DAMIEN ROGERS

LAW, POLITICS AND THE LIMITS OF PROSECUTING MASS ATROCITY

Human Rights Interventions

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Damien Rogers

Law, Politics and the Limits of Prosecuting Mass Atrocity

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For Francesca,
unflinching warrior and fierce keeper of the peace

Preface

This book is the culmination of yet another long night's journey into day. While it has taken me many years to write, its arguments rest largely on foundations built by others. What began as a somewhat timid response to Gerry Simpson's excellent *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007) was soon buttressed by the authoritative contents of *International Prosecutors*, edited by Luc Reydams, Jan Wouters and Cedric Ryngaert and published by Oxford University Press in 2012. The publication of Christine Schwöbel-Patel's *Critical Approaches to International Criminal Law: An Introduction* (London and New York: Routledge, 2014) offered much-needed reassurance that other scholars were grappling with the vexing issues perplexing me. Without quality scholarship like theirs, it would not have been possible to write this book.

I am also grateful to the Macmillan Brown Library at the University of Canterbury for granting me access to their Justice Erima Harvey Northcroft Tokyo War Crimes Trial Collection. It is, without doubt, a national treasure.

My hope is that this book encourages its readers to consider the relationship between law and politics in a new light. The book not only demonstrates that law can constrain politics and that politics can create, animate and saturate the law, but also shows that international criminal law constitutes its own type of international politics. In my view, too often politics is conceptualised, unduly narrowly, as only cohering around a state leader and his or her prerogatives. When this happens, law—especially the enforcement of international criminal law—is routinely seen as a by-product

of politico-strategic affairs. While states are undoubtedly important to the conduct of contemporary world affairs, including as makers of public 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, and of their broader movements. It can also blind us to the ways in which international prosecutors of mass atrocity express their preferences for democracies, markets without fetters and individuals as sovereigns unto themselves. These expressions are important because those who do not share these preferences can find themselves transformed initially into suspects, then into the accused before becoming defendants standing in the dock. Denounced as enemies of mankind, defendants are essentially excommunicated from humanity's ranks. In this regard I also hope the book encourages its readers to entertain the possibility that prosecutions of mass atrocity occur as part of a silent war fought for control over the politico-cultural project of modernity.

Earlier drafts of this book were improved by comments and suggestions generously offered by Neil Boister and Gay Morgan as well as by Gerry Simpson and Wouter Werner. Three anonymous reviewers deserve praise too for their penetrating criticism, responses to which I have done my best to incorporate in the pages that follow. While they might not always agree with everything I have done, the book is certainly better for their efforts. My colleagues at Massey University's Centre for Defence and Security Studies and the politics programme provided ample encouragement and, in particular, Professor Graeme Fraser offered wise council when it was most needed. I also wish to thank Cambridge University Press for permission to reprint parts of my chapter entitled 'Prosecutors' Opening Statements: The Rhetoric of Law, Politics and Silent War' in Nabou Hayash and Cecilia Bailliet (eds) *The Legitimacy of International Criminal Tribunals* (Cambridge: Cambidge University Press, 2017). Any errors of fact, lapses of expressions and all violations of academic conventions contained in this book are my own.

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CHAPTER 1

Introduction

The grave realities of mass atrocity can render life increasingly nasty, ever-more brutish and exceedingly short for humanity's most vulnerable members. Cultures of impunity arise and flourish where state leaders are unable, or unwilling, to prevent or curtail this violence. Such cultures stimulate intense levels of fear within entire populations, provoking large-scale internal displacement and refugee flows across state borders. Sometimes mass atrocity itself spills over these borders, turning localised violence into wider, more complex regional armed conflagrations, as occurred recently in Sub-Saharan Africa.[1] In these circumstances, state capabilities to enforce the rule of law can be seriously eroded. Yet mass atrocities all-too-frequently involve the state, even though offering protection to its citizenry is often cited as the state's primary function.[2] State leaders have conducted mass atrocities not only against their own citizens, but also against the citizens of other states. Framed as an international security problem, these atrocities are in many ways worse than armed conflict and deserve to be treated with urgency and determined resolve by the international community, especially at the United Nations (UN) and within its Security Council.[3]

Notwithstanding these important politico-strategic considerations, mass atrocity is best characterised as a politico-social problem in the sense that groups struggle against one another in order to establish or maintain a collective sense of self.[4] That social relations are torn asunder is almost always

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an objective informing the commission of mass atrocity, especially where social groups antagonise others by deliberately casting intended victims in the reductive, narrow terms of their national, racial, ethnical, class, religious or tribal affiliations. As Gerry Simpson points out, "[t]he subject is not 'man's inhumanity to man' but the inhumanity to specific categories of men."[5] Describing mass atrocities as affecting "humanity as a whole" and suggesting "that humanity is a victim" is, therefore, a step too far, as these violent episodes are a means by which particular social groups are augmented while others are seriously harmed or destroyed.[6] Understanding mass atrocity as a politico-social problem challenges the conventional view of politics as something done by states and state leaders, as these social groups can coexist within a state and across its borders, and can assume control of the state and its machinery of government; such a perspective opens up the empirical field of inquiry beyond the fiction of states as the primary entity conducting world affairs. It also reveals that the ways in which atrocities are described can serve certain political interests, especially in terms of imposing a powerful distinction between the so-called civilised and the barbarian.[7] Such descriptions have prompted, shaped and justified a plethora of responses from the international community, including the use of international criminal law (ICL) to prosecute those who commit mass atrocity.

This book is about those prosecutions. In particular, it offers a sustained and in-depth examination of various roles international prosecutors play in this collective endeavour. During the pre-trial phase of their work, these prosecutors prepare indictments, warrants of arrest or summonses to appear. They choose 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 then a defendant, and tend to commence formal proceedings leading to trial. At trial, prosecutors build on the content of those indictments when making opening statements outlining their cases against defendants. Providing international prosecutors with an opportunity to showcase the legal character of their role, these statements 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. For some perpetrators of mass atrocity, international prosecutors represent an appreciable risk to be avoided; for many victims of these crimes they symbolise hope that justice might be done.[8] 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, dynamic organisations, the associated administrative duties of which can occupy a considerable amount of their time and energy.[9] As strategists, these prosecutors can shape parts of their respective ICL institutions, thereby 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.[10] 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.[11]

International prosecutors are often "the public face of international criminal justice,"[12] generating appreciable impacts in locales beyond the courtroom. 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 foster outreach relationships with government officials and officials of intergovernmental organisations, though this is not necessarily open diplomacy as prosecutors may, in fact, choose to deal with diplomats behind closed doors.[13] As the personification of international criminal justice within the wider international community, international prosecutors are living objects around which others can coalesce and, at times, mobilise into action. This occurs even though some policymakers, diplomats, journalists and academics are intimidated by international prosecutors when they make "self-assured comments about the imperatives of customary international law, often couched in confident resort to mysterious Latin maxims."[14]

The pool of these prosecutors continues to grow as successive generations of lawyers cut their professional teeth at various ICL institutions. The specialised skillsets belonging to this "energetic, transnational and

networked epistemic community" are highly marketable beyond academia.[15] Forming part of "an industry of international criminal law practice populated by judges, lawyers and administrators who move from tribunal to tribunal,"[16] 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 knowledge through research and university teaching, "generating ever more students of mass atrocity jurisprudence for a legal market incapable of absorbing them."[17] Most of these prosecutors share a deep repugnance for the internationalised culture of impunity that Carla Del Ponte describes as *muro di gomma*.[18] 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 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 state leaders, policymakers and domestic law-makers to advocacy groups and researchers alike. As a burgeoning cadre of professional litigators, these prosecutors are a growing force to be reckoned with in local, international and global settings, generating impacts that resonate far beyond the courtroom. For these reasons alone, then, international prosecutors of mass atrocity receive critical treatment in the following pages.

Law, Politics and the Limits of Prosecuting Mass Atrocity explores the efforts of prosecutors ahead of the defence counsel and members of the bench because, as legal actors, prosecutors search out the limits of ICL's enforceability. The prosecutor's mandate is, moreover, "the *raison d'être* of the tribunal."[19] While these mandates are articulated in legal instruments establishing tribunals, prosecutors breathe life into their sometimes imprecise instructions though their own ideas and actions. This book specifically concerns those prosecutors belonging to major international institutions; namely, those established by the order of an occupying power, through a UN Security Council resolution or through a treaty or an international agreement among states.[20] These international institutions are prioritised here ahead of domestic and special national courts, or hybrid and internationalised tribunals, because these are the most forceful and direct expression of the international community's collective will to prosecute mass atrocities. This is important because prosecutors who belong to these institutions derive their authority from those state leaders who

design and establish these courts. When these prosecutors perform various law-related functions and confront those accused of committing mass atrocity in an adversarial manner, their efforts echo the intentions of the executives on whose behalf they prosecute. In many instances, prosecutors articulate and reproduce reigning official versions of events before those versions encounter opposition from the defence as well as mediation from the bench.

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 Criminal 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 major ICL institutions—or, more specifically, the three successive generations of prosecutors who belong to these landmark institutions—which are the primary focus of this book.

Law and Politics

By examining institutional arrangements, including the origins, complexity and significance of prosecutorial mandates, this book 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, of course, very little that is new or particularly unique in recognising international prosecutors as agents of the law. Recent legal scholarship gives a great deal of attention to such legal agency in terms of, inter alia, prosecutors' mandates, independence, discretion and trial functions.[21] This scholarship forms part of a burgeoning literature which—while acknowledging politico-strategic

circumstances, in part, facilitate this law's enforcement—tends to view the law as an apolitical set of rules proscribing the commission of serious international crime.[22] Much of this literature is informed by an assumption that a dichotomy exists between law and politics; that is, while one informs and shapes the other, law and politics 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 prevented and all-too-seldom enabled the arrest of those who stood accused of committing mass atrocity, the law itself is not a form of international politics.[23] As we shall see, this is a view shared by most, if not all, the prosecutors considered in this book.

Separating law and politics into two distinct domains serves obvious academic and professional interests. Yet the sharp focus given to the legal aspects of prosecuting mass atrocity 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 remain important to understanding mass atrocity prosecutions, much of this literature does not fully account for the injustices endemic to most circumstances in which mass atrocities occur. Messy underlying political problems, including economic and social deprivation, are easily overlooked. 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.[24]

By critically examining prosecutorial performance during the pre-trial and trial phases, this book contends that the three generations of international prosecutors which have so far emerged are, in fact, also political actors. Indeed, 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,"[25] these decisions are always partial and subjective, helping to create or sustain certain types of political communities.[26] The law is, moreover, its own type of politics as 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."[27] In this sense, legal agency is merely a continuation of some prior political exchange.

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 certain activities occurring within public affairs, or as the practice of compromise and consensus, or, more simply, as the exercise of power.[28] The definition used in this book is taken from Ralph Pettman, who suggested that politics refers to "all those things we do, individually and in 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."[29] Pettman's definition is preferred here over all others because it is, at once, inclusive yet limited. It is inclusive because it can be applied to any situation where power, broadly conceived, is used over others. This includes prosecutors who make choices to obtain various degrees of power over the accused, their defence, the bench as well as other prosecutors. 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 forms of power exercised by state leaders or their official institutions. This helps to signal differing modalities of power as well as the inter-relationships among the politico-strategic, politico-economic and politico-social dimensions of local and international affairs; for, as we shall see, the politico-strategic dimension is as fundamental to explaining the establishment of major ICL enforcement institutions as the politico-economic dimension is to explaining post-conflict reconstruction transformations or the politico-social dimension is to explaining the targeted destruction of certain groups through mass atrocity. But, perhaps even more importantly, Pettman's definition enables this book to bring into focus the broader and more profound politico-cultural context of modernity and the rivalry among its ancillary, or subsidiary, utopian movements. In other words, this definition of politics enables a bifurcated analysis of the prosecutors' collective efforts, signalling brief moments of consonance and longer periods of dissonance between their more immediate, specific politico-strategic circumstances and the broader material and ideational conditions prevailing within the modernist project. Other definitions of the political preclude this kind of analysis and eschew explanations that suggest there is more to prosecuting mass atrocity than the performance of justice or the exercise of state-centric power.

International prosecutors are, by and large, political actors serving in the interests of economic liberalisation. The preferences shared among

state leaders 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 values informing prosecutorial action are probably reflected and re-inscribed through a Gramscian process of cultural hegemony whereby the interests of the powerful became the values inherited by the less powerful and the weak.[30] Similarly, the actions undertaken by prosecutors, and the work of those legal scholars offering uncritical treatments of those actions, could play a role in limiting the politico-legal consciousness of many participants in, and observers of, mass atrocity prosecutions.[31] In serving these interests, international prosecutors 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 the orthodox ideas and practices of economic liberalisation.[32]

Perhaps a more powerful, albeit less overt, reason lies in economic liberalisation's and ICL's common origins. The roots of economic liberalisation can be found in nineteenth-century England where a profound experiment in social engineering was conducted. The experiment's aim was to create a new type of economic life in the shape of a free market, which was disconnected from various traditional forms of social and political control. The free market would not be fettered by the desire to encourage social cohesion as the price of all goods and services were set without consideration of the associated social consequences.[33] In the first half of the twentieth century, economic liberalisation found favour in Northern America in the form of neo-capitalism, which is characterised by consumer-driven mass production supported by a dramatic expansion of the state's provision not only of health and educational services, but also of public housing and transportation goods where private firms were reluctant to operate.[34] Neo-capitalism had its "heyday"[35] 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.[36] More specifically, these ideas, practices and policy preferences seek to apply the so-called market mechanisms into areas of social life hitherto organised, governed and conducted in other ways.[37] By displacing traditional social paradigms with a set of reified market relations, neoliberalism privileges individual economic imperatives ahead of collective human wellbeing.[38]

Both neo-capitalism (with its tendency to transform economies into consumption-driven markets freed from social fetters, but with strong assistance from the state) and neoliberalism (with its tendency to expand the free market and its logic into social and political affairs) are various expressions of economic liberalisation that 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."[39]

The roots of ICL can also be traced back to the nineteenth century and, more specifically, to 1859 when Henry Dunant stumbled across the Battle of Solferino's bloody aftermath before helping to 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."[40] It is no coincidence that this dramatic change in attitudes and practices in caring for strangers occurred as the destructive power of manufactured weapons dramatically increased during the mid-nineteenth century.[41]

It is significant that the late nineteenth century witnessed the rise of ideologically radical notions of the rights of man as these liberal freedoms and protections were accompanied by institutional developments cohering around mass media, public opinion and accountable government.[42] 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 basic human rights beyond their territories.[43] 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 mass 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 Gary J. 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."[44] Central here is the notion of a common humanity worth protecting, even from itself, that was increasingly accepted.[45] This sensibility concerning matters of an international character, which emerged in the late nineteenth century, was an element of the liberal, cosmopolitan worldview prevailing at that time.[46] The international law that followed was informed and shaped by a liberal theory of politics,[47] which, in turn, contributed to the conditions for the spread of economic liberalisation. Although all mass atrocity prosecutions are political 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."[48]

Hostis Humani Generis and Modernist Discourse

Abhorrence runs deep and wide towards those who deliberately inflict unnecessary pain and suffering on others as a means of achieving some political objective. Those who commit such acts of politico-cruelty are denounced as *hostis humani generis* (enemies of mankind). A Latin term, *hostis humani generis* was probably first used by Pliny the Elder to refer to Nero's tyranny in the first century. The term also has an important Christian heritage where it referred to the devil from about the ninth century onwards.[49] Christianity's enemies were not the only targets, however, as "this supreme degree of hostility could now be projected onto whoever filled the semantic requirements of the phrase," including Goth, Vandal and Hun barbarian tribes that were seen as enemies of civilisation.[50] *Hostis humani generis* also found application during the modern period. The near universal revulsion at the horrifying means used frequently by pirates convinced many that these acts were "heinous" and, as such, belonged in "the pantheon of peremptory norms."[51] 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.[52] 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."[53] 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 transnational commerce was entitled to punish a pirate, who was in this sense less an enemy of humanity than an enemy of homo economicus.

The application of this trope to those who commit acts of politico-cruelty matters for those designated within this category since, once so denounced, they are subjected to a process of abjection.[54] The process of abjection is one of purification through excising certain traits of the human character 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 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 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 renounced while also casting out their opponents, rivals or enemies beyond an immediate community, group or society. Since this trope claims to distinguish between the human and the non-human who wage war on humanity,[55] 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."[56] In practice, however, those who are so denounced are constructed as "the enemy, not of mankind, but of particular men with particular political projects."[57] *Hostis humani generis* is something of a legal fiction subject to those who control legal interpretations and deploy power according to hegemonic values and interests.[58] It has been reconstituted to suit certain contemporary purposes, though, 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 exclusive, self-serving, "elusive and self-congratulatory 'international community.'"[59]

Sometime during the nineteenth century, then, a discourse against politico-cruelty emerged. By discourse, I mean here what Michel 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."[60] 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."[61] Richard Tarnas captures the character of modernity well when he explains the foundations of its worldview[62]:

> 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 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 on the modernist project 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.[63] 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."[64] 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. 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 apex of modernity is to be found in a "global transformation" based on the practical application of the Scientific and Industrial Revolutions as well as the ascendency of ideologies as diverse as liberalism, nationalism, socialism and racism.[65]

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.[66] 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."[67] 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.[68] 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."[69]

Modernist world politics involves contests played out among proponents of various 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."[70] 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[71] and of the politico-cultural project of modernity more generally.[72] Each of these utopian movements, elaborated in more detail in subsequent chapters, is an amalgam of nationalism and race, ethnicity, class or religion. Each of these movements, moreover, seeks to use organised armed violence, usually through the state and its machinery of government, as a means of radically transforming society in terms of some hierarchy. 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."[73]

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… institutions established."[74] 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.[75] 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 to a wide array of responses to the problem of mass atrocity. This discourse's most powerful and enduring manifestation lies in the collective effort to criminalise mass atrocities. As the body of rules prohibiting the commission of war crimes, crimes against humanity and crimes of genocide, ICL has evolved since the nineteenth century and now "ripples through the imaginative space of post-conflict justice and, thereby, aspires to fill the sullen void of impunity."[76] While the discourse is a significant driving force behind the codification of substantive ICL, it is at its sharpest when it manifests as the will to undertake trials, best demonstrated through prosecuting mass atrocities 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.

The more general material and ideational conditions comprising the politico-cultural project of modernity are thus distinguishable from specific sets of politico-strategic circumstances within which certain ICL institutions are established. This bifurcation is important because prosecutions of mass atrocity 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. The relationship between those immediate politico-strategic circumstances and the modernist discourse against politico-cruelty is complex and dynamic, shifting from brief moments of consonance to longer periods of dissonance. The discourse encourages an expansion of ICL, but in practice this expansion occurs only insofar as the prevailing politico-strategic circumstances permit. Prosecuting mass atrocity becomes a particular form of modernist world politics, which is understood here more broadly than the diplomacy of state leaders and their representatives, though such diplomacy remains important.

Prosecuting Mass Atrocity and Silent War

By foregrounding the material and ideational conditions giving rise to those institutions designed specifically to enforce ICL, this book also contends that successive generations of international prosecutors help wage a mostly silent and largely unacknowledged war. War is understood here in a different way to the notion of war offered by the nineteenth-century Prussian soldier, Carl von Clausewitz. For Clausewitz, war is the continuation of state-based politics conducted by other means. It is a clash of arms, or a series of clashes of arms, which result from the failure of politics.[77] War is also understood here differently from the thinking of Foucault, who suggested that politics is a continuation of armed conflict by other means because relationships of politicised power emerge from relationships of armed force established through physical battles. These new power relationships help transform a condition of conflict into a condition of peace, preserving the result of battles in “a sort of silent war” that enshrines uneven relationships of force, re-inscribing those relationships 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.”[78]

Building on Foucault's ideas, this silent and unacknowledged war is something more than a militarised politico-strategic affair as it is fought among proponents of large, complex utopian movements that pursue competing versions of modernity. Since utopian movements pursue their preferred path towards a perfected humanity, at stake here is nothing less than the determination of what it means to be human. Silent war is more than a form of politics for it seeks to obtain and maintain power by delegitimising, degrading and destroying its perceived enemies, rivals and opponents by any available means. It is fought on a battleground no longer understood as some geographically bound territory, but rather as the entire politico-cultural project of modernity. This includes the key institutional architecture governing the politico-strategic, politico-economic and politico-social dimensions of international life and policing international society's norms and related rules of behaviour. This silent 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. In these scenarios, law becomes one of silent war's means; the old maxim *silent enim leges inter arma* (law is silent in war[79]) needs to be revised so that war is now a silent spectre in law. Prosecuting mass atrocity is a form of lawfare as it constitutes "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."[80] It is a tactic of war available for 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. Silent war is, therefore, a phenomenon larger than the conduct of armed conflict, extending well beyond the clash of arms or series of clashes of arms, as the formal cessation of hostilities becomes less meaningful when configurations of power transcend battle.

By placing representatives of discredited utopian movements in the dock, prosecutions of mass atrocity constitute an internal frontline in this silent and unacknowledged war, which I hereafter call politico-cultural civil war. Significantly, this civil war differs markedly from those more well-known understandings of this term as internal armed conflict fought over the institutions of 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 domestic

disturbances and full-blown international armed conflict.[81] 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."[82] It is a civil war because it is fought by rival modernists for control over their politico-cultural project and because this fight engages strategies of devastation, annihilation, occupation and pacification.

Arguing that prosecutors of mass atrocity 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. "The trial," Simpson explains, "also can be a trial of the accusers and their political projects."[83] 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 Göering's initial advice to his co-accused at Nuremberg: that is, to "confine their evidence to three words, 'Lick my arse.'"[84] Soon after proffering that advice, however, Göering 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 by his adversaries."[85] 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. The defence team chosen by Milošević—which included Jacques Vergès, former defence counsel for Klaus Barbie and Ilich Ramirez Sanchez—signalled a defence strategy that, 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.[86] 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.[87]

Resistance to ICL enforcement efforts have also taken place as alternative forms of justice, such as the *Gacaca* courts in Rwanda or the *Achillio* courts in Nigeria. Legal scholarship, particularly critical ICL scholarship,[88] is another site where resistance has taken shape. Such resistance might be part of an "insurrection of subjugated knowledges," which is, according to Foucault,[89]

> 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: naive knowledges, hierarchically inferior knowledges, knowledges that are below the required level of erudition or scientifity… it is the reappearance of what people know at the local level, of these disqualified knowledges, that the critique is made possible.

It remains to be seen if these counterhegemonic discourses can undermine the prevailing ideology.[90] These forms of resistance do not locate themselves beyond somewhat narrow concepts of politics and, at trial, defendants and their defence counsel seldom, if ever, draw upon contending versions of modernist politics 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."[91]

Perspective and Structure

Law, Politics and the Limits of Prosecuting Mass Atrocity adopts a critical perspective, but not in the sense of being negative or hostile towards the prosecutor for negativity's or hostility's sake. 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 prosecutions exist 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."[92] By using an expansive definition of politics, this book conducts a unique analysis of an important vanguard actor in the quest for international criminal justice; an analysis that 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 relationships between the law and politics of prosecuting mass atrocity. The argument offers its reader a fresh way of understanding and explaining the conduct of those who prosecute mass atrocity and are important politico-legal actors in contemporary world affairs. In so doing, the book uncovers "the political economies that undergird violence and [brings] to the fore both the conditions that sustain violence and those that enable change."[93] This argument differs from those put forth in the work of other scholars through its dual focus on the discourse against politico-cruelty and the politico-cultural civil war, both of which are original. Through its synthesis of existing knowledge and, more importantly, its specific analytic treatment of the international prosecutor, this book differs from those works offering constructive 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.'"[94] That is the kind of scholarship which Tor Krever correctly sees as largely "focused on doctrinal exegesis and self-affirming genealogies."[95]

Notwithstanding its benefits, this critical perspective reveals an unresolvable problematique which, lying at the heart of this book, warrants explicit acknowledgement. Specifically, the research method and related analytic techniques used in this book are predominantly distal, reifying the conduct of international prosecutors. Yet such a rationalist epistemology is a limited, and limiting, way of knowing, as Pettman explains[96]:

> 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 mass atrocity, to be on trial as a defendant or to carry out the responsibilities associated with being a prosecutor. Even though some prosecutors—such as Telford Taylor, Richard Goldstone, Louise Arbour and Carla Del Ponte—have constructed book-length accounts of their experiences as prosecutors,[97] these first-hand accounts are artefacts to be objectified, looked at and considered from a mental distance.

As a by-product of the modernist world affairs that this book interrogates, 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 the prosecution of mass atrocity, this book forms part of the broader episteme underpinning the utopian movement of economic liberalisation and ICL, sharing the rationalising habits of the modernist mind that I have attempted to critique. Much of the academic literature informing this book 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 author 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"[98] 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.[99] Since it relies heavily upon a rationalist epistemology deeply entrenched within the modernist project—and, more specifically, within the subsidiary utopian movement that this book 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 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—that such a critique endorses the commission of mass atrocities.[100] As this book demonstrates, it is possible and meaningful to simultaneously critique the perpetration and the prosecution of mass atrocity, 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."[101]

This book comprises three main parts, each of which explores the quest for international criminal justice arising from within a general historical setting. Whereas Part I concerns the prosecution of mass atrocity within the period immediately following the Second World War, Part II concerns the aftermath of the Cold War and Part III 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 occasionally give rise to ICL institutions. These first chapters illuminate the interplay between that discourse and the evolution of substantive ICL, and also situate 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 ICL, 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 the accused and expression of their own political preferences. The relationship between hosting trials alongside 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 within their relevant institutional settings, 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 book's three main parts demonstrate a large degree of inter-generational conformity in the interplay between the law and politics of prosecuting mass atrocity. 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,"[102] it is possible not only to uncover those politico-economic structures, but also to reveal the political preferences of prosecutors, signal the utopian movement they serve and illuminate the limits of prosecuting mass atrocity. Chapter 10 concludes the book by reflecting on the implications of the argument's two major contentions—that international prosecutors are political actors serving the interests of economic liberalisation and that as political actors these prosecutors help wage politico-cultural civil war—both of which hold significance for those scholars, researchers and analysts who study the relationship between law and politics, especially those interested in better understanding the limits of prosecuting mass atrocity.

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PART I

Prosecuting Mass Atrocity After the Second World War

CHAPTER 2

International Military Tribunals

The decision to prosecute mass atrocities, which were committed as part of the Second World War, was by no means inevitable. This chapter argues, firstly, that a consensus to establish two international military tribunals signalled a rare moment of consonance between a set of circumstances in which the US emerged as primus inter pares (first among equals) and an underlying discourse offering a useful paradigm for state leaders wishing to bring to justice those who commit acts of politico-cruelty. The chapter argues, secondly, that these tribunals were primarily designed to punish those responsible for starting the Second World War. Both were forms of victor's justice that helped secure the peace by legitimising post-conflict power relations as the new status quo in international affairs. The chapter argues, lastly, that these tribunals fostered local attitudes embracing individualism ahead of belligerent forms of nationalism based on race at a time when US foreign policymakers sought to reconstruct German and Japanese states as peace-loving democracies and recast their respective economies as overseas markets for US goods and services. The chapter concludes that these post-conflict reconstruction efforts are both an extension of an international armed conflict and the first crucial steps towards building an interconnected set of neo-capitalist free markets, marking the beginning of a politico-cultural civil war fought by proponents of economic liberalisation for control over the modernist project.

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Politics: Grand Coalition Consensus

The first major international prosecutions of mass atrocity relied heavily upon a coalition forged by the US, UK and USSR during the Second World War. Central to this so-called Grand Coalition was the US and its status as primus inter pares. Given its military, economic and diplomatic power, the US was uniquely placed to plan a future world order in which its values and interests would be front and centre. Various degrees of devastation meant potential rivals were focusing their attention elsewhere. Before the Second World War was won, US President Roosevelt had proposed, financed and then laid the foundations not only for the UN but also for the so-called Bretton Woods institutions of the International Bank for Reconstruction and Development (now World Bank) and the International Monetary Fund (IMF). Even though others had made larger military commitments to the coalition's victory, the US would be the prime beneficiary and, accordingly, prepared itself for world leadership.[1]

A consensus among coalition members 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 on 12 June 1941. It explicitly repudiated acts of vengeance by the public and required governments to place the punishment of war criminals among their principal war aims.[2] High-level discussions among coalition members, which concerned the prospects of bringing justice to bear on Germany's war leaders, commenced only once 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 trial 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.[3] "It was a deadlock," Geoffrey Robertson explains, "broken by the casting vote of Joseph Stalin, who loved show trials as long as everyone was shot in the end."[4] Stalin, it seems, had moved beyond his earlier musings when the coalition met at Tehran and he suggested, probably mischievously, shooting 50,000 Germans without trial.[5] The somewhat strange situation, in which liberal

leaders sought summary executions whereas Stalin favoured a trial, has not gone unnoticed by scholars.[6]

In the end, the US prevailed as coalition members (and France) agreed to meet in London in order to draft a charter for a tribunal. Starting on 26 June 1945, the London Conference spanned 15 sessions and concluded on 8 August 1945.[7] The consensus arrived at through the conference produced the London Agreement of 8 August 1945—with the Charter of the International Military Tribunal (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."[8] The London Charter was drawn up in six weeks, which contained only 30 articles and was, in the view of one who was present at its drafting, built on a fragile consensus as the coalition "stumbled and compromised their way into the business of a major trial of war criminals."[9]

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 subsequently warned Japan that it should comply with the law 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 war 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 were usually accompanied by statements focusing on the Nazis.[10] Coalition members stated their intention to prosecute Japanese war leaders only after the European theatre had closed and Japan's defeat was all but assured.[11]

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 IMTFE (Tokyo Charter).[12] Whereas the IMT was established by agreement of the Grand Coalition (and France), the IMTFE was established by SCAP.[13] 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 coalition members who had been approached to participate in the tribunal chose not to or delayed unduly.[14] Despite 13 fewer Articles, The Tokyo Charter closely resembled the London Charter as its drafting by SCAP's legal section largely followed

the structure and approach of its predecessor while drawing upon the US State, War and Navy Departments Coordinating Committee (SWNCC) Directive of 6 October.[15]

Understood in this context, the Grand Coalition's decision to prosecute mass atrocities committed as part of the Second World War required a 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. The consensus for trials was also informed by an underlying discourse against politico-cruelty. Salient here is the notion that mass atrocities have no place in world affairs and that their authors are to be excommunicated from the human community. The rule of ICL is the favoured means of this abjection, requiring the establishment of institutions to enforce an evolving body of rules. The politics of the immediate post-war years thus gave rise to two institutions designed specifically to enforce ICL. These IMTs were a fundamental part of the Grand Coalition's 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.[16] These IMTs were established as a means of prosecuting mass atrocity, but those prosecutions were so selective in reach that this effort can only be understood as a form of victor's justice.

Law: Victor's Justice

The significance of the underlying discourse against politico-cruelty is further signalled by the frequent recourse to, and appreciable development of, ICL's substantive elements. The design phase of both tribunals involved negotiations over definitions of various atrocities. UK delegates to the London Conference insisted war crimes and crimes against humanity be included after US delegates suggested the IMT's jurisdiction be focused exclusively on crimes against peace. As a result, Article 6(b) of the London Charter explains the category of war crimes 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."[17] The Tokyo Charter offers no further elaboration beyond its reference to violations of the law or custom of armed conflict. For the IMTFE designers, "[w]ar crimes charges were almost an afterthought" as "the question of definition obviously did not concern the Charter's drafters overmuch."[18] Although war crimes require a nexus between certain acts and an underlying situation of armed conflict, both tribunals' designers went further by demanding those accused of war crimes must first be charged with crimes against peace in order to trigger the tribunal's jurisdiction.[19]

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."[20] 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).[21] 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. It also included acts of persecution on political, racial or religious grounds in execution of, or in connection with, any crime within the tribunal's jurisdiction. 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. 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."[22] Article 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.

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 this crime was restricted to those relevant events that occurred after German forces had invaded Poland on 1 September 1939.[23] The crime of genocide was absent from the Tokyo Charter. In fact, although war crimes, crimes against humanity and crimes of genocide could have been committed anywhere in the world, the IMT's jurisdiction did not cover those mass atrocities 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 Chap. 3 the indictment only covers mass atrocities committed by Japanese war leaders between 1928 and 1948.

Although both tribunals were designed with a remit that included putting on trial those who were responsible for committing mass atrocity, they were planned with an eye firmly fixed on punishing those who were responsible for initiating, and then losing, the most deadly international armed conflict in human history. Put simply, atrocities were defined in the shadow of crimes against peace.[24] These tribunals were not designed as enforcement mechanisms for all ICL as it stood in the middle of the twentieth century and the trial of Germany's war leaders was not primarily concerned with the Holocaust.[25] 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 criminalising aggression. It was not until the Second World War was drawing to a close that serious consideration was given to this question by state leaders and jurists.[26] The inclusion of crimes against peace within the London Charter was openly contested by both the Soviet and French representatives, though all delegates to the London Conference did not want the causes of the Second World War to be considered and scrutinised by the IMT.[27] 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.[28] 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. Bradley F. Smith recalls "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."[29] 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.[30] In so doing, the IMT clearly

demonstrated that the aggressive use of force in international affairs was more an international crime than a national right.[31]

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 also of "international law" 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.[32] 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.[33]

By predicating the prosecution of mass atrocities on crimes against peace, members of the Grand Coalition found a way to insulate themselves from the types of charges used to prosecute their vanquished foes and to shield the atrocities they may have committed during the Second World War from the glare of international criminal justice.[34] This sharpening of jurisdictional focus deliberately excluded a range of actions which "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."[35] 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,[36] 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 Goldhagen as unjustified by military necessity,[37] raises important questions over the use of the London Charter as a jurisdictional shield for the coalition's own war crimes. Unsurprisingly, the USSR's declaration of war on Japan and the US's 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.[38]

More than gratifying the desire to punish their enemies for creating a situation of international armed conflict, this focus on crimes against peace

reflects the security concerns shared by members of the Grand Coalition. Once their ability to wage armed conflict was destroyed and the major war 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 was, however, not to be placed at risk by the potential for other powers aspiring to revise the terms of this new post-conflict settlement within international society. The consensus to punish those responsible for crimes against peace helped inscribe and legitimise post-conflict power relations among state leaders by sending a powerful deterrent to any would-be revisionists of the new status quo in international affairs. Moreover, the consensus to punish these crimes through the rule of international law also helps further consolidate the state-based system of international affairs at the expense of alternative ways of organising international society, whether through a return to empire, the emergence of a single world government or the birth of a world proletariat. 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 the London Charter and the judgement that followed offered an innovative approach to aggression, though this innovation served to entrench the post-war status quo.[39]

Establishing institutions to prosecute mass atrocity was not the Grand Coalition's primary end. As coalition members 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.[40] Nothing was to be left to chance. As Richard H. Minear argues "[t]he appointment of justices only from among the aggrieved and victor nations itself may not have invalidated the [IMTFE's] judgement, but it raises serious questions about the tribunal's impartiality." "Just as the justices at Tokyo came only from aggrieved and victor nations," Minear continues, "so the accused were all Japanese."[41] 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. For some legal analysts this criticism is weak as a matter 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.[42] Japan's acceptance of the Potsdam Declaration and

the subsequent Instrument of Surrender rendered impotent any legal challenges to the IMTFE's lawfulness.[43] 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 IMTs. As one of the Japanese defendants, Okawa Shumei, said during his trial, "this trial is not the realization of justice, it is the continuation of war."[44]

War: Rebuilding After International Armed Conflict

Both IMTs were a by-product of the Grand Coalition's military victory and were resourced by their respective armed forces.[45] The decision on where these tribunals would sit reflected the new local realities of occupying forces controlling Germany and Japan. As occupiers of defeated enemy territory, US military forces assumed sovereignty over parts of Germany and all of Japan, seeking to administer these territories in accordance with the laws of occupation.[46] Particular zones of post-war Germany and certain sectors of Berlin were occupied and administered variously by the coalition forces; Nuremberg fell within the US zone of occupation. 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,[47] they also agreed that its first trial would be held in Nuremberg. 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. Despite 11 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.[48] MacArthur's decision to seat the 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 their leaders' commission of mass atrocity.[49]

Both tribunals were complemented by other trials held within and beyond occupation zones. Once the IMT's first trial 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 unilateral trials of German war criminals within respective zones of occupation. 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 12 thematic trials within Germany.[50] Conducted under the auspices of the Nuremberg Military Tribunal, these trials 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."[51] These trials were conducted under the US Army's authority and cannot be understood as international in any meaningful sense.[52] 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.[53] 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.'"[54]

MacArthur envisaged the IMTFE holding multiple trials when, in 1946, he proclaimed Article 14 of the Charter; specifically, that the first trial will be held at Tokyo and any subsequent trials will be held at such places as the tribunal decides. The indictment was also marked "No. 1" which indicated subsequent trials were at that stage likely.[55] Yet 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.[56] Unlike the IMT trial, which was followed by other trials, the IMTFE trial was followed by the release of other Class A suspects.[57] Nevertheless, the IMTFE was complemented by about 50 Special War Crimes Courts established by other governments under their respective national jurisdictions within the former theatres of war in the Asia-Pacific region.[58] These were established under the respective authorities of the Governments of Australia, Canada,

The Netherlands and China.[59] Taken together, these courts held over 2,000 trials, sentencing about 3,000 Japanese to terms of imprisonment and over 900 Japanese to death.[60]

These tribunals, based on and reflecting the doctrine of individual responsibility, would have produced significant effects on local post-conflict identity formation. Prosecutions of mass atrocity undertake 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.[61] 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,"[62] 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.[63]

At about the same time as the trials were commencing, plans were being implemented to reconstruct the German and Japanese militarist states as peace-loving democracies. Indeed, the IMT was meant to offer instructive lessons on the rule of law to German society, lessons that would illuminate the democratic transition of post-war Germany.[64] Conducted from 1945 until about 1949, the de-Nazification policy sought, initially, to deny active Nazi supporters access to all important official posts 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 which sought "to create a democratic phoenix out of the ashes of defeated fascism."[65] While coalition members 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.[66]

The intention to establish democracy in Japan featured in the Potsdam Declaration, which also signalled the coalition's intention 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."[67] Following the general disarming of Japan's military machine at home and abroad, which included about two million and three million combatants, respectively, the coalition 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 US also codified a new Constitution, reformed local government, separated the judiciary from the executive, encouraged the rise of unionism and introduced significant land reform.[68]

The reconstruction of German and Japanese states as peace-loving democracies was accompanied by plans to transform their wartime economies into bastions of free-market enterprise. A shift in US 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.[69] 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."[70] The US 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 (Truman Doctrine) and its Economic Recovery Program (Marshall Plan) combined to see the US provide Europe with about US$13B in aid.[71] Through these policy initiatives the US sought to build an interconnected set of neo-capitalist free markets: class conflict in Western Europe would yield to corporate collaboration; economic interdependence would emerge out of a mercantilist past; market forces and international authorities would supplant national controls; and rapprochement and cooperation would overcome international rivalry. Increasing productivity, lowering consumer prices and raising standards of living were seen as a means of recovery and security. The so-called Marshall planners sought to construct a single European market by fostering relationships between private business and public-private partnerships

while liberalising trade.[72] 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.[73] At the same time, however, US administrators either dismantled key Japanese businesses or "rendered [them] amenable to the interest of overseas capital."[74]

Understood in this context, the primary ends of the IMTs had less to do with doing justice—if doing justice involves an effort to disrupt and curtail the politics of hate and violence in order to resolve conflict through legal means[75]—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 IMTs 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 capitalist interests, nearly all of those government officials purged as part of the de-Nazification initiative found themselves reappointed.[76] 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. 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 industrialists no longer needed to be disciplined, the utopian movement of economic liberalisation remained a powerful force in modernist world politics. 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.[77] Even those who were sentenced to terms of imprisonment at Tokyo trial were freed on parole when Japan's Liberal Democratic Party assumed office in 1954. A quick embrace

of neo-capitalism also underscored the rehabilitation of these convicts, signalling the enduring power of economic liberalisation within modernist world politics. As US foreign policymakers began building the foundations for a hub-and-spoke model of international trade, with the US economy at its centre, the IMTs not only "served to simultaneously legitimize and showcase the US's role as the rising hegemon of the 'free world,'"[78] but would also facilitate what Grietje Baars describes as "international criminal law's effective deployment in the service of capitalism's victor's justice."[79] 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.[80] (The UN Charter had been drafted by the soon-to-be victorious state leaders at Dumbarton Oaks, near Washington DC and largely imposed on non-Great powers.[81]) 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.[82] Germany and Japan were both designated as enemy states under Article 53, meaning that the UN's restriction over the use of force did not apply to military action taken against them.[83] Article 42 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—the US, UK, USSR, China and France—meant these victorious powers of the Second World War could, and did, 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 the configurations of power and distribution of wealth were acutely unequal as the principles underpinning the conduct of international relations find use as instruments by most powerful.[84] For the foreseeable future, then, the foundations for international peace and security depended on two pillars, the first of which, the IMTs, would punish past crimes of aggression while the second, the UN Security Council, would protect future peace.[85]

Parallel efforts to refashion international economic systems occurred through the establishment of the Bretton Woods institutions, though the

early years of the Cold War saw the USSR turn away from these institutions.[86] The US was able to ensure international trade occurred 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.[87] As Michael McKinley explains, "Bretton Woods, as the institutionalisation of postwar American ideology, was to early globalisation what the Manhattan Project was to the Western Alliance. It provided the means for ordering the greater part of the world along lines established by the United States."[88] Here, then, the design of, and support provided to, the IMTs 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 Henry R. Luce dubbed as, prophetically in 1941, "the first great American Century" where freedom could be pursued without limit.[89] The IMTs were not only one of the Cold War's first fronts,[90] as "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,"[91] but 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 discourse against politico-cruelty 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 disputes between and among sovereign states, could focus on prosecuting individuals who commit mass atrocity.[92] Perhaps there was something of "an international fatigue" associated with establishing more institutions following the rapid creation of the UN, IMF and the World Bank.[93] 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 defendants. Notwithstanding the dearth of formal institutional development, the Genocide Convention (1948), the UN Universal Declaration of Human Rights (1948),[94] the

human rights protections inherent in the Geneva Conventions of 1949 and the Refugee Convention (1951)[95] 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.[96] 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 UN Charter's recognition of the general prohibition on the coercive use of armed force in international affairs.[97] 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."[98] 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 markers such as race, ethnicity, age, gender, class or religious affiliations. "The Declaration is," as 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 principles the Declaration espouses."[99]

Here, then, the establishment of the IMTs was not only an extension of the power configurations underpinning a new set of politico-strategic circumstances following the Second World War, 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 IMTs 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.

Conclusion

The prosecution of mass atrocity 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 practical action. Required for that was a set of propitious politico-strategic circumstances which materialised as the US's rise to primus inter pares. Taken together, the discourse and these circumstances delivered a moment that enabled a consensus to prosecute mass atrocities, instead of resorting to the summary execution of the vanquished. 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's substantive elements 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 IMTs 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 an interconnecting set of neo-capitalist free markets in Europe and Asia, 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.[100] It is in this context—that is, a transition from an international armed 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 IMTs functioned 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 a silent war to which the remaining chapters of Part I now shift the focus.

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CHAPTER 3

Indictment of German and Japanese War Leaders

The discourse against politico-cruelty not only informed the consensus to establish the international military tribunals in the immediate aftermath of the Second World War, but it also empowered the pre-trial performance of the first generation of international prosecutors of mass atrocity. This chapter begins by introducing members of this generation and outlining their mandates before noting the IMT prosecutors were better resourced than their IMTFE counterparts. The US, whose rise in world affairs was central to founding the authorising consensus among the Grand Coalition, was disproportionately represented in both prosecution teams. The chapter then critically examines the ways in which this first generation of prosecutors prepared indictments as their "main accusatorial instrument,"[1] transforming vanquished enemies into the accused who later stand before the tribunals as defendants. In particular, the selection of charges included in the relevant indictments sought to shield any misconduct of the courts' founders from the glare of international criminal justice. It produced the victor's justice described in the previous chapter by focusing exclusively on punishing crimes committed by their defeated enemies. At the same time, the selection of the accused not only drew attention to defeated German and Japanese war leaders, but also sharpened focus on the politico-strategic, politico-economic and politico-social dimensions of the discredited utopian movements of Nazism and Shinto-Imperialism. This chapter concludes that the first generation of international prosecutors breathed

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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 large extent to which they are politico-legal actors at once vital to ICL enforcement while serving the interests of economic liberalisation by supporting the rise and spread of neo-capitalism.

First Generation of International Prosecutors

The US continued to play the role of first among equals at the IMT. This is evident in the appointment of Justice Robert H. Jackson, a 53-year-old American serving as Associate Justice on the US Supreme Court, as chairman of the prosecutors' committee.[2] A small town lawyer from western New York, with a gift for language but without holding a Degree in Law, 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.[3] Roosevelt's successor, President Truman, requested Jackson represent US interests at the London Conference before appointing him as the US Chief Prosecutor at the IMT.[4] 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's bench.[5] Jackson proved hugely influential in holding the first trial at Nuremberg, placing weight on having infrastructure adequate to the task-at-hand and informing other delegates that the US had determined the trial would take place there.[6] Having selected the courtroom, Jackson also exercised responsibility for running the prosecution office and managing staff.[7] Jackson was the driving force behind the tribunal and, without him and his American legal team, the IMT might never have become a reality.[8] 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."[9]

In addition to 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. While Sir Hartley Shawcross nominally led the British contribution to the prosecutorial effort, he seldom attended the tribunal, delegating his role to Maxwell-Fyfe.[10] (As the incoming Attorney General, Shawcross had replaced Maxwell-Fyfe as

Chief Prosecutor-designate; Maxwell-Fyfe was Attorney General until the UK General Election on 2 August 1946 and had led the British delegation for most of the London Conference.[11]) 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.[12] 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.[13]

The purpose of the Committee for the Investigation and Prosecution of Major War Criminals, whose mandate was provided for in the London Charter,[14] was to agree upon the Chief Prosecutors' work plans, finalise the list of major German war criminals to be tried and approve and lodge the indictment, including any accompanying documents, with the IMT. 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 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 defendants during the trial itself.

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 them. 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 25 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. 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. The French delegation included 12 trial lawyers whereas the Soviet delegation included only nine.[15] The four Chief Prosecutors at the IMT were, then, supported by considerable resources, though those resources were unevenly spread.

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 approval of Joseph B. Keenan's appointment as the Chief Prosecutor on 7 December 1945, while all other governments contributing to the tribunal were each entitled to appoint only an associate prosecutor.[16] 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.[17] In February 1939 Keenan left the public service for private practice in Ohio.[18] 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 might render him a realistic candidate for the Senate.[19] Keenan featured among those US officials, including other staff belonging to the International Prosecutions Service (IPS), who helped SCAP's legal section to draft the Tokyo Charter.[20] It was only after the Charter had been signed that the US authorities began to consult its relevant allies.[21]

The division of labour among the IPS is significant here as Keenan seized the responsibility for making opening and closing statements, while the presentation of the case itself was relegated to the associate prosecutors. The lack of a deputy Chief Prosecutor was a noteworthy absence in this respect. According to Neil Boister and Robert 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."[22] 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.[23] 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 trial.[24] The IMTFE's prosecutorial resources were, nevertheless, much less in quantity and quality than that of the IMT.[25]

In addition to Keenan, Arthur Strettell Comyns-Carr, Robert L. Oneto, Sergei Alexandrovich Golunsky, Justice Alan Mansfield, Brigadier Ronald

Henry Quilliam, Brigadier Henry Nolan, Xiang Zhejun, W.G. Frederick Borgerhoff-Mulder, P. Govinda Menon and Major Pedro Lopez each belonged to the IPS. Comyns-Carr was a barrister and former Member of the British Parliament,[26] though he almost quit the IPS because communication with his family was so limited.[27] 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.[28] 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[29] 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.[30] 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. Borgerhoff-Mulder had relevant experience, serving as judge on the Special War Criminals Court established during the previous year in The Hague.[31] 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 Philippine Army.

The prosecutorial mandate articulated in the Tokyo Charter, which states that the Chief of Counsel will investigate and prosecute charges against Japanese war criminals, was slightly narrower than Nuremberg's.[32] Whereas the IMT had four Chief Prosecutors leading separate prosecution teams, the IMTFE had a single Chief Prosecutor with ten associate prosecutors, together forming a unified prosecution approach within a multinational IPS.[33] Despite these differences, it is clear that the drafters of both charters intended to design institutions with strong prosecutorial functions, meaning the prosecutorial performance would be vital to the trial process.

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.[34] They were, in effect, beholden to US prosecutorial designs.[35] 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 among his own friends in private practice and official capacities.[36] 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 governments,[37] 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.'"[38] Staff turnover at the IPS probably also hampered the prosecutorial effort.

Selecting the Charges

Work on the indictment of Germany's war leaders began before the text of the London Charter was agreed and finalised.[39] Its preparation was shaped by representatives 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. 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.[40] 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 mass atrocity.[41] Donna E. 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."[42] Later that month, Jackson redrafted the conspiracy charge and a consensus began to emerge around the indictment's content.[43]

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.[44] In addition to the sections devoted to each of these four counts the indictment had three appendices. Entitled "Statements of Individual Responsibility for Crimes set out in Counts One, Two, Three, and Four," Appendix A linked each of the individuals accused to the above-mentioned 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. 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.[45] Jackson believed that a number of German policies would fall under the concept of a master plan, thereby relieving the prosecutors of the burden of defining new categories of international crime.[46] 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 Germany's plans for, and execution of, foreign aggression against an array of European countries. According to the indictment, the purpose of this conspiracy was:

(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";

(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.[47]

Dealing specifically with crimes against peace, Count Two refers to the abovementioned conspiracy charges. Even though the German war effort violated international treaties, agreements and assurances, Jackson lamented that most people would be deeply disappointed to learn that initiating international armed conflict was not regarded as a crime under international law as it stood in the nineteenth and early twentieth centuries.[48] The inclusion of crimes against peace in the indictment must have raised serious questions about the USSR's initiation of hostilities against Poland and Finland in 1939.[49] Nevertheless, Jackson convinced the other Chief Prosecutors that the illegitimacy of aggressive war ought to lie at the centre of the Nuremberg trial, revealing his "highly unorthodox legal means served deeply orthodox political ends" of securing a states-based system of international affairs.[50] 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 German armed forces, 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 cruel and grotesque means, including experimental operations conducted on living human beings.[51] The allegations of torture revealed intensely cruel treatment that involved disembowelling prisoners before immersing them in ice-cold water or the use of electrified torture equipment.[52] Prisoners were used to clear roads littered with anti-personnel mines and others were killed in vans that filled with poison gas.[53] This section of the indictment also describes a similar litany of gruesome scenes where civilians deported for slave labour experienced inhumane over-crowding, insufficient clothing and little or no food, causing many deaths. The total numbers deported (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.[54] 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. Defendants charged under Count Three were nevertheless accused of committing genocide as they attempted to exterminate civilian groups based on their race, nationality or religion. They were also charged with deporting for slave labour, murdering and ill-treating prisoners of war and plundering private and public property.[55] 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,[56] 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.[57]

Count Four of the indictment gave focus to the Germans' 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 and Italy, and on the High Seas. Particular mention is given to the Jews, who had been systematically persecuted by the German authorities since 1933. During the Soviet Army's advance Jews were murdered by Germans to preclude their liberation.[58] 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 Holocaust, a request that he rejected.[59] More cynical, however, was the establishment of concentration camps by the USSR within their zone of occupation as the court heard details of German

death camps.[60] 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.[61]

When compared to Jackson's role in drafting the indictment of Germany's war leaders, Keenan appears to have played a more limited one in preparing the IMTFE indictment.[62] Displaying very little enthusiasm for becoming directly involved in the drafting process,[63] Keenan delegated that role to an executive committee, which he established but which Comyns-Carr chaired. It first convened on 4 March 1946.[64] 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 mass atrocity and a final draft of the indictment.[65]

The arrangement of the IMTFE indictment differs from the IMT's, though both draw upon the same categories of crime comprising substantive ICL.[66] Whereas the IMT indictment coheres around four counts, the IMTFE indictment comprises 55 counts—something of "a byzantine collection of charges"[67]—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.[68] 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 mass atrocity can be understood as something of a concession to their allies.[69] At one stage, Keenan pressed for the removal of the war crimes charges, though he was unable to overcome the opposition of associate prosecutors.[70] Crimes against humanity rarely featured during the ensuing trial since, for the most part, the Japanese war leaders did not tend to abuse their own citizens.[71] 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.[72] 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 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 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's preparation for war at home through its belligerent posturing, increasing strength, militarisation of domestic political institutions, propaganda and education systems and mobilising its own civilians. 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."[73]

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 law and custom 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.

The IMT indictment gives notice of specific charges, but it also signals the desire of some members of the Grand Coalition to use the trial as a means of creating a historical record.[74] Yet the indictment is silent on any reasons explaining why Germans might collude and conspire in order to use aggressive force. Absent here, for instance, was any acknowledgment

of Germany's experience of the so-called shackles of Versailles, draconian reparations generating resentment among Germans at the severe economic consequences of the peace following the First World War. 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.[75] 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.[76]

The IMTFE indictment remains similarly silent on possible causes of, or triggers for, Japan's crimes 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.[77] 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.[78] There is nothing that draws attention to the similarities between Japan's 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 narrative in Appendix A did not cover the remaining counts focused upon the conduct of armed hostilities, the indictment did not devote much of its content to mass atrocity, 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.[79] 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.[80] This omission might have been deliberate since the IPS was made aware of the sexual enslavement of Korean women to serve as prostitutes in Japanese military brothels during Tanaka's interrogation. Japanese officers had thought this system would prevent further incidents of mass rape, such as the kind that

occurred earlier in Nanking.[81] 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' selection of charges for inclusion in these indictments is one of the sharpest manifestations of the discourse against politico-cruelty 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 glare of international criminal justice. Enforcing a particular form of victor's justice as a means of legitimising 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 two indictments were empowered, in 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's and Japan's defeated war leaders, but also sharpened focus on both Nazism's and Shinto-Imperialism's politico-strategic, politico-economic and politico-social dimensions.

Selecting the Accused

Upon its appointment in May 1945, the US prosecution team at Nuremberg 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,[82] 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.[83] Jackson's limited understanding of German 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.[84] 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 Germany's

structures of power made the task of refining that list a difficult one. According to Richard 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."[85] 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 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. Held in Soviet custody, both Erich Raeder and Hans Fritsche were subsequently included among the accused. Of the 24 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 21 men to face prosecution.[86] 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."[87] The list of persons included on the indictment became "a patchwork of subcategories."[88]

The IMT indictment also charged six organisations—*Die Reichsregierung* (Reich Cabinet), *Das Korps der Politischen Leiter Der Nationasozialisttischen Deutschen Arbeiterpartei* (Leadership Corps of the Nazi Party), *Die Schutzstaffeln Der Nationalsocialistischen Deutschen Arbeiterparte* (commonly known as the SS) including *Der Sicherheistsdienst* (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 subsequent courts and found guilty by virtue of formal association, rather than by the commission of particular deeds. Jackson insisted that no agreement should be reached on an indictment that did not include the German General Staff.[89]

Notwithstanding the various considerations used in their selection, suspects named in the IMT indictment draw attention not only to Germany's

defeated war leaders, 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 involved in committing mass atrocities, 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.[90] 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).[91] Nazism views German society as superior, placing it at the apex of a hierarchy of races constituting the human species. Within this hierarchy, races were ascribed particular characteristics which were immutable and transmitted inter-generationally. Nazis believed that humanity's highest accomplishments, from architecture to literature and music, resulted from bred genius rather than a series of isolated cases of individual brilliance. The Nazis fused the concepts of nation and race, switching from describing themselves as German to Aryan.[92]

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."[93] 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.[94] 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.[95] Other suspects committed suicide before being arrested.[96] As they had done at the IMT, the Grand Coalition held suspects before they were indicted by the IMTFE.[97] (The arrest of suspects within occupied Japan, like within occupied Germany, was relatively easy to effect,[98] 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.)[99] 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.[100] Over a period of about ten weeks and behind closed doors, a short-list of 26 accused were selected from a list of about 260 persons by an executive committee of the IPS comprising all the associate prosecutors and some US staffers.[101] This process was fraught with difficulties because the IPS had not yet developed a viable theory concerning each of the accused's guilt or 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."[102] 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 them.[103] The total number of accused could not exceed the 28 seats that had been built into the dock.[104]

The indictment, which accused 28 Japanese of crimes against peace and mass atrocity, was lodged with the IMTFE on 29 April 1946.[105] As Boister and Cryer lament:

> 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.[106]

Focusing exclusively on individuals, the IMTFE indictment accused no groups or organisations of committing crimes against peace or mass atrocity. Confronted with frequently changing cabinets, the IPS necessarily departed from the experience at Nuremberg where the prosecution could give focus to a single, stable Nazi-led regime.[107] Absent from Japan was anything resembling the unified and highly coordinated Nazi Party or a Hitler-type leadership.[108] 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 war leadership, but also to Shinto-Imperialism's politico-strategic dimension. Featuring in the indictment were 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.

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 dimensions 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.[109] It may also have been due to a lack of compelling evidence linking industry to crimes against peace.[110] (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.[111]) 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 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.[112] It also relates to the shifting politico-strategic circumstances of the post-Second World War 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.[113] In the final analysis, many Japanese were familiar with only a select few of the individuals accused by the IMTFE indictment.[114]

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. These ideas emerged out of the nineteenth century at a time when Japanese leaders sought to be free of western influences, including the ideologies of liberalism and individualism. The "imperial way" was at once an inspiring political theology based upon the emperor's divinity and moral excellence, and the basis for a holy war against the ideological foundations of modernity and western superiority.[115] 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.[116] Koreans, Chinese, Taiwanese and other Asian nations conquered by the Japanese war machine were all seen as subordinate to the Shinto-Imperialist, member of 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 Dabuege. Both men would have been justifiable inclusions in the IMT indictment and were held in custody at that time.[117] Jackson fervently argued for the inclusion of Krupp, a well-known

industrialist who had supported the Nazi war machine. When Krupp was considered 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.[118] 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.[119] 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 Italians 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 Hungarians allies.[120]

There were several possible omissions 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.[121] 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 in the summer of 1945.[122] However, non-juridical factors, such as maintaining law and order within Japan and avoiding further intensifying hostility towards the US,[123] played a role in Hirohito's non-indictment. Keenan had wanted to prosecute the Emperor for the crime of aggressive war, as did the Dutch, Russian and Philippine prosecutors. But SCAP instructed them to not indict the Emperor because he would be useful to the US during its political reconstruction of Japan.[124] 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.[125] In addition to SCAP's refusal to force Hirohito's abdication or to include him in the indictment, the international prosecutors helped shield the Emperor while prosecuting the 28 accused.[126] 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.[127] 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.[128] 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.[129] Thus, Frederiek 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."[130] Not all participating representatives were happy with that situation.

Some of those involved in the selection process criticised the indictment's exclusion of well-known politicians and businessmen who originally appeared on the list of suspects. Apparently, they were expected to play a role in Japan's reconstruction.[131] 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.[132] 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.[133] Research material and results were 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.[134] For Yuma Totani this was, simply put, an American cover-up.[135] 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."[136]

Conclusion

The preparation of 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 that 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 founders of the tribunals, 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—specifically German and Japanese war leaders as representatives of Nazi and Shinto-Imperial utopian movements—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 of the Second World War by other means, but is also part of a contest between proponents of neo-capitalism and non-liberal utopian movements. And this is a contest also clearly visible in the opening statements delivered respectively at Nuremberg and Tokyo, which is the topic of the next chapter.

Notes

1. Jeffrey Locke, "Indictments," in *International Prosecutors*, eds. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 604.
2. See generally Gail Jarrow, *Robert H. Jackson: New Deal Lawyer, Supreme Court Justice, Nuremberg Prosecutor* (Honesdale, Pennsylvania: Calkins Creek, 2008).
3. Ronald C. Slye and Beth Van Schaack, *International Criminal Law: The Essentials* (New York: Aspen Publishers, 2009), 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." Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992), 43.
4. Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Michigan: University of Michigan), 10.
5. Bernard D. Meltzer, "Robert H. Jackson: Nuremberg's Architect and Advocate," *Albany Law Review* 68 (2005): 55.
6. Gregory Townsend, "Structure and Management," in *International Prosecutors*, eds. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 176–177.
7. Meltzer, "Nuremberg's Architect," 56.

8. Richard Overy, "The Nuremberg Trials: International Law in the Making," in *From Nuremberg to The Hague: The Future of International Criminal Justice*, ed. Phillipe Sands (Cambridge: Cambridge University Press, 2003), 7.
9. As cited in Meltzer, "Nuremberg's Architect," 56.
10. Townsend, "Structure and Management," 202–203.
11. Townsend, "Structure and Management," 174.
12. Townsend, "Structure and Management," 204–205.
13. Francine Hirsch, "The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Post-war Order," *American Historical Review* (2008): 710.
14. See International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945–1 October 1946* I (Nuremberg, Germany), 13.
15. Townsend, "Structure and Management," 178–206.
16. Richard J. Goldstone and Adam M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (New York and London: Routledge, 2009), 59.
17. Minear, *Victors' Justice*, 40.
18. Townsend, "Structure and Management," 210, n 285.
19. Robert Donihi, "War Crimes," *St John's Law Review* 66(3) (1992): 741.
20. Townsend, "Structure and Management," 211.
21. Minear, *Victors' Justice*, 20; and B.V.A Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Cambridge: Polity, 1994), 2.
22. Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 76–77.
23. Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, Massachusetts: Harvard University Asia Centre and Harvard University Press, 2008), 41.
24. Donihi, "War Crimes," 740–741.
25. Townsend, "Structure and Management," 210.
26. Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (London: Collins, 1989), 67.
27. 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," *Diplomacy & Statecraft* 22(3) (2011): 483.
28. Brackman, *Other Nuremberg*, 68.
29. Brackman, *Other Nuremberg*, 68.
30. Sedgwick, "People's Court," 487.
31. Brackman, *Other Nuremberg,* 67–68.

32. "Indictment" as cited in Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), 8.
33. Zachary D. Kaufman, "The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations," *The John Marshall Law Review* 43 (2010): 760–761.
34. Townsend, "Structure and Management," 217.
35. Boister and Cryer, *A Reappraisal*, 76.
36. Donihi, "War Crimes," 741.
37. Brackman, *Other Nuremberg*, 67.
38. Townsend, "Structure and Management," 221–222.
39. Luc Reydams and Jed Odermatt, "Mandates," in *International Prosecutors*, eds. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 83.
40. Frederieck de Vlaming, "Selection of Defendants," in *International Prosecutors*, eds. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 543–544.
41. Townsend, "Structure and Management," 179.
42. Donna E. Arzt, "Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal," *New York Law School Journal of Human Rights* 12(3) (1995): 694.
43. Townsend, "Structure and Management," 179.
44. International Military Tribunal, *Trial of Major War Criminals*, 27–95.
45. Meltzer, "Nuremberg's Architect," 58.
46. Overy, "Nuremberg Trial," 17.
47. International Military Tribunal, *Trial of Major War Criminals*, 30.
48. William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press), 199.
49. Overy, "Nuremberg Trial," 19–20.
50. Kirsten Sellars, *'Crimes against Peace' and International Law* (Cambridge: Cambridge University Press, 2013), 108.
51. International Military Tribunal, *Trial of Major War Criminals*, 43.
52. International Military Tribunal, *Trial of Major War Criminals*, 45 & 47.
53. International Military Tribunal, *Trial of Major War Criminals*, 19.
54. John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave Macmillan, 2008), 63–65.
55. International Military Tribunal, *Trial of Major War Criminals*, 43–44.
56. Schabas, *Unimaginable Atrocities*, 154.
57. Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2014), 117.
58. International Military Tribunal, *Trial of Major War Criminals*, 67.
59. Reydams and Odermatt, "Mandates," 85–86.
60. Overy, "Nuremberg Trial," 25–26.

61. Townsend, “Structure and Management,” 205.
62. Townsend, “Structure and Management,” 214.
63. Boister and Cryer, *A Reappraisal*, 69.
64. Townsend, “Structure and Management,” 217.
65. Totani, *Tokyo War Crimes Trial*, 18–19.
66. “Indictment” in Boister and Cryer, *Documents,* 16–69.
67. Boister and Cryer, *A Reappraisal*, at 49.
68. Minear, *Victors’ Justice*, 24.
69. Reydams and Odermatt, “Mandates,” 88.
70. Boister and Cryer, *A Reappraisal*, 179.
71. Schabas, *Unimaginable Atrocities*, 50.
72. Boister and Cryer, “Indictment” in *Documents,* 34–46.
73. Boister and Cryer, *A Reappraisal*, 70.
74. Locke, “Indictments,” 614.
75. Cryer et al., *An Introduction*, 120.
76. Overy, “Nuremberg Trial,” 23.
77. Boister and Cryer, *A Reappraisal*, 9.
78. Boister and Cryer, *A Reappraisal*, 10 & 15.
79. Daniel Jonah Goldhagan, *Worse than War: Genocide, Eliminationism and the Ongoing Assault on Humanity* (London: Little Brown, 2009), 8.
80. Boister and Cryer, *A Reappraisal*, 64.
81. Boister and Cryer, *A Reappraisal*, 64.
82. Arzt, “Hate Speech Problem,” 711.
83. Overy, “Nuremberg Trial,” 7.
84. de Vlaming, “Selection of Defendants” 545.
85. Overy, “Nuremberg Trial,” 9–11.
86. Schabas, *Unimaginable Atrocities*, 11.
87. Quoted in Arzt, “Hate Speech Problem,” 711.
88. Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), 121.
89. Taylor, *Anatomy*, 104 & 115.
90. Arzt, “Hate Speech Problem,” 697.
91. Roger Griffin, *The Nature of Fascism* (London and New York: Routledge, 1993), 85–86.
92. Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton and Oxford: Princeton University Press, 2003), 106.
93. Weitz, *Utopias*, 106.
94. Griffin, *Fascism*, 97.
95. Townsend, “Structure and Management,” 209.
96. Donihi, “War Crimes,” 744.
97. Cedric Ryngaert, “Arrest and Detention,” in *International Prosecutors,* eds. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 695.

98. Totani, *Tokyo War Crimes Trial*, 63.
99. Ryngaert, "Arrest and Detention," 653.
100. Totani, *Tokyo War Crimes Trial*, 64.
101. Minear, *Victors' Justice*, 102–103.
102. Boister and Cryer, *A Reappraisal*, 53; and Minear, *Victors' Justice*, 102–103.
103. Minear, *Victors' Justice*, 108.
104. Boister and Cryer, *A Reappraisal*, 54.
105. Townsend, "Structure and Management," 225.
106. Boister and Cryer, *A Reappraisal*, 73.
107. Sellars, *'Crimes against Peace,'* 190.
108. Minear, *Victors' Justice*, 129.
109. Donihi, "War Crimes," 748.
110. Boister and Cryer, *A Reappraisal*, 62–63.
111. Minear, *Victors' Justice*, 37.
112. Boister and Cryer, *A Reappraisal*, 13.
113. Grietje Baars, "Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post WWII," in *The Hidden Histories of War Crimes Trials*, eds. Kevin Jon Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 187.
114. Boister and Cryer, *A Reappraisal*, 60.
115. Herbit P. Bix, *Hirohito and the Making of Modern Japan* (New York: HarperCollins, 2000), 11.
116. Griffin, *Fascism*, 153.
117. Overy, "Nuremberg Trial," 13–14.
118. Overy, "Nuremberg Trial," 12–13.
119. Overy, "Nuremberg Trial," 10–11.
120. Goldstone and Smith, *International Judicial Institutions*, 53; and Overy, "Nuremberg Trial," 8–9.
121. Minear, *Victors' Justice*, 110; and Boister and Cryer, *A Reappraisal*, 65.
122. Totani, *Tokyo War Crimes Trial*, 43.
123. Madoka Futamura, *War Crimes Tribunal and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (London and New York: Routledge, 2008), 63; and Minear, *Victors' Justice*, 113.
124. de Vlaming, "Selection of Defendants," 546.
125. Totani, *Tokyo War Crimes Trial*, 4.
126. Goldstone and Smith, *International Judicial Institutions*, 62.
127. Bix, *Hirohito*, 589.
128. Boister and Cryer, *A Reappraisal*, 67.
129. Totani, *Tokyo War Crimes Trial*, 62.
130. de Vlaming, "Selection of Defendants," 545.
131. de Vlaming, "Selection of Defendants," 547.

132. Goldstone and Smith, *International Judicial Institutions*, 63.
133. Boister and Cryer, *A Reappraisal*, 63.
134. Futamura, *War Crimes Tribunal*, 63; and Goldstone and Smith, *International Judicial Institutions*, 62–64.
135. Totani, *Tokyo War Crimes Trial*, 3.
136. Boister and Cryer, *A Reappraisal*, 328.

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CHAPTER 4

Opening Statements at Nuremberg and Tokyo

The discourse against politico-cruelty not only empowered the first generation of international prosecutors as they prepared their indictments, but also animated the opening statements made by Jackson at Nuremberg and Keenan at Tokyo. Building on the content of the indictments examined in the preceding chapter, both opening statements announced serious international crimes, foreshadowed evidence of those crimes and sought to preclude foreseeable defences. This chapter begins by showing that these statements were vital ingredients in the trial process and, therefore, crucial to early efforts to prosecute mass atrocity. A close reading of these statements reveals the use of legal rhetoric that self-consciously distinguishes itself from the politico-strategic calculations of state leaders 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 as well as both prosecutors' preferences for democracies and individualism. The chapter argues that such prosecutorial conduct is more than ICL enforcement; it is modernist world politics in action. It also argues that 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 silent war. When that belligerent rhetoric is placed alongside the concerted and sustained efforts to reconstruct the German and Japanese states and

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economies, and to build an architecture governing the politico-strategic and politico-economic dimensions of international life, then these prosecutions of mass atrocity occur as part of a politico-cultural civil war.

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 war leaders was read in successive phases by each prosecutor taking a turn and all 21 defendants 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 that represented the pinnacle of his performance in Nuremberg."[1] In that statement, Jackson described the way in which the defendants came to power and then used that power domestically before engaging in a war of aggression. He concluded his oration by giving focus to the relevant law.[2] 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."[3] Justice William Webb made some introductory remarks before a court clerk read aloud (in both English and Japanese) the indictment over a number of days.[4] On 6 May 1946, all 28 Japanese defendants pleaded not guilty to various charges of crimes against peace, murder, conspiracy to commit murder, war crimes and crimes against humanity.[5] It was not until 4 June 1946, however, that Keenan addressed the tribunal in order to deliver his 20,000-word opening statement.[6] He would depart Tokyo immediately afterwards, leaving other members of the IPS to manage the early stages of the trial, much to their chagrin.[7] Following some preliminary remarks, Keenan's opening statement gave focus to the Tokyo Charter and the tribunal's authority and jurisdiction before defining the crimes with which the defendants 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 defendants' alleged actions, which constitute serious international crimes. He went on to signal the evidence which the IPS would produce during the trial, to reiterate the need to punish those guilty of mass atrocities through the rule of international law and to recommend that the defendants are worthy of punishment.[8]

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 Germany did not contravene a peace treaty with the US, Jackson seemed to say, crimes against peace were an attack upon the peace enjoyed by the society of states.[9] Aggressive war was "the greatest menace of our times."[10] "It was aggressive war, which the nations of the world had renounced. It was war in violation of treaties, by which the peace of the world was sought to be safe-guarded," Jackson emphasised.[11] Jackson was unequivocal when he stated that Germany's aspirations of territorial expansion could only be achieved through aggressive war and the murder of those who lived in those territories.[12] In addition to the charges of conspiracy to initiate international armed conflict, Jackson announced the commission of crimes against humanity that, on the one hand, had begun before the war and had occurred within Germany and, on the other hand, had occurred during the war in occupied territories.[13] Of these crimes against humanity the most heinous targeted the Jews.[14] Jackson also announced war crimes that included "a long series of outrages against inhabitants of occupied territory."[15]

Keenan was equally emphatic about the centrality of crimes against peace 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,"[16] "[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?"[17] He proclaimed that Japanese war aim was world domination, though the control of East Asia and the control of both the Pacific and Indian Oceans were more immediate objectives. The defendants conspired to wage this undeclared and illegal war of aggression.[18] 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."[19]

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 mass atrocity 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 a secret order that outlined how open warfare would be waged without a public declaration of war. 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.[20] These documents also 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-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."[21]

During his opening statement, Keenan made frequent reference to what the evidence of Japanese crimes against peace and mass atrocity 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."[22] 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"[23] and had the temerity to claim a few moment later that "[e]vidence to be offered under Charter Article 5a, Crimes against Peace, and 5b, Conventional War Crimes, has now been outlined"[24] when no such evidence had been signalled.

Both opening statements sought to preclude major defences based upon the legal principle of *nulla peona 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 by surprise," Jackson suggested before somewhat snidely remarking that the defendants "really are surprised that there is any such thing as law."[25] 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 admitted that no juridical precedent for the tribunal existed, but argued that none was needed as custom necessarily evolves and responds to exigent demands of the day. Without innovations and timely revision, the law would be something of a dead letter.[26] Keenan traced much the same developments in international law and, like Jackson, remained unperturbed by the lack of legal precedent. He argued that wars of aggression have always been punishable since time immemorial and that the IMTFE went as far as to offer the defendants "the privilege of defending themselves and asserting their innocence."[27] Recognised as illegal by the world's conscience, murder, and mass murder in particular, has always attracted penalty and been recognised as an affront to civilised behaviour.[28]

Both prosecutors also used their opening statements to try to preclude legal defences relating to superior orders and claims of immunity as state leaders. Jackson explained that the London Charter neither allowed the defendants to invoke the defence of superior orders nor allowed them to defend their crimes as acts of state because all defendants, in high or low ranks, would remain immune to the reach of the law. It could not have been the drafters' intent to establish a court to try Germany's war leaders and then provide them all with a broad 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."[29] For Keenan, the defendant's rank did not preclude their conviction if the evidence proved beyond a reasonable doubt that their crimes are punishable by law.[30]

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 defendant'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 defendant's actions. 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. This first generation of international prosecutors clearly 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.

Rhetoric of Politics

Despite this self-consciously legal rhetoric, Jackson's and Keenan's opening statements vilify the utopian movements to which the defendants respectively belonged. For Jackson, Nazism was a "despotism equalled only by the dynasties of the ancient East."[31] He abhorred both its "violent interference with elections"[32] and its "authoritarian and totalitarian program." He pointed to the burning of the Reichstag building, the "symbol of free parliamentary government," as a likely Nazi-led arson.[33] 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."[34] 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."[35] 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."[36] 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"[37] and as a means of asserting the German nation as a "master race," the advancement of which included an "anti-Semitic program," overt antagonism towards the free press and the Hitler–Hindenburg decree suspending certain liberties and rights hitherto enjoyed by German individuals.[38] Membership to the Nazi party required an oath "which in effect amounted to an abdication of personal intelligence and moral responsibility."[39]

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."[40] Their alliance with the Nazis was "another stage in their plot against democratic countries"[41] and underscoring the New World Order was an objective of "extinguishing democracy throughout the world."[42] According to Keenan, the Japanese Government was itself 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."[43] 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."[44]

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,"[45] offering his own country as a model: "In the United States, we have tried to build an economy without armament, a system of government without militarism, and a society where men are not regimented for war."[46] Kennan decried the invasion of China as being driven by Japanese mercantile priority interests.[47]

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 ordinary Germans of their natural-born right to dignity and freedom.[48] The modus operandi of the Nazi party was inconsistent with democracy in that it sought power

regardless of the people's will.[49] The destruction of democracy is, for Keenan, an anathema to truly civilised persons.[50] Japan and Germany were linked in "their plot against democratic countries," which, in his view, deserves protection.[51] 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."[52]

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."[53] 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 effort of individuals, as such and as members of groups, who seem willing to bring the world to a premature end."[54] 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."[55] 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."[56]

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."[57] "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."[58] Perhaps Jackson put it most eloquently when he said[59]:

> 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 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 no less than "part of the determined battle for civilisation to preserve the entire world from destruction."[60] He declared that a refusal to wage this battle would be an "unpardonable crime"[61] in and of itself because civilisation cannot "stand idly by and permit these outrages without an attempt to deter such efforts."[62] 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."[63]

A critical examination of these opening statements unmasks 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."[64] 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. 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 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, relied on a moment of consonance between a propitious set of politico-strategic circumstances and the underlying 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.

Rhetoric of War

Whereas the designers of the international military tribunals used crimes against peace as a means of differentiating the German and Japanese aggressors from the Grand Coalition, the prosecutors used mass atrocity as a means of contrasting the savagery of the defendants against the civility of the accusers. To this end, Jackson characterised Nazi crimes as "abnormal and inhuman conduct,"[65] "a campaign of arrogance, brutality, and annihilation"[66] that passed "in magnitude and savagery any limits of what is tolerable by modern civilization."[67] "[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,"[68] "Germany became one vast gas chamber"[69] and "[e]ven the most warlike of peoples have recognized in the name of humanity some limitations on the savagery of warfare."[70] 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"[71] was an "inhumane type of warfare" conducted with "ruthlessness and savage brutality."[72] "[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.[73] 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 renders those who commit them *hostis humani generis*, thereby disqualifying them from humanity's ranks. As a result, the authors of this savage violence must be brought to justice 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."[74] 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 coalition members 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."[75]

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 "a ring of evil men,"[76] "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."[77] Nazism is "anti-Christian in its ideology"[78] and its dire consequences are of a kind that "the world has not witnessed since the pre-Christian ages."[79] 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"[80] 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."[81] These acts are deemed repugnant because they function as the antithesis of a rational modernity. 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 mass atrocity 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. They 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."[82] Despite claims to

the contrary Nazism is very much a modern phenomenon, a product of the Enlightenment and "a child of *our* age."[83] Many of its modernist beliefs were in circulation across Europe for centuries and the extermination of Jews was justified in pseudo-scientific terms of advancing the human species by ensuring the survival of the fittest. Hitler admired the US's own human sterilisation programmes and its attempted annihilation of its native Indian population.[84] 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," Barry Buzan and George Lawson explain, "meant not just abiding by European frameworks, diplomatic rules and norms; it also meant becoming an imperial power."[85] But rather than acknowledging these mass atrocities 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 are so proud" but also demands action in light of "the dire threat of moral and political disarmament."[86]

Such denunciations serve no obvious legal purpose within international criminal trial processes, focusing as they do on the defendants' character and on the nature of their alleged acts, rather than their guilt. The explicit condemnation of the defendant 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 an existential level for all concerned.

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 defendants were an important part. Jackson explained that the defendants were the architects of mass atrocity who did not "soil [their] own hands with blood."[87] These men swore a party oath that required them to eschew their own thinking and abdicate their moral responsibility by obsequiously following Adolf Hitler.[88] This meant that

ordinary Germans were hostage to a police state, which was itself hostage to the Nazi Party.[89] Keenan also sought to separate everyday Japanese citizens from the ever-enlarging ambit of the supreme military commanders and its encroachment on more general matters of government.[90] In these circumstances, ordinary Japanese were also victims of the defendants.[91] This was tactically important because, firstly, it would have been logistically impossible to try all German and Japanese nationals and, secondly, because the coalition members desired to exert control over their defeated 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."[92] Their importance was symbolic. The defendants become emblematic of the discredited utopia. Such an approach coheres with the underlying strategy of the international military tribunals' designers 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 war 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. Keenan understood that the total nature of modern war means future wars will "have no limit of space or territory… This problem of peace, which has ever been the desire of the human race, has now reached a position of the crossroad."[93] 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,"[94] akin to those southern slave states declaring succession in the early 1860s, triggering the US Civil War. Keenan's earlier allusion to Lincoln's Gettysburg Address is accompanied by another echo of the US Civil War when he declared.[95]

> 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, 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 states remain intact.

More than fulfilling an important legal function within the international military tribunals or 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 series of interconnecting neo-capitalist free markets, 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 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.

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 leaders 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 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. The next part of this book turns its attention towards the second generation of international prosecutors who, belonging to the ICTY and the ICTR, are also agents of the law, politics and war, but they encountered a different set of politico-strategic circumstances in the aftermath of the Cold War.

Notes

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3. Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (London: Collins, 1989), 98.
4. International Military Tribunal, *Trial of Major War Criminals*, 103–104.
5. International Military Tribunal, *Trial of Major War Criminals*, 104.
6. International Military Tribunal, *Trial of Major War Criminals*, 119 & 126.
7. Robert Donihi, "War Crimes," *St John's Law Review* 66(3) (1992): 748.
8. Joseph B. Keenan, *Opening Statement of the Prosecution* Northcroft Archive (Prosecution's Documents file) Macmillan Brown Library, University of Canterbury.

9. Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), 148.
10. International Military Tribunal, *Trial of Major War Criminals*, 99.
11. International Military Tribunal, *Trial of Major War Criminals*, 104.
12. International Military Tribunal, *Trial of Major War Criminals*, 109–110.
13. International Military Tribunal, *Trial of Major War Criminals*, 113.
14. International Military Tribunal, *Trial of Major War Criminals*, 118.
15. International Military Tribunal, *Trial of Major War Criminals*, 138.
16. Keenan, *Opening Statement*, 1.
17. Keenan, *Opening Statement*, 3.
18. Keenan, *Opening Statement*, 32.
19. Keenan, *Opening Statement*, 7.
20. International Military Tribunal, *Trial of Major War Criminals*, 130–135.
21. International Military Tribunal, *Trial of Major War Criminals,* 141.
22. Keenan, *Opening Statement*, 43.
23. Keenan, *Opening Statement*, 42.
24. Keenan, *Opening Statement*, 45.
25. International Military Tribunal, *Trial of Major War Criminals,* 144.
26. International Military Tribunal, *Trial of Major War Criminals,* 147.
27. Keenan, *Opening Statement*, 6.
28. Keenan, *Opening Statement*, 8.
29. International Military Tribunal, *Trial of Major War Criminals*, 150.
30. Keenan, *Opening Statement*, 31.
31. International Military Tribunal, *Trial of Major War Criminals*, 99–100.
32. International Military Tribunal, *Trial of Major War Criminals,* 107.
33. International Military Tribunal, *Trial of Major War Criminals,* 110.
34. International Military Tribunal, *Trial of Major War Criminals,* 154.
35. International Military Tribunal, *Trial of Major War Criminals,* 109.
36. International Military Tribunal, *Trial of Major War Criminals,* 131.
37. International Military Tribunal, *Trial of Major War Criminals,* 99.
38. International Military Tribunal, *Trial of Major War Criminals,* 105–113.
39. International Military Tribunal, *Trial of Major War Criminals,* 107.
40. Keenan, *Opening Statement*, 2.
41. Keenan, *Opening Statement*, 38.
42. Keenan, *Opening Statement*, 39.
43. Keenan, *Opening Statement*, 36.
44. Keenan, *Opening Statement*, 32.
45. International Military Tribunal, *Trial of Major War Criminals*, 153.
46. International Military Tribunal, *Trial of Major War Criminals,* 153.
47. Keenan, *Opening Statement*, 33.
48. Keenan, *Opening Statement*, 2.
49. Keenan, *Opening Statement*, 8.

50. Keenan, *Opening Statement*, 2.
51. Keenan, *Opening Statement*, 38.
52. Keenan, *Opening Statement*, 56.
53. International Military Tribunal, *Trial of Major War Criminals*, 150.
54. Keenan, *Opening Statement*, 1.
55. Keenan, *Opening Statement*, 31.
56. Keenan, *Opening Statement*, 50.
57. International Military Tribunal, *Trial of Major War Criminals*, 98–99.
58. International Military Tribunal, *Trial of Major War Criminals,* 154.
59. International Military Tribunal, *Trial of Major War Criminals,* 155.
60. Keenan, *Opening Statement*, 1.
61. Keenan, *Opening Statement*, 6.
62. Keenan, *Opening Statement*, 3.
63. Keenan, *Opening Statement*, 20.
64. Simpson, *Law, War and Crime*, 13.
65. International Military Tribunal, *Trial of Major War Criminals,* 102.
66. International Military Tribunal, *Trial of Major War Criminals,* 100.
67. International Military Tribunal, *Trial of Major War Criminals,* 127.
68. International Military Tribunal, *Trial of Major War Criminals,* 119.
69. International Military Tribunal, *Trial of Major War Criminals,* 130.
70. International Military Tribunal, *Trial of Major War Criminals,* 136.
71. Keenan, *Opening Statement*, 35.
72. Keenan, *Opening Statement*, 35.
73. Keenan, *Opening Statement*, 52.
74. Zygmunt Bauman, *Modernity and the Holocaust* (New York: Cornell University Press, 1989), x. (Emphasis in original.)
75. Robert Shnayerson, "Judgement at Nuremberg," *Smithsonian* (1996): 136.
76. International Military Tribunal, *Trial of Major War Criminals*, 112.
77. International Military Tribunal, *Trial of Major War Criminals*, 105.
78. International Military Tribunal, *Trial of Major War Criminals,* 115.
79. International Military Tribunal, *Trial of Major War Criminals,* 100.
80. Keenan, *Opening Statement*, 1.
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83. Roger Griffin, *The Nature of Fascism* (London and New York: Routledge, 1993), 111.
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86. Bauman, *Modernity,* xii.
87. International Military Tribunal, *Trial of Major War Criminals*, 105.
88. International Military Tribunal, *Trial of Major War Criminals*, 107.
89. International Military Tribunal, *Trial of Major War Criminals,* 112.
90. Keenan, *Opening Statement*, 36.
91. Keenan, *Opening Statement*, 52.
92. International Military Tribunal, *Trial of Major War Criminals*, 99.
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PART II

Prosecuting Mass Atrocity After the Cold War

CHAPTER 5

Ad-hoc International Criminal Tribunals

Half a century would pass by before members of the international community would undertake another successful prosecution of mass atrocity. Nevertheless the discourse against politico-cruelty continued to offer a paradigm for those state leaders wishing to prosecute mass atrocities occurring as part of the internal armed conflicts in the former Yugoslavia and Rwanda. Another set of propitious politico-strategic circumstances was required, however, 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 two ad-hoc international criminal tribunals in the aftermath of the Cold War not only reveals the large extent to which the Council's deliberations were shaped by that discourse, but also reflects the rise of US global hegemony following the USSR's dissolution. The chapter argues, secondly, that these ad-hoc tribunals were not established primarily to bring to justice those responsible for initiating internal armed conflicts in the former Yugoslavia and Rwanda, though war-makers were put on trial. 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 these tribunals had the effect of encouraging local attitudes towards individualism ahead of various ethno-nationalisms while other related peace-building efforts sought to entrench democratic-liberal models of governance in

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accordance with the so-called Washington Consensus. 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 a continuation of the politico-cultural civil war fought for control over the modernity project.

Politics: UN Security Council Consensus

From the end of the Second World War up until the early 1990s politico-strategic affairs underwent an array of significant developments. The proliferation of nuclear weapons and their capability to annihilate the entire human species profoundly affected the conduct of international relations. It led, in part, to the Cold War. For a period of 50 years following their successful alliance against Germany, the intense antagonism informing the relationship between the US and the USSR played a determining role in world politics. Although not an international armed conflict, the Cold War was an ongoing global conflict underpinned by the threat of armed force and an exchange of nuclear weapons. Both parties armed as though preparing for an epic, if not apocalyptic, conflagration. This illustrates the large degree to which the catastrophe of the Second World War quickly faded into the background of the Cold War.[1] This Cold War paralysed the UN Security Council's efforts to fulfil its responsibilities to restore or maintain international peace and security as "serial vetoes by the superpowers transformed the body into little more than a debating society."[2]

The end of the Cold War prompted a declining use of the veto power held by the five permanent members of the Security Council (P-5).[3] It revealed "a new spirit of relative optimism" underpinned by an increasing level of trust between the Western and Eastern blocs and a greater commitment to the rule of international law by the USSR's successor states.[4] In a speech to the US Congress on 6 March 1991, US President George W.H. Bush also heralded this post-Cold War era as a potential new world order. Justifying the US-led invasion of Kuwait, he said:

> [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.[5]

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 ascendency. But with the ending of the Cold War, US ascendency reached an unprecedented height as global hegemon and 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, in the years after World War II."[6] Given the Cold War's chilling effect extended to the UN's considerations of establishing ICL institutions,[7] the prospects for pursuing international criminal justice looked at this time somewhat brighter than it had during the previous half century. It was during this more active phase of the UN Security Council's work that a consensus was forged to establish two major international institutions for enforcing ICL. "The end of the Cold War," William Schabas enthuses, "provided a fertile environment for the renaissance of international criminal justice."[8] 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.[9] 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.[10] In an action that Luc Reydams and Jan Wouters suggest saw the Security Council crossing a Rubicon,[11] the Council called for, and received, a number of reports to inform its considerations: namely, the Report of the 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).[12] It was implicitly understood that the work of these experts was

a prelude to international trials unless those at the centre of the conflict began to respect the UN Security Council's Resolutions.[13] 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.[14] 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."[15] When the Commission of Experts finally delivered its Interim Report in February 1993, it concluded that mass atrocities had been committed.[16] Images of these contemporary horrors drew frequent comparison to the horrors perpetrated by the Nazis during the Second World War.[17]

On 22 February 1993 the Security Council authorised an international criminal tribunal to be established in order to prosecute individuals who committed war crimes in the former Yugoslavia after 1991.[18] This broke new ground. Unlike the international military tribunals, the ICTY was established while the underlying armed conflict was raging. 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.[19] 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.[20] 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.[21] (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.[22]) The establishment of the ICTY was authorised on 25 May 1993 by the Security Council, which approved the Report of the Secretary-General to which the Statute of the International Tribunal for the former Yugoslavia ("ICTY Statute") was appended.[23] All member-states were obliged to cooperate since the tribunal was established under Chapter VII of the UN Charter.[24]

The UN Security Council was criticised for establishing the ICTY instead of taking decisive action to protect civilians through authorising the use of armed force. According to Antonio 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."[25] For Makau Mutua establishing the ICTY "let powerful states 'off the hook'… as they could no longer be accused of inaction." 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.[26]

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 called 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 authorised 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 authorised the establishment of the United Nations Assistance Mission for Rwanda (UNAMIR) until national elections were held and a new government installed.[27] 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 fulfilling their obligations under the Genocide Convention.[28] 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 international humanitarian law in Rwanda, the Council authorised the establishment of the ICTR.[29] The process by which the Council reached its consensus to establish an ad-hoc tribunal for the mass atrocities 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[30]—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.[31] 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 been vacated by the defeated forces that fled into exile in nearby states. The victorious RPF forces were readily identifiable.[32]

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. Memories persisted of US Rangers dragged through the streets of Mogadishu as the armed intervention in Somalia failed. US officials were fearful that a multilateral armed humanitarian intervention into Rwanda would fail as those in Somalia, Bosnia and Haiti had failed and become "like quagmires in the making."[33] In any case, Rwanda did not feature highly among the priorities of US foreign policymakers,[34] 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.[35] The US had suggested amending the ICTY's mandate, extending its jurisdiction to cover Rwanda. This was rejected because some members of the Council foresaw the tribunal evolving into a more broad-focused permanent court.[36] The most significant action taken by the US in relation to the establishment of the ICTR was to refrain from exercising its veto power.

Rwanda had, however, remained an important focus of French foreign policy in the aftermath of the Cold War.[37] 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. French armed forces played important roles in assisting the Government of Rwanda to repulse the RPF's 1990 invasion and in supporting the genocide by providing weapons and training to both the military forces and the militia. France continued delivering arms in breach of a UN sanctions regime. It actively assisted the *genocidaries* by providing military training and, in some cases, pretended to rescue desperate survivors only to

abandon them to the *Interahamwe*. 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 in the dark. 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.

The UK was also involved in the internal armed conflict. It provided support to the RPF, including military training for their invasion of Rwanda. Since the 1990s British intelligence officers, based in Uganda, worked closely with the RPF and benefited from the RPF's effective intelligence operations within Rwanda. The strength of the relationship was 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."[38] Within the UN Security Council, the UK Government played a less than constructive role during relevant negotiations and 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. As genocide unfolded, 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. This led to Resolution 912, agreed on 21 April 1994, which reduced the mission's troop strength from 2,700 to 270.[39] 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. Notwithstanding this intransigence, the Security Council decided to establish the ICTR with 13 votes in favour. The PRC abstained while the Rwandan Government, a non-permanent member at that time, voted against the Resolution.

The UN Security Council's establishment of the ICTR 18 months after the ICTY has been the subject of criticism. The Council could have taken much stronger preventative action, intervening far earlier than it did. Human rights experts had been warning of an impending crisis for a year leading up to the genocide, but the Council remained inert. When compared to the international community's responses to mass atrocities

committed as part of the Second World War and those committed as part of the Yugoslav wars of dissolution, the response to the Rwanda Genocide suggested to some that the lives of Africans mattered less than Westerners and Europeans.[40] The muted media interest around the arrest of Colonel Théoneste Bagosora, a leading figure in planning and executing the genocide, also 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.[41] Matua is especially 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."[42]

Notwithstanding this valid criticism, there is another deeper, more striking politico-strategic issue at play here too. The Rwandan internal armed conflict and the genocide offered opportunities for powerful western governments to obtain greater degrees of political influence over African markets and resources. The rivalry between France and the UK for influence over African political and economic affairs not only reflects a "mutual paranoia" driven by a deep ideological divide, but also "*constituted an undeclared war* between France and America, with Britain's foreign policy being driven by Washington."[43] 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 prosecuting mass atrocities occurring in Yugoslavia and Rwanda was informed by the discourse against politico-cruelty. 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 such acts through ICL enforcement. Action was triggered by the Council's determination that mass atrocities "constituted a 'threat to international peace and security' as required by Chapter VII of the Charter."[44] 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 development of international criminal law, but the justice delivered by these prosecutions of mass atrocity was so narrow in its scope that it can only be understood as a form of highly selective hegemon's justice.

Law: Hegemon's Justice

The discourse against politico-cruelty not only informed the consensus to establish the two ad-hoc tribunals, but 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 aggression, for instance.[45] Like the international military tribunals, the ad-hoc tribunals were designed as selective mechanisms of enforcing ICL but, unlike the international military tribunals, bringing to justice 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 internal armed conflicts, albeit with very important international dimensions. Instead of crimes against peace, the ICTY and ICTR Statutes give focus to mass atrocities 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, violations of Article 3 common to the 1949 Geneva Conventions as well as 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. 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 population, the ICTR Statute requires no such nexus with armed conflict, though the proscribed inhumane acts must be connected to discriminatory grounds.[46] Both Statutes cite, verbatim, the definition of genocide contained in the Genocide Convention.[47] 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. 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 it would underscore the gravity of the ICTY's mission and augment its legal foundations as Yugoslavia was a party to the Genocide Convention which envisaged the establishment of an international court. 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.[48]

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 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 begun in 1991 and was open ended, covering conflicts in Kosovo,[49] 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.[50] 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."[51]

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 hegemons 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."[52] 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, though its nomenclature did presume those who were prosecuted were somehow automatically "responsible" for war crimes.[53] 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.[54] Yet the exact impact of particular prosecutions on international peace and security remains difficult to determine, particularly as one of the worst atrocities occurred in Srebrenica after those who had led massacre had been indicted.[55]

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. The prosecution of mass atrocity reflects, first and foremost, the values and advance the interests of the world's major powers and only secondly offers some limited justice for victims. The crime of aggression, more often than not committed by powerful states, has been largely ignored by international policymakers in favour of war crimes and the development of the law reflects this.[56] 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.

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 atrocities occurred.[57] 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.[58] Most of the tribunals' official documents were not translated into local languages.[59] Nor was the Statute translated into local languages for some time. The geographic distance between the ICTY seat and the locations where mass atrocities 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 DC, 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 had a negligible impact on most Rwandans who remained unaware of trial proceedings.[60]

The establishment of the two ad-hoc tribunals impacted on the national judiciaries in the former Yugoslavia and Rwanda. 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.[61] The ICTR, for example, was never intended to replace the Rwandese justice system—which, after the genocide, comprised of only about 40 magistrates,[62] 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[63])—but rather, to focus on prosecuting the most senior of all those accused of genocide.[64] 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 US$10m per annum over the first five years following the genocide to assist with reconstructing the Rwandan justice sector.[65] The tribunals' primacy comes partly at the expense of post-conflict states' legal systems, which suffer from unnecessary and often counter-productive neglect.[66] However, 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.[67] When the international community did reconstruct these national institutions in the former Yugoslavia and Rwanda, they undermined these national judiciaries by refusing them the opportunity to prosecute local war criminals.[68]

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."[69] Rwanda resurrected a local dispute 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 who 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 disfiguration of social relations that had underpinned traditional practices.[70] This new system merely transformed the old Hutu-Tutsi identity markers into a new nomenclature of *genocidiares*-victims.[71] This system represented another form of victor's justice as Kagame's regime excluded all war crimes and, hence, precluded atrocities committed by the RPF from the *Gacaca* court's jurisdiction.[72]

Once the ICTY began to near the completion of its work it began referring cases back to national courts.[73] 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 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.[74]

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.[75] It can also deter others who would otherwise associate with the accused, which makes it difficult for them to exercise power over others within their state's jurisdiction.[76] This is particularly significant in Rwanda where indictments and arrests helped to incapacitate the remaining Hutu supremacists, stigmatised individuals associated with the previous ruling regime and discouraged *Interahamwe* remnants from reinvigorating their violent cause.[77] The establishment of both ad-hoc tribunals generated immediate impacts at the national level as well. The prosecution of mass atrocity can encourage respect for the rule of law among local communities and national societies which, in turn, provides succour to those who are resisting leaders that exploit inter-ethnic tensions.[78] Whereas the promise of the ICTR may have helped to discourage some Tutsi from seeking revenge killings of Hutu,[79] cooperating with the ICTY featured as part of the ongoing tensions between staunch nationalists and multi-ethnic democrats.[80] The work of the ICTY does not merely affect those individuals

who were prosecuted for, and found guilty of, committing 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.[81] 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.[82] "Against this backdrop," Payam 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."[83]

Ad-hoc tribunals also contribute to the process of identity formation in societies confronted with the legacies of mass atrocity. In particular, the establishment of both the ICTY and the ICTR has helped entrench individualism ahead of other possible identity markers. Locals 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 concern about individuals being prosecuted.[84] Nonetheless, the trials occurring at the ICTR are, in part, an effort to protect the rights to "life, liberty, and security of person" as a means of reconstituting Rwandese society along the lines of western notions of justice and individual human rights.[85]

The rise of the human rights agenda informing transitional justice initiatives is significant here. These initiatives are, as Chandra Lekha Sriram points out, "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."[86] 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.[87] The UN Security Council's preferences for certain styles of legal accountably may not necessarily be a good fit with local requirements. Liberal concepts of individual rights may jar with local cultures that

conceive rights as a group or collective good. So too might the selection and prosecution of only a few scapegoats drawn from the many individuals responsible for mass atrocity. Discounted here as well are community-based decision-making processes concerning a perpetrator's reintegration into their community, preferences for reparations or the desire for victims to be exhumed from mass graves and afforded proper burials.[88] Individually focused transitional justice initiatives may not be well suited for post-conflict states and opening up the local economy to the global free market is likely to produce new social cleavages without reconciling old grievances.[89] This is, however, not to suggest that local practices are to be seized upon as better simply because they are indigenous.[90]

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. Containing 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, the Dayton Accord assumed that democratic institution would reduce the chances of renewed hostilities within Bosnia.[91] 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.[92]

Croatia's transition to democracy was different to the transition occurring in Bosnia, as post-war elections did not enshrine existing ethnic cleavages among the previously warring parties.[93] 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.[94]

The transition to democracy occurring within Kosovo was different still, as the territory was administered by international officials as a UN

Protectorate.[95] 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.[96] 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.[97]

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 "a form of dogmatic theology" intolerant of dissent.[98] 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.[99] 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.[100] International 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.[101] 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. 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. These externally inspired proposals for democratic power sharing likely provoked the more extreme members of the ruling regime, who sought to undermine the Arusha Accords, not only to hasten their preparation for mass atrocity but also to initiate the genocide immediately upon Habyarimana's death. The international community's efforts to lead Rwanda towards democracy resulted in one of humanity's darkest chapters.[102] Post-conflict Rwanda, however, does not appear to have a regime intent on fully implementing wholesale democratic reform. Kagame's regime, while 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.[103]

Before this latest transition to democracy international financial institutions began applying pressure on the Rwandan Government to undertake structural adjustment programmes and reform its economy.[104] 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.[105] 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."[106] This is very similar to the Yugoslav situation.

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-authorised 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."[107] An untested assumption informed these peacebuilding efforts: that liberalising post-conflict countries would encourage stability and peace. This process of liberalisation required periodic and genuine free-and-fair elections,

constitutional checks and balances on governmental power, and the protection of freedoms of speech, assembly and conscience. It also required a market-orientated economic model with minimal governmental control and maximal freedom for commercial actors to pursue profits.[108] 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 targeted governments to pursue policies further liberalising their economies on the belief that deregulating and privatising the economy delivers the best conditions for ongoing growth.[109]

Yet this type of reconstruction employed by peace-builders appears to have fostered the very conditions leading to the resumption of hostilities.[110] The politico-strategic and politico-economic interventions preceding the conflict in Yugoslavia were central to the growing crises.[111] 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[112] as generating the very conditions of "socioeconomic inequality, insecurity, and human misery" within which social order breaks down.[113] In this context, celebrating the prosecution of mass atrocity as some kind of ready-made antidote to outbreaks of armed violence and acts of politico-cruelty 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.[114] The ending of the Cold War heralded the demise of the last major obstacle—the USSR—to the expansion of neoliberal economies into social and political affairs, following on from the building of a series of neo-capitalist markets in the immediate aftermath of the Second World War with the reconstruction of war-torn Germany and Japan. In the early 1990s, the US

> 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.[115]

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.

Conclusion

The prosecution of mass atrocity 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 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 provoking 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 as many neoliberal free markets as possible, 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 also “accorded no obvious priority; ‘comfort measures’ were withheld from the mutilated and dying ethnic groups who numbered in the hundreds of thousands.”[116] 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 mass atrocity would perform their legal functions.

Notes

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14. Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2014), 123.
15. Reydams and Wouters, "Establishing International Criminal Tribunals," 23.
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36. Akhavan, "Politics and Pragmatics," 502.
37. Cameron, *Cat's Paw*, 61–104. In this and the following paragraph I draw heavily on Cameron.
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79. Akhavan, "Beyond Impunity," 24.
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CHAPTER 6

Indictment of Yugoslav and Rwandan Troublemakers

The discourse against politico-cruelty not only informed the UN Security Council's decision to establish the ad-hoc tribunals, but 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 before outlining their formal mandates. 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.[1] As these prosecutors developed their various approaches for selecting charges, the respective statutes provided frameworks for those decisions,[2] underscoring the P-5's power to deploy a form of hegemon's justice against unruly troublemakers. At the same time, the prosecutors' 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 mass atrocities. While the prosecution's early focus on Christo-Slavism was 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

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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 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.

Second Generation of International Prosecutors

A second generation of international prosecutors of mass atrocity, comprising 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.[3] 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 18 months. Cherif Bassiouni—an Egyptian-born academic mentioned in the previous chapter—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 county's junta, had strong support from the US, but failed to attract sufficient enthusiasm from his own government.[4] 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 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.[5] Arbour was the second prosecutor to serve simultaneously at the ICTY and the ICTR between October 1996 and September 1999.[6] Her academic qualifications include a Master of Laws Degree (with Distinction) from the 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 practised 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.[7]

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 ICC 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. He 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.

According to Article 16 of the ICTY Statute, prosecutors were responsible for investigating 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 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.[8] (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.[9]) Generally speaking, the mandate for the ICTR's prosecutors was identical to that of ICTY's. Indeed, Article 15(3) of the ICTR Statute states that the ICTY prosecutor would serve concurrently as the ICTR prosecutor. This was the situation until UN Security Council Resolution 1503 spilt the roles in August 2003. 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.

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 governments 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 staffers, though the structures constantly evolved and new units and positions were established as others were discontinued.[10] 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.[11] This level of resourcing is significantly less than that of the international military tribunals. There were, moreover, varying degrees of competencies among staff, an issue provoking Del Ponte's ire, particularly at the ICTR where she encountered a dozen incompetent staff members who were unnecessarily increasing the workload of the rest of the team.[12] Del Ponte recalls the drafting of indictments was particularly woeful as many failed to link crime-scene evidence to the accused and were sent back for redrafting. Arbour had encountered the same problem.[13]

Selecting the Charges

As the ICTY's first incumbent prosecutor, Goldstone's "first priority was to set the wheels of international prosecution in motion."[14] 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 was worthy of financial support."[15] 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 11 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.[16] 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) and increased by five the total number of charges of crimes against humanity (13 amendments introduced 31 further charges whereas five amendments dropped 26 existing charges); the number of genocide charges remained the same.[17] Arbour revised only one set of war crimes charges that she had originally proposed. Arbour, however, withdrew indictments against 20 individuals, which had been issued by Goldstone but which she deemed to be too low-profile.[18]

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 contempt of the tribunal was issued too. 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 called on both ad-hoc tribunals to conclude their investigations by the close of 2004 and complete their trials by the close of 2008.[19]

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 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 charges related to contempt of court. 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.[20]

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.

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."[21]

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.[22] 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 concedes that genocide, which demands a demonstrable intent to destroy a group, is the most challenging international crime to prosecute, especially as the architects of mass atrocity are shrewd enough to never publicly express their sinister intent.[23] 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 trouble-makers 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."[24] In this sense, the wars of dissolution are not so much a direct threat to the entire international system in the way that the Second World War was, but rather, present a more localised opportunity for those with real power over the international system to discipline a former communist state. The prosecution's selection of charges is, therefore, best understood as being part of a much larger phenomenon in which the pairing of liberalised democracies and liberalised economies emanates from the international system's core to its periphery. In the case of Rwanda especially, such reconstruction constitutes another "modern rendering of the mission civilisatrice—the colonial-era belief that the European imperial powers had a duty to 'civilise' their overseas possessions."[25]

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 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.[26] Although Goldstone typically refrained from commenting publicly on his approach to selecting the accused for the ICTY,[27] 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 mass atrocity, 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 Duško Tadić, but Goldstone preferred to demonstrate the tribunal in motion.[28] 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,[29] and relied on evidence gathered by other organisations, which

had conducted investigations into atrocities.[30] Goldstone's criteria of prosecution targeted politicians, members of the armed forces and militias as well as local, provincial and national government officials.[31] This strong focus on those individuals involved in politico-strategic affairs reveals deep ethno-national divisions and a corresponding prosecutorial bias. Goldstone, for 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 mass atrocities 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.[32] Arbour relied more heavily on the evidence discovered by the prosecution's own investigations and less on evidence provided by other organisations. The pool of suspects broadened beyond those already held in custody and Arbour introduced sealed indictments and sought greater levels of international assistance to arrest suspects. Arbour's approach was more "offence-driven" than her predecessor's, as she considered the gravity of the crime to be an important factor. This meant her investigations focused on atrocities resulting in mass fatalities and on those higher up the command chain.[33] 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."[34]

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 mass atrocity by indicting more senior officials than had any of her predecessors. Like Goldstone, she received a form of censure from the then-UN Secretary General Kofi Annan when he felt that she had encroached on sensitive political issues.[35] 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.[36] 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: 16 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 atrocities falling 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.[37] She admits that she sought to indict Kosovo Liberation Army (KLA) leaders because she wanted to avoid the impression that the tribunal was merely delivering victor's justice.[38] 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."[39] An extreme form Serb nationalism had overtaken the amalgam of nationalism and communism that had begun to fade by the early 1990s. Milosevic and his supporters both fostered and exploited an exclusive ethnic-based nationalism and it provided the ideological basis for the radical transformation of Serbian collective identity.[40] Although ethnic identity politics are extremely important, there was more than Serb nationalism at play here because, 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. Religion played important roles as both a cause and a justification for this violence. In particular, adherents of Christoslavism believe that Slavs are, by their nature, a race of Christians whose existence is threatened by their own followers converting to other religions and by all Yugoslav Muslims.[41] Christoslavism is thus another modernist utopian movement emerging "in the long dissolution of Christianity and the rise of modern political religion."[42]

In terms of the ICTR, Goldstone's indictments accused 17 individuals, Arbour's indictments accused 29 individuals, Del Ponte's indictments accused 28 individuals and Jallow's indictments accused six individuals.[43] 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*.[44] Arbour, however, chose to investigate suspects who held power at the state level,[45] 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 featured here too.

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.[46] Reminiscent of the Nazi's hatred of the Jewish people, a hatred of 'Tutsi' was central to this Hutu nationalist sense of being, though the hating group was 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."[47] The utopian ends sought by Hutu are evident in the Hutu Manifesto of 1957, which blamed Tutsi supremacy for Rwanda's problems and called for revolution to oust them.[48] This 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. "The Rwandese genocide is," according to one African specialist, "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."[49]

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 mass atrocities committed by the RPF. No Tutsi and no member of Kagame's RPF would stand trial, a scenario reminiscent of

the victor's justice delivered 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.[50] While Arbour discreetly commenced investigations into RPF crimes, no indictments were forthcoming, possibly because she feared some form of retaliation from Kagame's Government.[51] Del Ponte was less discreet and more aggressive,[52] 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 atrocities.[53] 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,[54] 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.[55] Jallow refocused the prosecutorial effort squarely on Hutu accused of genocide.[56] Victor Peskin muses that Jallow did so in order to foster better relations with the Rwandan Government,[57] 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."[58]

Gender representation deserves a brief mention here since gender is an identity marker that is far broader 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 mass atrocity. 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 Tadić, the first of the accused to stand trial.[59] The cases against Tadić, Zdravko Mucić, Anto Furundžija and Radislav 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 of both the commission of mass atrocity and the prosecution of those crimes.[60]

There are, however, some notable omissions in the ICTY and ICTR indictments. NATO could have been thoroughly investigated. Del Ponte explains that she did not indict NATO command, which was responsible for, among other acts, an attack on a passenger train crossing on a railroad bridge, because she understood the practical difficulties of investigating a

military alliance that supported the ICTY. NATO's cooperation would cease and this would impact on other current investigations. Del Ponte believed that she had "collided with the edge of the political universe in which the tribunal was allowed to function."[61] On this occasion Schabas agrees with the 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."[62] To varying extents all of the ICTY prosecutors were "enmeshed in NATO's political and military strategy."[63] 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.

Conclusion

The second generation of international prosecutors' selection of charges as well as the accused represents a further and more recent manifestation of the discourse against politico-cruelty. The indictments prepared under the auspices of the ad-hoc tribunals 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. This is 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 none whatsoever. This omission might reflect the unease of bringing to the world's attention both the complicity between prevailing neoliberal orthodoxies and the conditions giving rise to armed conflict and mass atrocity. 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 mass atrocity from the glare 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 these indictments prepared in the pre-trial phase, the first opening statements delivered, respectively, during the first trials held at the ad-hoc tribunals express both legal and political rhetoric as well as invoke the rhetoric of war.

Notes

1. 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.
2. Frederiek de Vlaming, "Selection of Defendants," in *International Prosecutors*, ed. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 548.
3. 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.
4. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), 36.
5. See generally Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven and London: Yale University Press, 2000).
6. See generally Louise Arbour, *War Crimes and the Culture of Peace* (Toronto, Buffalo, and London: University of Toronto Press, 2002).
7. See generally Carla Del Ponte in collaboration with Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (New York: Other Press, 2009). 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 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.

8. Luc Reydams and Jan Wouters, "The Politics of Establishing International Criminal Tribunals," in *International Prosecutors*, ed. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 29; and Makau Matua, "Never Again: Questioning the Yugoslav and Rwanda Tribunals," *Temple International and Comparative Law Journal* 11 (1997): 180.
9. Robert Cryer et al. *An Introduction to International Criminal Law and Practice* (Cambridge: Cambridge University Press, 2014), 125.
10. Gregory Townsend, "Structure and Management," in *International Prosecutors*, ed. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 227–234.
11. Townsend, "Structure and Management," 246–253.
12. Del Ponte with Sudetic, *Madame Prosecutor*, 134
13. Del Ponte with Sudetic, *Madame Prosecutor*, 125.
14. de Vlaming, "Selection of Defendants," 549.
15. Goldstone, *For Humanity*, 105.
16. de Vlaming, "Selection of Defendants," 565.
17. See, in particular, *Prosecutor v Kovačević (Amended Indictment)* ICTY, Pre-Trial Chamber, IT-97-24-I, 28 January 1998.
18. de Vlaming, "Selection of Defendants," 565.
19. United Nations Security Council Resolution 1503 (S/Res/1503 (2003)) and United Nations Security Council Resolution 1534 (2004) (S/RES/1534 (2004)), respectively.
20. de Vlaming, "Selection of Defendants," 561.
21. Willam Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 78.
22. 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, *War Crimes*, 32.
23. Del Ponte with Sedutic, *Madame Prosecutor*, 156.
24. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), 5.
25. Roland Paris, "International peacekeeping and the 'mission civilisatrice,'" *Review of International Studies* 28 (2002): 638.

26. Schabas, *Unimaginable Atrocities*, 195. Goldstone considered Boutros-Ghali a "mercurial personality." Goldstone, *For Humanity*, 100.
27. de Vlaming, "Selection of Defendants," 549.
28. Bosco, *Rough Justice*, 37.
29. de Vlaming, "Selection of Defendants," 550.
30. de Vlaming, "Selection of Defendants," 551.
31. de Vlaming, "Selection of Defendants," 552–553.
32. de Vlaming, "Selection of Defendants," 565–566.
33. de Vlaming, "Selection of Defendants," 555.
34. Arbour, *War Crimes*, 31.
35. Kofi Annan's letter to Del Ponte is reported in full at Del Ponte with Sudetic, *Madame Prosecutor*, 105.
36. de Vlaming, "Selection of Defendants," 558–559.
37. de Vlaming, "Selection of Defendants," 566–567.
38. Del Ponte and Sudetic, *Madame Prosecutor*, 88.
39. Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton and Oxford: Princeton University Press, 2003), 191–192.
40. Weitz, *Utopias* 192.
41. Michael A. Sells, *The Bridge Betrayed: Religion and Genocide in Bosnia* (Berkley: University of California Press, 1996), xv & 51.
42. John Gray, *Black Mass: Apocalyptic Religion and the Death of Utopia* (London: Penguin, 2007), 1.
43. de Vlaming, "Selection of Defendants," 567.
44. de Vlaming, "Selection of Defendants," 553.
45. de Vlaming, "Selection of Defendants," 557.
46. See generally Gérard Prunier, *Africa's World War: Congo, The Rwandan Genocide, and the Making of a Continental Catastrophe (*Oxford: Oxford University Press, 2009).
47. Linda Melvern, *Conspiracy to Commit Murder: The Rwanda Genocide* (London and New York: Verso 2004), 3.
48. Melvern, *Rwanda Genocide,* 6.
49. Prunier, *Africa's World War*, xxxvii.
50. de Vlaming, "Selection of Defendants," 550.
51. de Vlaming, "Selection of Defendants," 567–568.
52. Bosco, *Rough Justice*, 75.
53. de Vlaming, "Selection of Defendants," 559.
54. de Vlaming, "Selection of Defendants," 568.
55. Yvonne Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (London and New York: Routledge, 2013), 127; and Del Ponte with Sedutic, *Madame Prosecutor*, 233.
56. de Vlaming, "Selection of Defendants," 561.
57. de Vlaming, "Selection of Defendants," 568.

58. Schabas, *Unimaginable Atrocities*, 79.
59. de Vlaming, "Selection of Defendants," 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, *For Humanity*, 85.
60. Del Ponte recalls that Plavsic "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, *Madame Prosecutor*, 161.
61. Del Ponte and Sudetic, *Madame Prosecutor*, 60.
62. Schabas, *Unimaginable Atrocities*, 77.
63. Bosco, *Rough Justice*, 65.

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20. Prosecutor v Kovačević (Amended Indictment) ICTY, Pre-Trial Chamber, IT-97-24-I, 28 January 1998.
21. UNSC Res 1503 (S/RES/1503) (2003).
22. United Nations Security Council Resolution 1503 (S/Res/1503 (2003)).
23. United Nations Security Council Resolution 1534 (2004) (S/RES/1534 (2004)).
24. Statute of the International Criminal Tribunal for Rwanda.

CHAPTER 7

Opening Statements at The Hague and Arusha

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 serious international crimes, foreshadowing evidence of those crimes and seeking to preclude foreseeable defences. These orations proved fundamental to the reinvigorated enforcement of ICL. This chapter begins by arguing that 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. It goes on to argue that 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. The chapter also argues that by denouncing the defendants and, thereby, calling for them to be cast out beyond the ranks of the human community, these

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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; belonging to international criminal tribunals established in the aftermath of the Cold War, this second generation are very much like their predecessors as agents of ICL, economic liberalisation and politico-cultural civil war.

Rhetoric of Law

Duško Tadić, a Bosnian-Serb accused of persecuting Muslims, was 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 12 counts of grave breaches of the Geneva Conventions of 1949, ten counts of violations of the law or custom of armed conflict and 11 counts of crimes against humanity, though some counts were laid in the alternative.[1] 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."[2] 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 50 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 prosecution of mass atrocity 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 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."[3] 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."[4] 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.[5] In other words, it is clear that mass atrocities involving 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 social fabric of Rwandan society. We are both trying to obtain national reconciliation, fair trials and justice."[6] 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 defendant 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 mass atrocities, rather than as a crime of aggression or a crime against peace, which was the case 50 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.[7] Serbians perceived themselves as victims, especially of the Nazi-backed Ustasha during the Second World War, and were deeply suspicious of other states within Yugoslavia. A tension existed between the aspiration of a Yugoslav people and the realities of ethnic divisions which were actively promoted by various nationalists.[8] 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."[9] Niemann described 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. Where Serbs were not in control, they deliberately undermined the existing authorities. They warned Serb populations prior to major attacks, enabling selective evacuations. Hoping to negotiate a peaceful outcome, many Muslims did little to prepare for armed attacks, which usually involved excessive artillery shelling of non-Serb communities followed by street-level fighting and the systemic rounding up of the non-Serb population. Military-aged males were then separated from women, children and the elderly.[10] 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 conflict loomed. Tadić was described as "an important

source of intelligence" for the advancing Serb forces during the conflict and as someone who could identify local Muslims, Croats and others who might oppose Serb nationalism.[11] 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."[12]

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 Tutsi refugees, descendants of refugees and exiles—invaded Rwanda from their bases in Uganda.[13] 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 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."[14] The internal armed conflict was a precursor for mass atrocity, but it was the death of President Habyarimana that triggered the genocide. With all the expediency and precision of a well-rehearsed military operation a series of roadblocks sprouted up around Kigali as Tutsis and moderate Hutus were massacred.[15] 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,[16] ordered the killing of those Tutsis who, fleeing a neighbouring commune where they were being killed, sought Akayesu's protection[17] and did nothing to prevent the murder of those people held at the local prison.[18]

Both opening statements signalled that the prosecutors intended to rely upon witness testimony, differing from the international military tribunals which relied more heavily on documentary evidence. Niemann informed the bench that he expected to call over 80 witnesses, including expert witnesses who would speak to the armed conflict's emerging international character and its politico-historical background, special fact witnesses who would show the international element underlying the Serbian armed forces operation within Bosnia and medical and forensic expert witnesses. Eyewitnesses to Tadić's crimes would offer the most significant evidence, however. Niemann elaborated his special concern for these witnesses since the horror and confusion they experience would necessarily mean that some details of each witness's versions of events might differ from one another

without undermining their reliability.[19] 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[20] while confirming the existence of a situation of internal armed conflict in Rwanda between 1 January and 31 December 1994.[21] 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 atrocities.[22] Like Niemann, Haile-Mariam expressed confidence in the reliability of his witnesses who, surviving mass atrocity, had their experiences indelibly marked on their consciousness.[23] 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,[24] no doubt placing an unwelcome burden on the defendant 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 "ethnical" or "racial."[25] 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 ethnical or racial is established."[26] 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.[27] Haile-Mariam sought to preclude a superior order defence by arguing that no evidence existed to suggest that Akayesu was forced to commit atrocities and, if there was pressure from his superiors, it was of a sort which he could resist.[28] Akayesu could have chosen to save the civilians under his authority without risk to himself.[29] Instead, he ordered the massacre, presumably, in order to avoid a reprimand or, worse, the loss of his job.[30]

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 mass atrocity within situations of internal armed conflict, foreshadowing evidence of those 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 avoid 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 presented with an "historical opportunity, for adding one more brick to the great edifice of a more humane society, *where rule of law is elevated over force*."[31] This legal rhetoric also reduces the ugly realities of internal armed conflict to background material, which, providing the required context for certain 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.

Rhetoric of Politics

A close reading of these opening statements reveals an attempt to denigrate the discredited utopian movements of the defendant 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."[32] 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.[33] On the other hand, participants in this utopian movement, Niemann suggested, "either had anti-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."[34] 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"[35] and the Hutu militia, more energy was devoted to explicating the movement's politico-social dimension. Haile-Mariam was at pains, for example, to explain that the genocide was less a spontaneous bloodlust of anger at the President's death and more an assiduously planned and expertly executed operation. It was fuelled by a communications approach that disseminated hate speech, which reflected a set of ideas in which the Tutsi were characterised as aristocratic foreign invaders to the widest possible audience in a timely fashion. The objective was nothing short of exterminating the Tutsi population from Rwanda and the non-Tutsi population would play a key role in the killings.[36] 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.[37] 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 for endowing the apparent physical differences between Hutu and Tutsi with ideological meanings and reinforcing the classification of ethnicities, with Tutsi as supreme, through a requirement for citizens to hold identification cards.[38]

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. However, these prosecutors failed to do so as they defined 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 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 mass atrocity, despite, as Chap. 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.[39] The UN Security Council's limited action with respect to both the escalation of conflict and the commission of mass atrocity was 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 and 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 troublemakers 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 by scholars. 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."[40] 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"[41] and the legal profession has, since the ending of the Second World War, either become "depoliticised and marginalised" or "turned into a technical instru-

ment for the advancement of the agenda of powerful interests or actors in the world scene."[42] "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."[43]

To varying extents both prosecutors used their opening statements to suggest that this liberal economic movement somehow represents all humanity or, at least, the very best of humanity. While Niemann recognised that the inhumanities resulting from staunch ethnic nationalism strains human reasoning,[44] 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 leaders. 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:

> [t]his 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.[45]

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 mass atrocity. 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 leaders, 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 defendants' 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 1950s, wish to extend the depth and spread of neoliberalism.

Rhetoric of War

Both opening statements graphically describe particular acts of politico-cruelty. Niemann relates an incident where civilians emerged from among the ruins of their town and the rubble of their homes, waving white flags, and were then ordered by armed Serbs to form columns and to march silently, as though a "trophy of war." Some Muslims were beaten or executed as the march progressed. On a separate occasion, a number of male prisoners were given life-threatening beatings. Two male prisoners were forced to perform acts of oral sex on another man before mutilating him. Gang rape of women was more common, however.[46] Haile-Mariam offered similarly vivid descriptions of acts of politico-cruelty committed by Akayesa who himself ordered 15 children to a checkpoint where they would be killed. When some refused, he told them to follow him as their fathers were waiting with lollies. A bloody-thirsty, machete-wielding

crowd made short work of the children.[47] These are no ordinary crimes. Signalling a key difference between the deplorable behaviour of the defendants 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 defendants' acts of politico-cruelty and the immediate circumstances underlying the two separate situations of internal armed conflict. They suggested that the capacity to commit these mass atrocities was an intrinsic aspect of the defendant'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 openly fraternising with Muslims[48] to someone capable of committing mass atrocity. 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 socialised and played sport with locals[49] 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 begun to actively participate in the massacre.[50] 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 defendants' actions. Niemann ascribed virtue to Tadić's Muslim victims who were desperate to negotiate peace and avoid bloodshed as Serbs attacked.[51] 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 ethno-centrism, if not an exercise at absolution from apathy in the face of immense human suffering"[52]—neither offers a full explanation connecting the decisions of the global hegemon to the actions of the defendants. Rather than over-simplistic primordial hatred, the mass atrocities taking place in both Yugoslavia and Rwanda resulted from the deliberate and calculated actions of those who sought to obtain,

or maintain, positions of power within their respective settings.[53] 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, deserved to be acknowledged here too. They were omitted, however.

Although the capacity to commit mass atrocity is understood to be an intrinsic part of the defendant's character unleashed only under conditions of armed conflict, 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 mass atrocity in the 1990s were also categorised as *hostis humani generis*. As a consequence of this denouncement, the defendants, 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, mass atrocity is personalised in the figure of the defendant, *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 defendant at the start of international criminal trials sharpened focus on the utopian movements to which the defendant belonged, enabling them to be subjected to the disciplinary process of abjection. However, that defendants 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 alleged act, the guilt of the defendant or the legal findings of the bench. Less dangerous than those who initiate international armed conflicts only to lose them, these troublemakers must be expelled and their utopian movements destroyed through "the often highly discretionary legal and political violence of the hegemon"[54] 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."[55] But the tone here is not belligerent as it was in the immediate aftermath of the Second World War. It remains 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 towards 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 own narrow interests.[56] The market is encouraged to intervene in political and social affairs. 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 from its beginning at the international military tribunals up until the ad-hoc tribunals of the 1990s, western legal culture has embraced a somewhat simple understanding of the relationship among international law and its enforcement, the phenomenon of armed conflict and wars of pacifications, and the sanctity of individual human rights.[57] 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 transforming zones they occupied and to establishing an international architecture within which post-war international affairs would be conducted. As mentioned in Chap. 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. Those who drove the establishment of the UN and granted themselves the power of veto as permanent members of the Security Council are the same victorious powers that established the IMT.[58] Since the end of the Second World War, then, much of global politics occurs in the shadows cast by the US, UK and the USSR. The 44-year contest between socialism and liberalism had also given way to a neoliberal orthodoxy which, while ascendant, is not without challenge from the authoritarian 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. 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 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.

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 mass atrocity. Like the statements made by Jackson and Keenan 50 years earlier, Niemann's and Haile-Mariam's orations proved vital to the trial phase of enforcing ICL by announcing the commission of serious international 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, yet are 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."[59] 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.

NOTES

1. See *Prosecutor v Tadić* (*Indictment (Amended))* ICTY Pre-Trial Chamber IT-94-1-I, 14 December 1995.
2. *Prosecutor v Tadić (transcript)* ICTY Trial Chamber IT-94-1-T, 7 May 1996, 10.
3. *Tadić,* 11.
4. *Tadić*, 12–13.
5. *Tadić*, 19.
6. *Prosecutor v Jean Paul Akayesu (transcript)* ICTR Trial Chamber ICTR-94-4-T, 9 January 1997 at [7].
7. *Tadić*, 13.
8. *Tadić*, 14.
9. *Tadić*, 18.
10. *Tadić*, 20–21.
11. *Tadić*, 26.
12. *Tadić*, 34.
13. *Akayesu*, 28.
14. *Akayesu*, 29.
15. *Akayesu*, 29–31.
16. *Akayesu*, 40.
17. *Akayesu*, 49.
18. *Akayesu*, 50.
19. *Tadić*, 47.
20. *Akayesu*, 47.
21. *Akayesu*, 44.
22. *Akayesu*, 43.
23. *Akayesu*, 53.
24. *Akayesu*, 55.
25. *Akayesu*, 65.
26. *Akayesu*, 66.
27. *Akayesu*, 67.
28. *Akayesu*, 57.
29. *Akayesu*, 58.
30. *Akayesu*, 59.
31. *Akayesu*, 21. (Emphasis added.)
32. *Tadić*, 11–12.
33. Michael A. Sells, *The Bridge Betrayed: Religion and Genocide in Bosnia* (Berkley: University of California Press, 1996), 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.

34. *Tadić*, 34.
35. *Akayesu*, 28.
36. *Akayesu*, 30–32. (Emphasis added.)
37. Payam Akhavan, "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda," *Duke Journal of Comparative an International Law* 7 (1997): 348.
38. *Akayesu*, 25.
39. Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004), 72 & 107.
40. Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), 17–18.
41. Martti Koskenniemi, *The Politics of International Law* (Oxford and Portland: Hart Publishing, 2011), 75.
42. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 3.
43. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 614.
44. *Tadić*, 11–12.
45. *Akayesu*, 68–69.
46. *Tadić*, 27–28, 35, & 39.
47. *Akayesu*, 49–52.
48. *Tadić*, 26.
49. *Akayesu*, 33.
50. *Akayesu*, 37–38.
51. *Tadić*, 27.
52. Akhavan, "Justice and Reconciliation," 329.
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PART III

Prosecuting Mass Atrocity During the War on Terror

CHAPTER 8

International Criminal Court

In the years after the Cold War, the prospects of establishing a permanent court for prosecuting mass atrocity waxed and waned; its creation was not a foregone conclusion until 60 states ratified the Rome Statute for the International Criminal Court midway through 2002. The discourse against politico-cruelty, still offering a paradigm for state leaders wishing to prosecute mass atrocity, needed to be accompanied by yet another 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 that discourse, but also signals the extent of US estrangement during the few years leading up to and during the US-led War on Terror. The circumstances in which the Rome Statute was negotiated, which offered a unique window of opportunity for NGOs in particular to play important roles in drafting the Rome Statute and encouraging its ratification, were different from the climate within which the ICC would operate.[1] 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. 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.

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The chapter argues, thirdly, that the establishment of the ICC, six decades after the founding of the UN and the Bretton Woods institutions, completes a 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 prosecution of mass atrocity 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. 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.[2] A resurgent anti-colonial nationalism might also be informing the decisions of some African leaders to withdrawal from the Rome Statute.

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, particularly as the various costs associated with those tribunals discouraged state leaders from establishing more courts along those lines.[3] Running the two ad-hoc tribunals consumed much of the UN Security Council's time as it was often confronted with various administrative issues and probably lessened any enthusiasm to establish additional tribunals.[4] Tribunal fatigue may have prompted a shift away from using the enforcement powers of the UN Security Council as a means of prosecuting mass atrocity towards 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, 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 an international criminal court were being discussed back then.[5] 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. 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 express their own views and actions. NGOs seized upon opportunities arising not only out of the ending of the Cold War, but also out of the international community's support of the ad-hoc tribunals as a major response to mass atrocities.[6] NGOs and other members of global civil society were not necessarily absent during the establishment of the military and ad-hoc tribunals; however, these more recent efforts surrounding the negotiation of the Rome Statute were both more extensive and intensive, gaining greater prominence than before. This was the most recent moment of consonance between an underlying discourse against politico-cruelty and the prevailing politico-strategic circumstances before the 9/11 attacks engendered a longer period of dissonance and prompted the War on Terror. This situation was more complex than what David Bosco suggests when he argues that "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."[7]

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 international drugs crimes would not fall within the court's jurisdiction.[8] It is entirely 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."[9] At the 1998 Rome Conference the negotiation of these bracketed sections of specific text proved slow going as these discussions took place in informal committees which agreed by consensus only.[10]

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 60 members. These states believed they could design a global institution for prosecuting mass atrocity that would be considered fair and legitimate by the most of the international community because members of the group lacked great power status.[11] This group played a progressive and constructive role as a force driving the negotiations, offering specific remedies to contentious text.[12] Among this group Germany supported a strong and independent ICC, promptly ratified the Rome Statute and publicly encouraged other states to ratify.[13] Yvonne Dutton believes that in so doing Germany sought to "distance itself from its shameful past" and its nationals whom the IMT found guilty.[14] 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 mass atrocity.[15] 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).[16] Some of the NGOs involved themselves at an early stage of the negotiations through a Committee of Experts which, led by 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.[17] Represented at the conference in large numbers—officially accredited NGOs outnumbered states by a figure of 236 to 160[18]—NGOs pursued their various objectives by presenting papers and lobbying delegations.[19] 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.[20] 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. NGOs also ensured that the perspectives of states, such as Sierra Leone and Bosnia, which had recently experienced mass atrocity, were given voice and heard.[21] The Rome Conference was, thus, notable for the various roles played by NGOs,[22] 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.[23] 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."[24] 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 People's Republic of China (PRC)—also emerged during negotiations. They were intransigent on some issues. The consensus among the Grand Coalition established over 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.[25] 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 on an ICC from the UN General Assembly to a diplomatic conference,[26] 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.[27] The conference adopted the statute with 120 votes in favour, 20 abstentions and seven votes against: namely, the US, Libya, Iraq, Israel, China, Syria and Sudan.[28] The Rome Statute required 60 state-parties to ratify it in order to enter into force. That occurred, relatively expeditiously compared to other international treaties, on 1 July 2002.[29] 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."[30] The role played by NGOs in encouraging the 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."[31] This included educating legislators[32] and building alliances among NGOs from the Global North, with significant legal and media resources, and those from the Global South.[33]

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,[34] though the US was, as mentioned, not the only state opposing the ICC's establishment.[35] 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.[36] 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.[37] 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 international agreements."[38] The US frequently discouraged other state leaders, which they could influence, from ratifying the Rome Statute while encouraging those and other state leaders to sign agreements to refuse to surrender American military personnel to the ICC. Despite the strong rhetoric used by the US in its promotion of improved human rights, it remains wary of the threat that the ICC's reach might pose to its sovereignty.[39] 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 armed force, if necessary, 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 somewhat tentative 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."[40] This attack offered an echo of the Japanese attack on Pearl Harbour on 7 December 1941, though Al Qaeda's attacks penetrated deeper into American mainland and gave focus to civilian targets. Further, Al Qaeda's organisational structure presented a more original challenge to the US as "a network that could operate anywhere and everywhere, and yet was definitely situated nowhere."[41]

It was, however, the US Government's response which resonated more powerfully within contemporary world affairs.[42] 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.[43] 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 its own security, military and intelligence apparatus, engaged in its War on Terror, from international justice on the grounds that it plays a unique role in the maintenance of international peace and security.[44]

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 and US exceptionalism. As something of an informal ideology, US exceptionalism encourages Americans to believe their country's

founding principles are somehow special and that the country has a unique and exemplary role to play in world affairs. It was an ideology that easily justified the attempted annihilation of native Americans.[45] Such justifications have led to claims the American political experiment is, in fact, a liberal empire.[46] 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. The US also softened its position on providing military aid only to states with a Status of Forces Agreement (SOFA) and removed a restriction on providing military training to non-SOFAs.[47] 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.[48] 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,[49] and dispatching 100 military advisors to hunt down Joseph Kony, a fugitive wanted by the ICC prosecutor.[50] 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 remains 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, reactionary 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"[51] Radical Islam is as modern as communism and Nazism, shaped as it is by western ideologies. Its proponents believe they can remake humanity through violence to deliver a utopia on earth, and that history is merely a prelude to this new world waiting to be remade.[52]

The consensus to establish the ICC was shaped by the discourse against politico-cruelty, particularly its abhorrence of mass atrocity and its favoured recourse 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. In order to fully understand the emergence of the ICC it is necessary to eschew state-based notions of the political as NGOs played a key role not only in the negotiation over the Rome Statute but also in obtaining its relatively expedient entry into force. NGOs were able to tap into the discourse of politico-cruelty, with its abhorrence for unnecessary suffering and cruelty inflicted as a means of securing some substantive ends.

Notwithstanding the significance of the group of like-minded states and the coterie of NGOs forging the abovementioned consensus, the US's 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 it once was, focusing instead it seems on waging its War on Terror. Nevertheless, the consensus to establish a permanent court designed specifically to prosecute mass atrocity provided another temporal manifestation of the 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.

Law: Donors' Justice

Just as the discourse against politico-cruelty informed the decision to establish the ICC, it also shaped 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 determination would be a pre-requisite for an ICC investigation.[53] 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.[54] According to the outcome of that conference, the crime of aggression means "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."[55] 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."[56]

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 mass atrocities, 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." 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 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 treaties cannot create obligations or rights for those who do not sign them.[57] This is also the view held by the President of Sudan, who is wanted by the ICC despite not signing the Rome Statute.

Whereas the ICTY and ICTR Statutes did not provide for detailed definitions of mass atrocity, the Rome Statute defines war crimes and crimes against humanity to an unprecedented degree,[58] 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.[59] Despite a strong minority opposing the inclusion of war crimes within the ICC's jurisdiction[60] 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 International Humanitarian Law (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.[61] 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; (d) other serious violations of the laws and customs 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.[62] 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. 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.[63] "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. A balanced review of the Rome Statute's war crimes provisions shows significant advances in some areas of ICL but less in others, particularly where the provisions offer genuflection to the power of state sovereignty.[64]

The Rome Statute's definition of crimes against humanity also reflects the development of ICL since the international military tribunals, particularly where there 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.[65] 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.[66] The effect, however, is "to broaden the classes of conduct amounting to crimes against humanity"[67] and the discriminatory grounds underpinning persecution from political, racial, ethnic or religious to include cultural and gender grounds.

While some aspects of Article 7 elaborate, clarify or broaden customary international law, other aspects appear narrower. 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. So too does the requirement that an attacker of civilians must be seeking to further a state's 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.[68] 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 increasing the prosecutor's threshold for proving for a crime against humanity.[69] 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 the conspiracy elements of Part III of the Genocide Convention were not taken up and included in the Rome Statute. This signifies a disparity between the Rome Statute and the underlying custom as the latter both prohibits and makes punishable "conspiracy to commit genocide" whereas the former contains no similar prohibition.[70]

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 the court can only exercise its jurisdiction over a state if, and after, that state becomes a state-party and only after the Statute has entered into force.[71] Since it has jurisdiction over situations referred to it by the UN Security Council, the ICC has established 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 China and India have not signed and ratified the Rome Statute. Sparks flew at the Rome Conference over the jurisdiction to be enjoyed by the court, resulting in the ability to prosecute mass atrocities committed within the territory of a state-party or by state-party's national[72] provided that he or she was over the age of 18 when the alleged offence took place.[73] 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, 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.)[74] Whereas NGOs argued for an end to impunity for all perpetrators of mass atrocity, 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.[75]

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 members of the court 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,[76] 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 mass atrocity crimes 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. While mass atrocities have produced millions of victims, few have actually participated during trial proceedings as recognised juridified victims.[77]

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 speak on behalf of others underrepresented in intergovernmental decision-making processes.[78] According to Sara Kendall, donors' justice refers to financial support provided to international criminal justice institutions by third-party funders who are not directly engaged in an armed conflict or mass atrocity under investigation or prosecution by the court. These funding efforts transform international criminal justice into another type of market in which for the global "haves" pursue their various objectives.[79] 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 greater individualism, enjoy the financial and diplomatic support of international donors. As a result, many of these NGOs suffer a democratic deficit, yet have access to funding that is comparable to a large firm and have begun playing important roles facilitating the transfer of ideas and the dissemination of norms from the international community to local settings. As such, NGOs can advance their economic donors' political objectives.[80] This is important because:

> 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.'[81]

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 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 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 mass atrocities. 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.

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 in the international zone of The Hague specifically to house the court. 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 had its seat there, as does the International Court of Justice and the Special Tribunal for Lebanon.[82] 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 stand in deliberate contrast to the violence, carnage and brutality of recent atrocities committed in places such as the Democratic Republic of the Congo (DRC), Central African Republic (CAR) and Darfur, Sudan.

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 refers to a specifically designed solution to fix a particular, unique problem and is not designed to fix other problems.[83] 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 a would-be perpetrator who believes that the international community would be reluctant to establish tribunals specifically to deal with their situation.[84] 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 mass atrocity, though the power to determine if these national-level prosecutorial efforts are genuine belongs to the ICC.[85] 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.[86] 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.[87] 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,[88] which was, as we shall see in the following chapter, the case for Uganda, the DRC (at least in the Ituri province) and Mali.[89]

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.[90] 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 Lord's Resistance Army (LRA) were indicted, undermining their incentive to negotiate within the Juba peace process.[91] 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."[92] 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, the root causes of such violence are merely gathered up as records of the past in order to help establish mitigating factors for the defendant upon conviction.[93] 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 have 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 the ICC prosecutor,[94] but also to strengthen democratic institutions and processes in DRC,[95] CAR,[96] Ivory Coast[97] and Mali.[98] This signals the close relationship between the prosecution of mass atrocity 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.[99] It also signals the politico-economic transitions simultaneously underway in these countries. Those whose design these pathways to peace are informed by the prevailing neoliberal orthodoxies, which also helps to explain why they often neglect the root causes of much armed conflict.[100] The 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 heighten, rather than lessen, the risk of armed violence which would likely undermine the long-term prospects associated with development, peace and democracy.[101]

The establishment of a permanent court designed specifically to judge and, if necessary, punish those accused by the ICC prosecutor of committing mass atrocity 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 as the apex of politico-social affairs. 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 human rights embodied in individuals.[102] This is ironic since local transitional justice-rendering practices, which are often lauded as traditional, are the progeny of both modernity and local imaginaries.[103] 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.[104] 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 withdrawal their respective government's signatures from the Rome Statute.

Conclusion

The prosecution of mass atrocity 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. NGOs have become an important vehicle for the further spread and more intense entrenchment of the global free market. Through their concerted and sustained effort to implement and embed instruments of international criminal law, these organisations not only spread their ideologies centred around protecting individual human rights, but are also the tangible manifestation of donor funding which help to professionalise and indoctrinate recent law graduates from around the world.[105] 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.

Notes

1. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), 72.
2. 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.

3. Richard J. Goldstone and Adam M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (London and New York: Routledge, 2009), 106 & 110.
4. Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008), 328.
5. Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York: Palgrave Macmillan, 2008), 88.
6. Struett, *Constructing the International Criminal Court*, 25.
7. Bosco, *Rough Justice*, 72.
8. Goldstone and Smith, *International Judicial Institutions*, 96–97.
9. Cassese, *International Criminal Law*, 262–263.
10. Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2014), 47.
11. Bosco, *Rough Justice*, 39.
12. Cryer et al., *An Introduction*, 148.
13. Yvonne Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (London and New York: Routledge, 2013), 72.
14. Dutton, *Committing to the Court*, 74.
15. Dutton, *Committing to the Court*, 14.
16. Bosco, *Rough Justice*, 39. Refer to http://www.coalitionfortheicc.org.
17. Struett, *Constructing the International Criminal Court*, 73.
18. Luc Reydams and Jan Wouters, "The Politics of Establishing International Criminal Tribunals," in *International Prosecutors*, ed. Luc Reydams et al. (Oxford: Oxford University Press, 2013), 74.
19. Cryer et al., *An Introduction*, 148.
20. Struett, *Constructing the International Criminal Court*, 7.
21. Struett, *Constructing the International Criminal Court*, 118.
22. Reydams and Wouters, "Establishing International Criminal Tribunals," 71.
23. Reydams and Wouters, "Establishing International Criminal Tribunals," 75.
24. Struett, *Constructing the International Criminal Court*, 110.

25. Reydams and Wouters, "Establishing International Criminal Tribunals," 75–76.
26. Struett, *Constructing the International Criminal Court*, 73–74.
27. Cryer et al., *An Introduction*, 150.
28. Antonio Cassese, *Cassese's International Criminal Law*, revised by Antonio Cassese et al. (Oxford: Oxford University Press, 2013), 263.
29. Cryer et al., *An Introduction*, 150.
30. Reydams and Wouters, "Establishing International Criminal Tribunals," 79.
31. Struett, *Constructing the International Criminal Court*, 131.
32. Struett, *Constructing the International Criminal Court*, 136.
33. Struett, *Constructing the International Criminal Court*, 148.
34. Dutton, *Committing to the Court*, 53.
35. Cryer et al., *An Introduction*, 173.
36. Cryer et al., *An Introduction*, 173–176.
37. Dutton, *Committing to the Court*, 54–55.
38. John Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective," *Law and Contemporary Problems* 64(1) (2001): 180. (My emphasis added.)
39. Dutton, *Committing to the Court*, 48.
40. Richard Falk, *The Great Terror War* (Moreton-in-Mash, Gloustershire: Arris Books, 2003), 40.
41. Falk, *Terror War,* 6.
42. 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 Carla Del Ponte in collaboration with Chuck with Sedutic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (New York: Other Press, 2009), 150.
43. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 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.
44. Struett, *Constructing the International Criminal Court*, 125.
45. Robert G. Patman, "Globalisation, the New US Exceptionalism and the War on Terror," *Third World Quarterly* 27(6) (2006): 964.
46. Michael McKinley, *Economic Globalisation as Religious War: Tragic Convergence* (Milton Park, Abingdon, Oxon: Routledge, 2007), 93.
47. Dutton, *Committing to the Court*, 55–56.
48. Cryer et al., *An Introduction*, 176.

49. Dutton, *Committing to the Court*, 57; and UNSC Res 1970 (S/RES/1970) (2011).
50. Dutton, *Committing to the Court*, 58.
51. John Gray, *Al Qaeda and What it Means to be Modern* (London: Faber and Faber, 2003), 26; see also John Gray, "A Point of View: ISIS and what it means to be modern," BBC News (11 July 2014), 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," New Statesman (27 November 2014), available at http://www.newstatesman.com/world-affairs/2014/11/wahhabism-isis-how-saudi-arabia-exported-main-source-global-terrorism.
52. Gray, *Al Qaeda*, 2.
53. Bosco, *Rough Justice*, 54; and Struett, *Constructing the International Criminal Court*, 94.
54. Struett, *Constructing the International Criminal Court*, 93.
55. See International Criminal Court, *Report of the Special Working Group on the Crime of Aggression* (ICC-ASP/7/20/add.1).
56. Assembly of State Parties, Resolution RC/Res.6 (11 June 2010).
57. David Hoile, *Justice Denied: The Reality of the International Criminal Court* (London: Africa Research Centre, 2014), 296.
58. Cryer et al., *An Introduction*, 151–152.
59. Bosco, *Rough Justice*, 52.
60. Cryer et al., *An Introduction*, 273.
61. Cryer et al., *An Introduction*, 274.
62. William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 36–37.
63. Cassese, *Cassese's International Criminal Law*, 80–83.
64. Cassese, *Cassese's International Criminal Law*, 83.
65. Cryer et al., *An Introduction*, 231–232.
66. Cryer et al., *An Introduction*, 244.
67. Cassese, *Cassese's International Criminal Law*, 107–108.
68. Cassese, *Cassese's International Criminal Law*, 105–107.
69. Struett, *Constructing the International Criminal Court*, 121. (Emphasis in original.)
70. Cassese, *Cassese's International Criminal Law*, 129.
71. Cryer et al., *An Introduction*, 169.
72. Bosco, *Rough Justice*, 55. (Emphasis in original.)
73. Cryer et al., *An Introduction*, 169.
74. Bosco, *Rough Justice*, 180. The UN Security Council has not, however, provided funding to support the increased workload resulting from their referrals.
75. Struett, *Constructing the International Criminal Court*, 123.

76. Dutton, *Committing to the Court*, 2.
77. Sara Kendall and Sarah Nouwen, "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood," *Law and Contemporary Problems* 76 (2014): 252.
78. Struett, *Constructing the International Criminal Court*, 34.
79. Sara Kendall, "Donors' Justice: Recasting International Criminal Accountability," *Leiden Journal of International Law* 24 (2011): 587 & 593.
80. Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009), 80.
81. Clarke, *Fictions of Justice,* 46.
82. See http://www.icc-permanentpremises.org/news.
83. Reydams and Wouters, "Establishing International Criminal Tribunals," 19.
84. Dutton, *Committing to the Court*, 3.
85. Dutton, *Committing to the Court*, 13.
86. Cryer et al., *An Introduction*, 154.
87. Struett, *Constructing the International Criminal Court*, 124–125.
88. Hoile, *Justice Denied*, 219; see also Charles Chernor Jalloh, "Regionalizing International Criminal Law?" *International Criminal Law Review* 9 (2009): 445.
89. Hoile, *Justice Denied*, 241, 270 & 371, respectively.
90. Dutton, *Committing to the Court*, 2.
91. Hoile, *Justice Denied*, 242.
92. Clarke, *Fictions of Justice*, 8.
93. Clarke, *Fictions of Justice*, 55.
94. See for instance: UN Security Council Resolution 2164 (2014), para 8.
95. UN Security Council Resolution 1925 (2010), para 12.
96. UN Security Council Resolution 2149 (2014), para 30.
97. UN Security Council Resolution 1528 (2004), para 6.
98. UN Security Council Resolution 2164 (2014), para 13.
99. Neha Jain, "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court," *European Journal of International Law* 16(2) (2005): 239.
100. M.A. Mohamed Salih, "A Critique of the Political Economy of the Liberal Peace: Elements of an African experience," in *New Perspectives on Liberal Peacebuilding,* ed. Edward Newman, Roland Paris and Oliver P Richmond (Tokyo, New York, Paris: United Nations University Press, 2009), 155.
101. Salih, "A Critique," 134.
102. Clarke, *Fictions of Justice*, 24–25.
103. Clarke, *Fictions of Justice*, xix.

104. Christopher Gevers, “International criminal law and individualism,” in *Critical Approaches to International Criminal Law: An Introduction*, ed. Christine Schwöbel (New York: Routledge, 2014), 233.
105. Clarke, *Fictions of Justice*, 67–68.

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7. ———. 2008. *International Criminal Law*. Oxford: Oxford University Press.
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28. UNSC Res 1970 (S/RES/1970) (2011).
29. UN Security Council Resolution 2164 (2014).
30. UN Security Council Resolution 2149 (2014).
31. UN Security Council Resolution 1925 (2010).
32. UN Security Council Resolution 1528 (2004).
33. Assembly of State Parties, Resolution RC/Res.6 (11 June 2010).
34. International Criminal Court. *Report of the Special Working Group on the Crime of Aggression* (ICC-ASP/7/20/add.1).

CHAPTER 9

New Generation of Prosecutors: Warrants, Summonses and Opening Statements

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. Having outlined the prosecutor's formal mandate, 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. This bias 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. When these prosecutorial biases and varying rhetorical registers are understood as an extension of the material

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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 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. This third generation of international prosecutors, much like the earlier two, are empowered by the discourse against politico-cruelty that also informed the consensus among like-minded state leaders to establish a permanent court.

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.[1]) 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 Chap. 6, he prosecuted senior military figures in the Argentinean junta for its *Dirty War* in the early 1990s and was considered for the role of first ICTY prosecutor in 1994.[2] He also featured as a judge on a television show similar to *The Peoples' Court*. Strongly desiring the ICC post, 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.[3]

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 The Gambia. Her resume also includes experiences in diplomatic negotiations for the Economic Community of West African States (ECOWAS) Treaty 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 is unlikely to embark upon a radically different course of action.[4]

The design of prosecutorial functions here is very similar to that of earlier tribunals; namely to investigate potential mass atrocities 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 generations of prosecutors, respectively.

Prosecutorial focus is constrained by the court's jurisdiction, meaning the prosecutor cannot pursue any crimes outside the ICC's jurisdiction. There are other important fetters on the prosecutor's independence that 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 12 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 similar mandates but

with differing 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 for a term of nine years without prospect for reappointment, the ICC prosecutor, once elected, will for the most part operate without strong state-based controls.[5] The prosecutors and their deputies must be of different nationalities,[6] reducing other forms of identity-markers, such as gender, ethnicity, religion or class, to secondary importance.

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.[7] As the ad-hoc tribunals begun 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.

Warrants and Summonses

Situations that might feature mass atrocity 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, 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. A situation differs from a case in that a case refers to a phase in the pre-trial proceedings once an accused is identified.[8] 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 approval for the prosecutor to proceed to a full investigation.[9] 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.[10] 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.[11] This underscores the centrality of the prosecutor's role in the legal process, determining to undertake a full investigation and requesting a Warrant of Arrest, even though members of the bench review certain aspects of prosecutorial conduct.[12] Prosecutors can seek an arrest warrant (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,[13] 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 Lord's Resistance Army, a rebel non-state armed group. The situation in DRC was also the subject of a self-referral in April 2004.[14] Here, the ICC prosecutor sought to try six separate cases against, respectively, Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga, Mattieu Ngudjolo Chui, 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.[15]

This situation in CAR has been the subject of a second self-referral in May 2014,[16] and the situation in Mali was self-referred in July 2012,[17] 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 mass atrocity 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 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 mass atrocity.[18] These NGOs document evidence in Uganda implicating the Ugandan Peoples' Defence Force, in DRC implicating President Kabila, in CAR implicating President Francios Bozize and his Presidential Guard and in Mali implicating the security forces.[19] 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.[20] 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 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.[21] The ICC prosecutor sought to charge Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddifi and Abdullas Al-Senussi for two counts of crimes against humanity each. Each of these men occupied a senior position within the Libyan Government.[22] The prosecution of heads of state are especially significant not only because they seem to attract greater media attention but also because these leaders reside at the summit of their various political organisations and have their hands on the levers of power and the chain of command. The indictment of state leaders helps to signal the end of a regime responsible for mass atrocities, a symbol break with the immediate past.[23] More cynically, these indictments also help prepare the way for further public condemnations and subsequent transitions from authoritarian and for Muslim rule to democracy.

Whereas the self-referring authorities are granted de facto immunity from charges, the first prosecutor has attempted to appear more even-handed in his 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.'"[24] 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 the 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 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.[25] 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 mass atrocity.[26]

As mentioned, the ICC prosecutor has used his proprio motu powers to undertake 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 Fancis 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 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 leaders. This prejudice gives attention exclusively to the politico-strategic dimension of the commission of mass atrocity 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. The ICC's repeated indictment of Africans tends to characterise them as both violent criminals and hapless victims in need of rescue and protection. The case against Thomas Lubanga is instructive here as it contrasts African victimhood, particular sexual vulnerability, against the defendant's status as *hostis humani generis*. The trial caseload to date offers a rendition of previous representations of African identity based on distinctions not only over victimhood and criminality, but also over the insider or outsider and the civilised and barbarian.[27] The ICC reveals its commitment to prolonging Western and European intervention is stronger than its commitment to international justice, 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 criminals that flourished under Mobuto's reign.[28] Echoing paternalist colonial attitudes and reflecting the discourse against politico-cruelty, these representations also serve the interests 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 and 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.[29] 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, the prosecutor relied heavily on material provided by NGOs, which reflected the agendas and priorities of those that fund them.[30]

Omitted from these warrants and summonses are any situations that involve great powers.[31] The prosecutor has chosen to prosecute mass atrocity which occurs in places where these great powers have low stakes instead of focusing on armed conflicts, such as the US invasion and occupation of Iraq.[32] Israel's attack on Gaza in late 2008 also fell beyond the prosecutorial gaze.[33] 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. All of this indicate that the prosecutor has

used his or her discretion strategically.[34] Here, then, the prosecutor's selection of the accused and of the charges of mass atrocity 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.

Opening Statements

Thomas Lubanga Dyilo stood in the dock as the defendant 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, give 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.[35] 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.[36]

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 defendants—was read by a Court Officer and the two defendants 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 defendants and the problems associated with the intimidation of witnesses. Steynberg then outlined in more detail the evidence that would be introduced against the accused.[37] The opening statement took less than an hour for Bensouda and Steynberg to deliver.

Lubanga's recruitment of children as soldiers in his politico-military group, *Union dees Patriotes Congolais*, and in its armed wing, the *Forces Patriotiques pour la Liberation du Congo* lay at the centre of Moreno-Ocampo's first trial. These child soldiers were used to murder, pillage and rape.[38] 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.[39] The perniciousness of this 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.[40] The atrocities committed by Lubanga, he went on, would haunt not just one child, but an entire generation of children.[41] The spectre of the child soldier is, however, a particularly thorny issue in the prosecution of mass atrocity as they are constructed as both victims in need of rescuing and perpetrators of crimes worthy of punishment.[42] Girl soldiers were singled out for particular lamentation. According to Moreno-Ocampo and Bensouda, girl soldiers, who were used not only as fighters but also as cooks and cleaners, were raped by their commanders on a daily basis and, if they resisted, they were killed.[43] By contrasting this part of the opening statement delivered by Moreno-Ocampo and Bensouda with Jackson's oratory 64 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.[44]

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 mass atrocity. Firstly, the causes of the armed conflict occurring in Ituri between September 2002 and August 2003 were located in the 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.[45] 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 about four million people died in DRC between 1998 and 2004 as a direct or indirect result of the armed conflict, making this conflict the world's deadliest since the Second World War.[46] 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 if the character of the conflict became international after Ugandan armed forces occupied Ituri between late September 2002 and mid 2003.[47]

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 declared that over 200 people were killed and another thousand were injured during the armed violence in the Rift Valley.[48] An underlying situation of armed conflict is absent here, however. Rather, organised post-election violence is at issue and the prosecutor was quick to justify her involvement on the grounds that Kenya's domestic systems were not up to the task of investigating the matter.[49] 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 1671 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 would the testimony of three expert witnesses. Eyewitness testimony from 33 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 the child soldiers who would appear as witnesses and relive their traumatic experiences as they gave their testimony, being re-victimised in the process.[50]

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 22 victims and witnesses would be asked to testify,[51] 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."[52] Bensouda and Steynberg then decried their difficulties in securing witness testimony, a process dogged with ongoing challenges concerning the safety of their witnesses, some of who were subjected to bribes, intimidation or threats.[53]

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.[54] The Special Court for Sierra Leone was also cited for having concluded that recruiting children soldiers 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."[55] 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, that the defence will argue that the post-election violence was an unplanned hostile

reaction from the local voters who believe that election had been rigged. The defence was also likely to try to discredit the witnesses by suggesting the prosecution offered an array of inducements for their contrived testimony.[56]

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 defendant and the urgent necessity of finding them guilty. Concomitant with strong accusations of criminal culpability directed at the defendant, this self-consciously legal rhetoric seeks to de-historicise the situations within which mass atrocity occurs. Notable for its absence here is a close examination of the violence's root causes which, occurring in postcolonial settings that have witnessed draconian colonial administration, contested governance arrangements, widespread poverty and foreign exploitation of natural resources.[57] 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, especially its complicity with the conditions giving rise to atrocity.

While Moreno-Ocampo and Bensouda did not explicitly mention defending civilisation, they did valorise the international community as the highest authority. Their mandate to investigate and prosecute mass atrocity was authorised by the state-parties to the Rome Statute. Those like Lunanga who defy and mislead the international community have to be shown the force of the law.[58] Even though the meaning of the term international community, which includes states as well as UN specialised agencies 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[59]:

> 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 defendants 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 mass atrocity is an intrinsic aspect of the defendant's 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 defendant changed in light of their respective politico-strategic circumstances, the third generation of prosecutors emphasised the consistency in the defendant's character, as though their usual practice was to take recourse to violence when their politics fails them.[60]

Defendants 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. His army of children was his means of achieving this end and he used all of his talents to build it. He played off opposing groups when he had to and was willing to deceive the international community. He had no qualms about dispatching troops to the field while publicly declaring a pacification programme or recruiting children into his army while promising to demobilise others already in uniform.[61] It was Lubanga's custom to deal with opponents violently, his subordinate on one occasion taking a Minister hostage.[62] More Machiavelli than Mahatma, Lubanga deliberately misled the international community by issuing orders to demobilise child solders before re-recruiting most of them and ordering them into combat roles.[63] Bensouda and Stenberg described Ruto as "a powerful politician" who, along with Sang, "a radio broadcaster,"[64] 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.[65] Sang, described as the "main mouthpiece used by Mr Ruto," made available his prime-time radio show.[66] 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."[67]

Just as the defendants are not characterised as either evil or insane by the ICC prosecutors, the political movements they represent 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 further "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 here as a war of pacification, does not require an explicit declaration.

The type of group to which the defendants 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."[68]

This armed group is an anathema to Moreno-Ocampo and 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."[69] "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."[70] Child soldering 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."[71]

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 triad.[72] 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.[73] 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 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 defendants 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"[74]; "The environment *of terror* that Lubanga's men created in the camps;"[75] "The children were *terrorised;*"[76] 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."[77] During the War on Terror language that paints defendants 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 rival utopian movement. To this end, Moreno-Ocampo warned the defence that he intended to seek the highest punishment available.[78] 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."[79]

Conclusion

The pre-trial and trial efforts of this third generation of international prosecutors represent 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 leaders. 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 that international prosecutors are merely juridical actors, 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.

Notes

1. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), 83. Del Ponte went as far to describe it as her "dream job." See Carla Del Ponte in collaboration with Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminal and the Culture of Impunity* (New York: Other Press, 2009), 28.
2. David Scheffer, *All The Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton and Oxford: Princeton University Press, 2012), 31.
3. Bosco, *Rough Justice*, 84.
4. Bosco, *Rough Justice*, 187.
5. Bosco, *Rough Justice*, 54.
6. Gregory Townsend, "Structure and Management," in *International Prosecutors*, ed. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 287.
7. Townsend, "Structure and Management," 288.
8. William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 80.
9. Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2014), 163–166.
10. Cryer et al., *An Introduction,* 165.

11. 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.
12. Bosco, *Rough Justice*, 18.
13. ICC OTP, 'Press Release: President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC,' 29 January 2004.
14. ICC OTP, 'Press Release: Prosecutor receives referral of the situation in the Democratic Republic of Congo,' 19 April 2004.
15. ICC OTP, 'Press Release: Prosecutor receives referral concerning Central African Republic,' 7 January 2015.
16. 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.
17. ICC OTP, 'Statement: ICC Prosecutor opens investigation into war crimes in Mali: The legal requirements have been met. We will investigate,' 16 January 2013.
18. David Hoile, *Justice Denied: The Reality of the International Criminal Court* (London: Africa Research Centre, 2014), 245, 270, 275–276 & 372.
19. 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.
20. UN Security Council Resolution 1593 (2005).
21. UN Security Council Resolution 1970 (2011).
22. *Prosecutor v Gaddafi (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/11, 27 June 2011. Not all indictments are publicly available.
23. Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009), 3–4.
24. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), xi.
25. Hoile, *Justice Denied*, 301–302
26. Hoile, *Justice Denied*, 353.
27. Ann Sagan, "African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law," *Millennium—Journal of International Studies* 39(3) (2010): 20–21.
28. Tor Krever, "Dispensing Global Justice," *New Left Review* 58 (2014): 96 & 97.
29. Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009), 95.

30. Clarke, *Fictions of Justice*, 2.
31. Bosco, *Rough Justice*, 186.
32. Bosco, *Rough Justice*, 91.
33. Krever, "Dispensing Global Justice," 88.
34. Bosco, *Rough Justice*, 186.
35. *Prosecutor v Lubanga (Transcript)* ICC Trial Chamber I ICC-01/04-01/06 26 January 2009.
36. Hoile, *Justice Denied*, 256.
37. *Prosecutor V Ruto (Transcript)* ICC Trial Chamber V ICC-01/09-01/11, 10 September 2013.
38. *Lubanga*, 4.
39. *Lubanga*, 23–24.
40. *Lubanga*, 4–5.
41. *Lubanga*, 35.
42. Clarke, *Fictions of Justice*, 91.
43. *Lubanga*, 11–12.
44. Sergey Vasiliev, "Trial," in *International Prosecutors*, ed. Luc Reydams et al. (Oxford: Oxford University Press, 2012), 748–749.
45. *Lubanga*, 19.
46. *Lubanga*, 20.
47. *Lubanga*, 22.
48. *Ruto*, 14.
49. *Ruto*, 17.
50. *Lubanga*, 33.
51. *Ruto*, 22.
52. *Ruto*, 24.
53. *Ruto*, 18–19.
54. *Lubanga*, 13.
55. *Lubanga*, 14.
56. *Ruto*, [32–33].
57. Clark, *Fictions of Justice*, 19.
58. *Lubanga*, 35–36. (My emphasis added.)
59. *Lubanga*, 15.
60. *Lubanga*, 27; *Ruto*, 15–16.
61. *Lubanga*, 24–25.
62. *Lubanga*, 27.
63. *Lubanga*, 30–31.
64. *Ruto*, 14.
65. *Ruto*, 15–16.
66. *Ruto*, 16.
67. *Ruto*, 26.
68. *Lubanga*, 16.

69. *Lubanga*, 7.
70. *Lubanga*, 34.
71. *Lubanga*, 9.
72. *Ruto*, 26.
73. *Ruto*, 28.
74. *Lubanga*, 4–5.
75. *Lubanga*, 6.
76. *Lubanga*, 7.
77. *Ruto*, 14.
78. *Lubanga*, 34.
79. *Ruto*, 19.

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CHAPTER 10

Conclusion

Three successive generations of international prosecutors are best understood as agents not only of the law, but also of politics and war. Prosecutors play vital roles in the enforcement of ICL, specifically preparing indictments, warrants or summonses and making opening statements. They are also politico-legal actors involved in a series of ongoing contests among rival utopian movements. At the same time, 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. 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. 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. There are rare moments of convergence between the prevailing set of politico-strategic circumstances and the discourse against politico-cruelty, though usually the relationship can be characterised by longer periods of dissonance.

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The perspective adopted throughout this book is a critical one in the sense of offering a critique a la Karl Marx and Immanuel Kant. As James Miller explains:

> 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.'[1]

The book 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."[2] 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 actions are deemed tolerable by state leaders and the wider international community.[3]

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."[4] 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. 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.[5]

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.[6] 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.”[7] 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.[8] According to Baars, “[a]cademic lawyers perform a post-hoc rationalization of an event, attach to it a history and a logic and send it forward into ‘progressive development.’”[9] 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.”[10] That is a deficiency from which this book is not immune, particularly given its heavy use of scholarship produced within the Global North, predominately at British universities.

The book’s argument 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 argument would have been proven weak, too, had there been an absence of evidence indicating significant political, economic and social reconstruction efforts concomitant with the prosecution of mass atrocity. This was, however, not the case.

This argument has three implications which hold significance for all of those who are involved in the prosecution of mass atrocity. Firstly, the quality of international prosecutors’ juridical credentials is questioned 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 prosecutions of mass atrocity occurring in the immediate aftermath of the Second World War were undertaken in order to secure the spoils of victory won by the Grand Coalition, similar prosecutions occurring in the aftermath of the Cold War were 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, prosecutions of mass atrocity are pursued through major ICL institutions not as ends in themselves, but as part of a broader strategy that assists locales transitioning from situations of armed conflict towards 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 arguments challenge some scholars—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"[11]—to reconsider the relationship between the circumstances establishing ICL institutions and the prosecutorial performances that occur as trials. 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 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, questions are raised 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.[12] (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."[13]) The complacency of this quest for international criminal justice 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. 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."[14]

By giving focus to these various political threads, this argument challenges other, more critical 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 proponents, including the international prosecutors examined in this book, claim that this order is somehow immune from politics.[15] 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.[16] In practice, however, international law more generally presents a mechanism through which important political decisions are deferred elsewhere.[17] Yet the rule of international law is itself a battleground over which rival utopian movements seek to gain ascendency over their rivals.[18] Creating specialist bodies of law, such as ICL, offer further opportunities to pursue particular agendas.[19] 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 mass atrocity are indicted less for their actions and more for where they are positioned in world affairs.[20] 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."[21] 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, politico-economic and politico-social structures and the inequalities these structures create by constructing a scapegoat in the form of the accused.[22]

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,"[23] before arguing that:

> 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.[24]

In other words, prosecutions of mass atrocity function 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."[25] The complicity between these prosecutions 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:

> 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.[26]

The challenge here is for this acknowledgement to become more commonplace.[27]

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 are conducted among the ruins of discredited utopian movements which, framed in secular terms denying the primacy of religion, were vehicles for conveying and embodying religious myths.[28] 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.[29] For Gray, modernity offers a new religion of humanity, the object of worship being the human species.[30] 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."[31] 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 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."[32] Tallgren opines that "[i]nternational criminal justice comes close to a religious exercise of hope and perhaps deception"[33] and that "this kind of religious exercise of hope… is stronger than the desire to face everyday life."[34] "The Rome Statute and its language of secular objectivity and universalism—its image of freedom and 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."[35] Koskenniemi not only reckons international law "a kind of secular faith"[36] and human rights a kind of agnostic religion of modernity,[37] 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.[38] Orford sees international prosecutors as "offering salvation to

those threatened by state-sponsored murder and genocide."[39] 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.[40] 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.

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,[41] he is correct only insofar that those religions engender modernist politico-cultural projects. McKinley also draws a parallel between economic globalisation and religious war.[42] 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 "lawrriors."[43] 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 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 argument challenges those more critical 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.

Notes

1. James Miller, *The Passion of Michel Foucault* (Cambridge, Massachusetts: Harvard University Press, 1993), 302.
2. Michael J. Shapiro, *The Politics of Representation: Writing Practices in Biography, Photography, and Political Analysis* (Madison: University of Wisconsin Press, 1988), 54.
3. Michael J. Shapiro, *War Crimes, Atrocity, and Justice* (Cambridge: Polity Press, 2015), 35.
4. Marrti Koskenniemi, *The Politics of International Law* (Oxford and Portland, Oregon: Hart Publishing, 2011), 184.
5. Tor Krever, "Unveiling (and veiling) politics in international criminal trials," in *Critical Approaches to International Criminal Law: An Introduction*, ed. Christine Schwöbel (New York: Routledge, 2014), 132.
6. Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York: Palgrave Macmillan, 2008), 54.

7. Kamari Maxime Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009), 115.
8. For a compelling argument on this general point, see Michael McKinley, "The Co-option of the University and the Privileging of Annihilation," *International Relations* 18(2) (2004): 151.
9. Grietje Baars, "Making ICL History: On the need to move beyond pre-fab critiques of ICL," in *Critical Approaches to International Criminal Law: An Introduction,* ed. Christine Schwöbel (New York: Routledge, 2014), 198.
10. Christine Schwöbel, "The market and marketing culture of international criminal law," in *Critical Approaches to International Criminal Law: An Introduction*, ed. Christine Schwöbel (New York: Routledge, 2014), 276.
11. Shapiro, *War Crimes*, xii & 47.
12. Koskenniemi, *Politics of International Law*, 127.
13. Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge: Cambridge University Press, 2001), 255. Norrie goes on to argue that: "Criminal law is an 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."
14. Michael McKinley, *Economic Globalisation as Religious War: Tragic Convergence* (Milton Park, Abingdon, Oxon: Routledge, 2007), 54.
15. Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), 141.
16. Koskenniemi, *Politics of International Law*, 36–37.
17. Koskenniemi, *Politics of International Law*, 58.
18. Koskenniemi, *Politics of International Law*, 223.
19. Koskenniemi, *Politics of International Law*, 65.
20. Simpson, *Law, War and Crime*, 114.
21. Simpson, *Law, War and Crime*, 11.
22. Koskenniemi, *Politics of International Law*, 235.
23. Clarke, *Fictions of Justice*, 5.
24. Clarke, *Fictions of Justice*, 111.
25. McKinley, *Tragic Convergence*, 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 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."

26. Grietje Baars, "Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post WWII," in *The Hidden Histories of War Crimes Trials*, ed. Kevin Jon Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 192.
27. 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," *Journal of International Criminal Law* 8 (2010): 313; and William A. Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (London: Cameron May, 2008) particularly Chap. 20 entitled "War Economies, Economic Actors and International Criminal Law."
28. John Gray, *Black Mass: Apocalyptic Religion and the Death of Utopia* (London: Penguin, 2007), 1.
29. Gray, *Black Mass,* 28.
30. Gray, *Black Mass* 58–59.
31. Cullen Murphy, *God's Jury: The Inquisition and the Making of the Modern World* (London: Penguin, 2011), 21.
32. Tor Krever, "International Criminal Law: An Ideology Critique," *Leiden Journal of International Law* 26(3) (2013): 701.
33. Immi Tallgren, "The Sensibility and Sense of International Criminal Law," *European Journal of International Law* 13(3) (2002): 561.
34. Tallgren, "Sensibility and Sense," 593.
35. Clarke, *Fictions of Justice*, 7.
36. Koskenniemi, *Politics of International Law*, 361
37. Koskenniemi, *Politics of International Law*, 232.
38. Koskenniemi, *Politics of International Law*, 126.
39. Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), 7.
40. Simpson, *Law, War and Crime,* 179.
41. Gray, *Black Mass*, 184.
42. McKinley, *Tragic Convergence,* 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."

43. The term is found in David Luban, "Carl Schmitt and the Critique of Lawfare," *Case Western Reserve Journal of International Law* 43 (2010): 458.

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