, they found there “the greatest possible ‘understanding.’”<sup>317</sup>

Even though MacArthur envisaged the IMTFE holding multiple trials when, in 1946, he proclaimed its Charter’s Article 14—specifically that the first trial will be held at Tokyo and any subsequent trials will be held at such places as the tribunal

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<sup>313</sup> Schabas, above n 7, at 11.

<sup>314</sup> Ferencz, above n 281.

<sup>315</sup> Donihi, above n 75, at 739.

<sup>316</sup> Baars, above n 256, at 164.

<sup>317</sup> Arendt, above n 74, at 185.

decides—and the “indictment was marked ‘No. 1’, to signify that other trials were [at that stage] likely,”<sup>318</sup> only one trial took place. Even before this trial was completed, US Chief Prosecutor Joseph Keenan believed subsequent trials would offer very little in the way of additional didactic value, recommending against their continuation.<sup>319</sup> Unlike the IMT trial, which was followed by other trials, the IMTFE trial was followed by the release of other Class A suspects.<sup>320</sup> Nevertheless, the IMTFE was complemented by about 50 Special War Crimes Courts established by Allied Governments under their respective national jurisdictions within the former theatres of war in the Asia-Pacific region.<sup>321</sup> These were established under the respective authorities of the Governments of Australia, Canada, The Netherlands and China.<sup>322</sup> Taken together, these Allied courts held over 2,000 trials, sentencing about 3,000 Japanese to terms of imprisonment and over 900 Japanese to death.<sup>323</sup>

The IMT’s and the IMTFE’s significance extends beyond the ambit of international criminal law. Nuremberg’s legacy was inscribed directly onto Germany’s Basic Law, specifically Article 25 that subordinates German law to international law, creating particular duties for German inhabitants under international law, and Article 26 that bans preparations for wars of aggression.<sup>324</sup> The IMTFE’s was especially important too, marking “the starting point of Japan’s confrontation with its past, a process that continues to this day,”<sup>325</sup> though many Japanese people choose not to express their views on the Tokyo trial.

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<sup>318</sup> Boister and Cryer, above n 209, at 69.

<sup>319</sup> Reydam and Wouters, above n 137, at 18-19.

<sup>320</sup> Minear, above n 74, at 39.

<sup>321</sup> Totani, above n 282, at 7.

<sup>322</sup> Simon Chesterman “International Criminal Law with Asian Characteristics?” at 11 available at <http://law.nus.edu.sg/wps/>; and Barak Kushner *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (Harvard University Press, Cambridge, Massachusetts and London, 2015).

<sup>323</sup> Chesterman, above n 322, at 11.

<sup>324</sup> Arzt, above n 268, at 724.

<sup>325</sup> Totani, above n 282, at 2.



Significant impacts of the IMT and the IMTFE included the effects on post-conflict identity formation produced by the doctrine of individual responsibility. ICL enforcement undertakes a form of social engineering by fostering a commitment to individualism, which, by condemning, exalts the individual and his or her personal freedoms. This particular way of articulating one's identity differs markedly from identity articulated in terms of a nationalism, which seeks to compensate for the alienation experienced by individuals belonging to modernist societies. It differs too from identities articulated in terms of a collectivism seeking to compensate for that alienation by encouraging participation in some kind of global social movement.<sup>326</sup> While Simpson is correct to assert “[t]he history of war crimes law can be comprehended as a series of undulations between recourse to the administration of local justice and grand gestures towards the international rule of law,”<sup>327</sup> there is something more insidious going on here, transforming German and Japanese politico-social affairs. In point of fact, holding individuals responsible for what had been up to that point considered to be state crimes was a “radical premise,” representing a major departure in the practice of international law.<sup>328</sup>

Concomitant with the Allies' intention to establish the IMT and the IMTFE were plans to reconstruct the German and Japanese militarist states as peace-loving democracies. Referring to the democratic transition of post-war Germany, Arzt contends that the IMT:<sup>329</sup>

intended to point the way forward as much as could any trial about the recent past, was held in the same setting, at the same time, and under the same sponsorship, that of the Allied occupation forces, as the postwar reconstruction project. None of these conjunctions were compelled, yet all were deemed imperative... The Major War Crimes Trial was thus one of a series of object lessons for the onlooking people of Germany in how to conduct their public affairs according to the rule of law.

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<sup>326</sup> Pettman, *World Affairs: An Analytical Overview*, above n 74, at 128.

<sup>327</sup> Simpson, above n 26, at 33.

<sup>328</sup> Sellar, above n 193, at 85.

<sup>329</sup> Arzt, above n 268, at 702-703.

Conducted from 1945 until about 1949, the de-Nazification policy sought, initially, to deny active Nazi supporters access to all important official, and some private, offices, thereby causing the demise of the Nazi Party as a force to be reckoned with within Germany's domestic politics. Along with the policies of de-militarisation, in its later phases de-Nazification sought to deny Germany's capability to again threaten international peace by creating a democratic society, free from the domination of fascists or military cliques and where politico-strategic power lies on a broad base of popular consent. This policy was nothing short of a "political cleansing" of post-war Germany<sup>330</sup> which sought "to create a democratic phoenix out of the ashes of defeated fascism."<sup>331</sup> While the Allies busied themselves removing thousands of Nazis from a rehabilitating German state, they undermined the core proposition of the American conspiracy charge that the German war criminals were guilty of a massive organised conspiracy while most members of German society were innocent.<sup>332</sup>

The intention to establish democracy in Japan featured in the Potsdam Declaration, which also signalled the Allies' intentions to occupy Japan in order to ensure its full de-militarisation, the surrender of its armed forces, the dismantling of its military industries and the removal of the militaristic clique responsible for Japan's aggression. The SWNCC initial post-surrender policy for Japan aimed to prevent Japan from ever posing a threat to the US and to facilitate the rise of "a peaceful and responsible government" which "should conform as closely as may be to the principles of democratic self-government."<sup>333</sup> Following the general disarming of Japan's military machine at home and abroad, which included about two million and three million combatants respectively, the Allies removed from public life those Japanese who were closely connected to the militaristic clique and gave amnesty to those Japanese who opposed the pre-war and war governments. In addition to encouraging the rise of political parties the Allies also codified a new Constitution,

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<sup>330</sup> At 717.

<sup>331</sup> At 719.

<sup>332</sup> Simpson, above n 26, at 70.

<sup>333</sup> Reydams and Odermatt, above n 14, at 87.

reformed local government, separated the judiciary from the executive, encouraged the rise of unionism and introduced significant land reform.<sup>334</sup>

Accompanying the intention to establish these tribunals and reconstruct the German and Japanese militarist states as peace-loving democracies were plans to reconstruct their wartime economies as bastions of free-market enterprise. The shift in Allied policy—from debilitating the German economy under the guise of the Morgenthau Plan to resuscitating and developing that economy—became most apparent in the spring of 1947.<sup>335</sup> This enormous reconstruction project was not an altruistic venture, however; as then US Secretary of State George Marshall himself conceded the plan bearing his name “was rooted in US security and economic interests.”<sup>336</sup> The US, heavily industrialised as the so-called *arsenal of democracy*, desperately needed foreign markets for its goods. US efforts to support any government, anywhere in the world if that government opposed the spread of communism (the *Truman Doctrine*) and its Economic Recovery Program (the *Marshall Plan*) combined to see the US provide Europe with about US\$13B in aid.<sup>337</sup> According to Michael J Hogan:<sup>338</sup>

Through the Marshall Plan, American leaders sought to recast Europe in the image of American neo-capitalism. They envisioned a Western European system in which class conflict would give way to corporative collaboration, economic self-sufficiency to economic interdependence, international rivalry to rapprochement and cooperation, and arbitrary national controls to the integrating powers of supranational authorities and natural market forces. One line of their policy aimed at liberalizing trade and making currencies convertible, another at forging national and transitional networks of private cooperation and public-

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<sup>334</sup> See WG Beasley *The Modern History of Japan* (Weidenfeld and Nicolson, London, 1975) at 279-284.

<sup>335</sup> Baars, above n 356, at 174.

<sup>336</sup> Greg Behrman *The Most Noble Adventure: The Marshall Plan and the Reconstruction of Post-War Europe* (Aurum Press, London, 2008) at 69.

<sup>337</sup> At 4-5. These are 1940s figures.

<sup>338</sup> Michael J Hogan “American Marshall Planners and the Search for a European Neo-capitalism” (1985) 44(72) *AHR* 44 at 45.

private power sharing, and a third at building central institutions of coordination and control. Through these and related initiatives American Marshall planners hoped to create an integrated European market—one that could absorb German power, boost productivity, raise living standards, lower prices, and thus set the stage for security and recovery on the Continent and for a fully multilateral system of world trade.

Although there was no equivalent plan for war-torn Asia, the US provided material assistance to Japan in the immediate aftermath of its defeat by delivering large shipments of food and other raw materials. With the subsequent outbreak of the Korean War, the US-led UN forces placed large orders for Japanese-made equipment and the procurement orders by US troops based in Japan helped boost the national economy.<sup>339</sup> At the same time, however, US administrators either dismantled key Japanese businesses or “rendered [them] amenable to the interest of overseas capital.”<sup>340</sup>

Understood in this context, the primary ends of the IMT and the IMTFE had less to do with *doing justice*—if doing justice involves an effort to disrupt and curtail the politics of hate, separation and violence in order to dissolve tensions, violence and conflict through legal means<sup>341</sup>— and more to do with the politico-social, politico-economic and politico-strategic transformation of a post-conflict zone in accordance with the victor’s preferences. These two tribunals sought to transform local politico-social attitudes while local politico-strategic and politico-economic institutions underwent reconstruction. Accordingly, the design of the international military tribunals cannot be fully understood in isolation from US-led efforts to reconstruct German and Japanese states as peace-loving democracies, as well as to resuscitate German and Japanese industrial capacity as overseas markets for US goods and services. In parts of Germany, particularly the Ruhr and the Rhineland, key to Europe’s economy and, by extension, American capital interests, nearly all of those

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<sup>339</sup> Beasley, above n 334, at 304.

<sup>340</sup> Tim Jacoby “Hegemony, Modernisation and Post-war Reconstruction” (2007) 21(4) *Global Security* 521 at 525.

<sup>341</sup> Zolo, above n 27, at 165.

government officials purged as part of the de-nazification initiative found themselves reappointed.<sup>342</sup> In Japan too, government officials removed from public life because of their ties to the wartime government, and some of the large industrial conglomerates that had been disestablished, were rehabilitated as a means of strengthening liberalisation efforts in the face of potential socialist revolution.<sup>343</sup> As US foreign policymakers began building the foundations for a hub-and-spokes model of international trade, with the US economy at its centre, the international military tribunals not only “served to simultaneously legitimize and showcase the US’s role as the rising hegemon of the ‘free world,’”<sup>344</sup> but would also facilitate what Baars describes as “international criminal law’s effective deployment in the service of capitalism’s victor’s justice.”<sup>345</sup> US firms were well placed to benefit from this reconstruction, but so too were many other proponents of neo-capitalism.

In addition to establishing these tribunals alongside their significant post-conflict reconstruction efforts, the Grand Coalition sought to reshape the international system in its own interests. At the very moment when delegations from the US, UK, USSR and France met in London to begin their negotiation of guiding principles for prosecuting war criminals the United Nations Charter was signed at the San Francisco Conference.<sup>346</sup> (That Charter had been drafted by the soon-to-be victorious state-makers at Dumbarton Oaks, near Washington DC and largely imposed on non-Great powers.<sup>347</sup>) Under Article 2 of the UN Charter, the general prohibition of the coercive use of armed force in international affairs was recognised, though without mentioning if any such breaches would attract criminality.<sup>348</sup> Germany and Japan were both designated as *enemy states* under Article 53, meaning that the UN’s

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<sup>342</sup> Jacoby, above n 340, at 524.

<sup>343</sup> At 525.

<sup>344</sup> Baars, above n 256, at 164.

<sup>345</sup> At 187.

<sup>346</sup> Taylor, above n 75, at 39.

<sup>347</sup> Zolo, above n 27, at 13-14. The US, UK, USSR and China were represented at Dumbarton Oaks.

<sup>348</sup> Simpson, above n 26, at 145.

restriction over the use of force did not apply to military action taken against them.<sup>349</sup> Article 42 of the UN Charter granted to the Security Council primary responsibility for authorising the use of force as a means of preventing or punishing acts of aggression, though the power of veto given to the P-5—namely the US, UK, USSR, China and France—meant these victorious nations of the Second World War could, in effect, make frequent recourse to the use of force in international affairs without fear of sanction. In this sense the UN formed a crucial element of the broader effort to reshape and legitimise the post-conflict international environment in the interests of the Grand Coalition, even though at the same time “the distribution of power and wealth [was] as unequal as it could possibly be, even the fundamental principles which have regulated international society for centuries—state sovereignty, the legal equality of states, non-interference in internal jurisdiction, the regulation of warfare—tend to become the instruments of the strongest.”<sup>350</sup> For the foreseeable future, then, the foundations for international peace and security were dependent on two pillars, the first of which, the international military tribunals, would punish past crimes of aggression while the second, the UN Security Council, would protect future peace.<sup>351</sup>

Parallel efforts to refashion international economic systems occurred through the establishment of the so-called Bretton Woods Institutions—the International Bank for Reconstruction and Development (now the World Bank) and the International Monetary Fund (IMF)—though the early years of the Cold War saw the USSR turn away from these institutions.<sup>352</sup> The US was able to ensure international commerce took place in ways consistent with its own security and economic needs not only by appointing US Treasury’s chief economist, Harry Dexter White, as the IMF’s first director, but also by locating the IMF and the World Bank in Washington DC.<sup>353</sup> As McKinley explains “Bretton Woods, as the institutionalisation of postwar American ideology, was to early globalisation what the Manhattan Project was to the Western

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<sup>349</sup> At 62.

<sup>350</sup> Zolo, above n 27, at 9.

<sup>351</sup> Sellars, above n 193, at 111.

<sup>352</sup> Behrman, above n 336, at 20.

<sup>353</sup> Jacoby, above n 340, at 528; and Baars, above n 256, at 176.

Alliance. It provided the means for ordering the greater part of the world along lines established by the United States.”<sup>354</sup> Here, then, the design of, and support provided to, the IMT and the IMTFE cannot be fully appreciated without reference to either the efforts to reconstruct local politico-strategic and politico-economic institutions or the US-led efforts to reshape the overarching international system in its own interests during what I have already noted Henry R Luce dubbed as, prophetically in 1941, the “American Century.” According to Luce:<sup>355</sup>

Throughout the 17th century and the 18th century and the 19th century, this continent teemed with manifold projects and magnificent purposes. Above them all and weaving them all together into the most exciting flag of all the world and of all history was the triumphal purpose of freedom. It is in this spirit that all of us are called, each to his own measure of capacity, and each in the widest horizon of his vision, to create the first great American Century.

Thus, not only did the IMT and the IMTFE “became one of the first fronts of the Cold War,”<sup>356</sup> in which the US contested the USSR in order to exercise hegemony over international affairs through exerting control over the UN and Bretton Woods institutions, but these tribunals also signalled an emerging contest between those who benefit most from democratisation, market liberalisation and individualism, and those who are put at a serious disadvantage and, in many cases, are exploited by these developments. This contest was far broader than politico-strategic affairs, signalling the slipping away of that rare moment of consonance between the underlying material and ideational conditions and the prevailing politico-strategic circumstances and the dawning of a new period of dissonance.

Similar developments in international institutions governing the politico-social dimension of world affairs did not occur in the immediate aftermath of the Second World War, however. What was lacking was a permanent court which, complementing the International Court of Justice (ICJ) with its focus on resolving

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<sup>354</sup> McKinley, above n 74, at 155.

<sup>355</sup> Luce, above n 238, at 61-65.

<sup>356</sup> Hirsch, above n 275, at 726.

disputes between and among sovereign states, could focus on prosecuting individuals who commit serious international crimes.<sup>357</sup> Struett suggests that perhaps there was something of “an international fatigue” associated with establishing more institutions following the rapid creation of the UN, IMF and the North Atlantic Treaty Organization (NATO).<sup>358</sup> No doubt some of that fatigue probably resulted from hearing, again and again, the contrary views and dissenting rhetoric of those standing in the docks as the accused. Notwithstanding the dearth of formal institutional development, the Genocide Convention (1948), the UN Universal Declaration of Human Rights (1948),<sup>359</sup> the human rights protections inherent in the Geneva Conventions of 1949 and the Refugee Convention (1951)<sup>360</sup> collectively helped to inscribe the individualist notion of identity in the politico-social dimension of world affairs. The UN Declaration of Human Rights, in particular, articulated the profound idea that human rights were universal and must be protected by the international community regardless of any state allegiances.<sup>361</sup> For Schabas, the Declaration emanates from the UN Charter, which was originally intended to have its own *Bill of Rights* and, as such, must be understood in light of the Charter’s recognition of the general prohibition on the coercive use of armed force in international affairs.<sup>362</sup> For Pettman, the Declaration is the “most notable example of the discourse of neo-individualism” and it “represented a significant milestone in the attempt to have the human rights doctrine adopted worldwide.”<sup>363</sup> This is because it offers a powerful articulation of a set of moral claims which any person is entitled to make based on nothing more than their humanity and irrespective of any other secondary identity

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<sup>357</sup> Struett, above n 85, at 51-52.

<sup>358</sup> At 64.

<sup>359</sup> The Universal Declaration of Human Rights, Paris (proclaimed 10 December 1948) available at <http://www.un.org/en/universal-declaration-human-rights>.

<sup>360</sup> Convention relating to the Status of Refugees, UNTS 189 (entered into force 22 April 1954) and the Protocol relating to the Status of Refugee, UNTS 606, (entered into force 4 October 1967).

<sup>361</sup> Dutton, above n 91, at 11.

<sup>362</sup> Schabas, above n 7, at 208.

<sup>363</sup> Pettman, *World Affairs: An Analytical Overview*, above n 74, at 132.



markers such as race, ethnicity, age, gender, class or religious affiliations. “The Declaration is,” Pettman observes, “an important plank in the platform of post-World War II international law. As such its articles are regularly used as international standards to pressure regimes that flout the principle the Declaration espouses.”<sup>364</sup>

Here, then, the battle to win the peace following the Second World War was not only an extension of the power configurations underpinning a new set of politico-strategic circumstances enabling the establishment of the international military tribunals, but was also the beginnings of a new contest in which proponents of neo-capitalism began to exert control over the reconstruction of politico-strategic and politico-economic institutions in newly-occupied territories. Their aspirations and efforts did not stop there, however. They set about designing and then controlling architecture for governing the politico-strategic and politico-economic dimensions of international life. As a new form of politics emerging as a continuation of the Second World War by other means, this transition to peace and the ensuing establishment of the international military tribunals established in the immediate aftermath of the Second World War was also the opening of a new front in a politico-cultural civil war fought by proponents of economic liberalisation for control over the modernist project.

## *V Conclusion*

The quest for international criminal justice in the immediate aftermath of the Second World War was informed by the discourse against politico-cruelty, which has its origins in nineteenth-century liberalism more specifically and the modernist project more generally. The existence of that discourse was insufficient, however, to spur on this quest in the form of concrete action. Rather, required for that was a set of propitious politico-strategic circumstances which, in practical terms, materialised as the US’s rise to *primus inter pares*. Taken together, the discourse and these circumstances delivered a moment that could enable a consensus to undertake trials of those responsible for committing serious international crimes instead of resorting to the summary execution of the surviving wartime leadership, and shaped the design

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<sup>364</sup> At 133.

of the tribunals' institutional arrangements, including its prosecutorial mandates, substantive elements and jurisdictional reach. Once the IMT's central design features were determined by the London Charter, they were, by and large, incorporated in the Tokyo Charter. This, in turn, fortified the discourse by further developing ICL in the immediate aftermath of the Second World War and by transforming its central ideas into practical actions of consequence within post-conflict locales. As an extension of the military victory over Germany and Japan, the international military tribunals were established as a form of victor's justice, targeting only the vanquished and reinforcing the underpinning configuration of material power in world politics at that time. The power to establish these tribunals was underscored by the victorious force of arms, which was also used to reconstruct German and Japanese states and economies as a step towards building a neo-capitalist free market of near global proportions, with the US economy at its centre. This is what Baars was getting at when she wrote that the IMT was capitalism's victor's justice.<sup>365</sup> It is in this context—that is, a transition from global conflict to a politico-cultural civil war fought for control over vanquished states and their vulnerable economies as well as the international architecture used to govern international affairs—that the international military tribunals were established and designed as a stage upon which the first generation of international prosecutors would perform. And it is to that performance as agents of law, politics and war, which the remaining chapters of Part 1 of this thesis now shifts its focus.

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<sup>365</sup> See Baars, above n 256.

## CH. 3: IMT AND IMTFE INDICTMENTS

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### *I Introduction*

The discourse against politico-cruelty not only informed the decision to establish the international military tribunals and shaped the design of those institutions, but it also empowered the pre-trial performance of the first generation of international prosecutors of serious international crime. This chapter begins by introducing significant members of this generation before noting the IMT prosecutors were better resourced than their IMTFE counterparts. The US was, of course, disproportionately represented in both prosecution teams. The chapter then critically examines the ways in which this generation of prosecutors prepared indictments as their “main accusatorial instrument”<sup>366</sup> transforming vanquished enemies into the accused before the tribunals. In particular, the selection of charges included in the IMT and IMTFE indictments sought to shield any misconduct of the Grand Coalition, the Court’s founders, from the glare of international criminal justice. It effected the victor’s justice described in the previous chapter by focusing exclusively on punishing defeated enemies and deterring aspiring aggressive revisionists of the new status quo of international affairs. At the same time, the selection of the accused not only drew attention to defeated German and Japanese state-makers, but also sharpened focus on the politico-economic and politico-social dimensions of the discredited utopian movements of Nazism and Shinto-Imperialism. This chapter concludes that this first generation of international prosecutors, who belonged to one of two international military tribunals which were established in the immediate aftermath of the Second World War, breathed life into their formal prosecutorial mandates through their ideas and actions yet did so in a way envisaged by their politico-strategic masters. In so doing, this generation of prosecutors demonstrate the great extent to which they are politico-legal actors at once vital to ICL enforcement while serving in the interests of neo-capitalism.

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<sup>366</sup> Locke, above n 14, at 604.

## *II First Generation of International Prosecutors*

Justice Robert H Jackson, Sir David Maxwell-Fyfe, August Champetier de Ribes and Lieutenant-General Roman A Rudenko each appeared before the bar of the IMT as a Chief Prosecutor. First and foremost Jackson, a 53 year old American, took leave from his position as Associate Justice on the US Supreme Court to prepare for, and to conduct, the IMT's first trial as Chairman of its prosecutor's committee.<sup>367</sup> While Shawcross nominally led the British contribution to the prosecutorial effort, he seldom attended the tribunal, delegating his role to his predecessor as Attorney-General, Maxwell-Fyfe.<sup>368</sup> (As the incoming Attorney General, Shawcross had replaced Maxwell-Fyfe as Chief Prosecutor-designate, who was Attorney General until the UK General Election on 2 August 1946 and had led the British delegation for most of the London Conference.<sup>369</sup>) Just as Shawcross delegated British prosecutorial responsibility to Maxwell-Fyfe, Francois de Menthon delegated French prosecutorial responsibility to Champetier de Ribes. After delivering his opening statement, de Menthon was recalled to Paris as Minister of Justice. De Ribes, a devout Catholic, was an experienced politician, serving as junior Minister and then as Minister in various French Governments and, in 1947, was runner-up for the French Presidency.<sup>370</sup> Rudenko, a 28 year old Ukrainian, led the Soviet prosecution effort. Like Judge Major-General Iona T Nikitchenko, Assistant Judge Aleksander Volchkov and Assistant Prosecutor Lev Sheinin—three key members of the Soviet contribution to the IMT who built their careers during Stalin's Moscow Trials—Rudenko had helped enforce Stalin's justice as Chief Prosecutor of a series of show trials in the Ukraine.<sup>371</sup>

Joseph B Keenan, Arthur Strettell Comyns-Carr, Robert L Oneto, Sergei Alexandrovich Golunsky, Justice Alan Mansfield, Brigadier Ronald Henry Quilliam,

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<sup>367</sup> See generally Gail Jarrow *Robert H Jackson: New Deal Lawyer, Supreme Court Justice, Nuremberg Prosecutor* (Calkins Creek, Honesdale, Pennsylvania, 2008).

<sup>368</sup> Townsend, above n 1, at 202-203.

<sup>369</sup> At 174.

<sup>370</sup> At 204-205.

<sup>371</sup> Hirsch, above n 275, at 710.

Brigadier Henry Nolan, Xiang Zhejun, WG Frederick Borgerhoff-Mulder, P Govinda Menon and Major Pedro Lopez each belonged to the IPS of the IMTFE. Keenan was appointed Chief Prosecutor of the IPS by SCAP on 7 December 1945. Comyns-Carr was a barrister and former Member of the British Parliament,<sup>372</sup> though he almost quit the IPS because communication with his family was so limited.<sup>373</sup> A former member of the French resistance movement who was nearly executed in 1944, Oneto belonged to the French Ministry of Justice. Following France's liberation from occupied rule, Oneto became the Chief Prosecutor of the Special Versailles Court, trying both Nazi war criminals and Vichy collaborators. Fluent in English and having taught at the Moscow Institute of Law and the Red Army Military Academy of Law, Golunsky had represented the Soviet Unions' Foreign Ministry at the San Francisco Conference which, in 1945, established the UN.<sup>374</sup> Unlike the IMT, the IMTFE included prosecutors from countries in addition to the US, UK, France and the USSR. An Australian judge who sat on the Supreme Court of Queensland, Mansfield had previously investigated Japanese war crimes in New Guinea and was, reputedly, brilliant at cross-examining. Also from the antipodes, Quilliam was a Deputy Adjunct-General of the New Zealand Army<sup>375</sup> and had experience as an examiner in the field of criminal law at the University of New Zealand, though he was to depart during proceedings without leaving a replacement.<sup>376</sup> Nolan was a Vice Judge Advocate in the Canadian Army. The Chief Prosecutor of the Shanghai High Court and former prosecutor before the Supreme Court of China, Zhejun, was well versed in international law.<sup>377</sup> Borgerhoff-Mulder had relevant experience, serving as judge on the Special War Criminals Court established during the previous year in The

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<sup>372</sup> Arnold C Brackman *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Collins, London, 1989) at 67.

<sup>373</sup> James Burnham Sedgwick "A People's Court: Emotion, Participant Experiences, and the Shaping of Postwar Justice at the International Military Tribunal for the Far East, 1946-1948" (2011) 22(3) *Diplomacy & Statecraft* 480 at 483.

<sup>374</sup> Brackman, above n 372, at 68.

<sup>375</sup> At 68.

<sup>376</sup> Sedgwick, above n 373, at 487.

<sup>377</sup> Brackman, above n 372, at 67-68.

Hague.<sup>378</sup> Menon had Bachelor of Arts and Bachelor of Laws Degrees, practised both civil and criminal law in the Madras High Court before being appointed to the post of Crown Prosecutor in December 1940. The historical record surrounding Lopez is weak, but he was a Major, presumably in the Philippines' army.

In order to fulfil their pre-trial and trial functions the IMT's prosecutors' committee was supported by hundreds of staff, requiring Chief Prosecutors to create various management structures and to focus a considerable amount of their energy on managing staff.<sup>379</sup> Of the four Chief Prosecutors, Jackson had access to the largest pool of legal resources, drawing on private US firms as well as the US civil and armed services. While only twenty-five US delegates appeared before the tribunal, there may have been as many as 1,700 Americans playing various supporting roles. So extensive were the resources placed at Jackson's disposal that his staff performed many of the administrative functions normally associated with a registry.<sup>380</sup> The British Chief Prosecutor was supported by about 170 persons, including "drivers, cooks, and bottle washers." Considerably smaller than the US delegation, the BWCE was larger than the French or Soviet delegations.<sup>381</sup> The French delegation included twelve trial lawyers whereas the Soviet delegation included only nine.<sup>382</sup> The four Chief Prosecutors at the IMT were, then, supported by considerable resources, though those resources were unevenly spread.

Compared to its IMT counterpart the IPS at Tokyo was of a much smaller scale and was a function of SCAP's authority, meaning that the ten associate prosecutors reported to the US Chief Prosecutor without any independent authority over administrative, evidentiary or investigative units.<sup>383</sup> When Keenan arrived from Washington DC he had with him a 39-member delegation, which included 22 lawyers recruited by the US Department of Justice, six of whom Keenan had chosen from

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<sup>378</sup> At 68.

<sup>379</sup> Townsend, above n 1, at 178.

<sup>380</sup> At 183-184.

<sup>381</sup> At 202-203.

<sup>382</sup> At 206.

<sup>383</sup> At 217.

among his own friends in private practice and official capacities.<sup>384</sup> The IPS grew to a staff of about 500, including 277 attorneys, investigators and assistants from the US and its allies, and 232 locally-employed staff. The quality of staff expertise varied and US prosecutors conceded that the American staffers were of a lesser quality than many of those provided by other Allies,<sup>385</sup> a situation that irked some, including Quilliam, who thought that “Keenan selected and assigned US attorneys who ‘were inexperienced and incompetent’ and prevented ‘British Commonwealth representatives from taking a prominent part in the proceedings.’”<sup>386</sup> Staff turnover at the IPS probably hampered the prosecutorial effort.<sup>387</sup>

The US, whose rise in world affairs was central to founding the authorising consensus among the Grand Coalition, continued to play the role of first among equals at the IMT. This is evident in Jackson’s appointment as Chairman of the prosecutors’ committee. A small town lawyer from western New York, with a gift for language but without holding a law degree, Jackson held several posts in New Deal Washington, including as Attorney General under the Roosevelt Administration before the President elevated him to the Supreme Court in 1941.<sup>388</sup> Roosevelt’s successor, President Truman, requested Jackson represent US interests at the London Conference before being appointed as the US Chief Prosecutor at the IMT.<sup>389</sup> Jackson shaped the terms of the London Charter and was also involved in selecting the judges from his own country that were to be appointed members of the IMT.<sup>390</sup> Jackson proved hugely influential in holding the first trial at Nuremberg, placing weight on having infrastructure adequate to the task-at-hand and having informed other delegates that the US had already determined the trial would take place at

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<sup>384</sup> Donihi, above n 75 at 741.

<sup>385</sup> Brackman, above n 372, at 67.

<sup>386</sup> Townsend, above n 1, at 221.

<sup>387</sup> At 222.

<sup>388</sup> Slye and Schaack, above n 15, at 29. According to Taylor “[h]e was probably the last nationally prominent lawyer to gain admission to the bar by serving an apprenticeship rather than a law school degree.” Taylor, above n 75, at 43.

<sup>389</sup> Minear, above n 74, at 10.

<sup>390</sup> Meltzer, above n 278, at 55.

Nuremberg.<sup>391</sup> Having selected the courtroom, Jackson also exercised responsibility for running the prosecution office and had overall responsibility for the office's personnel recruitment matters.<sup>392</sup> According to Overy, Jackson was the driving force behind the tribunal and, without him and his American legal team, the IMT might never have become a reality.<sup>393</sup> Jackson himself later reflected upon his own role's importance and uniqueness: "This is the first case I have ever tried when I had first to persuade others that a court should be established, help negotiate its establishment, and when that was done, not only prepare my case but find myself a courtroom in which to try it."<sup>394</sup>

As the prime driver behind the establishment of the IMTFE, the US continued to act as *primus inter pares*. This is evident in Truman's appointment of Keenan as the Chief Prosecutor<sup>395</sup> while all other governments contributing to the tribunal were each entitled to appoint only an associate prosecutor. A graduate from Harvard Law School in 1930, Keenan worked his way up to become head of the criminal division of the US Department of Justice. He wrote the so-called Lindbergh kidnapping law and led a series of gang-busting law-enforcement operations.<sup>396</sup> In February 1939 Keenan left the public service for private practice in Ohio.<sup>397</sup> More than a New Deal bureaucrat, Keenan's lobbying skills on Capitol Hill were valued by Roosevelt, who called him *Joe the Key*. There was at one time speculation that Keenan's profile may render him "a viable Democratic candidate for the Senate seat then held by Ohio's conservative Robert Taft."<sup>398</sup> Keenan featured among those US officials, including other staff belonging to the IPS and to SCAP's legal section, who helped draft the Tokyo Charter.<sup>399</sup> It was only after the Charter had been signed and issued that the

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<sup>391</sup> Townsend, above n 1, at 176-177.

<sup>392</sup> Meltzer, above n 278, at 56.

<sup>393</sup> Overy, above n 298, at 7.

<sup>394</sup> As cited in Meltzer, above n 278, at 56.

<sup>395</sup> Goldstone and Smith, above n 15, at 59.

<sup>396</sup> Minear, above n 74, at 40.

<sup>397</sup> Townsend, above n 1, at 210, n 285.

<sup>398</sup> Donihi, above n 75, at 741.

<sup>399</sup> Townsend, above n 1, at 211.



US authorities began to consult its relevant allies.<sup>400</sup> The US's new status as *primus inter pares* was also evident in the way that all of the international prosecutors were directly accountable to SCAP,<sup>401</sup> which meant, in practice, that the members of the IPS were beholden to US prosecutorial designs.<sup>402</sup> As head of the IPS, the Chief Prosecutor was located at SCAP's General Headquarters and was designed as a subsidiary organ before the IMTFE was established.<sup>403</sup> The division of labour is significant here as the Chief Prosecutor seized the responsibility for making opening and closing statements, while the presentation of the case itself, including introducing evidence, was relegated to the associate prosecutors.<sup>404</sup> The lack of a deputy Chief Prosecutor was a noteworthy absence in this respect. According to Boister and Cryer "[m]ost consider [Keenan] a poor choice. He has been accused variously of being a poor administrator, non-consultative, bad tempered, an alcoholic, absent, unable to control national interests, and a poor litigator."<sup>405</sup> If the IMT and the IMTFE were seen as equally important, then the US President ought to have given equal care to his selection of key staff, ensuring that both tribunals had prosecutors of comparable merit.<sup>406</sup> The IPS did, however, benefit from being in the shadow of the IMT when some of its members travelled to Nuremberg in order to observe proceedings there before returning to Tokyo to help complete preparations for the trial held at the IMTFE.<sup>407</sup> The IMTFE's prosecutorial resources were, thus, much less in quantity and quality than that of the IMT.<sup>408</sup>

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<sup>400</sup> Minear, above n 69, at 20; and Röling and Cassese, above n 234, at 2.

<sup>401</sup> Townsend, above n 1, at 217.

<sup>402</sup> Boister and Cryer, above n 209, at 76.

<sup>403</sup> Townsend, above n 1, at 209.

<sup>404</sup> Boister and Cryer, above n 209, at 77.

<sup>405</sup> At 76.

<sup>406</sup> Totani, above n 282, at 41.

<sup>407</sup> Donihi, above n 75, at 740-741.

<sup>408</sup> Townsend, above n 1, at 210.

### *III Selecting the Charges*

Preparation of the indictment of Germany's wartime leaders began before the text of the London Charter was agreed and finalised.<sup>409</sup> Its preparation was shaped by members of the Grand Coalition who, as mentioned in the previous chapter, designed the IMT in order to prosecute crimes of which they were victims during a war to which they were also a party.<sup>410</sup> This preparation also drew on the work of the UNWCC which, in December 1944, had published a list of 712 suspects, of which 49 were considered major war criminals.<sup>411</sup> While the British, French and Soviet delegations to the London Conference collaborated in order to prepare a draft indictment by 18 September 1945, the Americans, and in particular Jackson who had by then relocated to Nuremberg, rejected that draft and re-wrote it, giving greater focus to its consideration of crimes against peace at the expense of atrocity crimes.<sup>412</sup> Arzt does not overstate the case when she declares that “[d]ue to the powerful obsession and early influence of Robert Jackson, the idea that the Nazis' heinous political acts and decisions constituted the criminal launching of aggressive war, or Crimes Against Peace, became the centrepiece of the trial.”<sup>413</sup> Later that month Jackson redrafted the conspiracy charge and a consensus began to emerge around the content of the indictment.<sup>414</sup>

Signed by each of the Chief Prosecutors on 6 October 1945 in Berlin and served on the accused on 19 October 1945, the IMT indictment is arranged around four counts—namely conspiracy to commit crimes against peace, crimes against peace, war crimes and crimes against humanity—the latter three reflecting particular categories of crimes expressed in the London Charter.<sup>415</sup> In addition to the sections devoted to each of these four counts the indictment has three appendices. Entitled

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<sup>409</sup> Reydams and Odermatt, above n 14, at 83.

<sup>410</sup> de Vlaming, above n 14, at 543.

<sup>411</sup> At 544.

<sup>412</sup> Townsend, above n 1, at 179.

<sup>413</sup> Arzt, above n 268, at 694.

<sup>414</sup> Townsend, above n 1, at 179.

<sup>415</sup> International Military Tribunal, above n 304, at [27-95].

“Statements of Individual Responsibility for Crimes set out in Counts One, Two, Three, and Four,” Appendix A links each of the individuals accused to the abovementioned categories of crime. Appendix B does for accused organisations what Appendix A does for accused individuals. Appendix C lists the particulars of violations of international treaties, agreements and assurances caused by the accused in the planning, preparing and initiating of international armed conflict.

Count One deals with the common plan to commit crimes against peace, understood at the time to represent the core of the entire case.<sup>416</sup> Leading the effort focusing on this count, the American prosecutors dealt with crimes against peace by separating that category of crime from the common plan, or conspiracy, to commit those crimes.<sup>417</sup> Jackson believed that a number of Nazi policies would fall under the concept of a master plan, thereby relieving the prosecutors of the burden of defining new categories of international crime.<sup>418</sup> Count One provided a brief history of the political rise of Adolf Hitler and the Nazi Party from the early 1920s. The indictment’s narrative covers the Nazi Party’s acquisition of domestic power with Hitler’s rise to Chancellor in January 1933, as well as the consolidation of that power by eliminating any and all domestic resistance through purging the German civil service, establishing and maintaining concentration camps, the destruction of trade unions and subverting churches’ authority. It also covers the Nazi Party’s harnessing of Germany’s industrial capacity for war-making purposes as well as the Nazis’ plans for, and execution of, foreign aggression against an array of European countries. According to the indictment, the purpose of this conspiracy was:<sup>419</sup>

- (i) to abrogate and overthrow the Treaty of Versailles and its restrictions upon the military armament and activity of Germany;
- (ii) to acquire the territories lost by Germany as the result of the World War of 1914-18 and other territories in Europe asserted by the Nazi conspirators to be occupied principally by so-called 'racial Germans';

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<sup>416</sup> Meltzer, above n 278, at 58.

<sup>417</sup> At 58.

<sup>418</sup> Overy, above n 298, at 17.

<sup>419</sup> International Military Tribunal, above n 246, at [30].

(iii) to acquire still further territories in continental Europe and elsewhere claimed by the Nazi conspirators to be required by the 'racial Germans' as 'Lebensraum,' or living space, all at the expense of neighbouring and other countries.

Dealing specifically with crimes against peace, Count Two refers to the abovementioned conspiracy charges. Even though the Nazi war effort violated international treaties, agreements and assurances, Jackson lamented that most people would be deeply disappointed to learn that war was not regarded as a crime under international law as it stood in the nineteenth and early twentieth centuries.<sup>420</sup> The inclusion of crimes against peace in the indictment must have raised serious questions about the USSR's initiation of international armed conflict against Poland and Finland in 1939.<sup>421</sup> Nevertheless, Jackson convinced the other Chief Prosecutors that the illegitimacy of aggressive war ought to lie at the centre of the Nuremberg trial which, as Sellars notes, reveals that Jackson's "highly unorthodox legal means served deeply orthodox political ends—namely, to underwrite a sovereign-based, state-centric international framework."<sup>422</sup> The British prosecutors took primary responsibility for proving this charge, which was the briefest of the indictment's four counts.

Count Three covers war crimes allegedly committed by the accused. Under this count the indictment describes several circumstances in which civilians, found in territories occupied by Nazis, were incarcerated in concentration camps established and maintained at now-infamous places, such as Belsen, Buchenwald, Dachau and Auschwitz. These prisoners were murdered by various means, including:<sup>423</sup>

shooting, hanging, gassing, starvation, gross overcrowding, systematic under-nutrition, systematic imposition of labour tasks beyond the strength of those ordered to carry them out, inadequate provision of surgical and medical services, kickings, beating, brutality and torture of all kinds,

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<sup>420</sup> Schabas, above n 7, at 199.

<sup>421</sup> Overy, above n 298, at 19-20.

<sup>422</sup> Sellars, above n 193, at 108.

<sup>423</sup> International Military Tribunal, above n 246, at [43].

including the use of hot irons and pulling out of fingernails and the performance of experiments by means of operations and otherwise on living human subjects.

The allegations of torture revealed intensely cruel treatment, “such as immersion in icy water, asphyxiation, torture of the limbs, and the use of instruments of torture, such as the iron helmet and electric current” as well as “dis-embowelling and the freezing of human beings in tubs of water.”<sup>424</sup> Prisoners were used to clear roads littered with anti-personnel mines and were “murdered by poison gas in gas vans.”<sup>425</sup> This section of the indictment then goes on to describe a similar litany of gruesome scenes where civilians deported for slave labour experienced inhumane overcrowding, insufficient clothing and little or no food, causing many deaths. The total numbers (including nearly five million Soviet citizens) and the attrition rates were staggering, in some cases with about a third of all victims perishing in transit.

Also covered by Count Three was the killing of civilian hostages, plundering of public and private property, the exaction of collective penalties, wanton destruction of cities, towns and villages not justified by military necessity, conscription of civilian labour, the forcing of civilians in occupied territories to swear allegiance to a hostile power and the Germanisation of Occupied Territories. Rafael Lemkin, who assisted Jackson with drafting the indictment, was particularly animated by this third count, successfully arguing for his concept of genocide to be included in the indictment despite some fairly strenuous objections from the British.<sup>426</sup> Lemkin thought that his concept—describing the intent to destroy, or cripple in their development, entire nations—was inapplicable to the Jews, who were not a nation. This meant that the atrocities committed in Germany by the Nazis before the war began were excluded from the indictment under the war crimes count.<sup>427</sup> Defendants charged under Count Three were nevertheless accused of committing “deliberate and systemic genocide, viz., the extermination of racial and national groups, against the civilian populations

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<sup>424</sup> At 45 & 47.

<sup>425</sup> At 19.

<sup>426</sup> Cooper, above n 265, at 63-65.

<sup>427</sup> At 73-74.

of certain occupied territories to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies, and others” and with deportation for slave labour, the murder and ill-treatment of prisoners of war, and the plunder of private and public property.<sup>428</sup> Count Three of the IMT indictment also covers the murder (sometimes while combatants were surrendering) and the ill-treatment of prisoners of war. Such ill-treatment included the denial of adequate food, shelter, clothing and medical care, as well as the forcing of prisoners of war to labour in inhumane conditions, torture and forced marches with no food, which led to death by exhaustion. Uncomfortable questions presumably remained unasked when the USSR insisted upon charging German defendants for the Katyn forest massacre,<sup>429</sup> a war crime which they themselves had ordered, executed and tried to conceal. The French and Soviet prosecutors took responsibility for prosecuting this category of crime, with the former dealing with war crimes committed in Western Europe and the latter with those committed in Eastern Europe.<sup>430</sup>

Count Four of the IMT indictment gave focus to the Nazi’s crimes against humanity, a category of crime which, as mentioned in the previous chapter, was at that time a novelty within ICL. It explains that these crimes occurred within Germany, those countries under German occupation, in Austria, Czechoslovakia, Italy and on the High Seas. Particular mention is given to the Jews, who had been systematically persecuted since 1933: “As the Germans retreated before the Soviet Army they exterminated Jews rather than allow them to be liberated. Many concentration camps and ghettos were set up in which Jews were incarcerated and tortured, starved, subjected to mercilessness atrocities, and finally exterminated.”<sup>431</sup> The World Jewish Congress and the American Jewish Congress made a joint request to Jackson that at least one count in the indictment be focused specifically on the

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<sup>428</sup> International Military Tribunal, above n 246, at [43-44].

<sup>429</sup> Schabas, above n 7, at 154.

<sup>430</sup> Cryer and others, above n 15, at 117.

<sup>431</sup> International Military Tribunal, above n 246, at [67].

Holocaust, a request that he rejected.<sup>432</sup> More cynical, however, was the establishment of concentration camps by the USSR within their zone of occupation as the court heard details of the Nazi death camps.<sup>433</sup> The French and Soviet prosecutors split responsibility for prosecuting crimes against humanity along the same geographic lines as they had done for war crimes. The French planned to discharge their responsibilities by presenting their material in four phases, specifically “forced labour,” “economic looting,” “crimes against persons” and “crimes against mankind” across France, Denmark, Norway, Holland, Belgium and Luxemburg.<sup>434</sup>

When compared to Jackson’s role in drafting the IMT indictment, Keenan appears to have played a more limited one in preparing the IMTFE indictment.<sup>435</sup> Displaying very little enthusiasm for becoming directly involved in the drafting process,<sup>436</sup> Keenan delegated that role to an executive committee, which he established but which Comyns-Carr chaired. It first convened on 4 March 1946.<sup>437</sup> Increasingly dissatisfied with the way in which Keenan set about discharging his responsibilities as Chief Prosecutor, other members of the IPS began to assert themselves in order to hasten the indictment’s preparation. This led not only to the emergence of Comyns-Carr and Mansfield as “de facto leaders” of the IPS, but also to the timely completion of investigations, identification of a proposed list of individuals accused of committing crimes against peace and atrocity crimes, and a final draft of the indictment.<sup>438</sup>

The arrangement of the IMTFE indictment differs from the IMT’s, though both draw upon the same categories of crime comprising substantive ICL.<sup>439</sup> Whereas the

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<sup>432</sup> Reydam and Odermatt, above n 14, at 85-86.

<sup>433</sup> Overy, above n 298, at 25-26.

<sup>434</sup> Townsend, above n 1, at 205.

<sup>435</sup> At 214.

<sup>436</sup> Boister and Cryer, above n 209, at 69.

<sup>437</sup> Townsend, above n 1, at 217.

<sup>438</sup> Totani, above n 282, at 18-19.

<sup>439</sup> “Indictment” as cited in Neil Boister and Robert Cryer *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, Oxford, 2008) at [16-69].

IMT indictment coheres around four counts, the IMTFE indictment comprises 55 counts—something of “a byzantine collection of charges”<sup>440</sup>—categorised into three groups: group one (counts 1—36) are 36 counts of crimes against peace; group two (counts 37—52) are 16 counts of murder and conspiracy to murder; and group three (counts 53—55) are three counts of conventional war crimes and crimes against humanity.<sup>441</sup> The indictment treats each count separately, linking a particular crime, as defined by the Tokyo Charter, to a specific vanquished enemy. Since the US was primarily concerned with prosecuting crimes against peace, the inclusion of atrocity crimes can be understood as something of a concession to their allies.<sup>442</sup> At one stage Keenan pressed for the removal of the war crimes charges, though he was unable to overcome the opposition of associate prosecutors.<sup>443</sup> Crimes against humanity rarely featured during the ensuing trial since, for the most part, the Japanese wartime leaders did not tend to abuse their own citizens.<sup>444</sup> Instead, charges of murder were used against the Japanese, thereby elevating the US military casualties from casualties of war to victims of murder.

The historical narrative of Japanese crimes against peace, supporting counts 1—36, is provided by Appendix A, rather than in the indictment's main body.<sup>445</sup> Beginning on 1 January 1931 and concluding on 2 September 1945, this narrative traces the use of *incidents* as provocations for Japanese action. Japanese military activities included: blowing up parts of the Manchurian railway; bombing Chapei; shelling Nanking; bombing Nanking and Canton; and capturing Nanking, Han Kow, Chansha, Hengyang and Kweilin. The Japanese military then installed, and immediately officially recognised as independent and sovereign, puppet governments in their occupied territories. Within these occupied territories the Japanese military exploited local resources for their own war purposes (as well as, in some cases, for

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<sup>440</sup> Boister and Cryer, above n 209, at 49.

<sup>441</sup> Minear, above n 74, at 24.

<sup>442</sup> Reydams and Odermatt, above n 14, at 88.

<sup>443</sup> Boister and Cryer, above n 209, at 179.

<sup>444</sup> Schabas, above n 7, at 50.

<sup>445</sup> Boister and Cryer, above n 439, at [34-46].



personal enrichment) by establishing monopolies and weakening local resistance through dubious and illicit means, including by supplying opium. The narrative gives focus to the Japanese military establishment's preparation for war at home through its belligerent posturing, increasing military strength, militarisation of domestic political institutions, propaganda and education systems and mobilising its own civilians. These preparations for war abroad included forming alliances with Germany and Italy, and organising itself for attacks, particularly on the USSR. The indictment then describes Japan's undeclared attacks on the USSR at Lake Hassan as well as its surprise attacks on the US at Pearl Harbour, on the British Commonwealth at Singapore, Malaysia, Hong Kong, Shanghai, the Philippines and Thailand, and on the Portuguese colony on the Island of Timor. "As each count contained many cumulative charges," Boister and Cryer explain, "a plethora of individual charges resulted. The crimes against peace counts, for example, contained over 750 individual charges."<sup>446</sup>

Appendix B lists the articles of treaties violated by Japan, supporting the charges of crimes against peace (counts 1—36) and murder and conspiracy to murder (counts 37—52); Appendix C lists the official assurances violated by Japan, supporting the charges of crimes against peace (counts 1—36); Appendix D outlines the laws and customs of armed conflict, supporting the charges of war crimes and crimes against humanity (counts 53—55); and Appendix E sets out in detail the statement of each accused's individual responsibility for crimes identified in the indictment.

Although the IMT indictment gives notice of specific charges, it also signals the desire of some members of the Grand Coalition to use the trial as a means of creating a historical record.<sup>447</sup> Yet the indictment is silent on any reasons explaining why Germans might collude and conspire in order to achieve Nazi wartime objectives. Absent here, for instance, was any acknowledgment of Germany's experience of the *shackles of Versailles*, draconian reparations generating resentment among Germans at the severe economic consequences of the peace, which John Maynard Keynes

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<sup>446</sup> Boister and Cryer, above n 209, at 70.

<sup>447</sup> Locke, above n 14, at 614.

predicted and publicised in the early 1920s (though Keynes was not alone in saying so).<sup>448</sup> As we shall see in the following chapter, this was an issue that Jackson would signal in his opening statement. Absent too were charges concerning the Blitz over the UK, which would have drawn unwanted attention to the devastating and indiscriminate use of air power by the British Royal Air Force against German cities.<sup>449</sup> The selection of charges for inclusion in the indictment would have necessarily been cognisant that the USSR was almost certainly guilty of committing crimes that could have fallen under three of the four categories of serious international crime.<sup>450</sup>

Like the IMT indictment, the IMTFE indictment was used by international prosecutors as a vehicle to help establish a historical record; and, like its counterpart, the IMTFE indictment remains silent on possible causes of, or triggers for, Japan's crime against peace. There is no mention of Japan's treatment by the US Government as a second-class international citizen, including the rejection by the US, the UK and Australia of Japan's proposal to the League of Nations for the inclusion of a principle of racial equality in the League's Covenant.<sup>451</sup> Absent too are references to the measures unilaterally undertaken by the US, such as the US Immigration Act of 1924 targeting Japanese immigrants who were ineligible for US citizenship, the trade embargoes on steel and petrol or the relocation of the US Pacific Fleet to Pearl Harbour in Hawaii.<sup>452</sup> There is nothing that draws attention to the similarities between Japan's utopian vision of an Asian empire placing Japan in its *rightful place in the sun* among the British, the French, the Russians, the Dutch, the Chinese and the US, each of whom had undertaken large-scale empire-building movements that relied upon violence to obtain and secure control over various governmental apparatuses, economies, natural resources, societies and communities. Since the indictment's

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<sup>448</sup> Robert Skidelsky *John Maynard Keynes, 1883-1946: Economist, Philosopher, Statesman* (Macmillan, London, 2003), particularly Parts 3 and 4, at 175-251 and 253-336, respectively.

<sup>449</sup> Cryer and others, above n 15, at 120.

<sup>450</sup> Overy, above n 298, at 23.

<sup>451</sup> Boister and Cryer, above n 209, at 9.

<sup>452</sup> At 10 and 15.

narrative in Appendix A did not cover the remaining counts focused upon the conduct of armed hostilities, specifically the Japanese' recourse to atrocity crimes, the indictment did not devote much of its content to atrocity crimes, perhaps to avoid opening the door to a consideration of the US bombing of Hiroshima and Nagasaki using atomic bombs, a war crime committed by US President Truman, but left untried.<sup>453</sup> Excluded here too were those crimes against humanity concerning the Japanese military's organised sexual slavery of their colonial subjects, sometimes referred to as *comfort women*.<sup>454</sup> Boister and Cryer suspect that this omission might have been deliberate since “the prosecution was made aware of [the sexual enslavement of Korean women to serve as prostitutes in Japanese military brothels], having been informed by Tanaka during his interrogation that Japanese officers had suggested setting up such a system in the wake of the multiple rapes which occurred in Nanking, as a way of preventing further such behaviour.”<sup>455</sup> Japan's other crimes against its own colonies of Taiwan and Korea were also notably absent from the indictment.

Here, then, the first generation of international prosecutors' inclusion of specific crimes within the IMT and IMTFE indictments was empowered by the discourse against politico-cruelty. The prosecutors' selection of charges for inclusion in these indictments is one of the sharpest manifestations of the discourse and was vital to ICL enforcement. At the same time, these selections were enabled and constrained by the politics of enforcing ICL in the immediate aftermath of the Second World War as the prosecutorial effort sought to shield the war conduct of the Grand Coalition—including the fire bombings of German and Japanese cities as well as the use of atomic bombs to obliterate the Japanese cities of Hiroshima and Nagasaki—from the gaze of international criminal justice. Enforcing a particular form of victor's justice as a means of ensuring the new status quo in international affairs also featured as a motivation here. If the crimes selected by this first generation of international prosecutors for inclusion in the IMT and IMTFE indictments were empowered, in

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<sup>453</sup> Goldhagan, above n 102, at 8.

<sup>454</sup> Boister and Cryer, above n 209, at 64.

<sup>455</sup> At 64.

part, by the discourse against politico-cruelty and, in part, by the politico-strategic circumstances in the immediate aftermath of the Second World War, then their selection of the accused not only drew attention to Germany and Japan's defeated state-makers, but also sharpened focus on both Nazism's and Shinto-Imperialism's politico-economic and politico-social dimensions.

#### *IV Selecting the Accused*

Upon its appointment in May 1945 the US prosecution team at the IMT had yet to ascertain which of their vanquished enemies were to become the accused. Even though there was external pressure for the indictment to *name names* before all of the available evidence was considered or those with expertise on Nazi command and control arrangements were consulted,<sup>456</sup> it was only after months of wrangling that a range of potential defendants were identified. Even then the rationale behind these selections was less than self-evident to those directly involved.<sup>457</sup> Jackson's limited understanding of Nazi politico-strategic arrangements and his reluctance to consult widely left him unable to identify precisely who could, in fact, be charged in accordance with the London Charter and, ultimately, no specific criteria for inclusion in the indictment were developed, articulated or agreed.<sup>458</sup> The preliminary selections contained over a hundred individuals, leading Maxwell-Fyfe to advocate for a much reduced list of about a half-dozen senior Nazis, though differing interpretations of Nazi Germany's structures of power made the task of refining that list a difficult one.<sup>459</sup> According to Overy "the many arguments over whom to indict betrayed a great deal of ignorance and confusion on the Allied side about the nature of the system they were to put on trial."<sup>460</sup> In the end the selection of specific individuals for inclusion in the IMT indictment was based on various considerations and resulted from a series of hard-fought compromises. The accused were drawn from those

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<sup>456</sup> Arzt, above n 268, at 711.

<sup>457</sup> Overy, above n 298, at 7.

<sup>458</sup> de Vlaming, above n 14, at 545.

<sup>459</sup> Overy, above n 298, at 9.

<sup>460</sup> At 11.

individuals who were already in custody—Martin Bormann, tried *in absentia* but probably already dead, is the exception here—while some were chosen for their high-profile notoriety. While Hermann Göring, Joachim Von Ribbentrop, Wilhelm Frick, Robert Ley, Ernst Kaltenbrunner and Alfred Rosenberg were near certainties once the British suggested them, other individuals were included as a means of representing important features of Nazi rule. Even though this politics of representation was dubious, it fostered consensus among the Allies on the scope and duration of the trial itself.<sup>461</sup> Held in Soviet custody, both Erich Raeder and Hans Fritzsche were subsequently included among the accused. Of the twenty-four defendants agreed to by the prosecutors, Bormann was, as mentioned, tried in absentia, Gustav Krupp was deemed unfit to stand trial while Robert Ley committed suicide prior to the trial. This left twenty-one men to face prosecution.<sup>462</sup> Telford Taylor, then serving under Jackson, recalls “[a]ll in all, the task of selecting the defendants was hastily and negligently discharged, mainly because no guiding principles of selection had been agreed on.”<sup>463</sup> The list of persons included on the indictment became, as Simpson puts it, “a patchwork of subcategories.”<sup>464</sup>

The IMT indictment also identified and charged six organisations—namely Die Reichsregierung (Reich Cabinet), Das Korps der Politischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party), Die Schutzstaffeln Der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the SS) including Der Sicherheitsdienst (commonly known as the SD), Die Geheime Staatspolizey (Secret State Police, commonly known as the Gestapo), Die Sturmabteilungen der nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the SA), and the General Staff and High Command of the German Armed Forces—in connection to each of the four categories of crimes outlined above. The purpose here was for those organisations found guilty to be declared criminal organisations, members of which could be brought before later

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<sup>461</sup> At 12.

<sup>462</sup> Schabas, above n 7, at 11.

<sup>463</sup> Quoted in Arzt, above n 268, at 711.

<sup>464</sup> Simpson, above n 26, at 121.

courts and be found guilty by virtue of formal association, rather than by the commission of particular deeds. As Taylor recalls, Jackson insisted that no agreement should be reached on an indictment that did not include the German General Staff.<sup>465</sup>

Notwithstanding the various considerations used in their selection, suspects named in the IMT indictment draw attention not only to Germany's defeated wartime leadership, but also, more specifically, to Nazism's politico-strategic dimension; that is, the Nazi regime's state-making efforts including policy formulation, administration, law enforcement and military affairs. Illustrating this dimension of Nazism was the inclusion of the Deputy Fuhrer, Chancellor, and various Ministers and military leaders. Drawing attention to Nazism's politico-economic dimension, were an industrialist, Ministers of Economics, Heads of Reichsbank and the German Labour Front, and a General Plenipotentiary for Labour Deployment. The IMT indictment also highlighted the politico-social dimension of Nazism through the selection of a Nazi Party Secretary, senior officials, a Head of the Hitler Youth and the editor of *Der Sturmer*, a virulent anti-Semitic newspaper. Taken together, these accused helped reflect the broad range of individuals, from high-level Government officials and the military establishment's top brass to agents of social influence and those holding powerful positions within Germany's financial and industrial sectors,<sup>466</sup> involved in committing crimes against peace and atrocity crimes. They were, for all intents and purposes, held up by the prosecutors as the repugnant face of Nazism. By *Nazism*, I mean the set of ideas and preferences concerning German society that were promulgated through the policies and related activities of the Nationalist Socialist German Workers Party (NSDAP) in the decades following the First World War. Central to these ideas is the view of German society as an organic nation or *volk*, an imagined community bound by blood as a single race of people, though this *volkisch* ultra-nationalism precedes the rise of Nazism, reaching back to the Napoleonic Wars.<sup>467</sup> Nazism views German society as superior, placing it at the apex of a

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<sup>465</sup> Taylor, above n 75, at 104 and 115; see also International Military Tribunal, above n 246, at [80-84].

<sup>466</sup> Arzt, above n 268, at 697.

<sup>467</sup> Roger Griffin *The Nature of Fascism* (Routledge, London and New York, 1993) at 85-86.

hierarchy of races constituting the human species. Within this hierarchy, races were ascribed particular characteristics which were immutable and transmitted inter-generationally. As Eric D Weitz explains:<sup>468</sup>

[t]he lofty accomplishments of human beings, from the architecture of the ancient Greeks to the classical music of nineteenth-century Germans, were the results not of isolated instances of individual creativity, but of a genius bred and sustained by the racial characteristics that lay ‘in the blood.’ The Nazis’ terms of identification switched effortlessly from ‘German’ to ‘Aryan,’ indicating their blending concepts of nation and race.

At the very bottom of this hierarchy—even below it as a subhuman species—was the Jew who, for Hitler, belonged to a race, membership to which was a permanent condition: “Jews were the maggots feeding on a rotting corpse, the parasites that had to be surgically removed, the sexual predators preying on German women, a spider that sucks people’s blood, a plague worse than the Black Death, the sponger who spreads like a noxious bacillus and then kills the host.”<sup>469</sup> Building on this anti-Semitism Nazism called for Germany’s biological, spiritual and political regeneration as a means of rescinding the *shackles of Versailles*, defeating the anti-German Jew-Bolshevik conspiracy and rearming in preparation for a Greater Germany comprising all Germans with a single territory extending far into Eastern Europe.<sup>470</sup> The politico-social objective here is to remake the race-based German nation, using armed force and other forms of political violence if necessary or expedient, as a utopia on earth.

As the main occupying force in Japan, the US military held about 100 suspected war criminals, most of who were detained at Sugamo Prison. Some of these detainees were held in custody because they featured on an arrest warrant issued by MacArthur on 11 September 1945.<sup>471</sup> Other suspects committed suicide before

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<sup>468</sup> Eric D Weitz *A Century of Genocide: Utopias of Race and Nation* (Princeton University Press, Princeton and Oxford, 2003) at 106.

<sup>469</sup> At 106.

<sup>470</sup> Griffin, above n 467, at 97.

<sup>471</sup> Townsend, above n 1, at 209.

being arrested.<sup>472</sup> As they had done at the IMT, the Grand Coalition held suspects before they were indicted by the IMTFE.<sup>473</sup> (The arrest of suspects within occupied Japan, like within occupied Germany, was relatively easy to effect,<sup>474</sup> due, at least in part, to a lack of resistance to those arrests by the occupied population facing serious economic challenges with little energy with which to contest the authority of occupying forces.)<sup>475</sup> The IPS undertook their investigations of those whom the US military had already identified as Class A suspects though, in some instances, they exercised their own initiative, adding other individuals to the indictment.<sup>476</sup> A short-list of 26 accused were selected from a list of about 260 persons, over a period of about ten weeks and behind closed doors, by an executive committee of the IPS, comprising all the associate prosecutors and some US staffers.<sup>477</sup> This process was fraught with difficulties because the IPS had not yet developed a viable theory concerning each of the accused's guilt, nor gathered sufficient evidence proving the accused planned and initiated a war of aggression. This was largely because the IPS remained in the dark when it came to both criteria for selecting the accused and Keenan's trial scheme. In order to fulfil that leadership vacuum Comyns-Carr argued that "[t]he final selection should be a balanced one, containing representatives of each period and phase, roughly in proportion to the importance attached to each period and phase. Individuals who represented more than one period and phase should be chosen over those who only represented one."<sup>478</sup> Keenan submitted a recommended list of the accused to MacArthur on 10 April 1946, though following Golunsky's arrival from the USSR a few days later and at his prompting, two additional suspects—Mamoru Shigemitsu and Yoshijiro Umezu—were included in the indictment based upon Golunsky's promise to provide sufficient evidence to convict

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<sup>472</sup> Donihi, above n 75, at 744.

<sup>473</sup> Cedric Ryngaert "Arrest and Detention" in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012) 647 at 695.

<sup>474</sup> Totani, above n 282, at 63.

<sup>475</sup> Ryngaert, above n 473, at 653.

<sup>476</sup> Totani, above n 282, at 64.

<sup>477</sup> Minear, above n 74, at 102-103.

<sup>478</sup> Boister and Cryer, above n 209, at 53; and Minear, above n 74, at 102-103.



them.<sup>479</sup> The total number of accused could not exceed the twenty-eight seats, which had been built into the dock.<sup>480</sup> The indictment, which accused twenty-eight Japanese of crimes against the peace and atrocity crimes, was lodged with the IMTFE on 29 April 1946.<sup>481</sup> As Boister and Cryer lament:<sup>482</sup>

The selection of individuals to stand trial was a process plagued by poor organisation and consultation, and little information, knowledge, and time. What emerged was a spread of twenty-eight accused chosen mostly on the basis of position, rather than direct evidence of culpability. As a result, the omissions of individuals of similar and greater authority, in particular the emperor, remained extremely questionable from the point of view of fairness. In this regard Tokyo provides a far stronger example of selectivity undermining the legitimacy in international criminal process than Nuremberg... It should nonetheless occasion no surprise that at the outset of its judgement the majority of the Tribunal dismissed forty five of the fifty five charges on the grounds of redundancy, lack of jurisdiction, the merging of one count into another or because a charge was stated obscurely.

Focusing exclusively on individuals the IMTFE indictment accused no groups or organisations of committing crimes against peace and atrocity crimes. At Tokyo the IPS, confronted with “the rise and fall of some seventeen cabinets, representing a variety of political interests, many opposed to each other, operating through highly diffuse lines of responsibility,” necessarily departed from the experience at Nuremberg where the prosecution could give focus to “a single and seemingly monolithic Nazi-run regime, led throughout the relevant period by the same individuals, and which devolved responsibility through a hierarchical party system.”<sup>483</sup> Absent from Japan was anything resembling the unified and highly-

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<sup>479</sup> Minear, above n 74, at 108.

<sup>480</sup> Boister and Cryer, above n 209, at 54.

<sup>481</sup> Townsend, above n 1, at 225.

<sup>482</sup> Boister and Cryer, above n 209, at 73.

<sup>483</sup> Sellars, above n 193, at 190.

coordinated Nazi Party or a Hitler-type leadership.<sup>484</sup> Most of the accused featuring in the indictment emerged from within the elite of Japanese policy-making organs—specifically the Cabinet, diplomatic corps and military—drawing attention not only to the defeated Japanese wartime leadership, but also to Shinto-Imperialism’s politico-strategic dimension. Featuring in the indictment was the Lord Keeper of the Privy Seal, Chief Cabinet Secretary, and various Prime Ministers, Ministers, and Ambassadors as well as those who were more intimately involved in leading the military machine. As Totani explains “[b]eyond representing major organs of the wartime Japanese government, the same group of individuals represented the key *phases* of the Japanese war as well.... As was the case with the representation of key government organs, all defendants represented more than one key phase of the war.”<sup>485</sup>

The inclusion of Okinori Kaya as Finance Minister, Shūmei Ōkawa, theorist and philosopher and Kingorō Hashimoto as founder of Sakurakai (an ultra-nationalist secret society mostly among military men) draws attention to the politico-economic and politico-social dimension of Shinto-Imperialism, though to a far more limited extent than its politico-strategic dimension. Unlike at the IMT there were no industrialists (or *Zaibatsu*) on trial at the IMTFE, despite Soviet pressure to prosecute some. This may have been because Japanese industry, unlike the German conglomerates, was thought at the time to not have used slave labour in a widespread and systemic manner.<sup>486</sup> It may also have been due to a lack of compelling evidence linking industry to crimes against peace.<sup>487</sup> (The risk of an acquittal here too could be taken to vindicate the role the *Zaibatsu* and other Japanese business leaders played in fuelling Shinto-Imperial ambitions.<sup>488</sup>) This under-representation of the politico-economic dimension, especially when compared to the IMT indictment, relates directly to the domestic situation in Japan, in which the military came to dominate

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<sup>484</sup> Minear, above n 74, at 129.

<sup>485</sup> Totani, above n 282, at 65. (Emphasis in original.)

<sup>486</sup> Donihi, above n 75, at 748.

<sup>487</sup> Boister and Cryer, above n 209, at 62-63.

<sup>488</sup> Minear, above n 74, at 37.

public life, particularly from 1936 when Hirota's Cabinet restored a dormant process whereby potential War and Navy Ministers must be selected from active service.<sup>489</sup> It also relates to the shifting politico-strategic circumstances of the post-World War II era in which the US initially described the Pacific War as a "joint military-industrial war for markets and resources" before curtailing its prosecutorial efforts and employing the industrial elites as a bulwark against communist expansion in North East Asia.<sup>490</sup> In the final analysis many Japanese were familiar with only a select few of the individuals accused by the IMTFE indictment.<sup>491</sup>

Just as the IMT indictment depicted the repugnant face of Nazism, so too the Tokyo indictment gave focus to the multiple dimensions of Shinto Imperialism and its destructive utopian vision. By *Shinto-Imperialism*, I mean the ideas and preferences concerning Japanese society that were designed and pursued by the military cliques controlling executive government from the 1930s onwards. As Boister and Cryer astutely observe:<sup>492</sup>

The 'imperial way' was a motivating political theology sprung from the idea of the emperor as the literally living embodiment of Japan past and present, a paradigm of moral excellence all should follow. The term denoted a kind of ideological warfare but also, on the other hand, an action plan. It was designed to make Japan free of all externally derived isms, such as Western democracy, liberalism, individualism, and communism. Free to be itself only, the nation would regain self-esteem and be able to wage a 'holy' war of ideas against Western political doctrines. Although the roots of kodo went back to the crisis of the mid-nineteenth century, its revival at the end of the 1920s, and its actual application in real-life Japanese diplomacy during the 1930s, helped Japan break with its immediate past—and also greatly narrowed the nation's range of possible choices.

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<sup>489</sup> Boister and Cryer, above n 209, at 13.

<sup>490</sup> Baars, above n 256, at 187.

<sup>491</sup> Boister and Cryer, above n 209, at 60.

<sup>492</sup> Bix, above n 74, at 11.

This race-based hyper-nationalism was authorised by the divine Emperor, whose ancestor had opened up Japan to modernity's powerful military and economic as well as ideational forces.<sup>493</sup> Koreans, Chinese, Taiwanese, and other Asian nations conquered by the Japanese war machine were all seen as subordinate to the Shinto-Imperialism, a natural 'master race' of Asia using mass murder to deliver a utopia to earth.

There were notable exclusions from both indictments. Excluded from among those who served in official positions were former SS Minister of the Interior, Otto Thierack, and the former SS General and head of the Order Police, Kurt Daluege, both of whom would have been justifiable inclusions in the IMT indictment and were held in custody at that time.<sup>494</sup> Jackson fervently argued for the inclusion of Krupp, a well-known industrialist who had supported the Nazi war machine. When Krupp was considered to be too old and too ill to attend trial Jackson refocused his efforts on Krupp's son, Alfred. Jackson, however, was unable to persuade the other prosecutors and the trial proceeded without a Prussian *iron baron*.<sup>495</sup> Even though a consensus emerged among the US, UK and USSR prosecutors that there was nothing unjust in selecting captains of industry for inclusion in the IMT indictment, that consensus was not universal as there were some who sought to understand business activities as being somehow independent of politics and irrelevant to the Nazi war machine.<sup>496</sup> The dawning of the Cold War also precluded non-German nationals from featuring in the indictment; while suspects' nationality was at first considered irrelevant, the US soon rejected for inclusion in the indictment any members of the Black Shirt brigade in order to shield their prospective Italian allies, just as the USSR rejected the inclusion of any members belonging to the Nazi Arrow Cross party as a means of shielding their prospective Hungarian allies.<sup>497</sup>

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<sup>493</sup> Griffin, above n 467, at 153.

<sup>494</sup> Overy, above n 298, at 13-14.

<sup>495</sup> At 12-13.

<sup>496</sup> At 10-11.

<sup>497</sup> Goldstone and Smith, above n 15, at 53; and Overy, above n 298, at 8-9.

There were several possible omissions in the selection of the accused within the IMTFE indictment too. First and foremost, as the sovereign of Japan, its head of state and the Supreme Commander of all Japanese armed forces since ascending the throne in 1926, Emperor Hirohito is the most obvious candidate.<sup>498</sup> Japan had waged war from the early 1930s in his name and under his authority and had ceased armed hostilities under his direct orders, surrendering to the Allied powers in the summer of 1945.<sup>499</sup> However non-judicial factors, such as maintaining law and order within Japan, and avoiding further intensifying hostility towards the US,<sup>500</sup> played a role in Hirohito's non-indictment. According to de Vlaming:<sup>501</sup>

The Americans, hoping the Japanese Emperor would play a central role in the political reconstruction process, instructed the committee that the supreme leader should not be prosecuted, despite his responsibility for waging aggressive war. This decision, made by General MacArthur and supported by US President Truman, went against the Chief Prosecutor's wishes, who felt there were ample grounds to prosecute the Emperor. The instructions also went against the wishes of the Dutch, Russian, and Philippine delegations—although in the end the latter voted with the Americans because they were on their payroll... [i]t soon became clear that, as the Cold War was heating up, the Allies' search for a stable Japan and a speedy restoration of its political and economic institutions influenced the proceedings.

In other words, SCAP believed that Japanese support for the US occupation would only be forthcoming if the Japanese people remained united under Hirohito's imperial household. Significantly, while Hirohito was never put on trial neither was he granted immunity.<sup>502</sup> In addition to SCAP's refusal to force Hirohito's abdication or to include him in the indictment, the international prosecutors helped shield the

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<sup>498</sup> Minear, above n 74, at 110; and Boister and Cryer, above n 209, at 65.

<sup>499</sup> Totani, above n 282, at 43.

<sup>500</sup> Madoka Futamura *War Crimes Tribunal and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge, London and New York, 2008) at 63; and Minear, above n 69, at 113.

<sup>501</sup> de Vlaming, above n 14, at 546.

<sup>502</sup> Totani, above n 282, at 4.

Emperor while prosecuting the twenty-eight accused.<sup>503</sup> Hirohito's own recorded recollection of the international armed conflict was used, firstly, as his defence against inclusion in the indictment and, secondly, as a means of providing information with which to prosecute his indicted subordinates.<sup>504</sup> The Emperor's absence in the dock posed a dual challenge to the prosecutors: they sought to prove a conspiracy resting largely on constitutional structures without the constitutional leader while, at the same time, seeking to avoid incriminating the Emperor as they indicted his closest advisors.<sup>505</sup> For all intents and purposes, the question over Hirohito's indictment for crimes against peace closed with the ending of the US occupation of Japan, following the San Francisco Peace Treaty of 1951.<sup>506</sup> Thus, de Vlaming is correct to observe that “[p]olitical circumstances and the founding governments’ views came to influence the Tribunal’s proceedings.... The Americans had the final say.”<sup>507</sup> Not all participating representatives were happy with that situation.

Some of those involved in the selection process criticised the “decision not to prosecute a number of prominent politicians and businessmen who initially featured on the list of suspects on the grounds that they were projected to play potentially useful role in the country’s reconstruction efforts.”<sup>508</sup> The dawning of the Cold War also informed the exclusion of the so-called Unit 731, which conducted biological (bacteriological) weapons research through experiments on humans; the unit tested conventional arms as well as germ and other biological weapons on live human subjects, and undertook vivisection.<sup>509</sup> Excluded here too was Unit 1644 of the Central China Expeditionary Army, which also conducted grotesque experiments on human beings taken as prisoners of war.<sup>510</sup> Research material and results were

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<sup>503</sup> Goldstone and Smith, above n 15, at 62.

<sup>504</sup> Bix, above n 74, at 589.

<sup>505</sup> Boister and Cryer, above n 209, at 67.

<sup>506</sup> Totani, above n 282, at 62.

<sup>507</sup> de Vlaming, above 14, at 545.

<sup>508</sup> At 547.

<sup>509</sup> Goldstone and Smith, above n 15, at 63.

<sup>510</sup> Boister and Cryer, above n 209, at 63.

provided by members of these units in exchange for immunity, a trade-off SCAP and other US officials were prepared to make in order to deprive the USSR of this expertise.<sup>511</sup> For Totani this was, simply put, an American cover-up.<sup>512</sup> Overall, Boister and Cryer are correct to maintain “the indictment process was badly managed, inexpertly undertaken, politically influenced, and overambitious. The ideas behind the indictment of a single, overarching conspiracy were unnuanced and based around an uninterrogated presumption that all the members of the Axis were governed in the same way and had the same basic policies.”<sup>513</sup>

#### ***IV Conclusion***

The preparation of the IMT and IMTFE indictments by the first generation of international prosecutors represents one of the sharpest manifestations of the discourse against politico-cruelty, pointing out particular acts of politico-cruelty which cannot be tolerated while signalling the best remedy for such acts. As a fundamental component of the pre-trial process, the preparation of these documents is vital to ICL enforcement at the international military tribunals. While the selection of specific charges for inclusion within the indictments sought to shield the war conduct of the Grand Coalition—the founders of the tribunals—and secure the new status quo in international affairs, the selection of suspects draws attention to the politico-strategic, politico-economic and politico-social dimensions of two discredited utopian movements; namely, Nazism and Shinto-Imperialism. There is more than ICL enforcement at work here. Notwithstanding the fact that politics saturates the enforcement of this law, the prosecutorial performance itself is constitutive of politics because these prosecutors seek to have their way over others—whether these *others* are the wartime leaders of Germany or Japan, the formal and informal members of the Nazi or Shinto-Imperial utopian movements, or their fellow prosecutors—for non-trivial purposes. This politics is not only an extension of the politico-strategic circumstances that established the international military tribunals and a continuation

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<sup>511</sup> Futamura, above n 500, at 63; and Goldstone and Smith, above n 15, at 62-64.

<sup>512</sup> Totani, above n 282, at 3.

<sup>513</sup> Boister and Cryer, above n 209, at 328.

of the war by other means, but is also part of a contest between proponents of neo-capitalism and non-liberal utopian movements seeking control over post-conflict states, economies and societies. And this is a contest, also clearly visible in Jackson's and Keenan's opening statements delivered respectively at the IMT and the IMTFE, which is the topic of this thesis's next chapter.



## CH. 4: JACKSON'S AND KEENAN'S OPENING STATEMENTS

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### *I Introduction*

Just as the discourse against politico-cruelty empowered the first generation of international prosecutors' preparation of indictments, it also animated the opening statements made by Robert H Jackson at the IMT and by Joseph B Keenan at the IMTFE. Building on the content of the indictments examined in the preceding chapter, both opening statements announced serious international crimes, foreshadowed the evidence of those crimes and sought to preclude foreseeable defences. These statements were vital ingredients in the trial process and, therefore, crucial to early ICL enforcement efforts. A close reading of these statements reveals the use of legal rhetoric that self-consciously distinguishes itself from the politico-strategic calculations of state-makers as much as it deliberately distances itself from the ugly realities of international armed conflict. Yet these opening statements vilify Nazism and Shinto-Imperialism as two discredited utopian movements while explicitly extolling the virtues of neo-capitalism, including both prosecutors' preferences for democracies and individualism. More than ICL enforcement, such prosecutorial conduct is modernist world politics in action. However, when these prosecutors denounce the defendants and call for them to be cast out from the ranks of the human community, they invoke a belligerent rhetoric of war. And when that belligerent rhetoric is placed alongside the concerted and sustained efforts to reconstruct the German and Japanese states and economies, and to build an architecture governing the politico-strategic and politico-economic dimensions of international life, then those prosecutors become transformed into auxiliary combatants supporting those who seek to maintain their control over the modernist project through politico-cultural civil war. Part I draws to a close by concluding that this first generation of international prosecutors, belonging to international military tribunals established in the immediate aftermath of the Second World War, are agents not only of ICL, but also of the politics of neo-capitalism, which, as mentioned, was

the expression of economic liberalisation favoured in the middle of the twentieth century.

## *II Rhetoric of Law*

The first and only trial held at the IMT began in the morning of 20 November 1945, soon after which the indictment of Germany's wartime leadership was read in successive phases by each prosecutor taking a turn and all twenty-one of the accused entered pleas of not guilty to various charges of crimes against peace, conspiracy to commit crimes against peace, war crimes and crimes against humanity. The stage was set for Jackson to deliver his opening statement the following day, "an oration," according to Gregory Townsend, "that represented the pinnacle of his performance in Nuremberg."<sup>514</sup> In that statement Jackson described the way in which the accused came to power ("The Lawless Road to Power" and "The Consolidation of Nazi Power") and then used that power domestically ("The Battle against the Working Class," "The Battle against the Churches," and "Crimes against the Jews") before engaging in a war of aggression ("Terrorism and Preparation for War," "Experiments in Aggression," "War of Aggression," "Conspiracy with Japan," and "Crimes in the Conduct of War"). He concluded his oration by giving focus to "The Law of the Case," "The Crime against Peace," "The Law of Individual Responsibility" and "The Responsibility of the Tribunal."<sup>515</sup> It was a statement that would take Jackson the best part of the day to deliver.

The first and only trial of the IMTFE began on 3 May 1946 when "[f]or a fleeting moment... the attention of a distraught world was focused on Tokyo."<sup>516</sup> Justice William Webb, as president of the tribunal, made some introductory remarks before a court clerk read aloud (in both English and Japanese) the indictment over a

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<sup>514</sup> Townsend, above n 1, at 201.

<sup>515</sup> International Military Tribunal *Trial of the Major War Criminals before the International Military Tribunal II Proceedings* (Nuremberg, Germany, 1947) 14 November – 30 November 1945, at [98-155].

<sup>516</sup> Brackman, above n 372, at 98.

number of days.<sup>517</sup> On 6 May 1946 all twenty-eight Japanese defendants pleaded not guilty to various charges of crimes against peace, murder, conspiracy to commit murder, war crimes and crimes against humanity.<sup>518</sup> It was not until 4 June 1946, however, that Keenan addressed the tribunal in order to deliver his 20,000 word opening statement,<sup>519</sup> he would depart Tokyo immediately after, leaving other members of the IPS, much to their chagrin, to manage the early stages of the trial.<sup>520</sup> Following some preliminary remarks, Keenan's opening statement gave focus to the Tokyo Charter and the IMTFE's authority and jurisdiction before defining the crimes with which the accused were charged. Keenan recounted the details of the indictment, expounded the law upon which the indictment draws and "considers the facts" as a means of outlining the alleged actions of the accused which constitute crimes against peace and atrocity crime. He went on to signal the evidence which the IPS would produce during the trial, to reiterate the need to punish those guilty of serious international crime through the international rule of law and to recommend that the accused are worthy of punishment.<sup>521</sup>

Crimes against peace lay at the heart of both opening statements, evident in the priority afforded to these crimes by the prosecutors and the amount of time spent focusing on these relative to other crimes. Never mind that Nazi Germany did not contravene a peace treaty with the US, Jackson seemed to say, the crimes against peace were an attack upon the peace enjoyed by the society of states.<sup>522</sup> Aggressive war was "the greatest menace of our times."<sup>523</sup> "It was aggressive war, which the nations of the world had renounced. It was war in violation of treaties, by which the

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<sup>517</sup> At 103-104.

<sup>518</sup> At 104.

<sup>519</sup> At 119 & 126.

<sup>520</sup> Donihi, above n 75, at 748.

<sup>521</sup> Joseph B Keenan *Opening Statement of the Prosecution* Northcroft Archive (Prosecution's Documents file) Macmillan Brown Library University of Canterbury.

<sup>522</sup> Simpson, above n 26, at 148.

<sup>523</sup> International Military Tribunal, above n 515, at [99].

peace of the world was sought to be safe-guarded,” Jackson emphasised.<sup>524</sup> Jackson is unequivocal when he states:<sup>525</sup>

The Nazi policy embraced ends recognized as attainable only by a renewal and a more successful outcome of war, in Europe. The conspirators' answer to Germany's problem was nothing less than to plot the regaining of territories lost in the First World War and the acquisition of other fertile lands of Central Europe by dispossessing or exterminating those who inhabited them. They also contemplated destroying or permanently weakening all other neighbouring peoples so as to win virtual domination over Europe and probably of the world. The precise limits of their ambition we need not define for it was and is as illegal to wage aggressive war for small stakes as for large ones.

In addition to the charges of conspiracy to initiate international armed conflict, Jackson announced the commission of two groups of crimes against humanity, “one within Germany before and during the war, the other in occupied territory during the war.”<sup>526</sup> Of these crimes against humanity the “most savage and numerous... were those against the Jews.”<sup>527</sup> Jackson also announced war crimes, including “a long series of outrages against inhabitants of occupied territory.”<sup>528</sup>

Keenan was equally emphatic on the central importance of international armed conflict when he stated that “our specific purpose is to contribute all we soundly can towards the end—the prevention of the scourge of aggressive war,”<sup>529</sup> “[o]ur purpose is one of prevention or deterrence” and “[w]hat can we do with the powers conferred upon us here in this courtroom to contribute in a just and efficient manner to the prevention of future wars?”<sup>530</sup> He proclaimed, moreover, that:<sup>531</sup>

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<sup>524</sup> At [104].

<sup>525</sup> At [109-110].

<sup>526</sup> At [113].

<sup>527</sup> At [118].

<sup>528</sup> At [138].

<sup>529</sup> Keenan, above n 521, at 1.

<sup>530</sup> At 3.

<sup>531</sup> At 32.

the accused participated in the formulation or execution of a common plan or conspiracy to wage declared or undeclared war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances against any country or countries which might oppose them, with the object of ensuring military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and all the countries bordering thereon and island therein and ultimately the domination of the world.

Keenan also announced and defined conventional war crimes and crimes against humanity, but did so under the following caveat: “The allegations contained in this indictment are necessarily so extensive, the period covered so long, the area involved so great, the accused so numerous, and the power they wielded so far-reaching, that an opening statement attempting to cover in detail every phase of the case would be unduly long and burdensome.”<sup>532</sup>

Jackson cited a range of official documents captured by the Grand Coalition during its march on Berlin, foreshadowing the evidence of crimes against peace and atrocity crimes that the prosecution would provide to the IMT. Some of these documents were the German High Command’s various invasion plans for Austria, Czechoslovakia, Poland and England, including “Keitel’s top secret mobilization order for 1939-40 prescribing secret steps to be taken during a ‘period of tension’ during which ‘no state of war’ will be publically declared even if open war measures against the foreign enemy will be taken.” Other documents cited by Jackson as evidence were Hitler’s direct orders, such as his Barbarossa Directive which, bearing Keitel’s and Jodl’s initials, outlines the offensive against Russia, as well as minutes taken from meetings between Hitler and his senior advisors. Referenced here too is a letter, dated 25 August 1939, from Funk to Hitler that outlines the economic preparations made for war in Europe, and a diary kept by Jodl.<sup>533</sup> These documents include an order from Hitler, dated 9 October 1942, for captured commandos “to be slaughtered to the last man” and a military order denying captured airmen prisoner-

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<sup>532</sup> At 7.

<sup>533</sup> International Military Tribunal, above n 515, at [130-135].

of-war status. Also useful to the prosecution in proving these charges was a letter, dated 28 February 1942, written by Rosenberg to Keitel regarding the deliberate starving of Soviet prisoners of war, a speech, given on 25 January 1944 by Frank, describing the deportation of slave labour to Germany, and correspondence between Rosenberg and Sauckel describing the conditions of depravity in which those prisoners of war were placed. Alluding to the treatment of defeated enemies, Jackson said “[t]he German organized plundering, planned it, disciplined it, and made it official just as he organized everything else, and then he compiled the most meticulous records to show that he had done the best job of looting that was possible under the circumstance. And we have those records.”<sup>534</sup>

During his opening statement Keenan made frequent reference to what the evidence of Japanese crimes against peace and atrocity crimes would show, but more often than not refrained from signalling what the evidence would actually be, except for a mention or two of “direct orders” and other evidence “concerning atrocities already known to the world.”<sup>535</sup> He did, however, introduce a piece of evidence in his opening statement by citing a document compiled by the Army Information Section of the Imperial Headquarters of the Japanese Army, entitled “Comprehensive Results of the Japanese Military Operations in China during July 1937—June 1941.” Nevertheless, “[e]vidence will be introduced,” he assured the bench, “to prove each of the accused guilty”<sup>536</sup> and had the temerity to claim a few moments later that “[e]vidence to be offered under Charter Article 5a, Crimes against Peace, and 5b, Conventional War Crimes, has now been outlined”<sup>537</sup> when no such evidence had been signalled.

Both opening statements sought to preclude major defences based upon the legal principle of *nulla poena sine lege* (no penalty without law) by outlining the applicable law. “It may be said that this is new law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of the law has taken them

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<sup>534</sup> At [141].

<sup>535</sup> Keenan, above n 521, at 43.

<sup>536</sup> At 42.

<sup>537</sup> At 45.

by surprise,” Jackson suggested before somewhat snidely remarking that the defendants “really are surprised that there is any such thing as law.”<sup>538</sup> Jackson traced the evolution of international law criminalising aggressive war from the end of the First World War, the Briand-Kellogg Pact (1928), Geneva Protocol for the Pacific Settlement of International Disputes (1924), Resolutions of the Eighth Assembly of the Leagues of Nations (1927) and the Sixth Pan-American Conference (1928). Jackson was at his most authoritative when he said:<sup>539</sup>

It is true of course, that we have no juridical precedent for the Charter. But international law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law. International law is not capable of development by the normal processes of legislation, for there is no continuing international legislative authority. Innovations and revisions in inter-national law are brought about by the action of governments such as those I have cited, designed to meet a change in circumstances. It grows, as did common law, though decisions reached from time to time in adapting settled principles to new situations. The fact is that when the law evolves by the case method, as did common law and as international must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law, so far as international law can be decreed, had been clearly pronounced when these acts took place. Hence, I am not disturbed by the lack of judicial precedent for the inquiry it is proposed to conduct.

Keenan traced much the same developments in international law and, like Jackson, remained unperturbed by the lack of legal precedent. He said:<sup>540</sup>

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<sup>538</sup> International Military Tribunal, above n 515, at [144].

<sup>539</sup> At [147].

<sup>540</sup> Keenan, above n 521, at 6.

[t]o those who demand precise, well-established precedents for action, we would point out that this is far from a novel idea. From the time of the prehistoric and primeval ages, and continuing through the medieval period right up to the present day, there has always been some process or other for the punishment of the originators of aggressive wars. This method of constituting an international legal tribunal and permitting such war criminals the privilege of defending themselves and asserting their innocence is but the culmination of the modern and civilised ideals of culture and tolerance which have become crystalized in concrete form.

And, furthermore.<sup>541</sup>

All of these offences [listed in the indictment] bring about the unlawful and intentional taking of human life so that, as we shall later point out at some length, this section of the Charter creates no new law. Quite to the contrary, it defines criminal offences of the gravest nature which have long been recognized as illegal in the mind and public conscience of the world. Some of the offences have been recognized in assemblies participated in by large groups of nations. Others have been outlawed by treaties, declarations and resolutions. Some of them have been in effect designated as criminal acts by assurances. However, by whatever form this state of international law was established or however it became crystallized, it was the full realization that the dictate of humanity and the requirements of civilisation demanded that these offences be recognized as such and placed beyond the pale of civilized conduct. Indeed, as we believe it quite obvious, all during the period of time wherein the crimes charged in this indictment occurred, it was well recognized by all nations that the continued existence of civilization required that they come to an end.

Both prosecutors also used their opening statements to try to preclude legal defences relating to superior orders and claims of immunity as state-makers. Jackson explained that the London Charter neither allowed the accused to “take refuge in superior orders nor in the doctrine that his crimes were acts of state” because all of the accused, in high or low ranks, would remain immune to the reach of the law. It

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<sup>541</sup> At 8.



could not have been the Charter's drafters' intent to establish a court to try Germany's wartime leadership and then provide them with an escape clause. "Modern civilisation puts unlimited weapons of destruction in the hands of men," he said, and "[i]t cannot tolerate so vast an area of legal irresponsibility."<sup>542</sup> For Keenan, the rank of the accused "is no bar to their being considered as ordinary criminals and felons if the evidence presented to this Tribunal proves beyond reasonable doubt that they have been parties to crimes for which they should be punished."<sup>543</sup>

Here, then, building upon the indictments' details of alleged crimes against peace, war crimes and crimes against humanity committed by certain individuals at specific times and places, opening statements made by these international prosecutors constitute vital ingredients of the trial process. These statements sought to persuade the bench of the accused's guilt by announcing serious international crimes, foreshadowing evidence of those crimes and outlining relevant applicable law before attempting to preclude foreseeable defences, a disposition deliberately designed for the bench's benefit and a forensic style condemning as criminal the actions of the accused. Taken together, this constitutes a self-consciously legal rhetoric. Prosecutors distinguished their legal rhetoric from the Machiavellian world of power politics by claiming trial processes rise above victor's justice and the desire for vengeance, as much as they deliberately distance ICL enforcement from the ugly realities of international armed conflict, which are reduced to the subject material justiciable by the trial itself. This legal rhetoric was couched in language which reflects the contents of the indictments, both of which in turn reflect the legal instruments used to establish the international military tribunals. There is a 'legal' thread here linking back to the discourse against politico-cruelty, which gave rise to ICL's substantive elements.

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<sup>542</sup> International Military Tribunal, above n 515, at [150].

<sup>543</sup> Keenan, above n 521, at 31.

### *III Rhetoric of Politics*

Despite this self-consciously legal rhetoric, Jackson's and Keenan's opening statements vilify the utopian movements of the accused, giving focus to both movements' politico-strategic, politico-economic and politico-social dimensions. For Jackson, Nazism was a "despotism equalled only by the dynasties of the ancient East."<sup>544</sup> He abhorred both its "violent interference with elections"<sup>545</sup> and its "authoritarian and totalitarian program." He pointed to the burning of the Reichstag building, as the "symbol of free parliamentary government," as a likely Nazi-led arson.<sup>546</sup> Jackson described "...the forces which these defendants represent, the forces that would advantage and delight in their acquittal, [as] the darkest and most sinister forces in society—dictatorship and oppression, malevolence and passion, militarism and lawlessness."<sup>547</sup> He lamented the inadequate support given to Germany's democratic elements "which were trying to govern Germany through the new and feeble machinery of the Weimar Republic."<sup>548</sup> Jackson also despised the "[f]inanciers, economists, industrialists [who] joined in the plan and promoted elaborate alterations in industry and finance to support an unprecedented concentration of resources and energies upon preparations for war."<sup>549</sup> Jackson pointed to the Nazis as "symbols of fierce nationalism and of militarism, of intrigue and war-making which have embroiled Europe generation after generations"<sup>550</sup> and as a means of asserting the German nation as a "master race," the advancement of which included an "anti-Semitic program," "hostilities to civil liberties and freedom of the press" and the Hitler-Hindenburg decree suspending certain liberties and rights hitherto enjoyed by German individuals.<sup>551</sup> Membership to the Nazi party required

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<sup>544</sup> International Military Tribunal, above n 515, at [99-100].

<sup>545</sup> At [107].

<sup>546</sup> At [110].

<sup>547</sup> At [154].

<sup>548</sup> At [109].

<sup>549</sup> At [131].

<sup>550</sup> At [99].

<sup>551</sup> At [105-113].

an oath “which in effect amounted to an abdication of personal intelligence and moral responsibility.”<sup>552</sup>

For Keenan, the Shinto-Imperialists “were determined to destroy democracy and its essential basics—freedom and respect of human personality; they were determined that the system of government of and by and for the people should be eradicated and what they called a “New Order” established instead.”<sup>553</sup> Their alliance with the Nazis was “another stage in their plot against democratic countries”<sup>554</sup> and underscoring the New World Order was an objective of “extinguishing democracy throughout the world.”<sup>555</sup> According to Keenan, the invasion of Manchuria was driven by Japanese proprietary interests.<sup>556</sup> Keenan declared that the Japanese Government was held hostage by “militaristic cliques and ultra-nationalistic secret societies [that] resorted to rule by assassination and thereby exercised great influence in favour of military aggression.”<sup>557</sup> This militaristic nationalism would likely have an intergenerational influence as “for years prior to 1 January 1928 the military in Japan had sponsored, organized and put into effect in the public school system of Japan a program designed to instil a militaristic spirit in the youth of Japan and to cultivate the ultra-nationalistic concept that the future progress of Japan was dependent upon wars of conquest.”<sup>558</sup>

By using their opening statements to vilify discredited utopian movements, the prosecutors also extolled the virtues of neo-capitalism. For Jackson, in particular, the economy should be as free as possible from military, if not political and social, control, though the government plays an important role in maintaining the rule of law. Jackson prized the “American dream of a peace-and-plenty economy,”<sup>559</sup> offering his own country as a model: “In the United States, we have tried to build an

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<sup>552</sup> At [107].

<sup>553</sup> Keenan, above n 521, at 2.

<sup>554</sup> At 38.

<sup>555</sup> At 39.

<sup>556</sup> At 33.

<sup>557</sup> At 36.

<sup>558</sup> At 32.

<sup>559</sup> International Military Tribunal, above n 515, at [153].

economy without armament, a system of government without militarism, and a society where men are not regimented for war.”<sup>560</sup> Kennan saw the invasion of China as being driven by Japanese mercantile priority interests.<sup>561</sup> Both Jackson and Keenan signal their preference for democracy ahead of dictatorship as a means of managing politico-strategic affairs. Early in his speech, Jackson scorns the Nazis for robbing “from the German people all those dignities and freedoms that we hold natural and inalienable rights in every human being.”<sup>562</sup> The modus operandi of the Nazi party was inconsistent with democracy in that it “was not organized to take over power in the German State by winning support of a majority of the German people; it was organized to seize power in defiance of the will of the people.”<sup>563</sup> The destruction of democracy is, for Keenan, an anathema to truly civilised persons.<sup>564</sup> Japan and Germany were linked in “their plot against democratic countries,” which, in his view, deserve protection.<sup>565</sup> Kennan concludes his oration by proclaiming that “[a] great American four score years ago made a plea on a battlefield to his own people that government of and for and by the people should not perish from the earth.”<sup>566</sup>

The opening statements signal, too, the preference of Jackson and Keenan for individualism ahead of race-based nationalism as a means of managing politico-social affairs. “Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction,” Jackson averred, as “[c]rimes always are committed only by persons.”<sup>567</sup> While race-based nationalism may have fuelled war and duly receives Keenan’s opprobrium, Keenan was at pains to emphasise the importance of individuals and, indeed, individual responsibility. For example, Keenan declared the “threat of destruction comes not from the forces of nature, but from the deliberate planned

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<sup>560</sup> At [153].

<sup>561</sup> Keenan, above n 521, at 33.

<sup>562</sup> At 2.

<sup>563</sup> At 8.

<sup>564</sup> At 2.

<sup>565</sup> At 38.

<sup>566</sup> At 56.

<sup>567</sup> International Military Tribunal, above n 515, at [150].

effort of individuals, as such and as members of groups, who seem willing to bring the world to a premature end.”<sup>568</sup> Since humans run governments, all state-based crimes are committed by humans and a “man’s official position cannot rob him of his identity as an individual nor relieve him from responsibility for his individual offenses.”<sup>569</sup> Keenan sums it up best by proclaiming “that the life of a single individual is of the gravest moment and deserving of all reasonable efforts for its protection. The life of an individual is a matter of sanctity and can never be lawfully sacrificed for immoral purposes.”<sup>570</sup>

Jackson’s and Keenan’s opening statements also characterised themselves as erstwhile defenders of civilisation using the rule of law. “The wrongs which we seek to condemn and punish,” Jackson maintained, “have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”<sup>571</sup> “The attack on the peace of the world is the crime against international society” Jackson announced, “which brings into international cognizance crimes in its aid and preparation which otherwise might be only internal concerns.” For Jackson, his prosecutorial effort “represents mankind’s desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world’s peace and to commit aggressions against the rights of their neighbours.”<sup>572</sup> Perhaps Jackson put it most eloquently when he said:<sup>573</sup>

Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that

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<sup>568</sup> Keenan, above n 521, at 1.

<sup>569</sup> At 31.

<sup>570</sup> At 50.

<sup>571</sup> International Military Tribunal, above n 515, at [98-99].

<sup>572</sup> At [154].

<sup>573</sup> At [155].

men and women of good will, in all countries, may have “leave to live by no man's leave, underneath the law.”

Similarly, Keenan's trial is “part of the determined battle for civilisation to preserve the entire world from destruction.”<sup>574</sup> He declared that a refusal to wage this battle would be an “unpardonable crime”<sup>575</sup> in and of itself because civilisation cannot “stand idly by and permit these outrages without an attempt to deter such efforts.”<sup>576</sup> Keenan remarked that the prosecution’s “broad aim is the orderly administration of justice” for “with the opening of the present century, the civilized world began to place restraints upon the waging of war.”<sup>577</sup>

A critical examination of these opening statements unmask this first generation of international prosecutors as agents not merely of ICL, but also of modernist world politics. As Simpson argues “particular forms of politics are on trial. Most obviously, the trial is an investigation of, and accusation directed against, the political project of the accused. Accordingly, at Nuremberg fascism (from the Soviet Perspective) and Nazism (from the Anglo-American perspective) were on trial.”<sup>578</sup> More than ICL enforcement, these statements rely upon a disposition deliberately designed for the consumption of the audience-at-large and a deliberative style approving of the utopian economic liberalisation movement. These statements sought to persuade the bench, trial observers and the public to vilify the discredited utopian movements of Nazism and Shinto-Imperialism while extolling neo-capitalism. Considered in light of these complexities, these two opening statements are not so much informed and shaped by the pressures of modern politics as they constitute a form of modernist world politics. The distinction between legal and political registers of these opening statements dissolves as soon as ICL enforcement is understood as a form of modernist world politics. The political preferences of Jackson and Keenan take precedence over those of their fellow prosecutors by virtue of their status as

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<sup>574</sup> Keenan, above n 521, at 1.

<sup>575</sup> At 6.

<sup>576</sup> At 3.

<sup>577</sup> At 20.

<sup>578</sup> Simpson, above n 26, at 13.

Chief Prosecutors derived from being US representatives. The political rhetoric contained in these opening statements reflects the politics of establishing the tribunals, which, as mentioned, was the propitious set of politico-strategic circumstances and the discourse against politico-cruelty. There is, then, a political thread running from nineteenth-century liberalism up until the rise of the US as *primus inter pares*, the selection of the accused and the opening statements marking the beginning of the trial phase of ICL enforcement.

#### ***IV Rhetoric of War***

Whereas the drafters of the London and Tokyo Charters used crimes against peace as a means of differentiating the German and Japanese aggressors from the Grand Coalition, the prosecutors used atrocity crimes as a means of contrasting the *savagery* of the accused against the *civility* of the accusers. To this end, Jackson characterised Nazi crimes as “abnormal and inhuman conduct,”<sup>579</sup> “a campaign of arrogance, brutality, and annihilation”<sup>580</sup> that passed “in magnitude and savagery any limits of what is tolerable by modern civilization.”<sup>581</sup> “[O]f the 9,600,000 Jews who lived in Nazi-dominated Europe,” Jackson lamented, “60 per cent are authoritatively estimated to have perished.... History does not record a crime ever perpetuated against so many victims or one ever carried out with such calculated cruelty,”<sup>582</sup> “Germany became one vast gas chamber”<sup>583</sup> and “[e]ven the most warlike of peoples have recognized in the name of humanity some limitations on the savagery of warfare.”<sup>584</sup> For his part, Keenan emphasised that the Shinto-Imperialist’s “atrocities [were] of almost unbelievable severity, both as to their character and extent” and this “wanton and reckless disregard for life and property”<sup>585</sup> was an “inhumane type of

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<sup>579</sup> International Military Tribunal, above n 515, at [102].

<sup>580</sup> At [100].

<sup>581</sup> At [127].

<sup>582</sup> At [119].

<sup>583</sup> At [130].

<sup>584</sup> At [136].

<sup>585</sup> Keenan, above n 521, at 35.

warfare” conducted with “ruthlessness and savage brutality.”<sup>586</sup> “[T]he complete recitation of these cruelties on a mass scale would require more time than this Tribunal and these proceedings would permit,” Keenan conceded.<sup>587</sup> This belligerent rhetoric is clearly empowered by the discourse against politico-cruelty because it appears axiomatic to both prosecutors that the savagery of these acts of politico-cruelty renders those who commit them *hostis humani generis*, thereby disqualifying them from the ranks of humanity. As a result, the authors of this savage violence must be punished through the rule of international law and are to be subjected to a process of abjection.

Even though both prosecutors described the acts of politico-cruelty committed by their vanquished enemies as savage and thus having no place within civilised society, they could not have escaped the conclusion that international armed conflict and mass atrocity are part of the modern experience. As Zygmunt Bauman puts it “[t]he Holocaust was born and executed in our modern rational society; at the high stage of our civilization and at the peak of human cultural achievement.”<sup>588</sup> The disturbing lesson here is that acts of politico-cruelty could be committed by almost everyone, including the armed forces of the Grand Coalition. Significantly, the fact the Allies committed atrocities but were not held accountable was due less to the fact they won the armed conflict and more to the fact they did not start it. The French prosecutor, François de Menthon, appeared to understand this well when he opined that Hitler’s truly diabolic achievement was to revive “all the instincts of barbarism, repressed by centuries of civilisation, but always present in men’s innermost nature.”<sup>589</sup>

These acts of politico-cruelty were depicted by the prosecutors not merely as savage, but also as non-Christian and evil in the case of the Nazis and as non-rational and insane in the case of the Shinto-Imperialists. Jackson characterised the Nazis as

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<sup>586</sup> At 35.

<sup>587</sup> At 52.

<sup>588</sup> Bauman, above n 74, at x. (Emphasis in original.)

<sup>589</sup> Shnayerson, above n 115, at 136.



“a ring of evil men,”<sup>590</sup> “without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war.”<sup>591</sup> Nazism is “anti-Christian in its ideology”<sup>592</sup> and its dire consequences are of a kind that “the world has not witnessed since the pre-Christian ages.”<sup>593</sup> Keenan, on the other hand, characterised the Shinto-Imperialists as insane and “willing to bring the world to a premature end in their mad ambition for domination”<sup>594</sup> for “they declared war on civilization” and this was a “mad scheme for domination and control of Eastern Asia, and as they advanced, ultimately the entire world.”<sup>595</sup> These acts are deemed repugnant because they function as the antithesis of a rational modernity born from a Judaea-Christian sacral tradition. Those who commit these deeds are to be understood as nothing more than evildoers and madmen who have no place in the human community.

Yet characterising those who committed atrocity crimes as evil or insane also posed something of a dilemma for the first generation of international prosecutors. The problem here is, of course, that both Nazism and Shinto-Imperialism are part and parcel of the modernist project. The Nazis and Shinto-Imperialists emerged from two highly-developed states, economies and societies, representing the zenith of modernity and civilised notions of progress. As Bauman explains “[i]t is common knowledge by now that the initial attempts to interpret the Holocaust as an outrage committed by born criminals, sadists, madmen, social miscreants, or otherwise morally defective individuals failed to find any confirmation in the facts of case. Their refutation by historical research is today all but final.”<sup>596</sup> Despite claims to the contrary Nazism is very much a modern phenomenon, a product of the Enlightenment

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<sup>590</sup> International Military Tribunal, above n 515, at [112].

<sup>591</sup> At [105].

<sup>592</sup> At [115].

<sup>593</sup> At [100].

<sup>594</sup> Keenan, above n 521, at 1.

<sup>595</sup> at 2.

<sup>596</sup> Bauman, above n 74, at 19.

and “a child of *our* age.”<sup>597</sup> Many of its modernist beliefs were in circulation across Europe for centuries.<sup>598</sup> As Gray expounds:<sup>599</sup>

The peculiar achievement of Enlightenment racism was to give genocide the blessing of science and civilization. Mass murder could be justified by faux-Darwinian ideas of survival of the fittest, and the destruction of entire peoples could be welcomed as part of the advance of the species.

Nazi policies of extermination did not come from nowhere. They drew on powerful currents in the Enlightenment and used as models policies in operation in many countries, including the world’s leading democracy. Programmes aiming to sterilize the unfit were underway in the United States. Hitler admired these programmes and also admired America’s genocidal treatment of indigenous peoples: he ‘often praised to his inner circles the efficiency of America’s extermination—by starvation and uneven combat—of the red savages who could not be tamed by captivity.’

The same can be said of Shinto-Imperialism too because its roots lie in Japan’s confrontation with modernity during the post-Meiji Restoration period in which Japan was recognised (albeit partially and provisionally) as a civilised nation-state only after it had proven its destructive capacity by fighting and winning a modern war against Russia in the early twentieth century. “Becoming a ‘civilized’ member of international society” Buzan and Lawson explain, “meant not just abiding by European frameworks, diplomatic rules and norms; it also meant becoming an imperial power.”<sup>600</sup> But rather than acknowledge these atrocity crimes as by-products of modernity, the prosecutors imply those crimes are “a wound or a malady of our civilization,” an implication which not only results in “the moral comfort of self-exculpation” and endorses “the innocence and sanity of the way of life of which we

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<sup>597</sup> Griffin, above n 467, at 111.

<sup>598</sup> Gray, above n 35, at 55-56.

<sup>599</sup> At 62.

<sup>600</sup> Buzan and Lawson, above n 153, at 42; see also Röling and Cassese, above n 234, at 73.

are so proud” but also demands action in light of “the dire threat of moral and political disarmament.”<sup>601</sup>

Such denunciations serve no obvious legal purpose within international criminal trial processes, focusing as they do on the character of the accused and the nature of the alleged act, rather than the guilt of the accused. The explicit condemnation of the accused does, however, sharpen the focus on the threatening nature of their utopian movements and underscores the need for those movements to be destroyed. Nazis and Shinto-Imperialists were not only an anathema to the modern civilised world, but also represented a practical threat to it—as borne out by the destruction wrought by the Second World War. The stakes of this contest are raised to the level of the *existential* for all concerned, becoming a war waged by proponents of neo-capitalism on all others.

Significant here is the way in which the responsibility of the leaders accused of serious international crimes was separated from the responsibility of the societies of which the accused were an important part. This separation is illustrated in the following comments by Jackson:<sup>602</sup> “These defendants were men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders.” Moreover: “[t]he membership took the Party Oath which in effect amounted to an abdication of personal intelligence and moral responsibility... The membership in daily practice followed its leader with an idolatry and self-surrender more Oriental than Western”<sup>603</sup>; and “[t]he German people were in the hands of the police, the police were in the hands of the Nazi Party.”<sup>604</sup> The attempt at separation is visible too in the following comments made by Keenan:<sup>605</sup>

Through the express provisions of the Japanese Constitution, there has been a sharp distinction made between matters of general affairs of state and matters pertaining to the supreme command under the Army and

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<sup>601</sup> Bauman, above n 74, at xii.

<sup>602</sup> International Military Tribunal, above n 515, at [105].

<sup>603</sup> At [107].

<sup>604</sup> At [112].

<sup>605</sup> Keenan, above n 521, at 36.

Navy. Through the life of this conspiracy, the evidence will show, there was a constant tendency to enlarge the scope of matters contained within the concept of supreme command at the expense of matters belonging to general affairs of state.

Furthermore: “[w]e must reach the conclusion that the Japanese people themselves were utterly within the power and force of these accused, and to such extent were its victims.”<sup>606</sup> This was tactically important because, firstly, it would have been logistically impossible to try all German and Japanese nationals and, secondly, because the Allies desired to exert control over their enemies’ resources, including the labour force.

Jackson appreciated that the fate of those “twenty-odd broken men” sitting in the IMT’s dock “is of little consequence to the world” as “their personal capacity for evil is forever past.”<sup>607</sup> Their importance was symbolic. The accused become emblematic of the discredited utopia. Such an approach coheres with the underlying strategy of the London and Tokyo Charters’ drafters in that the Grand Coalition could neither prosecute entire societies, nor wanted to deny themselves the benefits of reconstructed states, economies and societies. Accusing only the Nazi and Shinto-Imperialist wartime leaders leaves German and Japanese societies guiltless so that they can be rehabilitated and then incorporated into the spreading configurations of neo-capitalism. International prosecutors, so vital to ICL enforcement, were not only part of a larger and ongoing political contestation, but were also helping to wage politico-cultural civil war for control over the states, economies and societies of their defeated enemies. Underpinning these efforts was an ideological goal of convincing the occupied population that the victor’s preferred model was the correct one.

While Keenan’s prosecutorial capabilities and performance are often seen as lesser than Jackson’s, Keenan expressed something profound which Jackson never really focused upon in the preparation of the IMT indictment and in the delivery of his opening statement. In particular, Keenan understood that the total nature of modern war means future wars will “have no limit of space or territory... This

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<sup>606</sup> At 52.

<sup>607</sup> International Military Tribunal, above n 515, at [99].

problem of peace, which has ever been the desire of the human race, has now reached a position of the crossroad.”<sup>608</sup> He sensed the alliance between Germany and Japan, a means of advancing the utopian visions of Nazism in Europe and Shinto-Imperialism and Asia respectively, was a “confederacy,”<sup>609</sup> akin to those southern slave states declaring succession in the early 1860s, triggering the US Civil War. Keenan’s allusion to the US Civil War was strengthened when he concluded his opening statement by declaring:<sup>610</sup>

Today, we of the prosecution voice to this Tribunal a like sentiment, but the development of our times require that we request this Tribunal to take such actions, within the confines of justice, toward those individuals as will establish a principle which may in some degree serve to prevent not only government but civilization itself from perishing.

Civil war, no longer confined within the continental territory of the US or within its sphere of influence following the Monroe doctrine, was global in its aspirations and was to be fought for control over modernity. And this war was waged by utopian movements; significantly, while rival movements were destroyed the German and Japanese State remain intact.

More than fulfilling an important legal function within the international military tribunals and advancing the politics of the Grand Coalition, prosecutors denounced the defendants as representatives of the discredited utopian movements of Nazism and Shinto-Imperialism, calling for them to be cast out beyond the ranks of the human community. When this belligerent rhetoric is considered alongside the concerted and sustained efforts to reconstruct German and Japanese states and economies and to build architecture governing the conduct of international affairs, including constructing a neo-capitalist free market of global proportions, then those prosecutors are no longer merely juridical actors but are, rather, auxiliary combatants supporting those seeking to obtain control over the emerging world order, nascent architecture of global governance, and, beyond that, the modernist project. In other

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<sup>608</sup> Keenan, above n 521, at 3.

<sup>609</sup> At 2.

<sup>610</sup> At 56.

words, the trials themselves form an important element of the peace following victory by force of arms, suggesting that this form of modernist world politics is nothing more, or less, than a politico-cultural civil war.

## *V Conclusion*

As speech acts containing at least three distinct registers, the opening statements made by the first generation of international prosecutors represent another sharp manifestation of the discourse against politico-cruelty. Commencing the trial proper, these statements are vital to ICL enforcement at the international military tribunals. By critically examining the ways in which both statements announced serious international crimes, foreshadowed evidence of those crimes, signalled relevant applicable law and attempted to preclude foreseeable defences, this chapter found a legal rhetoric that self-consciously distinguishes itself from the politico-strategic calculations of powerful state-makers as much as it deliberately distances itself from the ugly realities of international armed conflict. It also found that these statements, particularly the explicit preferences for democracies, free markets and individualism by these self-declared defenders of civilisation and the international rule of law, help unmask the fiction of international prosecutors as juridical actors remaining above all political considerations, revealing a political rhetoric deployed in the service of neo-capitalism, albeit one dressed up in the majesty of law's robes. When these opening statements denounce representatives of discredited utopian movements and call for their abjection from international life, international prosecutors invoke a belligerent war rhetoric, helping wage a politico-cultural civil war fought for control over vanquished states, economies and societies as well as the politico-strategic and politico-economic institutions governing international life. Even though the rhetoric of these opening statements operates within three distinct registers of law, politics and war, the distinctiveness of these registers dissolves as soon as the enforcement of ICL is understood as a form of modernist world politics and that politics is understood as a form of politico-cultural civil war.

## CONCLUSION TO PART I

Part I of this thesis recognises that this first generation of international prosecutors played vital roles in ICL enforcement in the immediate aftermath of the Second World War by preparing indictments and making opening statements as well as by conducting investigations, presenting evidence, cross-examining witnesses and supporting the bench with administrative assistance. Some members of this generation sought to convict twenty-one individuals and six organisations in a trial that took place under the auspices of the IMT at the Palace of Justice in Nuremberg, Germany between 20 November 1945 and 1 October 1946. The trial lasted 403 open sessions.<sup>611</sup> As was shown in the preceding chapters, while crimes against peace were the prosecutors' primary focus here, atrocity crime—namely war crimes and crimes against humanity—also featured. Significantly, the persons accused of committing serious international crimes at that trial were German nationals of high standing in, or closely associated with, Adolf Hitler's Third Reich. Lasting less than eleven months, the trial considered oral evidence from 116 witnesses and from 19 of the accused, affidavits from a further 143 witnesses and several thousand documents.<sup>612</sup> The tribunal's 166-page judgment resulted in twelve of those accused being found guilty and sentenced to death by hanging, three of those accused being found guilty and sentenced to terms of life imprisonment, and two of the accused being found guilty and sentenced to 20 years of imprisonment. Three of the six organisations were declared criminal. Two of the individuals accused were found not guilty and immediately released. The Soviet Judge, Nikitchenko, dissented from the judgement, signalling he would have found all defendants and organisations guilty.<sup>613</sup> Of those who were sentenced to death, only Goering eluded the hangman only by committing suicide merely hours before his scheduled execution. The remaining eleven men who were condemned to hang in the early hours of 16 October 1946 did so in the courthouse's gymnasium, though these executions were botched as several

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<sup>611</sup> Cryer and others, above n 15, at 118.

<sup>612</sup> International Military Tribunal, above n 246, at [171-341].

<sup>613</sup> Cryer and others, above n 15, at 118.

of the condemned were left choking for up to thirty minutes.<sup>614</sup> The first executions carried out as punishment for contravening ICL were as draconian as they were macabre. For some of those who eluded the gallows at the IMT and the Allied Control Council trials which followed soon after, particularly the industrialists, reinstatement in their former posts awaited them when altered politico-strategic circumstances allowed.<sup>615</sup> Those convicted, seemingly, needed only to switch their allegiance to the newly-dominant movement of neo-capitalism. When politico-strategic circumstances shifted to the extent that the German industrialist no longer needed to be disciplined, the utopian movement of economic liberalisation remained a powerful force in modernist world politics.

Other members of this first generation accused twenty-eight individuals, each of whom were Japanese nationals directly involved in organising their country's war effort, of committing serious international crimes at a trial held before the IMTFE at Ichigaya in Tokyo. These crimes included crimes against peace as well as atrocity crime in the form of war crimes and crimes against humanity. Beginning on 3 May 1946, while the IMT was in session, this trial concluded on 12 November 1948.<sup>616</sup> The prosecution's case involved 15 separate phases and was heard between 4 June 1946 and 21 January 1947, before the defence case, taking longer, was heard between 24 February 1947 and 12 January 1948. Having heard the rebuttal, sur-rebuttal and summation of both parties, the tribunal adjourned on 16 April 1948, re-opening on 4 November to deliver its judgement and handing down sentences on 12 November of that year. The IMTFE promptly dissolved that day, without marking its conclusion in any noteworthy manner.<sup>617</sup> The trial lasted two-and-a-half years, much longer than its European predecessor. This was probably due to the unfamiliar legal systems, the breadth and detail of history addressed by the indictment, the destruction of important documents and the sheer volume not only of circumstantial evidence tendered by the

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<sup>614</sup> Shnayerson, above n 115, at 141.

<sup>615</sup> Baars, above n 256, at 179.

<sup>616</sup> Tim Maga *Judgment at Tokyo: The Japanese War Crimes Trial* (University Press of Kentucky, Lexington, 2001) at xi.

<sup>617</sup> Totani, above n 282, at 8.



prosecution but also of irrelevant evidence tendered by the defence.<sup>618</sup> Over 400 witnesses provided testimony for the trial, which posed greater translation complexities than did the IMT as witnesses made statements in Chinese, Mongolian, Russian, French and German, each of which then had to be translated into English and Japanese.<sup>619</sup> There was close to fifty thousand pages of trial manuscript and over five thousand court exhibits.<sup>620</sup> The 1,781 page judgment delivered in this trial took six months to reach and convicted 25 individuals: five judges—Sir William Webb, Delfin Jarnellia, Henri Bernard, Bert Rôling and Radhabinod Pal—each issued separate opinions, the most controversial of which was Pal’s 1,235 page critique of the trial as an exemplar of victor’s justice. Unlike the dissenting Nikitchenko at Nuremberg, Pal would have acquitted all of the accused. Instead, apart from two accused who died while in custody and one who was released from custody following a diagnosis of mental illness, they were all convicted by a majority of the Court. Seven of the convicted men received the death penalty and were hanged on 23 December 1948. The remaining penalties were prison sentences ranging from seven years of imprisonment to life imprisonment, though when Japan’s Liberal Democratic Party assumed office in 1954 these prisoners were freed on parole. A quick embrace of neo-capitalism also underscored the rehabilitation of these convicts, signalling the enduring power of economic liberalisation within modernist world politics.

Part I of this thesis goes further, however, by contending that members of this first generation of prosecutors were more than agents of ICL; they were also political actors serving in the interests of neo-capitalism. Part I described the politico-strategic circumstances enabling the establishment of the international military tribunals and placed those circumstances within a set of material and ideational conditions that were present in the rise, spread and entrenchment of liberal regimes in the nineteenth century in particular and the modernist project more generally. It then traced a political thread from those material and ideational conditions, through the design and establishment of the tribunals, to the prosecutors’ pre-trial and trial efforts. It

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<sup>618</sup> Boister and Cryer, above n 209, at 97.

<sup>619</sup> Totani, above n 282, at 7.

<sup>620</sup> At 4.

illustrated that the IMT and IMTFE indictments signal important politico-strategic, politico-economic and politico-social dimensions of Nazism and Shinto-Imperialism, respectively, while the rhetoric of the prosecutors' opening statement vilify those two discredited utopian movements. Despite proclaiming themselves as erstwhile defenders of modern civilisation, the opening statements also reveal the international prosecutors' politico-strategic, politico-economic and politico-social preferences for neo-capitalism as well as for democracies ahead of dictatorships and for individualism ahead of race-based nationalism. The rhetoric used in these opening statements unmask the first generation of prosecutors as agents of economic liberalisation following the lead of those state-makers who, establishing both tribunals, were busying themselves with reconstructing the German and Japanese economies as the first steps towards building a neo-capitalist free market on a global scale. This is not to suggest that there was a monolithic and undifferentiated allied programme, but rather, to signal that this fragile consensus was built upon the new status of *primus inter pares* enjoyed by the US. Rather than repulse the barbarian hordes massing along civilisation's frontiers, these agents of economic liberalisation used ICL, particularly their indictments and opening statements, as a means of getting their way, including scoring another highly-symbolic victory, over their civilised and technologically-advanced rivals. These rivals, the *modern barbarians* advancing the causes of German National Socialism and Japanese Shinto-Imperialism respectively, were prosecuted in the immediate aftermath of the Second World War by the victors. Having won the bloodiest international armed conflict in human history, the Grand Coalition were intent on not losing the resulting peace.

Part I goes further still by contending that these prosecutors helped wage a politico-cultural civil war fought over the institutions governing international affairs within the broader and deeper politico-cultural project of modernity. Despite prosecutors' politico-legal claims to the contrary, the institutions designed specifically to enforce ICL in the immediate aftermath of the Second World War were much less concerned with pursuing justice than they were with ensuring peace, stability and security for those at the helm of modernist world affairs. More than fulfilling an important politico-legal function within the international military tribunals, the first

generation of international prosecutors used their opening statements as a means of denouncing, as *hostis humani generis*, the discredited utopian movements of Nazism and Shinto-Imperialism, by describing the accused as either non-Christian and evil or non-rational and insane before urging the bench to expel them from the human community. In so doing, this first generation of international prosecutors relied heavily on the widespread and deeply-held collective will to prosecute those individuals who commit acts of cruelty for some substantive ends. Put simply, the discourse against politico-cruelty, rooted in nineteenth-century liberalism, was crucial to these prosecutorial efforts. Furthering the interests of the executives who appointed them, these prosecutors animated two separate trials, both of which purported to adjudicate from a position of neutrality. This neutrality was more apparent than real, however. In practice, the trials were used to strengthen the position of one modernist utopian movement ahead of two rival movements, taking the form of Nazism and Shinto-Imperialism respectively. This rivalry is more than a strong contention of ideas, though the ideas of race and nationalism are undoubtedly important. These utopian movements had catastrophic real world consequences, evident not only in the control exerted over the German and Japanese government, economy and society, but also in those countries' aggressive and expansive foreign policies, which resulted in an international armed conflict causing untold death, misery and destruction. Far from being neutral, the two atrocity crime trials explored in Part 1 were an extension of the Second World War and form part of what Foucault would describe as silent war, waged after the noise of battle had ceased, but underpinned by the force of arms nonetheless. By seeking to eliminate the leaders of rival utopian movements while rebuilding the war-torn machinery of government, markets, and communities, international prosecutors help wage a politico-cultural civil war, firstly, by demonising the accused while extolling the virtues of neo-capitalism, secondly, by normalising the new territorial status quo arrangement while deflecting attention away from the motives informing post-conflict reconstruction efforts, and, thirdly, by prioritising aspects of the historical record while maintaining the fraught distinction between law, politics and war.

When the abovementioned opening statements in particular are understood as concomitant to the reconstruction of post-war German and Japanese economies as building blocks for a global free market, with the US economy at its centre, and to the founding of an international architecture for securing future peace among states, with Washington DC at its centre, then the prosecutorial effort is revealed as an extension of capitalism's victor's justice, with the prosecutors themselves functioning as auxiliary combatants of those seeking control over the modernist project. Speaking from among ruins resulting from a war of devastation, the prosecutors' rhetoric remained belligerent while also seeking to persuade and convert those who had followed the discredited utopian movements through a mix of grandiose statements and courtroom theatrics. There were, no doubt, also audiences at home who needed their own vision of utopia affirmed time and time again. Forming important elements of the peace established by victorious force of arms, the prosecutorial effort driving these two trials and the pursuit of international criminal justice in the immediate aftermath of the Second World War is nothing more, or less, than politico-cultural civil war. This thesis now shifts its attention towards the second generation of international prosecutors who, belonging to the ICTY and ICTR established by the UN Security Council, are also agents of the law, politics and war, but encountered a different set of politico-strategic circumstances in the aftermath of the Cold War.

**PART II**

**THE QUEST FOR INTERNATIONAL CRIMINAL JUSTICE  
IN THE AFTERMATH OF THE COLD WAR**

## CH. 5: INTERNATIONAL CRIMINAL TRIBUNALS

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### *I Introduction*

While the discourse against politico-cruelty continued to offer a durable paradigm for state-makers wishing to punish certain individuals who committed serious international crimes in the aftermath of the Cold War, another set of propitious politico-strategic circumstances was required before a second pair of major ICL institutions would be established. This chapter argues, firstly, that the consensus within the UN Security Council to establish ad-hoc international criminal tribunals to try individuals suspected of committing atrocity crimes within either the former Yugoslavia or Rwanda not only reveals the large extent to which the Council's deliberations were shaped by the discourse against politico-cruelty, but also reflects the rise of US global hegemony following the USSR's dissolution. The chapter argues, secondly, that while these tribunals developed ICL from its earlier codifications at the international military tribunals, the ICTY and the ICTR were not established primarily to punish those responsible for initiating internal armed conflicts in the former Yugoslavia and Rwanda, though war-makers were punished. Rather, these tribunals sought to restore international peace and security in certain *trouble spots* in a way that asserted the UN Security Council's primacy in world affairs, particularly in matters of peace, security and justice. The chapter argues, thirdly, that the design of these tribunals had the effect of encouraging local attitudes towards individualism ahead of various ethno-nationalisms while other related peace-making efforts sought to exploit opportunities to entrench democratic-liberal models of governance in accordance with the so-called *Washington Consensus*. Hence, the establishment of the ad-hoc tribunals cannot be fully understood in isolation of the US-led efforts to widen and deepen the spread of neoliberalism from the 1970s up until the 1990s and are thus a continuation of the politico-cultural civil war for modernity.

## ***II Politics: UN Security Council Consensus***

From the ending of the Second World War up until the early 1990s, politico-strategic affairs underwent an array of significant developments. As mentioned in the previous chapter, the UN was established and its Charter created a Security Council comprising five permanent members—namely China, France, USSR, UK and the US—and six non-permanent members (which changed to ten in 1965), each serving two-year terms. (The *China seat* passed from the Republic of China to the People's Republic of China (PRC) in 1971 and the *USSR seat* was assumed by the Russian Federation in 1991.) Under Article 24 of the UN Charter, the Security Council was given the primary, but not exclusive, responsibility for the maintenance and restoration of international peace and security. With that responsibility the Council was granted powers to authorise measures that included sanctions and peacekeeping operations. The significance of these powers lies in the Charter's general prohibition of the use of force to settle disputes in international affairs, articulated in Article 2(4).

Since 1945 politico-strategic affairs had been profoundly affected by the proliferation of nuclear weapons and their capability to annihilate the entire human species, leading, in part, to the Cold War and a concomitant *chilling* effect on the work of the UN Security Council. Although it was not an international armed conflict, the Cold War was an ongoing global conflict underpinned by the *threat* of armed force. The Cold War represented one of, if not the primary, major changes in the politico-strategic circumstances since the ending of the Second World War. According to Richard Crockatt:<sup>621</sup>

For fifty years relations between the United States and the Soviet Union were the deciding factor in international affairs. War against Germany brought them together in 1941 in an alliance which was decisive in securing Germany's defeat, but victory ultimately drove them apart, giving rise to the state of continuous, if fluctuating, antagonism which we know as cold war. No open hostilities took place between the United States and the Soviet Union, yet for the bulk

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<sup>621</sup> Richard Crockatt *The Fifty Years War: The United States and the Soviet Union in World Politics, 1941-1991* (Routledge, New York and London, 1995) at 3.

of the period each armed against the other as if for war. Even their brief alliance against Germany was plagued by mistrust and misgivings. Since these loomed ever large as the hot war against Germany gave way to cold war, and since the US-Soviet relationship was the determining factor in both the anti-axis alliance and the shaping of the post-war world, it seems appropriate to view both within the same frame. In short, the upheaval of the Second World War set the geopolitical scene for the cold war.

It was this Cold War that paralysed the UN Security Council's efforts to fulfil its responsibilities<sup>622</sup> as "serial vetoes by the superpowers transformed the body into little more than a debating society."<sup>623</sup>

The ending of the Cold War prompted a declining recourse to veto use among the P-5.<sup>624</sup> In addition to breaking the deadlock in the UN Security Council, the ending of the Cold War heralded "a new spirit of relative optimism" underpinned by an increasing level of trust between the Western and Eastern blocs and a greater

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<sup>622</sup> Between 1946 and 1989 the UN Security Council authorised only two sanction regimes, Rhodesia in 1966 and South Africa in 1977, and established only 18 peacekeeping operations. Between 1946 and 1990 the UN Security Council passed 683 Resolutions, vetoing 194. Since 1945 the USSR had the highest recourse to veto among the P-5, with 117 vetoes recorded, all but three of which occurred before 1986. The US is second highest with 82 vetoes recorded, all but 12 of which occurred between 1966 and 1986. In these statistics the USSR and the US eclipse China (5 vetoes), France (18 vetoes) and the UK (30 vetoes), though "vetoes cast" is not always an accurate indicator of the will of a P-5 as not all Resolutions are put to a vote if it is clear a permanent member is staunchly opposed. Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominnik Zaum (eds) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, Oxford, 2008) at 689.

<sup>623</sup> David Bosco *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, Oxford, 2014) at 34.

<sup>624</sup> Between 1991 and 2006 the UN Security Council passed 1,055 Resolutions and vetoed only 18, signalling a period of increased activism on the part of the Council. The Council authorised twenty sanction regimes between 1990 and 2006, beginning with its comprehensive sanctions against Iraq, and established 43 peacekeeping operations. Lowe and others, above n 622, at 643-662, 689 & 678-686.



commitment to the rule of international law by the USSR's successor states.<sup>625</sup> Even the late Boutros Boutros-Ghali, the then-Secretary-General of the United Nations, proclaimed early in 1992 that member-states recognised the historic opportunity to fulfil the UN's original objectives of maintaining international peace and security, securing justice and human rights for all and promoting "social progress and better standards of life in larger freedom."<sup>626</sup> In a speech to the US Congress on 6 March 1991, US President George WH Bush also heralded this post-Cold War era, emerging with the US-led invasion of Kuwait, as a potential new world order. In particular, he said:<sup>627</sup>

[T]he world we've known has been a world divided—a world of barbed wire and concrete block, conflict and cold war. Now, we can see a new world coming into view. A world in which there is the very real prospect of a new world order. In the words of Winston Churchill, a "world order" in which "the principles of justice and fair play... protect the weak against the strong...." A world where the United Nations, freed from cold war stalemate, is poised to fulfil the historic vision of its founders. A world in which freedom and respect for human rights find a home among all nations.

The US President had good reason for his triumphal appraisal of world affairs given the US remained at the heart of politico-strategic affairs. Although the US rose to *primus inter pares* in the years leading up to the Second World War, and played a key role in designing the UN, IMF, and World Bank, the Cold War circumscribed this ascendancy. But with the ending of the Cold War, US ascendancy reached an unprecedented height as global hegemon and, according to Goldstone and Smith, the "rise of *Pax Americana* and the 'end of history' opened new possibilities to return to the international notions of justice that had seemed to permeate, even if ephemerally,

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<sup>625</sup> Cassese, *Cassese's International Criminal Law* above n 15, at 258.

<sup>626</sup> Payam Akhavan "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal For Rwanda" (1997) 7 *DJIL* 325.

<sup>627</sup> George Bush "Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict" (1991) The American Presidency Project. Available at <http://www.presidency.ucsb.edu/ws/?pid=19364>.

in the years after World War II.”<sup>628</sup> Given the Cold War’s chilling effect extended to the UN’s considerations of establishing ICL institutions,<sup>629</sup> the prospects for pursuing international criminal justice looked at this time somewhat brighter than it had during the previous half century. It was, thus, under a more active phase of the UN Security Council’s work in which a consensus was forged to establish two major international institutions for enforcing ICL in the aftermath of the Cold War. “The end of the Cold War,” Schabas enthuses, “provided a fertile environment for the renaissance of international criminal justice.”<sup>630</sup>

It is important, however, not to overstate the immediate impact of these changing politico-strategic circumstances. While the Cold War may have at crucial times paralysed the UN Security Council, it did not halt the superpowers from pursuing their own interests through the coercive use of force. Both superpowers undertook “lengthy wars of aggression—the United States in Vietnam, the Soviet Union in Afghanistan—or in single interventions, the former in Guatemala, Lebanon, Cuba, Santa Domingo, Grenada, Libya and Panama between 1954 and 1986, and the latter in Eastern Europe in 1956 and 1968.”<sup>631</sup> And significant as these changes were, the reinvigorated pursuit of international criminal justice was not immediately prompted by the fall of the Berlin Wall or the disintegration of the USSR.<sup>632</sup> Moreover, although the US reached an unprecedented ascendancy, as McKinley explains:<sup>633</sup>

[t]he success of Bretton Woods collapsed on its principal architect. In the US itself the wealth created in this period encouraged domestic competition to the US corporations, which, when accompanied by a distrust of big business and corresponding effective antitrust activity, resulted in an overall decline in corporate profitability. More

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<sup>628</sup> Goldstone and Smith, above n 15, at 95. (emphasis in original.)

<sup>629</sup> Antonio Cassese “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9 *EJIL*, 2 at 7.

<sup>630</sup> Schabas, above n 7, at 14.

<sup>631</sup> Zolo, above n 27, at 9.

<sup>632</sup> Scheffer, *All The Missing Souls*, above n 215, at 15.

<sup>633</sup> McKinley, above n 74, at 65-66.

significantly, as a result of the overvaluing of the dollar which Bretton Woods encouraged, the effect of the economic reconstruction of Western Europe and Japan (which also brought with it increasing challenges to US corporations from abroad), but also developments such as American foreign investment, a surge in imports (and consequent damage to exports), and currency speculation, was to create foreign holdings of dollars which exceeded US reserves of gold, resulting in Nixon's abandonment of the convertibility pledge. Thus, in the space of 30 years in military terms, and 27 years in economic-financial terms, the US designs for a post-World War global order incorporating what was, in essence, the first phase of contemporary grand-strategic, and thus economic globalisation, had come seriously undone.

Nevertheless, a set of propitious politico-strategic circumstances emerged in the aftermath of the Cold War which re-ignited the pursuit of international criminal justice. This, in turn, constituted another rare moment of consonance between the prevailing politico-strategic circumstances and the underpinning discourse against politico-cruelty.

The UN Security Council first considered the deteriorating Yugoslav situation in September 1991, reaffirming sovereign rights over non-interference in its Resolution 713 (1991).<sup>634</sup> By 1992 the Security Council determined that this situation constituted a threat to international peace and security and, in February of that year, established the United Nations Protection Force (UNPROFOR) which, beginning as a force to protect Serbs in Croatia, expanded into a more far-reaching, multi-dimensional peacekeeping force.<sup>635</sup> In an action that Reydams and Wouters suggest saw the Security Council crossing a Rubicon,<sup>636</sup> the Council called for, and received, a number of reports to inform its considerations: namely, the Report of the

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<sup>634</sup> Susan L Woodward "The Security Council and Wars in the Former Yugoslavia" in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominnik Zaum (eds) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press Oxford, 2008) at 406-440, especially at 408; and UNSC Res 713 (S/RES/713) (1991).

<sup>635</sup> Daphna Shraga and Ralph Zacklin "The International Criminal Tribunal for the Former Yugoslavia" (1994) 5 *EJIL* 1.

<sup>636</sup> Reydams and Wouters, above n 137, at 23.

European Community investigative mission into the treatment of Muslim women in the former Yugoslavia; the Report of the Steering Committee in the International Conference on the Former Yugoslavia; and an Interim Report of the Commission of Experts established by Resolution 780 (1992).<sup>637</sup> According to Daphna Shraga and Ralph Zacklan “[t]he unspoken understanding was that this Commission [of Experts] would be a step towards the establishment of an international tribunal to prosecute individuals if the parties did not conform to Security Council Resolutions.”<sup>638</sup> The Commission of Experts, however, did not obtain much in the way of governmental support and its first chairman, Fritz Kalshoven, resigned. Cherif Bassiouni, its second chairman, obtained the necessary financing from private sources, undertook significant evidence-gathering activities in the former Yugoslavia and reported back to the Security Council in 1994.<sup>639</sup> On 18 December 1992 the UN General Assembly had not yet received any formal report from the Commission but, nevertheless, urged the UN Security Council “to consider recommending the establishment of an ad hoc international war crimes tribunal to try and punish those who have committed war crimes in the Republic of Bosnia and Herzegovina when sufficient information has been provided by the Commission of Experts.”<sup>640</sup> When the Commission of Experts finally delivered its Interim Report in February 1993, it concluded that atrocity crimes had been committed.<sup>641</sup> Images of these contemporary horrors drew frequent comparison to the horrors perpetrated by the Nazis in the lead up to, and during, the Second World War.<sup>642</sup>

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<sup>637</sup> Report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia, available at <http://www.womenaid.org/press/info/humanrights/warburtonfull.htm>; the Report of the Steering Committee in the International Conference on the Former Yugoslavia; the Interim Report of the Commission of Experts established by Resolution 780 (1992) in (1994) 88(4) *American Journal of International Law* 784; and UNSC Res 780 (S/RES/780) (1992).

<sup>638</sup> Shraga and Zacklin, above n 635, at 2.

<sup>639</sup> Cryer and others, above n 15, at 123.

<sup>640</sup> Reydams and Wouters, above n 137, at 23.

<sup>641</sup> At 24.

<sup>642</sup> Shraga and Zacklin, above n 635, at 2; and Cryer and others, above n 15, at 122-123.

On 22 February 1993 the Security Council, through Resolution 808 (1993), decided that:<sup>643</sup>

[A]n international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991... [and] [r]equest[ed] the Secretary-General to submit for consideration by the Council... a report on all the aspects of the matter, including specific proposals and, where appropriate, options for the effective and expeditious implementation of the decision.

This broke new ground. Unlike the international military tribunals, the ICTY was established while the underlying armed conflict was raging and it was unclear which forces would be victorious and which territories would be occupied by the contending forces. An understanding of the scale of atrocities, while emerging, was also still far from complete.<sup>644</sup> The conflict's end would occur only at the close of 1995 with the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), which obliged all former Yugoslav states to cooperate with the ICTY.<sup>645</sup> Moreover, never before had the UN Security Council used its powers to establish an international criminal tribunal, which many believed ought to have been created by way of treaty rather than by way of binding UN Security Council Resolution.<sup>646</sup> (Although establishing a tribunal by way of treaty was considered, this pathway was rejected on the grounds of the need both for expediency and for the relevant states in the former Yugoslavia to ratify such a treaty.<sup>647</sup>) The establishment of the ICTY was authorised on 25 May 1993 by UN Security Council Resolution 827, which approved the Report of the Secretary-General to which the Statute of the International Tribunal for the former Yugoslavia (hereafter the "ICTY Statute") was appended.<sup>648</sup> Since the

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<sup>643</sup> UNSC Res 808 (S/Res/808) (1993).

<sup>644</sup> Scheffer, *All the Missing Souls*, above n 215, at 20.

<sup>645</sup> Cryer and others, above n 15, at 132; and UNSC *The Situation in Bosnia and Herzegovina* (S/1995/999) (1995).

<sup>646</sup> Scheffer, *All the Missing Souls*, above n 215, at 20.

<sup>647</sup> Cryer and others, above n 15, at 128.

<sup>648</sup> UNSC Res 827(S/RES/827) (1993).

tribunal was established by the UN Security Council under Chapter VII of the UN Charter, all UN member-states were obliged to cooperate.<sup>649</sup> It remains contentious, however, whether or not the Council determined in its Resolution that the threat to the peace resulted from the armed conflict or from the atrocities committed in the context of that conflict.<sup>650</sup>

The UN Security Council has been criticised for establishing the ICTY instead of taking decisive action to protect civilians through authorising the use of armed force. According to Cassese “[t]he response of the international community to the conflict in Yugoslavia had been tardy and lukewarm, due to impotence at the military and political levels. The establishment of a Tribunal was thus seized upon during the conflict not only as a belated face-saving measure but also in the pious hope that it would serve as a deterrent to further crimes.”<sup>651</sup> For Makau Mutua establishing the ICTY “let powerful states ‘off the hook’... as they could no longer be accused of inaction.”<sup>652</sup> Matua goes on to suggest that the P-5 would have acted sooner, and more decisively, had the victims been of Western European origins or followers of Christianity and Judaism, rather than Muslim.<sup>653</sup>

Responding to Rwanda’s most recent internal armed conflict, which followed an invasion by the Rwandese Patriotic Front (RPF) from neighbouring Uganda on 1 October 1990, the UN Security Council adopted Resolution 812 (1993) calling for both parties to the conflict to observe a ceasefire from 9 March 1993 and to permit humanitarian supplies to be delivered and displaced persons to return to their homes. On 22 June 1993 the Council adopted Resolution 846 authorising the establishment of the United Nations Observer Mission Uganda-Rwanda (UNOMUR) in order to monitor weapons transfers across the Uganda-Rwanda border. Following the conclusion of the Arusha Agreement on 5 October 1993, the UN Security Council issued Resolution 872 authorising the establishment of the United Nations Assistance

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<sup>649</sup> Goldstone and Smith, above n 15, at 97.

<sup>650</sup> Cryer and others, above n 15, at 131.

<sup>651</sup> Cassese, *Cassese’s International Criminal Law* above n 15, at 259.

<sup>652</sup> Matua, above n 71, at 175.

<sup>653</sup> At 175.

Mission for Rwanda (UNAMIR) until national elections were held and a new government installed.<sup>654</sup> As the genocide began to unfold in April 1994 the Security Council's discussions did not focus on *genocide* even though there was a steady stream of evidence signalling a widespread, systemic, and deliberate effort to destroy Rwandese Tutsi. Avoiding the use of the term *genocide* may have relieved some Council members of the burden of their obligations under the Genocide Convention.<sup>655</sup> On 1 July 1994 the Security Council established a Commission of Experts very much in accordance with the one established two years earlier in relation to the Yugoslav situation. Once that Commission had provided its Interim Report detailing violations of IHL in Rwanda, the Council adopted, on 8 November 1994, Resolution 995, thereby authorising the establishment of the ICTR.<sup>656</sup> The process by which the Security Council reached its consensus to establish an international criminal tribunal for the atrocity crimes committed within Rwanda—starting with its statements condemning the atrocities and then establishing a Commission of Experts before taking the decision to establish the ICTR before that Commission had issued its final report<sup>657</sup>—was very similar to that behind the consensus around establishing the ICTY.

Notwithstanding these procedural similarities, the situation on the ground in Rwanda differed significantly from that in the former Yugoslavia. Both parties to the conflict in Rwanda, for example, had at some point called for international trials.<sup>658</sup> Unlike the Yugoslav situation, the fighting in Rwanda had ceased (or at least appeared to have come to an end at the time) and the institutions of government had

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<sup>654</sup> UNSC Res 812 (S/RES/812) (1993); UNSC Res 846 (S/RES/846) (1993); and UNSC Res 872 (S/RES/872) (1993).

<sup>655</sup> Hazel Cameron *Britain's Hidden Role in the Rwandan Genocide: The Cat's Paw* (Routledge, New York, 2013) at 23 & 104.

<sup>656</sup> Reydam and Wouters, above n 137, at 29; and UNSC Res 995 (S/RES/995) (1994).

<sup>657</sup> Cryer and others, above n 15, at 139.

<sup>658</sup> Reydam and Wouters, above n 137, at 29.

been vacated by the defeated forces that fled into exile in nearby states. The victorious RPF forces were readily identifiable.<sup>659</sup>

The role played by the US in establishing the ICTR was far less active than its efforts to establish the IMT, the IMTFE and the ICTY. The US saw very little cost in taking no significant action over the atrocities unfolding in Rwanda during April 1994 given the absence of strong domestic concern and the persistent memories of US Rangers dragged through the streets of Mogadishu as the armed intervention in Somalia failed.<sup>660</sup> US officials were fearful that a multilateral armed humanitarian intervention into Rwanda would fail as those in Bosnia, Somalia and Haiti had failed and become “like quagmires in the making.”<sup>661</sup> In any case, Rwanda did not feature highly among the priorities of US foreign policymakers,<sup>662</sup> though that is not to say that the Central Intelligence Agency was not involved in aiding and abetting the RPF’s 1990 invasion of Rwanda.<sup>663</sup> The US had suggested amending the ICTY’s mandate, extending its jurisdiction to cover Rwanda. This was rejected “because of the misgivings of some Council members who feared that the expansion of an existing ad hoc jurisdiction would lead to a single tribunal that would gradually take on the characteristics of a permanent juridical institution.”<sup>664</sup> The most significant action taken by the US in relation to the establishment of the ICTR was to refrain from exercising its right to veto.

Rwanda had, however, remained an important focus of French foreign policy in the aftermath of the Cold War. While the Congo-Zaire region was the subject of a long-standing rivalry between France and the UK, contemporary French Anglophobia in the African continent is fuelled more by fears of the increasing influence of US foreign policy.<sup>665</sup> French armed forces played important roles in assisting the

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<sup>659</sup> Payam Akhavan “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment” (1996) 90(3) *AJIL* 501 at 509.

<sup>660</sup> Power, above n 96, at 335.

<sup>661</sup> At 340.

<sup>662</sup> At 342.

<sup>663</sup> Cameron, above n 655, at 38.

<sup>664</sup> Akhavan, above n 659, at 502.

<sup>665</sup> Cameron, above n 655, at 61.



Government of Rwanda to repulse the RPF's 1990 invasion<sup>666</sup> and in supporting the genocide by "supplying arms and military equipment, military training and dissemination of racialised ideologies to the [Rwandan Armed Forces (FAR)] and Hutu militia organisations."<sup>667</sup> As Hazel Cameron explains:<sup>668</sup>

Once the genocide in Rwanda commenced in April 1994, France knowingly persisted in its collusive, participatory role by continuing to deliver arms and military training to the *genocidaires* throughout the period of Operation Turquoise in breach of a UN embargo.... Despite having knowledge of the daily suffering of the Tutsi people on the hills of Bisesero, the French soldiers arrived there accompanied by militia and unequipped to rescue desperate survivors. These soldiers then left the area, knowing that the wounded and starving Tutsi were in fact the true victims of genocide, not the perpetrators as they had been led to believe by their leaders.

France also played something of a spoiling role during the UN Security Council's discussions of the Rwandan situation by deliberately withholding information and intelligence, presumably as a means of keeping other Council members uninformed. This was a situation that then UN Secretary-General Boutros Boutros-Ghali did little to remedy, given his direct involvement in transferring arms from Egypt to Rwanda four years earlier when he was Egypt's Foreign Minister.<sup>669</sup>

Like France, the UK was also involved in the internal armed conflict, playing a less than constructive role during relevant Security Council negotiations. The UK provided support to the RPF, including military training for their invasion of Rwanda.<sup>670</sup> Moreover, since the 1990s British intelligence officers, based in Uganda, worked actively with the RPF and benefited from the RPF's "excellent and very strong intelligence machine inside Rwanda."<sup>671</sup> The strength of the relationship was

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<sup>666</sup> At 64.

<sup>667</sup> At 78.

<sup>668</sup> At 78.

<sup>669</sup> At 67.

<sup>670</sup> At 80

<sup>671</sup> At 80

such that a former British official suggested “both the Government of Uganda and the RPF were the cat’s paw of the British Government with the RPF being groomed to overthrow the Francophone Government of Juvénal Habyarimana in Rwanda.”<sup>672</sup> Within the UN Security Council, the UK Government actively discouraged the strengthening of UNAMIR’s mandate. A Resolution strengthening UNAMIR was, for instance, not even tabled for consideration given the strong opposition from both the UK and the US.<sup>673</sup> The UK, along with the US and the Russian Federation, sought a partial withdrawal of UNAMIR whereas most of the non-permanent members sought to strengthen UNAMIR’s mandate and bolster peacekeeping troop numbers.<sup>674</sup> This led to Resolution 912, agreed on 21 April 1994, which reduced the mission’s troop strength from 2,700 to 270.<sup>675</sup> When an informal meeting of the Council was called on 29 April 1994 to discuss the opportunity to establish an international criminal tribunal, a draft presidential statement prepared by the then New Zealand Chair of the Council, Colin Keating, was rejected by the UK, as well as by the PRC and the US.<sup>676</sup> Notwithstanding this French and British intransigence, the Security Council decided to establish the ICTR with 13 votes in favour. The PRC abstained while, as mentioned, the Rwandan Government voted against the Resolution.

The UN Security Council’s establishment of the ICTR eighteen months after the ICTY has been the subject of criticism. According to Akhavan:<sup>677</sup>

[T]here was ample opportunity, but little willingness, to take preventive action or to intervene against what is perhaps the worst genocide since the Second World War. At least one year before the massacres of April 1994, which according to some estimates took the lives of as many as five hundred thousand to one million people in just three months, United Nations human rights experts and nongovernment organizations had

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<sup>672</sup> At 80.

<sup>673</sup> At 89.

<sup>674</sup> At 90.

<sup>675</sup> At 91; and UNSC Res 912 (S/RES/912) (1994).

<sup>676</sup> At 104.

<sup>677</sup> Akhavan, above n 659, at 501.

forewarned of an impending calamity, but to no avail... On the basis of international responses to other situations [Nuremberg, Tokyo, Yugoslavia], it has been suggested that the plight of African victims would not generate the same outcry as the suffering of European. In other words, the Rwanda Tribunal was established because of the precedential effect of the Yugoslav Tribunal. In view of this harsh reality, there is little room for celebration, and even less for triumphalism.

Elsewhere Akhavan suggests that the muted media interest around the arrest of Colonel Théoneste Bagosora, a leading figure in planning and executing the genocide, signals a lesser concern for Rwandans compared to the attention given to Radovan Karadžić who, when indicted by the ICTY prosecutor, became something of a media celebrity.<sup>678</sup> Matua is equally terse in his assessment, arguing the world remained asleep as horrors unfolded in Rwanda and, although the ICTR was possible only because of the precedent provided by the ICTY, the ICTR “was an afterthought” and “a sideshow to the Yugoslav Tribunal.”<sup>679</sup> Yet in so doing both Akhavan and Matua miss a deeper, more striking politico-strategic issue at play here. As Cameron explains:<sup>680</sup>

[This h]istorical and contemporary rivalry is rooted in not only economic and geopolitical disputes over Africa, but also in mutual paranoia and a deep ideological and cultural division. That the behaviour of France and Britain in Rwanda in the period of the civil war from 1990 and throughout the genocide *constituted an undeclared war* between France and America, with Britain’s foreign policy being driven by Washington, is a matter worthy of consideration... Rwanda’s instability post-independence ensured that opportunities manifested themselves for powerful governments of the West to gain political control in the Great Lakes region of Africa, thereby providing an opportunity to manipulate the economic markets of Central Africa.

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<sup>678</sup> Akhavan, above n 626, at 328.

<sup>679</sup> Matua, above n 71, at 176-178.

<sup>680</sup> Cameron, above n 655, at 113. (Emphasis added.)

In other words, powerful modern Western states were acting as rivals in a new scramble for African resources. This reveals contending politico-strategic priorities among former Second World War allies. Such rivalry did not, however, preclude cooperation among the P-5 when it came to taking some action in this unruly trouble-spot.

The consensus within the UN Security Council to establish ad-hoc international criminal tribunals as a means of punishing those who committed atrocity crimes in Yugoslavia and Rwanda was shaped by the discourse against politico-cruelty, which includes the legacy of the international military tribunals. The UNSC, especially the P-5, shared not only abhorrence towards specific acts of politico-cruelty, but also a desire to abject those who commit those acts through ICL enforcement. Even though Akhavan notes that UN Security Council action was triggered not by the “the massive and systemic scale of the human rights violations,” but rather by “the determination that such violations, in particular circumstances of the former Yugoslavia and Rwanda, constituted a ‘threat to international peace and security’ as required by the Charter,”<sup>681</sup> this does not mean the P-5 were unaffected by the discourse. It only means that the Security Council could justify its actions in terms consistent with its responsibilities under the UN Charter. While the discourse against politico-cruelty shaped the strategic thinking of the Security Council, the politico-strategic circumstances brought about by the end of the Cold War, including the preponderance of US power following the USSR’s dissolution and the concomitant diminished recourse to veto, were vital to founding these ad-hoc tribunals. This represented another rare moment of consonance between that underlying discourse and the more immediate circumstances. Having emerged as *primus inter pares* at the end of the Second World War, the US had emerged as a global hegemon at the conclusion of the Cold War. The ad-hoc tribunals of the 1990s were experiments in justice to see if institutions could be developed that served particular, and very limited, goals. As we shall now see, these tribunals represent an important chapter in the history of the pursuit of international criminal justice, but the justice delivered

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<sup>681</sup> Akhavan, above n 626, at 327.

was so narrow in its scope that it can only be understood as a form of highly selective hegemon's justice.

### ***III Law: Hegemon's Justice***

The discourse against politico-cruelty not only informed the consensus to establish the ad-hoc tribunals for the former Yugoslavia and Rwanda, but also shaped the design of these institutions, as it had the international military tribunals fifty years earlier. Drafters of the ICTY Statute drew heavily, though not exclusively, on the London and Tokyo Charters for the design of the tribunal's structure. The ICTY Statute provided for a structure based upon three pillars, the first of which was the Registry that managed the tribunal's administrative work, including victim and witness programmes, transportation and detention of the accused and public relations.<sup>682</sup> The second pillar was the bench but, for the purposes of this thesis, the final pillar of the ICTY, the prosecution, is the most important. According to Article 16 of the ICTY Statute, prosecutors were responsible for investigating crimes outlined in the tribunal's Statute; that is, serious violations of IHL committed in the territory of the former Yugoslavia since January 1991 (including Kosovo in 1999, though this could not have been anticipated at the time). These investigations could be initiated either *ex-officio* or on the basis of information obtained from any source, particularly from governments, UN organs, intergovernmental organisations or NGOs. In order to collect evidence the prosecutor had the power to question suspects, victims and witnesses as well as to conduct on-site inspections. The discretion to proceed with an investigation, or to proceed from an investigation to a prosecution, rested exclusively with the prosecutor. If a determination was reached that a *prima facie* case existed, then the prosecutor was empowered to prepare an indictment for the approval of a judge of the Trial Chamber. The prosecutor would also bring a case against those persons named in the indictment. In discharging those responsibilities the prosecutor was to act independently and could not seek or receive instruction from any source, including governments. While the ICTY was established on 25 May 1993, a year and a half lapsed before a prosecutor was

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<sup>682</sup> Cryer and others, above n 15, at 129.

appointed, precisely the amount of time the Grand Coalition took to establish the IMT, run its first and only trial, issue a judgement and determine related penalties before executing the sentences.<sup>683</sup> (However, to be fair, before the first ICTY prosecutor could begin his legal work suitable premises had to be arranged and qualified staff had to be employed.<sup>684</sup>) Generally speaking, the mandate for the ICTR's prosecutors was identical to that of ICTY's. Significantly, Article 15(3) of the ICTR Statute states that the:

Prosecutor of the International Tribunal for the former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecution before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

This was the situation until UN Security Council Resolution 1503 spilt the roles in August 2003. The key difference in mandates concern the tribunals' jurisdiction, with the ICTR prosecutor being "responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994."<sup>685</sup> Following the lead of the drafters of the London and Tokyo Charters, the designers of the ad-hoc tribunals created a strong prosecutorial mandate, meaning the international prosecutor would be vital to the trial process in particular and the enforcement of ICL more generally.

While the discourse against politico-cruelty informed the structural design of the ad-hoc tribunals, it also played a role in developing ICL's substantive elements in the aftermath of the Cold War. The Statutes establishing these ad-hoc tribunals have much in common, particularly when it comes to defining the serious international crimes under their respective jurisdictions. Neither Statute includes the crime of

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<sup>683</sup> Reydams and Wouters, above n 137, at 29; and Matua, above n 71, at 180.

<sup>684</sup> Cryer and others, above n 15, at 125.

<sup>685</sup> Statute of the International Criminal Tribunal for Rwanda Article 15, subsection 1; and UNSC Res 1503 (S/RES/1503) (2003).

aggression, for instance. Reydams and Odermatt observe that “crimes against peace, the overarching crime at the IMT and IMTFE and the first cause of many atrocities, are not included in the Statute.”<sup>686</sup> Like the international military tribunals, the ad-hoc tribunals were designed as selective mechanisms of enforcing ICL but, unlike the international military tribunals, punishing those responsible for initiating armed conflict was not the key driving force behind these post-Cold War tribunals, though war-makers were put on trial. This was, in part, because, unlike the Second World War, the conflicts in the former Yugoslavia and Rwanda were wars of dissolution characterised as internal armed conflicts (albeit with very important international dimensions). Without an underlying situation of international armed conflict, neither of the ICTY and ICTR Statutes included crimes against peace or the crime of aggression, meaning “no one would be prosecuted for starting the Balkan wars.”<sup>687</sup> Instead of crimes against peace, the ICTY and ICTR Statutes give focus to atrocity crimes following the determination of the UN Security Council that reports of mass killings, detentions, rape and ethnic cleansing in the former Yugoslavia constituted a threat to international peace under Chapter VII of the UN Charter.

Both the ICTY and ICTR Statutes claim jurisdiction over war crimes. Article 4 of the ICTR Statute represents a key difference between the two Statutes because it includes, within the ICTR’s subject-matter jurisdiction, both violations of Article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II. Not applicable here are the grave breaches provisions of the 1949 Geneva Conventions, as the underlying armed conflict in Rwanda was deemed non-international in character.<sup>688</sup> The Statutes for both tribunals define crimes against humanity in exactly the same way—that is, as murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial, and religious grounds; or other inhumane acts. Whereas the ICTY Statute requires the acts comprising crimes against humanity to be committed in armed conflict, whether international or non-international in character, and directed against any civilian

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<sup>686</sup> Reydams and Odermatt, above n 14, at 91; and Zolo, above n 27, at 29.

<sup>687</sup> Reydams and Odermatt, above n 14, at 91.

<sup>688</sup> Akhavan, above n 745, at 659.

population, the ICTR Statute requires no such nexus with armed conflict, though the proscribed inhumane acts must be connected to discriminatory grounds.<sup>689</sup> Both Statutes cite, verbatim, the definition of genocide contained in the Genocide Convention.<sup>690</sup>

Under both Statutes the following acts were deemed punishable: genocide; conspiracy to commit acts of genocide; direct and public incitement to commit genocide; attempt to commit acts of genocide; and complicity in genocide.<sup>691</sup> This definition was not available to the drafters of the London and Tokyo Charters, though as mentioned in Chapter 2 the trials held at the IMT and the IMTFE informed the UN General Assembly's consideration of the Genocide Convention. Although there was little evidence of genocide occurring in Bosnia, the crime was included in the ICTY Statute at the prompting of the UN Commission of Human Rights and some member-states because the crime of genocide would underscore the gravity of the ICTY's mission and augment its legal foundations as Yugoslavia was a party to the Genocide Convention which, as mentioned, envisaged the establishment of an international court.<sup>692</sup> The inclusion of the crime of genocide alongside war crimes left many with an impression that the ICTR had two objectives, the first of which was to prosecute members of the defeated regime for committing genocide, the second to prosecute members of the victorious RPF for war crimes.<sup>693</sup>

Although both ad-hoc tribunals could render judgements only against natural persons and (unlike the IMT) did not have jurisdiction over organisations, political parties, administrative agencies or other legal entities, key differences exist between their respective jurisdictions. While the ICTY's geographic jurisdiction covered serious violations of IHL committed within the territory of the former Yugoslavia, the ICTR covered the territory of Rwanda, including its land surface and airspace, as well

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<sup>689</sup> At 503.

<sup>690</sup> Convention on the Prevention and Punishment of the Crime of Genocide, UNTS 78 (entered into force 12 January 2051).

<sup>691</sup> Akhavan, above n 745, at 659.

<sup>692</sup> Reydams and Odermatt, above n 14, at 92.

<sup>693</sup> At 93.



as the territory of neighbouring states in respect of serious violations of IHL committed by Rwandan citizens. The geographic coverage of the ad-hoc tribunals' jurisdiction was much more focused compared to that of the continental-wide scope of their earlier military counterparts. Whereas the ICTY's temporal jurisdiction began in 1991 and was *open ended*, covering conflicts in Kosovo,<sup>694</sup> the ICTR's temporal jurisdiction was more limited, focusing exclusively on the period 1 January 1994 to 31 December 1994. Some members of the Security Council were unsure if their authority to act in accordance with Chapter VII extended to crimes committed before the April 1994 genocide began to unfold.<sup>695</sup> A compromise was reached whereby 31 December 1994 was selected as an end date, demonstrating the ICTR's temporal jurisdiction was "an artificial and politically convenient timeframe."<sup>696</sup>

This development of ICL's substantive elements demonstrates the UN Security Council's desire to reinforce its primacy in determining whether or not threats to international peace and security exist and in authorising any appropriate responses. The ICTY and ICTR Statutes did not feature crimes against peace because the hostilities in question were internal armed conflicts, which, in the view of the UN Security Council, did not threaten to destabilise the entire state-based system of international affairs. That the tribunals' nomenclature included the word *criminal* rather than *military* is significant in this respect too for it shows the institutions' designers perceived themselves less as victors and occupiers and more as hegemon designers designing and enforcing rules for international affairs: none of the P-5 were major belligerents in these two conflicts, though as mentioned both France and the UK played roles supporting parties to the Rwandan conflict. The situations in the former Yugoslavia and in Rwanda represent what Michael Pugh would describe as opportunities for "modern versions of peacekeeping" to function "as forms of riot control directed against the unruly parts of the world to uphold the liberal peace."<sup>697</sup>

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<sup>694</sup> Cryer and others, above n 15, at 129.

<sup>695</sup> Akhavan, above n 659, at 505

<sup>696</sup> Reydams and Odermatt, above n 14, at 94.

<sup>697</sup> Michael Pugh "Peacekeeping and Critical Theory" (2004) 11(1) *International Peacekeeping* 39 at 41.

In other words, these two unruly “trouble spots” of the former Yugoslavia and Rwanda represented an opportunity for the most powerful governments in the world, acting in concert under the auspices of the UN Security Council, to project their authority, legitimacy and power. Moreover, the ICTY and ICTR Statutes did not presume the guilt of the accused, although as Reydams and Odermatt point out “the presumption of innocence is immediately somewhat undone by stating that persons to be prosecuted are ‘responsible’ for serious violations of international humanitarian law.”<sup>698</sup> This underscores a key difference between the international military tribunals and these ad-hoc tribunals; the former focused on punishment whereas the latter focused on prosecution. However, the focus on prosecution was never intended as an end in itself, but rather, as a means of contributing to the restoration and maintenance of peace.<sup>699</sup> Yet the exact impact of particular prosecutions on international peace and security remains difficult to determine, particularly as “[t]he worst incident of violence in Bosnia, the Srebrenica massacre in 1995, took place after Serb nationalist leaders involved in the attack had already been indicted by the ICTY.”<sup>700</sup>

At stake for the P-5 here, in the aftermath of the Cold War, was not the pursuit of international criminal justice in and of itself, but rather, the use of ICL as a means of securing the primacy of the UN Security Council in international affairs. The US in particular, as sole remaining superpower, played the role of hegemon not only by helping set some of the rules for the conduct of international affairs, but also by helping enforce those rules through UN Security Council action. From securing, as victors, a new peace in the immediate aftermath of the Second World War, the Grand Coalition—transformed into the P-5—enforced another new peace following the dissolution of the USSR. Zolo sums up the matter well when he writes:<sup>701</sup>

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<sup>698</sup> Reydams and Odermatt, above n 14, at 89.

<sup>699</sup> Madoka Futamura and James Gow “The Strategic Purpose of the ICTY and International Peace and Security” in James Gow, Rachel Kerr and Zoran Pajić (eds) *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the former Yugoslavia* (Routledge, New York, 2014) 15 at 15.

<sup>700</sup> Struett, above n 85, at 181.

<sup>701</sup> Zolo, above n 27, at 30-31.

In practice, a dual-standard system of international criminal justice has come about in which a justice ‘made to measure’ for major world powers and their victorious leaders operates alongside a separate justice for the defeated and downtrodden. In particular, international crimes of *jus in bello*, which are normally considered less serious than the crime of aggression, have been prosecuted relentlessly and in some cases punished with great harshness, in particular by the Hague Tribunal for the former Yugoslavia. At the same time, aggressive war, a crime predominantly committed by the political and military authorities of the major powers, has been systemically ignored. Even though it was described at the Nuremberg Tribunal as the ‘supreme international crime’, those responsible for such crimes retain impunity, occupying the summit of the pyramid of international power.

Here, then, the victor’s justice of the immediate aftermath of the Second World War had given way to a form of hegemon’s justice in the aftermath of the Cold War.

#### ***IV War: Rebuilding after Internal Armed Conflict***

Unlike the international military tribunals, the seats of the ad-hoc tribunals were established outside the *locus delicti*, that is, beyond the immediate conflict zones where the atrocity crimes occurred.<sup>702</sup> The chronically poor security situation in the conflict-affected former Yugoslavia shaped, in part, the decision to locate the ICTY outside the country, though issues relating to holding a trial in The Hague far from the relevant local communities—such as the ability of some local actors to freely distort perceptions of trial proceedings in their favour—was somewhat belatedly addressed through the ICTY’s outreach efforts.<sup>703</sup> Most of the tribunals’ official documents were not translated into local languages.<sup>704</sup> Nor was the Statute translated into local languages for some time. The geographic distance between the ICTY seat

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<sup>702</sup> Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, Cambridge, 2005) at 124.

<sup>703</sup> Cryer and others, above n 15, at 138.

<sup>704</sup> Rachel Kerr “Introduction: Trials and Tribulations at the ICTY” in James Gow, Rachel Kerr and Zoran Pajić (eds) *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the former Yugoslavia* (Routledge, New York and London, 2014) 1 at 5.

and the locations where atrocity crimes were committed partly reflects, and partly reinforces, the new centres of global power in New York, as neo-liberalism's financial hub—and, by extension, Washington, London, Paris, Moscow and Beijing—and partly reflects the status of The Hague as the symbolic centre from which international justice emanates. The seat of the ICTR was located in Tanzania, which is, of course, a state neighbouring Rwanda but which was also “metaphorically too distant from the people of Rwanda, who remain for the most part uninformed about and unaffected by the tribunal.”<sup>705</sup>

The establishment of the two ad-hoc tribunals impacted on the national judiciaries in the former Yugoslavia and Rwanda, respectively. Both tribunals had primacy over national courts, which could concomitantly hear cases falling within the tribunals' respective jurisdictions. These tribunals could claim superior jurisdiction in any such case, conduct investigations and try cases if it found the national court had acted improperly or in a way which did not serve the best interests of international justice.<sup>706</sup> The ICTR, for example, was never intended to replace the Rwandese justice system—which, after the genocide, comprised of only about 40 magistrates,<sup>707</sup> 14 prosecutors and 25 police inspectors across the entire country (out of a pre-genocide complement of 300 judges and lawyers in appellate courts and 500 in provincial courts<sup>708</sup>)—but rather, to focus on prosecuting the most senior of those accused.<sup>709</sup> The primacy enjoyed by the ad-hoc tribunals over the domestic courts illuminates the UN Security Council's relative neglect of rule-of-law reconstruction projects in the aftermath of internal armed conflict; whereas the ICTR's operating budget was about US\$90m per year, the international community provided only about \$US10m per annum over the first five years following the genocide to assist with

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<sup>705</sup> Cryer and others, above n 15, at 144.

<sup>706</sup> Gary Feinberg “The International Criminal Tribunal for the Former Yugoslavia: The Establishment and Evaluation of a Unique Concept in International Justice Administration” (2006) 2 *War Crimes, Genocide & Crimes against Humanity* 87 at 89.

<sup>707</sup> Akhavan, above n 659, at 509.

<sup>708</sup> Dutton, above n 91, at 123.

<sup>709</sup> Akhavan, above n 659, at 509.

reconstructing the Rwandan justice sector.<sup>710</sup> The tribunals' primacy comes partly at the expense of post-conflict states' legal systems, which suffer from unnecessary and often counter-productive neglect.<sup>711</sup> Moreover, the crimes lying at the heart of international trials are oftentimes removed from many citizens' experiences and are not the crimes which national courts will seek to pass judgement on in the future, providing uncertain grounds for normative developments around the rule of law.<sup>712</sup> As Pdraig McAuliffe laments "[a]t a time when the peace-building community was trying to reconstruct national institutions in Rwanda and the Balkan states, the international community was very publicly de-legitimizing the national judiciary, regardless of the extent to which it was reforming or restructuring, by denying them the chance to try local war criminals under the primacy model."<sup>713</sup>

While the primacy of ad-hoc tribunals had some deleterious impacts on national judiciaries, in Rwanda weak national institutions were buttressed by local traditional practices. The ICTR's narrow focus on selected individuals set the scene for what Lars Waldorf describes as "the most ambitious experiment in transitional justice ever attempted: mass justice for mass atrocity."<sup>714</sup> Rwanda resurrected a local dispute

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<sup>710</sup> McAuliffe, above n 182, at 6.

<sup>711</sup> At 190-191.

<sup>712</sup> At 9. McAuliffe argues, for instance: "while we readily accept the potency of successor trials to communicate political messages about human rights to divided communities and reorient court processes to this task, we ignore the more obvious potency of such trials to communicate how criminal procedure is supposed to work. While it is presumed that trials of war crimes or genocide will help ground the rule of law, we forget that these crimes have little or no relation to the ordinary crimes that ordinary citizens will now rely on the courts to resolve after the conflict. Both international criminal law and localised, grass-roots processes are valorised by their respective enthusiasts for the distance from the state justice system and manifest ambivalence about whether the state justice system should have a leading role in reckoning with the past. It is imperative that these blind-spots be brought to light by questioning the presuppositions and omissions in the literature."

<sup>713</sup> At 189.

<sup>714</sup> Lars Waldorf "Like Jews Waiting for Jesus: Posthumous Justice in Post-Genocide Rwanda" in Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds) *Localising Transitional Justice:*

resolution practice known as the *Gacaca* as a formal nation-wide system of community courts covering the large-scale participation of lower-level perpetrators. Notwithstanding the clamour surrounding the indigenous character of these courts, they bore little resemblance to Rwanda's customary dispute resolution practices. Instead, the Gacaca system was a state-based institution for prosecuting and imprisoning suspects under codified, rather than customary, law. It judged and provided sentences for serious international crimes even though these traditional practices sought only to remedy minor civil disputes. Its judges, over one third of whom were women, were elected and comparatively young compared to the traditional male elders. Unlike traditional hearings held before the entire community, these Gacaca proceedings were closed, involving only the parties and the *inyangamunga* (trusted persons who function as the Judges at Gacaca). The differences between traditional practices and this new nation-wide system of local courts signalled "the destruction of the social capital that underpins the traditional system."<sup>715</sup> Moreover, this new system has merely transformed the old Hutu-Tutsi identity markers into a new nomenclature of genocidaires-victims.<sup>716</sup> For Waldorf, this system represented another form of victor's justice as Kagame's regime excluded all war crimes and, hence, precluded potential atrocity crimes committed by the RPF from the Gacaca court's jurisdiction.<sup>717</sup>

Once the ICTY began to near the completion of its work it began referring cases back to national courts.<sup>718</sup> The United Nations Mechanism for International Criminal Tribunals (MICT) was established in late 2010 as a means of completing the work of the ad-hoc tribunals following the final trials and related appeals. The MICT ensures a judge and prosecutor will be available not only to try any of the few suspects who, having been indicted yet remaining at large as fugitives, are

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*Interventions and Priorities After Mass Violence* (Stanford University Press, Stanford, 2010)  
183 at 183.

<sup>715</sup> At 188.

<sup>716</sup> At 200.

<sup>717</sup> At 191.

<sup>718</sup> Cryer and others, above n 15, at 130.

apprehended, but also to review any subsequent appeals based on new evidence which might exonerate any of those convicted under either the ICTY or the ICTR.<sup>719</sup>

The establishment of both ad-hoc tribunals generated immediate impacts at the state-level. Becoming the subject of an indictment and the related arrest warrant can encourage leaders and potential leaders to flee.<sup>720</sup> It can also deter others who would otherwise associate with the accused, which makes it difficult for such suspects to exercise power over others within their state's jurisdiction.<sup>721</sup> This is particularly significant in Rwanda where:<sup>722</sup>

The ICTR has made its most obvious contribution by politically incapacitating the remnants of the Hutu extremist leadership responsible for the 1994 genocide... This is the result of the arrest as well as the stigmatization of those associated with the previous governments. Without the ICTR, it would have been much easier for the defunct Interahamwe to find political sympathisers, and to launch a more vigorous campaign against successor governments.

The establishment of both ad-hoc tribunals generated immediate impacts at the national level as well. Atrocity crimes trials can encourage “the progressive entrenchment of a more lawful self-conception” among local communities and national societies which, in turn, provides succour to those who are resisting leaders that exploit inter-ethnic tensions.<sup>723</sup> Whereas the promise of the ICTR may have helped to discourage some Tutsi from seeking revenge killings of Hutu,<sup>724</sup> cooperating with the ICTY featured as part of the ongoing tensions between staunch nationalists and multi-ethnic democrats.<sup>725</sup> The work of the ICTY does not merely affect those individuals who were prosecuted for, and found guilty of, committing

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<sup>719</sup> Schabas, above n 7, at 16.

<sup>720</sup> Payam Akhavan “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” (2001) 95 *AJIL* 7 at 12.

<sup>721</sup> At 15.

<sup>722</sup> At 23.

<sup>723</sup> At 13.

<sup>724</sup> At 24.

<sup>725</sup> At 21.

atrocities against Serb civilians. It also shapes the form of reconciliation within Serbian society and informs the transformation to a democratic culture by valorising the individual, with attendant voting rights, as the basic unit of society.<sup>726</sup> There is, however, a dearth of strong evidence indicating that international criminal tribunals contributed much to the reconciliation of warring factions, especially as in places, such as Bosnia, ethnic tensions continue to dominate national politics.<sup>727</sup> “Against this backdrop,” Akhavan argues, “the first experiments in international accountability could not have been expected to instantly transform an entrenched culture of impunity into an abiding respect for the rule of law... yet the potential impact of the ICTY and ICTR on political behaviour [could be] subtle and long-term, profound and lasting.”<sup>728</sup>

Ad-hoc tribunals also contribute to the process of identity formation in societies confronted with the legacies of atrocity crime. In particular, the establishment of both the ICTY and the ICTR has helped entrench individualism ahead of other possible identity markers. They may even understand themselves to be global citizens. Important variations exist on the ground, however, with the situation in Rwanda differing from that in the former Yugoslavia as Rwandese society is still suffering as a consequence of the ongoing armed conflict fought between government forces and Hutu insurgents; post-genocide Rwandese society appeared to many to be beyond repair and the travails of the daily struggle for survival overshadowed immediate consideration of prosecutions.<sup>729</sup> The trials occurring at the ICTR are, in part, an effort to protect the rights to “life, liberty, and security of person”<sup>730</sup> as a means of reconstituting Rwandese society along the lines of “social justice and respect for the fundamental rights of the human person.”<sup>731</sup>

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<sup>726</sup> At 8. The individual was not always considered the basic unit of society as at various times and places it had been family, tribe, caste, religious community and the polis. See Sledentop, above n 55.

<sup>727</sup> Bosco, above n 623, at 38.

<sup>728</sup> Akhavan, above n 720, at 10.

<sup>729</sup> At 23.

<sup>730</sup> Akhavan, above n 626, at 341.

<sup>731</sup> At 342.



The rise of the human rights agenda informing transitional justice initiatives is significant here. These initiatives are, as Chandra Lekha Sriram points out, “are not simply contemporaneous with peacekeeping; they share key assumptions about preferable institutional arrangements and a faith that other key goods—democracy, free markets, “justice”—can essentially stand in for, and necessarily create, peace.”<sup>732</sup> Yet such initiatives imposed by the international community, like liberal peacebuilding, can destabilise post-conflict countries as they may be inappropriate for certain politico-legal cultures.<sup>733</sup> The UN Security Council’s preferences for certain styles of legal accountability may not necessarily be a good fit with local requirements as:<sup>734</sup>

...the emphasis upon individual rights, obligations and accountability derives from a Western liberal vision of individual rights that may not be appropriate to cultures that emphasise group or community identity. Visions of rights and justice that are communally based may not arise where countless numbers perpetrated crimes but only few are singled out as “criminals”. Societies that engage in communally based treatments of wrongdoers may prefer reparations, exhumation and proper burial of victims, and of communal discussion of the reintegration of a perpetrator over individual accountability.

These types of individually-focused transitional justice initiatives may well be “a particularly poor model for states emerging from armed conflict... [and by s]imply embedding market forces without dealing with past grievances and inequalities may entrench old grievances or create new ones.”<sup>735</sup> This is, however, not to suggest that local practices are to be seized upon as better simply because they are indigenous.<sup>736</sup>

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<sup>732</sup> Chandra Lekha Sriram “Transitional Justice and the Liberal Peace” in Edward Newman, Roland Paris and Oliver P Richmond (eds) *New Perspectives on Liberal Peacebuilding* (United Nations University Press, Tokyo, New York, Paris, 2009) 112 at 112.

<sup>733</sup> At 112.

<sup>734</sup> At 122.

<sup>735</sup> At 114.

<sup>736</sup> At 124.

The establishment of these two ad-hoc tribunals and their impact on politico-social *identity-making* processes in the aftermath of mass atrocities must be seen in the context of politico-strategic *state-making* practices and politico-economic *market-making* practices in the aftermath of internal armed conflict. The democratisation occurring within the immediate aftermath of Yugoslavian balkanisation took various forms, depending on the territory in question. The Dayton Accord contained agreement on, inter alia, national elections for pan-Bosnian political institutions, including a three-member presidency, which has one from each of the three major ethnic groups, and a bicameral parliament. According to Paris “[t]he Dayton Accord explicitly sought to transform Bosnia into a liberal democracy on the assumption that doing so could reduce the likelihood of renewed fighting.”<sup>737</sup> While the election was generally seen as being free and fair and reflecting Bosnian’s electoral preferences, US negotiator Richard Holbrooke later pointed out that the election results served to buttress those individuals and groups who had triggered and waged the internal armed conflict. These circumstances rendered a vibrant and democratic Bosnian Government unfeasible, especially as many of the newly-elected hardliners appeared disinclined to engage in the democratic institution to which they had been elected.<sup>738</sup>

Croatia’s transition to democracy was different to the transition occurring in Bosnia, as post-war elections did not enshrine existing ethnic cleavages.<sup>739</sup> Chauvinist attitudes abounded during the 2000 election campaign, though the absence of an assertive Serbian community, one of the key parties to the conflict, may have dulled the appeal of, and enthusiasm for, various staunch forms of ethno-nationalism. As Paris elaborates: “In Croatia, the virtual elimination of the Serbian community as a serious political force removed the immediate threat to Croatian cultural security and may help explain why political liberalization did not seem to exacerbate divisions and tensions among formerly warring parties, as happened in Bosnia”<sup>740</sup>

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<sup>737</sup> Roland Paris *At War’s End: Building Peace After Civil Conflict* (Cambridge University Press, Cambridge, 2004) at 99.

<sup>738</sup> At 101.

<sup>739</sup> At 109.

<sup>740</sup> At 110.

The transition to democracy occurring within Kosovo was different still, as the territory was administered by international officials in what Paris describes as “the creation of a UN Protectorate.”<sup>741</sup> These international officials took responsibility for reconstructing governmental institutions, carefully managing the processes underpinning political liberalisation and training locals to eventually serve in a new bureaucracy.<sup>742</sup> There were, however, important similarities to the transition in Bosnia as Kosovo separatists gained power through democratic elections. The holding of elections which empowered secessionist individuals and groups occurred in spite of the then-UN Secretary-General Kofi Annan’s comments indicating he wanted to avoid repeating the “mistakes” made in the Bosnian elections which merely provided those who initiated the conflict with an unwarranted degree of legitimacy.<sup>743</sup>

These democratic reformations, occurring during the immediate aftermath of the Yugoslav conflict, were accompanied by the reconstruction of the economy along orthodox neoliberal lines, which McKinley would describe as resting upon “a form of dogmatic theology” intolerant of dissent.<sup>744</sup> As the socialism of Tito’s regime began to unravel during the 1980s and the USSR dissolved during the early 1990s, the IMF required Yugoslavia to implement draconian austerity measures, including eliminating trade barriers and food subsidies, devaluing the currency and curtailing funding of social services. By resulting in increasing levels of unemployment and economic inequality, these measures exacerbated existing tensions within Yugoslav society and between central government and its constituent republics. These factors are salient to understanding Yugoslavia’s rapid and violent disintegration.<sup>745</sup> In the conflict’s aftermath the Dayton Accord sought to promote economic growth by protecting private property and promoting a market-style economy, which included the IMF appointing the Governor of Bosnia’s new central bank.<sup>746</sup> International

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<sup>741</sup> At 213.

<sup>742</sup> At 215.

<sup>743</sup> At 217.

<sup>744</sup> McKinley, above n 74, at 107.

<sup>745</sup> Paris, above n 737, at 107.

<sup>746</sup> At 99-100.

peacekeepers played a role here by repairing much-needed housing and war-damaged infrastructure, including bridges, roads, and water and sewage facilities. These peacekeepers also helped establish the institutional structures and processes needed to manage a market economy, including the means of regulating the financial and commercial sectors, creating a central bank and founding a common currency.<sup>747</sup> Economic reform was limited while IMF officials waited until the necessary structures and processes for managing the economy were operating before implementing a full-scale structural adjustment programme in Bosnia.

The shift towards democratisation in Rwanda began with the Belgian colonial administration in the 1960s when, as a UN Trust territory, the country began to grow some of its key democratic institutions. The shift re-emerged in the early 1990s with the Arusha Accords, which sought to end the most recent internal armed conflict that began in 1990. At the heart of the Arusha Accords lies a desire to transform Rwanda from a single party system—with the National Republican Movement for Democracy and Development (MRND), the only lawful party since 1975—to a multi-party democracy. As Paris argues:<sup>748</sup>

Although the internationally-sponsored plans for democratisation and power sharing do not provide a complete explanation for the events of April 1994, they do appear to have provoked extremist members of the regime to act quickly—both in preparing for the massacres and in initiating the genocide immediately after Habyarimana’s death—in order to prevent the Arusha Accords from being implemented. At the very least, then, the effort to move Rwanda in the direction of democracy did not have the pacifying influence that international peacebuilders had hoped for and apparently expected. The international community had presented the plan for power sharing followed by democratic elections as a means of resolving Rwanda’s civil war, but attempts to foster peace and stability in Rwanda backfired, and in the worst possible way.

Rwanda, however, does not appear to have a “post-conflict successor regime” that is intent on fully implementing wholesale democratic reform. Kagame’s regime, while

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<sup>747</sup> At 106.

<sup>748</sup> At 75-76.

rebuilding much of Rwanda, stimulating economic growth and providing a measure of security, is also widely recognised as being increasingly authoritarian, despite handsomely winning elections in 2003 and 2008.<sup>749</sup>

Before this latest transition to democracy the Rwandan Government experienced “pressure from the international financial institutions to implement structural adjustment programs”<sup>750</sup> to reform its economy. In September 1990, for example, the Government agreed to reduce public spending and public debt, to privatise state-owned assets, to improve revenue collection and to eliminate export controls and subsidies, including for coffee producers, in exchange for financial assistance from the IMF and the World Bank.<sup>751</sup> These measures resulted in Rwanda’s declining economic performance during the early 1990s, which created conditions within which Rwandese communities became more susceptible to hate speech inciting atrocities against the Tutsi. As Michel Chossudovsky astutely recognises “the imposition of sweeping macro-economic reforms by Bretton Woods institutions exacerbated simmering ethnic tensions and accelerated the process of political collapse.”<sup>752</sup> This is very similar to the Yugoslav case.

This reconstruction of Yugoslavian and Rwandan conflict-afflicted state and economic structures was part of a broader and more profound transformation of particular locales during the 1990s, when UN Security Council-authorized post-conflict peacebuilding efforts “represented the most ambitious and concerted international effort to rehabilitate war-shattered states since the Allied post-war reconstruction of Germany and Japan. The attempted peacebuilding was nothing less than an enormous experiment in social engineering, aimed at creating the domestic conditions for durable peace within countries just emerging from civil wars.”<sup>753</sup> According to Paris:<sup>754</sup>

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<sup>749</sup> Waldorf, above n 714, at 185.

<sup>750</sup> Paris, above n 737, 71.

<sup>751</sup> At 71-72.

<sup>752</sup> As cited in Paris, above n 737, at 77.

<sup>753</sup> At 4.

<sup>754</sup> At 5.

Peacebuilding missions in the 1990s were guided by a generally unstated but widely accepted theory of conflict management: the notion that promoting “liberalization” in countries that had recently experienced civil war would help to create the conditions for a stable and lasting peace. In the political realm, liberalization means democratization, or the promotion of periodic and genuine elections, constitutional limitations on the exercise of governmental power, and respect for basic civil liberties, including freedom of speech, assembly, and conscience. In the economic realm, liberalization means marketization, or movement towards a market-orientated economic model, including measures aimed at minimizing governmental intrusion in the economy, and maximizing the freedom for private investors, producers, and consumers to pursue their respective economic interests.

Thus, the reconstruction of Yugoslavia’s and Rwanda’s state and economic structures as part of peacebuilding efforts was strongly informed by the desire to have these institutions engage more fully with the global free market and by the so-called Washington Consensus—that is, the view that prosperity in terms of economic growth in the developing world required international donors to encourage “recipient states to implement economic liberalization policies, on the grounds that deregulation and privatization of these states’ economies would create the most propitious conditions for sustained growth.”<sup>755</sup>

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<sup>755</sup> At 29. For more general criticism of Bretton Wood’s policies, see Joy Asongazoh Alemazung “Post-Colonial Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic and Political Development” (2010) 3(10) *JPAS* 62; Dženan Donlagić and Amra Kožarić “Justifications of Criticism of the International Financial Institutions” (2010) 55(186) *Economic Annals* 115; William Easterly *The Tyranny of Experts: Economists, Dictators and the Forgotten Rights of the Poor* (Basic Books, New York, 2013); Eurodad *World Bank and IMF Conditionality: a development injustice* (June 2006) available at [http://www.eurodad.org/uploadedfiles/whats\\_new/reports/eurodad\\_world\\_bank\\_and\\_imf\\_conditionality\\_report.pdf](http://www.eurodad.org/uploadedfiles/whats_new/reports/eurodad_world_bank_and_imf_conditionality_report.pdf); John Head *The Future of the Global Economic Organizations: An Evaluation of Criticisms Leveled at the IMF, The Multilateral Development Banks, and the WTO* (Brill, The Netherlands, 2005); and Ngaire Woods *The Globalizers: The IMF, the World Bank, and Their Borrowers* (Cornell University Press, Ithaca and London, 2006).

Yet this type of reconstruction employed by peace-builders “seems, paradoxically, to have increased the likelihood of renewed violence in several of these states.”<sup>756</sup> The politico-strategic and politico-economic interventions preceding the conflict in Yugoslavia were central to the growing crises and atrocity crimes committed therein.<sup>757</sup> The neoliberal reconstruction of the Yugoslav state and the opening up of the Yugoslav economy to the flows of goods, services and currencies from the Global North, undertaken from the late 1970s up until the wars of dissolution, has been identified by some scholars<sup>758</sup> as generating the very conditions of “socioeconomic inequality, insecurity, and human misery” within which social order breaks down.<sup>759</sup> In this context celebrating ICL enforcement upon particular individuals as some kind of ready-made antidote to outbreaks of armed conflict and atrocity crime obscures and, to an extent, normalises the roles played by those benefiting from the spread of neoliberal reform in pre-war and post-war Yugoslavia and Rwanda, among various other countries.<sup>760</sup> The ending of the Cold War heralded the demise of the last major obstacle—the USSR—to the US-led building of a neoliberal free market of global proportions, the first steps of which were taken in the immediate aftermath of the Second World War with the reconstruction of war-torn Germany and Japan. At this moment in time, Zolo explains, the US:<sup>761</sup>

had within its grasp the ‘extraordinary possibility’ of building a just, pacific international system based on the values of liberty, the rule of law, democracy, and the market economy. The foundations for this new world order were to be a system of ‘global security’, reflecting the ever increasing interdependence of economic, technological and communication factors on the planetary scale. Such a system would require the close cooperation of the nations in the three most highly industrialised areas on the planet: North America, Europe, and Japan.

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<sup>756</sup> Paris, above n 737, at 6.

<sup>757</sup> Krever, above n 25, at 718.

<sup>758</sup> At 715.

<sup>759</sup> At 719.

<sup>760</sup> At 721-722.

<sup>761</sup> Zolo, above n 27, at 46.

Here, then, neo-capitalism was for US policymakers in the aftermath of the Second World War what neoliberalism was for their counterparts in the aftermath of the Cold War. Although US foreign policymakers were at the forefront of both efforts, the political movement which they were furthering was *economic liberalisation*, which found support among many of the elite in other capitals around the world. The peace dividend following the Cold War was not to be lost. While the new power configuration resulting from the Cold War enabled the founding of two new institutions designed specifically to enforce ICL, these arrangements also marked a continuation of the politico-cultural civil war over modernity in which the new hegemon remakes war-torn countries and exerts control over the key institutions used to govern the politico-strategic and politico-economic dimensions of international life. It is a silent war, as Foucault suggested, underpinned by a force of arms but not expressed as a clash of arms in battle.

## ***V Conclusion***

The quest for international criminal justice in the aftermath of the Cold War was informed by the discourse against politico-cruelty, which was manifested so clearly in the establishment of the international military tribunals half a century earlier, but which now required a new set of propitious politico-strategic circumstances. While the US did not achieve a military victory over the USSR, its rise to global hegemon was facilitated by the USSR's dissolution and was the basis for the consensus forged within the UN Security Council which established both the ICTY and the ICTR. This signalled the end of a period of dissonance between the underlying discourse and the prevailing politico-strategic circumstances. As an extension of this new configuration of global power, the establishment of the ICTY and, to a lesser extent, the ICTR was driven more by the opportunity to exercise and demonstrate primacy in world affairs over these trouble spots, than to eliminate a threat posed by particular war-makers to the security of international society and its system. Moreover, the establishment of these two tribunals cannot be fully understood in isolation from the Washington Consensus pursued through the IMF and the World Bank, which was at play locally prior to the conflicts and, probably, played a significant role unleashing the armed



violence and mass atrocity. Efforts to liberalise the state and the economy intensified in the aftermath of these two internal armed conflicts and was accompanied by social engineering efforts. It was part and parcel of managing the expansion of the global neoliberal free market under the politics of economic liberalisation, though Rwanda itself had very little natural resource of high commercial value. As McKinley observes, Rwanda was not only regarded as “geopolitically and geoeconomically insignificant” but was also “accorded no obvious priority; ‘comfort measures’ were withheld from the mutilated and dying ethnic groups who numbered in the hundreds of thousands.”<sup>762</sup> It is in this set of politico-strategic circumstances in particular, and the broader material and ideational conditions more generally, that the ad-hoc tribunals were prepared as a stage upon which the second generation of international prosecutors of serious international crime would perform their legal functions.

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<sup>762</sup> McKinley, above n 74 at 39.

## CH. 6: ICTY AND ICTR INDICTMENTS

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### *I Introduction*

The discourse against politico-cruelty not only informed the UN Security Council's decision to establish the ad-hoc tribunals, but it also empowered the pre-trial efforts of the second generation of international prosecutors. This chapter opens by introducing the men and women who served as prosecutors at the ICTY and the ICTR. It then draws on empirical evidence extracted and collated from over 300 original and revised indictments as a means of illustrating the ways in which this second generation of prosecutors determined their various selections.<sup>763</sup> As these prosecutors developed their various approaches for selecting the charges, the respective Statutes provided frameworks for those decisions,<sup>764</sup> underscoring the P-5's power to deploy a form of hegemon's justice against unruly trouble-makers. At the same time, the prosecutor's selection of the accused drew attention to the particular utopian movements of Christo-Slavism and Hutu supremacy, though their ongoing emphasis on the politico-strategic dimension—which includes governmental, military and constabulary leaders, as well as their lower-level subordinates—overshadowed an important politico-economic dimension at play in these crimes. While the prosecution's early focus on Christo-Slavism is subsequently balanced, to some degree, with representatives from other ethno-national groups, no such balancing occurred within the ICTR, which was a much more one-sided affair. Moreover, just as gender-based crimes came into focus in a few of these indictments, so too did a very modest form of gender balancing. The chapter concludes that members of this generation, like their predecessors, breathed life into their formal

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<sup>763</sup> This chapter relies heavily on primary source material taken from the official ICTY and ICTR websites during 2015-2016: <http://www.icty.org> and <http://www.ictrcaselaw.org>. Not all indictments are published, however, and the ICTR website in particular has significant gaps. I have, therefore, taken a cautionary approach and based my analysis and assessment only on those documents that I have been able to locate and download. While this means the chapter falls well short of being authoritative, it is as close to a comprehensive treatment as I could manage without direct and unfettered access to the tribunals' archives.

<sup>764</sup> de Vlaming, above n 14, at 548.

prosecutorial mandates through their various approaches, yet each did so largely in accordance with the wishes of their politico-strategic masters, the P-5. Hence, as this second generation of international prosecutors illustrated their importance to ICL enforcement, they unveiled themselves as politico-legal actors deeply complicit with the values and interests of neoliberalism.

## ***II Second Generation of International Prosecutors***

A second generation of international prosecutors of serious international crime, comprising of Justice Richard J Goldstone, Justice Louise Arbour, Carla Del Ponte, Serge Brammertz and Justice Hassan Babacar Jallow, emerged from within the ad-hoc criminal tribunals.<sup>765</sup> By most accounts it was a difficult gestation period, particularly for the ICTY, as the UN Security Council bickered over candidates for the prosecutor's post. Consequently, the ICTY was left without a prosecutor for its first eighteen months. Cherif Bassiouni—an Egyptian-born academic already cited in this thesis—was a leading contender, but failed to garner Russia's support, possibly due to his Islamic faith. Luis Moreno-Ocampo, an Argentine lawyer who found fame by helping to prosecute his country's *junta*, had strong support from the US, but failed to attract sufficient enthusiasm from his own government.<sup>766</sup> A Venezuelan, Ramón Escovar Salom was appointed as the first ICTY prosecutor in October 1993. Salom took a Degree in Law and a Doctorate in Political Science from the Central University of Venezuela, holding academic positions at the Central University of Venezuela, the Centre for International Affairs at Harvard University and the University of Cambridge. He was Minister of Justice between 1964 and 1969, Ambassador to France between 1986 and 1989 and Attorney-General between 1989 and 1994. Although Salom was appointed as the first ICTY prosecutor, he resigned before ever assuming the post in favour of becoming Minister of the Interior. His

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<sup>765</sup> Unless otherwise indicated the biographical details of these prosecutors are taken from their official profiles listed on the respective websites: See <http://www.icty.org/en/about/office-of-the-prosecutor> and <http://unictr.unmict.org/en/tribunal/office-prosecutor/prosecutor>.

<sup>766</sup> Bosco, above n 623, at 36.

deputy prosecutor, Graham Blewitt, served as temporary prosecutor until Goldstone was appointed in July 1994.

Goldstone was, in effect, the ICTY's and the ICTR's first prosecutor, serving between August 1994 and September 1996. Goldstone graduated with a Bachelor of Arts Degree and a Bachelor of Laws Degree cum laude from the University of Witwatersund. Prior to his appointment Goldstone practised as an Advocate at the Johannesburg Bar, rising to Senior Counsel in 1976 and then to Judge of the Transvaal Supreme Court in 1980. During South Africa's transition from apartheid to democracy, he chaired South Africa's Commission of Inquiry regarding Public Violence and Intimidation between 1991 and 1994, which quickly became known as the Goldstone Commission.<sup>767</sup> Arbour was the second prosecutor to serve simultaneously at the ICTY and the ICTR between October 1996 and September 1999.<sup>768</sup> Her academic qualifications include a Master of Laws Degree (with Distinction) from the Faculty of Law, University of Montreal. She held a number of academic posts, the most senior of which was Assistant Professor and Associate Dean at the Osgoode Hall Law School, York University. Arbour was called, in 1971, to the Quebec Bar and, in 1977, to the Ontario Bar. Arbour was appointed to the Supreme Court of Ontario in 1987 and to the Court of Appeal for Ontario in 1990. Del Ponte, the third of the ICTY's prosecutors, served between 1999 and 2007; she was also the third ICTR prosecutor between 1997 and 2003 before her responsibilities were narrowed exclusively to the ICTY. Del Ponte graduated from the University of Geneva with a Master of Laws Degree and practiced law in her own firm from 1975 until 1981 when she was appointed Investigating Magistrate and then Public Prosecutor, focusing her prosecutorial efforts on financial, white-collar and organised crime. In 1994 Del Ponte became the Attorney-General of Switzerland.<sup>769</sup>

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<sup>767</sup> See generally Goldstone, above n 6.

<sup>768</sup> See generally Arbour, above n 75.

<sup>769</sup> See generally Del Ponte and Sudetic, above n 6. Del Ponte acknowledged that "I came from a prosperous place in a prosperous, multicultural country whose neutrality, wealth, political stability, and respect for local autonomy have underpinned its identity and shielded it from the ravages of war for so many decades. Perhaps, instead, my comfortable childhood and the ordered society in which I grew up gave me a sense of equilibrium, and I wanted to apply my

The fourth and final ICTY prosecutor is Brammertz, first appointed to the role on 1 January 2008 and reappointed in September 2011. He remains at the post, which he holds in conjunction with the post of prosecutor of the MICT, to which he was appointed on 26 February 2016. In addition to holding Degrees in Law and Criminology, Brammertz also holds a Doctor of Philosophy Degree in International Law from the Albert Ludwig University in Germany. He was professor of law at the University of Liege, a post he held until 2002, a year after which he was appointed the ICTY Deputy Prosecutor. The final ICTR prosecutor, Jallow, was appointed by the UN Security Council on 15 September 2003 and reappointed in 2011. He remained in that post until the ICTR ceased operating on 31 December 2015. Jallow studied law at the University of Dar es Salaam, Tanzania, the Nigerian Law School, and the University College, London, and is author of a number of publications concerning international criminal law, public international law and human rights law. Jallow was a State Attorney in Gambia from 1976 until 1982 when he was appointed Solicitor-General before serving as Gambia's Attorney-General and Minister of Justice between 1984 and 1994 and, later, as a Judge of the Supreme Court of Gambia. Prior to becoming the ICTR prosecutor, he was a Judge of the Appeals Chamber of the Special Court for Sierra Leone on the appointment of the UN Secretary-General in 2002 and, before that, conducted a juridical evaluation of the ICTY and the ICTR at the UN Secretary-General's request.

Just as the first generation of international prosecutors were supported by staff, so too were the ICTY and ICTR prosecutors. When Goldstone arrived at The Hague in 1994, he had a staff of 40, mostly from the US. By 1995 the number of staff had risen to 116, from 34 countries, though his budget provided for 126 positions. There were problems with recruitment, however, as the Registrar had the authority to hire and fire all ICTY staff, including the prosecutor's staff, and states that seconded staff into the ICTY had to pay the UN a 13 per cent 'subvention,' discouraging the seconding practice. At full capacity in 1998, the prosecutor's office had about 225

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talent and energy to the criminal-justice system in order to restore the balance other people lost in their lives through some wrong. Perhaps I simply inherited some deep-seated drive to vanquish evil." At 13.

staffers, though the structures constantly evolved and new units and positions were established as others were discontinued.<sup>770</sup> Staff numbers at the ICTR were similar: in 2006 there were 256 established posts, though when the ICTR was first established there was less than a dozen staff employed and, towards the end of 1995, there was about only 50 staff, mostly seconded from states, including 21 Dutch investigators.<sup>771</sup> This level of resourcing is significantly less than that of the IMT and the IMTFE. There were, moreover, varying degrees of competencies among staff, an issue provoking Del Ponte's ire, particularly at the ICTR, where she "discovered the inexperience and incompetence of about a dozen of them, which was making the workload on the others all the more burdensome and was significantly detracting from the quality of cases the Office of the Prosecutor was presenting."<sup>772</sup> The drafting of indictments was particularly woeful, as Del Ponte recalls:

The first draft indictment to come across my desk had a meticulous presentation of crime-scene evidence, but a flimsy fact-base linking this evidence with the political leader the indictment was supposed to be targeting. I cannot remember how many drafts I sent back to the staff attorneys because the linkage evidence was inadequate. I cannot remember how many meetings I had with attorneys and investigators to explain this problem. I know Louise Arbour rejected many draft indictments for the same reason.<sup>773</sup>

### *III Selecting the Charges*

As the ICTY's first active prosecutor, Goldstone's "first priority was to set the wheels of international prosecution in motion."<sup>774</sup> In his memoir Goldstone recalls being informed that the UN General Assembly's Advisory Committee on Administrative and Budgetary Questions had determined at least one indictment had to have been issued prior to his first meeting with them, in order to demonstrate that "the tribunal

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<sup>770</sup> Townsend, above n 1, at 227-234.

<sup>771</sup> At 246-253.

<sup>772</sup> Del Ponte with Sudetic, above n 6, at 134

<sup>773</sup> At 125.

<sup>774</sup> de Vlaming, above n 14, at 549.

was worthy of financial support.”<sup>775</sup> In his two years at the ICTY Goldstone issued at least 20 separate indictments containing a total of 612 war crimes charges, 364 charges of crimes against humanity and nine charges of the crime of genocide. Goldstone also revised and reissued at least seven of those indictments, reducing by 35 the total number of charges of crimes against humanity (three amendments added 21 further charges whereas eight amendments dropped 56 existing charges) and reducing by eleven the total number of war crimes charges (three amendments added 37 further charges whereas seven amendments dropped 48 existing charges); the charges of crimes of genocide remained nine.

As the second ICTY prosecutor, Arbour issued—and authorised her subordinates to issue—at least 13 indictments, though some of these were based on investigations that began under Goldstone’s tenure.<sup>776</sup> These new indictments included 110 war crimes charges, 92 charges of crimes against humanity and five charges of the crime of genocide. Arbour also amended and reissued 17 existing indictments. These reissued and amended indictments decreased by 43 the number of war crimes charges (nine amendments added 57 further charges whereas 14 amendments dropped 100 charges) increased by five the total number of charges of crimes against humanity (thirteen amendments introduced 31 further charges whereas five amendments dropped 26 existing charges); the number of genocide charges remained the same.<sup>777</sup> Arbour revised only one set of war crimes charges that she had originally proposed. Arbour, however, withdrew indictments against twenty individuals, which had been issued by Goldstone but which she deemed to be too low-profile.<sup>778</sup>

As the third prosecutor at the ICTY, Del Ponte issued at least 36 separate indictments, which, collectively, included 395 war crimes charges, 250 charges of crime against humanity and 13 charges of the crime of genocide. One charge of

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<sup>775</sup> Goldstone, above n 6, at 105.

<sup>776</sup> de Vlaming, above n 14, at 565.

<sup>777</sup> See, in particular, *Prosecutor v Kovačević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-24-I, 28 January 1998.

<sup>778</sup> de Vlaming, above n 14, at 565.

contempt of the tribunal was issued. On 120 occasions Del Ponte also revised and reissued existing indictments. When Del Ponte revised and reissued indictments that she had originally prepared, the effect was to reduce by 94 the number of war crimes charges (adding six new charges but dropping 100 existing charges) and to reduce by 38 the number of charges of crimes against humanity (adding 18 new charges but dropping 56 existing charges); charges of the crime of genocide increased by six, with seven new charges added and one existing charge dropped. When Del Ponte revised and reissued indictments prepared by either Goldstone or Arbour, the effect was to decrease by 58 the total number of war crimes charges (adding 45 new charges but dropping 103 existing charges) and to increase by 14 the total number of charges of crimes against humanity (adding 46 new charges while dropping 32 existing charges); charges of the crime of genocide increased by one, following the addition of four new charges and the dropping of three existing charges.

Brammertz, the last of the ICTY prosecutors, did not issue any new indictments, instead amending and reissuing at least 15 indictments. The effect of these amendments decreased by four the number of war crimes charges and decreased by two the total number of charges of crimes against humanity. Charges of the crime of genocide remain unaffected. This was very much in accordance with the Completion Strategy insisted upon by the UN Security Council, which, firstly, called “on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010” and then called “on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal.”<sup>779</sup>

In his role as the ICTR’s first prosecutor Goldstone issued at least two indictments, covering 29 charges of war crimes, 43 charges of crimes against humanity and 25 charges of the crime of genocide. Arbour issued at least five new indictments, including 14 war crimes charges, 28 charges of crimes against humanity

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<sup>779</sup> United Nations Security Council Resolution 1503 (S/Res/1503 (2003)) and United Nations Security Council Resolution 1534 (2004) (S/RES/1534 (2004)), respectively.



and 29 charges of the crime of genocide. Arbour also amended and reissued at least 12 existing indictments, which resulted in 23 war crimes charges, 56 charges of crimes against humanity and 40 charges of the crime of genocide. Del Ponte issued at least 16 indictments, which, collectively, included 13 war crimes charges, 61 charges of crimes against humanity and 39 charges of the crime of genocide. Del Ponte also amended and reissued at least 14 indictments, resulting in 35 war crimes charges, 97 charges of crimes against humanity, and 69 charges of the crime of genocide. As the final ICTR prosecutor, Jallow issued nine new indictments, including one indictment containing four contempt of court related charges. Taken collectively, these indictments included 14 charges of crimes against humanity and 15 charges of the crime of genocide; there were no war crimes charges among these indictments. Jallow also amended and reissued 24 existing indictments, the effect of which was 15 war crimes charges, 50 charges of crimes against humanity, and 45 charges of the crime of genocide. Jallow prioritised the crime's gravity, favouring crimes of murder, especially the murder of children and sex-related crimes.<sup>780</sup>

The rate at which indictments were issued and, in many cases, reissued (and reissued multiple times) varied throughout each tribunal's *caseload lifecycle*. At the ICTY Goldstone brought at least 985 charges in his two years in the job, whereas Arbour and Del Ponte brought at least 207 and 658 charges, respectively. In other words, Goldstone delivered charges at a rate of about 500 a year whereas Arbour delivered about 70 per year and Del Ponte about 80 per year, though the latter two also amended and reissued multiple existing indictments. At the ICTR Goldstone brought at least 97 charges, whereas Arbour, Del Ponte and Jallow brought at least 71, 113 and 29 charges, respectively. This means that Goldstone delivered charges at a rate of about 50 per year whereas Arbour and Del Ponte delivered about 23 charges per year and Jallow about ten per year, though the latter three amended and reissued multiple existing indictments too. There are a number of reasons for this variance, including Goldstone's decision to focus on low-hanging fruit, the discovery of new evidence, both incriminatory and exculpatory, and the changing circumstances within which prosecutorial discretion occurred.

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<sup>780</sup> de Vlaming, above n 14, at 561.

While the categories of serious international crime featuring in these indictments were determined by the UN Security Council when it authorised the ICTY and ICTR Statutes, the second generation of international prosecutors were largely free to select the particular charges that they each wished to put. Charges of the crime of genocide and crimes against humanity far exceeded war crimes within the ICTR. This reflected the UN Security Council's concern with the genocide ahead of the situation of internal armed conflict as well as the de facto immunity enjoyed by the RPF, shielded from prosecution by President Kagame. Significantly, when Arbour sought to indict an individual for genocide, war crimes and crimes against humanity, and the relevant judge rejected the genocide charge on the grounds of insufficient evidence, Arbour withdrew the case rather than prosecute only war crimes and crimes against humanity; this suggests that for at least one prosecutor "prosecuting charges other than genocide was a distraction from the Tribunal's mission."<sup>781</sup>

Within the ICTY, war crimes were predominant and genocide charges were rare, reflecting the armed conflicts unfolding throughout the dissolution of Yugoslavia. More specifically, the high frequency of war crimes charges occurring in Goldstone's indictments, especially when compared against genocide-related charges, reflects the ongoing internal armed conflicts occurring in Croatia and Bosnia at that time. In addition to the armed conflicts in Croatia and Bosnia, Arbour had to respond to the armed conflict that erupted in Kosovo during her tenure as prosecutor. While the frequency of war crimes charges here was comparable to the charges of crimes against humanity, genocide charges remained rare.<sup>782</sup> In addition to the wars of dissolution that confronted her predecessors, Del Ponte had to contend with new internal armed conflicts in Macedonia and in the Preševo Valley. She readily

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<sup>781</sup> Schabas, above n 7, at 78.

<sup>782</sup> According to Arbour "[t]he issuance of indictments, the arrest of indictees, and the unfolding of the story in the dramatic stage of an international courtroom disturb the semblance of peace that comes sometimes from ignorance, often from silence. But even more than the punishment of the perpetrator, it is the process itself, from beginning to end, that speaks the language of peace." See Arbour, above n 75, at 32.

concedes that “[g]enocide is the most difficult of international crimes to prove. It requires the prosecution to show beyond reasonable doubt that the accused intended to destroy a group of people physically; and persons contemplating genocide, particular as shrewd as Milošević, do not express a genocidal intention in public.”<sup>783</sup> Given the ICTY Statute was produced as a means of contributing to the restoration and maintenance of international peace and security, the prosecutors’ favouring of war crimes within the ICTY merely illustrates the UN Security Council’s concern not so much with the territorial disintegration of a sovereign state, since the self-determining new states were quickly recognised as sovereign unto themselves, but more with Serbians trying to prevent this balkanisation by using the military, armed force and ethnic cleansing. These unruly troublemakers are what Simpson would describe as *outlaw states* subjected to the disciplinary apparatus of the hegemons who “polic[e] the international order from a position of assumed cultural, material and legal superiority.”<sup>784</sup> In this sense, the wars of dissolution are not so much a direct threat to the entire international system in the way that World War II was, but rather, present a more localised opportunity for those with real power over the international system to discipline a former communist state through neoliberal reform. The prosecution’s selection of charges are, therefore, best understood as being part of a much larger phenomenon, identified by Paris, as “the globalisation of a particular model of domestic governance—liberal market democracy—from the core to the periphery of the international system” and, in the case of Rwanda especially, may constitute another “modern rendering of the *mission civilisatrice*—the colonial-era belief that the European imperial powers had a duty to ‘civilise’ their overseas possessions.”<sup>785</sup>

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<sup>783</sup> Del Ponte with Sedutic, above n 6, at 156.

<sup>784</sup> Gerry Simpson *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, Cambridge, 2004) at 5.

<sup>785</sup> Roland Paris “International peacekeeping and the ‘mission civilisatrice’” (2002) 28 *Review of International Studies* 637 at 638.

#### *IV Selecting the Accused*

Goldstone indicted at least 77 individuals under the auspices of the ICTY. Accusations focused on those who were either in positions of authority within local or national governance structures or were involved with the armed forces, constabulary or guarding prisons. The indictment of Serb leaders Radovan Karadžić and Ratko Mladić during a situation of armed conflict in Bosnia and Herzegovina even earned Goldstone an admonishment by the then-UN Secretary-General Boutros Boutros-Ghali for engaging in political matters.<sup>786</sup> Although Goldstone typically refrained from commenting publicly on his approach to selecting the accused for the ICTY,<sup>787</sup> others have described it as a pyramid strategy. This means that Goldstone began by deliberately investigating and prosecuting relatively low-level, but direct, participants in the commission of atrocity crimes, the prosecution of whom required less complex investigations than more senior figures, but whose testimony would lead on to evidence of crimes committed by more senior persons. Dragon Nikolić, the first person indicted by the ICTY, was a “small fish.” So too was Tadić, but Goldstone preferred to demonstrate the tribunal in motion.<sup>788</sup> Goldstone also tended to select his accused from those suspects who were already in custody, in part because the ongoing armed conflict made on-site investigation too dangerous,<sup>789</sup> and relied on evidence gathered by other organisations, which had conducted investigations into the atrocities.<sup>790</sup> While Goldstone’s criteria listed “the social sectors targeted for prosecution: politicians, the armed services and paramilitary groups as well as government officials at local, provincial and national level,”<sup>791</sup> this strong focus on those individuals involved in politico-strategic affairs also reveals deep ethno-national divisions and a corresponding prosecutorial bias. Goldstone, for

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<sup>786</sup> Schabas, above n 7, at 195. Goldstone considered Boutros-Ghali a “mercurial personality.” Goldstone, above n 6, at 100.

<sup>787</sup> de Vlaming, above n 14, at 549.

<sup>788</sup> Bosco, above n 623, at 37.

<sup>789</sup> de Vlaming, above n 14, at 550.

<sup>790</sup> At 551.

<sup>791</sup> At 552-553.

example, indicted 49 Bosnian Serbs, but only 20 Bosnian Croats, three Croatian Serbs, and two Bosniaks as well as a Serb and a Montenegrin.

Arbour's indictments produced a further 22 accused for the ICTY. Like her immediate predecessor, Arbour focused exclusively within the politico-strategic dimension. She did not, however, continue Goldstone's pyramid strategy when it came to launching investigations into atrocity crimes committed in Kosovo. As a consequence of this change in policy, no low or mid-level officials appeared in the indictments whereas Serb President Slobodan Milošević did.<sup>792</sup> Moreover, Arbour relied more heavily on the evidence discovered by the prosecution's own investigations and less on evidence provided by other organisations' investigations of suspected atrocity crimes. The pool of potential accused broadened beyond those already held in custody and Arbour introduced sealed indictments and sought greater levels of international assistance to arrest suspects. According to de Vlaming.<sup>793</sup>

A striking difference with her predecessor was Arbour's 'offence-driven' approach, which prioritized incidents based on the crime's gravity in order to target the highest possible defendants, such as 'Srebrenica, where there was massive loss of human life, and the promise of climbing up the chain of command to visit the responsibility of the highest echelons was greatest.'

Arbour's focus on politico-strategic affairs also signalled ethno-nationalist cleavages by indicting 15 Bosnian Serbs, but only five Serbs and two Bosnian Croats, echoing Goldstone's prosecutorial bias. Arbour went as far as to state that "leaders' crimes advanced group claims of entitlement, based, for instance, on alleged unsettled historical grievances or, worse, on assertions of racial, ethnic, or religious superiority."<sup>794</sup>

Carla Del Ponte indicted 58 individuals, maintaining strong focus on the politico-strategic dynamics which informed the conduct of the armed conflicts and the commission of atrocity crimes by indicting more senior officials than had any of

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<sup>792</sup> de Vlaming, above n 14, at 565-566.

<sup>793</sup> At 555.

<sup>794</sup> Arbour, above n 75, at 31.

her predecessors. Like Goldstone, she received a form of censure from the UN Secretary General when he felt that she had “entered in the discussion of more general political issues.”<sup>795</sup> Del Ponte explicitly connected her selection of the accused to the UN Security Council’s purposes of contributing to the restoration and maintenance of international peace and security; removing those local and national leaders who perpetuate armed violence would help restore peace within the former Yugoslavia. To that end, Del Ponte assumed lasting peace rested on investigations into all parties to the conflict.<sup>796</sup> This policy of *even-handedness* would broaden the prosecution’s politico-social perspective to include among Del Ponte’s indictments individuals belonging to nine separate ethnic groups: sixteen Bosnian Serbs; nine Serbs; eight Kosovo Albanians; seven Bosnian Croats; six Bosniaks; six Croats; two Montenegrin Serbs; two Macedonians; and two Croatian Serbs. While the new armed conflict in Kosovo and Macedonia increased the geographical spread of the atrocity crimes under the ICTY’s jurisdiction and can partially explain this enlarged perspective, Del Ponte’s even-handed approach to selecting the accused appeared to be based less on the gravity of crimes and more on the social groups to which the accused belonged.<sup>797</sup> She admits that she “was determined to present indictments against KLA leaders implicated in criminal activity. The tribunal’s credibility depended upon this. A war crimes tribunal that tries the accused from only one side of the given conflict is dispensing only a victor’s justice. This alone cannot help end the culture of impunity.”<sup>798</sup> Nevertheless, a clear prosecutorial bias in favour of politico-social representation is evident here too.

When considered collectively, the ICTY indictments overwhelming target Serb nationalists, presumably because Serb nationalism “served as the pacesetter of events and as the ideology that, ultimately, underpinned the most extreme forms of population politics.”<sup>799</sup> As Weitz explains further:<sup>800</sup>

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<sup>795</sup> Kofi Annan’s letter to Del Ponte is reported in full at Del Ponte with Sudetic, above n 6, at 105.

<sup>796</sup> de Vlaming, above n 14, at 558-559.

<sup>797</sup> de Vlaming, above n 14, at 566-567.

<sup>798</sup> Del Ponte and Sudetic, above n 6, at 88.

<sup>799</sup> Weitz, above n 468, at 191-192.

By the mid-1990s, the original ideological synthesis of communism and nationalism seems to have faded and was replaced by a Serbian nationalism couched in such extreme terms that it barred the participation of other peoples in the exclusive Serbian state that Milošević and his supports attempted to construct.... The genocide also developed because of a set of deeper historical factors, notably, the potency of nationalism, the continued commitment to communism on the part of important segments of the Serbian elite, and the typical—certainly by the 1990s—communist reliance on a powerful state to engineer the transformation of society.

But there was more than Serb nationalism at play here, though ethnic identity politics are extremely important. In order to create a special enclave in Europe, Serb nationalists relied on violence, including ethnic cleansing, to transform their society into their version of utopia. For Michael A Sells, religion played important roles as both a cause and a justification for the violence; he explains:<sup>801</sup>

Christoslavism maintains that Slavs are Christian by nature, that conversion to another religion entails or presupposes a transformation or deformation of the Slavic race, and that all Muslims in Yugoslavia (whether ethnic Slavs or Albanians) have transformed themselves into Turks and are personally responsible for the death of the Christ-prince Lazar at the Serbian Golgotha (the battle of Kosovo) and for the pollution of the Slavic race. At moments of crisis, the Kosovo ideology helps efface the boundaries between notions of religion and race and turn religious nationalism into the most virulent form of realist ideology.

Christoslavism is thus another modernist utopian movement emerging “in the long dissolution of Christianity and the rise of modern political religion.”<sup>802</sup>

In terms of the ICTR, Goldstone’s indictments accused 17 individuals, Arbour’s indictments accused 29 individuals, Del Ponte’s indictments accused 28

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<sup>800</sup> At 192.

<sup>801</sup> Michael A Sells *The Bridge Betrayed: Religion and Genocide in Bosnia* (University of California Press, Berkley, 1996) at xv & 51.

<sup>802</sup> Gray, above n 35, at 1.

individuals and Jallow's indictments accused six individuals.<sup>803</sup> Many of those indicted were ministers or senior officials in the Hutu-led government, held the position of *Bourgemestre* or *prefet* or counsellor, were members of the Rwandan armed forces and constabulary or belonged to the *Interahamwe*. Goldstone continued his pyramid approach, which guided his prosecutorial efforts at the ICTY. He investigated lower-level perpetrators within Rwanda's communes as he sought to gather evidence against more senior leadership roles, such as *Bourgemestres* and *prefets*.<sup>804</sup> Arbour, however, chose to investigate suspects who held power at the state level,<sup>805</sup> an approach that Del Ponte maintained. Businessmen and other individuals involved in managing aspects of the Rwandan economy were also indicted. Churchmen were transformed into the accused as were individuals involved in political parties and the associated movements. Journalists also featured here.

All of the ICTR indictments take aim at Hutu nationalism. Even though the notion of Hutu was largely constructed as an ethnic identity marker by the former Belgian colonial authorities, it formed the basis of an exclusive vision of Rwandan society.<sup>806</sup> Reminiscent of the Nazi's hatred of the Jewish people, a hatred of 'Tutsi' is central to this Hutu nationalist sense of being, though the hating group is no longer defined by a convergence of nationalism and race, but instead by the amalgamation of nationalism and ethnicity. The Tutsi were characterised as a homeless 'Other' who migrated to Rwanda before destroying Hutu dynastic rule in order to impose their despotic rule over the hapless Hutu. According to this reductive view, "Tutsi were proud, arrogant, tricky and untrustworthy... [whereas] Hutu were modest, loyal, independent and impulsive."<sup>807</sup> Linda Melvern captures well the utopian ends sought by Hutu when she describes the Hutu Manifesto of 1957 in the following terms:<sup>808</sup>

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<sup>803</sup> de Vlaming, above n 14, at 567.

<sup>804</sup> de Vlaming, above n 14, at 553.

<sup>805</sup> At 557.

<sup>806</sup> See generally Prunier, above n 101.

<sup>807</sup> Linda Melvern *Conspiracy to Commit Murder: The Rwanda Genocide* (Verso, London and New York, 2004) at 3.

<sup>808</sup> At 6.



The manifesto maintained that the problem in Rwanda was Tutsi supremacy.... A rallying point for this so-called social revolution was a belief that the Tutsi were not really Rwandans at all; they had overrun the country years before. For the Hutu the future of Rwanda meant freedom from Tutsi rule and for the Tutsi it means restoration of their dynamic customs and an end of Belgian colonisation. In turn, there were Tutsi supremacists who belied that the Hutu were by their very nature subservient.

This version of staunch Hutu nationalism became another failed modern utopian movement when state power was used to radically transform Rwandan society not merely by using violence to forcibly remove unwanted Tutsi from a particular geographic area but by using violence to destroy that group in its entirety. As one African specialist puts it, “[t]he Rwandese genocide is an example of an atrociously violent leap into some form of modernity. The lack of previous economic and social modernization was not its cause, but it created the conditions of its feasibility.”<sup>809</sup> A pernicious religious factor was evident in the role played by various Christian churches which, failing to provide an effective place of sanctuary for the genocide’s victims, functioned instead as sites for massacre.<sup>810</sup>

Even though the politico-strategic, politico-economic and politico-social dimensions of Hutu supremacy were addressed by the prosecutor, the indictments focused only on one side of the underlying armed conflict and did not address atrocity crimes committed by the RPF. No Tutsi and no member of Kagame’s RPF would stand trial, reminiscent of the victor’s justice in the immediate aftermath of the Second World War. From the outset, Goldstone had a fractious relationship with the Rwandan authorities, particularly over investigations and prosecutions.<sup>811</sup> While

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<sup>809</sup> Prunier, above n 100, at xxxvii.

<sup>810</sup> Timothy Longman “Church Politics and the Genocide in Rwanda” (2001) 31(2) *Journal of Religion in Africa* 163.

<sup>811</sup> de Vlaming, above n 14, at 550. Goldstone recollected that “[t]hose difficulties reached a climax when the Rwandan government demanded that I withdraw a request to the Cameroons to have Colonel Theoneste Bagasora transferred to trial to Arusha. Bagasora was the alleged leader of the genocide, and the government was determined that he should stand trial and face

Arbour discreetly commenced investigations into RPF crimes, no indictments were forthcoming, possibly because she feared some form of retaliation from Kagame's Government.<sup>812</sup> Del Ponte was less discreet and more aggressive,<sup>813</sup> announcing to the world in general and to Kigali in particular that she would launch 'special investigations' into Tutsi RPF army officers suspected of committing atrocity crimes.<sup>814</sup> Lacking support from the international community, including the P-5, and encountering obstructive authorities in Rwanda, these investigations did not result in any indictments during Del Ponte's tenure<sup>815</sup> despite her occasional public statements claiming indictments were imminent. Del Ponte maintains that the Rwandan Government lobbied the UN Security Council to have her removed as ICTR prosecutor in order to prevent her special investigations from bearing fruit.<sup>816</sup> Jallow refocused the prosecutorial effort squarely on the Hutu and the genocide.<sup>817</sup> Victor Peskin muses that Jallow did so in order to foster better relations with the Rwandan Government,<sup>818</sup> though Schabas suggests the decision may merely "reflect a genuine and sincere belief that the mission of the Tribunal is to address the 1994 genocide."<sup>819</sup>

Gender representation deserves a brief mention here since gender is an identity marker that is far more broad than the ethnic-based nationalism at play in the former Yugoslavia and Rwanda. Arbour was, of course, the first female to be appointed as an international prosecutor of serious international crimes. Before her arrival, however, Goldstone took a deliberate decision to give greater focus to gender-related crimes following some harsh criticism over his dealing with Duško Tadić, the first of

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execution in Kigali. Unwilling to compromise, I said I would prefer the tribunal to cease its activities rather than defer to the national courts of Rwanda." See Goldstone, above n 6, at 112.

<sup>812</sup> de Vlaming, above n 14, at 567-568.

<sup>813</sup> Bosco, above n 623, at 75.

<sup>814</sup> de Vlaming, above n 14, at 559.

<sup>815</sup> At 568.

<sup>816</sup> Dutton, above n 86, at 127; and Del Ponte with Sedutic, above n 6, at 233.

<sup>817</sup> de Vlaming, above n 14, at 561.

<sup>818</sup> At 568.

<sup>819</sup> Schabas, above n 7, at 79.

the accused to stand trial.<sup>820</sup> The cases against Tadić, Mucić, Furundžija and Kristić contained important gender-based crimes. Plavšić Biljana was the first female formally accused of committing serious international crimes in the ICTY. Pauline Nyiramasuhuko was first in the ICTR. This focus highlights the very important gendered dimensions not only of commission of atrocity crimes but also of the prosecution of those crimes.<sup>821</sup>

There are, however, some notable omissions in the ICTY and ICTR indictments. NATO could have been thoroughly investigated. Del Ponte explains why she did not indict NATO command, which was responsible for, among other acts, an attack on a passenger train crossing on a railroad bridge:<sup>822</sup>

No one in NATO ever pressed me to refrain from investigating the bombing or from undertaking a prosecution based upon it. But I quickly concluded that it was impossible to investigate NATO, because NATO and its member states would not cooperate with us. They would not provide us access to the files and documents. Over and above this, however, I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function. If I went forward with an investigation of NATO, I would not only fail in this investigative effort, I would render my office incapable of continuing to investigate and prosecute the crimes committed by the

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<sup>820</sup> de Vlaming, above n 14, at 552. In his memoir Goldstone also recalls being lobbied by NGOs and “besieged by thousands of letters and petitions signed by people, mostly women, from many countries, urging me to give adequate attention to gender-related war crimes. They pointed to the many reports of systemic mass rape in Bosnia and to the glaring inadequacies of humanitarian law in dealing with that crime... It led, among other things, to my appointing Patricia Sellers, a thoughtful international lawyer from the United States as my special adviser on gender, both in our office and in relation to our investigations and indictments.” Goldstone, above n 6, at 85.

<sup>821</sup> Del Ponte recalls that Plavšić “tried to talk to me woman to woman. Dressed in a stiff tweed skirt, like a proper British lady, she informed me that she was a doctor of biology and proceeded to describe the superiority of the Serbian people. Her nonsense was nauseating, and I brought the meeting to an end. I wanted to seek life imprisonment against her.” See Del Ponte with Sedutic, above n 6, at 161.

<sup>822</sup> Del Ponte and Sudetic, above n 6, at 60.

local forces during the wars of the 1990s. Security for the tribunal's work in Bosnia and Herzegovina as well as in Kosovo depended upon NATO.

On this occasion Schabas agrees with prosecutor when he writes that, “[p]rivately, many at the Tribunal said the Prosecutor had little choice because the Security Council would have shut down the entire operation if even serious consideration was given to prosecuting Americans, or other NATO nationals.”<sup>823</sup> To varying extents all of the ICTY prosecutors were “enmeshed in NATO’s political and military strategy.”<sup>824</sup> Here, then, while the discourse against politico-cruelty encourages an expansion of international criminal law, this expansion occurs only to the extent permitted by the prevailing politico-strategic circumstances.

## ***V Conclusion***

The second generation of international prosecutors’ selection both of charges and of the accused represents a further and more recent manifestation of the discourse against politico-cruelty. The indictments prepared under the auspices of the ICTY and the ICTR identify specific acts of politico-cruelty that cannot be tolerated, fulfilling a fundamental function in the pre-trial process. While the selection of specific charges reflected the will of the P-5 to demonstrate their primacy in the conduct of international affairs in the aftermath of the Cold War, the selection of suspects draws attention to two discredited utopian movements: namely Christoslavism and Hutu supremacy. The prosecutorial performance within the ad-hoc tribunals thereby constitutes a form of modernist world politics because these prosecutors seek to have their way over others for non-trivial purposes, not merely as an extension of the politico-strategic circumstances that established the ad-hoc tribunals, but also as part of a contest between proponents of neoliberalism and those that prove to be unruly troublemakers. There is no longer a contest between rival economic systems of global proportions. Significantly, the ICTR indictments included a few politico-economic actors whereas the ICTY indictments contained

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<sup>823</sup> At 77.

<sup>824</sup> Bosco, above n 623, at 65.

none whatsoever. This omission might reflect the unease of bringing to the world's attention both the complicity between the prevailing economic system of neoliberalism and the conditions giving rise to armed conflict and atrocity crime. The reluctance to indict economic actors might also reflect awareness that post-conflict reconstruction efforts will need to engage with local entrepreneurs and business owners without wanting to await their 'rehabilitation' as occurred in the aftermath of the Second World War. By shielding the politico-economic dimensions of atrocity crime from the quest of international criminal justice in the aftermath of the Cold War, these prosecutors function as servants of the great powers and their sovereign prerogatives, diverting attention away from the dominant politico-economic system and its violent eruptions and structural pathologies. Building on the content of the indictments prepared in the pre-trial phase, the first opening statements delivered, respectively, during the first trials held at the ICTY and the ICTR express both legal and political rhetoric as well as invoke the rhetoric of war.

## CH. 7: NIEMANN'S AND HAILE-MARIAM'S OPENING STATEMENTS

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### *I Introduction*

The discourse against politico-cruelty not only empowered the second generation of international prosecutors' preparation of indictments, but also animated the first opening statements at the ICTY and the ICTR, made by Grant Niemann and Yakob Haile-Mariam, respectively. Like the opening statements delivered at the international military tribunals, both these statements were vital ingredients in the trial process, announcing the commission of atrocity crimes expressed in the respective indictments, foreshadowing evidence of those crimes and seeking to preclude foreseeable defences. These orations proved fundamental to the reinvigorated enforcement of ICL. A close reading of these statements reveals the same legal rhetoric, self-consciously distinguishing itself from the world of politico-strategic power calculations and the ugly realities of armed conflict, as was used by the first generation of international prosecutors. There was no need for these opening statements to overtly vilify Christoslavism or Hutu supremacy as two discredited utopian movements given the extent to which neoliberalism was spreading beyond the US and parts of western Europe to many places throughout the world following the ending of the Cold War. Their prosecutorial conduct, nevertheless, produces a political rhetoric implicitly endorsing the neoliberal dispensation and thereby constitutes a form of politics. By denouncing the defendants and, thereby, calling for them to be cast out beyond the ranks of the human community, these statements contain a rhetoric of war too. When that war rhetoric is placed alongside the concerted and sustained efforts to reconstruct the former Yugoslavia and Rwanda in accordance with the Washington Consensus, then these prosecutors can be understood to be supporting those who manage the institutional architecture used to govern politico-strategic and politico-economic affairs in international life as a means of controlling the modernist project. Despite key differences, the continuities between the first and second generations of international prosecutors are striking, leading Part

II of this thesis to close by concluding that the second generation, belonging to international criminal tribunals established in the aftermath of the Cold War, are very much like their predecessors as agents of ICL, economic liberalisation and politico-cultural civil war.

## *II Rhetoric of Law*

Duško Tadić, a Bosnian-Serb accused of persecuting Muslims, was, as mentioned, the first person tried before the ICTY. According to his indictment, which was amended for a second time on 14 December 1995, Tadić stood accused of twelve counts of grave breaches of the Geneva Conventions of 1949, ten counts of violations of the laws or customs of armed conflict and eleven counts of crimes against humanity, though some counts were laid in the alternative.<sup>825</sup> Tadić's trial began on 7 May 1996. Following a further amendment of the indictment, which removed three counts charging the accused with forcible sexual intercourse, the bench seized upon the historic occasion to make a few preliminary remarks, placing law's majesty well above any political fray. The presiding judge, Judge Gabrielle Kirk McDonald, reflected upon the importance of fair trial standards before stating the judges "will be tryers of fact and we will apply the law to our findings."<sup>826</sup> Unlike the two trials at the international military tribunals, the indictment was not read aloud, though Tadić was asked if he understood the charges against him. Moreover, unlike at the international military tribunals, the ICTY's then chief prosecutor, Justice Goldstone, did not deliver the opening statement. Instead, Senior Trial Lawyer Grant Niemann delivered the first opening statement at the ICTY. And unlike Justice Jackson fifty years earlier, who took the best part of a day to deliver his opening address, Niemann took a mere two-and-a-half hours of the tribunal's trial time.

Placing this particular pursuit of international criminal justice within a broader project of maintaining international peace and security, Niemann explained to the bench that the ICTY was "created not only to administer justice in respect of the

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<sup>825</sup> See *Prosecutor v Tadić (Indictment (Amended))* ICTY Pre-Trial Chamber IT-94-1-I, 14 December 1995.

<sup>826</sup> *Prosecutor v Tadić (transcript)* ICTY Trial Chamber IT-94-1-T, 7 May 1996 at [10].

accused that stands before you, but there is an expectation that in so doing you will contribute to a lasting peace in the country that was once Yugoslavia.”<sup>827</sup> Niemann continued by giving focus to the composition and dissolution of the Socialist Federal Republic of Yugoslavia, particularly the ethnic divisions both preceding and outlasting the communist regime, the composition of military forces along ethnic lines and the ensuing internal armed conflict. He argued that to understand the conflict’s nature, the people of Yugoslavia and their ethnic composition, and the reasons why one ethnic group would want to so cruelly turn upon another with the intent of bringing about their destruction, it is first necessary to understand what Yugoslavia once was. The “bringing of Yugoslavia into a federation of states was the realisation of a dream,” according to Niemann, “but it also was an uneasy attempt to embrace the complicated mixture of diverse peoples, cultures, historic and religious traditions, and geography.”<sup>828</sup> Niemann’s opening statement then focused upon particular geographic areas and timeframes relevant to the Serbian forces’ military attacks and, in the context of those attacks, a “campaign of terror to drive out the non-Serbs and those ‘disloyal’ Serbs from the occupied areas” dubbed as “ethnic cleansing” by the Serbian extreme nationalist leader, Vojislav Šešelj.<sup>829</sup> In other words, it is clear that atrocity crime, such as persecution, torture, rape and murder, occurred in the shadows cast by an internal armed conflict.

The first trial held at the ICTR was of Jean-Paul Akayesu and it began on 9 January 1997. Like Justice Goldstone before her at the ICTY, Justice Arbour was absent from the opening of the ICTR’s first trial. The prosecutor’s opening statement was introduced instead by Deputy Prosecutor Honoré Rakotomanana. Before reminding the judges of their own roles during the trial, providing the context for the ICTR’s establishment and reflecting on reasons for the various delays in beginning the ICTR’s first trial, Rakotomanana declared that “[n]o matter which side of the bar you are on, our objective is one and the same; that is to say that we are here to eradicate the culture of impunity, which has reigned and which has destroyed the

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<sup>827</sup> At [11].

<sup>828</sup> At [12-13].

<sup>829</sup> At [19].



social fabric of Rwandan society. We are both trying to obtain national reconciliation, fair trials and justice.”<sup>830</sup> Like the ICTY, the indictment was not read aloud. Akayesu was asked in French, his native tongue, by the bench if he understood the charges facing him which, according to the amended indictment, included three counts of genocide, seven counts of crimes against humanity and five counts of violations of Article 3 Common to the Geneva Conventions. The substantive opening statement was delivered by Senior Prosecutor Yakob Haile-Mariam.

Haile-Mariam began his opening statement with an overview of the charges against the accused before dealing with the nature of Rwandan society, the road to internal armed conflict in Rwanda during the early 1990s and the genocide of 1994. Haile-Mariam’s statement then provided some of Akayesu’s personal and professional details, including his role as *bourgemestre* and his motives for committing genocide. The widespread and systemic attack on civilians, of which Akayesu’s crimes were a part, were sketched and two experts who were to testify before the court were named, including the late Dr Alison Des Forges. Haile-Mariam went on to deal with some questions of law, particularly the trial chamber’s need to determine the character of the armed conflict in Rwanda. The defence of *superior orders* was precluded by Haile-Mariam before the Genocide Convention and the Geneva Conventions were cited and the solemn nature of the collective task before the tribunal was reflected upon.

The first opening statements at the ad-hoc tribunals focused on armed conflict as a situation that underlies the commission of atrocity crime, rather than as a crime of aggression or a crime against peace, which was the case fifty years earlier at the international military tribunals. Niemann’s statement at the ICTY devoted a significant amount of space to describing the situation of internal armed conflict, particularly its causes which he saw as being rooted in diverging interests at the local and national levels.<sup>831</sup> Serbians perceived themselves as victims, especially of the

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<sup>830</sup> *Prosecutor v Jean Paul Akayesu (transcript)* ICTR Trial Chamber ICTR-94-4-T, 9 January 1997 at [7].

<sup>831</sup> *Tadić*, above n 826, at [13].

Nazi-backed Ustasha during the Second World War, and were deeply suspicious of other states within Yugoslavia. According to Niemann, a tension existed between “the Yugoslav ideal of one people and the ethnic divisions promoted by the nationalist interest of the various republics.”<sup>832</sup> Following the death of President Josip Broz Tito in 1980 the centre could no longer hold and the Federation began to collapse. The end was signalled on 6 March 1992 when Bosnia declared independence, followed on 7 April 1992 by the declaration of the Republika Srpska: “[A] brutal war ensued.”<sup>833</sup> Niemann provided the following description of activities which, occurring in the midst of armed conflict but following military occupation and the establishment of administrative controls over some of the civilian population, comprised ethnic cleansing:<sup>834</sup>

In those areas where the Serbs were not in control of the local administrations, including the police, every effort was made to undermine their authority. In most of the occupied cities, the Serbs set up ‘crisis headquarters’ which took over the control of the local government including the Territorial Defence. In those places where this occurred, the Serb population received advanced notice—the Bosnian-Serb populations received advanced notice of what was about to occur. In those cities where there was to be a Serbian attack either by the JNA, paramilitary groups or both, a significant proportion of the Bosnian-Serb population was evacuated before the attack commenced. This pattern repeated itself in a consistent manner all over Bosnia. Many Muslims tried to negotiate a resolution in the hope of avoiding violence. As a consequence, the Muslims did little in preparation for the Serbian attack. The military operations by the JNA and the pro-Serb military groups followed in a consistent pattern. Excessive amounts of artillery were used in the initial stages to shell non-Serb neighbourhoods in order to discourage resistance, non-Serbs were expelled from the area and where resistance occurred it was ruthlessly crushed. The artillery attack by the JNA was usually co-

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<sup>832</sup> At [14].

<sup>833</sup> At [18].

<sup>834</sup> At [20-21].

ordinated by the paramilitary groups who were assisted by Serb irregulars in street fighting and the rounding up of the non-Serbs of the district. The paramilitary group operated right across Bosnia. The rounding up of the non-Bosnian-Serb population was a systemic and thorough operation, with the paramilitary groups relying on local information and identification of the non-Serbs by the local irregulars. Once the non-Serb population had been collected together, they were then sorted: Women, children and elderly men were separated from the men of military age, although at times and in some places all men were separated from the women and children, making the women much more vulnerable to rape and mistreatment.

Having pointed out that mosques were deliberately destroyed, camps were established and rape and torture became commonly-used tactics, Niemann focused upon Tadić by describing his role before the fighting as a café and bar owner with an interest in martial arts, though he began to display intense Serb nationalism as the conflict loomed. Tadić was described as “an important source of intelligence” for the advancing Serb forces during the conflict and as “a person capable of identifying local Muslims, Croats and other persons disloyal to the Serb nationalist cause.”<sup>835</sup> Tadić assisted the Serbian artillery shelling of his home town of Kozarac and, in the immediate aftermath of the shelling, shot unarmed civilians who he knew to be Muslim. Following the successful attack Tadić visited the camps to carry out “assaults, murders, rapes, and sexual assaults on the prisoners that he had selected.”<sup>836</sup>

Haile-Mariam similarly provided background material for the internal armed conflict in Rwanda, which, lasting three years, began on 1 October 1990 when the RPF—comprising of Tutsi refugees, descendants of refugees and exiles—invaded Rwanda from their bases in Uganda.<sup>837</sup> The conflict was temporarily halted by the Arusha Accords, which sought to encourage power sharing among the RPF, the MRND and other rival political parties. The peace did not hold in Rwanda as the

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<sup>835</sup> At [26].

<sup>836</sup> At [34].

<sup>837</sup> *Akayesu*, above n 830, at [28].

Accord was opposed by Hutu supremacists. A series of assassinations in Kigali on or about 21 February 1994 offered “a prelude for the forthcoming apocalypse.”<sup>838</sup> According to Haile-Mariam the internal armed conflict was a precursor for genocide.<sup>839</sup>

[O]n April 6 1994, towards dusk, President Habyarimana’s plane was shot out of the sky, as it approached Kigali Airport, killing all aboard, including the president of Burundi. Then all hell broke loose. The planners of the genocide went to work with speed and precision. Shortly after the president’s plane crashed, and before any official announcement by Radio Rwanda was made, roadblocks went up around Kigali and environs and the killing of Tutsis and moderate Hutus began with chilling efficiency by the units of the Force Army Rwandese and the Interahamwe militia.

In his opening statement Haile-Mariam linked the actions of the accused to this crime of genocide: Akayesu was in a position of authority, which carried powers beyond those prescribed by law, and encouraged local civilians to approach him for advice, including informally settling disputes. Using his position of authority Akayesu gave a speech which incited the people of Taba to commit genocide,<sup>840</sup> ordered the killing of those Tutsis who, fleeing a neighbouring commune where they were being killed, sought Akayesu’s protection<sup>841</sup> and did nothing to prevent the murder of those people held at the local prison.<sup>842</sup>

Both opening statements signalled that the prosecutors intended to rely heavily upon witness testimony, differing from the international military tribunals which relied heavily on documentary evidence. Niemann informed the bench that he expected to call over 80 witnesses, including expert witnesses would speak to the armed conflict’s emerging international character and its politico-historical background, special fact witnesses who would show the international element

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<sup>838</sup> At [29].

<sup>839</sup> At [29-31].

<sup>840</sup> At [40].

<sup>841</sup> At [49].

<sup>842</sup> At [50].

underlying the Serbian armed forces operation within Bosnia and medical and forensic expert witnesses. Eye-witnesses to Tadić's atrocity crimes would offer the most significant evidence, however. Niemann elaborated his special concern here:<sup>843</sup>

For some of the witnesses the recounting of what occurred to them may cause them stress, more so than what one may ordinarily encounter in a national forum. The recounting by a number of people of the same events may reflect the horror and confusion of the occasion. This may sometimes prevent the neat and orderly dovetailing of the evidence, but such minor variations or descriptions will only serve to reinforce the reliability and integrity of their evidence, because it is almost beyond human capacity for two human beings to witness such appalling scenes and to later recount them with identical descriptions of what occurred.

Other forms of evidence included documents supporting expert witness testimony, video evidence, maps and photographs taken by ICTY investigators. Haile-Mariam similarly foreshadowed his use of expert witnesses to describe the conditions triggering the application of IHL<sup>844</sup> while confirming the existence of a situation of internal armed conflict in Rwanda between 1 January and 31 December 1994.<sup>845</sup> In addition to experts the prosecutor would draw on video footage of various killings, international news media and NGO staff who, as eyewitnesses, were to speak to the widespread and systemic attacks against the civilian population throughout Rwanda, as well as Akayesu's role in these atrocity crimes.<sup>846</sup> Like Niemann, Haile-Mariam stressed his concern that:<sup>847</sup>

The witnesses are persons who lived through the ordeal. Some of them survived death by dint of chance and others by heroic determination to live. Their words are irreproachable, because they have stared at death in the eye and brushed against it. Would their

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<sup>843</sup> *Tadić*, above n 826, at [47].

<sup>844</sup> *Akayesu*, above n 830, at [47].

<sup>845</sup> At [44].

<sup>846</sup> At [43].

<sup>847</sup> At [53].

judgements be impaired by the horror of death they were staring at? In our view, no. Because what we see in terror or extreme pleasure is usually indelibly embedded in our consciousness. As someone said, perhaps in jest, there is nothing like death which concentrates the mind. Men and women who brushed with death do not lie. The prosecution witnesses are simple family men and women who are struggling through life without intentions of hurting anybody.

The issue of translation also received comment, with the prosecutor suggesting that Akayesu can himself correct any inaccuracies as the evidence against him is heard,<sup>848</sup> no doubt placing an unwelcome burden on the accused and his defence team.

Whereas Niemann refrained from discussing applicable ICL rules, Haile-Mariam cited the Genocide Convention's definition of genocide as well as the Geneva Convention's provisions concerning attacks on civilians. Although the definition contained within the Genocide Convention states that genocide must target groups defined by nationality, ethnicity, race or religion, ambiguity remains around the exact composition of such groups. Haile-Mariam argued that these identity markers have a "broad and expansive meaning" and the Rwandese Tutsi's distinctive identity and common descent meant that group fell within the terms "ethnic" or "racial."<sup>849</sup> Haile-Mariam went on to argue that "[t]he fact that a group is political, social, or other group, is irrelevant, so long as the particular intent to destroy a group perceived by the killers as ethnic or racial is established."<sup>850</sup> He also noted that the ICTY's Appeals Court decision concerning the Tadić case—reflecting as it does on "elementary considerations of humanity"—means that IHL applies to any armed conflict, regardless of its international or non-international character.<sup>851</sup> Moreover, Haile-Mariam sought to preclude a superior order defence by arguing that no evidence existed to suggest that Akayesu was forced to commit atrocity crimes and, if there was pressure from his superiors, it was of a sort which he could resist.<sup>852</sup>

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<sup>848</sup> At [55].

<sup>849</sup> At [65].

<sup>850</sup> At [66].

<sup>851</sup> At [67].

<sup>852</sup> At [57].

Akayesu could have chosen to save the civilians under his authority without risk to himself.<sup>853</sup> As the prosecutor puts it:<sup>854</sup>

[I]t is almost trite to say that he should not have ordered the massacre of innocent people, because he was going to be [sic] reprimand, or because he was threatened with the loss of his position as bourgemestre, that is trite. Even death threats to him or his family, even if imminent, would not exculpate him from responsibility for the murder of innocent people. If that were proven, it would only help to reduce his punishment.

Here, then, building on the content of their respective indictments, this second generation of international prosecutors used their opening statements to frame their legal arguments. They did so by contextualising atrocity crimes within situations of internal armed conflict, foreshadowing evidence of those atrocity crimes subsequently submitted during trial and precluding any foreseeable defence rebuttals. The relative brevity of these statements signals a more self-assured and sure-footed legal approach based on various factors, including the civilian (as opposed to military) character of the tribunals, the tribunals' international nature derived from being a product of the international community (as opposed to an alliance of powerful states) where frequent assertion of sovereign prerogatives is eschewed more than welcomed, and the tribunals' seemingly neutral status vis-à-vis the internal armed conflicts. Moreover, these statements express a legal rhetoric, which self-consciously distinguishes itself from the Machiavellian world of politico-strategic power calculations, as though ICL enforcement is somehow above the cut-and-thrust of the national-level politics unfolding in post-conflict zones or immune from the politicking within the UN Security Council's chamber. The deliberate neutrality of their language suggests a conscious effort to eschew the emotive and rather grandiose oratory used by Jackson and Keenan and to favour a more technocratic rhetoric. As Haile-Mariam put it, the ICTR "was established by the Security Council as a collective expression of the international community for justice. It has, therefore, a

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<sup>853</sup> At [58].

<sup>854</sup> At [59].

mammoth task, as well as a historical opportunity, for adding one more brick to the great edifice of a more humane society, *where rule of law is elevated over force.*”<sup>855</sup> This legal rhetoric also reduces the ugly realities of internal armed conflict to background material, which, providing the required context for certain atrocity crimes, is not justiciable in itself. Vital to ICL enforcement, these statements echo expressions of the Security Council’s will to establish ad-hoc tribunals in the aftermath of the Cold War.

### ***III Rhetoric of Politics***

A close reading of these opening statements reveals an attempt to denigrate the discredited utopian movements of the accused in a way that is more subtle than the earlier vilification of Nazism as evil or Shinto-Imperialism as insane. Niemann, for example, depicted Christoslavism as being responsible for *unleashing* “unspeakable horror,” “human tragedy” and “absolute terror,” which the international community must confront “otherwise evil has no boundary.”<sup>856</sup> In other words, the staunch ethno-nationalism driving the Serbian utopian movement, while destructive, is not evil in itself. While much attention was given to Christoslavism’s politico-strategic dimension, particularly the evolution and use of the Serbian military and its militia, special focus was given to its politico-social dimension. On the one hand, notwithstanding the apparent shallowness of Milošević’s own Christoslavic convictions, the armed forces he controlled were deeply and, in many cases, fanatically religious without observing regular rituals and practices.<sup>857</sup> On the other hand, participants in this utopian movement, Niemann suggested, “either had anti-

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<sup>855</sup> At [21]. (Emphasis added.)

<sup>856</sup> *Tadić*, above n 826, at [11-12].

<sup>857</sup> Sells, above n 801, at 87. For Sells, “[t]he word ‘ethnic’ in ‘ethnic cleansing’ is a euphemism. Bosnian Serbs, Croats, and Muslims all speak the same language, despite the fact that for political reasons they each call it now by a different name. They all trace their descent to tribes that migrated to the area around the sixth century and were Slavic in language and culture by the time they settled in the area. Those who had been singled out for persecution have fallen on the wrong side of a dividing line based solely on religious identity.” At 13.



Muslim, ethno-centric political dispositions which was conducive to the performance of these deeds or, alternatively, they were sadistically predisposed towards violence and took pleasure in inflicting tremendous pain and suffering upon the helpless victims, and thus served as an agent of the authorities.”<sup>858</sup> The objective of ethnic purity, which lay at the heart of Christoslavism and was the purpose for which the persecution of Muslims and other acts of politico-cruelty were committed, was placed at odds with the co-existence of multicultural societies within a sovereign state. On these grounds alone, it was suggested, the Christoslavic utopian movement should be rejected by the bench and the wider audience-at-large. Sitting just below the surface of the oration too is a gentle rebuke of Tito’s Soviet-styled communism, which controlled, but only for a while, the contending ethno-nationalist forces but, eventually, let the destructive ethno-national genie out of the old socialist bottle.

While Haile-Mariam did give some focus to the politico-strategic dimension of the Hutu supremacy’s utopian movement, particularly when he discussed the Arusha Accord’s recognition of the need to “integrate the military of the country together with the RPF”<sup>859</sup> and the Hutu militia, known as the *Interahamwe*, more energy was devoted to explicating the movement’s politico-social dimension. Haile-Mariam was at pains, for example, to explain that:<sup>860</sup>

... the massacre of 1994 was not a spontaneous outburst of popular anger at the death of a beloved president, as some detractors would like us to believe, rather it appeared to be a carefully calculated, systematically planned, and meticulously executed carnage. *The ideological basis for the massacres was carefully laid down by branding all Tutsis as invaders, feudalists, and aristocrats, who have no right to live in Rwanda.* The ideology was disseminated by hate spewing Radio Mille Collines, Radio Rwanda, and an array of publications dedicated to incite the Hutu population to a frenzy of hate, to make sure that all non-Tutsi Rwandese participated in the killings so as to blur individual accountability.... Beaten into years of submission

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<sup>858</sup> Tadić, above n 826, at [34].

<sup>859</sup> Akayesu, above n 830, at [28].

<sup>860</sup> At [30-32]. (Emphasis added.)

and unquestioning obedience by a strong authoritarian state, the peasants obeyed the order to kill their neighbours, sometime their relatives, their wives, and their children. Your honours, the objective was to completely erase the Tutsi population in Rwanda so that, as one leader said, the next generation of Rwandese will ask, “What did Tutsis look like?”

As a means of dehumanising Tutsis the *genocidaires* relied upon the impulse to affirm one’s sense of self by degrading others and denying their claims to humanity.<sup>861</sup> Put in another way, the category of the Tutsi as *negated Other* was deliberately constructed and perpetuated for political gain. Former European colonial masters also receive rebuke here.<sup>862</sup>

During the colonial period, the benign and not always identifiable physical differences between Hutu and Tutsis were given an ideological content by the European colonizers. The Belgium colonialists graded the Tutsis as the top, Hutus lower down, and Twa at the bottom of the heap. The classification was reinforced with ID cards issued by colonial authorities. Hence forth the possibility of crossing over from being a member of the Hutu ethnic group to that of Tutsi ethnic group, depending on the amount of wealth one had, was closed for good with ID cards.

Even though neither Niemann nor Haile-Mariam articulated strong preferences for democracies, free markets or individualism in their opening statements, this does not mean that they are devoid of such preferences. Rather, their speech acts are, in this sense, acts of omission. The history of the events surrounding the armed conflicts and mass atrocities committed therein creates a responsibility for the prosecutors to identify all contextual factors, including western interventions, though these prosecutors fail to do so as they define their trial functions in narrow and reductive terms. Thus, a critical examination of these opening statements reveals preferences implicitly endorsing the status quo arrangements emerging in the

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<sup>861</sup> Akhavan, above n 626, at 348.

<sup>862</sup> Akayesu, above n 830, at [25].

aftermath of the Cold War. Significantly, neither opening statement criticised the role played by the forces of neoliberalism in creating the conditions encouraging armed conflict and atrocity crimes, despite, as Chapter 5 explained, the *conditionalities* of IMF support, most notably the structural adjustment programmes, stimulating the descent into internal armed conflict in both the former Yugoslavia and Rwanda in the early 1990s.<sup>863</sup> The UN Security Council’s limited action with respect to both the escalation of conflict and the commission of atrocity crime were also omitted in both statements. The prosecutors’ implicit endorsement of neoliberalism, which flows from their silence when the conditions for the existence of these atrocities—including, specifically, the impact of economic liberalisation under the Washington Consensus—called on them to speak, also silently endorses the views held by the most powerful members of the UN Security Council in the immediate aftermath of the Cold War. It suggests too that the key political contest here is no longer between the US and the USSR, as representatives of liberal democracy or communism, respectively, but is now between modernity’s proponents of neoliberalism and all others. Those who pursue alternative visions to neoliberalism are seen as unruly trouble makers who need to be disciplined by the rule of law or the force of arms, or both. Neoliberalism was becoming so entrenched by the mid-1990s that the prosecutors needed not articulate its values; they were implicitly understood by the international community to be the undisputed order of the day.

This has not gone unnoticed. Orford laments that “[t]he ‘myopia’ of international lawyers about the effects of the new interventionism means that, in general, international legal debate fails to address the ways in which the destructive consequences of corrosive economic restructuring contributes to instability, leading to further violence and denials of human rights.”<sup>864</sup> This is significant because, as Koskenniemi explains further, the entire field of international law “was born from a move to defend a liberal-internationalist project in a time of anger and opportunity”<sup>865</sup> and the legal profession has, since the ending of the Second World War, either

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<sup>863</sup> Paris, above n 737, at 72 and 107.

<sup>864</sup> Orford, above n 138, at 17-18.

<sup>865</sup> Koskenniemi, above n 24, at 75.

become “depoliticised and marginalised” or “turned into a technical instrument for the advancement of the agenda of powerful interests or actors in the world scene.”<sup>866</sup> “Non-intervention is intervention” he says, “namely intervention on the side of the status quo” and in so doing “throws light on aspects of international law’s involvement in the construction and maintenance of an international political and economic system.”<sup>867</sup>

To varying extents both prosecutors used their opening statements to suggest that this liberal movement somehow represents all humanity or, at least, the very best of humanity. While Niemann recognised that “[w]hat man has done to man in the cause of nationalism, or ethnic hegemony in the former Yugoslavia, strains the most agile of human reasoning,”<sup>868</sup> he did not talk explicitly of defending civilisation through the international rule of law. Instead, he views himself as a lawyer merely seeking to apply ICL on behalf of a community of states and their state-makers. Unlike Jackson and Keenan, Niemann did not need to persuade his audience-at-large of the virtues and necessity of trials, which had well-known precedents at Nuremberg and, to a lesser degree, Tokyo. Haile-Mariam did, however, claiming with the following flourish:<sup>869</sup>

[A]t this age of dawn of human rights, this first trial in the African continent for the violations of international humanitarian laws is one of the greatest leaps forward in the protection of human rights everywhere, with particular emphasis in the continent of Africa, at least in some parts, a continent racked by dictators, ethnic hate mongers, a continent in agony, epitomized by genocide in Rwanda. This trial, your Honors, is also unique in the annals of jurisprudence in our navigation of these uncharted waters of jurisprudence and, as an offshoot of our relentless prosecution of those suspected, it is our hope, also, that some jurisprudence will emerge to govern irrational actions of men and women in future. It is in this recognition of this historical

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<sup>866</sup> Koskenniemi, above n 36, at 3.

<sup>867</sup> Koskenniemi, above n 37, at 614.

<sup>868</sup> *Tadić*, above n 826, at [11-12].

<sup>869</sup> *Akayesu*, above n 830, at [68-69].

occasion, and responsibility, that we, at the prosecution, brace ourselves to our task with humility and keenly aware of the need to say or do nothing that may inflame the already incendiary ethnic relations in Rwanda, because our purpose here is not to do justice in the abstract, but to do a just justice for reconciliation and peace in Rwanda and to do our part in mending the tattered social fabric of the Rwandese society.... [W]e, at the prosecution, will do our utmost to meet the challenges and be worthy of the sacred trust humanity has entrusted us with. We will do our best in joining your honors in your historic task of rendering justice and in your attempt to exorcise the demons and scourge of genocide from the Rwandese social fabric once and for all.

Echoes of the civilising mission are easy to identify, especially as the statement endorses the superiority of modern Western culture through ICL's long reach. Perhaps more poignant, however, is modernity's penchant for reason as an end in itself and the modernist belief that humanity can be perfected through civilising, enlightened instruction. Whereas the first generation of international prosecutors were confronted by crimes committed by members of highly civilised societies; it appears Haile-Mariam confronts, on behalf of humanity, crimes committed by individuals embedded in Joseph Conrad's *heart of darkness*. They are not yet fully illuminated by the light of reason, which is grasped at here as some kind of antidote to the pathologies of armed conflict and other forms of illegitimate organised violence. He is, in this respect, more lawyer rooted in western modernity than African nationalist blaming the West.

Considered in light of these complexities, the distinction between legal and political registers of these opening statements dissolves as soon as ICL enforcement is understood as a form of modernist world politics, which is, of course, broader than the diplomacy of state-makers, though such diplomacy remains important. Indeed, the second generation of international prosecutors' opening statements were at once shaped by the politics of the UN Security Council and express rhetoric constitutive of modernist world politics. This rhetoric seeks to use power over others for non-trivial purposes not only by persuading the bench and the wider audience-at-large of the

accused's guilt, but also by tacitly endorsing neoliberalism as the dominant movement within modernity. Even though the politico-strategic circumstances evolved since the establishment of the international military tribunals, the efforts of the second generation of international prosecutors took place in trials which occur on stages reflecting, re-inscribing and extending existing power relations. These power relations, however, are not necessarily drawn along politico-strategic lines, as they have important politico-economic and politico-social dimensions too, and are utopian in their vision of reshaping the world. These configurations of power, having already constructed various instruments of control and organisations of global governance in the immediate aftermath of the Second World War, are focused in the 1990s more on maintaining control over those organisations and extending the reach of their instruments into the former USSR's spheres of influence and the former battlegrounds of the Cold War in central Europe and postcolonial Africa. Proponents of economic liberalisation, no longer favouring the neo-capitalism of the 1940s and fifties, wish to extent the depth and spread of neoliberalism.

#### *IV Rhetoric of War*

Both opening statements graphically describe particular acts of politico-cruelty, which, given their significance to this thesis, deserve to be quoted here in some detail. Niemann, for example, said:<sup>870</sup>

Defenceless and unable to negotiate a cease-fire, the terrified townsfolk, mostly Muslims and non-Serbs, desperately clinging to their white flags emerged in their thousands from their hiding places, in basements, under rubble and in creek beds. These people were not soldiers, they were not armed, they were for the most part civilians, including women, children and the elderly. They were the innocent citizens of this area. Serbian soldiers and local armed citizens, including Tadić, who by now had armed himself with an automatic weapon, ordered these unfortunate people into columns, to remain silent and to keep their heads bowed. They were then marched

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<sup>870</sup> Tadić, above n 826, at [27-28]; [35]; and [39].

through Zozarac, as the trophy of war, to the taunts and curses of the Serb on-lookers. Some of the Muslims and non-Serbs were pulled from the line and beaten or killed. The bodies of the dead were left beside the roads as the column marched by. Mother and fathers watched in horror as their military aged sons were pulled out from the column and shot before their very eyes. In the mid-afternoon on a day in June 1992, the accused Tadić entered the Omarska camp with a group of Bosnian Serbs. They went to the large garage building known as the 'hangar.' They proceeded to call out the names of a number of people, including Emir Karabasic, Jasmin Hrnica, Enver Alic, Fikret Harambasic and Emire Beganovic.... These men were then subjected to the most horrific beating and torture. Two other male prisoners were then called out forced to perform oral sex on Fikret Harambasic and then to sexually mutilate him. Karabasic, Hrnica, Alic and Harambasic died as a result of these assaults [....] Tadić also physically took part or otherwise participated in the torture of more than 12 female detainees, including several gang rapes.... [and] was aware of the widespread nature of the plunder and destruction of personal and real property of the non-Serbs and was physically involved in this plunder and destruction himself.

Haile-Mariam offered similarly vivid descriptions of acts of politico-cruelty committed by Akayesu:<sup>871</sup>

[O]n April 19<sup>th</sup>, 1994, Akayesu in a speech where he was addressing the people of his commune identified all Tutsis as the enemy and urged that they should be killed. He also ordered the killing of Tutsis who came from the neighbouring commune of Runda and other communes where they were being killed, to seek refuge and protection, which they, in vain hoped they would get from Mr Akayesu... Akayesu incited the Hutu population by telling them that they were going to be massacred by Tutsis, which immediately resulted in the massacre of the Tutsi minority.... Akayesu purposefully went and brought the Interahamwe militia, armed with machetes and long knives. He stood

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<sup>871</sup> *Akayesu*, above n 830, at [49-52].

by and did nothing when people were brought out of the prison of the commune and killed.... innocent children and babies were thrown into the river and drowned with the full knowledge of Mr Jean-Paul Akayesu.... Akayesu ordered the beating of three mothers of 15 children, all the three were mothers. One of the sisters was severely beaten, from which she fainted. Then Akayesu ordered the children, the 15 children to the checkpoint, which doubled as a slaughter spot. When the younger ones refused to go with Akayesu he told them that their fathers were waiting for them at the road with candies. Innocent as they were, they followed Akayesu and when they reached the roadblock the waiting crowd split their tender skulls with machetes.

These are no ordinary crimes. Signalling a key difference between the deplorable behaviour of the accused and the laudable behaviour of the prosecutors, such acts of politico-cruelty help justify the power relationships undergirding the two trials in particular and the pursuit of international criminal justice in general.

Rather than disqualifying the accused from humanity's ranks by describing them as evil or insane, as had the first generation of international prosecutors, both Niemann and Haile-Mariam demonstrate a more complex and nuanced understanding of the relationship between the accused's acts of politico-cruelty and the immediate circumstances underlying the two differing situations of internal armed conflict. They suggested that the capacity to commit these atrocity crimes was an intrinsic aspect of the accused's character, which lies dormant until their respective underlying politico-strategic situation changes during the course of an internal armed conflict. Instead of denouncing Tadić by characterising him in an overtly derogatory way, Niemann gave focus to the way in which Tadić underwent a metamorphosis from appearing "to get on well with the Muslim population and [who counted] among his close associates one Emir Karabasic"<sup>872</sup> to someone capable of committing atrocity crimes. The transformation is signalled by Tadić's increasing involvement in the Serb Nationalist Party as civil war approached. Haile-Mariam took an approach similar to Niemann's, saying that Akayesu "was seen as a gentle and amiable person, who drank

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<sup>872</sup> *Tadić*, above n 826, at [26].



beer with the local boys and played football with the local boys”<sup>873</sup> until the Prime Minister made a speech in which senior members of the Government made it clear that officials either side with them and support the killing or lose their positions of authority, after which “Akayesu succumbed and followed the avenue of killing, and ordering killings.”<sup>874</sup> Furthermore, Akayesu “initially appeared to comply with the Prefet’s order to protect ordinary people, and, at first, managed to keep things calm in his commune. Patrols were set up to keep residents safe from outside attackers and maintain security.” The prosecution notes that:<sup>875</sup>

All that began to change, however, after the interim government moved from the capital, Kigali, due to increased fighting, to Gitarama on April 12, 1994.... The Interahamwe militia, the killing machine of the Rwandese genocide, became more active and began a campaign which appeared to be aimed at eliminating Tutsis and driving the moderates of opposition party, MDR.

Akayesu simply acted in order to keep his job, status and the associated benefits of both. Stark contrasts are drawn to their victims’ innocence and virtue in order to illuminate the grotesqueness of the accused’s actions. Niemann ascribed virtue to Tadić’s Muslim victims who “were desperately trying to negotiate a peaceful settlement of the crisis, thereby avoiding bloodshed and destruction, [when] the Serbs attacked.”<sup>876</sup> Haile-Mariam also ascribed virtue to Akayesu’s Tutsi victims by focusing on their innocence, particularly when they sought protection from the man who would facilitate their death.

While both prosecutors refrained from engaging in a tribal war thesis—that is, attempting to explain the causes of the Rwandan genocide as “an unforeseeable and spontaneous outburst of primordial bloodlust,” which is merely a “reflection of ethnocentrism, if not an exercise at absolution from apathy in the face of immense human

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<sup>873</sup> *Akayesu*, above n 830, at [33].

<sup>874</sup> At [37-38].

<sup>875</sup> At [36-37].

<sup>876</sup> *Tadić*, above n 826, at [27].

suffering”<sup>877</sup>—neither offers a full explanation connecting the decisions of the global hegemon to the actions of the accused. As Akhavan explains.<sup>878</sup>

[C]ontrary to the simplistic myths of primordial ‘tribal’ hatred, the conflicts in the former Yugoslavia and Rwanda were not expressions of spontaneous bloodlust or inevitable historical cataclysm. Both conflicts resulted from the deliberate incitement of ethnic hatred and violence by which ruthless demagogues and warlords elevate themselves to positions of power.

Missing here, however, is an acknowledgement of the various roles played by foreign-led restructuring of Yugoslavia in the 1980s and 1990s, by the UK and France during the Rwandese internal armed conflict or by the UN Security Council’s actions, or inactions, to ensure international peace and security in Europe and Africa.

Although the capacity to commit atrocity crimes is understood to be an intrinsic part of the accused’s character unleashed only under certain conditions, that behaviour had to be condemned by the prosecutors as well as by those who authorise their mandates. Just as those Nazis and Shinto-Imperialists who committed crimes against peace could not be tolerated at the international military tribunals, those accused of atrocity crime in the 1990s are categorised as *hostis humani generis*. As a consequence of this denouncement, the accused, if found guilty, are deemed no longer fit to belong to the human species, at least symbolically, and must forfeit their liberty (but not their lives). Put simply, the atrocity crime is personalised in the figure of the accused, *hostis humani generis*, and as a representative of a utopian movement unleashing destructive forces into the world. They must be expelled, symbolically, from the human community. Denouncing the accused at the start of international criminal trials sharpened focus on the utopian movements of the accused, enabling them to be subjected to the disciplinary process of abjection. However, that the accused are denounced by virtue of their recourse to acts of politico-cruelty serves no obvious legal purpose within international criminal trial process. It does not strengthen, for instance, the prosecutors’ arguments concerning the nature of the

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<sup>877</sup> Akhavan, above n 626, at 329.

<sup>878</sup> Akhavan, above n 720, at 7.

alleged act, the guilt of the accused or the legal findings of the bench. Less dangerous than those who initiate international armed conflicts only to lose them, these deviants and troublemakers must be expelled and their utopian movements destroyed through “the often highly discretionary legal and political violence of the hegemon”<sup>879</sup> because their mere existence is an affront to those who enjoy positions of power and influence over modernist world affairs. Arbour underscored the urgency of taking action against these movements when she decried that “it is truly astonishing that powerful perpetrators of atrocities have not only remained unpunished over the years, but that they have not even been ostracized. It is the ‘them among us’ that must be addressed through the exposition of their crimes, because as long as they are among us, we are them.”<sup>880</sup> But the tone here is not belligerent as it was in the immediate aftermath of the Second World War. It remains a rhetoric of war but one which reflects, reinforces, and reproduces the power enjoyed by those in positions of superior authority within zones of privilege and prosperity.

This rhetoric of symbolic expulsion and excommunication is the rhetoric of war. It is war rhetoric not in the sense that it calls for waging of international or non-international armed conflict through a clash, or a series of clashes, of arms in battle. It is war rhetoric in the sense that it calls for, and normalises, the ongoing politico-cultural civil war fought through, firstly, the reconstruction of conflict-affected countries and, secondly, the enforcement of ICL in the aftermath of mass atrocity. Under these conditions the reconstruction of the state entails a shift toward democratisation through promoting periodic and genuine elections, establishing constitutional limits on governmental power and encouraging respect for civil liberties, such a freedom of speech, assembly and conscience. Concomitantly, the reconstruction of the economy entails a shift towards marketisation through a range of policy measures limiting governmental control over the market while maximising the ability of private investors, producers and consumers to protect and advance their

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<sup>879</sup> Simpson, above n 26, at 161.

<sup>880</sup> Arbour, above n 75, at 46.

own narrow interests.<sup>881</sup> The enforcement of ICL operates here like some covert fifth column. Modernity is remaking itself in terms determined by those in positions of power and influence in world affairs and it is done as a means of reflecting their values and serving their interests.

Throughout ICL's evolution—that is, since its beginning at the international military tribunals up until the ad-hoc tribunals of the 1990s—“we have seen the development in Western legal culture of a simplified version of the relationship between the exercise of judicial power at the international level, the phenomenon of war, the safeguarding of human rights, and the process of pacification.”<sup>882</sup> This simplified relationship is a function of politico-cultural civil war, illustrating the changing modalities of power at the global level from the efforts of the victors of the Second World War to transform zones they occupied and to establish an international architecture within which post-war international affairs would be conducted. As mentioned in Chapter 5, the US established itself as the global hegemon, setting and enforcing rules for international affairs in a manner underscored by the extraordinary material power of their armed force. As Schabas reminds us “[i]t may be worth recalling that those who effectively controlled the establishment of the United Nations tribunals, namely the permanent members of the Security Council, are essentially the same countries that set up the Nuremberg court (with the addition of China). In 1945 they were called the ‘great powers’, whereas today they are the ‘permanent five’. Same product, different packaging.”<sup>883</sup> He goes on to quip that “[i]n 1945 they claimed to act on behalf of ‘civilized nations’; today, they prefer a more modern and politically palatable term, the ‘international community.’”<sup>884</sup> Since the end of the Second World War, then, much of global politics occurs in the shadows cast by the Big Three. The forty-four year contest known as the Cold War (1947-1991) between socialism and liberalism has also given way to a neoliberal orthodoxy which, while ascendant, is not without challenge from the authoritarian

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<sup>881</sup> Paris, above n 737, at 5.

<sup>882</sup> Zolo, above n 27, at 158.

<sup>883</sup> Schabas, above n 7, at 77.

<sup>884</sup> At 77.

regimes of the People's Republic of China or the Russian Federation. Unlike the victor's justice pursued in the immediate aftermath of the Second World War, when prosecutors were appointed by, and reported to, the governments that had defeated the military forces led by those in the dock, the second generation of prosecutors were authorised by the UN Security Council, the five permanent members of which did not defeat those in the docks with their own military forces (though, as explained in Chapter 5, both the UK and France were seriously implicated in Rwanda's internal armed conflict). This second generation of prosecutors serve at the pleasure of the global hegemon who, when consensus among the P-5 prevails, sets and enforces the rules of international affairs on those occasions and upon those deviants and troublemakers when it suits their shared interests to do so. By reproducing these power configurations the prosecutorial opening statements examined in this chapter reduce and curtail the spaces available to voice and practice dissent, even when this dissent takes place far beyond the zones of privilege and prosperity.

## *V Conclusion*

The opening statements examined in this chapter constitute a tangible manifestation of the discourse against politico-cruelty, which comprises material and ideational conditions that shape the responses to the problem of atrocity crimes. Like the statements made by Jackson and Keenan fifty years earlier, Niemann's and Haile-Mariam's orations proved vital to the trial phase of enforcing ICL by announcing the commission of atrocity crimes, foreshadowing evidence of those crimes and precluding foreseeable defences in a legal rhetoric that self-consciously distinguishes itself from the world of politico-strategic power calculations. And like those earlier statements, these statements contain a political rhetoric, full of silences and omissions that serve neoliberal interests. Whereas neo-capitalism was, for the first generation of prosecutors, key to taking the first steps towards building a free market of global reach, neoliberalism was key to entrenching this utopian movement in the 1990s. "Detached from religion and at the same time purged of the doubts that haunted its classical proponents," Gray expounds, "the belief in the market as a divine ordinance became a secular ideology of universal progress that in the later twentieth century

was embraced by international institutions.’<sup>885</sup> There is more than politics occurring here, as Niemann and Haile-Mariam both invoked war rhetoric when they denounced Tadić and Akayesu as *hostis human generis*, calling for the bench to expel these men from the human community. Such calls were made in support of those who manage the politico-strategic and politico-economic institutions governing international life and, in so doing, helped wage a form of politico-cultural civil war for control of the modernist project that presents itself as a kind of policing act in these two cases.

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<sup>885</sup> Gray, above n 35, at 75.

## CONCLUSION TO PART II

By examining the institutional arrangements of the ad-hoc tribunals, including the formal prosecutorial mandates, Part II of this thesis recognises that the second generation of international prosecutors played vital roles in the enforcement of ICL during the aftermath of the Cold War. As agents of the law these prosecutors prepared indictments and made opening statements as well as conducted investigations, presented evidence and cross-examined witnesses, though, unlike the first generation of international prosecutors, they did not provide administrative support to the bench. Members of this second generation of international prosecutors indicted 161 persons under the auspices of the ICTY, 141 of whom had their proceedings concluded at the time of writing.<sup>886</sup> Between 1997 and the end of 2015, when it closed its doors for the last time, members of this second generation of prosecutors also indicted 93 persons under the auspices of the ICTR.<sup>887</sup>

While there was much commonality between the functional responsibilities given to both the first and second generation of international prosecutors, the pre-trial efforts of this second generation differed in various important respects from

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<sup>886</sup> ICTY “Key Figures of the ICTY Cases” available at <http://www.icty.org/en/about>. Between 1996 and the end of 2015, 18 of the 141 persons tried were acquitted, 13 were referred to a national jurisdiction and 20 had indictments withdrawn. Ten were reported dead before they could be transferred to the ICTY and nine died after transfer to ICTY. Of the 74 persons who received sentences, 20 pled guilty. Fifty have now served their sentences, 19 have been transferred to prisons in order to serve their sentences, two are awaiting transfer to serve their sentences and three have died while serving their sentences. Four of the accused are still at trial while 16 others are before the Appeals Chamber. There are no fugitives at large.

<sup>887</sup> ICTR “Key Figures of ICTR Cases” see instead <http://unictr.unmict.org>. Seventy-seven of those indicted have had their proceedings concluded at the time of writing. Of these 77, 32 are currently serving sentences in prisons in another state, six are awaiting transfers to a state in order to serve their sentences and fourteen have served their sentences. Fourteen were acquitted and released, two had their indictments withdrawn, three died before or while serving their sentence and two died before their judgment. Four have been transferred to another jurisdiction (two to Rwanda and two to France). Six persons are currently before the Appeals Chambers. There are nine fugitives at large, six of which are under Rwandan jurisdiction and three are under MICT jurisdiction.

Jackson's and Keenan's earlier approaches to drafting indictments. Firstly, the second generation of prosecutors were not beholden to their respective government's formal instructions<sup>888</sup> and none were US nationals. Secondly, this generation of prosecutors served consecutively, rather than concurrently, which meant the ways in which indictments were prepared evolved throughout the life of the tribunal. Thirdly, four ICTY prosecutors served concurrently as the ICTR prosecutor. Fourthly, the underpinning armed conflict had not yet ceased when the prosecutors began the indictment process, with fighting occurring in both Bosnia and Croatia.<sup>889</sup> This second generation of prosecutors seemed more subdued than their predecessors, particularly in the sense of taking a more assured legalistic tone in their opening statements, primarily because the work of that first generation made it possible to do so without the significant efforts of rhetorical justification. This signals an evolution of ICL to a point of self-confident maturity in its own understanding of its purposes, structures, processes and procedures as well as the growing acceptance of the endeavour's legitimacy as a preferred solution to the problem of mass atrocity. Notwithstanding these differences an important legal thread runs through these opening statements, the indictments upon which these statements draw and the legal instruments establishing international criminal tribunals. This thread has its roots firmly placed in the London and Tokyo Charters examined in Chapter 2 as well as in the material and ideational conditions described in Chapter 1 as the discourse against politico-cruelty.

Critically examining prosecutorial performance during pre-trial and trial phases, Part II went further than merely recognising this second generation of prosecutors as legal actors. For starters, the fact that a leader such as Milošević was put on trial, and certain Western leaders were not, implies the Western view of the relevant political and historical context is automatically correct and beyond dispute.<sup>890</sup> Taken together,

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<sup>888</sup> De Vlaming, above n 14, at 547.

<sup>889</sup> At 549.

<sup>890</sup> Martti Koskenniemi "Between Impunity and Show Trials" (2002) 6 *Max Planck UNYB* 1 at 17.



the ICTY and ICTR indictments signal important politico-strategic and politico-social dimensions of Christoslavism and Hutu supremacy, helping to discredit the failed utopian movements of the accused. The first two opening statements further discredit these movements while implicitly endorsing the neoliberal dispensation, which has emerged as the status quo at the end of the Cold War. There were, admittedly, significant attempts to bring a semblance of balance to the prosecutor's charge sheets. Del Ponte's even-handed approach resulted in greater inclusiveness of those suspects transformed into the accused, for instance. Yet rebalancing on the basis of the politics of representation placed the tribunals at risk of reputational harm. This is because representatives of some groups were indicted on the grounds of an identity politics, which also informed the actions of those accused of targeting others merely for their membership to a particular social group rather than for any specific act that they have done. Part II drew a political thread from these performances, intended for the most part to please those state-makers who established two ICL enforcement institutions in the aftermath of the Cold War, to the prosecutorial performances occurring at the international military tribunals. Whereas victors of the Second World War pursued neo-capitalism as the first step of building a global free-market, in the post-Cold War era the global hegemon pursued neoliberalism as a means of entrenching the global free market; as previously mentioned both neo-capitalism and neoliberalism are versions of *economic liberalisation*, which dates back to the 19<sup>th</sup> century liberalism. The quest for international criminal justice during the 1990s, it seems, occurred at the hegemon's pleasure.

By foregrounding the material and ideational conditions giving rise to the establishment of the ad-hoc tribunals, Part II also contends that when these indictments and opening statements are considered alongside the post-war reconstruction efforts in Yugoslavia and Rwanda, then the prosecutorial effort is, in effect, an extension of hegemon's justice by other means. By fulfilling their prosecutorial functions in a way that normalised democratic reform, individualism, and the free market, each assisted the furtherance of the Washington Consensus. In the aftermath of the Cold War—a major global conflict as significant for modernist world politics as the Second World War—the prosecutors positioned themselves as

auxiliary combatants of those who seek to maintain, extend and strengthen their control over the modernist project. In so doing, their silences and omissions reproduced the power configurations at play in modernist world affairs and concealed the consequences of neoliberalism. It would be wrong to suggest that individual prosecutors always fully supported the foreign policies of the US, but they seldom distanced themselves from the broader utopian movement of remaking the world through economic liberalisation. While this second generation of prosecutors maintained a rhetoric of war, this was no longer as belligerent as their predecessors. The time was more majestic, authoritative and ‘civil’, signalling that the politico-cultural civil war for modernity was now being waged as “a war of pacification” taking place beyond the “zones of prosperity.”<sup>891</sup>

Relying heavily on the widespread and deeply-held collective will to prosecute those individuals who commit acts of cruelty for some substantive ends, the second generation of international prosecutors furthered the interests of the executives who appointed them. They did so by leading the charge within two separate tribunals, both of which purported to adjudicate from a position of neutrality. Like the prosecutors at the international military tribunals before them, however, this neutrality was more apparent than real as the various prosecutorial efforts strengthened economic liberalisation ahead of both Christo-Slavism and Hutu supremacy, two rival modernist utopian movements. Notwithstanding the importance of the ideas of ethnicity and nationalism, this rivalry was more than an intellectual clash. Both rival utopian movements had enormous real world consequences not only for those who lived within the former Yugoslavia and Rwanda, but also for those who considered internal armed conflict and mass atrocity an affront to human dignity. Far from being neutral adjudicators of ICL, the ad-hoc criminal tribunals formed part of what Foucault would describe as silent war, underpinned by the force of arms where it was not waged through armed clashes, battles and armed conflict. By seeking to eliminate the leaders of rival utopian movements while rebuilding the war-torn machinery of government, markets, and communities, this second generation of

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<sup>891</sup> Herfried Münkler “Old and new wars” in Myriam Dunn Cavelty and Victor Mauer (ed) *Routledge Handbook of Security Studies* (Routledge, London and New York, 2010) 190 at 197.

international prosecutors help wage a politico-cultural civil war, firstly, by deflecting attention away from the motives informing post-conflict reconstruction efforts while normalising the geopolitical status quo and, secondly, by maintaining the false distinction among law, politics and war while prioritising certain aspects of the historical record. This second generation of prosecutors shared much in common with their predecessors, signalling there is more continuity than change in the ways in which both the first and the second generations set out to prosecute the most serious of international crimes. Part II of this thesis concludes that the second generation of international prosecutors of serious international crime, belonging to international criminal tribunals established in the aftermath of the Cold War, are agents not only of international criminal law, but also of the modernist world politics and politico-cultural civil war.

**PART III**

**THE QUEST FOR INTERNATIONAL CRIMINAL JUSTICE  
AND THE WAR ON TERROR**

## CH. 8: INTERNATIONAL CRIMINAL COURT

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### *I Introduction*

Offering a proven and enduring paradigm for state-makers wishing to confront those who commit serious international crimes, the discourse against politico-cruelty needed to be accompanied by yet another altered set of propitious politico-strategic circumstances before the ICC would be established. This chapter argues, firstly, that the broad-based consensus for establishing the ICC not only reflects the degree to which much of the international community has its strategic thinking informed by the discourse against politico-cruelty, but also signals the extent of US estrangement during the few years leading up to and during the US-led War on Terror. As Bosco usefully suggests “[t]he ICC was negotiated in a very different climate from the one in which it would operate”<sup>892</sup>—a climate, that is, which offered a unique window of opportunity for NGOs in particular to play important roles in drafting the Rome Statute and encouraging its ratification. The chapter argues, secondly, that the ICC was designed less as a means of securing victor’s justice or enforcing hegemon’s justice and more as the fulcrum of a legal regime that pursues victim’s justice by combating the impunity enjoyed by some local and state-level leaders around the world. Victim’s justice is, however, the marketable face of NGO/donor justice and is further evidence of the extent of neoliberalism’s entrenchment in contemporary world affairs. The chapter argues, thirdly, that the establishment of the ICC, six decades after the founding of the UN and the Bretton Woods institutions, completes the tripartite architecture for governing modernist world affairs. As such, the ICC’s workload cannot be fully understood in isolation of the politics of economic liberalisation, especially in those parts of Africa rich in natural resources required to fuel the globalising world economy. The connection between the pursuit of international criminal justice and the ongoing reformation of local politico-strategic and politico-economic governance arrangements, which facilitate the free market’s exploitation of natural resources, has not gone unnoticed by Africans in particular.

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<sup>892</sup> Bosco, above n 623, at 72.

This has stimulated calls for an African court equipped to prosecute western firms for illegal commercial activities on the continent and has, in part, led to the adoption of the Malabo Protocol.<sup>893</sup> A resurgent anti-colonial nationalism might also be informing the decisions of some African leaders to withdrawal from the Rome Statute.

## ***II Politics: Consensus among the Like-Minded Group***

The experience of overseeing the ad-hoc tribunals probably encouraged efforts to build a more enduring and wide-reaching court,<sup>894</sup> particularly as the various costs associated with those tribunals discouraged state-makers from establishing more courts along those lines.<sup>895</sup> According to Cassese “the logistics of setting up the two ad hoc tribunals strained the capabilities and resources of the UN and consumed the [Security Council’s] time. The [Security Council] found itself frequently seized with issues and problems concerning these tribunals and their administration, and as a result became less inclined to establish other similar organs.”<sup>896</sup> *Tribunal fatigue* may have prompted a shift away from using the enforcement powers of the UN

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<sup>893</sup> Amnesty International *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, available at <https://www.amnesty.org/en/documents/afr01/3063/2016/en>. Article 28L Bis of the Protocol on the Statute of the African Court of Justice and Human Rights (as amended by the Malabo Protocol) states: “Illicit exploitation of natural resources” means any of the following acts if they are of a serious nature affecting the stability of a state, region or the union: (a) Concluding an agreement to exploit resources, in violation of the principle of peoples’ sovereignty over their natural resources; (b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned; (c) Concluding an agreement to exploit natural resources through corrupt practices; (d) Concluding an agreement to exploit natural resources that is clearly one-sided; (e) Exploiting natural resources without any agreement with the States concerned; (f) Exploiting natural resources without complying with the norms relating to the protection of the environment and the security of the people and the staff; and (g) Violating the norms and standards established by the relevant natural resources certification mechanism.

<sup>894</sup> Goldstone and Smith, above n 15, at 110.

<sup>895</sup> At 106.

<sup>896</sup> Cassese, above n 15, at 328. This point did not make it into the revised 2013 edition.

Security Council as a means of pursuing international criminal justice toward a treaty-based approach still linked to the UN Security Council but not necessary hostage to the travails of its dynamic agenda or the interests of its veto-wielding P-5. While the ad-hoc tribunals were being established by the UN Security Council under Chapter VII of the UN Charter, a road was being paved for a more permanent institution for enforcing ICL: in particular, the debates focusing on the ICTY's establishment within the UN Security Council revealed that plans for a permanent international criminal court were being discussed back then.<sup>897</sup> The negotiations establishing the ICC must be understood, then, within a similar set of politico-strategic circumstances that gave rise to the ad-hoc tribunals in the aftermath of the Cold War, though, of course, these negotiations, occurring in Rome, were not constrained to the same extent as those that took place within the UN Security Council during the mid-1990s. Having negotiations occur beyond the Council's chambers opened up opportunities for non-state actors to foreground their own views and actions, for instance. As Michael J Struett puts it:<sup>898</sup>

The existence of a unique set of circumstances in world politics was an important condition that facilitated the success of NGO efforts at discursive persuasion. The end of the Cold War, the tragic developments in the former Yugoslavia and the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the election of Tony Blair as British Prime Minister, among countless other local and global factors, were all crucial developments that facilitated the prompt establishment of an ICC. The end of the Cold War removed the tendency to view every international conflict in terms of its implications or the categorical struggle between the West and the East.

This is not to say that NGOs and other members of global civil society were absent during the establishment of the military and ad-hoc tribunals, or that these groups did not support certain prosecutorial efforts. Rather, it is to emphasise that such efforts surrounding the negotiation of the ICC were both more extensive and intensive,

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<sup>897</sup> Struett, above n 85, at 88.

<sup>898</sup> At 25.

gaining greater prominence than before. As Bosco explains “the period between the end of the Cold War and the 9/11 attacks had likely been a unique and limited window to launch the ICC. For that brief period, the security and sovereignty concerns of certain major powers were reduced enough for several of them to acquiesce to the court.”<sup>899</sup> This is not to imply, however, that the security concerns of the major powers are identical, but rather that these concerns are underpinned by the ongoing propagation of a neoliberal agenda, of which the governing global elite have a stake in entrenching and protecting. This was the most recent moment of consonance between the underlying discourse and the prevailing politico-strategic circumstances.

The ICC’s diplomatic roots can be traced back to 1989 when Trinidad and Tobago requested the UN General Assembly consider establishing a court designed specifically to try cases of transnational drug trafficking. The draft statute produced in 1994 by the ILC for an “international drug court” served as a basis for the statute that would establish the ICC, though “much to the chagrin of some, despite its critical role in forming the court, international drugs crimes would not be within the ICC’s jurisdiction.”<sup>900</sup> It is possible that the regulation of commercial activity—even illicit commercial activity—was at odds to the underlying free-market ethos circulating among the world’s elite during an era of intensifying globalisation. The ILC’s draft statute was examined by an ad-hoc committee established for that purpose and, in 1996, the General Assembly established a Preparatory Committee on the Establishment of an International Criminal Court, which drafted the text of a possible treaty. Following the decision to hold a Diplomatic Conference at Rome on the issue, the Committee submitted both a draft Statute and a draft Final Act which, spread over 173 pages, included “some 1300 words in square brackets, representing multiple options either to entire provisions or to some words contained in certain provisions.”<sup>901</sup> At the 1998 Rome Conference the negotiation of these bracketed

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<sup>899</sup> Bosco, above n 623, at 72.

<sup>900</sup> Goldstone and Smith, above n 15, at 96-97.

<sup>901</sup> Cassese, above n 15, at 262-263.



sections of specific text proved slow going as these discussions took place in informal committees which agreed by consensus only.<sup>902</sup>

During these negotiations three major groups emerged, the largest of which was the so-called like-minded group of states which included Canada, Australia, UK and France among its sixty members. These states believed they could design a global architecture for the pursuit of international criminal justice, which would be considered fair and legitimate by the most of the international community because members of the group lacked great power status.<sup>903</sup> This group played a progressive and constructive role as a force driving the negotiations, offering specific remedies to contentious text.<sup>904</sup> Among this group Germany supported a strong and independent ICC, promptly ratified the Rome Statute and publicly encouraged other states to ratify.<sup>905</sup> Dutton believes that in so doing Germany sought to “distance itself from its shameful past” and its nationals whom the IMT found guilty.<sup>906</sup> Germany was also asserting its leadership within the EU.

The efforts of the group of like-minded states were informed, shaped and buttressed by NGOs advocating for a strong independent prosecutor (with *proprio motu* powers) and an ICC capable of exercising jurisdiction over atrocity crimes.<sup>907</sup> As early as the beginning of 1995, some NGOs met in New York in order to better coordinate their advocacy efforts, forming the Coalition for an International Criminal Court (CICC).<sup>908</sup> Some of the NGOs involved themselves at an early stage of the negotiations through a Committee of Experts which, led by Cherif Bassiouni, drafted a statute for the establishment of an international criminal court with jurisdiction over all international crimes as the UN General Assembly and the ILC devoted themselves to similar tasks.<sup>909</sup> Represented at the Conference in large numbers—officially-

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<sup>902</sup> Cryer and others, above n 15, at 47.

<sup>903</sup> Bosco, above n 623, at 39.

<sup>904</sup> Cryer and others, above n 15, at 148.

<sup>905</sup> Dutton, above n 91, at 72.

<sup>906</sup> At 74.

<sup>907</sup> At 14.

<sup>908</sup> Bosco, above n 623, at 39. Refer to <http://www.coalitionfortheicc.org>.

<sup>909</sup> Struett, above n 85, at 73.

accredited NGOs outnumbered states by a figure of 236 to 160<sup>910</sup>—NGOs pursued their various objectives by presenting papers and lobbying delegations.<sup>911</sup> Some members belonging to NGOs participated on delegations as consultants and others as full members of delegations; Canada and Costa Rica are two examples where such representations were offered as a symbol of goodwill. The limited capacity of numerous smaller delegations to engage with, and fully understand, many of the important proposals was ameliorated, to a modest extent, where these delegations had ongoing access to the legal expertise provided by NGOs.<sup>912</sup> At least 30 less developed states, for example, relied upon legal expertise drawn from graduate students and faculty members belonging to US or western European laws schools.<sup>913</sup> NGOs also ensured that the perspectives of states, such as Sierra Leone, and Bosnia, which had recently experienced atrocity crime, were given voice and heard.<sup>914</sup> The Rome Conference was, thus, notable for the various roles played by NGOs,<sup>915</sup> both from within delegations and from the meeting's margins, helping foster a sense of purpose among, and a set of expectations of, the group of like-minded states.<sup>916</sup> Indeed, the ranks of the like-minded states began to swell to nearly 60 members by the Conference's third week, helped no doubt by CICC's publicising a list of affiliated states that "served both as recognition from the human rights community of the favourable stance that these states were taking and also created pressure on other states to have their names added to the list."<sup>917</sup> By the close of the Conference, over 100 states claimed some form of association with the positions adopted by the group of like-minded states.

A second major group comprising three of the P-5—the US, Russian Federation and the PRC—also emerged during negotiations. The consensus among the Grand

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<sup>910</sup> Reydams and Wouters, above n 137, at 74.

<sup>911</sup> Cryer and others, above n 15, at 148.

<sup>912</sup> Struett, above n 85, at 7.

<sup>913</sup> At 118.

<sup>914</sup> At 118.

<sup>915</sup> Reydams and Wouters, above n 137, at 71.

<sup>916</sup> At 75.

<sup>917</sup> Struett, above n 85, at 110.

Coalition established half a century earlier and the consensus among the UN Security Council in the mid-1990s had been broken as France and the UK voted as part of the like-minded group of states whereas the US, Russian Federation and PRC did not.<sup>918</sup> A non-aligned movement was the third major group emerging from within the Rome Conference. This group comprised many of those smaller, developing states which, having achieved independence after the Second World War, were numerically dominant in this forum. This latter group played an important role in shifting the debate over an ICC from the UN General Assembly to a diplomatic Conference,<sup>919</sup> a vital step along the path towards building the capability needed to pursue international criminal justice.

At the Rome Conference's closing session the text of the Statute was adopted along with a Resolution establishing a Preparatory Committee to prepare any other documents required to establish the ICC.<sup>920</sup> As Cassese explains:<sup>921</sup>

A group of distinguished diplomats, and in particular the Canadian Philippe Kirsch, who chaired the Committee of the Whole (where the major points of the draft statute were substantially negotiated) must be credited with having been able skilfully to devise and suggest a number of compromise formulae that in the event permitted the Conference to adopt the Statute by 120 votes to 7 votes (USA, Libya, Iraq, Israel, China, Syria, Sudan) with 20 abstentions.

The Rome Statute required sixty state-parties to ratify it in order to enter into force. That occurred, relatively expeditiously compared to other international treaties, on 1 July 2002.<sup>922</sup> Whereas the London and Tokyo Charters were drafted by “a handful of statesmen from the highest echelons of government” the Statutes of the ICTY, ICTR and ICC were drafted by “career diplomats, international civil servants, and experts and activists of all types.”<sup>923</sup> The role played by NGOs in encouraging the

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<sup>918</sup> Reydams and Wouters, above n 137, at 75-76.

<sup>919</sup> Struett, above n 85, at 73-74.

<sup>920</sup> Cryer and others, above n 15, at 150.

<sup>921</sup> Cassese, *Cassese's International Criminal Law* above n 15, at 263.

<sup>922</sup> Cryer and others, above n 15, at 150.

<sup>923</sup> Reydams and Wouters, above n 137, at 79.

ratification of the Rome Statute warrants particular attention; once they had agreed that the compromises reached over the draft Statute were acceptable, NGOs began mobilising “a worldwide campaign to secure signatures and ratifications of the Rome Statute.”<sup>924</sup> This included educating legislators<sup>925</sup> and building alliances among NGOs from the Global North, with significant legal and media resources, and those from the Global South.<sup>926</sup>

The US, which had been central to the development of the international military tribunals in the immediate aftermath of the Second World War, and instrumental in the development of the ICTY and, to a lesser extent, the ICTR in the aftermath of the Cold War, was less so when it came to the development of the ICC. US delegates played a significant role at first, but their influence waned as they began to object to the draft statute as it was taking shape. When 120 states voted to establish an ICC largely unfettered by the UN Security Council, the US voted against the Rome Statute’s adoption,<sup>927</sup> though the US was, as mentioned, not the only state opposing the ICC’s establishment.<sup>928</sup> Despite signing the Rome Statute in the closing moments of the Clinton Administration and at the last possible moment for a founding member to sign it without having to have had also ratified it, the US later signalled its intention not to ratify the Statute through correspondence with the UN Secretariat.<sup>929</sup> On 6 May 2002 John Bolton, then-undersecretary of state for arms control and international security for the Bush Administration, advised then-UN Secretary-General Kofi Annan that the US did not intend to ratify the treaty. The decision was based around fears of the prosecutor’s powers and the spectre of a *runaway prosecutor*.<sup>930</sup> As Bolton subsequently put it, “[t]he United States should raise our objections to the ICC on every appropriate occasion, as part of *our larger campaign* to assert American interests against stifling, illegitimate and unacceptable

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<sup>924</sup> Struett, above n 85, at 131.

<sup>925</sup> At 136.

<sup>926</sup> At 148.

<sup>927</sup> Dutton, above n 91, at 53.

<sup>928</sup> Cryer and others, above n 15, at 173.

<sup>929</sup> Cryer and others, above n 15, at 173-176.

<sup>930</sup> Dutton, above n 91, at 54-55.

international agreements.”<sup>931</sup> The US frequently discouraged other state-makers, which they could influence, from ratifying the Rome Statute while encouraging those and other state-makers to sign agreements to refuse to surrender American military personnel to the ICC. As Dutton reflects “[a]lthough the United States is a leader in promoting better human rights practise and accountability mechanisms, the evidence suggests that it viewed, and continues to view, the ICC’s strong enforcement mechanisms as a credible threat to state sovereignty.”<sup>932</sup> US cooperation with the ICC was further curtailed by the American Service Members’ Protection Act, which not only provided for cancelling aid to those state parties refusing to sign a non-surrender agreement with the US, but also authorised the use of “all means necessary, including military force” to release suspects arrested by the ICC prosecutor. This raises the possibility of US Special Forces conducting hostage rescue missions if any US national is taken into custody at The Hague. The decision taken by the Bush Administration to not ratify the Rome Statute signals both a divergence from Clinton’s commitment to pursuing international criminal justice and an estrangement from the international community’s respect of emerging norms.

An even more dramatic event was to irrevocably shift the focus of US foreign policy, especially its defence, international security and justice dimensions. On 11 September 2001, as the Rome Statute was being ratified but before the ICC was formally established and operating, members of a fundamentalist Islamic group known as Al Qaeda executed a well-planned and well-coordinated attack on the continental US, most notably targeting New York’s World Trade Centre and Washington’s Pentagon. Richard Falk describes these targets, respectively, as “the prime expression of American economic dominance in an era of globalization” and “the core embodiment of American military power.”<sup>933</sup> This attack offered an echo of the Japanese attack on Pearl Harbour on 7 December 1941, though Al Qaeda’s

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<sup>931</sup> John Bolton “The Risks and Weaknesses of the International Criminal Court from America’s Perspective” (2001) 64(1) *Law and Contemporary Problems* 167 at 180. (My emphasis added.)

<sup>932</sup> Dutton, above n 91, at 48.

<sup>933</sup> Richard Falk *The Great Terror War* (Arris Books, Moreton-in-Mash, Gloucestershire, 2003) at 40.

attacks penetrated deeper into American mainland and gave focus to civilian targets while Al Qaeda's organisational structure presented a more original challenge to US as "a network that could operate anywhere and everywhere, and yet was definitely situated nowhere."<sup>934</sup> The attacks in New York and Washington resulted in a civilian death toll reaching 3,000, signifying a form of mega-terrorism which "is violence against civilian targets that achieves significant levels of substantive as well as symbolic harm, causing damage on a scale once associated with large-scale military attacks under state auspices, and thus threatening to target society in a warlike manner that gives rise to a defensive urgency to strike back as effectively as possible."<sup>935</sup>

It was, however, the US Government's response which resonated more powerfully within contemporary world affairs.<sup>936</sup> While in the immediate aftermath of these terror attacks the US enjoyed a high level of international support for its reprisals against the Taliban regime in Afghanistan, some legal scholars now suggest that these attacks may not have been covered by the self-defence provisions of Article 51 of the UN Charter.<sup>937</sup> Moreover, the US invasion of Afghanistan and then Iraq and, more specifically, the conduct of the ensuing occupation may have undermined perceptions of US prestige. When the US Government favoured the extra-judicial killing of Osama bin Laden ahead of an international trial similar to that which it had used to punish the Nazis and Shinto-Imperialists, it fully abdicated its leadership role in the quest for international criminal justice. The US continues to shield from international justice its own security, military and intelligence apparatus, engaged in

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<sup>934</sup> At 6.

<sup>935</sup> At 7-8.

<sup>936</sup> The attacks had an immediate and direct impact on the level of US support for the ICTY, Del Ponte recalls, as the US shifted its resources towards the War on Terror; see Del Ponte with Sedutic, above n 6, at 150.

<sup>937</sup> Anghie, above n 71, at 278. Anghie questions, in particular, whether or not the US invasion of Afghanistan was an act of self-defence, which is legal under the UN Charter, or an act of reprisal, which is not legal under the Charter.

its War on Terror, on the grounds that it plays a unique role in the maintenance of international peace and security.<sup>938</sup>

As dramatic as the events of 11 September 2001 were, the US-led War on Terror is reshaping the politico-strategic dimension of contemporary world affairs, but it may have roots in the nineteenth-century notion of manifest destiny, the attempted annihilation of native Americans and US exceptionalism. According to Patman:<sup>939</sup>

The idea of US exceptionalism refers to an informal ideology that endows Americans with a pervasive faith in the uniqueness, immutability, and superiority of the country's founding liberal principles, and also with the conviction that the USA has special destiny among nations. The founders of America saw the country as a new form of political community, dedicated to the Enlightenment principles of the rule of law, private property, representative government, freedom of speech and religion, and commercial liberty.

More than that, however, "American exceptionalism and its successor ontologies of indulgence and self-justification—manifest destiny, *Pax Americana*, Containment, and Roll-back—were, it should be noted, at first conceded in terms of this character, hence the term 'liberal empire.'"<sup>940</sup> US exceptionalism, particularly its search for national security, has resulted in a new level of estrangement from the norms increasingly respected by the wider international community. The US Government openly eschews international law-making process that it cannot control or use as an instrument to further US security and economic interests.

More recently, however, the US appears to be in a mood for rapprochement with the Court and its proponents. Significant here is the US decision not to veto a Security Council Resolution referring the Darfur situation to the ICC prosecutor.<sup>941</sup> The US also softened its position on providing military aid only to states with a Status

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<sup>938</sup> Struett, above n 85, at 125.

<sup>939</sup> Robert G Patman "Globalisation, the New US Exceptionalism and the War on Terror" (2006) 27(6) *Third World Quarterly* 963 at 964.

<sup>940</sup> McKinley, above n 75, at 93.

<sup>941</sup> Dutton, above n 91, at 55.

of Forces Agreement (SOFA) and removed a restriction on providing military training to non-SOFAs.<sup>942</sup> Even though the US attitude towards the ICC began to soften during the Bush Administration's second term, it is the Obama Administration that has encouraged a more positive attitude.<sup>943</sup> This was signalled by that Administration sending the largest delegation to the Kampala Review Conference in 2010, supporting the Security Council's Resolution 1970 (2011) referring the Libyan situation to the ICC prosecutor,<sup>944</sup> and dispatching 100 military advisors to hunt down Joseph Kony, a fugitive wanted by the ICC prosecutor.<sup>945</sup> It is no coincidence that the situations in Sudan and Libya, the only two situations so far referred to the ICC prosecutor by the UN Security Council, involved leaders who follow of Islam in a time when the US remain embroiled in its War on Terror. This signals important linkages between the search for international security and the quest for international criminal justice. The fierce contest between two rival modernist utopian movements could not be plainer: US-led economic liberalisation on a global scale versus representatives of an expansive Muslim fundamentalism. The irony here is, of course, that "[r]adical Islam is a symptom of the disease of which it pretends to be the cure"<sup>946</sup> As Gray explains further:<sup>947</sup>

Like communism and Nazism, radical Islam is modern. Though it claims to be anti-western, it is shaped as much by western ideology as by Islamic traditions. Like Marxists and neo-liberals, radical Islamists see history as a prelude to a new world. All are convinced they can remake the human condition. If there is a uniquely modern myth, this is it.

The consensus to establish the ICC was shaped by the discourse against politico-cruelty, particularly its abhorrence of mass atrocity and its favoured recourse

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<sup>942</sup> At 56.

<sup>943</sup> Cryer and others, above n 15, at 176.

<sup>944</sup> Dutton, above n 91, at 57; and UNSC Res 1970 (S/RES/1970) (2011).

<sup>945</sup> At 58.

<sup>946</sup> Gray, *Al Qaeda* above n 45; Gray "A Point of View" above n 45; and Armstrong, above n 45.

<sup>947</sup> At 26.



to ICL as a means to excommunicate *hostis humani generis*. A set of propitious politico-strategic circumstances, including the appetite of a group of like-minded states *and* certain NGOs to establish a permanent court designed specifically to enforce ICL, were also required. “Only by breaking with a statist ontology and examining the agency of individual actors is it possible to account for the emergence of an ICC,”<sup>948</sup> Struett explains, where NGOs “played a crucial role in shaping the Rome Statute for the ICC and in securing its entry into force less than four years after it opened for signatures.”<sup>949</sup> Struett goes on to argue that:<sup>950</sup>

[A] crucial factor leading to the adoption of the Rome Statute was the development of a normative discourse between nongovernmental organizations, lawyers, academics, international civil servants, and states. In many respects it was the NGOs, and not state governments, that predominantly shaped the content of the Rome Statute. The outcome of the Rome ICC Treaty Conference was driven by a discourse that was orientated towards creating the widest possible normative consensus recognizing the legitimacy of the new court’s power to enforce international criminal law. The relatively disinterested nature of NGOs allowed them to contribute to this discourse in a way that was morally resonant; consequently they were influential.

Notwithstanding the significance of the group of like-minded states and the coterie of NGOs forging the abovementioned consensus, the US’ decision not to be a member of the court signals an important departure from earlier ICL enforcement efforts. Unlike previous quests for international criminal justice, which the US has led, supported or enabled, the establishment of the ICC is less dependent on US largesse. The US, while still powerful, is no longer the driving force behind the quest for international criminal justice that they once were, focusing instead it seems on waging its War on Terror. Nevertheless, the consensus to establish a permanent court designed specifically to enforce ICL provided another temporal manifestation of the

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<sup>948</sup> Struett, above n 85, at 17.

<sup>949</sup> At 2.

<sup>950</sup> At 23.

discourse against politico-cruelty. Despite the loud proclamations asserting the centrality of victim's justice by the court's proponents, the design of this institution was informed by EU members and by assertive NGOs underwritten by donor capitalism.

### ***III Law: Donors' Justice***

Borrowing much from the statutes establishing the ad-hoc tribunals, the Rome Statute provides a blueprint for the ICC's structure and composition. According to Article 34 of the Statute, the ICC comprises of four organs: a Presidency; Chambers (which includes a Pre-Trial Division, a Trial Division, and an Appeals Division); a Registry; and the Office of the Prosecutor (OTP). (While the Statute recognises the Defence as being an important pillar of international criminal justice, it was not included as an organ of the ICC.) The key pillar, at least for the purposes of this thesis, is the OTP. The design of prosecutorial functions here is very similar to earlier tribunals; namely to investigate potential serious international crimes by collecting, examining and analysing evidence (including questioning the accused, witnesses and victims), preparing indictments, making opening statements, presenting evidence, cross-examining witnesses and making closing arguments. The prosecutor is also empowered to seek the cooperation of any state or intergovernmental organisation and to enter into agreements facilitating the cooperation of a state, intergovernmental organisation or person. The prosecutor has obligations not to disclose information obtained on the condition of confidentiality and can take necessary steps to ensure the integrity of that information is preserved. According to Article 42, the prosecutor is also "responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court." The Statute goes further at Article 54, stating "The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally." This is a significant development from the earlier tribunals' prosecutorial mandates, reflecting the

significance of truth to the pursuit of international criminal justice whereas punishment and then prosecution had been the focus on the first and second generation of prosecutors, respectively.

Prosecutorial focus is constrained by the court's jurisdiction, meaning the prosecutor cannot pursue any charges outside the ICC's jurisdiction. There are other important fetters on the prosecutor's independence, which did not exist at earlier tribunals. Firstly, the Pre-trial Chambers represent a legal fetter by authorising investigations, issuing warrants and summons to appear and conducting pre-trial hearings. Secondly, a politico-strategic fetter is held by the UN Security Council, which can not only refer situations to the ICC prosecutor, but can also compel the prosecutor to defer his or her investigation for up to twelve months at a time. The design of the OTP also differs from earlier international tribunals by having one prosecutor, rather than a team of prosecutors as occurred at the international military tribunals, or a single prosecutor responsible for managing the caseload of two contemporaneous tribunals with differing mandates and jurisdiction, as occurred in the case of the international criminal tribunals until 2003. Moreover, the appointment process for the ICC's prosecutor differs from the court's predecessors. While he or she is elected by a majority of the Assembly of State Parties (ASP) for a term of nine years without prospect for reappointment, the ICC prosecutor "once elected... moves largely beyond the control of states."<sup>951</sup> The prosecutors and their deputies must be of different nationalities,<sup>952</sup> reducing other forms of identity-markers, such as gender, ethnicity, religion or class, to secondary importance.

Just as the discourse against politico-cruelty informs the ICC's design through its reliance on the rule of international criminal law, it also shapes the scope of its jurisdiction. Although Article 5 of the Rome Statute states that the ICC will have jurisdiction over the crime of aggression, the content of that crime was not agreed at the Rome Conference. The US led an unsuccessful effort to exclude this crime from the Statute. The P-5 were keen to protect their unique authority to determine when an act of aggression causes a breach of the international peace, believing that their

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<sup>951</sup> Bosco, above n 623, at 54.

<sup>952</sup> Townsend, above n 1, at 287.

determination would be a pre-requisite for an ICC investigation.<sup>953</sup> Although the Rome Conference did not agree on the definition of the crime of aggression, an agreement was reached at the subsequent Review Conference in Kampala in 2010. The inclusion of aggression as a crime reflected the desires of many smaller states, which thought themselves more likely to become victims of aggression than to become alleged aggressors.<sup>954</sup> According to the outcome of that Conference, the crime of aggression means, as previously mentioned, “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”<sup>955</sup> An “act of aggression” is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>956</sup>

This wording signals that initiating international armed conflict—which is not an act of self-defence under Article 51 of the UN Charter or authorised by the UN Security Council under Chapter VII—is no longer considered the supreme international crime, as it was at the military tribunals, or only as an underlying contextual factor of atrocity crimes, as it was at the ad-hoc tribunals. Instead, the crime of aggression now sits alongside war crimes, crimes against humanity and crimes of genocide as a serious international crime that merits inclusion in the prosecutor’s reach, given that the Rome Statute’s preamble reaffirms “the purposes and principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations.”<sup>957</sup> This means the status quo system of politico-strategic affairs, established in 1945, is preserved and remains stable, though the ability of the P-5 to

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<sup>953</sup> Bosco, above n 623, at 54; and Struett, above n 85, at 94.

<sup>954</sup> Struett, above n 85, at 93.

<sup>955</sup> See above n 221.

<sup>956</sup> Assembly of State Parties, Resolution RC/Res.6 (11 June 2010).

<sup>957</sup> See above n 209.

wage aggressive wars of their choosing or to veto any proposed ICC-related UN Resolution is mitigated somewhat because the Council's power to defer an ICC investigation requires the consent of all five veto holders. Yet the Council can refer situations occurring in states that are not signatories to the Rome Statute, which some legal scholars protest is in tension with existing principles of international law which suggest "that a treaty does not create either obligations or rights for third parties."<sup>958</sup>

Whereas the ICTY and ICTR Statutes did not provide for detailed definitions of atrocity crimes, the Rome Statute defines war crimes and crimes against humanity to an unprecedented degree,<sup>959</sup> though those who negotiated the definitions claimed they were only designing an ongoing mechanism to punish what ICL determines is a serious international crime, rather than defining new crimes *per se*.<sup>960</sup> Despite a strong minority opposing the inclusion of war crimes within the ICC's jurisdiction<sup>961</sup> the Rome Statute defines war crimes in greater detail than the statutes of the earlier tribunals. It reflects developments in ICL by building upon the ICTY's Tadić judgement that IHL can be applied to situations of non-international armed conflict. About half of the provisions applicable to situations of international armed conflict were deemed applicable to situations of non-international, or internal, armed conflict.<sup>962</sup>

Article 8(2) of the Rome Statute states that war crimes means: (a) grave breaches of the Geneva Conventions of 12 August 1949; (b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; (c) in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949; (e) other serious violations of the laws and customs

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<sup>958</sup> David Hoile *Justice Denied: The Reality of the International Criminal Court* (Africa Research Centre, London, 2014) at 296.

<sup>959</sup> Cryer and others, above n 15, at 151-152.

<sup>960</sup> Bosco, above n 623, at 52.

<sup>961</sup> Cryer and others, above n 15, at 273.

<sup>962</sup> At 274.

applicable in armed conflicts not of an international character, within the established framework of international law.

Notwithstanding these significant developments in ICL, the Rome Statute has its omissions, including the war crime of employing weapons calculated to cause unnecessary suffering. Although this war crime featured in the ICTY Statute, and was thereby deemed by the UN Security Council to reflect the state of customary international law at that time, delegates to the Rome Conference were unable to reach an agreement on a set of words defining the crime, possibly because it might be applied to the nuclear weapons arsenals held by the major powers.<sup>963</sup> Other parts of the Rome Statute appear retrograde. The inclusion of the phrase “within the established framework of international law” in Article 8(2) (b) and (e), but not in other provisions, implies that those crimes are justiciable under the ICC only if they are found in customary international law. In other words, there are two categories of war crime that require the ICC to examine on a case-by-case basis the current status of general international law. Moreover, the ICC’s jurisdiction over the means of warfare appears narrower than that of customary international law. Customary international law, for example, prohibits the use of indiscriminate weapons in international armed conflict as a war crime whereas the Rome Statute apparently does not. Furthermore, the Statute’s prohibition of certain weapons used in non-international armed conflict as a war crime also falls short of the general international law.<sup>964</sup> “One is therefore left with the impression that the framers of the ICC Statute were eager to shield their servicemen as much as possible from being brought to trial for war crimes,” Cassese avers. Cassese went on to surmise that “a tentative appraisal of the provisions on war crimes of the ICC Statute cannot but be chequered: in many respects the Statute marks a great advance in ICL, in others it proves instead faulty; in particular, it is marred by being too obsequious to state sovereignty.”<sup>965</sup>

The Rome Statute’s definition of crimes against humanity also reflects the development of ICL since the international military tribunals, particularly where there

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<sup>963</sup> Schabas, above n 7, at 36-37.

<sup>964</sup> Cassese, *Cassese’s International Criminal Law* above n 15, at 80-83.

<sup>965</sup> At 83.

is no longer a requirement for a nexus with an underlying international armed conflict. Article 7 of the Rome Statute states that crime against humanity means:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

This list is significant for it not only elaborates and clarifies aspects of customary international law by rejecting the requirement of both an underlying situation of armed conflict and discriminatory grounds (with the exception of persecution), but also builds on the relevant provisions of the ICTY and ICTR Statutes. Acts of forced transfer of population, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, enforced disappearance and apartheid are included in the Rome Statute, but were absent from the previous Statutes.<sup>966</sup> In so doing, the drafters at Rome again claimed they were not expanding ICL's reach, but rather, were merely codifying and reflecting what was already understood to be inhumane acts.<sup>967</sup> The effect, however, is "to broaden the classes of conduct amounting to crimes against humanity" and the discriminatory grounds underpinning

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<sup>966</sup> Cryer and others, above n 15, at 231-232.

<sup>967</sup> At 244.

persecution from political, racial, ethnic or religious to include cultural and gender grounds.<sup>968</sup>

While some aspects of Article 7 elaborate, clarify or broaden customary international law, other aspects appear narrower.<sup>969</sup> Article 7 is narrower than customary international law where it states that victims of crimes against humanity are civilian, thus excluding non-civilians such as belligerents who, having been wounded or captured, lay down their weapons. This seems at odds with custom concerning *hors de combat*.<sup>970</sup> So too does the requirement that an attacker of civilians must be seeking to further a state or similar organisation's policy. Article 7 has a higher threshold than international customary law when it comes to the crime of persecution which, under the Rome Statute, must be committed in connection with another act or crime contained in the Statute.<sup>971</sup> The US, UK and France continued to resist proposals which would have seen crimes against humanity requiring the terms widespread *or* systemic attack instead of widespread *and* systemic attack, thereby "raising the bar of what a prosecutor would have to show in order to prove the commission of a crime against humanity."<sup>972</sup> Those efforts were unsuccessful as the Rome Statute includes the phrase "widespread or systematic attack."

Article 6 of the Rome Statute follows the ICTY and ICTR Statutes by reproducing the definition of genocide found in Article II of the Genocide Convention. Yet, as Cassese notes, the conspiracy elements of Part III of the Genocide Convention were not taken up and included in the Rome Statute. This signifies "an inconsistency between customary international law and the ICC Statute. The former prohibits and makes punishable 'conspiracy to commit genocide'; that is, an inchoate crime consisting of the planning and organizing of genocide not

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<sup>968</sup> Cassese, *Cassese's International Criminal Law* above n 15, at 107-108.

<sup>969</sup> At 105.

<sup>970</sup> At 106.

<sup>971</sup> At 107.

<sup>972</sup> Struett, above n 85, at 121. (Emphasis in original.)



necessarily followed by the perpetration of the crime, whereas Article 6 does not contain a similar prohibition.”<sup>973</sup>

While the elaboration of war crimes and crimes against humanity in greater specificity is one key difference between the ICC and its predecessors, a more significant difference lies in the ICC’s temporal and jurisdiction reach. Unlike the international military tribunals’ jurisdiction covering the spatial and temporal zones relevant to the Second World War’s two major theatres in Europe and Asia, and unlike the ad-hoc tribunals’ jurisdiction covering internal armed conflict’s spatial and temporal zones, the ICC’s permanence means it is future orientated, covering serious international crimes committed since the treaty entered into force on 1 July 2002, but not before that. This is significant for, “[i]f a state becomes a party to the Statute after its entry into force, the court may exercise jurisdiction only with respect to crimes committed after the Statute has come into force for that particular state.”<sup>974</sup> Since it has jurisdiction over situations referred to it by the UN Security Council, the ICC has “potentially worldwide jurisdiction,”<sup>975</sup> establishing an ICL regime of near global reach. In addition to this expansive temporal jurisdiction the geographic reach of the ICC is sweeping, though not quite universal. Perhaps more than half of humanity is not protected by the Rome Statute given that the PRC and India have not signed and ratified the Rome Statute. As Bosco explains, the “*battle royale* at Rome was over the court’s jurisdiction, and the last-minute changes left two principal avenues. The Statute allows the ICC to prosecute crimes committed *on the territory* of a court member or by *a national* of a court member”<sup>976</sup> provided that person was over the age of 18 when the alleged offence took place.<sup>977</sup> There are, of course, important limits to this jurisdiction as powerful states, such as the current hegemon and other victors of the Second World War—namely the US and the Russian Federation—are not signatories, or have not acceded, to the Rome Statute. However,

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<sup>973</sup> Cassese, *Cassese’s International Criminal Law* above n 15, at 129.

<sup>974</sup> Cryer and others, above n 15, at 169.

<sup>975</sup> At 166.

<sup>976</sup> Bosco, above n 623, at 55. (Emphasis in original.)

<sup>977</sup> Cryer and others, above n 15, at 169.

while some observers expected the UN Security Council not to refer any situations to the ICC, the Council did so in early 2005 and again in early 2011, thereby helping, to a limited degree, to legitimise the court (though this did present opportunities to the P-5 to inform and shape the ICC's docket.)<sup>978</sup> Whereas NGOs argued for an end to impunity for all perpetrators of atrocity crimes, the UN Security Council argued to limit the range of cases that the ICC could hear, creating certain loopholes to avoid future international prosecutions targeting their citizens.<sup>979</sup>

The ICC is not another example of victor's justice, however. The ICC was not established following a major international armed conflict as a means of punishing only the vanquished. It was, rather, established by way of treaty and has broad support not only from among the society of states, but also from across the wider international community, which includes global civil society, NGOs and academics. Citizens belonging to ASP members will face trial. Nor is the ICC another example of hegemon's justice as it was not established following an internal armed conflict as a means of restoring or maintaining peace and international security. Whereas the military and ad-hoc tribunals were retrospective enforcement institutions (with the partial exception of the ICTY) imposed on the vanquished or weak by powerful states,<sup>980</sup> there was, in fact, no particular, single armed conflict that spurred on this latest quest. Whereas the substantive elements and jurisdictional reach of the military tribunals meant those institutions were designed in order to deliver victor's justice, and the substantive elements and jurisdictional reach of the ad-hoc tribunals meant those institutions were designed in order to deliver hegemon's justice, the ICC has been designed by medium and small states in conjunction with NGOs as the fulcrum of an ICL regime that pursues *victim's justice* on the victim's behalf. It does so because the court combats the impunity enjoyed by some, but by no means all, local and state leaders around the world when they commit war crimes, crimes against humanity or crimes of genocide. Victims of the atrocity crimes under examination

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<sup>978</sup> Bosco, above n 623, at 180. The UN Security Council has not, however, provided funding to support the increased workload resulting from their referrals.

<sup>979</sup> Struett, above n 85, at 123.

<sup>980</sup> Dutton, above n 91, at 2.

are incorporated into trial proceedings not merely as witnesses, but also as key stakeholders in the pursuit of international criminal justice. By targeting the culture of impunity enjoyed by those who commit serious international crime, the ICC places the victim at the centre of the pursuit of international criminal justice in a way not previously seen in earlier ICL enforcement efforts. While victims are proclaimed the ICC's *raison d'être*, their actual access to international criminal justice is restricted by the prosecutor's selection of cases and charges as well as the victim's knowledge of their own eligibility. As Sara Kendall and Sarah Nouwen lament, "[o]f the millions of victims in the world, only thousands have managed to reach the top of the pyramid of juridified victimhood and have been granted provisional recognition as victims before the ICC. To date only a handful of these have been permitted to speak directly in ICC proceedings."<sup>981</sup>

Yet this *victim's justice* is also a form of *NGO justice*; that is, the justice of self-congratulatory global social movements, the most prominent NGOs of which are based in advanced industrial societies and tend to "try to speak for groups that are not well represented in intergovernmental decision making."<sup>982</sup> According to Sara Kendall, "[d]onors' justice can be defined as third-party financial support for the work of international criminal justice institutions, where funders are not a party to the conflict that the court was set up to adjudicate.... [and] International criminal justice thus becomes a marketplace for the global 'haves' to participate based upon their foreign and domestic agendas."<sup>983</sup> Even though the most significant donor moments occur within the Assembly of State Parties, the activities of NGOs are worthy of consideration, and not merely because they often portray themselves as somehow independent from the political forces circulating around them. These NGOs, particularly those advocating for democratic reform, market liberalisation and "a

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<sup>981</sup> Sara Kendall and Sarah Nouwen "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood" (2014) 76 *Law and Contemporary Problems* 252.

<sup>982</sup> Struett, above n 85, at 34.

<sup>983</sup> Sara Kendall "Donors' Justice: Recasting International Criminal Accountability" (2011) 24 *Leiden Journal of International Law* at 587 &593.

prevailing discourse of ‘rights talk’ and general principles of individualism” enjoy the financial and diplomatic support of international donors. As a result, many of these NGOs suffer a democratic deficit yet have “budgets as large as a regularly functioning corporation, [and] thus became public intermediaries, increasingly central to the transnational flow of ideas from international organizations to national cultural domains. In a symbolic way, they furthered the political aims of economic donors of the 1980s and 1990s while benefitting directly from their patronage.”<sup>984</sup> This is important because:<sup>985</sup>

the rise of the rule of law as another regime of knowledge and truth is fundamentally connected to an even more intertwined economy, which, although interconnected with human rights, is directly related to struggles over the management of Africa’s violence through a complex moral sphere to protect the ‘victim’ but is driven by the quest for justice made possible through donor capitalism. Thus, the new sphere of internationalisation is certainly about victim’s justice but must be understood through an ontology of the management of postcolonial African resources, the place of Europe’s declining colonial power, and American and Asian capital in the new ‘scramble for Africa.’

Victim’s justice, then, is the more marketable human face given to NGO justice which, in turn, constitutes donors’ justice, serving the interests of those advocating for neoliberalism. To a large extent the ICC’s jurisdiction reach maps closely against the distribution of the world’s more easily exploited natural resources. While the quest for international criminal justice is no longer as dependent on US policymakers as it once was, it is now being propelled by the EU, the strongest members of which are still advocating and entrenching neoliberalism at home and abroad as part of their policy agenda. While proponents of the ICC proclaim that the virtues of justice seeking informed the design of the Court, there are less obvious and more subtle factors at play here. The ICC has been designed as a propagator of virtue—or, to rephrase Arendt, as an institutional provider of a *banality of goodness*—which

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<sup>984</sup> Clarke, above n 27, at 80.

<sup>985</sup> At 46.

defends the moral interests of the international community and, through that society of states, our shared humanity. Yet, the Court's design also means that it will obscure and erase the negative consequences flowing from the globalising neoliberal economic system, which provides conditions for many recent atrocity crimes. In so doing, this banality of goodness masks a deeper transformation (which for some people almost epitomises evil in itself) that is present in neoliberalism and conceals the gulf between contemporary neoliberal practices and nineteenth-century classical liberalism.<sup>986</sup>

#### ***IV War: Rebuilding after Mass Atrocity***

The ICC's seat was initially located on the outskirts of The Hague in the seaside resort town of Scheveningen, until a new building was constructed specifically to house the court in the international zone of The Hague. The ICC finalised its move to these new premises in mid-December 2015 and is now located there. The selection of The Hague as the court's permanent seat supports the city's claim to be a new centre of international peace and justice as the ICTY also has its seat there, as does the International Court of Justice and the Special Tribunal for Lebanon.<sup>987</sup> This cluster of institutions of international law signals a potential shift in the underlying configurations of power in contemporary world politics, including the importance of EU funding, from the international military tribunals established by the victors of the Second World War on their newly-occupied territories. The peace, civility and sophistication of The Hague stands in deliberate contrast to the violence, carnage and brutality of recent atrocity crimes committed in places such as the Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR), Sudan, Kenya, Libya, Ivory Coast and Mali.

A key feature of the ICC is its permanence, which marks a major difference between it and its predecessors, all of which are more accurately described as being *ad hoc*— a Latin term that “generally signifies a solution designed for a specific

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<sup>986</sup> I am grateful to both Neil Boister and Gay Morgan for bringing this point to my attention.

<sup>987</sup> See <http://www.icc-permanentpremises.org/news>.

situation, non-generalizable, and not intended to be able to be adapted to other purposes.”<sup>988</sup> This difference is important because the permanent nature of the ICC means that it is a future-orientated institution, offering a more robust form of deterrence to those would-be perpetrators of serious international crime who believe that the international community would be reluctant to establish tribunals specifically to deal with their situations.<sup>989</sup> Augmenting the ICC’s permanent nature is the principle of complementarity and its status as a court of last resort. This complementarity calls for the strengthening of national-level judicial systems to the extent that they can themselves deal with prosecuting serious international crimes, though the power to determine if these national-level prosecutorial efforts are genuine belongs to the ICC.<sup>990</sup> In this way the relationship between the ICC and the domestic judiciaries of signatories to the Rome Statute is one which supplements rather than supplants.<sup>991</sup> The ICC’s geographic reach thus continues to grow as more states ratify the Rome Statute and take steps to strengthen their domestic justice sectors, including by developing relevant provisions in their respective municipal laws, for enforcing ICL.<sup>992</sup> However, this strengthening of domestic justice sectors does not necessarily deliver better criminal justice as investigations might be launched and trials conducted at the domestic level in order to shield certain individuals and groups from international scrutiny, though if the ICC prosecutor determines the prosecutions are bogus he or she can seize the case and place it before the ICC. States can also use the *self-referral* trigger process as a means of targeting opposition political parties or armed groups. Despite its design as a court of last resort, the ICC has on more than one occasion deemed admissible situations that are self-referred by an authority that has a functioning juridical system,<sup>993</sup> which was, as we shall see in the following chapter, the case for Uganda, the DRC (at least in the Ituri province) and Mali.<sup>994</sup>

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<sup>988</sup> Reydams and Wouters, above n 137, at 19.

<sup>989</sup> Dutton, above n 91, at 3.

<sup>990</sup> At 13.

<sup>991</sup> Cryer and others, above n 15, at 154.

<sup>992</sup> Struett, above n 85, at 124-125.

<sup>993</sup> Hoile, above n 958, at 219; see also Charles Chernor Jalloh “Regionalizing International Criminal Law?” (2009) 9 *International Criminal Law Review* 445.

Like the vanquished enemies tried at the military tribunals and the weak opponents of the hegemon tried at the ad-hoc tribunals, local or state leaders who face trial at the ICC are removed from their operating environments and those subject to arrest warrants are usually denied the freedom to travel at will.<sup>995</sup> This has predictable negative consequences on the prospects of peace negotiations where the accused are discouraged from giving up their arms, as occurred when the leaders of the LRA were indicted, undermining their incentive to negotiate within the Juba peace process.<sup>996</sup> At the same time, the ongoing strengthening of national judiciaries tends to entrench, locally, the global or cosmopolitan doctrine of individualism ahead of alternative forms of group identity based on national, ethnic, tribal, gender, class or religious affiliations. This cult of individualism not only reflects, but also inscribes “a political economy of human rights that draws its power from ritual spectacles funded through donor capitalism and positioned within new biopolitical bureaucracies compromising governmental and nongovernmental organizations.”<sup>997</sup> While the doctrine of individual responsibility draws upon western liberal thought and gives focus to the quest for international criminal justice on humanity’s behalf, it falls short of reconsidering root causes of armed conflict and mass atrocity in places such as Sub-Saharan Africa. Rather “root causes of violence are only collected as histories for establishing mitigating circumstances,” Clarke laments.<sup>998</sup> Nor does the doctrine of individual responsibility interrogate the power configurations imposed on those subject to the ICC’s jurisdiction—namely Libya and Sudan—and those who are beyond its immediate reach, such as the US, PRC, Japan, India and Pakistan.

The establishment of the ICC and the concomitant strengthening of state-parties’ justice sectors has occurred simultaneously with efforts to reconstruct particular states and economies in aftermath of mass atrocity. The UN Security Council has authorised some peacekeeping operations not only to support the work of

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<sup>994</sup> Hoile, above n 958, at 241, 270 & 371, respectively.

<sup>995</sup> Dutton, above n 91, at 2.

<sup>996</sup> Hoile, above n 958, at 242.

<sup>997</sup> Clarke, above n 27, at 8.

<sup>998</sup> At 55.

the ICC prosecutor,<sup>999</sup> but also to strengthen democratic institutions and processes in DRC,<sup>1000</sup> CAR,<sup>1001</sup> Ivory Coast<sup>1002</sup> and Mali.<sup>1003</sup> This signals the close relationship between ICL enforcement and politico-strategic transitions to democracies. Yet at the same time it reveals a tension between the UN Security Council and the ICC because peacekeepers are excluded from the prosecutor's purview.<sup>1004</sup> It also signals

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<sup>999</sup> See for instance: UN Security Council Resolution 2164 (2014), para 8, which states the Council “[u]rges the Malian authorities... to continue to cooperate with the International Criminal Court”; and UN Security Council Resolution 2149 (2014) para 30((f)(i), which states the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) shall “support and work with the Transitional Authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC.”

<sup>1000</sup> UN Security Council Resolution 1925 (2010), para 12, clause (q) states: “Provide technical and logistical support for the organization of national and local elections, upon explicit request from the Congolese authorities and within the limits of its capacities and resources.”

<sup>1001</sup> UN Security Council Resolution 2149 (2014) para 30 (b) (i) states: “To take a leading role in international efforts to assist the Transitional Authorities working with ECCAS, the African Union, relevant stakeholders and the international community to devise, facilitate, coordinate, and provide technical assistance to the political transition and electoral process” and (v) “To devise, facilitate and provide technical assistance to the electoral process and make all necessary preparations, in support of the Transitional Authorities and working on an urgent basis with the National Electoral Authority, for holding free, fair and transparent and inclusive elections, including the full and effective participation of women at all level and at an early stage, and the participation of CAR IDPs and refugees no later than 2015.”

<sup>1002</sup> UN Security Council Resolution 1528 (2004) para 6 (m) states: “To provide oversight, guidance and technical assistance to the Government of National Reconciliation, with the assistance of ECOWAS and other international partners, to prepare for and assist in the conduct of free, fair and transparent electoral processes linked to the implementation of the Linas-Marcoussis Agreement, in particular the presidential election.”

<sup>1003</sup> UN Security Council Resolution 2164 (2014), para 13 (b)(v) states, respectively: “To support, within its resources and areas of deployment, the conduct of inclusive, free, fair and transparent local elections, including through the provision of appropriate logistical and technical assistance and effective security arrangements, in the context of an inclusive decentralization process led and owned by the Malian authorities.”

<sup>1004</sup> Neha Jain “A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court” (2005) 16(2) *EJIL* 239.



the politico-economic transitions simultaneously underway in these countries. MA Mohamed Salih acknowledges that “the architects of the liberal peace are in fact empowered by the prevailing neo-liberal paradigm and economic liberalization, which explains why they keep silent about the root causes of African conflict.”<sup>1005</sup> Salih also rues the fact that tension between democracy and economic liberalisation has meant the liberal peace’s dominant form of political economy not only fails to resolve major issues— including systemic poverty and woefully inadequate access to basic human needs, as well as democratic, economic and social exclusion, the social justice deficit—but also tends to “increase rather than decrease the likelihood of the social conflicts and violent struggles that undermine development and by the same token also undermine peace and democracy in the long term.”<sup>1006</sup>

The establishment of a permanent court designed specifically to judge and, if necessary, punish those accused by the ICC prosecutor of committing serious international crimes adds a new institution to the post-Second World War architecture of global governance. Sitting alongside the UN and its Security Council as the summit of politico-strategic affairs, and the World Bank, IMF, and World Trade Organisation (WTO) as the pinnacle of politico-economic affairs, the ICC completes the tripartite system. While the precise impact of the ICC’s workload remains to be seen, its ongoing existence will no doubt contribute to the making of global legal culture based on a notion of neo-individualism or, put in another way, cosmopolitanism. The groups and networks that control these institutions have a powerful say over the conduct of contemporary world affairs. Such dramatic changes to the governance arrangements for international life provoke unease, protest and resistance. The process of strengthening domestic justice sectors is, for instance, contested locally, in Africa especially, where the rival of Islamic fundamentalism is, in part, a reaction to the predominance of the Western, modernist conceptualisation of

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<sup>1005</sup> MA Mohamed Salih “A Critique of the Political Economy of the Liberal Peace: Elements of an African experience” in Edward Newman, Roland Paris and Oliver P Richmond (eds) *New Perspectives on Liberal Peacebuilding* (United Nations University Press, Tokyo, New York, Paris, 2009) 133 at 155.

<sup>1006</sup> At 134.

human rights embodied in individuals.<sup>1007</sup> This is ironic since “[t]he modernity of transitional justice-making is ‘at large,’ and Islamic Sharia revivalism, Ugandan *Acholi*, and Rwanda *Gachacha* reconciliation mechanisms, often celebrated as “traditional,” are as much a product of modernity as they are of local imaginaries.”<sup>1008</sup> The yet to be established African Court of Justice and Human Rights will be capable of targeting offences of a commercial nature and many African NGOs and regional civil society groups have called for the indictment of foreign firms either directly involved in armed conflict or illegitimately profiting from African resources.<sup>1009</sup> The impact of this resistance on the ICC remains to be seen, though a resurgent anti-colonial nationalism probably lurks behind the recent decisions by the leaders of Burundi, South Africa, and the Gambia to withdraw their respective government’s signatures from the Rome Statute.

## ***V Conclusion***

The quest for international criminal justice in the long aftermath of the Cold War was informed by the discourse against politico-cruelty, with its roots in nineteenth-century liberalism and manifested so clearly in the establishment of the military tribunals of the mid-1940s and the ad-hoc tribunals of the mid-1990s. But it also required a propitious set of politico-strategic circumstances. While the US had risen to global hegemon following the USSR’s demise, a group of like-minded states supported by various NGOs drove the treaty negotiation process that led to the establishment of the ICC. The consensus, while purportedly seeking victim’s justice, was underpinned by capitalist donors from the western world. As Clarke explains:<sup>1010</sup>

In their attempts to implement international treaties and doctrine, NGOs have become more important than ever to facilitating the spread

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<sup>1007</sup> Clarke, above n 27, at 24-25.

<sup>1008</sup> At xix.

<sup>1009</sup> Christopher Gevers “International criminal law and individualism” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014) 221 at 233.

<sup>1010</sup> Clarke, above n 27, at 67-68.

of global capitalism. This has occurred not simply through an ideological mission to secure rights for all on the basis of humanity; rather, it has necessarily involved the capitalistic circulation of donor funding that is producing new and entrepreneurial forms of capital support to some of the leading and most recent graduates and professionals from a range of countries.

The key politico-strategic development here, however, was the US's shift from a degree of estrangement from the international community to an exceptional use of force as global hegemon fighting representatives of radical Islam under the banner of a war against terror and, though it has re-engaged to a point, it has not reconciled with that community in the context of the pursuit of international criminal justice. It ceded its leadership to the EU. The ICC's establishment cannot be fully understood in isolation of the continued efforts to liberalise the state and the economy in the aftermath of armed conflict and mass atrocity, particularly in parts of Africa endowed with natural resources of commercial value. Like the ad-hoc tribunals before it, the ICC was designed, at least in part, to help facilitate the further expansion and, more specifically, entrenchment of neoliberalism and, as such, must be seen as the final pillar of a tripartite architecture of governing the politico-strategic, politico-economic and politico-social dimensions of international life. The ICC's designers thus established an important stage upon which the third generation of international prosecutors of serious international crime would perform, deploying a melody of legal, political and war registers.

## CH. 9: A NEW GENERATION OF PROSECUTORS

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### *I Introduction*

The discourse against politico-cruelty not only informed the consensus among like-minded state-makers to establish a permanent court and shaped the court's design, but also empowers the third generation of international prosecutors of serious international crime. This penultimate chapter introduces two individuals, Luis Moreno-Ocampo and Fatou Bensouda, the former as the first to occupy the post of ICC prosecutor and the latter as the incumbent. The chapter explores the preparation of 24 warrants of arrest and four summonses to appear, giving particular focus to the selection of the accused and the charges against them. It argues that these choices reveal a prosecutorial bias favouring the referring state-based authority by targeting leaders of *rebel* non-state armed groups as well as leaders of *outlaw* states, a bias which appears more often than not based upon short-term strategic calculation rather than a non-partisan review of the facts and relevant evidence. The chapter then examines Moreno-Ocampo's first opening statement, which his deputy at the time, Bensouda, helped deliver in 2009, before examining Bensouda's first opening statement as ICC prosecutor, which Anton Steynberg helped deliver in 2013. It argues that both these statements, drawing on the content of the respective warrant and summons, express a rhetoric containing a mix of legal, political and war registers. Even though the prosecutors emphasise ICL enforcement as being separate from the conduct of armed conflict and rising above the politics of post-atrocity situations, the distinction drawn between law and politics dissolves when both are understood to serve as a means of waging politico-cultural civil war. Part III of this thesis concludes by suggesting that when these prosecutorial biases and varying rhetorical registers are understood as an extension of the material and ideational conditions giving rise to the ICC and, therefore, as concomitant to the reconstruction efforts taking place in certain locales in the aftermath of mass atrocity, then this third generation of international prosecutors are explicable not only as agents of ICL, but also as political actors serving, unwittingly or otherwise, in the interests of economic

liberalisation and, in that politico-legal capacity, as auxiliary combatants helping wage a politico-cultural civil war for control over the modernist project.

## ***II Third Generation of International Prosecutors***

Emerging from within the ICC, a third generation of international prosecutors so far includes the first ICC prosecutor, Luis Moreno-Ocampo, who served in that role between June 2003 and June 2012 and his successor since June 2012, Fatou Bensouda, before which she was ICC deputy prosecutor. (Carla del Ponte expressed an interest in the position, but never gained much support as a candidate.<sup>1011</sup>) Moreno-Ocampo, an Argentine and graduate of the University of Buenos Aires Law School, was professor of criminal law at the University of Buenos Aires and visiting professor at Stanford University and at Harvard Law School. As mentioned in Chapter 6, he prosecuted senior military figures in the Argentinian junta for its *Dirty War* in the early 1990s and was considered for the role of first ICTY prosecutor in 1994.<sup>1012</sup> He also featured as a judge on a television show similar to *The Peoples' Court*.<sup>1013</sup> Strongly desiring the position, Moreno-Ocampo chose to meet informally with various EU officials in Germany, Spain, The Netherlands, Norway and London in order to press his own case.<sup>1014</sup>

Born in The Gambia, Bensouda holds a Master's Degree in International Maritime Law and The Law of the Sea. Before taking up her role as deputy prosecutor Bensouda had worked as Legal Advisor, Trial Attorney, Senior Trial Advisor as well as Head of the Legal Advisory Unit at the ICTR. Her professional experience includes stints as Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions and Chief Legal Advisor to the President and Cabinet of the Republic of Gambia. Her resume also includes experiences in diplomatic negotiations for the Economic Community of West African States (ECOWAS) Treaty

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<sup>1011</sup> Bosco, above n 623, at 83. Del Ponte went as far to describe it as her “dream job.” See Del Ponte and Sedutic, above n 6, at 28.

<sup>1012</sup> Scheffer, *All The Missing Souls*, above n 215, at 31.

<sup>1013</sup> Bosco, above n 623, at 84.

<sup>1014</sup> At 84.

and the Preparatory Commission for the ICC. Emerging from within the court and involved in many of her predecessor's decisions, Bensouda represents more continuity than change and "may be disinclined to chart a dramatically different course."<sup>1015</sup>

While the staffing levels supporting the ICC prosecutor are comparable to those supporting ad-hoc tribunals, they are much lower than the staffing levels supporting the prosecutors belonging to the international military tribunals. In 2011, for instance, the OTP has an establishment of 218 positions, though, like previous tribunals, the office structures evolved and specialised units were established in order to cope with unforeseen developments.<sup>1016</sup> As the ad-hoc tribunals began to wind up their work, staff sought to migrate towards the ICC, further consolidating the industry of ICL experts; the ICC also offers academics opportunities to work within the court as visiting professionals.

### ***III ICC Warrants and Summonses***

Situations that might feature serious international crimes come before the ICC through one of three avenues. Firstly, States-Party to the Rome Statute can refer certain situations occurring within their own jurisdiction to the court: Uganda, the DRC, CAR and Mali have undertaken such self-referrals. Secondly, the UN Security Council can, acting under Chapter VII of the UN Charter, refer situations to the ICC, which happened with respect to Darfur in Sudan and Libya, two non-States-Parties to the Rome Statute. Thirdly, the ICC prosecutor can examine situations under his or her own *proprio motu* powers, as occurred in Kenya and Côte d'Ivoire. As Schabas explains "[a] situation is distinct from a 'case', the term used to describe the stage in the proceedings when an individual defendant has been identified."<sup>1017</sup> While States-Party and the UN Security Council can refer *situations*, the prosecutor determines the specific *cases* warranting investigation, after which the Pre-Trial Chamber grants

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<sup>1015</sup> At 187.

<sup>1016</sup> Townsend, above n 1, at 288.

<sup>1017</sup> Schabas, above n 7, at 80.

approval for the prosecutor to proceed to a full investigation.<sup>1018</sup> After conducting a preliminary examination he or she can decline to investigate situations further on the basis of insufficient gravity, complementarity or the interests of justice.<sup>1019</sup> Ten situations that either have been investigated or are under investigation have given rise to 18 cases that have either been heard by, or are currently before, the ICC Trial Chamber. In addition to the situations currently before the Court the prosecutor has opened preliminary investigations into a further nine, which have not yet generated cases.<sup>1020</sup> Thus, “[w]hile the judges do review prosecutorial behaviour in several respects, the prosecutor alone takes the critical decision to trigger a full investigation and request arrest warrants.”<sup>1021</sup> Prosecutors can seek a Warrant of Arrest (and can seek to have it sealed) or, if they have reason to believe that an arrest is not necessary and the accused will turn himself or herself in voluntarily, then a Summons to Appear will suffice.

For the situation in Uganda, which was referred to the Court by the authorities in Kampala in 2003,<sup>1022</sup> the ICC prosecutor intends to try two cases: Warrants of Arrest bring charges against Joseph Kony, Vincent Otti, Okot Odhiambo, and Mr Lukwiya (now deceased); another brings charges against Dominic Ongwen. These charges are either war crimes (52 counts) or crimes against humanity (29 counts). All of the accused are believed to be senior members of the LRA, a *rebel* non-state armed group. The situation in DRC was also the subject of a self-referral in April 2004.<sup>1023</sup> Here, the ICC prosecutor sought to try six separate cases against, respectively, Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga, Mattieu Ngudjolo Chui,

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<sup>1018</sup> Cryer and others, note 15, at 163-166.

<sup>1019</sup> At 165.

<sup>1020</sup> As at the time of writing, namely: Afghanistan; Burundi; Colombia; Guinea; Iraq/UK; Nigeria; Palestine; Registered vessels of Comoros, Greece and Cambodia; and Ukraine. See: <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>.

<sup>1021</sup> Bosco, above n 623, at 18.

<sup>1022</sup> ICC OTP ‘Press Release: President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’ 29 January 2004.

<sup>1023</sup> ICC OTP ‘Press Release: Prosecutor receives referral of the situation in the Democratic Republic of Congo’ 19 April 2004.

Callixte Mbarushimana and Sylvestre Mudacumura. Warrants of Arrest, all of which were issued under seal, bring charges of war crimes (33 counts) and crimes against humanity (11 counts). These men are senior members of the Front for Patriotic Resistance of Ituri (FRPI), Union of Congolese Patriots (UPC), *Forces Patriotiques pour la libération du Congo* (FPLC), *Forces Démocratiques de Libération du Rwanda* (FDLR) and the Nationalist and Integrationist Front (FNI), all of which are *rebel* non-state armed groups. For the situation in CAR, the ICC prosecutor sought to try two cases, the first against Jean-Pierre Bemba Gombo, who commanded the armed group calling itself *Mouvement de Liberation du Congo* (MLC). The charges in this first case were war crimes (initially four, but rose to five counts) and crimes against humanity (initially two, but rose to three counts). The second case brought charges of perverting the course of justice against Jean-Pierre Bemba Gombo, Amee Kiliolo Musamba (lead Council for the Accused), Fidele Babala Wandu, Jean-Jacques Mangenda Kabongo (case manager for the Defence), and Narcisee Arido (defence attorney). This situation was also referred to the ICC in January 2006 by the Government authorities.<sup>1024</sup> This situation in CAR has been the subject of a second self-referral in May 2014,<sup>1025</sup> and the situation in Mali was self-referred in July 2012,<sup>1026</sup> though no charges laid in respect of those two situations have been made or, if made, not made public.

The selection of the accused in these cases arising from situations referred to the court by States-Party reveals prosecutorial bias. The ICC prosecutor appears reluctant to focus investigations into allegations of atrocity crimes committed by the referring authority. This signals a practice of granting *de facto* immunity to those state authorities who, belonging to the court, are quick to denounce their local rivals and opponents as *hostis humani generis*. Clearly the abovementioned self-referring

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<sup>1024</sup> ICC OTP ‘Press Release: Prosecutor receives referral concerning Central African Republic’ 7 January 2015.

<sup>1025</sup> ICC OTP ‘Press Release: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic’ 24 September 2014.

<sup>1026</sup> ICC OTP ‘Statement: ICC Prosecutor opens investigation into war crimes in Mali: The legal requirements have been met. We will investigate’ 16 January 2013.



authorities' use of the ICC in particular, and the pursuit of international criminal justice more generally, is not only a form of politics in which they seek to have their way over others for non-trivial purposes, but is also an extension of the internal armed conflicts which they cannot win through the clash of arms alone. Thus, only members of non-state armed groups are transformed here by the ICC prosecutor from *rebels* into the accused, despite claims of government-driven atrocities and human rights abuses. More specifically, NGOs, most prominently Human Rights Watch, have made credible claims that the referring States-Party is almost certainly responsible for the commission of atrocity crimes.<sup>1027</sup> These NGOs document evidence in Uganda implicating the Ugandan Peoples' Defence Force, in the DRC implicating President Kabila, in CAR implicating President Francios Bozize and his Presidential Guard and in Mali implicating the security forces.<sup>1028</sup> While the prosecutor has relied on evidence gathered by NGOs for cases against rebel groups, such evidence against the self-referring authorities has been marginalised when it has not been altogether neglected. That the ICC prosecutor accepts and relies upon the evidence implicating only rebel groups and not the self-referring authority reveals prosecutorial bias and signals the limits of NGO advocacy and monitoring efforts.

The situation in Darfur, Sudan was referred to the ICC on 31 March 2005 by the UN Security Council.<sup>1029</sup> The prosecutor has decided to pursue five separate cases against the following individuals: Ahmed Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman; Omar Hassan Ahmad Al Bashir; Bahar Idriss Abu Garda; Abdallah Nanda Abakear Nourain; and Abdel Raheem Muhammad Hussein. Harun, Al-Rahman and Al-Bashir are associated with the Government of Sudan or its Janjaweed militia whereas Garda, Banda and Jerbo held leadership positions within, respectively, the United Resistance Front, the Justice and Equality Movement

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<sup>1027</sup> Haile, above n 958, at 245, 270, 275-276 & 372.

<sup>1028</sup> Human Rights Watch *Courting History: The Landmark International Criminal Court's First Years* (2008), available at <https://www.hrw.org/reports/2008/icc0708/>; and more recently Human Rights Watch *Unfinished Business: Closing Gaps in the Selection of ICC Cases* (2011) available at <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases>.

<sup>1029</sup> UN Security Council Resolution 1593 (2005).

Collective (JEM) and the Sudan Liberation Army (SLA), each of which are so-called rebel organisations. The charges include war crimes (48 counts), crimes against humanity (38 counts), and crimes of genocide (3 counts). The UN Security Council also referred, on 26 February 2011, the situation in Libya to the Court.<sup>1030</sup> The ICC prosecutor sought to charge Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullas Al-Senussi for two counts of crimes against humanity each. Each of these men occupied a senior position within the Libyan Government.<sup>1031</sup> The prosecution of heads of state, Ellen L Lutz and Caitlin Reiger explain, are significant for the following reasons:<sup>1032</sup>

Because of the high publicity value of prosecutions of top political figures, the news media carries more information about criminal prosecutions of heads of state or government than it does for prosecutions of lower-ranking officials. In terms of responsibility, heads of state or government are at the top of the chain of command.... Finally, at a symbolic level, these cases often represent far more than the individuals on trial. Especially in situations in which the prosecutions have followed a political transition or the end of a regime, pursuing the highest individual in the hierarchy is also about marking a break with the past and sometimes condemning an entire system that facilitated the commission of serious crimes in the name of the state.

More cynically, these indictments also help prepare the way for further public condemnations and subsequent transitions from authoritarian and for Muslim rule to democracy. In these two instances, the pursuit of international criminal justice does not engage in the aftermath of international armed conflict, but rather, is used as part of politico-cultural civil war's *casus belli*.

Whereas the self-referring authorities are granted *de facto* immunity from charges, the first prosecutor has attempted to appear more even-handed in his

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<sup>1030</sup> UN Security Council Resolution 1970 (2011).

<sup>1031</sup> *Prosecutor v Gaddafi (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/11, 27 June 2011. Not all indictments are publicly available.

<sup>1032</sup> Ellen L Lutz and Caitlin Reiger (eds) *Prosecuting Heads of State* (Cambridge University Press, Cambridge, 2009) at 3-4.

selection of the accused in the Darfur cases. From the UN Security Council's perspective, the real targets of its referrals are leaders of *outlaw* states which, as Simpson explains, are "a figure whose estrangement from the community of nations and demonisation by that community has long been required as part of the project of creating and enforcing international 'society.'"<sup>1033</sup> It is entirely plausible that Sudanese rebel groups are included among the accused precisely in order to symbolise some sort of balance and to avert unwanted criticism of prosecutorial bias, echoing Del Ponte's earlier arguments for her selection of the accused for both the ICTY and the ICTR. According to David Hoile, perhaps staunchest among the ICC's critics, the court ignored several rebel movements responsible for committing war crimes and crimes against humanity. It showed a measure of inconsistency, too, where the ICC prosecutor gave focus to child soldiers in the first trial concerning the situation in the DRC, but ignored available evidence indicating that JEM had used child soldiers. Moreno-Ocampo chose instead to indict three rebel commanders on charges relating to an attack on an African Union peacekeeping force's base in September 2007.<sup>1034</sup> Six years later this pretence of targeting rebel groups was dropped in the situation in Libya where non-state armed groups were omitted from the warrants and summonses, despite evidence of their responsibility for the commission of atrocity crime.<sup>1035</sup>

As mentioned, the ICC prosecutor has used his *proprio motu* powers to undertake preliminary investigations into two situations. For the situation in Kenya, the prosecutor intended to try four cases: the first against William Samoei Ruto, Kiprono Kosgey and Joshua Arap Sang, each of whom was associated with the Orange Democratic Movement (ODM) which lost the elections in late 2007; the second of which is against Francis Kirimi Mathaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, members supporting the Party of National Unity (PNU) which won the election; and a third against Walter Osapiri Barasa and a fourth against Paul Gichera and Philip Kipkoech Bett, each charged with various counts of

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<sup>1033</sup> Simpson, above n 784, at xi.

<sup>1034</sup> Haile, above n 958, at 301-302

<sup>1035</sup> At 353.

perverting the course of justice. The charges in the first two cases include crimes against humanity (27 counts). The other situation to have found its way to the ICC though the prosecutor's own volition is the situation in Cote d'Ivoire. Here, two cases are being pursued, the first against former President Laurent Gbagbo and his close advisor Charles Ble Goude, the second against Simone Gbagbo, wife of the former President. The charges include crimes against humanity (12 counts). Unlike situations involving internal armed conflict or, more particularly, the use of state-based armed force against its own citizens, these two *proprio motu* cases occur in the context of an attempted disruption of the democratic process through illegitimate armed violence organised in accordance with local identity markers. The message here is clear: those who challenge and overthrow the results of the ballot box through political violence can expect to find themselves in the ICC docks. Prosecutorial predilection for democracies could not be more sacrosanct or, for that matter, blatant.

These three sets of decisions, then, reveal a prosecutorial bias favouring referring state-based authority by targeting leaders of *rebel* non-state armed groups, senior members of *outlaw* states and those who use force to *subvert* the democratic process. This bias reflects and reinforces the authority of sovereignty-bound state-makers. This prejudice gives attention exclusively to the politico-strategic dimension of the commission of atrocity crimes or the underlying situations of armed conflicts, but does so at the expense of signalling important politico-economic or politico-social dimensions. Unlike previous generations, the selection of the accused does not take aim at a particular utopian movement based on some combination of nationalism and race, ethnicity, class, or religion, and that uses violence embodied in the power of the state to radically transform society. Instead, these selections—including the selection of charges—are significant because they focus on Africa and on African leaders who potentially control access to natural resources. As Ann Sagan makes clear, the ICC's repeated indictment of Africans tends to characterise them as both violent criminals and hapless victims in need of rescue and protection. Sagan's conclusion is compelling.<sup>1036</sup>

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<sup>1036</sup> Sagan, above n 109, 20-21.

The shift towards cosmopolitan community and a reconciliation of the contestation between cosmopolitan and state-based conceptions of international order is made possible through a revival of historical representations of the African subject through the dichotomies of victim-criminal, insider-outsider and civilisation-barbarism. The cosmopolitan and liberal narratives of international law are institutionalised through their articulation in the Rome Statute and the structure and discourse of the court, making the court particularly susceptible to the indictment of African criminals as well as a site of production for the rearticulation of historical representations of African subjects. This representation is illustrated in the rhetoric of *The Prosecution v. Thomas Lubanga Dyilo*, which emphasises signifiers of victimhood, including sexualised and gendered crimes, in contrast with the criminalised representation of Lubanga as a representation of an outsider of the cosmopolitan community.

Krever would agree, pointing out that the ICC is “less a tool of international justice than the judicial concomitant to Western [imperial] intervention,” particularly as the children of western leaders—who not only oversaw the assassination of Patrice Lumumba, the first democratically-elected leader of the Congo, but also actively supported the dictatorship of Mobuto—thought themselves morally fit to judge those war criminal that flourished under Mobuto’s reign.<sup>1037</sup> Echoing paternalist colonial attitudes and reflecting the discourse against politico-cruelty, these representations also serve the interest of those who are intent on exploiting Africa’s vast natural resources. It is no coincidence that the crimes being investigated and prosecuted in Africa occur in countries that rank among the world’s poorest, have been subjected to various structural adjustment programmes valorising democracy and market-based economies but remain rich in the natural resources vital to fuel the global free market economy.<sup>1038</sup> This deliberate focus on resource-rich countries is further underscored by the evidential streams informing the early selections, especially, as Lubanga’s defence lawyer pointed out, “much of the prosecutions’ case was reliant on NGO

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<sup>1037</sup> Tor Krever “Dispensing Global Justice” (2014) 58 *New Left Review* 96 & 97.

<sup>1038</sup> Clarke, above n 27, at 95

research studies and that ‘NGO justice’ was produced through highly-biased data fuelled through donor-sponsored agendas.”<sup>1039</sup>

Omitted from these warrants and summonses are “situations involving major powers.”<sup>1040</sup> Bosco explains further: “Faced with several conflicts [including Iraq] in which major powers of their allies were directly involved, the prosecutor chose instead to focus on international violence in a part of the world where these powers had few direct interests and where the United Nations was already heavily engaged.”<sup>1041</sup> Israel’s attack on Gaza in late 2008 also fell beyond the prosecutorial gaze.<sup>1042</sup> The ICC prosecutor might well argue that, in his or her assessment, strengthening the ICL regime, especially during its embryonic stage, is more important than blind justice and that such a strategy requires case selection that is consistent with the preferences of the members of the ASP and does not incur the displeasure of the UN Security Council, particularly the P-5. Bosco concludes that “the overall pattern strongly suggests that the prosecutor’s office has, to this point, used its discretion on where to open investigations strategically.”<sup>1043</sup> Here, then, the prosecutor’s selection of the accused and of the charges of atrocity crime appears based less on a non-partisan review of the facts and relevant evidence and more upon short-term political calculation to curry favour with the ICC’s most powerful stakeholders. These selections can, moreover, be understood vis-à-vis the entrenchment of neoliberalism across the world and, by extension, as forming part of a politico-cultural civil war, signalling a shift from ICL show trials to ICL sideshows best illustrated by both prosecutors’ opening statements.

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<sup>1039</sup> At 2.

<sup>1040</sup> Bosco, above n 623, at 186.

<sup>1041</sup> At 91.

<sup>1042</sup> Krever, above n 1037, at 88.

<sup>1043</sup> At 186.

#### *IV Moreno-Ocampo's and Bensouda's Opening Statements*

Thomas Lubanga Dyilo stood in the dock as the accused at the ICC's first trial. This trial began on 26 January 2009. The charges against Lubanga—being a co-perpetrator enlisting and conscripting children under 15 years of age—were read in his native tongue, French. The opening statement was delivered by ICC prosecutor Moreno-Ocampo and his deputy, Bensouda. The statement was structured in four main parts: the first part, read by Moreno-Ocampo, describes “the facts” of case and “the law to be applied,” while the second and third parts, read by Bensouda, gives focus to the underlying situation of armed conflict and to aspects of Lubanga's biography and character. The final section, read by Moreno-Ocampo, deals with the nature of the evidence against Lubanga.<sup>1044</sup> At the close of his oration Moreno-Ocampo promptly departed the courtroom in order to be present at the World Economic Forum in Davos, Switzerland. As a result he did not hear any of the defence's opening remarks.<sup>1045</sup>

The first case to go to trial under Bensouda's leadership was that of William Samoei Ruto and Joshua Arap Sang, which began on 10 September 2013. Before the prosecutor's opening statement was read aloud, the presiding judge, Judge Eboe-Osuji, provided an overview of the procedural history of the case up until that point. This included an admissibility challenge posed by the Kenyan Government, which now wanted to exercise its jurisdiction over the case it had initially referred to the court, and the court's dismissal of that challenge. (As mentioned earlier in the previous chapter, this was, and remains, controversial because it flies in the face of the complementarity principle underpinning this court of last resort.) A synopsis of the charges—three counts of crimes against humanity for both the accused—was read by a Court Officer and the two men accused pleaded not guilty to all charges. Bensouda then began her first opening statement as ICC prosecutor and was assisted by Senior Trial Lawyer, Anton Steynberg. Bensouda began her opening address by giving focus to the local circumstances of the crimes, the biography and character of the accused and the problems associated with the intimidation of witnesses.

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<sup>1044</sup> *Prosecutor v Lubanga (Transcript)* ICC Trial Chamber I ICC-01/04-01/06 26 January 2009.

<sup>1045</sup> Haile, above n 958, at 256.

Steynberg then outlined in more detail the evidence that would be introduced against the accused.<sup>1046</sup> The opening statement took less than an hour for Bensouda and Steynberg to deliver.

At the centre of Moreno-Ocampo's first trial were Lubanga's atrocity crimes concerning the recruitment of children as soldiers in his politico-military group, *Union des Patriotes Congolais*, and in its armed wing, the *Forces Patriotiques pour la Liberation du Congo*. These child soldiers were used to murder, pillage and rape.<sup>1047</sup> According to Moreno-Ocampo and Bensouda, a common plan also existed to maintain and broaden Lubanga's control over the Ituri district through enlisting, conscripting and using children as combatants.<sup>1048</sup> The perniciousness of this atrocity crime lies in the victims' suffering. These children, the ICC prosecutor lamented, were unable to simply forget all they saw and did, the beatings received and given, the terror they felt and inflicted and the rapes they committed and suffered.<sup>1049</sup> The atrocities committed by Lubanga, he went on, would haunt not just one child, but an entire generation of children.<sup>1050</sup> The spectre of the child soldier is, however, a particularly thorny issue in the pursuit for international criminal justice as they are constructed as both victims in need of rescuing and perpetrators of atrocity crimes that contain acts worthy of punishment.<sup>1051</sup> Girl soldiers were singled out for particular lamentation. According to Moreno-Ocampo and Bensouda:<sup>1052</sup>

[I]n the training camps, girl soldiers were the daily victims of rape by the commanders. Girl soldiers, some aged 12 years, were used as cooks and fighters, cleaners and spies, scouts and sexual slaves. One minute they will carry a gun, the next minute they will serve meals to the commanders, the next minute the commanders will rape them. They were killed if they refused to be raped. One child soldier became severely

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<sup>1046</sup> *Prosecutor V Ruto (Transcript)* ICC Trial Chamber V ICC-01/09-01/11, 10 September 2013.

<sup>1047</sup> *Lubanga*, above n 1194, at [4].

<sup>1048</sup> At [23-24].

<sup>1049</sup> At [4-5].

<sup>1050</sup> At [35].

<sup>1051</sup> Clarke, above n 27, at 91.

<sup>1052</sup> *Lubanga*, above n 1044, at [11-12].



traumatised after killing a girl who refused to have sex with the commander. There were very little girls. You will hear that as soon as the girl's breasts started to grow, Thomas Lubanga's commanders could select them as their forced wife. "Wife" being the wrong word. And they were sexual slaves, and transformed them into sexual slaves. One of our witnesses will describe how he observed daily examples of his commanders raping girl soldiers. You can still meet any of them in the Democratic Republic of Congo. Some of them kept as so-called wives by the commanders, some of them, in the streets of Kinshasa and Bunia, rejected by their community and struggling to make a living as prostitutes. These girl combatants are left on the margins of many disarmament, demobilisation and reintegration projects. As emphasised by the special representative of the United Nations Secretary-General Ms. Radhika Coomaraswamy in her amicus brief to this court, girl combatants are too often invisible, because they're also wives and domestic aides and slip away or are not brought forward for demobilisation programmes.

By contrasting this part of the opening statement delivered by Moreno-Ocampo and Bensouda with Jackson's oratory sixty-four years earlier, Sergey Vasiliev suggests this is an example of poor trial advocacy at the ICC. Instead of previewing evidence in corroboration of actual charges (enlistment and conscription of children under the age of 15 and using them to participate actively in an armed conflict), this portion of the ICC prosecutor's statement was devoted to describing crimes related to sexual violence against girls in the UPC camps that were not charged and would not have to be proven. This aspect of the statement may have been grandstanding in its intent, yet was underwhelming and even counterproductive in its effect, fuelling some victims' pre-existing frustration with the narrow scope of the charges brought against Lubanga.<sup>1053</sup>

Like the opening statements at the ad-hoc criminal tribunals, armed conflict is treated by Moreno-Ocampo and Bensouda not as a crime in and of itself, but as an underlying condition for atrocity crimes. Firstly, the causes of the armed conflict occurring in Ituri between September 2002 and August 2003 were located in the

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<sup>1053</sup> Vasiliev, above n 14, at 748-749.

aftermath of the genocide occurring in Rwanda during 1994, when hundreds of thousands of Rwandese, including some of those responsible for the genocide, fled to eastern Zaire before attacking Rwanda, triggering the First Congo War in 1996.<sup>1054</sup> Also contributing to the underlying situation of armed conflict was the Second Congo War, which began in 1998 and involved some nine African countries. According to Bensouda “[c]lose to 4 million are estimated to have died in the DRC between 1998 and 2004, in particular due to starvation and disease resulting from war.... the highest number of civilians killed as a consequence of war since the Second World War.”<sup>1055</sup> The armed conflict has both international and non-international elements, though the prosecution signalled its intention to disclose all of its evidence concerning both elements in order for the Trial Chamber “to determine whether the Ugandan occupation of Ituri between the 1<sup>st</sup> of September, 2002 and early June 2003 transformed the character of the conflict into an international armed conflict.”<sup>1056</sup>

In their opening statement Bensouda and Steynberg announced serious international crimes too. Crimes against humanity, specifically murder, deportation or the forcible transfer of population and persecution, were the focus here. The prosecutor declares:<sup>1057</sup>

It is the violence in the Rift Valley, in particular the districts of Nandi and Uasin Gishu, that is the subject of the present case. Once the dust had settled and the flames were doused, over 200 people lay dead and another 1,000 people were injured in these two constituencies alone. Over 50,000 homes were razed to the ground in the Uasin Gishu alone—the highest number in any single district in Kenya—and tens of thousands of people fled the areas.

An underlying situation of armed conflict is absent here, however. Rather, organised post-election violence is at issue. Again, the prosecutor declared:<sup>1058</sup>

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<sup>1054</sup> *Lubanga*, above n 1044, at [19].

<sup>1055</sup> At [20].

<sup>1056</sup> At [22].

<sup>1057</sup> *Ruto*, above n 1046, [at 14].

<sup>1058</sup> [at 17].

There has been, Mr President, much speculation and often inaccurate public and political discourse regarding the Prosecution's reason for investigating the post-election violence in Kenya. Today too many people have forgotten the intensive efforts of the International Criminal Court throughout 2008 and 2009 to encourage Kenya to establish genuine national proceedings. Let me emphasise that the Prosecution intervened in this matter only after the Kenya efforts to establish a domestic mechanisms to investigate the violence failed.

This is consistent with the previous prosecutor's publicly-stated reasons for undertaking this investigation using his *proprio motu* powers. The targeting of an ethnic group, the Kikuyu, is significant for the enforcement of ICL because of their suspected proclivity to vote for a particular political party, the PNU. Steynberg also expressed his concern to the bench over the probable use of the term *tribe*, which, although derogatory for it implies that a particular group is uncivilised, would nevertheless likely be used by many of the prosecutions' witnesses as the word is an important part of their vocabulary.

Moreno-Ocampo and Bensouda pointed to the various forms of evidence they intended to led, including 1,671 documents, which they claimed would incriminate Lubanga. Many of these documents were composed at the time of the atrocities and bear Lubanga's signature or were seen by him. Video clips used during the opening statement would also be used as evidence, alongside others, as will the testimony of three expert witnesses. Eyewitness testimony from thirty-three child soldiers would not only make visceral their individual suffering, but would also provide facts about "enlistment and conscription" "training" and "active participation," as well as "killing civilians," "rape," "pillaging," and providing "security." Moreno-Ocampo placed particular emphasis on:<sup>1059</sup>

The nine former child soldiers you will see in this courtroom are remarkable individuals. We are impressed by the way they have, and continue to, overcome the adversity they have faced. Many of them have recently completed the high school exams and yet even these nine still find it painful to recount what happened to them. Even these nine would

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<sup>1059</sup> *Lubanga*, above n 1044, at [33].

prefer not to speak about the details of what they saw and what they did. Testifying will force them to relive traumatic experiences they are deeply ashamed of and wish to forget or ignore entirely. These witnesses are vulnerable witnesses, your honours. I need say no more. The court is calling two expert witnesses who will explain the difficulties that the witnesses will experience as they testify, how these child witnesses are always at risk of re-victimisation.

Bensouda and Steynberg not only foreshadowed their subsequent use of brief video clips, but also deployed them as part of their opening statement in the more detailed sections covered by Steynberg. The prosecutor signalled that twenty-two victims and witnesses would be asked to testify,<sup>1060</sup> including expert witnesses who would provide “insight into the political and historical background against which these crimes were committed, including the Kenyan political environment... from a political, sociological, and anthropological perspective.”<sup>1061</sup> Bensouda and Steynberg then decried their difficulties in securing witness testimony:<sup>1062</sup>

[t]his trial is the culmination of a long and difficult investigation. It has been fraught with co-operation challenges and obstacles relating to the security of witnesses. Many victims and witnesses have been too frightened to come forward. Others have given statements, but subsequently sought to withdraw from the process, citing intimidation or fear of harm. Worrying evidence, Mr President, has also emerged of attempts to bribe witnesses to withdraw or recant their evidence.

Relevant law received brief treatment in both opening statements. Moreno-Ocampo and Bensouda made reference to the crimes articulated in the Rome Statute concerning children in armed groups being committed in three ways: conscription, enlistment or using them to participate actively in combat.<sup>1063</sup> The Special Court for Sierra Leone was also cited for having concluded that recruiting children soldiers

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<sup>1060</sup> *Ruto*, above n 1046, at [22].

<sup>1061</sup> At [24].

<sup>1062</sup> At [18-19].

<sup>1063</sup> *Lubanga*, above n 1044, at [13].

under the age of 15 was a crime under customary international law since at least 1996. Moreno-Ocampo and Bensouda also sought to preclude a legal defence hinging on children's consent, which, according to the prosecutor, is not a valid defence for the crime of recruiting child soldiers does not allow for the lawful voluntary enlistment of children or for the lawful conscription of children. "The prohibition is absolute and suffers no exception" Moreno-Ocampo declared, "[and] has been argued and settled legally by the drafters of the Rome Statute nearly 11 years ago."<sup>1064</sup> With only the briefest mention of the Rome Statute, Bensouda and Steynberg sought to steal the thunder of the defence's likely approach, rather than preclude likely defences on legal grounds. Steynberg opined, for example:<sup>1065</sup>

The Defence will have you believe that the post-election violence in the Rift Valley was not in fact the product of prior planning by the accused and his network, but rather the spontaneous response of the population to what they perceived as election fraud. They will allege that the Prosecution's evidence to the contrary is a fabrication and that many of the Prosecution witnesses have engaged in an elaborate conspiracy. They will point to alleged inducements offered to witnesses, whether by the Prosecution or some other yet to be identified party in order to falsely lay the blame at the feet of the accused. Indeed the Defence are obliged to do so since the evidence against them, if accepted, is compelling.

Here, then, building on the content of their respective warrant and summons, this third generation of international prosecutors used their opening statements in order to frame their legal arguments by announcing serious international crimes, foreshadowing evidence subsequently submitted during trial and precluding any foreseeable defence rebuttals. For both these ICC prosecutors the law, and their role enforcing ICL, is a domain entirely separate from politics and war. Their opening addresses, which commenced the trials proper, were designed to convince the bench and the audience-at-large of the guilt of the accused and the urgent necessity of finding the accused guilty. Concomitant with strong accusations of criminal

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<sup>1064</sup> At [14].

<sup>1065</sup> *Ruto*, above n 1046, at [32-33].

culpability directed at the accused, this self-consciously legal rhetoric seeks to de-historicise the situations within which atrocity crimes occur. Notable for its absence here is a close examination of “the root causes of the violence in various postcolonial contexts [that] are underlain by histories of colonial subject formation, contested governance and boundary-making dictates, foreign resource ownership and extraction in the midst of poverty, and unresolved conflict—all contributory factors to this ongoing conflict in so many of the recent African civil wars?”<sup>1066</sup> Rather, the legal register suggests that the prosecutorial rhetoric is always separate from the politics establishing the ICC and separate from the concomitant post-conflict reconstruction taking place in the situations providing cases for the court.

Unlike the first generation of international prosecutors, this third generation does not articulate their politico-strategic, politico-economic and politico-social preferences within their opening statements. Like the prosecutors at the ad-hoc tribunals, the ICC prosecutors do not explicitly extol the virtues of democratic government and liberal markets. Nor do they extol the virtues of individualism. This is not to suggest, however, that the ICC prosecutors are devoid of such preferences, but only that these preferences no longer need justification as these are now the entrenched status quo following the end of the Cold War, with its concomitant shift away from authoritarian totalitarian regimes towards democracy, away from planned economies towards free markets, and away from various forms of collectivism towards individualism, particularly as prosecuting under ICL rests upon the doctrine of individual responsibility. By giving focus to African criminality and victimhood, prosecutors reinforce the existing power configurations in contemporary world affairs, normalise the current set of politico-strategic circumstances and help conceal the utopian nature of economic liberalisation.

While Moreno-Ocampo and Bensouda did not explicitly mention defending civilisation, they did valorise the international community as the highest authority:<sup>1067</sup>

The Rome Statute ratified by 108 States and supported by citizens and institutions across the globe has given me a mandate. I have to

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<sup>1066</sup> Clark, above n 27, at 19.

<sup>1067</sup> *Lubanga*, above n 1044, at [35-36]. (My emphasis added.)

investigate and prosecute the perpetrators of the most serious crimes *of concern to the international community as a whole*. The aim is to end impunity and contribute to the prevention of future crimes. Crimes like Thomas Lubanga's crimes. Thomas Lubanga knew what he was doing so clearly that *he consciously tried to mislead and appease the international community* by issuing demobilisation orders on paper even as he kept recruiting child soldiers in practice. ...Thomas Lubanga has to learn that the Rome Statute could not be circumvented. Children are not soldiers. If convicted, Thomas Lubanga's sentence will send a clear message: the era of impunity is ending.

Even though the meaning of the term *international community*, which includes states as well as UNICEF and local NGOs, remains unspecified here, reason, enlightenment, progress and the sanctity of individual life are civilised values that underpin the language of this statement. Moreno-Ocampo summed up the issue at hand as follows:<sup>1068</sup>

The crux of the matter is to both ensure that those children, whatever the function they perform, are recognised as a child soldiers and benefit from all the protection afforded to child soldiers under human rights law, while ensuring at the same time that they keep the widest protection afforded to civilians under international humanitarian law. It is, for this court, a challenging mission.

Although there was some focus on the law criminalising certain acts of politico-cruelty within both opening statements, even less focus is given to the importance of maintaining the rule of international law. Bensouda and Steynberg did mention the Rome Statute, albeit cursorily and only in relation to another case before the Court at that time; yet the sanctity of law, they argued, must be preserved from malign influences.

The ICC prosecutors did not characterise the accused as either evil or insane as the Nazis and Shinto-Imperialists had been characterised by the first generation of international prosecutors. While the second generation of prosecutors suggested that the capacity to commit atrocity crimes is an intrinsic aspect of the accused's

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<sup>1068</sup> At [15].

character, which lay dormant until their respective underlying material politico-strategic situation changed during the course of armed conflict, the ICC prosecutors took a more essentialist view of human nature; instead of being shaped by their material circumstances, the accused shaped these circumstances to suit their own ends. In other words, rather than using the opening statements to suggest that the character of the accused changed in light of their respective politico-strategic circumstances, the third generation of prosecutors emphasised the consistency in the accused's character, as though their usual practice was to take recourse to violence when their politics fails them.<sup>1069</sup>

The accused are thus depicted in prosecutorial opening statements as seeking political gain via illegitimate violent means. Moreno-Ocampo and Bensouda described Lubanga's insatiable hunger for power and influence:<sup>1070</sup>

Thomas Lubanga Dyilo had ambition. He wanted political power and an army to build his power upon. The evidence will show how he combined his talents as an educated man, as a trader, how he used his connections, the loyalty of the Gegere elite while harming the Gegere families at the same time, how he carefully selected the most opportunistic methods to build his power, recruiting children, recruiting children as soldiers, shifting alliances whenever necessary, trying to play with the international community. He pretended that he was loyal to the Rassemblement Congolais when they were in power and he was conspiring against them at the same time. He announced programmes of pacification, and he was sending his troops to kill all the Lendus at the same time. He promised to demobilise the child soldiers, and he was recruiting them at the same time. The evidence will show that at all times relevant to the charges he had total control of his group. Those who opposed his will had to leave.

It was Lubanga's custom to deal with opponents violently, his subordinate on one occasion taking a Minister hostage.<sup>1071</sup> More Machiavelli than Mahatma, Lubanga deliberately misled the international community by issuing orders to demobilise child

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<sup>1069</sup> *Lubanga*, above n 1044, at [27] and *Ruto*, above n 1046, at [15-16].

<sup>1070</sup> *Lubanga*, above n 1044, at [24-25].

<sup>1071</sup> At [27].



solders before re-recruiting most of them and ordering them into combat roles.<sup>1072</sup> Bensouda and Stenberg described Ruto as “a powerful politician” who, along with Sang, “a radio broadcaster,”<sup>1073</sup> exploited pre-existing ethnic tensions between Kalenjin and Kikuyu in order to seize political power for himself and his party if the resulting ballot box was not in his favour. Ruto exhorted supporters to expel the Kikuyu from the Rift Valley as a means of permanently altering the area’s ethnic composition, consolidating his power over his Kalenjin supporters.<sup>1074</sup> Sang, described as the “main mouthpiece used by Mr Ruto” made available his prime-time radio show.<sup>1075</sup> Both men understood that losing the election would deprive them of legitimate power, “with all its attendant benefits for the winner and his supporters and marginalisation and disenfranchisement for the loser.”<sup>1076</sup>

Just as the accused are not characterised as either evil or insane by the ICC prosecutors, the political movements of the accused are not demonised by the ICC prosecutors in the way that Nazism and Shinto-Imperialism had been demonised by Jackson and Keenan. In fact, Moreno-Ocampo and Bensouda omit all but a bare mention of the political group to which Lubanga belongs, possibly as a way to ‘de-politicise’ the trial proceedings. Given the utopian movement of economic liberalisation reigns supreme within modernist world affairs, all other rivals are automatically deemed inauthentic, fraudulent and illegitimate. Politico-cultural civil war, waged as a war of pacification, does not require an explicit declaration.

The type of group to which the accused belong is, however, denounced by the ICC prosecutors in their opening statements. Lubanga built and led a non-state armed group, the purpose of which was to pose a military challenge to the existing government. This was no ordinary rebel army, however; the “Lubanga militia was an army of children.”<sup>1077</sup> This armed group is an anathema to Moreno-Ocampo and

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<sup>1072</sup> At [30-31].

<sup>1073</sup> *Ruto*, above n 1046, at [14].

<sup>1074</sup> At [15-16].

<sup>1075</sup> At [16].

<sup>1076</sup> At [26].

<sup>1077</sup> *Lubanga*, above n 1044, at [16].

Bensouda because of its deplorable treatment of minors, which it consumed as it grew. It was not only a direct threat to the state, but was also parasitic on society and an affront to the values of the *civilised* international community. Moreno-Ocampo's and Bensouda's opening statement is replete with first-hand examples of children as victims and the brutality they experienced. Described here, among other horrendous examples, are the experiences of children abducted as they went about their daily business and then forcefully enlisted into Lubanga's militia, the combat training given through beatings, terror, and fear, and how Lubanga instructed his men to "ensure obedience" by ordering "the children to beat and kill fellow child soldiers."<sup>1078</sup> "The defendant stole the childhood of the victims by forcing them to kill and rape" the prosecutors charged, and "Lubanga victimised children before they ever had the chance to grow up into full human beings who could make their own decisions."<sup>1079</sup> Child soldiering proper is then described as "children were launched into battle zones where they were instructed to kill everyone regardless of whether their opponents were military or civilian, regardless of whether they were men, women, or children."<sup>1080</sup>

Moreover, Ruto and Sang belong to a political party, conducting organised large-scale violence among their followers in the Rift Valley in lieu of a victory at the ballot box. "The network's plan, repeated time and time again at rallies and meetings, was war," Bensouda and Styenberg complained. With such intentions, theirs' was a criminal organisation resembling the Italian mafia or Chinese triads.<sup>1081</sup> Notwithstanding that group's non-state qualities, it had the capacity and resources to conduct organised large-scale acts of violence and is, therefore, an organisation for the purposes of the contextual elements required for crimes against humanity.<sup>1082</sup> Both of these non-state armed groups, then, were deemed illegitimate as their very existence undermined sovereignty and tended to destabilise the state and, by

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<sup>1078</sup> At [7].

<sup>1079</sup> At [34].

<sup>1080</sup> At [9].

<sup>1081</sup> *Ruto*, above n 1046, at [26].

<sup>1082</sup> At [28].

extension, the state-based system as it pertains to sub-Saharan Africa. Prosecutorial denouncement along such lines merely entrenched the politico-strategic status quo within the two situations investigated.

Given this challenge, which cannot be tolerated, those who inspire and lead such groups must be denounced as *hostis humani generis* and expelled from the human community. There is no place for these groups in contemporary world affairs. In order to ensure that the accused are denounced both prosecutors deploy the provocative rhetoric of the War on Terror. The single word, “terror,” is a loaded gun in the prosecutor’s hand. Observe its frequent use: “They cannot forget *the terror* they felt and *the terror* they inflicted”;<sup>1083</sup> “The environment of *terror* that Lubanga’s men created in the camps;”<sup>1084</sup> “The children were *terrorised*,”<sup>1085</sup> and “It is difficult to imagine the suffering or *the terror* of the men and the women and children who were burned alive, hacked to death, or chased from their homes by armed youths.”<sup>1086</sup> During the War on Terror language which paints the accused as terrorists—thereby placing these men beyond tolerance and the protection of law—is nothing short of war rhetoric. There is not even a need to denigrate the utopian movement of the accused. To this end, Moreno-Ocampo boldly asserted that he wants “to put the Defence on notice that the Prosecution anticipates to call for a severe punishment, very severe, close to the maximum. The Prosecution believes that the massive crimes litigated in this International Criminal Court, with hundreds or thousands of victims, with entire communities affected, warrant very high penalties.”<sup>1087</sup> Bensouda, however, is more circumspect, saying only that “[i]f the accused are, indeed, guilty, however the victims of the awful violence that wracked Kenya in 2007 and 2008 deserve to see them punished. This is a matter for the Chamber alone to decide.”<sup>1088</sup>

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<sup>1083</sup> *Lubanga*, above n 1044, at [4-5].

<sup>1084</sup> At [6].

<sup>1085</sup> At [7].

<sup>1086</sup> *Ruto*, above n 1046, at [14].

<sup>1087</sup> *Lubanga*, above n 1044, at [34].

<sup>1088</sup> *Ruto*, above n 1046, at [19].

## *V Conclusion*

The pre-trial and trial efforts of this third generation of international prosecutors represents another concrete manifestations of the discourse against politico-cruelty, signalling acts of politico-cruelty which cannot be tolerated under the rule of law. As a fundamental component of the pre-trial process, and then commencing the trial proper, the preparation of these documents and the making of these statements are vital to ICL enforcement at the ICC. There is more than ICL enforcement at work here, however. While the selection of specific charges for inclusion within these legal documents sought to highlight the vulnerability of African women and children, the selection of suspects draws attention to the African rebel groups and outlaw state-makers. By examining the ways in which both statements announced serious international crimes, foreshadowed evidence of those crimes, signalled relevant applicable law and attempted to preclude foreseeable defences, this chapter found a legal rhetoric that self-consciously distinguishes itself from the politico-strategic calculations of powerful state-makers as much as it deliberately distances itself from the ugly realities of armed conflict. It also found that these statements, despite the lack of explicit preferences for free markets and individualism, help unmask the fiction of international prosecutors as juridical actors remaining above all political considerations, revealing a political rhetoric deployed in the service of economic liberalisation. Notwithstanding the fact that politics saturates the enforcement of this law, the prosecutorial performance itself is constitutive of modernist world politics because these prosecutors seek to have their way over others—whether these others are the leaders of rebel groups or outlaw states, their followers, or their bench—for non-trivial purposes. This politics is not only an extension of the politico-strategic circumstances that established the ICC, but is also part of a contest between proponents of economic liberalisation and non-liberal utopian movements for control over post-conflict states, economies and societies. When the opening statements denounce those rebels and outlaws, calling for their abjection from international life, international prosecutors invoke rhetoric of war, helping wage a politico-cultural civil war fought for control over politico-strategic and politico-economic institutions governing international life. Even though the rhetoric of these opening statements

operates within three distinct registers of law, politics and war, the distinctiveness of these registers dissolves as soon as the enforcement of ICL is understood as a form of modernist world politics which is, in turn, is understood as a form of politico-cultural civil war.

## CONCLUSION TO PART III

Part III of this thesis recognises that this third generation of international prosecutors played vital roles in ICL enforcement during the US-led War on Terror by preparing arrest warrants and summonses to appear as well as by conducting investigations, presenting evidence and cross-examining witnesses. The two individuals who have held the post of ICC prosecutor have, cumulatively, sought the indictment of at least 38 individuals under the auspices of the ICC. There are 23 cases before the ICC and its bench has so far delivered four verdicts in which three individuals has been found guilty and one has been acquitted.<sup>1089</sup> This generation's prosecutorial performance has a direct bearing on both the enforcement of ICL within the ICC and the ongoing development of this evolving set of rules prohibiting the commission of war crimes, crimes against humanity, crimes of genocide and crimes of aggression. Yet assessments of the court's impact vary. Although Schabas complains that the ICC squandered its first decade by struggling "to find its way" despite its "extraordinarily light case-load,"<sup>1090</sup> Dutton is more circumspect, suggesting that while this "may not sound like a significant number of arrests, it bears noting that the ICC is still a very young institution. The fact that even some states and individuals have complied with this young institution's orders suggest that its powers are viewed as legitimate and significant."<sup>1091</sup>

Following on from the preceding two parts, Part III of this thesis asserted that members of this third generation of prosecutors are more than agents of ICL; they are also political actors serving in the interests of economic liberalisation. Part III described the politico-strategic circumstances enabling the establishment of the ICC, placing those circumstances within a set of material and ideational conditions that were present in the rise, spread and entrenchment of liberal regimes in the nineteenth century in particular and the modernist project more generally. It illuminated a political thread from those material and ideational conditions, through the design and establishment of the international military courts, the ad-hoc criminal tribunals, and

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<sup>1089</sup> For further Information, visit: <https://www.icc-cpi.int/about>.

<sup>1090</sup> Schabas, above n 7, at 17.

<sup>1091</sup> Dutton, above n 91, at 18.

the international criminal court, up to the ICC prosecutors' pre-trial and trial efforts. The various warrants and summonses signal a bias against so-called rebel armed groups, outlaw state leaders, and those who seek to subvert the democratic process. Far less grandiloquent than those made by Jackson and Keenan, the first opening statements made at the ICC reflect the law's majesty and reproduce the existing configurations of power and authority in modernist world affairs.

Part III, moreover, argued that these prosecutors help wage a politico-cultural civil war over the institutions governing international affairs and, through those institutions, the broader and deeper project of modernity. Modernity is a complex and dynamic project with many potential varieties. Some proponents of modernist utopias choose to use mass atrocities as a means of achieving, at least for them, rational ends. Others, in positions of power and influence in world affairs, condemn that cruelty through law and, in so doing, suppress the rival utopia movements. The rhetoric articulated in five opening statements made by each of the three generations of international prosecutors—particularly the epideictic style denouncing rival, but discredited utopian movements and calling for their abjection from humanity's ranks—plays an important part in the politico-cultural civil war fought for control over the project of modernity. These statements imply that transforming local politico-strategic, politico-economic, and politico-social institutions is not just palatable, but desirable and even necessary. Under such circumstances, the distinctiveness among the rhetoric of law, politics and war contained in all of the prosecutors' opening statements dissolves. Rather than helping ensure peace, stability and security for those victorious in Second World War, or helping the UN Security Council to police the world's trouble spots in the aftermath of the Cold War, the ICC prosecutors are helping open up African countries so that their natural resources can be commercially exploited. That is what the strong disciplining focus on African situations and the subsequent cases at the ICC signifies. The prosecutor's future reach may well broaden beyond Africa, but it will seldom engage in countries that are not endowed with natural resources required to fuel the global economy and will never reach as far the P-5. If the ICC prosecutor does focus her attention in areas

without natural resources it will be entirely for the optical effect of appearing balanced and objective in its quest for international criminal justice.

At the forefront of this quest, the prosecutor's role in the politico-cultural civil war is more or less covert as it is never explicitly acknowledged. Perhaps the complicity is not even fully grasped by the prosecutors themselves since the values informing prosecutorial action are reflected and re-inscribed through a Gramscian process of cultural hegemony whereby the interests of the powerful quietly and subtly became the values of held by the weak. Despite the lack of a declared combat role, the three successive generations of prosecutors examined in this thesis played direct roles on a new front-line in this civil war for modernity, both by targeting political and military leaders and their subordinates participating in armed conflicts and mass atrocities and by reifying a legal solution to a pressing politico-social problem. Put in another way, the prosecution's more limited, tactical courtroom goals—namely, the transformation of enemies, opponents, and rivals into the accused and then the transformation of the accused into convicts before the expulsion of these *hostis humani generis* from the ranks of humanity—creates something of a Marxist false consciousness about the real and helplessly compromised nature of the society of states and the wider international community by offering a veneer of a humanitarian normative order when there is no such thing.<sup>1092</sup> A banality of goodness propagated by the court masks a grim reality of armed conflict and atrocity crime which could not be more different than the lived experiences of the prosecutor based in The Hague. While as individuals each prosecutor of serious international crime might at certain times battle to change this, their efforts will always be circumscribed by the politico-strategic circumstances that give rise to the functional authority within the courtroom. Exploiting the widespread and deeply-held repugnance directed at those individuals who commit acts of politico-cruelty, this third generation of international prosecutors help wage a politico-cultural civil war, firstly, by deflecting attention away from the motives informing post-conflict reconstruction efforts and, secondly, by maintaining the false distinction among law, politics and war. Far from being neutral adjudicators of ICL, the ICC formed an important aspect of what Foucault

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<sup>1092</sup> I am grateful to Professor Boister for suggesting this point to me.



would describe as silent war that masks the discontinuities between periods of armed conflict and ongoing pacification efforts that almost always follow. This civil war, fought in and over the divided house of modernity while asserting civility and law ahead of barbarity and lawlessness, uses laws prohibiting the commission of war crimes, crimes against humanity, crimes of genocide and crimes of aggression as weapons in this politico-cultural civil war. Yet the re-conceptualisation of this law to cover those who wage politico-cultural civil war from positions of power is unimaginable. Put simply, law is politics and politics is war.

## **CONCLUSION: CHIEF AMONGST THE ANGELS?**

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The preceding chapters of this thesis collectively argued that three successive generations of international prosecutors are best understood as agents not only of the law, but also of politics and war. More than recognising the vital roles these prosecutors play in the enforcement of ICL, specifically preparing indictments, warrants or summonses and making opening statements, this thesis contends that they are politico-legal actors involved in a series of ongoing contests among rival utopian movements. While there are obvious immediate politico-strategic factors informing each generation's prosecutorial efforts, there are less easily identified deeper forces at play here too. This thesis went further still by contending that international prosecutors help wage a politico-cultural civil war among these utopian movements using all of the means available to obtain and maintain control over perceived enemies, rivals and opponents within modernist world affairs. By taking a critical approach—which as previously mentioned involves standing apart, to the extent that it is possible to stand apart, in order to explore the circumstances that gave rise to ICL institutions—the thesis signalled that the prosecutors' agency in law, politics and war is derived from configurations of power emerging in the aftermath of two global conflicts. The first of these global conflicts occurred as the Second World War during 1939-45, the second as the Cold War during 1948-1991; while a third global conflict, the so-called War on Terror, has been underway since late 2001 it did not shape the establishment and design of the ICC, though it does continue to inform the ideas and actions of the ICC prosecutor. Put simply, an evolving set of politico-strategic circumstances that established five institutions designed specifically to enforce ICL saturate prosecutorial mandates in ways that are inescapable for the prosecutors. Yet these circumstances connect with deeper, more profound transformations taking place in the context of the politico-cultural project of modernity. In rare moments there is a convergence between the prevailing set of politico-strategic circumstances and the discourse against politic-cruelty, though usually the relationship can be characterised by longer periods of dissonance. This critical approach also illustrated the role played by nineteenth-century liberalism in

giving rise to a discourse against politico-cruelty that awaited favourable politico-strategic circumstances before establishing ICL institutions as part of broader reconstruction efforts in which war-torn states are transformed into democracies and war-ravaged economies are transformed into free markets.

This thesis is critical, then, in the sense of offering a critique along the lines of Karl Marx and Immanuel Kant. As James Miller explains:<sup>1093</sup>

For both Marx and Kant, the purpose of critique was to render explicit what otherwise would remain implicit, bringing to light buried assumptions that regulated the way we think, and submitting these assumptions to public examination. In Kant's work, critique revealed the limits of reason, as well as the indomitable urge of the human spirit to pass beyond those limits; in Marx's work, on the other hand, critique revealed how categories of modern economics corresponded to 'the conditions and relations of a definite, historically determined mode of production.'

The thesis is critical so that interested scholars may better comprehend the complexities and complicities of this topic. It is self-consciously a "politicized form of writing" that seeks to "disturb us, force us out of our narrative habits by giving us an experience of discord in both our relation to things and to each other, by making unfamiliar, through transcoding or refiguring or otherwise re-contextualizing, what has been familiar."<sup>1094</sup> Whether they and their acolytes like it or not, the three generations of international prosecutors examined above are complicit with powerful forces animating modernist world affairs right up to, and including, the present moment. As much for the prosecutors themselves, as for those who champion their efforts, this critique calls into question the assumption that law is an ahistorical and non-contingent set of rules. Foucault is instructive here, revealing that *crimes* are neither organic nor universal, but result from complex policing and diplomacy practices that largely determine what actions constitute shocking crimes and what

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<sup>1093</sup> James Miller *The Passion of Michel Foucault* (Harvard University Press, Cambridge, Massachusetts, 1993) at 302.

<sup>1094</sup> Michael J Shapiro *The Politics of Representation: Writing Practices in Biography, Photography, and Political Analysis* (University of Wisconsin Press, Madison 1988) at 54.

actions are deemed tolerable by state-makers and the wider international community.<sup>1095</sup>

Koskenniemi perceptively warns “[a] trial that ‘automatically’ vindicates the position of the Prosecutor is a show trial in the precise Stalinist sense of that expression.”<sup>1096</sup> This charge is as valid for those scholars who uncritically champion prosecutors as legal agents while failing both to recognise their own unduly narrow notion of the political and to freely acknowledge their self-serving separation of law from politics which, as this thesis demonstrates, is a distinction that dissolves under sustained critical scrutiny. ICL enforcement institutions were, and are, important vehicles for spreading and intensifying a set of highly-specialised legal skills and knowledge, enabling the development of a cadre of qualified professional and academic experts who, in turn, buttress the cottage industry of international criminal justice.<sup>1097</sup> Even back in the 1950s members of NGOs were frequently legal scholars shifting seamlessly between civil society roles to the diplomatic corps and back again to academia.<sup>1098</sup> As Clarke elucidates, “[w]ith the globalization of substantive and procedural international criminal justice institutions, studies of lawmaking and justice-producing domains cannot be isolated from other spheres of control and interaction that go well beyond the state or the materiality of the object, seen or unseen.”<sup>1099</sup> Western universities in particular, as sites of teaching and knowledge production, are deeply embedded in the neoliberal world order and law schools are no exception.<sup>1100</sup> According to Baars, “[a]cademic lawyers perform a *post-hoc*

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<sup>1095</sup> Michael J Shapiro *War Crimes, Atrocity, and Justice* (Polity Press, Cambridge, 2015) at 35.

<sup>1096</sup> Koskenniemi, above n 24, at 184.

<sup>1097</sup> Tor Krever “Unveiling (and veiling) politics in international criminal trials” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014) at 132.

<sup>1098</sup> Struett, above n 85, at 54

<sup>1099</sup> Clarke, above n 27, at 115.

<sup>1100</sup> For a compelling argument on this general point, see Michael McKinley “The Co-option of the University and the Privileging of Annihilation” (2004) 18(2) *International Relations* 151; see generally William Bostock “The Global Corporatisation of Universities: Causes and Consequences” (1999) *AntePodium*, nfr; and David Sullivan “Professionalism and Australia’s

rationalization of an event, attach to it a history and a logic and send it forward into ‘progressive development.’”<sup>1101</sup> Schwöbel seems to support this point when she writes: “Given that the discipline is regarded as only fully ‘coming into its own’ at a time when the clash between two predominant ideologies was decided in favour of liberalism, such a synergy [between economic liberalisation and ICL] was arguably inescapable.”<sup>1102</sup> That is a deficiency from which this thesis is not immune, particularly given its heavy use of scholarship produced within the global north, predominately at British universities.

Importantly, the thesis would have been proven false if the three generations of international prosecutors had, as a matter of routine, accused representatives of profit-seeking transnational firms, especially those based in developed western-styled liberal democracies. The thesis would have been proven weak, too, had there been an absence of evidence indicating significant political, economic and social reconstruction in the aftermath of mass atrocity, efforts concomitant with the quest for international criminal justice through the enforcement of international criminal law. This was, however, not the case.

This thesis has three implications which hold significance for all of those who are involved in the international prosecution of serious international crime. Firstly, the thesis raises questions about the quality of international prosecutors’ *juridical credentials* by contrasting these credentials against their international security prerogatives. Foregrounding significant shifts in the politico-strategic circumstances underpinning the development of ICL’s major enforcement institutions helps to explain, at least in part, why and how these institutions came into being, whose interests they serve and whose values they reflect and inscribe. Whereas the pursuit

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Security Intellectuals: Knowledge, Power, Responsibility” (1998) 33(3) *Australian Journal of Political Science* 421.

<sup>1101</sup> Grietje Baars “Making ICL History: On the need to move beyond pre-fab critiques of ICL” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014) 196 at 198.

<sup>1102</sup> Christine Schwöbel “The market and marketing culture of international criminal law” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014) at 276.

of international criminal justice taking place in the immediate aftermath of the Second World War was undertaken in order to secure the spoils of victory won by the Grand Coalition, the pursuit of international criminal justice in the aftermath of the Cold War was undertaken as part of the UN Security Council's efforts to maintain their primacy in matters of international peace and security. This demonstrates that the nexus between pursuing international criminal justice and the search for security is by no means coincidental. To be sure, international criminal justice has been, and is being, pursued through major ICL institutions not as an end unto itself, but as part of a broader strategy that assists locales transitioning from situations of armed conflict toward more peaceful circumstances by establishing, transforming or reconstructing local politico-strategic and politico-economic institutions in ways that better engage with globalising governance systems. The pursuit of this kind of *transitional* international criminal justice, then, supports the grand strategy of those whose primary objective is to secure the systems of contemporary world affairs to their own advantage.

By illuminating those inter-related legal and political threads, the thesis challenges mainstream ICL scholars—much of whose work tends to offer what Michael J Shapiro would likely describe as a “pious mode of representation” that “has the effect of reproducing or reinforcing the prevailing modes of power and authority” and often lets “the prevailing power structure play ventriloquist”<sup>1103</sup>—to reconsider the relationship between the circumstances establishing ICL institutions and the prosecutorial performances that occur as trials within those institutions. This is important since much of this scholarship meditates upon the prosecutor's role as a legal actor, meaning that too often insufficient attention is given to the ways in which particular material and ideational conditions inform, shape and travel with the institutions designed to enforce ICL. When attention is focused on the conditions giving rise to the courtrooms' stage upon which prosecutors perform, it almost always takes a somewhat narrow focus on sets of politico-strategic circumstances which, while undoubtedly important, are only one element of the underlying context. ICL's narrow focus on the individual's actions in a context that amplifies that

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<sup>1103</sup> Shapiro, above n 1095, at xii and 47.

individual's conduct enables and encourages an ignorance of the broader set of circumstances and related complicities. This, in turn, distorts and obscures larger, more profound configurations of power at play in modernist world affairs.

Secondly, the thesis raises questions over international prosecutors' *integrity* by contrasting their commitment to protecting what they might describe as the humanist values of the international society of civilised states against their unacknowledged and perhaps unwitting commitment to advancing the market-orientated interests of a particular utopian movement. Rather than defending international society with all of its human diversity, the efforts of successive generations of international prosecutors tend to protect and advance the interests of those at the helm of the politico-cultural project of modernity. Situating ICL's development and enforcement as a significant temporality of the discourse against politico-cruelty, which has its origins alongside nineteenth-century liberalism, and contextualising prosecutorial conduct as part of a politico-cultural civil war played out among rival utopian visions, encourages a (re)conceptualisation of international prosecutors as agents of economic liberalisation even as this has developed over time and found expression as either neo-capitalism during the middle of the twentieth century or as neoliberalism from the 1970s onwards. International criminal law has evolved at the same time too. In fact, focusing exclusively on the juridical dimension of the international prosecutors' collective efforts renders invisible the extreme injustice created by the global economic system dominating contemporary world affairs. It implies that the enormous inequalities in the distribution of wealth flowing from that system are natural and determined by historical circumstance, and are not, therefore, the result of political decisions and not something that should be remedied through law.<sup>1104</sup> (A similar point has been made by Alan Norrie with respect to domestic criminal trials as the "individual commits crimes under the direct influence of social circumstances and not as the product of rational choices made in abstraction from such circumstances."<sup>1105</sup>) The complacency of this quest for international criminal justice

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<sup>1104</sup> Koskeniemi, above n 24, at 127.

<sup>1105</sup> Alan Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, Cambridge, 2001) at 255. Norrie goes on to argue that: "Criminal law is an

renders it complicit with the expansion of the global free market, which creates self-enclosing systemic conditions of poverty, trapping generations in a cycle of denied human potential.<sup>1106</sup> It thus carries serious social, economic and environmental costs, the burden of which is a heavy and ultimately unsustainable one for the human community to bear and warrants denouncing. Herein lies the basis for the claim that international prosecutors are in danger of being incurably infected by free market interests while remaining blind to its pathologies. The question of prosecutorial legitimacy thus becomes a question of prosecutorial culpability to the extent that prosecutors are complicit with a utopian vision whose failure “expresses itself as comprehensive and accelerating inequality, where inequality is experienced by the great majority of the world’s people as the steady decline, in many cases to zero, in the prospects for living a full, long, and secure life as generally defined and accepted by values which are local and temporal.”<sup>1107</sup>

By giving focus to these various political threads, this thesis challenges critical ICL scholars to broaden their concepts of the political to include not just strategic, but also economic and social dimensions. Understanding these three politico-dimensions helps bring into sharper focus the existence of, and rivalries among, various modernist utopian movements. The dominant utopian movement is, of course, economic liberalisation, which deploys the rule of international law as a means of creeping towards and then entrenching a particular world order, though its liberal

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expression of a social and political practice, and it bears the marks of that conflict within that practice. Because it is founded upon the political ideology of the juridical individual, criminal law is constructed upon the conflicts inherent in that ideology.”

<sup>1106</sup> For useful critiques of the global free market, see: Walden Bello *Capitalism’s Last Stand? Deglobalisation in the Age of Austerity* (Zed Books, London & New York, 2013); Noam Chomsky *Profit Over People: Neoliberalism and Global Order* (Seven Stories Press, New York, 1999); Paul Collier *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About it* (Oxford University Press, Oxford, 2007); Gray, above n 68; Jane Kelsey *Reclaiming the Future: New Zealand and the Global Economy* (Bridget Williams Books, Wellington, 1999); Jane Kelsey *At the Crossroads: Three Essays* (Bridget Williams Books, Wellington, 2002); and Erik S Reinert *How Rich Countries Got Rich...and Why Poor Countries Stay Poor* (Constable & Robinson, London, 2007).

<sup>1107</sup> McKinley, above n 74, at 54.



proponents, including the international prosecutors examined in this thesis, claim that this order is somehow immune from politics.<sup>1108</sup> Put in another way, the assertion of international law is often an assertion against politics, especially where that politics is understood as leading into a state of international anarchy, for the law seeks to constrain politics through non-political rule.<sup>1109</sup> In practice, however, international law more generally presents a mechanism through which important political decisions are deferred elsewhere.<sup>1110</sup> Yet the rule of international law is itself a battleground over which rival utopian movements seek to gain ascendancy over their rivals.<sup>1111</sup> Creating specialist bodies of law, such as ICL, offer further opportunities to pursue particular agendas.<sup>1112</sup> This, in turn, enables the use of ICL against rival utopian movements, effectively placing those movements on trial. The implication here is that those who stand accused of committing serious international crime are indicted less for their actions and more for where they are positioned in the aftermath of armed conflict and mass atrocity.<sup>1113</sup> Hence, as Simpson argues, “war crimes trials are political trials... not because they lack a foundation in law or because they are the crude product of political forces but because war crimes law is saturated with conversations about what it means to engage in politics or law, as well as a series of projects that seek to employ these terms in the service of various ideological preferences.”<sup>1114</sup> These might be more side-shows than show trials, however. ICL enforcement always endorses some hegemonic meta-narrative, implicit in which is a particular, but highly contested, understanding of some or other political contest. Couching a person’s individual culpability within the contours of that meta-narrative too often renders invisible the power yielded over significant politico-strategic,

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<sup>1108</sup> Simpson, above n 26, at 141.

<sup>1109</sup> Koskeniemi, above n 24, at 36-37.

<sup>1110</sup> At 58.

<sup>1111</sup> At 223.

<sup>1112</sup> At 65.

<sup>1113</sup> Simpson, above n 26, at 114.

<sup>1114</sup> At 11.

politico-economic and politico-social structures and the inequalities these structures create by constructing a scapegoat in the form of the accused.<sup>1115</sup>

Only a few scholars have noted the direct connection between the expansion of the liberal utopian movements and ICL enforcement. Clarke, for instance, goes as far as to suggest that “[a]s a political project, international justice regimes have succeeded in laying the foundations for this illusion of justice,”<sup>1116</sup> before arguing that:<sup>1117</sup>

This performance, this theater, linked as it is to a profoundly uneven global political economy, actually serves to undermine the capacity of the postcolonial state to ameliorate material violence. The benevolence of the new internationalism reveals some of the most tragic forms of victimhood—tragic because, despite its biopolitical mission and justice-seeking goals, the ICC’s mandate does not involve addressing root causes, preempting violence, and thereby fostering viable life-producing conditions for those who will otherwise likely become ‘victims’... As such, it represents the performing of justice in an attempt to make loss and disenfranchisement bearable.

In other words, the quest for international criminal justice, from the end of the Second World War up until the present day, functions as a form of palliative care for what McKinley describes as “grand strategic fraud” whereby the current proponents of economic liberalisation, more often than not US policymakers favouring neoliberalism, declare the urgent need to “bring progress and prosperity to the [Global] South.” The promise is, as McKinley points out, “untenable if the [Global] North is to remain dominant, to enjoy its standard of living. The promise, then, is only a declaration devoid of intent, a consoling word for the dying.”<sup>1118</sup> The

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<sup>1115</sup> Koskenniemi, above n 24, at 235.

<sup>1116</sup> Clarke, above n 27, at 5.

<sup>1117</sup> At 111.

<sup>1118</sup> McKinley, above n 74, at 8. McKinley goes on to argue that “to the extent that the [Global] South registers upon the consciousness of the North, and the sheer magnitude of its pathologies determine that they must, they do so primarily and almost exclusively as a profound and chronic threat to Northern privileges and cultures ensuring that, at best, the Global South

complicity between this pursuit of international criminal justice and the construction of a global free market is brought into stark relief when Baars argues that, following the end of the Cold War and the further spread and entrenchment of capitalism:<sup>1119</sup>

renewed impetus for international cooperation in the sphere of international criminal law, has not led to the application of that law to war's economic actors. Instead, international criminal law continues to draw our focus to individual deviancy rather than conflict produced by the modes of production, hiding economic grounds behind nationalist, racial, religious, etc explanations.... Thus, rather than suggesting 'corporate accountability in ICL' is a real possibility, the hidden history of Nuremberg may give us cause to investigate more deeply exactly how and why international criminal law constructs *de facto* 'corporate impunity' as a necessary ingredient of today's capitalist imperialism.

The challenge here is for this acknowledgement to become more commonplace within mainstream ICL scholarship.<sup>1120</sup>

Thirdly, the thesis raises questions over the international prosecutors' *lineage* within the politico-cultural project of modernity by placing that project in a broader, deeper and altogether more profound politico-sacral tradition. It is, of course, the Judaeo-Christian tradition which serves as the context for the modernist politico-cultural project, even though a process of secularisation may have largely distorted any residual sacral traces. Contemporary world affairs is conducted among the ruins of discredited utopian movements which, framed in secular terms denying the

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constitutes an intractable security problem which, only with imagination and the deft administration of aid, but more accurately conceived of as alms, might be managed.”

<sup>1119</sup> Baars, above n 256, at 192.

<sup>1120</sup> The Rome Statute contains provisions enabling the prosecution of those engaged in the business of war and the fuelling of mass atrocity, a topic somewhat belatedly being addressed by legal scholars. See generally James G Stewart “Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors” (2010) 8 *JICL* 313; and William A Schabas *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (Cameron May, London, 2008) particularly Ch. 20 entitled “War Economies, Economic Actors and International Criminal Law.”

primacy of religion, were vehicles for conveying and embodying religious myths.<sup>1121</sup> Although dressed in secular robes, modernity's utopian movements were imbued with a notion of salvation not so much in the afterlife but more in the immediate, realisable future, giving fresh life to Christianity's founding apocalyptic myths.<sup>1122</sup> For Gray, modernity offers a new religion of humanity, the object of worship being the human species.<sup>1123</sup> When understood in terms of this sacral tradition the international prosecutors' collective effort to rid humanity of its most extreme depravity constitutes an attempt to redeem us from our fallen state of nature. ICL enforcement echoes the Spanish and Roman Inquisitions, which were themselves "enabled by some of the broader forces that brought the modern world into existence, and that make inquisitions of various kinds a recurring and inescapable feature of modern life."<sup>1124</sup> In certain respects, then, international prosecutors of serious international crimes might function as contemporary versions of the Grand Inquisitor Tomas de Torquemada, using the rule of law, but always underpinned by the force of coercive arms, to have their way in non-trivial matters.

A handful of critical ICL scholars are already attuned to these religious traces on modernist world politics and, more specifically, the politics of the law. Krever finds what he describes as "an enchantment with criminal law and a growing faith in international criminal trials as the most suitable response and remedy to the major forms of violence and destruction that continue to plague the modern world."<sup>1125</sup> Tallgren opines that "[i]nternational criminal justice comes close to a religious exercise of hope and perhaps deception"<sup>1126</sup> and that "this kind of religious exercise of hope... is stronger than the desire to face everyday life."<sup>1127</sup> "The Rome Statute and its language of secular objectivity and universalism—its image of freedom and

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<sup>1121</sup> Gray, above n 35, at 1.

<sup>1122</sup> At 28.

<sup>1123</sup> At 58-59.

<sup>1124</sup> Cullen Murphy *God's Jury: The Inquisition and the Making of the Modern World* (Penguin, London, 2011), at 21.

<sup>1125</sup> Krever, above n 25, at 701.

<sup>1126</sup> Tallgren, above n 17, at 561.

<sup>1127</sup> At 593.

fairness for all of humanity and its discourse of nonpartisan and secular sensibility, for example,” for Clarke, “represents a language of freedom with an ontology that reflects ‘Western’ religious roots that have travelled and become hegemonic in a range of contexts.”<sup>1128</sup> Koskenniemi not only reckons international law “a kind of secular faith”<sup>1129</sup> and human rights a kind of agnostic religion of modernity,<sup>1130</sup> but also that international prosecutors learn to speak a medium of moral outrage in a way that reflects the spirit of Christian crusades and the Enlightenment’s civilising mission.<sup>1131</sup> Orford sees international prosecutors as “offering salvation to those threatened by state-sponsored murder and genocide.”<sup>1132</sup> Simpson claims to be witness to an ancient, but ongoing, war of the Old Testament between the forces of good and evil, fought as a type of “pest control,” policing action, or an effort at religious purification.<sup>1133</sup> When they make such remarks these critically-orientated scholars raise intriguing questions about the nature and scope of ICL and the extent to which it is shaped by religious traditions. Hypothetical scenarios, such as an ICL emerging from sacral contexts reflecting Islam, Buddhism, Hindu, Shinto, Tao, or even Zoroastrianism, beg a further set of questions that, perhaps, cannot yet be answered. It is entirely possible that modernity shaped by sacral traditions other than Judaeo-Christianity would provide a very different set of rules proscribing certain acts of politico-cruelty, perhaps one less myopically wedded to individualism and more focused on broader social groups or one less abstractly ahistorical and one more practically attuned to underlying material and ideational inequalities. These scholars are, however, in the minority, serving as the exception that proves the rule. As with the relationship between ICL and the liberal movement, the relationship between ICL and the Judaeo-Christian sacral context deserves wider attention within mainstream ICL scholarship.

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<sup>1128</sup> Clarke, above n 27, at 7.

<sup>1129</sup> Koskenniemi, above n 24, at 361

<sup>1130</sup> At 232.

<sup>1131</sup> At 126.

<sup>1132</sup> Orford, above n 138, at 7.

<sup>1133</sup> Simpson, above n 26, at 179.

In an important sense, modernist world politics are part of, and flow from, the unfinished wars of religion that so marked the seventeenth century and which gave rise to the Westphalian settlement. Yet while Gray argues that the faith placed in those utopian movements masquerading as secular versions of apocalyptic myth is largely moribund, replaced by the re-emergence of old-time religion strife at the core of global conflict,<sup>1134</sup> he is correct only insofar that those religions engender modernist politico-cultural projects. McKinley also draws a parallel between economic globalisation and religious war.<sup>1135</sup> While this thesis recognises the sacral traces pervading modernity it stops short of describing the politico-cultural civil war as a religious war or describing international prosecutors as holy “law-rrriors.”<sup>1136</sup> It does so because the prosecutors’ attachment to modernity—and, in particular, its politico-cultural practice of using reason as an end in and of itself, its state-based system of diplomacy, capitalism, and penchant for individualism, and its strongly-held belief in the perfectibility of humanity through civilising instruction and the power of knowledge to progress humanity—is stronger than it is to the Judaeo-Christian traditions, with its faith-based claims of knowledge and a belief in the afterlife. Even though international prosecutors use ICL to confront humanity’s worst excesses and seek to curb modernity’s most violent pathologies, represent the vanguard in the quest for international criminal justice and might be regarded by

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<sup>1134</sup> Gray, above n 35, at 184.

<sup>1135</sup> McKinley, above n 74, at 217. In particular, McKinley asserts the following: “That a form of religious war is underway is affirmed, but the type of war has revealed itself, too. It is a crusade which, in every aspect affecting strategic competence, recalls the original adventure in recklessness given the name in the eleventh century. As historians of the period advise us, the First Crusade, as evidently is this one, was led by rulers given to neither the introspection which would have tempered their belief in absolutes, nor the caution which would have bridled their ambition. In turn they addressed generally ignorant, unreflective, and frequently criminal audiences in need of simple reasons for believing that their inner zeal and the senseless, sanctimonious slaughter that they committed against people was a redemptive act, *Deus hoc vult* (“as God Will it”). In the end, failure: the costs were ruinous, not least for the rulers themselves, and the reigning theology of the day was unable to provide the basis for any relevant and lasting political organisation.”

<sup>1136</sup> The term is found in Luban, above n 58, at 458.

many as featuring among humanity's better angels, if not chief amongst the angels, these politico-legal actors must also be recognised as auxiliary combatants for those seeking to maintain their control over the modernist project through an ongoing politico-cultural civil war.

By highlighting this war thread, the thesis challenges critical ICL scholars to enlarge their concepts of war to be more than a clash of arms or series of clashes of arms. More than armed conflict, politico-cultural civil war represents a transformation of war's routine conduct because it involves all the means available, including but not restricted to the use of coercive force, to defeat one's enemies, rivals or opponents. It is fought for control over the key institutional architecture governing the politico-strategic, politico-economic and politico-social dimensions of international life. It involves policing international society's norms and related rules of behaviour. It can, and often does, take the form of a war of pacification fought beyond the zones of privilege and prosperity. This war is waged not only through the reconstruction of local politico-strategic and politico-economic institutions in the aftermath of armed conflict, but also through the enforcement of ICL in the aftermath of mass atrocity. Politico-cultural civil war also represents a broadening of war's province as the battleground is no longer some geographically-bound territory; it is, instead, the entire politico-cultural project of modernity.

Finally, then, this thesis offers a unique analysis of three successive generations of prosecutors of serious international crimes, which, firstly, argues that prosecutorial mandates are a concrete manifestation of the discourse against politico-cruelty and, secondly, that prosecutorial efforts serve the interests of the liberal utopia which itself is not merely analogous to war in its destructive consequences, but rather, constitutes a form of war in and of itself. The novel notions of the *discourse against politico-cruelty* and *politico-cultural civil war*—both of which mediate the relationship between the international prosecutor and the modernist project—may go some of the way towards mitigating the ever-present risk that both mainstream and critical ICL scholars, especially those who are fellow travellers with the international prosecutor, could easily adore devils as though they were deities.

## BIBLIOGRAPHY

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### A Cases

#### *1 International Criminal Tribunal for the Former Yugoslavia*

*Prosecutor v Ademi (Indictment)* ICTY, Pre-Trial Chamber, IT-01-46-I, 21 May 2001.

*Prosecutor v Ademi (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-46-PT, 26 November 2001.

*Prosecutor v Ademi (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-46-PT, 1 February 2002.

*Prosecutor v Ademi (Consolidated Indictment)* ICTY, Pre-Trial Chamber, IT-04-78, 27 May 2004.

*Prosecutor v Babić (Indictment)* ICTY, Pre-Trial Chamber, IT-03-72 6 November 2003.

*Prosecutor v Beara (Indictment)* ICTY, Pre-Trial Chamber IT-05-88-I, 26 March 2002.

*Prosecutor v Beara (Amended Indictment)* ICTY, Pre-Trial Chamber IT-02-58-PT, 30 March 2005.

*Prosecutor v Blagojević (Amended Indictment)* ICTY, Pre-Trial Chamber IT-98-33, 27 October 1999.

*Prosecutor v Blagojević (Joinder Indictment)* ICTY, Pre-Trial Chamber IT-02-53-PT, 22 January 2002.

*Prosecutor v Blagojević (Amended Joinder Indictment)* ICTY, Pre-Trial Chamber IT-02-60-PT, 27 May 2002.

*Prosecutor v Blagojević (Amended Joinder Indictment)* ICTY, Pre-Trial Chamber IT-02-60-T, 26 May 2003.



*Prosecutor v Blaškić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-14, 25 April 1997.

*Prosecutor v Bralo (Indictment)* ICTY, IT-95-17, 2 November 1995.

*Prosecutor v Brđanin (Indictment)* ICTY, Pre-Trial Chamber, IT-99-36, 12 March 1999.

*Prosecutor v Bobetko (Indictment)* ICTY, Pre-Trial Chamber IT-02-62, 23 August 2002.

*Prosecutor v Borovčanin (Indictment)* ICTY, Pre-Trial Chamber IT-02-64-I, 6 September 2002.

*Prosecutor v Boškoski (Indictment)* ICTY, Pre-Trial Chamber IT-04-82, 22 December 2004.

*Prosecutor v Boškoski (Amended Indictment)* ICTY, Pre-Trial Chamber IT-04-82-PT, 2 November 2005.

*Prosecutor v Bralo (Amended Indictment)* ICTY, Pre-Trial Chamber IT-95-17, 18 July 2005.

*Prosecutor v Brđjanin (Amended Indictment)* ICTY, Pre-Trial Chamber IT-99-36-I, 16 December 1999.

*Prosecutor v Brđanin (Amended indictment)* ICTY, Pre-Trial Chamber IT-99-36-I, 16 December 1999.

*Prosecutor v Brđjanin (Further Amended Indictment)* ICTY, Pre-Trial Chamber IT-99-36, 9 March 2001.

*Prosecutor v Brđanin (Third Amended Indictment)* ICTY, Pre-Trial Chamber IT-99-36, 16 July 2001.

*Prosecutor v Brđanin (Fourth Amended Indictment)* ICTY, Pre-Trial Chamber IT 99-36-PT, 5 October 2001.

*Prosecutor v Brđjanin (Fifth Amended Indictment)* ICTY, Pre-Trial Chamber IT-99-36, 7 October 2002.

*Prosecutor v Brđanin (Sixth Amended Indictment)* ICTY, Pre-Trial Chamber IT-99-36, 9 December 2003.

*Prosecutor v Čermak (Indictment)* ICTY, Pre-Trial Chamber IT-03-73, 19 February 2004;

*Prosecutor v Čermak (Amended Indictment)* ICTY, Pre-Trial Chamber IT-03-73-PT, 6 May 2005.

*Prosecutor v Čermak (Amended Indictment)* ICTY, Pre-Trial Chamber IT-03-73, 14 December 2005.

*Prosecutor v Češić (Third Amended Indictment)* ICTY, Pre-Trial Chamber IT-95-10/1, 26 November 2002.

*Prosecutor v Delalić (Indictment)* ICTY, Pre-Trial Chamber, IT-96-21, 19 March 1996.

*Prosecutor v Delić (Indictment)* ICTY, Pre-Trial Chamber IT-04-83-PT, 17 March 2005.

*Prosecutor v Delić (Amended Indictment)* ICTY, Pre-Trial Chamber IT-04-83-PT, 14 July 2006.

*Prosecutor v Dorđević (Fourth Amended Indictment)* ICTY, Pre-Trial Chamber, IT-05-87/1-PT, 2 June 2008.

*Prosecutor v Deronjić (Amended Indictment)* ICTY, Pre-Trial Chamber IT-02-61-PT, 29 November 2002.

*Prosecutor v Deronjić (Indictment)* ICTY, Pre-Trial Chamber IT-02-61-I, 3 July 2002.

*Prosecutor v Deronjić (Second Amended Indictment)* ICTY, Pre-Trial Chamber IT-02-61-PT, 29 September 2003.

*Prosecutor v Drljača (Indictment)* ICTY, Pre-Trial Chamber, IT-99-24, 13 March 1997.

*Prosecutor v Đukić (Indictment)* ICTY, Pre-Trial Chamber, IT-96-20, 29 February 1996.

*Prosecutor v Erdemović (Indictment)* ICTY, Pre-Trial Chamber, IT-96-22, 22 May 1996.

*Prosecutor v Furundžija (Indictment)* ICTY, Pre-Trial Chamber, IT-95-17/1, 2 November 1995.

*Prosecutor v Furundžija (Amended Indictment)* ICTY Pre-Trial Chamber, IT-95-17/1-PT, 2 June 1998.

*Prosecutor v Gagović (Indictment)* ICTY, Pre-Trial Chamber, IT-96-23, no date.

*Prosecutor v Gagović (Indictment)* ICTY, Pre-Trial Chamber, IT-96-23-I, 18 June 1996.

*Prosecutor v Galić (Indictment)* ICTY, Pre-Trial Chamber, IT-98-29-I, no date.

*Prosecutor v Galić (Indictment)* ICTY, Pre-Trial Chamber, IT-98-29-I, no date.

*Prosecutor v Gotovina (Indictment)* ICTY, Pre-Trial Chamber, IT-01-45-I, 21 May 2001.

*Prosecutor v Gotovina (Joinder Indictment)* ICTY, Pre-Trial Chamber IT-06-90-PT, 6 March 2007.

*Prosecutor v Gotovina (Amended Joinder Indictment)* ICTY, Pre-Trial Chamber IT-06-90-PT, 17 May 2007.

*Prosecutor v Gotovina (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-45, 19 February 2004.

*Prosecutor v Gotovina (Joinder Indictment)* ICTY, Pre-Trial Chamber, IT-06-90-PT, 21 July 2006.

*Prosecutor v Gotovina (Amended Joinder Indictment)* ICTY, Pre-Trial Chamber, IT-06-90-PT, 12 March 2008.

*Prosecutor v Hadžić (Indictment)* ICTY, Pre-Trial Chamber, IT-04-75-I, 21 May 2004.

*Prosecutor v Hadžić (First Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-75-I, 22 July 2011.

*Prosecutor v Hadžić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-75-PT, 22 March 2012.

*Prosecutor v Hadžihasanović (Indictment)* ICTY, Pre-Trial Chamber, IT-01-47, 5 July 2001.

*Prosecutor v Hadžihasanović (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-47-PT, 11 January 2002.

*Prosecutor v Hadžihasanović (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-47-PT, 15 August 2003.

*Prosecutor v Hadžihasanović (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-47-PT, 26 September 2003.

*Prosecutor v Halilović (Indictment)* ICTY, Pre-Trial Chamber, IT-01-48-I, 10 September 2001.

*Prosecutor v Haradinaj (Indictment)* ICTY, Pre-Trial Chamber, IT-04-84-I, 4 March 2005.

*Prosecutor v Haradinaj (Indictment)* ICTY, Pre-Trial Chamber, IT-04-84-PT, 26 April 2006.

*Prosecutor v Haradinaj (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-84-PT, 25 October 2006.

*Prosecutor v Haradinaj (Revised Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-84-PT, 10 November 2006.

*Prosecutor v Haradinaj (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-84-PT, 7 September 2007.

*Prosecutor v Haradinaj (Fourth Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-84-PT, 16 October 2007.

*Prosecutor v Haradinaj (Revised Fourth Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-84bis-PT, 16 October 2007.

*Prosecutor v Haradinaj (Revised Fourth Amended Indictment)* ICTY, Pre-Trial Chamber IT-04-84bis-PT, 9 November 2010.

*Prosecutor v Janković (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-96-12-I, 5 October 1999.

*Prosecutor v Jelisić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-10, no date.

*Prosecutor v Jelisić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-10-PT, 3 March 1998.

*Prosecutor v Jelisić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-10-PT, 19 October 1998.

*Prosecutor v Jokić (Indictment)* ICTY, Pre-Trial Chamber, IT-01-44, May 2001.

*Prosecutor v Jokić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-42, August 2003.

*Prosecutor v Karadžić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-5-I, July 1995.

*Prosecutor v Karadžić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-18-I, 14 November 1995.

*Prosecutor v Karadžić (Amended Indictment)* ICTY, Pre-Trial Chamber, 28 April 2000.

*Prosecutor v Karadžić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-5/18-PT, 18 February 2009.

*Prosecutor v Karadžić (Third Amended indictment)* ICTY, Pre-Trial Chamber, IT-95-5/18-PT, 27 February 2009.

*Prosecutor v Kordić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-14, November 1995.

*Prosecutor v Kordić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-14/2, 30 September 1998.

*Prosecutor v Kovačević (Indictment)* ICTY, Pre-Trial Chamber, IT-97-24-I, 12 May 1997.

*Prosecutor v Kovačević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-24-I, 28 January 1998.

*Prosecutor v Kovačević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-24-I, 28 January 1998.

*Prosecutor v Krajišnik (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-00-39-I, 21 March 2000.

*Prosecutor v Krasniqi (Indictment)* ICTY, Pre-Trial Chamber, IT-04-84-R77.2, 12 November 2007.

*Prosecutor v Krajišnik (Consolidated Indictment)* ICTY, Pre-Trial Chamber, IT-00-39 & 40-PT, 9 March 2001.

*Prosecutor v Krajišnik (Amended Consolidated Indictment)* ICTY, Pre-Trial Chamber, IT-00-39 & 40-PT, 7 March 2002.

*Prosecutor v Krnojelac (Indictment)* ICTY, Pre-Trial Chamber, IT-97-25-I, June 1997.

*Prosecutor v Krnojelac (Indictment)* ICTY, Pre-Trial Chamber, IT-97-25-I, 6 June 1997.

*Prosecutor v Krnojelac (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-25-I, April 1999.

*Prosecutor v Krnojelac (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-25-I, 2 March 2000.

*Prosecutor v Krnojelac (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-25-I, 25 June 2001.

*Prosecutor v Krstić (Indictment)* IT-98-33, ICTY, Pre-Trial Chamber, 30 October 1998.

*Prosecutor v Krstić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-33, 27 October 1999.

*Prosecutor v Kunarac (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-96-23-PT, 8 November 1999.

*Prosecutor v Kunarac (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-96-23-1, 13 July 1998.

*Prosecutor v Kunarac (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-96-23-PT, 27 August 1999.

*Prosecutor v Kupreškić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-16, November 1995.

*Prosecutor v Kupreškić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-16, 9 February 1998.

*Prosecutor v Kvočka (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-30/1, 12 June 1998;

*Prosecutor v Kvočka (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-30-PT, 31 May 1999;

*Prosecutor v Kvočka (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-30-I, 21 August 2000.

*Prosecutor v Limaj (Indictment)* ICTY, Pre-Trial Chamber, IT-03-66-I, 24 January 2003.

*Prosecutor v Limaj (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-66-I, 7 March 2003.

*Prosecutor v Limaj (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-66-PT, 6 November 2003.

*Prosecutor v Ljubičić (Indictment)* ICTY, Pre-Trial Chamber, IT-00-41, 26 September 2000.

*Prosecutor v Ljubičić (Corrected Amended Indictment)* ICTY, Pre-Trial Chamber, IT-00-41-PT, 8 April 2002.

*Prosecutor v Lukić (Indictment)* ICTY, Pre-Trial Chamber, IT-98-32-I, no date.

*Prosecutor v Lukić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-32-PT, 12 July 2001.

*Prosecutor v Lukić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-32/1, 27 February 2006.

*Prosecutor v Marinić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-15, 2 November 1995.

*Prosecutor v Martić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-11, no date.

*Prosecutor v Martić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-11, 18 December 2002.

*Prosecutor v Martić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-11, 14 July 2003.

*Prosecutor v Meakic (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-4-I, 18 July 2001.

*Prosecutor v Meakic (Consolidated Indictment)* ICTY, Pre-Trial Chamber, IT-02-65-I, 5 July 2002.

*Prosecutor v Meakic (Indictment)* ICTY, Pre-Trial Chamber, IT-95-4-I, no date;

*Prosecutor v Meakic (Indictment)* ICTY, Pre-Trial Chamber, IT-95-4-PT, 28 May 1998;

*Prosecutor v Meakic (Indictment)* ICTY, Pre-Trial Chamber, IT-95-4-I, 2 June 1998.

*Prosecutor v Miljković (Indictment)* ICTY, Pre-Trial Chamber, IT-95-9-I, no date;

*Prosecutor v Miljković (Indictment)* ICTY, Pre-Trial Chamber, IT-95-9-I, 29 June 1995;

*Prosecutor v Milošević (Indictment)* ICTY, Pre-Trial Chamber, IT-99-37, 22 May 1999.



*Prosecutor v Milošević (Indictment)* ICTY, Pre-Trial Chamber, 27 September 2001.

*Prosecutor v Milošević (Indictment)* ICTY, Pre-Trial Chamber, IT-02-51-I, 22 November 2001.

*Prosecutor v Milošević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-99-37-I, 29 June 2001.

*Prosecutor v Milošević (First Amended Indictment)* ICTY, Trial Chamber, IT-02-54-T, 23 October 2002.

*Prosecutor v Milošević (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-02-54-T, 23 October 2002.

*Prosecutor v Milošević (Amended Indictment)* ICTY, Trial Chamber, IT-02-54-PT, 22 November 2002.

*Prosecutor v Milošević (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-99-37-PT, 16 October 2006.

*Prosecutor v Milošević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-29/1-PT, 18 December 2006.

*Prosecutor v Milutinović (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-99-37-PT, 19 July 2002.

*Prosecutor v Milutinović (Amended Joinder Indictment)* ICTY, Pre-Trial Chamber, IT-05-87-PT, 16 August 2005.

*Prosecutor v Milutinović (Second Amended Joinder Indictment)* ICTY, Pre-Trial Chamber, IT-05-87-PT, 5 April 2006.

*Prosecutor v Milutinović (Third Amended Joinder Indictment)* ICTY, Pre-Trial Chamber, IT-05-87-PT, 21 June 2006.

*Prosecutor v Milutinović ((Redacted) Third Amended Joinder Indictment)* ICTY, Pre-Trial Chamber, IT-05-87-PT, 21 June 2006.

*Prosecutor v Mladić (Amended Indictment ICTY)* Pre-Trial Chamber, IT-95-5/18-I, 10 October 2002.

*Prosecutor v Mladić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-09-92-PT, 1 June 2011.

*Prosecutor v Mladić (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-09-92-PT, 20 October 2011.

*Prosecutor v Mladić (Fourth Amended Indictment)* ICTY, Pre-Trial Chamber, IT-09-92-PT, 16 December 2011.

*Prosecutor v Mrđja (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-02-59-S, 4 August 2003.

*Prosecutor v Mrkšić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-13/1, 28 August 2002.

*Prosecutor v Mrkšić (Consolidated Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-13/1, 9 February 2004.

*Prosecutor v Mrkšić (Second Modified Consolidated Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-13/1-PT, 26 August 2004.

*Prosecutor v Mrkšić (Third Consolidated Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-13/1-PT, 15 November 2004.

*Prosecutor v Mrkšić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-13a, 26 October 1995.

*Prosecutor v Mucić (Transcript)* ICTY Trial Chamber IT-96-21 17 March 1997.

*Prosecutor v Naletilić (Indictment)* ICTY, Pre-Trial Chamber, IT-98-34, 18 December 1998.

*Prosecutor v Naletilić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-34, 4 December 2000.

*Prosecutor v Naletilić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-3, 4 September 2001.

*Prosecutor v Nikolić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-2-I, 4 November 1995.

*Prosecutor v Nikolić (First Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-2-I, 12 February 1999.

*Prosecutor v Nikolić (Indictment)* ICTY, Pre-Trial Chamber, IT-02-56-I, 26 March 2002.

*Prosecutor v Nikolić (Indictment)* ICTY, Pre-Trial Chamber, IT-02-63-I, 6 September 2002.

*Prosecutor v Nikolić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-94-2, 7 January 2002.

*Prosecutor v Nikolic (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-94-2, 31 October 2003.

*Prosecutor v Norac (Indictment)* ICTY, Pre-Trial Chamber, IT-04-76, 29 April 2004.

*Prosecutor v Obrenović (Indictment)* ICTY, Pre-Trial Chamber, IT-01-43, 16 March 2001.

*Prosecutor v Orić (Indictment)* ICTY, Pre-Trial Chamber, IT-03-68-I, 28 March 2003.

*Prosecutor v Orić, (no title)* ICTY, Pre-Trial Chamber, IT-03-68-I, 28 March 2003.

*Prosecutor v Orić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-68-PT, 16 July 2003.

*Prosecutor v Orić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-68-PT, 1 October 2004.

*Prosecutor v Orić (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-68-T, 17 June 2005;

*Prosecutor v Orić (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-68-PT, 30 June 2005.

*Prosecutor v Pandurević (Indictment)* ICTY, Pre-Trial Chamber, IT-05-86-I, 10 February 2005.

*Prosecutor v Pandurević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-33, 27 October 1999.

*Prosecutor v Pandurević (Indictment (Amend 1))* ICTY, Pre-Trial Chamber, IT-05-86, 10 February 2005.

*Prosecutor v Pavković (Indictment)* ICTY, Pre-Trial Chamber, IT-05-87, 22 September 2003.

*Prosecutor v Pavković (Amended Joinder Indictment)* ICTY, Pre-Trial Chamber, IT-05-87-PT, 16 August 2005.

*Prosecutor v Perišić (Indictment)* ICTY, Pre-Trial Chamber, IT-04-81, 22 February 2005.

*Prosecutor v Perišić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-81-PT, 26 September 2005.

*Prosecutor v Perišić (Revised Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-81-PT, 5 February 2008.

*Prosecutor v Plavšić (Indictment)* ICTY, Pre-Trial Chamber, IT-00-40-I, 3 April 2000.

*Prosecutor v Popović (Indictment)* ICTY, Pre-Trial Chamber, IT-02-57-I, 26 March 2002.

*Prosecutor v Popović (Indictment)* ICTY, Pre-Trial Chamber, IT-05-88-T, 4 August 2006.

*Prosecutor v Prcać (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-98-30/1-I, 8 March 2000.

*Prosecutor v Prlić (Indictment)* ICTY, Pre-Trial Chamber, T-04-74, 2 March 2004.

*Prosecutor v Prlić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-74-PT, 16 November 2005.

*Prosecutor v Prlić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-74-PT, 11 June 2008.

*Prosecutor v Rajić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-12, 23 August 1995.

*Prosecutor v Rajić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-12, 13 January 2004.

*Prosecutor v Rašević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-25/1-PT, 12 May 2004.

*Prosecutor v Rašević (Second Joint Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-25/1-PT, 24 March 2006.

*Prosecutor v Ražnatović (Indictment)* ICTY, Pre-Trial Chamber, IT-97-27, 23 September 1997.

*Prosecutor v Šešelj (Indictment)* ICTY, Pre-Trial Chamber, 15 January 2003.

*Prosecutor v Šešelj (Modified Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-67, 12 July 2005.

*Prosecutor v Šešelj (Reduced Modified Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-67, 12 July 2005.

*Prosecutor v Šešelj (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-67, 25 June 2007.

*Prosecutor v Šešelj (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-67, 7 December 2007.

*Prosecutor v Sikirica (Indictment)* ICTY, Pre-Trial Chamber, IT-95-8, 21 July 1998.

*Prosecutor v Sikirica (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-8-PT, 24 August 1999.

*Prosecutor v Sikirica (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-8-PT, 3 January 2001.

*Prosecutor v Simić (Indictment)* ICTY, Pre-Trial Chamber, IT-95-9, no date.

*Prosecutor v Simić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-9, and no date.

*Prosecutor v Simić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-9  
19 November 1998.

*Prosecutor v Simić (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-9,  
24 April 2001.

*Prosecutor v Simić (Fourth Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-9,  
January 2002.

*Prosecutor v Simić (Fifth Amended Indictment)* ICTY, Pre-Trial Chamber, IT-95-9,  
30 May 2002.

*Prosecutor v Stakić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-  
24-PT, 31 August 2001.

*Prosecutor v Stakić (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-  
24-PT, 28 February 2002.

*Prosecutor v Stakić (Fourth Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-  
24-PT, 10 April 2002.

*Prosecutor v Stanišić (Indictment)* ICTY, Pre-Trial Chamber, T-03-69, 1 May 2003.

*Prosecutor v Stanišić (Indictment)* ICTY, Pre-Trial Chamber, IT-04-79-I, 24  
February 2005.

*Prosecutor v Stanišić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-69-PT,  
9 December 2003.

*Prosecutor v Stanišić (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-04-79-PT,  
22 August 2005.

*Prosecutor v Stanišić (Revised Amended Indictment)* ICTY, Pre-Trial Chamber, IT-  
04-79-PT, 22 September 2005.

*Prosecutor v Stanišić (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-  
03-69-PT, 20 December 2005.

*Prosecutor v Stanišić (Revised Second Amendment Indictment)* ICTY, Pre-Trial  
Chamber, IT-03-69-PT, 15 May 2006.

*Prosecutor v Stanišić (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-03-69-PT, 9 July 2008.

*Prosecutor v Stanišić (Consolidated Indictment)* ICTY, Pre-Trial Chamber, IT-08-91-PT, 29 September 2008.

*Prosecutor v Stanišić (Second Amended Consolidated)* ICTY, Pre-Trial Chamber, IT-08-91-PT, 10 September 2009.

*Prosecutor v Stanković (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-96-23.3, 3 March 2003.

*Prosecutor v Stanković (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-96-23/2, 8 December 2003.

*Prosecutor v Strugar (Indictment)* ICTY, Pre-Trial Chamber, IT-01-42, 22 February 2001.

*Prosecutor v Strugar (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-42, 31 March 2003.

*Prosecutor v Strugar (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-42, 17 October 2003.

*Prosecutor v Strugar (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-01-42-PT, 10 December 2003.

*Prosecutor v Tadić (Indictment)* ICTY, Pre-Trial Chamber, IT-94-1, 13 February 1995.

*Prosecutor v Tadić (Indictment (Amended))* ICTY, Pre-Trial Chamber, IT-94-1-I, 1 September 1995.

*Prosecutor v Tadić (Indictment (Amended))* ICTY, Pre-Trial Chamber, IT-94-1-I, 14 December 1995.

*Prosecutor v Talić (Indictment)* ICTY, Pre-Trial Chamber, IT-99-36/1, 12 March 1999.

*Prosecutor v Tadić (Transcript)* ICTY Trial Chamber IT-94-1-T, 7 May 1996.

*Prosecutor v Tolimir (Indictment)* ICTY, Pre-Trial Chamber, IT-05-88/2-I, 28 August 2006.

*Prosecutor v Tolimir (Consolidated Amended Indictment)* ICTY, Pre-Trial Chamber, IT-05-88-PT, 28 June 2005.

*Prosecutor v Tolimir (Second Consolidated Amended Indictment)* ICTY, Pre-Trial Chamber, IT-05-88-PT, 14 June 2006.

*Prosecutor v Tolimir (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-05-88/2-I, 11 June 2007.

*Prosecutor v Tolimir (Third Amended Indictment)* ICTY, Pre-Trial Chamber, IT-05-88/2-PT, 4 November 2009.

*Prosecutor v Trbić (Indictment)* ICTY, Pre-Trial Chamber, IT-05-88/1-PT, 18 August 2006.

*Prosecutor v Vuković (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-96-23/1, 5 October 1999.

*Prosecutor v Vasiljević (Indictment)* ICTY, Pre-Trial Chamber, IT-98-32, no date.

*Prosecutor v Župljanin (Second Amended Indictment)* ICTY, Pre-Trial Chamber, IT-99-36-I, 6 October 2004.

## **2 International Criminal Tribunal for Rwanda**

*Prosecutor v Akayesu (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-4-I, no date.

*Prosecutor v Akayesu (Transcript)* ICTR Trial Chamber ICTR-94-4-T, 9 January 1997.

*Prosecutor v Bagambiki (Indictment (redacted))* ICTR, Pre-Trial Chamber, ICTR-97-36-I, 9 October 1997.

*Prosecutor v Bagaragaza (Amended Indictment)* ICTR-05-86, 1 December 2006.



*Prosecutor v Bagilishema (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-95-1A-I, 17 September 1999.

*Prosecutor v Bagosora (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-7-I, 12 August 1999.

*Prosecutor v Barayagwiza (Amended indictment)* ICTR, Trial Chamber, ICTR-99-52T, 13 April 2000.

*Prosecutor v Bikindi (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-72-I, 15 June 2005.

*Prosecutor v Bisengimana (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2000-60-I, 1 July 2000.

*Prosecutor v Bizimana (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-44-I, 21 November 2001.

*Prosecutor v Bizimungu (Indictment)* ICTR, Pre-Trial Chamber, ICTR-99-50, 7 May 1999.

*Prosecutor v Bizimungu (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-00-56-I, 23 August 2004.

*Prosecutor v Bucyibaruta (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2005-85-I, 16 June 2005.

*Prosecutor v Gacumbitsi (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-64, 20 June 2001.

*Prosecutor v Gatete (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-00-61, 10 May 2005.

*Prosecutor v Hategekimana (Indictment (with redactions))* ICTR, Pre-Trial Chamber, ICTR-2000-55-I, 7 November 2000.

*Prosecutor v Kabiligi (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-30-I and 97-34-I, 30 July 1998.

*Prosecutor v Kabuga (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-44B-I, 1 October 2004.

*Prosecutor v Kajelijeli (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-44A-I, 25 January 2001.

*Prosecutor v Kalimanzira (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2005-88-I, 21 July 2005.

*Prosecutor v Kambanda (Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-23-DP, 16 October 1997.

*Prosecutor v Kamuhanda (Indictment)* ICTR, Pre-Trial Chamber, ICTR-99-54-I, 27 September 1999.

*Prosecutor v Kanyabashi (Amended indictment)* ICTR, Pre-Trial Chamber, ICTR-96-15-I, 2 November 2000.

*Prosecutor v Kanyarukiga (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2002-78-I, 5 December 2001.

*Prosecutor v Karemera (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-44-I, 23 February 2005.

*Prosecutor v Karemera (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-44-I, 24 August 2005.

*Prosecutor v Karera (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-01-74-I, 19 December 2005.

*Prosecutor v Karera (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-74-I, 8 June 2001.

*Prosecutor v Kayishema (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-67-I, 10 June 2001.

*Prosecutor v Kayishema (First Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-95-10-I, 29 April 1996.

*Prosecutor v Mpambara (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-65-I, 23 July 2001.

*Prosecutor v Mpambara (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-65-I, 27 November 2004.

*Prosecutor v Mpiranya (Indictment (with redactions))* ICTR, Pre-Trial Chamber, ICTR-00-56A, 20 January 2000.

*Prosecutor v Muhimana (Revised Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-95-1B-I, 3 February 2004.

*Prosecutor v Munyagishari (Indictment)* ICTR, Pre-Trial Chamber, ICTR-05-89, 9 June 2005.

*Prosecutor v Munyarugarama (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-02-79-I, 13 June 2012.

*Prosecutor v Munyakazi (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-36A-I, 27 November 2002.

*Prosecutor v Munyeshyaka (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2005-87-I, 20 July 2005.

*Prosecutor v Musabyimana (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-62-I, 7 Feb 2001.

*Prosecutor v Musema (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-13-I, 29 April 1999.

*Prosecutor v Muvunyi (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2000-55A-I, 22 December 2003.

*Prosecutor v Nahimana (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-99-52, 15 November 1999.

*Prosecutor v Nchamihigo (Second Revised Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-63-I, 11 December 2006.

*Prosecutor v Ndahimana (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-68-I, 10 June 2001.

*Prosecutor v Ndayambaje (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-8-I, 11 August 1999.

*Prosecutor v Ndimbati (Second Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-95-1F-I, 8 May 2012.

*Prosecutor v Ndindabahizi (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-71-I, 7 July 2003.

*Prosecutor v Ngeze (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-27-I, 10 November 1999.

*Prosecutor v Ngirabatware (Indictment (with Kamuhabda))* ICTR, Pre-Trial Chamber, ICTR-99-54, 27 September 1999.

*Prosecutor v Ngirabatware (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-99-54-T, 13 April 2009.

*Prosecutor v Nizeyimana (Indictment (with redactions))* ICTR, Pre-Trial Chamber, ICTR-2000-55-I, 7 November 2000.

*Prosecutor v Nizeyimana (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-00-55-PT, 1 March 2003.

*Prosecutor v Nizeyimana (Second Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-00-55-PT, 29 September 2010.

*Prosecutor v Nizeyimana (Second Amended Indictment)* ICTR-2000-55-PT, 17 December 2010.

*Prosecutor v Niyitegeka (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-14-I, 26 June 2000.

*Prosecutor v Nsengimana (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-69-I, 8 August 2001.

*Prosecutor v Ntagerura (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-10-I, 26 January 1998.

*Prosecutor v Ntakirutimana (Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-10-I, 20 October 2000.

*Prosecutor v Ntakirutimana (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-17-I, 17 April 1998.

*Prosecutor v Ntakirutimana (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-17-I, 7 July 1998.

*Prosecutor v Ntuyahaga (Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-40-I, 26 September 1998.

*Prosecutor v Nsengiyumva (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-12-I, 12 August 1999;

*Prosecutor v Nshogoza (Indictment)* ICTR, Pre-Trial Chamber, ICTR-07-91-I, 24 December 2007.

*Prosecutor v Nshogoza (Second Revised Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-07-91-I, 24 December 2007.

*Prosecutor v Ntawukuriryayo (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2005-82-I, 26 May 2005.

*Prosecutor v Nyiramasuhuko (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-21-I, 1 March 2001.

*Prosecutor v Nzabonimana (Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-44D-PT, 23 July 2009.

*Prosecutor v Renzaho (Second Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-31-I, 16 February 2006.

*Prosecutor v Rugambarara (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-00-59-I, 2 July 2007.

*Prosecutor v Ruggiu (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-32-I, 10 December 2010 1998.

*Prosecutor v Rukundo (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-70-I, 27 March 2003.

*Prosecutor v Rusatira (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2002-80-I, 1 February 2001.

*Prosecutor v Rutaganda (Indictment)* ICTR, Pre-Trial Chamber, ICTR-96-3-I, 12 February 1996.

*Prosecutor v Rwamakuba (Indictment)* ICTR, Pre-Trial Chamber, ICTR-98-44C-I, 9 June 2005.

*Prosecutor v Simba (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-76-I, 2 January 2002.

*Prosecutor v Simba (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-76-I, 10 May 2004.

*Prosecutor v Semanza (Third Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-97-20-I, 12 October 1999.

*Prosecutor v Seromba (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-66-I, 8 June 2001.

*Prosecutor v Serugendo (Corrigendum of Indictment)* ICTR, Pre-Trial Chamber, ICTR-2005-84-I, 21 July 2005.

*Prosecutor v Serushago (Modified Indictment)* Pre-Trial Chamber, ICTR-98-39-I, 8 October 1998.

*Prosecutor v Setako (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2004-81-I, 23 June 2008.

*Prosecutor v Uwinkindi (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-75-I, 5 September 2001.

*Prosecutor v Zigiranyirazo (Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-73-I, 20 July 2001.

*Prosecutor v Zigiranyirazo (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-73-I, 5 November 2003.

*Prosecutor v Zigiranyirazo (Amended Indictment)* ICTR, Pre-Trial Chamber, ICTR-2001-73-I, 7 March 2005.

### **3      *International Criminal Court***

*Prosecutor v Barasa (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC-01/09-01/13, 2 August 2013.

*Prosecutor v Al Bashir (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-02/05-01/09, 4 March 2009.

*Prosecutor v Al Bashir (Second Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-02/05-01/09, 12 July 2010.

*Prosecutor v Chui (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/04-02/07, 6 July 2007.

*Prosecutor v Gaddafi (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC 01/11 27 June 2011 2015.

*Prosecutor v Garda (Summons to Appear)* ICC Pre-Trial Chamber I ICC 02/05-02/09, 7 May 2009.

*Prosecutor v Gbagbo (Warrant of Arrest)* ICC Pre-Trial Chamber III ICC-02/11, 23 November 2011.

*Prosecutor v Gbagbo (Warrant of Arrest)* ICC Pre-Trial Chamber III ICC-02/11-01/12, 29 February 2012.

*Prosecutor v Gicheru (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC 01/09-01/15, 10 September 2015.

*Prosecutor v Gombo (Warrant of Arrest)* ICC Pre-Trial Chamber III ICC-01/05-01/08, 23 May 2008.

*Prosecutor v Gombo (Warrant of Arrest)* ICC Pre-Trial Chamber III ICC-01/05-01/08, 10 June 2008.

*Prosecutor v Gombo (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC-01/05-01/13, 20 November 2013.

*Prosecutor v Goude (Warrant of Arrest)* ICC Pre-Trial Chamber III ICC-02/11-02/11, 21 December 2011.

*Prosecutor v Harun (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-02/05-01/07, 27 April 2007.

*Prosecutor v Hussein (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-02/05-01/12, 1 March 2012.

*Prosecutor v Katanga (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC 01/04-01/07, 2 July 2007.

*Prosecutor v Koney (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC-02/04-01/05, 27 September 2005.

*Prosecutor v Lubanga (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/04-01/06, 10 February 2006.

*Prosecutor v Lukwiya (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC-02/04, 8 July 2005.

*Prosecutor v Mbarushimana (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/04-01/10, 28 September 2010.

*Prosecutor v Mudacumura (Demanded d'arrestation)* ICC La Chambre Preliminare II ICC-01/04-01/12, 28 August 2012.

*Prosecutor v Muthaura (Decision on the Prosecutor's Application for Summonses)* ICC Pre-trial Chamber II ICC-01-09-02/11, 8 March 2011.



*Prosecutor v Nourain (Summons to Appear)* ICC Pre-Trial Chamber I ICC-02/05-03/09, 27 August 2009.

*Prosecutor v Ntaganda (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/04-02/06, 22 August 2006.

*Prosecutor v Otti (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC-02-04, 8 July 2005.

*Prosecutor v Odhiambo (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC-02/04, 8 July 2005.

*Prosecutor v Ongwen (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC 02/04, 8 July 2005.

*Prosecutor v Ruto (Decision on the Prosecutors' Application for Summons to Appear)* ICC Pre-trial Chamber II ICC-01/09-01/11, 8 March 2011.

## ***B Treaties***

Amendment on the crime of aggression to the Rome Statute of the International Criminal Court, Secretary-General of the United Nations, registered 8 May 2013.

Assembly of State Parties, Resolution RC/Res.6 (11 June 2010).

Berlin (Potsdam) Conference Protocol of the Proceedings, 17 July – 2 August 1945, [http://avalon.law.yale.edu/20th\\_century/decade17.asp](http://avalon.law.yale.edu/20th_century/decade17.asp).

Cairo Declaration of 1 December 1943, <http://avalon.law.yale.edu/wwii/cairo.asp>.

Charter of the United Nations, (entered into force 24 October 1945).

Charter of the International Military Tribunal for the Far East (as Amended—26 April 1946) as cited in Neil Boister and Robert Cryer *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, Oxford, 2008).

Control Council Law No 10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity. <http://avalon.law.yale.edu/imt/imt10.asp>.

Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (entered into force 29 July 1899).

Convention on the Prevention and Punishment of the Crime of Genocide, UNTS 78 (entered into force 12 January 1951).

Convention relating to the Status of Refugees, UNTS 189 (entered into force 22 April 1954).

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, UNTS 75 (entered into force 21 October 1950).

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, UNTS 75 (entered into force 12 August 1949).

Convention (III) relative to the Treatment of Prisoners of War, UNTS 75 (entered into force 12 August 1949).

Convention (IV) relative to the Protection of Civilian Persons in time of War, UNTS 75 (entered into force 21 October 1950).

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, entered in force 22 June 1865).

Convention (X) for the Adaption to Maritime Warfare of the Principles of the Geneva Conventions, The Hague (entered into force 18 October 1907).

Covenant of the League of Nations, available at [http://avalon.law.yale.edu/20th\\_century/leagcov.asp](http://avalon.law.yale.edu/20th_century/leagcov.asp).

Final Act of the Second Peace Conference, The Hague (entered into force 18 October 1907).

General Treaty for the Renunciation of War, <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm> (accessed 25 March 2016).

International Convention on the Suppression and Punishment of the Crime of Apartheid, UNTS 1015 (entering into force 18 July 1976).

Joint Four-Nation Declaration, October 1943, available at <http://avalon.law.yale.edu/wwii/moscow.asp>.

London Agreement of 8 August 1945—with the Charter of the International Military Tribunal in *International Military Tribunal Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946 I* (Nuremberg, Germany, 1947).

Protocol relating to the Status of Refugee, UNTS 606, (entered into force 4 October 1967).

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), UNTS 1125 (entered into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem, UNTS 2404 (entered into force 14 January 2007).

Rome Statute of the International Criminal Court, UNTS 2187 (entered into force 1 July 2002).

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, UNTS 2253 (entered into force 9 March 2004).

Universal Declaration of Human Rights, Paris (proclaimed 10 December 1948) available at <http://www.un.org/en/universal-declaration-human-rights>.

### ***C United Nations Security Council Resolutions***

UNSC Res 713 (S/RES/713) (1991).

UNSC Res 780 (S/RES/780) (1992).

UNSC Res 808 (S/Res/808) (1993).

UNSC Res 827(S/RES/827) (1993).

UNSC Res 812 (S/RES/812) (1993).

UNSC Res 846 (S/RES/846) (1993).

UNSC Res 872 (S/RES/872) (1993).  
UNSC Res 995 (S/RES/995) (1994).  
UNSC Res 912 (S/RES/912) (1994).  
UNSC Res 1503 (S/RES/1503) (2003).  
UNSC Res 1534 (S/RES/1534) (2004).  
UNSC Res 1970 (S/RES/1970) (2011).  
UNSC Res 2164 (S/RES/2164) (2014).  
UNSC Res 2149 (S/RES/2149) (2014).  
UNSC Res 1925 (S/RES/1925) (2010).  
UNSC Res 1528 (S/RES/1528) (2004).  
UNSC Res 1593 (S/RES/1593) (2005).

***D Books and chapters in books***

Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005).

Kofi Annan with Nader Mousavizadeh *Interventions: A Life in War and Peace* (Penguin Press, New York, 2012).

Louise Arbour *War Crimes and the Culture of Peace* (University of Toronto Press, Toronto, Buffalo, London, 2002).

Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963, Penguin Classics, New York, 2006).

Grietje Baars “Capitalism’s Victor’s Justice? The Hidden Story Behind the Prosecution of Industrialists Post WWII” in Kevin Jon Heller and Gerry Simpson (eds) *The Hidden histories of War Crimes Trials* (Oxford University Press, Oxford, 2013).

\_\_\_\_\_ “Making ICL History: On the need to move beyond pre-fab critiques of ICL” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014).

Maria Bargh (ed) *Resistance: An Indigenous Response to Neoliberalism* (Huia Publishers, Wellington, 2007).

Michael Barnett *Empire of Humanity: A History of Humanitarianism* (Cornell University Press, Ithaca and London, 2013).

Gary J Bass *Freedom's Battle: The Origins of Humanitarian Intervention* (Alfred A Knopf, New York, 2008).

Cherif Bassiouni *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinius Nijoff Publishers, Bordrecht, Boston, Lancaster, 1987).

Zygmunt Bauman *Modernity and the Holocaust* (Cornell University Press, New York, 1989).

Zygmunt Bauman *Collateral Damage: Social Inequalities in a Global Age* (Cambridge: Polity, Cambridge, 2011).

WG Beasley *The Modern History of Japan* (Weidenfeld and Nicolson, London, 1975).

Greg Behrman *The Most Noble Adventure: The Marshall Plan and the Reconstruction of Post-War Europe* (Aurum Press, London, 2008).

Robert N Bellah *Religion in Human Evolution: From the Paleolithic to the Axial Age* (Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2011).

Alex J Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge, 2009).

Walden Bello *Capitalism's Last Stand? Deglobalisation in the Age of Austerity* (Zed Books, London & New York, 2013).

Roberto Beneduce “Contested memories: Peace-building and community rehabilitation after violence and mass crimes—A medico-anthropological approach”

in Béatrice Pouligny, Simon Chesterman and Albrecht Schnabel (eds) *After Mass Crime: Rebuilding States and Communities* (United Nations Press, Tokyo, 2007).

Herbert P Bix *Hirohito and the Making of Modern Japan* (HarperCollins Publishers, New York, 2000).

Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012).

Neil Boister and Robert Cryer *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, Oxford, 2008).

\_\_\_\_\_ *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, Oxford, 2008).

David Bosco *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, Oxford, 2014).

Arnold C Brackman *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Collins, London, 1981).

Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (first published 1977, Palgrave, New York, 2002).

Barry Buzan and George Lawson *The Global Transformation: History, Modernity and the Making of International Relations* (Cambridge University Press, Cambridge, 2015).

Hazel Cameron *Britain's Hidden Role in the Rwandan Genocide: The Cat's Paw* (Routledge, New York, 2013).

Antonio Cassese *International Criminal Law* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2008).

\_\_\_\_\_ *Cassese's International Criminal Law* revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting (3<sup>rd</sup> ed, Oxford University Press, Oxford, 2013).

Noam Chomsky *Profit Over People: Neoliberalism and Global Order* (Seven Stories Press, New York, 1999).

Kamari Maxine Clarke *Fiction of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, Cambridge, 2009).

Carl von Clausewitz *On War* (Penguin, Auckland, 1974).

Richard Cockatt *The Fifty Years War: The United States and the Soviet Union in World Politics, 1941-1991* (Routledge, New York and London, 1995).

Paul Collier *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About it* (Oxford University Press, Oxford, 2007).

John Cooper *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave MacMillan, New York, 2008).

Richard H Cooper and Juliette Voïnov Kohler (eds) *Responsibility to Protect: The Global Moral Compact for the 21<sup>st</sup> Century* (Palgrave Macmillan, New York, 2009).

Luc Côté “Independence and Impartiality” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, Cambridge, 2005).

Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst *An Introduction to International Criminal Law and Procedure* (3rd ed, Cambridge University Press, Cambridge, 2014).

Norman Davies *Europe at War, 1939-1945: No Simple Victory* (MacMillan, London, 2006).

Frederiek de Vlaming “Selection of Defendants” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Carla Del Ponte in collaboration with Chuck Sudetic *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press, New York, 2008).

Michael Dillon and Andrew W Neal (eds) *Foucault on Politics, Security and War* (Palgrave Macmillan, New York, 2008).

Yvonne Dutton *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge, London and New York, 2013).

Terry Eagleton *On Evil* (Yale University Press, New Haven and London, 2010).

William Easterly *The Tyranny of Experts: Economists, Dictators and the Forgotten Rights of the Poor* (Basic Books, New York, 2013).

Amos Elon "Introduction" in Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963, Penguin Classics, New York, 2006).

Gareth Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For all* (Brookings Institution Press, Washington, DC, 2008).

Richard Falk *The Great Terror War* (Arris Books, Moreton-in-Mash, Gloucestershire, 2003).

Charles Freeman *The Closing of the Western Mind: The Rise of Faith and the Fall of Reason* (Vintage Books, New York, 2005).

David P Forsythe *The Humanitarians: The International Committee of the Red Cross* (Cambridge University Press, Cambridge, 2005).

Michel Foucault *The Archaeology of Knowledge* (first published 1969, Routledge, London and New York, 2002).

\_\_\_\_\_ "*Society Must Be Defended*": *Lectures at the College De France, 1975-76*, trans David Macey (Picador, New York, 2003).

Anne Frank *The Diary of Anne Frank* (first published 1947, Pan Books, London and Sydney, 1983).

Hiroto Fujiwara and Stephan Parmentier "Investigations" in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).



Madoka Futamura *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge, London and New York, 2008).

Madoka Futamura and James Gow “The Strategic Purpose of the ICTY and International Peace and Security” in James Gow, Rachel Kerr and Zoran Pajić (eds) *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the former Yugoslavia* (Routledge, New York, 2014).

Jim George *Discourses of Global Politics: A Critical (Re)Introduction to International Relations* (Lynne Rienner Publishers, Boulder, Colorado, 1994).

Christopher Gevers “International criminal law and individualism” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014).

Matthew J Gibney *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, Cambridge, 2004).

Anthony Giddens *The Consequences of Modernity* (Stanford University Press, Stanford, 1990).

Martin Gilbert *History of the Twentieth Century* (HarperCollinsPublisher, London, 2001).

\_\_\_\_\_ *Churchill: A Life* (Pimlico, London, 1991).

Jonathon Glover *Humanity: A Moral History of the Twentieth Century* (Pimlico, London, 2001).

Daniel Jonah Goldhagen *Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (Little Brown, London, 2009).

Richard J Goldstone *For Humanity: Reflections of a War Crimes Investigator* (Yale University Press, New Haven CT and London, 2000).

Richard J Goldstone and Adam M Smith *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (Routledge, London and New York, 2009).

John Gray *False Dawn: The Delusions of Global Capitalism* (Granta, London, 1998).

\_\_\_\_\_ *Al Qaeda and What it Means to be Modern* (Faber and Faber, London, 2003).

\_\_\_\_\_ *Black Mass: Apocalyptic Religion and the Death of Utopia* (Penguin, London, 2007).

Roger Griffin *The Nature of Fascism* (Routledge, London and New York, 1993).

Clive Hamilton *Growth Fetish* (Pluto Press, London, Sterling, Virginia, 2003).

Pierre Hazan “Transitional Justice After September 11: A New Rapport with Evil” in Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds) *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, Stanford, 2010).

John Head *The Future of the Global Economic Organizations: An Evaluation of Criticisms Leveled at the IMF, The Multilateral Development Banks, and the WTO* (Brill, The Netherlands, 2005).

Kevin Jon Heller and Gerry Simpson (eds) *The Hidden Histories of War Crimes Trials* (Oxford University Press, Oxford, 2013).

Andrew Heywood *Politics* (Palgrave Macmillan, New York, 2013).

David Hoile *Justice Denied: The Reality of the International Criminal Court* (Africa Research Centre, London, 2014).

Charles Chernor Jalloh *Sierra Leone Special Court and its Legacy: The Impacts for African and International Criminal Law* (Cambridge University Press, Cambridge, 2015).

Gail Jarrow *Robert H Jackson: New Deal Lawyer, Supreme Court Justice, Nuremberg Prosecutor* (Calkins Creek, Honesdale, Pennsylvania, 2008).

Jane Kelsey *Reclaiming the Future: New Zealand and the Global Economy* (Bridget Williams Books, Wellington, 1999).

\_\_\_\_\_ *At the Crossroads: Three Essays* (Bridget Williams Books, Wellington, 2002).

\_\_\_\_\_ *Serving Whose Interests? The Political Economy of Trade Services Agreements* (Routledge-Cavendish, Oxon, 2008).

Sara Kendall “Critical orientations: A critique of international criminal court practice” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014).

Rachel Kerr “Introduction: Trials and Tribulations at the ICTY” in James Gow, Rachel Kerr and Zoran Pajić (eds) *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the former Yugoslavia* (Routledge, New York and London, 2014).

Ben Kiernan *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (Yale University Press, New Haven and London, 2007).

Martti Koskeniemi *The Politics of International Law* (Hart Publishing, Oxford and Portland, Oregon, 2011).

\_\_\_\_\_ *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870—1960* (Cambridge University Press, Cambridge, 2001).

\_\_\_\_\_ *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge, 2005).

Tor Krever “Unveiling (and veiling) politics in international criminal trials” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014).

Julia Kristeva *Powers of Horror: An Essay on Abjection* trans Leon S Roudiez (Columbia University Press, New York, 1982).

Barak Kushner *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (Harvard University Press, Cambridge, Massachusetts and London, 2015).

Eve La Haye *War Crimes in Internal Armed Conflicts* (Cambridge University Press, Cambridge, 2008).

Adam Lebor “Complicity With Evil” *The United Nations in the Age of Modern Genocide* (Yale University Press, New Haven and London, 2006).

Jeffrey Locke “Indictments” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominnik Zaum (eds) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, Oxford, 2008).

Ellen L Lutz and Caitlin Reiger (eds) *Prosecuting Heads of State* (Cambridge University Press, Cambridge, 2009).

Tim Maga *Judgment at Tokyo: The Japanese War Crimes Trial* (University Press of Kentucky, Lexington, 2001).

Frédéric Mégret “International criminal justice: A critical research agenda” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014).

Linda Melvern *Conspiracy to Commit Murder: The Rwanda Genocide* (Verso, London and New York, 2004).

James Miller *The Passion of Michel Foucault* (Harvard University Press, Cambridge, Massachusetts, 1993).

Richard H Minear *Victor’s justice: The Tokyo War Crimes Trial* (University of Michigan, Michigan, 2001).

Lydia Monin and Andrew Gallimore *The Devil’s Garden: A History of Landmines* (Pimlico, London, 2002).

Lindsay Moir *The Law of Internal Armed Conflict* (Cambridge University Press, Cambridge, 2002).

Herfried Münkler “Old and new wars” in Myriam Dunn Cavelty and Victor Mauer (ed) *Routledge Handbook of Security Studies* (Routledge, London and New York, 2010).

Cullen Murphy *God’s Jury: The Inquisition and the Making of the Modern World* (Penguin, London, 2011).

Pádraig McAuliffe *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Routledge, London and New York, 2013).

Michael McKinley *Economic Globalisation as Religious War: Tragic Convergence* (Routledge, Milton Park, Abingdon, Oxon, 2007).

Alan Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, Cambridge, 2001).

Anne Orford *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge, 2003).

Richard Overy “The Nuremberg Trials: International Law in the Making” in Philippe Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press, Cambridge, 2003).

Roland Paris *At War's End: Building Peace After Civil Conflict* (Cambridge University Press, Cambridge, 2004).

Ralph Pettman *World Politics: Rationalism and Beyond* (Palgrave, New York, 2001).

\_\_\_\_\_ *World Affairs: An Analytical Overview* (World Scientific, New Jersey, 2010).

\_\_\_\_\_ *Psychopathology and World Politics* (World Scientific, Singapore, 2012).

Samantha Power “A Problem From Hell”: *America and the Age of Genocide* (Flamingo, London, 2003).

Beatrice Pouligny, Simon Chesterman and Albrecht Schnabel (eds) *After Mass Crime: Rebuilding States and Communities* (United Nations University Press, Tokyo, 2007).

Gérard Prunier *Darfur: The Ambiguous Genocide* (Cornell University Press, New York, 2007).

\_\_\_\_\_ *Africa's World War: Congo, The Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press, Oxford, 2009).

Julian Reid “Life Struggles: War, Discipline and Biopolitics in the Thought of Michel Foucault” in Michael Dillon and Andrew W Neal (eds) *Foucault on Politics, Security and War* (Palgrave Macmillan, New York, 2008).

Erik S Reinert *How Rich Countries Got Rich... and Why Poor Countries Stay Poor* (Constable & Robinson, London, 2007).

Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

\_\_\_\_\_ “Introduction” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Luc Reydam and Jan Wouters “The Politics of Establishing International Criminal Tribunals,” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Luc Reydam and Jed Odermatt “Mandates” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Geoffrey Robertson *Crimes Against Humanity: The Struggle for Global Justice* (3<sup>rd</sup> ed, Penguin, London, 2008).

BVA Röling and Antonio Cassese *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity, Cambridge, 1994).

Paul Rogers *Irregular War: ISIS and the New Threat from the Margins* (I.B. Tauris, London and New York, 2016).

Cedric Ryngaert “Arrest and Detention” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

MA Mohamed Salih “A Critique of the Political Economy of the Liberal Peace: Elements of an African experience” in Edward Newman, Roland Paris and Oliver P Richmond (eds) *New Perspectives on Liberal Peacebuilding* (United Nations University Press, Tokyo, New York, Paris, 2009).

William Schabas *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (Cameron May, London, 2008).

\_\_\_\_\_ *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, Oxford, 2012).

David Scheffer “Atrocity Crimes: Framing the Responsibility to Protect” in Richard H Cooper and Juliette Voinov Kohler (eds) *Responsibility to Protect: The Global Moral Compact for the 21<sup>st</sup> Century* (Palgrave MacMillan, New York, 2009).

\_\_\_\_\_ *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, Princeton and Oxford, 2012).

Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, New York, 2006).

Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, London and New York, 2014).

\_\_\_\_\_ “Introduction” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014).

\_\_\_\_\_ “The market and marketing culture of international criminal law” in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, New York, 2014).

Kirsten Sellars *‘Crimes against Peace’ and International Law* (Cambridge University Press, Cambridge, 2013).

Michael A Sells *The Bridge Betrayed: Religion and Genocide in Bosnia* (University of California Press, Berkeley, 1996).

Michael J Shapiro *The Politics of Representation: Writing Practices in Biography, Photography, and Political Analysis* (University of Wisconsin Press, Madison 1988).

\_\_\_\_\_ *War Crimes, Atrocity, and Justice* (Polity, Cambridge, 2015).

Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds) *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, Stanford, 2010).

Gerry Simpson *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, Cambridge, 2004).

\_\_\_\_\_ *Law, War, and Crime: War Crimes Trials and the Reinvention of International Law* (Polity Press, Cambridge, 2007).

Miranda Sissons and Marieke Wierda “Political Pedagogy, Baghdad Style: The Dujail Trial of Saddam Hussein” in Ellen L Lutz and Caitlin Reiger (eds) *Prosecuting Heads of State* (Cambridge University Press, Cambridge, 2009).

Robert Skidelsky *John Maynard Keynes, 1883-1946: Economist, Philosopher, Statesman* (Macmillan, London, 2003).

Larry Sledentop *Inventing the Individual: The Origins of Western Liberalism* (Belknap Press of Harvard University Press, Cambridge Massachusetts, 2014).

Ronald C Slye and Beth Van Schaack *International Criminal Law: The Essentials* (Aspen Publishers, New York, 2009).

Bradley F Smith *Reaching Judgement at Nuremberg* (Andre Deutsch, London, 1977).

Chandra Lekha Sriram “Transitional Justice and the Liberal Peace” in Edward Newman, Roland Paris and Oliver P Richmond (eds) *New Perspectives on Liberal Peacebuilding* (United Nations University Press, Tokyo, New York, Paris, 2009).

Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds) *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press, Oxford, 2014).

Michael J Struett *The Politics of Constructing the International Criminal Court: NGOs, Discourses, and Agency* (Palgrave Macmillan, New York, 2008).

Emir Suljagić “Justice Squandered? The Trial of Slobodan Milošević” in Ellen L Lutz and Caitlin Reiger (eds) *Prosecuting Heads of State* (Cambridge University Press, Cambridge, 2009) at 195.

Richard Tarnas *The Passion of the Western Mind: Understanding the Ideas that Have Shaped Our World View* (Plimco, London, 1991).

Colin Tatz *With Intent to Destroy: Reflecting on Genocide* (Verso, London and New York, 2003).



Telford Taylor *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf, New York, 1992).

Ramesh Thakur *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, Cambridge, 2006).

Yuma Totani *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Centre and Harvard University Press, Cambridge, Massachusetts, 2008).

Stephen Toulmin *Cosmopolis: The Hidden Agenda of Modernity* (University of Chicago Press, Chicago, 1990).

Gregory Townsend “Structure and Management” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Sergey Vasiliev “Trial” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

Lars Waldorf “A Justice ‘Trickle-Down’: Rwanda’s First Postgenocide President on Trial” in Ellen L Lutz and Caitlin Reiger (eds) *Prosecuting Heads of State* (Cambridge University Press, Cambridge, 2009).

\_\_\_\_\_ “Like Jews Waiting for Jesus: Posthumous Justice in Post-Genocide Rwanda” in Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds) *Localising Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, Stanford, 2010).

Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (first published 1977, Basic Books, New York, 2006).

Eric D Weitz *A Century of Genocide: Utopias of Race and Nation* (Princeton University Press, Princeton and Oxford, 2003).

Marieke Wierda and Anthony Triolo “Resources” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds) *International Prosecutors* (Oxford University Press, Oxford, 2012).

James F Willis *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press, Westport, Connecticut, 1982).

Peter H Wilson *The Thirty Years War: Europe's Tragedy* (Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2009).

Alan Wolfe *Political Evil: What It Is And How To Combat It* (Alfred A Knopf, New York, 2011).

Ngairé Woods *The Globalizers: The IMF, the World Bank, and Their Borrowers* (Cornell University Press, Ithaca and London, 2006).

Susan L Woodward "The Security Council and the Wars in the Former Yugoslavia" in Vaughan Lowe, Adam Roberts, Jennifer Walsh and Dominik Zaum (eds) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1995* (Oxford University Press, Oxford, 2008).

Danilo Zolo *Victor's Justice: From Nuremberg to Baghdad* trans MW Weir (Verso, London, 2009).

### ***E Journal Articles***

Payam Akhavan "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment" (1996) 90(3) *AJIL* 501.

\_\_\_\_\_ "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda" (1997) 7 *DJCL* 325.

\_\_\_\_\_ "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 *AJIL* 7.

Joy Asongzoh Alemazung "Post-Colonial Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic and Political Development" (2010) 3(10) *JPAS* 62.

Louise Arbour “The Prosecution of International Crimes: Prospects and Pitfalls” (1999) 1(13) *Wash. U. J. L. & Pol’y* 13.

Franco Archibugi “Between neo-Capitalism and post-Capitalism: A Challenging Turn for Societal Reform” (2008) 18(3) *International Review of Sociology* 505.

Donna E Arzt “Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal” (1995) 12(3) *New York Law School Journal of Human Rights* 689.

Fatou Bensouda “Looking Back, Looking Ahead—Reflections from the Office of the Prosecutor of the ICC” (2012) 11(2) *Wash U. Global Studies L. Rev* 437.

Barton J Bernstein “Research note: Writing, Righting, or Wronging the Historical Record: President Truman’s Letter on his Atomic-Bomb Decision” (1992) 16 *Diplomatic History* 163.

Laurie R Blank “Finding Facts but Missing the Law: The Goldstone Report, Gaza, and Lawfare” (2010) 43 *Case W. Res J. Int’l L* 280.

Neil Boister “Transnational Criminal Law?” (2003) 14(5) *EJIL* 953.

John Bolton “The Risks and Weaknesses of the International Criminal Court from America’s Perspective” (2001) 64(1) *Law and Contemporary Problems* 167.

William W Bostock “The Global Corporatisation of Universities: Causes and Consequences” *Antepodium*, nfr.

Serge Brammertz “The Impact of Criminal Prosecutions on Compliance with IHL: Challenges and Perspectives on the Way Forward” (2015) 39(1) *UWA Law Review* 4.

Antonio Cassese “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9 *EJIL* 2.

Christine Chinkin “Rape and Sexual Abuse of Women in International Law” (1994) (5) *EJIL* 326.

Robert W Cox “Social Forces, States and World Orders: Beyond International Relations Theory” (1981) 10(2) *Millennium—Journal of International Studies* 216.

Allison Marston Danner “Constructing a Hierarchy of Crimes in International Criminal Law Sentencing” (2001) 87(3) *Virginia Law Review* 415.

Robert Donih “War Crimes” (1992) 66(3) *St John’s Law Review* 733.

Dženan Donlagic and Amra Kožarić “Justifications of Criticism of the International Financial Institutions” (2010) 55(186) *Economic Annals* 115.

Mark Drumbl “International Criminal Law: Taking Stock of a Busy Decade” (2009) 10(1) *Melbourne Journal of International Law* 1.

Charles J Dunlap “Lawfare Today: A Perspective” (2008) *Yale Journal of International Affairs* 146.

Dan Edelstein “*Hostis Humani Generis*: Devils, Natural Rights, and Terror in the French Revolution” (2007) 141 *Telos* 57.

SN Eisenstadt “Multiple Modernities” (2000) 129(1) *Daedalus* 1.

Gary Feinberg “The International Criminal Tribunal for the Former Yugoslavia: The Establishment and Evaluation of a Unique Concept in International Justice Administration” (2006) 2 *War Crimes, Genocide & Crimes against Humanity* 87.

Benjamin B Ferencz “Telford Taylor: Pioneer of International Criminal Law” (1999) 7 *Colombia Journal of Transnational Law*, available at <http://www.benferencz.org/1990-1999.html>.

\_\_\_\_\_ “A Prosecutor’s Personal Account: From Nuremberg to Rome” (1999) 52(2) *Journal of International Affairs* 455.

Richard J Goldstone “World Peace Through Justice Award Lecture” (2009) 8(4) *Wash. U. Global Stud. L. Rev.* 619.

Jody Greene “*Hostis Humani Generis*” (2008) 34(4) *Critical Inquiry* 683.

Christopher Keith Hall “The First Proposal for a Permanent ICC” (1988) 322 *International Review of the Red Cross* 57.

Kevin Jon Heller “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression” (2007) 18(3) *EJIL* 477.

Mayeul Hiéramente “The Myth of ‘International Crimes’: Dialectics and International Criminal Law” (2011) 3(2) *GoJIL* 551.

Francine Hirsch “The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order” (2008) *AHR* 701.

Michael J Hogan “American Marshall Planners and the Search for a European Neo-capitalism” 1985 *AHR* 44.

Robert H Jackson “The Trials of War Criminals: An Experiment in International Legal Understanding” (1946) 32 *ABAJ* 319.

Tim Jacoby “Hegemony, Modernisation and Post-war Reconstruction” (2007) 21(4) *Global Security* 521.

Neha Jain “A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court” (2005) 16(2) *EJIL* 239.

Charles Chernor Jalloh “Regionalizing International Criminal Law?” (2009) 9 *International Criminal Law Review* 445.

Hassan B Jallow “Prosecutorial Discretion and International Criminal Justice” (2005) 3 *Journal of International Criminal Justice* 145.

Zachary D Kaufman “The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations” (2010) 43 *The John Marshall Law Review* 753.

Sara Kendall “Donor’s Justice: Recasting International Criminal Accountability” (2011) 24(3) *LJIL* 585.

Sara Kendall and Sarah Nouwen “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood” (2014) 76 *Law and Contemporary Problems* 252.

Tor Krever “International Criminal Law: An Ideology Critique” (2013) 26(3) *LJIL* 701.

\_\_\_\_\_ “Dispensing Global Justice” (2014) 58 *New Left Review* 97.

Martti Koskenniemi "Between Impunity and Show Trials" (2002) 6 *Max Plank UNYB* 1.

Katrina Lee Koo "Confronting a Disciplinary Blindness: Women, War and Rape in the International Politics of Security" (2002) 73(3) *Australian Journal of Political Science* 525.

Timothy Longman "Church Politics and the Genocide in Rwanda" (2001) 31(2) *Journal of Religion in Africa* 163.

David Luban "Carl Schmitt and the Critique of Lawfare" (2010) 43 *Case Wes Res J Int'l L* 457.

Ernest Mandel "The Economics of Neo-Capitalism" (1964) *The Socialist Register* 56.

Makau Matua "Never Again: Questioning the Yugoslav and Rwanda Tribunals" (1997) 11 *Temp. Int'l & Comp. L.J.* 167.

Anja Matwijkiw "A Very Meaningful Anniversary" (2008) 8 *ICJR* 713.

Bernard D Meltzer "Robert H Jackson: Nuremberg's Architect and Advocate" (2005) 68 *Albany Law Review* 55.

S Michael Miller "Notes on Neo-Capitalism" (1975) 2 *Theory and Society* 1.

Luis Moreno-Ocampo "The International Criminal Court: Seeking Global Justice" (2015) 40 *Case W. Res. J. of Int'l L Rev* 215.

Michael McKinley "The Co-option of the University and the Privileging of Annihilation" (2004) 18(2) *International Relations* 151-172.

Grant Niemann "The Life and Times of a Senior Trial Attorney at the ICTY from 1994 to 2000" (2004) 2(2) *Journal of International Criminal Justice* 435.

Mark J Osiel "Why Prosecute? Critics of Punishment for Mass Atrocity" (2000) 22 *HRQ* 118.

Roland Paris "International peacekeeping and the 'mission civilisatrice'" (2002) 28 *Review of International Studies* 637.

Robert G Patman “Globalisation, the New US Exceptionalism and the War on Terror” (2006) 27(6) *Third World Quarterly* 963.

Ralph Pettman “Psychopathology and world politics” (2010) 32(3) *Cambridge Review of International Affairs* 475.

Michael Pugh “Peacekeeping and Critical Theory” (2004) 11(1) *International Peacekeeping* 39.

Ann Sagan “African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law” (2010) 39(3) *Millennium—Journal of International Studies* 3.

William A Schabas “‘Definitional Traps’ and Misleading Titles” (2009) 4(2) *GSP* 177.

David Scheffer “The Merits of Unifying Terms: 'Atrocity Crimes' and 'Atrocity Law'” (2007) 2 *GSP* 91.

\_\_\_\_\_ “Genocide and Atrocity Crimes” (2006) 1(3) *GSP* 229.

James Burnham Sedgwick “A People’s Court: Emotion, Participant Experiences, and the Shaping of Postwar Justice at the International Military Tribunal for the Far East, 1946-1948” (2011) 22(3) *Diplomacy & Statecraft* 480.

Robert Shnayerson “Judgement at Nuremberg” (1996) *Smithsonian* 124.

Daphna Shruga and Ralph Zacklin “The International Criminal Tribunal for the Former Yugoslavia” (1994) 5 *EJIL* 1.

James G Stewart “Atrocity, Commerce, and Accountability: The International Criminal Liability of Corporate actors” (2010) 8 *JICJ* 313.

David Sullivan “Professionalism and Australia’s Security Intellectuals: Knowledge, Power, Responsibility” (1998) 33(3) *Australian Journal of Political Science* 421.

Immi Tallgren “The Sensibility and Sense of International Criminal law” (2002) 13(3) *EJIL* 561.

\_\_\_\_\_ “The Voice of the International: Who is Speaking?” (2015) *Journal of International Criminal Justice* 1.

J Samuel Walker “History, Collective Memory, and the Decision to Use the Bomb” (1995) 19(2) *Diplomatic History* 319.

## **F Reports**

M Adatci “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties” (1920) 14 *Am. J. Int’l L.* 5.

Madeleine K Albright and William S Cohen *Preventing Genocide: A Blueprint for US Policymakers* (United States Holocaust Memorial Museum, Washington DC, 2008).

Amnesty International *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, available at <https://www.amnesty.org/en/documents/afr01/3063/2016/en>.

Eurodad *World Bank and IMF Conditionality: a development injustice* (June 2006) available at [http://www.eurodad.org/uploadedfiles/whats\\_new/reports/eurodad\\_world\\_bank\\_and\\_imf\\_conditionality\\_report.pdf](http://www.eurodad.org/uploadedfiles/whats_new/reports/eurodad_world_bank_and_imf_conditionality_report.pdf).

European Community *Report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia* available at <http://www.womenaid.org/press/info/humanrights/warburtonfull.htm>.

Human Rights Watch *Courting History: The Landmark International Criminal Court’s First Years* (2008) available at <https://www.hrw.org/reports/2008/icc0708/>.

\_\_\_\_\_ *Unfinished Business: Closing Gaps in the Selection of ICC Cases* (2011) available at <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases>

International Conference on Military Trials *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials*



(International Organization and Conference Series II, European and British Commonwealth 1, Department of State Publication 2090, Washington DC, 1949).

International Criminal Court *Report of the International Criminal Court for 2004* (A/60/177, 1 August 2005).

International Criminal Court *Report of the Special Working Group on the Crime of Aggression* (ICC-ASP/7/20/add.1).

United Nations *Report of the International Commission of Inquiry on Darfur to the Secretary-General* (S/2005/60 1 February 2005)

United Nations *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (A/49/342; S/1994/1007, 29 August 1994).

United Nations *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994* (A/51/399; S/1996/778, 24 September 1996).

United Nations Security Council *The Situation in Bosnia and Herzegovina* (S/1995/999) (1995).

Report of the Steering Committee in the International Conference on the Former Yugoslavia.

“Interim Report of the Commission of Experts established by Resolution 780 (1992)”  
*The American Journal of International Law* (1994) 88(4) 784.

## **G**     *Other Sources*

Grace Grall Akallo “The Endangered Children of Northern Uganda” Prepared Statement delivered before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations House of Representatives, Congress, 26 April 2006. Serial 109-177. Available at [http://commdocs.house.gov/committees/intrel/hfa27231.000/hfa27231\\_o.htm](http://commdocs.house.gov/committees/intrel/hfa27231.000/hfa27231_o.htm)

Karen Armstrong “Wahhabism to ISIS: how Saudi Arabia exported the main source of global terrorism” (2014) *New Statesman*, 27 November. Available at <http://www.newstatesman.com/world-affairs/2014/11/wahhabism-isis-how-saudi-arabia-exported-main-source-global-terrorism>

George Bush “Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict” (1991) The American Presidency Project. Available at <http://www.presidency.ucsb.edu/ws/?pid=19364>.

Simon Chesterman “International Criminal Law with Asian Characteristics?” Available at <http://law.nus.edu.sg/wps/>.

Carla Del Ponte “The Role of International Criminal Prosecutions in Reconstructing Divided Communities” Public lecture given at the Centre for the Study of Global Governance at the London School of Economics, 20 October 2003. Available at <http://eprints.lse.ac.uk/23448/>.

John Gray “A Point of View: ISIS and what it means to be modern” (2014) *BBC News*, 11 July. Available at <http://www.bbc.com/news/magazine-28246732>.

Steven Kay and Gillian Higgins “The Right to Self-Representation—The Lawyers in the Eye of the Storm” (2010) *International Criminal Law Bureau* 1. Available at <http://www.internationallawbureau.com/index.php/author/steven-kay/page/6>.

Joseph B Keenan *Opening Statement of the Prosecution* Northcroft Archive (Prosecution’s Documents file) Macmillan Brown Library, University of Canterbury.

Henry R Luce “The American Century” 17 February 1941, *TIME*.

Michael P Sharf “Have We Really Learned the Lessons of Nuremberg?” address presented 17 November 1995 during a Conference entitled “Nuremberg and the Rule of Law: A Fifty Year Verdict” Available at [http://www.pegc.us/archive/DoD/docs/Lessons\\_of\\_Nuremburg](http://www.pegc.us/archive/DoD/docs/Lessons_of_Nuremburg).

US White House “Press release by the White House, 6 August 1945.” Available at [www.trumanlibrary.org/whistlestop/study\\_collections/bomb/large/documents](http://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents).

ICC OTP ‘Press Release: President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC’ 29 January 2004.

ICC OTP ‘Press Release: Prosecutor receives referral of the situation in the Democratic Republic of Congo’ 19 April 2004.

ICC OTP ‘Statement: ICC Prosecutor opens investigation into war crimes in Mali: The legal requirements have been met. We will investigate’ 16 January 2013.

ICC OTP ‘Press Release: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic’ 24 September 2014.

ICC OTP ‘Press Release: Prosecutor receives referral concerning Central African Republic’ 7 January 2015.